

STATES DISTRICT COURT  
DISTRICT OF MAINE

PABLO ACOSTA,	)	
	)	
Plaintiff	)	
	)	
v.	)	Me. Civil No. 04-265-P-S
	)	Nh. Civ. No. 03-116-GZS
UNITED STATES OF AMERICA,	)	
	)	
Defendant	)	

**RECOMMENDED DECISION AFTER SCREENING  
42 U.S.C. § 1983 COMPLAINT**

This civil rights and negligence action by federal inmate Pablo Acosta against New Hampshire, Maine, and federal defendants was filed in the District of New Hampshire and has been transferred to the District of Maine after the recusals of all the judges in that district, including the magistrate judge. Prior to this transfer United States Magistrate Judge Muirhead of the New Hampshire District Court had entered two reports and recommendations, one after an initial 28 U.S.C. § 1915A(a)/ District of New Hampshire Local Rule 4.3 screening to determine if Acosta had stated claims apropos the various defendants and one on a motion to dismiss by the federal defendants. It is my understanding after a status conference with counsel that all prior orders and reports upon which those orders may have been based have been vacated.

As a consequence, these recusals and the transfer to this court bring the parties back to square one. In a separate recommended decision I have recommended that the court grant the motion to dismiss filed by the federal defendants. In this recommended decision I screen the complaint vis-à-vis the remaining Maine and New Hampshire

defendants pursuant to the District of New Hampshire Local Rule 4.3(d)(2)<sup>1</sup> and 28 U.S.C. § 1915A(a). For the reasons that follow, I recommend that the Court dismiss the complaint with prejudice as to Dartmouth Hitchcock Medical Center and Doctor Mark Geppert, from Seacoast Sports Medicine, because Acosta does not allege a deprivation of a constitutional right by these defendants. As to the Maine and New Hampshire correctional defendants -- Merrimack City House of Corrections (MCHC), the Hillsborough County Department of Corrections (HCDC), Cumberland County Jail (CCJ), an unidentified physician employed by CCJ, the Stafford County House of Corrections (SCHC), its employee, Doctor Edwin Charle, and Doctor Celia Englander -- I recommend that the Court dismiss these claims without prejudice because Acosta, in filing his initial complaint pro se, indicates that he did not exhaust administrative remedies vis-à-vis these claims as required as a prerequisite to filing suit by 42 U.S.C. § 1983. If the court accepts these recommendations I further recommend that the Court

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<sup>1</sup> This rule provides:

**(2) Incarcerated Plaintiffs.** The clerk's office shall forward initial filings and any subsequent amendments to those filings by inmates to the magistrate judge for preliminary review, whether or not a filing fee has been paid, pursuant to 28 U.S.C. § 1915A(a). After the initial review, the magistrate judge may:

(A) report and recommend to the court that the filing, or any portion of the filing, be dismissed because:

(i) the allegation of poverty is untrue, the action is frivolous, malicious, or fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief under 28 U.S.C. § 1915A(b); or

(ii) it fails to establish subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1);

(B) grant the party leave to file an amended filing in accordance with the magistrate's directives; or

(C) pursuant to Fed. R. Civ. P. 4(c)(2), appoint a person to effect service if the incarcerated person is proceeding in forma pauperis, or pursuant to Fed. R. Civ. P. 4(b), order the clerk's office to issue summons(es) against the adverse party if the inmate paid the filing fee, in which event the action shall proceed as all other actions.

Dist. Nh. Loc. R. 4.3(d)(2).

decline to continue to exercise supplemental jurisdiction over Acosta's remaining state law claims.

### *Discussion*

As I summarized in my recommended decision on the federal defendants' motion to dismiss, Acosta's claims arise out of his October 19, 1999, arrest on drug and firearm charges. He claims that his handcuffing during that arrest caused arm spasms. While detained at the Hillsborough County House of Corrections (HCHC) he asserts that he was negligently prescribed Elavil, a medication which Acosta believes is meant to control brain spasms. Acosta remained on that medication until shortly before February 16, 2000, when he was taken off it abruptly rather than gradually by health workers at the Cumberland County Jail (CCJ) where he had been transferred. As a consequence, Acosta alleges, he suffered a brain seizure on February 16, 2000, which caused him to fall from his top bunk at the Merrimack County House of Corrections (MCHC), where he was being detained at the time. His skull was fractured and he experienced intra-cerebral hemorrhage and further seizures.

Following this fall he was treated at Franklin Regional Hospital and the Dartmouth-Hitchcock Medical Center. At the latter facility Acosta believes he was overmedicated with Dilantin, causing him to experience grand mal seizures, respiratory failure, coma, complete paralysis, memory loss, and cognitive dysfunction.

From Dartmouth-Hitchcock Acosta was transferred to the Federal Medical Center in Rochester. He alleges that Dr. Clifford negligently prescribed carbamazepine to control his seizures, resulting in severe skin rashes, bleeding, and bruising. Acosta claims he was referred to a dermatologist but the medical director of the FMC refused to

consummate the referral. Also while at FMC, Acosta alleges, he fractured his finger and Dr. Clifford ignored the fracture for three weeks.

On May 24, 2000, Acosta was transferred to Strafford County House of Correction in Dover, New Hampshire. It is Acosta's claim that while he was there medical staff ignored his complaints of dizziness and, consequently he fell down the stairs and fractured his right foot. The staff delayed treating the fracture for twenty-four hours and the doctor who eventually saw him failed to properly diagnose the fracture.

### **Motion to Dismiss Standard**

In the wake of Swierkiewicz v. Sorema N. A., 534 U.S. 506, 508 (2002), to survive a motion to dismiss for failure to state a claim a 42 U.S.C. § 1983 complaint,

need only include "a short and plain statement of the claim showing that the pleader is entitled to relief." This statement must "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1957). State of mind, including motive and intent, may be averred generally. Cf. Fed.R.Civ.P. 9(b)(reiterating the usual rule that "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally"). In civil rights actions, as in the mine-run of other cases for which no statute or Federal Rule of Civil Procedure provides for different treatment, a court confronted with a Rule 12(b)(6) motion "may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

Educadores Puertorriquenos en Accion v. Hernandez, 367 F.3d 61, 66 (1st Cir. 2004).

See also Medina-Claudio v. Rodriguez-Mateo, 292 F.3d 31, 35 (1st Cir. 2002) (applying 12(b)(6) standard on question of exhaustion of remedies). The First Circuit indicated in Educadores Puertorriquenos en Accion that some pleadings, such as those utterly devoid of factual content, might not survive Rule 12(b)(6) review:

From this we intuit that, in a civil rights action as in any other action subject to notice pleading standards, the complaint should at least set forth

minimal facts as to who did what to whom, when, where, and why-- although why, when why means the actor's state of mind, can be averred generally. As we have said in a non-civil-rights context, the requirements of Rule 8(a)(2) are minimal--but "minimal requirements are not tantamount to nonexistent requirements." Gooley v. Mobil Oil Corp., 851 F.2d 513, 514 (1st Cir.1988).

Second, in considering motions to dismiss courts should continue to "eschew any reliance on bald assertions, unsupportable conclusions, and opprobrious epithets." Chongris v. Bd. of Appeals, 811 F.2d 36, 37 (1st Cir.1987) (citation and internal quotation marks omitted). Such eschewal is merely an application of Rule 8(a)(2), not a heightened pleading standard uniquely applicable to civil rights claims. See Correa-Martinez, 903 F.2d at 52-53 (treating the general no-bald-assertions standard and the heightened pleading standard for civil rights cases as two separate requirements); see also Higgs, 286 F.3d at 439 (rejecting the idea of "special pleading rules for prisoner civil rights cases," but nonetheless requiring complaints to meet some measure of specificity). As such, we have applied this language equally in all types of cases. See, e.g., Arruda v. Sears, Roebuck & Co., 310 F.3d 13, 18 (1st Cir.2002) (holding plaintiff to this standard in a bankruptcy action); LaChapelle, 142 F.3d at 508 (holding plaintiff to this standard in an action alleging breach of contract and intentional infliction of emotional distress). We will continue to do so in the future.

367 F.3d at 68.

### **Federal Civil Rights claims against Dartmouth Hitchcock Medical Center and Doctor Mark Geppert**

With respect to Dartmouth Hitchcock Medical Center Acosta's complaint alleges that he arrived at this medical center by ambulance suffering from a head injury. (Am. Compl. ¶ 20.) A CT scan noted an intracerebral hemorrhage in the right frontal lobe and a transverse fracture. (Id. ¶ 21.) He was "treated extensively" but was overmedicated with Dilatin causing a series of grand mal seizures which resulted in an emergency tracheotomy. (Id. ¶ 25.) Acosta was placed in the intensive care unit for four days where he developed septicemia due to over medication. (Id.) "That overmedication," the amended complaint avers, "was an act of negligence and was committed by persons who at the time of their negligence were acting on behalf of the United States Marshal[]." (Id.)

(See also id. ¶¶ 26, 27.) Based on these averments, Acosta claims that Dartmouth Hitchcock Medical Center's "failure to properly provide the requisite medical treatment was a part of the conspiracy by all the defendants to deprive the plaintiff of his civil rights to life and good health for which he claims damages. (Id. ¶ 46.)

Apropos Geppert, Acosta's complaint avers that Geppert is a doctor at Seacoast Sports Medicine who failed to properly diagnose his foot fracture that he suffered at the Strafford County House of Corrections. (Id. ¶¶ 30, 32.) "The negligent diagnosis," Acosta avers, has caused a permanent physically debilitating injury from which the plaintiff continues to suffer." In Count One Acosta avers that based on these factual allegations he claims that "Dr. Geppert did continue the general conspiracy to deprive the plaintiff of his civil rights to life and enjoyment of good health, simply due to his status as a federal prisoner." (Id. 44.)<sup>2</sup>

First, to state a claim vis-à-vis improper medical care of a pre-trial detainee Acosta must allege that the defendants were deliberately indifferent to his serious medical needs. See generally Farmer v. Brennan, 511 U.S. 825 (1994); Estelle v. Gamble, 429 U.S. 97 (1976). Acosta himself described his treatment by these two defendants as being negligent and negligence is not constitutionally actionable. Daniels v. Williams, 474 U.S. 327 (1986). Thus, even assuming these defendants are state actors, Acosta has not alleged that their treatment of him was unconstitutional. See Lugar v. Edmondson Oil

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<sup>2</sup> I do find Acosta's allegations vis-à-vis Geppert a little confusing as he alleges that some time subsequent to March 22, 2000, Acosta was transferred to Stafford County House of Corrections where he fell. (Id. ¶¶ 29, 30.) He states that the prison medical staff refused to admit the foot was fractured and claimed that there was only a sprain. (Id. ¶ 30.) It was twenty-four hours until they admitted that Acosta had suffered a fracture and then he "was finally treated properly." (Id.) He also alleges that Geppert's failure occurred on October 6, 2000, and it was not until February 15, 2001, that a competent radiologist diagnosed the injury as a foot bone factor. (Id. ¶ 32.) It is not clear to me when and where Geppert saw Acosta and what Acosta means when he alleges that it took twenty-four hours for the SCHC to treat the injury properly.

Co., Inc., 457 U.S. 922, 939 (1982). With respect to his assertions that these defendants partook in a conspiracy to deprive him of his right to adequate medical care, the "allegations in the complaint directed to conspiracy are wholly conclusory and inadequate, under any pleading standard, to support relief." Pena-Borrero v. Estremeda, 365 F.3d 7, 11 (1st Cir. 2004); see also Priester v. Lowndes County, 354 F.3d 414, 423 n.9 (5th Cir. 2004) ("The allegation of a conspiracy between private and state actors requires more than conclusory statements.").

There is also a substantial question concerning whether these entities can be reached under 42 U.S.C. § 1983 at all because they are not facially state actors. The First Circuit applies:

the familiar test first articulated in Ponce v. Basketball Fed'n of Puerto Rico, 760 F.2d 375 (1st Cir.1985), to determine if one can be considered a state actor: "(1) whether there was an elaborate financial or regulatory nexus between [the defendants] and the government ... which compelled [the defendants] to act as they did, (2) an assumption by [the defendants] of a traditionally public function, or (3) a symbiotic relationship involving the sharing of profits." Id. at 377.

Brown v. Newberger, 291 F.3d 89, 93 (1st Cir. 2002). There is no indication that either of these defendants met any of the requirements in connection with the State of New Hampshire, a local municipality, or other governmental entity. Compare Davila-Lopes v. Zapata, 111 F.3d 192, 193 (1st Cir. 1997).<sup>3</sup> Unlike the Maine and New Hampshire correctional facility defendants, there is no indication that these defendants had a formal contract with the federal and state defendants for the care of detainees or inmates.

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<sup>3</sup> If Dartmouth Hitchcock Medical Center was financed by the State of New Hampshire (a proposition that seems unlikely, see Matter of Hitchcock Clinic, Inc., 127 N.H. 62, 62-63, 499 A.2d 974, 975 (N.H. 1985)), it would not do Acosta much good as this funding would mean that the facility was a state agency and not an "entity" under § 1983, see Brown, 291 F.3d at 92 ; Bushey v. Derboven, 946 F.Supp. 96, 98 (D.Me.1996).

Rather, Acosta describes them as links – links exterior to the custodial institutions -- in a chain of treatment responses to Acosta's post-arrest medical needs.

**The Federal Civil Rights Claims against Maine and New Hampshire Correctional Defendants**

Count One of Acosta's amended complaint is pled as a count under 42 U.S.C. § 1983. It alleges, as relevant to the New Hampshire and Maine correctional defendants, they were part of the general civil rights conspiracy with respect to treating his medical condition.

As I noted in my recommended decision on the United States' motion to dismiss, Acosta disavowed the need to satisfy the exhaustion requirements of 42 U.S.C. § 1997e(a) on his initial complaint. Section 1997e(a) states: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). And Porter v. Nussle, 534 U.S. 516, 532 (2002) and Booth v. Churner, 532 U.S. 731 (2001) unequivocally require, at a bare minimum a documented attempt (or documented demonstration of an inability to) exhaust administrative remedies for claims such as Acosta's. In his initial complaint Acosta explained his decision not to file a grievance by indicating: "Complaint not addressable by grievance program." The amended complaint refers only to the notice of claim pertaining to the USMS/MCHC discussed in my companion recommend decision on the federal defendants' motion to dismiss. At the telephone conference I convened on February 7, 2005, to address the posture of this transferred case, counsel for Acosta indicated that if any grievances have now been filed he has had no personal involvement in them. Accordingly, as the record now stands,

Acosta has not pursued his administrative grievances as required prior to bringing these 42 U.S.C. § 1983 claims. The First Circuit has held that the fact that an inmate is transferred to another facility does not mean that the administrative grievance procedure is unavailable for purposes of 42 U.S.C. § 1997e(a). Medina-Claudio, 292 F.3d at 35. Therefore, I recommend that the Court dismiss these claims without prejudice.

### **State Law Claims**

If the Court accepts my recommendations in the two preceding sections, I further recommend that the Court decline to continue to exercise supplemental jurisdiction over Acosta's Count Three state law negligence claims. See 28 U.S.C. § 1367; Lares Group, II v. Tobin, 221 F.3d 41, 45 (1st Cir.2000).

### ***Conclusion***

For the above reasons I recommend that the court dismiss with prejudice Acosta's federal claims against Dartmouth Hitchcock Medical Center and Dr. Geppert. I further recommend that the Court dismiss **without prejudice** Acosta's claims against Merrimack City House of Corrections (MCHC), the Hillsborough County Department of Corrections (HCDC), Cumberland County Jail (CCJ), an unidentified physician employed by CCJ, the Stafford County House of Corrections (SCHC), its employee, Doctor Edwin Charle, and Doctor Celia Englander. If the court accepts this pair of recommendations, I still further recommend that the Court decline to continue to exercise supplemental jurisdiction over Acosta's remaining state law claims.

### **NOTICE**

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum,

within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

February 16, 2005.

/s/Margaret J. Kravchuk  
U.S. Magistrate Judge

ACOSTA v. UNITED STATES OF AMERICA, et  
al  
Assigned to: JUDGE GEORGE Z. SINGAL  
Case in other court: USDC-NH, 03-cv-116-B  
Cause: 42:1983 Prisoner Civil Rights

Date Filed: 12/07/2004  
Jury Demand: Plaintiff  
Nature of Suit: 550 Prisoner: Civil  
Rights  
Jurisdiction: Federal Question

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V.

**Defendant**

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**Defendant**

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*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Defendant**

**MERRIMACK CITY  
CORRECTIONAL FACILITY**

**Defendant**

**HIGHLANDER, DOCTOR**  
*TERMINATED: 02/07/2005*

**Defendant**

**HILLSBOROUGH COUNTY  
DEPARTMENT OF  
CORRECTIONS**

**Defendant**

**CUMBERLAND COUNTY  
JAIL**

**Defendant**

**STAFFORD COUNTY HOUSE  
OF CORRECTIONS**

**Defendant**

**DOCTOR EDWIN CHARLE**

**Defendant**

**UNIDENTIFIED PHYSICIAN  
EMPLOYED BY  
CUMBERLAND COUNTY  
JAIL**

**Defendant**

**FEDERAL BUREAU OF  
PRISONS**

**Defendant**

**DR MARK J GEPPERT**

**Defendant**

**FCI RAYBROOK**

**Defendant**

**FEDERAL MEDICAL  
CENTER**

**Defendant**

**CLIFFORD, DR**

**Defendant**

**DARTMOUTH-HITCHCOCK  
MEDICAL CENTER**

**Defendant**

**UNKNOWN FEDERAL,  
STATE OR COUNTY  
AGENCIES**

**Defendant**

**DR CELIA ENGLANDER**

**Notice Only Party**

**NEW HAMPSHIRE DISTRICT  
COURT**

represented by **NEW HAMPSHIRE DISTRICT**

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