

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 ON MOTION TO DISMISS**

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 42 U.S.C. § 1915(a) 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.

Accordingly, these recusals and the transfer to this court bring the parties back to square one. In this recommended decision I address the motion to dismiss filed by the United States on behalf of the United States Marshal Service (USMS), the Federal Bureau of Prisons (BOP), the Federal Correctional Institute of Raybrook, New York (FCI

Raybrook), the Federal Medical Center of Rochester, Minnesota (FMC) and Dr Clifford, who practices at the FMC. (Nh. Docket No. 17.) For the reasons below I recommend that the Court dismiss with prejudice the Federal Tort Claims Act claims against the USMS, the BOP, FCI Raybrook, the FMC, and Dr. Clifford. I further recommend that the Court dismiss without prejudice the civil rights claim against Clifford because Acosta's initial complaint states that he has not exhausted his claims as required by 42 U.S.C. § 1997e(a).

### *Discussion*

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.

***Federal Tort Claims Act***

Count Two of Acosta's amended complaint charges the federal defendants with negligence and is brought under the Federal Tort Claims Act. The resolution of the motion to dismiss with respect to most of Acosta's Federal Tort Claim Act claims turns on the question of administrative exhaustion. Dismissal on this ground would be "pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, and not pursuant to Rule 12(b)(6), because the administrative notice requirement of 28 U.S.C. § 2765 'is jurisdictional and cannot be waived.'" Barnett v. Okeechobee Hosp., 283 F.3d 1232, 1237 (11th Cir. 2002) (quoting Lykins v. Pointer Inc., 725 F.2d 645, 646 (11th Cir.1984) and citing Employees Welfare Comm. v. Daws, 599 F.2d 1375, 1378 (5th Cir.1979)). "This distinction is important. When a defendant moves under 12(b)(6) to dismiss a complaint for failure to state a claim, the plaintiff is safeguarded by a presumption that

the allegations in his complaint are true. A plaintiff does not necessarily have this same protection from a 12(b)(1) motion." Id. Whereas in ruling on a 12(b)(6) motion the Court usually will only consider the face of the complaint, in the context of the present 12(b)(1) dispute over notice, it is appropriate to take into consideration the notice of claim and its attachment provided by Acosta to determine if 12(b)(1) dismissal is appropriate. See id. at 1237-38.

The First Circuit's Santiago-Ramirez v. Secretary of Department of Defense addressed the importance of the proper administrative exhaustion of claims under the Federal Tort Claims Act:

The Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346, 2671-2680, waives the sovereign immunity of the United States to suits in tort. The prerequisite for liability under the Act is a "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). However, unlike a suit against a private person, the Congress has created an administrative procedure that claimants must follow and exhaust. This procedure allows the agency involved to receive a claim, investigate, and perhaps settle the dispute before a suit is filed. 28 U.S.C. § 2675. Section 2675 provides that "[a]n action shall not be instituted upon a claim against the United States ... unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied." The stated legislative purpose of this administrative prerequisite was to balance the goal of efficiently encouraging settlement between the agency and the claimant with the desire to provide "fair and equitable treatment of private individuals and claimants when they deal with the Government or are involved in litigation with their Government." S.Rep. No. 1327, 89th Cong., 2d Sess. 2, reprinted in 1966 USCCAN 2515, 2516.

Section 2675 requires that the potential plaintiff give notice to the government of the nature of the claim and the damages requested. 28 U.S.C. § 2675(a). Failure to timely file an administrative claim with the appropriate federal agency results in dismissal of the plaintiff's claim, since the filing of an administrative claim is a non-waivable jurisdictional requirement. United States v. Kubrick, 444 U.S. 111, 113, 100 S.Ct. 352, 355, 62 L.Ed.2d 259 (1979); Attallah v. United States, 955 F.2d 776, 779

(1st Cir.1992); Corte-Real v. United States, 949 F.2d 484, 485 (1st Cir.1991); Gonzalez-Bernal v. United States, 907 F.2d 246, 248 (1st Cir.1990); Richman v. United States, 709 F.2d 122 (1st Cir.1983).

984 F.2d 16, 18 -19 (1st Cir. 1993) (emphasis added)(footnote omitted).

With respect to the burden on the plaintiff to satisfy the notice requirement, the Court explained: "We understand a plaintiff to have satisfied the notice requirement of section 2675 if he or she provides a claim form or "other written notification" which includes (1) sufficient information for the agency to investigate the claims, and (2) the amount of damages sought." Id. at 19 (quoting Lopez v. United States, 758 F.2d 806, 809-10 (1st Cir. 1985), as citing the standard in Adams v. United States, 615 F.2d 284, 289 (5th Cir. 1980)). "In the context of section 2675," the Panel counseled, "the emphasis is on the agency's receipt of information: it must have enough information that it may reasonably begin an investigation of the claim." Id.; see also id. n.2.

Acosta argues in his response to the motion to dismiss that he believes he has established a valid claim under the Federal Tort Claims Act against USMS and the BOP pursuant to their contracts with the SCHC, MCCF, HCDC, and the CCJ. He claims that USMS and BOP can be held liable for their negligent selection of these contractors pursuant to both New Hampshire and Maine law. (Mem. Opp'n Mot. at 12-13.)

However, Acosta's notice of claim clearly fails to have given the USMS and the BOP enough information for the entities to reasonably begin an investigation of his claims other than his claim against the USMS for his treatment at the Merrimack County House of Corrections. The notice of claim, submitted by Acosta as Attachment 8, is directed only to the United States Marshal's Service and has the following text in the "Basis of Claim" box:

Claimant was over medicated causing him to be paralyzed. Claimant could not walk or talk and required therapy. At the present time, claimant is less than normal suffering from memory lapse and other manifestations due to the B.O.P. deliberate indifference. Documents annexed support the claim page number 2-11. Claimant was being held at the Merrimack City Correctional facility as a pretrial detainee under the authority of the U.S. Marshals service.

The documents attached are Acosta's registration form for the Dartmouth-Hitchcock Medical Center Emergency Department; two radiology reports from that facility; excerpts from Acosta's Presentence Investigation Report with descriptions of his MCHC experience, and follow-up care including his treatment by Dr. Clifford at FMC Rochester; an initial assessment for physical therapy from the FMC; and two referrals for rehabilitation from Dartmouth-Hitchcock Medical Center indicating the need for occupational therapy for cognitive training and speech and language pathology. His final attachment was a letter from Acosta to an attorney describing his ordeal at MCHC and the care at Dartmouth-Hitchcock, and indicating that from Dartmouth-Hitchcock he was flown by the USMS to the FMC "for further treatment." He then states, "I eventually recovered once I was given adequate medical treatment," and goes on to describe his lingering symptoms. In this letter Acosta explains: "It is my intention to file a lawsuit in federal court, naming the Marshal's service, the local jail facilities and the hospital as defendants. However, I am aware that the relevant statute of limitations might soon be an issue, so I am eager to proceed."<sup>1</sup>

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<sup>1</sup> The motion to dismiss states that Acosta's notice pack arguably "provided factual circumstances giving rise to potential negligence claims relating to HCHC's prescription of pain medication, the CCJ's termination of the prescription, and the adequacy of his medical care at the DHMC." (Mot. Dismiss at 13.) This conclusion is based on the references in this letter to these entities. However, with this passage in the letter summarizing Acosta's targeted intent vis-à-vis MCHC and the USMS, I disagree with counsel as this passage would suggest to most readers that Acosta's intended claim is limited to the USMS's responsibility for Acosta's treatment by MCHC. My conclusion is also supported by the interpretation of his claim by the Department of Justice, described below.

The Department of Justice responded on the USMS's behalf with a letter, provided by Acosta as Attachment 9, commencing:

This references the administrative tort claim you filed with the U.S. Marshal's Service (USMS), in the amount of \$1,000,000.00. You allege that you suffered personal injuries on or about February 16, 2000, while housed at the Merrimack City Correctional Facility (MCCF)<sup>2</sup>, in Boscawen, New Hampshire. You claim that the U.S. Marshal Service (USMS) was negligent for the actions of the jail personnel at the Merrimack City Correctional Facility.

With respect to the merits of the claim, the letter explained:

We have reviewed the circumstances surrounding your client's [sic] claim and have found no evidence of negligence or wrongful acts on the part of any USMS employee. Specifically, the USMS had no connection with the prescription or administration of medication which allegedly occurred while you were housed at the MCCF. In this regard, the daily safekeeping responsibility for federal prisoners housed at a local contract jail, such as MCCF, rests with the jail, and not with the USMS. The USMS is not legally responsible for the actions of local jail personnel, since they are considered to be independent contractors. See Logue v. United States, 412 U.S. 521 (1973).

It is apparent that there has not been proper exhaustion vis-à-vis any of Acosta's claims against the BOP or its facilities. Furthermore, Acosta's notice of claim did not put the USMS on notice to any of Acosta's claims vis-à-vis SCHC, HCDC, and the CCJ as there was no information at all concerning these entities in the notice and therefore no reason for the USMS to investigate Acosta's treatment therein.

However, even if this notice of claim could be read to give the breadth of notice that Acosta now asserts it does, any of Acosta's Federal Tort Claims Act claims vis-à-vis SCHC, HCDC, and the CCJ would fail for the same reasons his USMS/MCHC claim fails, as I now will explain.

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<sup>2</sup> The misnaming of the facility is of no moment.

With respect to Acosta's claim concerning his treatment at MCHC, this case turns on the 'contractor' exemption built into the definitional section of the Federal Tort Claims Act:

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

28 U.S.C. § 2671 (emphasis added). The question as to whether this exemption operates to bar Acosta's claim against the USMS for the negligence of MCHC employees, was answered by the United States Supreme Court's Logue v. United States, 412 U.S. 521, 528 (1973). In that case the Court addressed a claim against the United States Marshal Service under the Federal Tort Claims Act brought by the parents of a man who, while a federal pre-trial detainee at a county facility with which the USMS had contracted, hung himself. The Court concluded that the 'contractor' exemption in 28 U.S.C. § 2671 dictated that the plaintiffs could not hold the USMS liable for the negligence of the county facility employees. It reasoned:

Congress, of course, could have left the determination as to whose negligence the Government should be liable for under the Federal Tort Claims Act to the law of the State involved, as it did with other aspects of liability under the Act. But it chose not to do this, and instead incorporated into the definitions of the Act the exemption from liability for injury caused by employees of a contractor. While this congressional choice leaves the courts free to look to the law of torts and agency to define 'contractor,' it does not leave them free to abrogate the exemption that the Act provides.

412 U.S. at 528. See also Larsen v. Empresas El Yunque, Inc., 812 F.2d 14, 15 (1st Cir. 1986).

Acosta, conceding that the facilities are contractors,<sup>3</sup> seems to attempt to skirt the directive of Logue by linking his challenge to the USMS's decision to contract with MCHC rather than its supervisory responsibility for the conduct of its contractor facilities. I do not think the mandate of Logue (and Congress) can be dodged by such a cosmetic alteration in the statement of the claim; to conclude otherwise would make the contractor exception meaningless in most cases.<sup>4</sup> As the First Circuit has said, "Painting a pumpkin green and calling it a watermelon will not render its contents sweet and juicy." Arruda v. Sears, Roebuck & Co., 310 F.3d 13, 24 (1st Cir. 2002).

Accordingly, I conclude that Acosta has not satisfied the exhaustion of remedies requirement as to any Federal Tort Claims Act claims against the BOP or its facilities and as to the USMS apropos its placement of Acosta in any of the facilities other than MCHC. With respect to the USMS, I conclude that he did exhaust his remedies as to the claims against USMS relating to his treatment at MCHC but that he cannot pursue the claim because the contractor exemption of the Federal Tort Claims Act means that the USMS's sovereign immunity has not been waived.

### **The Civil Rights Claims against the United States Agencies and Employees**

Count One of Acosta's amended complaint is pled as a count under 42 U.S.C. § 1983. It alleges, as relevant to these defendants, that the USMS, its agents, and employees conspired to deprive Acosta of his civil rights by intentionally incarcerating him in institutions that provided him with inferior care. It also alleges that the BOP and its personnel conspired in ignoring proper care for prisoners. He alleges that FCI

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<sup>3</sup> Compare Lopez v. United States, 349 F.Supp.2d 179, 189-90 (D. Mass. 2004).

<sup>4</sup> Acosta has not framed his claim as one against a particular U.S. Marshal who made the hands-on decision to place Acosta in a particular facility. The only negligence he targets is in the Marshal Service's decision to contract with the various entities. Thus, the portion of the Logue decision addressing the need for remand to determine individual negligence is not applicable to this dispute.

Raybrook and its employees Dr. Keith Nagle and Dr. Mariani (both of whom are not named as defendants) improperly treated him with respect to his rash and thus were co-conspirators in depriving Acosta of his civil rights. And he claims that FMC Rochester and Doctor Clifford were part of the general civil rights conspiracy.

The United States also moves to dismiss the 42 U.S.C. § 1983 claims -- which can only be Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) claims vis-à-vis the federal defendants -- against the agencies under the holding of F.D.I.C. v. Meyer, 510 U.S. 471 (1994). On this score the United States is indisputably correct. See id. at 486. ("An extension of Bivens to agencies of the Federal Government is not supported by the logic of Bivens itself. We therefore hold that Meyer had no Bivens cause of action for damages against FSLIC.").

With respect to Doctor Clifford the United States moves to dismiss (and seeks to forestall Acosta's anticipated amendment of the complaint to name Doctor Mariana) on the grounds that Acosta has disavowed the need to satisfy the exhaustion requirements of 42 U.S.C. § 1997e(a). That provision 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).

I analyze this question under Civil Rule of Procedure 12(b)(6), see Medina-Claudio v. Rodriguez-Mateo, 292 F.3d 31, 35 (1st Cir. 2002), and I agree with the United States that 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. This exhaustion would be required for a claim that Clifford was deliberately indifferent to his medical needs or was part of a conspiracy to be deliberately indifferent to his medical needs. See Landrigan v. City of Warwick, 628 F.2d 736, 742 (1st Cir. 1980) ("While conspiracies may be actionable under section 1983, it is necessary that there have been, besides the agreement, an actual deprivation of a right secured by the Constitution and laws."). 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 above.<sup>5</sup> 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.

### ***Conclusion***

For the above reasons I recommend that the court **GRANT** the motion to dismiss (Nh. Docket No. 17) with prejudice as to all the federal defendants for Acosta's civil rights claims, except the claim that pertains to Dr. Clifford, and all of his claims under the

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<sup>5</sup> There is no dispute that Acosta did not file a notice of claim apropos the BOP as discussed above, so I need not analyze whether or not this might meet Acosta's 42 U.S.C. § 1997e(a) burden.

Federal Tort Claims Act . I further recommend that the court **GRANT** the motion to dismiss **without prejudice** as to Acosta's claims against Dr. Clifford.

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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**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**

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