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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

ARTURO E. ACOSTA,

*Plaintiff,*

vs.

N.A.P.H. CARE, *et al.*

*Defendants.*

2:09-cv-01998-RLH-RJJ

SCREENING ORDER

This *pro se* prisoner civil rights action comes before the Court for initial review of the amended complaint (#12) under 28 U.S.C. § 1915A, which follows upon a prior screening order where plaintiff was given leave to amend to state a claim if possible.

When a “prisoner seeks redress from a governmental entity or officer or employee of a governmental entity,” the court must “identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint: (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief.” 28 U.S.C. § 1915A(b).

In considering whether the plaintiff has stated a claim upon which relief can be granted, all material factual allegations in the complaint are accepted as true for purposes of initial review and are to be construed in the light most favorable to the plaintiff. *See, e.g., Russell v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980). However, mere legal conclusions unsupported by any actual allegations of fact are not assumed to be true in reviewing the complaint. *Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1937, 1949-51 & 1954, 173 L.Ed.2d 868

1 (2009). That is, bare and conclusory assertions that constitute merely formulaic recitations  
2 of the elements of a cause of action and that are devoid of further factual enhancement are  
3 not accepted as true and do not state a claim for relief. *Id.*

4 Further, the factual allegations must state a plausible claim for relief, meaning that the  
5 well-pleaded facts must permit the court to infer more than the mere possibility of misconduct:

6 [A] complaint must contain sufficient factual matter,  
7 accepted as true, to “state a claim to relief that is plausible on its  
8 face.” [*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127  
9 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007).] A claim has facial  
10 plausibility when the plaintiff pleads factual content that allows the  
11 court to draw the reasonable inference that the defendant is liable  
12 for the misconduct alleged. *Id.*, at 556, 127 S.Ct. 1955. The  
13 plausibility standard is not akin to a “probability requirement,” but  
14 it asks for more than a sheer possibility that a defendant has  
15 acted unlawfully. *Ibid.* Where a complaint pleads facts that are  
16 “merely consistent with” a defendant’s liability, it “stops short of  
17 the line between possibility and plausibility of ‘entitlement to  
18 relief.’” *Id.*, at 557, 127 S.Ct. 1955 (brackets omitted).

19 . . . . [W]here the well-pleaded facts do not permit the court  
20 to infer more than the mere possibility of misconduct, the  
21 complaint has alleged - but it has not “show[n]” - “that the pleader  
22 is entitled to relief.” Fed. Rule Civ. Proc. 8(a)(2).

23 *Iqbal*, 129 S.Ct. at 1949-50.

24 Allegations of a *pro se* litigant are held to less stringent standards than formal  
25 pleadings drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 596, 30  
26 L.Ed.2d 652 (1972).

27 In the amended complaint, plaintiff Arturo Acosta seeks to recover compensatory and  
28 punitive damages under the Fourteenth Amendment for allegedly inadequate medical care  
received at the North Las Vegas Detention Center (NLVDC) and the Clark County Detention  
Center (CCDC).

Following review of the amended complaint filed in response to the prior screening  
order, the Court concludes that plaintiff has failed to state a claim upon which relief may be  
granted as to any claim.

In Count I, together with the allegations in the nature of the case, plaintiff alleges that  
the NLVDC defendants were deliberately indifferent to his serious medical needs in violation

1 of his right as a detainee to due process under the Fourteenth Amendment. According to the  
2 allegations of the complaint, which are accepted as true solely for the purposes of the present  
3 review, plaintiff was in custody at NLVDC from December 2006 until his transfer to CCDC on  
4 January 30, 2007. Plaintiff fell from the upper bunk onto the concrete floor of his cell on  
5 January 17, 2007, injuring his shoulder and hip. Plaintiff promptly informed the officers on  
6 duty, who took no action. After submitting numerous kites (requests) for medical attention,  
7 plaintiff was examined by a physician who prescribed ibuprofen. Plaintiff alleges that the  
8 physician "failed to order medically indicated x-rays or any other appropriate diagnostic  
9 procedures, contrary to the prevailing standard of care."

10 The claims in Count I are barred by the applicable statute of limitations on the face of  
11 the complaint. Under federal law, Section 1983 claims arising out of Nevada are governed  
12 by a two-year limitations period. *See, e.g., Fink v. Shedler*, 192 F.3d 911, 914 (9th  
13 Cir.1999)(federal courts apply the forum state's personal injury statute of limitations for  
14 section 1983 claims); *Perez v. Seevers*, 869 F.2d 425, 426 (9th Cir.1989)(Nevada's statute  
15 of limitations for personal injury claims is two years). The events in Count I allegedly occurred  
16 prior to January 30, 2007, but the original complaint in this matter was not mailed for filing  
17 until more than two years later, on or about September 28, 2009. All claims in Count I  
18 accordingly are time-barred.

19 The claims in Count I against the health care providers further fail to state a claim for  
20 the reasons discussed below as to the remaining counts, because the allegations of actual  
21 fact do not set forth deliberate indifference.

22 In Count II, together with the allegations in the nature of the case, plaintiff alleges that  
23 Clark County, NaphCare, and a number of John Doe defendants were deliberately indifferent  
24 to his serious medical needs in violation of his right as a detainee to due process under the  
25 Fourteenth Amendment.

26 Specifically, plaintiff alleges that an x-ray was not taken of his shoulder until February  
27 15, 2007. This was nearly a month after the initial injury at NLVDC but only approximately two  
28 weeks after plaintiff's transfer to CCDC, although NaphCare allegedly provided health care

1 services at both facilities. Thereafter, plaintiff continued to complain of continuing extreme  
2 pain verbally and in writing. Nearly ten weeks later, on April 25, 2007, Dr. Brian Hayes  
3 recommended an MRI. Thereafter, however, an MRI was not taken despite plaintiff's  
4 continued complaints of pain. He was given over-the-counter pain medication.

5 On October 27, 2008, an orthopaedist at the University Medical Center noted reduced  
6 range of motion and concurred with Dr. Hayes' recommendation for an MRI, in order to rule  
7 out a possible rotator cuff tear versus an occult fracture. Five months later, on March 29,  
8 2009, an MRI was taken. The orthopaedist noted on May 18, 2009, that the MRI revealed an  
9 advanced rotator cuff tear. Plaintiff alleges that the MRI confirmed a serious medical need  
10 that had gone "undiagnosed" for nearly two-and-a-half years. Plaintiff does not allege any  
11 change in his medical care after the May 18, 2009, findings by the orthopaedist. The  
12 complaint alleges that plaintiff was in Clark County custody through approximately July 2009.

13 Plaintiff's allegations do not set forth deliberate indifference actionable under the  
14 Fourteenth Amendment.

15 As noted in the prior order, to state a claim for relief for deliberate indifference to  
16 serious medical needs, plaintiff must present factual allegations tending to establish that the  
17 defendant official knew of and disregarded an excessive risk to inmate health or safety.  
18 *See, e.g., Simmons v. Navajo County, Arizona*, 609 F.3d 1011, 1017-18 (9<sup>th</sup> Cir. 2010). The  
19 official both must be aware of the facts from which the inference of an excessive risk to  
20 inmate health or safety could be drawn, and he also must draw the inference. *Id.* In other  
21 words, plaintiff must show that the official was "(a) *subjectively aware* of the serious medical  
22 need and (b) failed adequately to respond." *Id.*, (quoting prior authority, with emphasis in  
23 original). Medical misdiagnosis, differences in medical opinion, medical malpractice, and  
24 negligence do not amount to deliberate indifference. *See, e.g., McGuckin v. Smith*, 974 F.2d  
25 1050, 1059 (9th Cir.1992), *rev'd on other grounds, WMX Tech., Inc. v. Miller*, 104 F.3d 1133  
26 (9th Cir.1997)(*en banc*); *Sanchez v. Vild*, 891 F.2d 240, 241-42 (9th Cir.1989).

27 In the present case, plaintiff maintains that "the standard of care in the community"  
28 required a prompt x-ray of the site of the injury, that a negative x-ray was not dispositive and

1 “compelled” further investigation, and that an MRI thus should have been taken sooner to  
2 uncover his theretofore undiagnosed injury. Plaintiff at bottom is seeking to state a medical  
3 malpractice claim challenging the failure to properly diagnose his condition sooner and to  
4 conduct additional diagnostic procedures sooner. After having been given an opportunity to  
5 amend to state a claim, plaintiff has failed to present any allegations of actual fact tending to  
6 establish that the defendants were subjectively aware that he had sustained a more serious  
7 injury yet failed to respond adequately. Again, medical misdiagnosis, differences in medical  
8 opinion, medical malpractice, and negligence do not amount to deliberate indifference.  
9 *McGuckin, supra*. Count II therefore fails to state a claim for deliberate indifference.

10 Moreover, claims based upon alleged acts and omissions prior to September 28, 2007,  
11 are time-barred as discussed with regard to Count I.

12 In Count III, together with the allegations in the nature of the case, plaintiff alleges that  
13 Dr. Hayes in particular was deliberately indifferent to his serious medical needs in violation  
14 of his right as a detainee to due process under the Fourteenth Amendment

15 Specifically, plaintiff alleges that Dr. Hayes unnecessarily delayed recommending an  
16 MRI until April 25, 2007, after negative x-rays were taken on February 15, 2007. He alleges  
17 that, thereafter, Dr. Hayes failed to ensure that an MRI was performed for nearly two years,  
18 including after the orthopaedist also recommended an MRI on October 27, 2008. Plaintiff  
19 alleges that Dr. Hayes “is not qualified to evaluate the appropriate medical intervention for the  
20 treatment of Rotator Cuff Tears and his refusal to obtain specialized treatment is grossly  
21 below the standard of care and violative of plaintiff’s constitutional rights.”

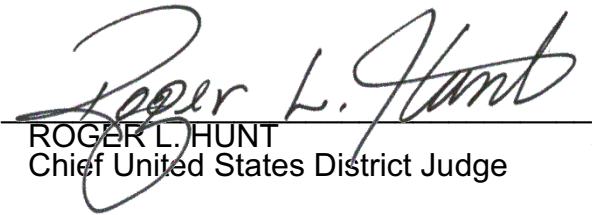
22 Claims based upon alleged acts and omissions prior to September 28, 2007, are time-  
23 barred as discussed previously. In all events, plaintiff’s efforts to state a medical malpractice  
24 claim based upon alleged inadequate medical care by an allegedly unqualified health care  
25 provider fail to state a claim for relief for deliberate indifference. Plaintiff, after having been  
26 given an opportunity to amend, has failed to present allegations of actual fact that would tend  
27 to establish that Dr. Hayes was subjectively aware that he had sustained a more serious injury  
28 yet failed to respond adequately.

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IT THEREFORE IS ORDERED that the complaint, as amended, is DISMISSED for failure to state a claim upon which relief may be granted.

The Clerk of Court shall enter final judgment accordingly.

DATED: January 10, 2011.



Handwritten signature of Roger L. Hunt in cursive script, written over a horizontal line.

ROGER L. HUNT  
Chief United States District Judge