

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION**

Victor M. Gonzalez, Administrator)	
of the Estate of Roger Gonzalez,)	
deceased,)	No. 15-cv-00776
)	
Plaintiff,)	Judge Philip G. Reinhard
)	Magistrate Judge Iain D. Johnston
vs.)	
)	Jury Demanded
Wexford Health Sources, Inc.,)	
Arthur Davida, M.D., Dr. Stephen Israel,)	
and Dr. Roderick L. Matticks.)	
)	
Defendants.)	

**DEFENDANT, WEXFORD HEALTH SOURCES, INC.,
REPLY IN SUPPORT OF ITS RULE 12(b)(6)**

MOTION TO DISMISS PLAINTIFF'S SIXTH AMENDED COMPLAINT

NOW COMES Defendant, WEXFORD HEALTH SOURCES, INC. ("Wexford") through its attorneys, CONNOLLY KRAUSE LLC, and for its Reply in support of its Rule 12(b)(6) Motion to Dismiss Plaintiff's Sixth Amended Complaint (Dkt. 244) states as follows:

ARGUMENT

I. Plaintiff's Complaint against Wexford should be dismissed for failure to plead separate counts in derogation of Fed. R. Civ. P. 10(b)

Plaintiff's Sixth Amended Complaint alleges three causes of action against two defendants through 45 paragraphs but fails to provide any guidance as to what facts support his claims. Plaintiff relies on the plain language of Fed. R. Civ. P. 10 not require separate causes of action to be pleaded in separate counts. This assertion is plainly wrong as Fed. R. Civ. P. 10 provides that for the promotion of clarity, separate claims must be stated in separate counts.

Plaintiff fails to address the Sixth Amended Complaint's failure to articulate the factual bases for its claims against Wexford. This is made obvious by the numerous footnotes throughout Plaintiff's response explaining certain allegations, claims, factual support, and even going so far

as adding additional facts for the purpose of clarification. (Dkt 252, p.1-5). Not only does Plaintiff use his response to add facts to his complaint, the fact added is in relation to agency, an exact issue raised in Wexford's motion to dismiss. The Seventh Circuit has taken the position that a complaint must be organized so as to assert facts and relate them to the wrongful conduct, without being vague and causing confusion. *Cincinnati Life Ins. Co. v. Beyrer*, 722 F.3d 939, 946 (7th Cir. 2013) *citing Standard v. Nygren*, 658 F.3d 792, 792, 798 (7th Cir. 2011); *United States ex rel. Garst v. Lockheed-Martin Corp.*, 328 F.3d 374, 378 (7th Cir. 2003).

Here, Plaintiff has simply not done so, creating prejudice against Wexford to answer a complaint that ambiguously alleges facts and conclusions of law without clarity of what is being alleged against Wexford. Accordingly, Plaintiff's Sixth Amended Complaint should be dismissed.

II. Plaintiff's claim against Wexford for *respondeat superior* liability under Illinois law for the alleged negligence of Wexford employees must be dismissed for failure to state a claim

Plaintiff's vague and confusing complaint is further evidenced by Plaintiff's response that his complaint need not plead supporting evidence for each element of a legal theory. (Dkt. 252, P. 6-7). The kitchen sink approach Plaintiff takes with his Sixth Amended Complaint makes no reference to a standard of care owed or a breach of that standard care. While Plaintiff relies on 7th Circuit law that he need not plead specific facts in support of each element of a legal theory, he fails to address the basic argument that the Sixth Amendment fails under *Iqbal*. *Iqbal* requires that a plaintiff's complaint "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'" and that claim is only sufficient if "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Further, this Court has held that "[t]o state a claim for medical malpractice under Illinois law, a plaintiff must allege '(1) the proper standard of care against which the defendant's conduct is measured; (2) an unskilled or negligent failure to

comply with the applicable standard; and (3) a resulting injury caused by the defendant's want of skill or care.”” *DeJesus v. Wexford Health Sources, Inc., et al*, 20-C-1682 (N.D. IL, Dkt. 401, p. 6, July 30, 2020) *citing Morisch v. United States*, 653 F.3d 522, 531 (7th Cir. 2011). Here, Plaintiff has admittedly has not pleaded the proper standard of care or a breach of that standard. *See id.*

Plaintiff’s complaint makes absolutely no reference to which agents of Wexford were the actors under his theory of *respondeat superior*¹, what duty of care Wexford owed to Plaintiff, or how Wexford allegedly breached that duty². As such, Plaintiff’s Sixth Amended Complaint prejudices Wexford by giving no notice of the allegations and claims brought against it, so that Wexford can fully defend itself against such claims.

III. Plaintiff’s claim against Wexford under Section 1983 for deliberate indifference for failure to have implemented a “medical hold” policy should be dismissed for failure to state a claim

Plaintiff relies on *Glisson* to support his argument that he successful pleaded a *Monell* claim. (Dkt. 252, p. 8-10). However, a clear reading of *Glisson* supports Wexford’s argument. Under *Glisson*, “[t]he key is whether there is a conscious decision not to take action,” which can be shown by repeated actions of an explicit decision to not act. *Glisson v. Ind. Dep’t of Corr.*, 849, F.3d 372, 381 (7th Cir. 2017). Plaintiff’s Sixth Amended Complaint pleads neither. As argued in Wexford’s memorandum of law, Plaintiff alleges no facts to support an explicit action by Wexford regarding the rejection of a “medical hold” policy, or any facts to make a plausible claim that Wexford repeatedly failed to enact a “medical hold” policy so as to create a constitutional violation.

After five iterations of his complaint, Plaintiff is unable to set forth factual allegations to support his legal conclusion that Wexford explicitly rejected a medical hold policy, or repeatedly

¹ Plaintiff concedes that he failed to identify what actors give rise to his claim for *respondeat superior* by realizing the need to identify such actor in his response. (Dkt. 252, fn. 3).

² Plaintiff concedes that his complaint fails to identify a duty owed by Wexford or how Wexford breached such duty by improperly trying to incorporate his expert’s report. (Dkt. 252, fn. 4); *Fed. R. Civ. P. 10(c)*.

failed to enact such a policy to the extent that it became a widespread policy by Wexford to reject it.

WHEREFORE, Defendant, WEXFORD HEALTH SOURCES, INC., respectfully requests that this Honorable Court grant its Fed. R. Civ. P. 12(b)(6) Motion to Dismiss and dismiss Plaintiff's Sixth Amended Complaint (Dkt. 244) as it pertains to Wexford with prejudice and for such other relief as this Court deems fair and just.

Respectfully submitted,

By: /s/Anthony M. DeLongis
One of the Attorneys for Defendant

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CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2020, I caused the foregoing document to be filed electronically with the Clerk of the Court through ECF. All of the participants in the case are registered CM/EFC users and will be served by the CM/EFC system.

By: /s/Anthony M. DeLongis