In the

United States Court of Appeals

For the Seventh Circuit

No. 18-2660

SCOTT HILDRETH,

Plaintiff-Appellant,

v.

KIM BUTLER, LORI OAKLEY, and
WEXFORD HEALTH SOURCES, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Illinois.
No. 3:15-cv-00831-NJR-DGW — **Nancy J. Rosenstengel**, *Chief Judge.*

On Petition for Rehearing and Rehearing En Banc

AUGUST 19, 2020

Before SYKES, *Chief Judge*, FLAUM, EASTERBROOK, KANNE, ROVNER, WOOD, HAMILTON, BARRETT, BRENNAN, SCUDDER, and ST. EVE, *Circuit Judges*.

PER CURIAM. On consideration of plaintiff-appellant's petition for rehearing and rehearing en banc, filed on June 16,

2020, a majority of the panel voted to deny rehearing. A judge in regular active service requested a vote on the petition for rehearing en banc. A majority of judges in regular active service voted to deny the petition for rehearing en banc. Judges Rovner, Wood, Hamilton, and Scudder voted to grant the petition for rehearing en banc.

Accordingly, the petition for rehearing and rehearing en banc is DENIED.

HAMILTON, *Circuit Judge*, joined by ROVNER, WOOD, and SCUDDER, *Circuit Judges*, dissenting from denial of rehearing en banc.

This case poses important questions about *Monell* liability in the context of prison healthcare. We may assume that convicted prisoners deserve their punishment in prison, but the Eighth Amendment imposes limits on that punishment. In important ways, prisoners are dependent and vulnerable. Their custodians may not act with deliberate indifference toward serious dangers to their prisoners or to their serious health needs. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). Custodians who learn of such dangers or needs must respond reasonably to them, whether the threat comes from violence at the hands of other prisoners, *Farmer v. Brennan*, 511 U.S. 825, 844–45 (1994), hazards in the prison environment, *Helling v. McKinney*, 509 U.S. 25, 33 (1993), suicide, *Woodward v. Correctional Medical Services*, 368 F.3d 917, 929 (7th Cir. 2004), or injury, illness, or pain. *Estelle*, 429 U.S. at 104–05. See also *Ortiz v. Jordan*, 562 U.S. 180, 190 (2011) (*Farmer*'s requirement of a reasonable response was clearly established law).

The question worth deciding en banc in this case is whether plaintiff Hildreth has come forward with evidence sufficient to find that defendant Wexford acted with deliberate indifference to his and other prisoners' serious medical needs by establishing unreasonable systems ("policies" in the language of *Monell*) for refilling and renewing prescriptions for needed medicines. See *Monell v. Dep't of Social Services*, 436 U.S. 658, 691 (1978). As the health care contractor for the prison, Wexford of course knew of the need for timely and reliable prescription refills and renewals. As explained in the panel dissent, a reasonable jury could also find that Wexford failed to take reasonable steps to meet that need. *Hildreth v. Butler*, 960 F.3d 420, 435 (7th Cir. 2020) (Hamilton, J., dissenting). Wexford designed and implemented systems that left plenty of room for human error or even malice, but without alerts or safeguards to learn of and correct inevitable problems with prescription refills and renewals. As a result, plaintiff Hildreth repeatedly suffered easily avoidable pain and debilitation, for days or more than a week at a time, while waiting for the medicine he needed for his Parkinson's disease.

The broader legal question posed here is whether the panel majority decision is consistent with our recent en banc decisions on *Monell* liability in *Glisson v. Indiana Dep't of Corrections*, 849 F.3d 372, 382 (7th Cir. 2017) ("There is no magic number of injuries that must occur before [defendant's] failure to act can be considered deliberately indifferent."), and *J.K.J. v. Polk County*, 960 F.3d 367, 380 (7th Cir. 2020) ("'in a narrow range of circumstances,' deliberate indifference could be found when the violation of rights is a 'highly predictable consequence' of a failure to provide officers what they need to confront 'recurring' situations"), quoting *Board of Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 409 (1997), as well as

whether it is consistent with *Woodward v. Correctional Medical Services*, 368 F.3d 917, 929 (7th Cir. 2004) ("CMS does not get a 'one free suicide' pass.").

In both *Glisson* and *J.K.J.*, we held that plaintiffs were entitled to a jury trial or verdict on their *Monell* claims without requiring proof of a minimum number of previous failings. In both cases, the *Monell* defendant was on notice of a serious risk of harm to certain prisoners. In *Glisson* it was the risk to patients with complex disease combinations if there were no effort to coordinate care. In *J.K.J.*, it was notice of the risk of sexual abuse by guards. Both *Glisson* and *J.K.J.* applied two key lessons from *Farmer v. Brennan*. First, knowledge of a danger or serious health need may be inferred from circumstantial evidence, including the obviousness of the risk or need. 511 U.S. at 842. Second, a state actor with actual knowledge of such a danger or need is expected to take reasonable, though not perfect, steps to address the danger or need. *Id.* at 843–45.

More generally still, this case poses the question whether courts need to channel *Monell* claims into separate and distinct categories depending on how the plaintiff characterizes his claim, whether as one based on a "pattern" of violations showing an unconstitutional custom or as one based on a more direct challenge to an explicit policy of the governmental or corporate defendant. The panel majority erred by adhering too rigidly to these categories as separate channels and failing to engage with the policy problem and holding of *Glisson*. As a result, the panel majority allowed Wexford to treat the case as only a "pattern" case, which in turn allowed Wexford to defend itself by saying that it had not known—*and had no way to know*—of the repeated acts of individual oversight or malice that delayed Hildreth's medicine. That defense was

actually an unintentional admission that Wexford's systems (i.e., its policies) for prescription refills and renewals were themselves unreasonable. They were unreasonable in the face of inevitable human error precisely because they did not include means for monitoring whether or not urgent medical needs were being met.

The categories for *Monell* cases can be helpful, but we should not let them distract us from the central issue. Regardless of how the claim is categorized, "The central question is always whether an official policy, however expressed (and we have no reason to think that the list in *Monell* is exclusive), caused the constitutional deprivation." *Glisson*, 849 F.3d at 379.

I respectfully dissent from the denial of rehearing en banc.

APPENDIX B

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Appeal from the United States District Court for the
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No. 3:15-cv-00831-NJR-DGW — **Nancy J. Rosenstengel**, *Chief Judge.*

ARGUED SEPTEMBER 19, 2019 — DECIDED MAY 19, 2020

Before SYKES, HAMILTON, and BRENNAN, *Circuit Judges.*

BRENNAN, *Circuit Judge.* Scott Hildreth, an inmate at an Illinois maximum-security prison, suffers from Parkinson's disease. He takes a prescription medication distributed by the prison three times a day to manage his symptoms. On three occasions Hildreth received his medication refill a few days late, causing him to experience withdrawal symptoms. His symptoms also render his handwriting illegible, so Hildreth

uses a typewriter to draft documents. He requested to keep that typewriter in his cell, which the prison denied because it was considered contraband. Instead, the prison provided Hildreth with an assistant to help him draft documents and increased access to the library where he can use a typewriter.

Feeling his treatment was lacking, Hildreth sued Wexford Health Sources, Inc. and two jail administrators under 42 U.S.C. § 1983 and the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 *et seq.*, alleging they violated his constitutional and statutory rights. The district court granted summary judgment to the defendants. Because Hildreth has not shown medication delays were a widespread practice or custom at the prison, and he received reasonable accommodations for his Parkinson's disease, we affirm the district court's decision.

I. Background

A. Delays in Hildreth's Medication

Hildreth's Parkinson's disease causes him to lose his balance, move uncontrollably, and occasionally fall. To alleviate these symptoms, a prison doctor prescribed Mirapex, which Hildreth contends made a "day and night" difference. As a specialty prescription, Mirapex was not kept in stock at the prison; instead, it was filled by an outside pharmacy. The prison allows Hildreth to keep a monthly supply of 90 Mirapex pills in his cell.

To refill his prescription, Hildreth must submit a refill sticker within seven days of the end of the prescription to a nurse, who takes it to an outside pharmacy. Hildreth usually receives his refill when he has three to five days of medication left.

According to Hildreth, his prescription refill was delayed "at least three times," causing him to experience withdrawal symptoms within a day or two. In each instance, he informed his gallery officer, who instructed him to tell the nurse. The nurse often told him to wait and see if the prescription would arrive on time. When his medication was late, Hildreth would file a grievance. For two of the three grievances, Hildreth received his medication within a few days of his prescription lapsing. Wexford's medical director, Dr. Roderick Matticks, testified the third lapse occurred in part because Hildreth failed to attend the chronic clinic, where a Wexford physician evaluates chronically ill inmates to assess their condition and whether prescriptions should be continued. Dr. Matticks was aware of these two or three instances in which Hildreth "had some perceived delays in obtaining refills on his medications."

B. Hildreth's Request for a Typewriter

Hildreth used a typewriter instead of handwriting documents because his Parkinson's symptoms rendered them illegible. But the prison, a maximum-security facility, banned the typewriter from his cell as contraband. Hildreth also claimed the prison discriminated against him based on his Parkinson's disease by failing to reasonably accommodate him for his inability to write legibly.

To accommodate Hildreth's request to draft documents, he was placed on the automatic call line to the law library when he was 90 days away from a court deadline. A counselor was available to help him draft documents, and he could contact an officer for emergencies. Hildreth also could use a typewriter whenever he had access to the law library. Kim Butler, the former assistant warden and ADA coordinator, granted

Hildreth access to the law library three days per week from 8:00 a.m. to 2:00 p.m. to use the typewriter.

In the summer of 2012, Hildreth filed a grievance requesting a permit allowing him to possess the typewriter in his cell. Over two years later, on October 30, 2014, Hildreth filed a grievance stating he needed staff assistance to file grievances. Defendant Lori Oakley, a grievance officer, reviewed the complaint and found it moot because Butler had provided Hildreth with increased law library access and assistance to draft grievances. Hildreth's extra library access was later rescinded after he was provided an ADA attendant to help write grievances and pleadings. According to Hildreth, the ADA attendant did not have a high school degree, could not spell, and had sloppy handwriting. Hildreth concluded it was "not even worth it" to use the attendant. The current ADA coordinator, Angela Crain, noted if Hildreth did not want the attendant, "he can simply request extra library time again in lieu of the attendant and the ADA attendant will then be assigned to another inmate."

Hildreth has not missed any court deadlines due to the prison's actions. Still, he testified he can do only a portion of what he used to, which was to spend at least six hours a day working on court filings with a typewriter in his cell. While other inmates can draft handwritten court filings at any time in their cells, Hildreth is limited to his time with the typewriter in the library.

C. District Court Proceedings

Hildreth sued under 42 U.S.C. § 1983 alleging Wexford violated his Eighth Amendment right by intentionally not refilling his Parkinson's medication on time, and under the ADA

that defendants Butler and Oakley discriminated against him by denying him access to a typewriter in his cell. Hildreth sought damages for past harm as well as prospective injunctive relief. While Hildreth initially sued pro se, the district court appointed counsel for him. Through that counsel Hildreth filed an amended complaint and engaged in discovery, including deposing Wexford's Rule 30(b)(6) designee.[1]

Wexford moved for summary judgment on Hildreth's § 1983 claim. According to Wexford, Hildreth's medication was late only three times over a period of nineteen months, too infrequent from which to infer a widespread practice or custom of deliberate indifference. The district court agreed and found only three documented instances when Hildreth experienced medication delays over a period of nineteen months:

- On April 8, 2014, Hildreth submitted a grievance noting he was out of medication. The Warden determined this was an emergency. A doctor saw Hildreth the next day and renewed his medication for

[1] Our dissenting colleague in Section I of his opinion sends out a warning "of obvious implications for discovery in the district courts" in future cases. That section of the dissent references reports and other materials which, the dissenting opinion admits, are outside of this case's record. Neither the result of this case nor this majority opinion's reasoning opens any doors to future similar litigation or expands the discovery in which parties may engage. The scope of discovery is defined by the claims pursued and the defenses raised. For the plaintiff's part, he set those parameters with the help of counsel. This majority opinion does not address discovery because it was not an issue in this appeal.

one year, but Hildreth did not receive his medication until a later date. The record does not indicate when he received this prescription.

- On October 25, 2014, Hildreth submitted another grievance stating he was about to run out of his prescription and had a couple days' worth left. The warden expedited this as an emergency. The grievance officer then contacted the healthcare unit, which stated Hildreth received the medication on October 30, 2014.
- On November 16, 2015, Hildreth submitted a grievance stating he had been out of his medication since November 13. The Warden expedited this grievance. The healthcare unit administrator advised the grievance officer that Hildreth's prescription had expired and the request to continue using Mirapex was sent to the pharmacy. The grievance officer responded on November 23, 2015, finding this grievance moot. The record does not indicate when he received this prescription.

Hildreth did not present evidence that any other inmates experienced medication delays.[2] The district court found that three delays over the period of a year and a half involving only Hildreth did not support an inference of a widespread

[2] Hildreth's other grievances did not relate to medication refill delays or were inadmissible hearsay. For example, Hildreth's October 30, 2014 grievance complained about the need for assistance in writing grievances, not about refill delays. And Hildreth's January 15, 2016 grievance referred to the return of his November 16, 2015 grievance—again, not about refill delays.

practice or custom, so summary judgment was granted to Wexford.

Defendants Butler and Oakley also moved for summary judgment on Hildreth's ADA claim, arguing they reasonably accommodated his disability. The district court considered whether Hildreth, given his disability, was able to participate in the activities in question with or without reasonable accommodations. The district court found he was able to use the law library and access a typewriter three times per week for six hours a day from August 2013 to July 2015. He also could contact an officer in emergency situations, and a counselor was available to assist. The increased library access was rescinded only after Hildreth was assigned a personal ADA attendant. Nevertheless, Hildreth could have requested extra library time in lieu of using the attendant. Although Hildreth complained the attendant was inadequate, Hildreth did not miss any court deadlines.

Considering the prison's security concerns and the fact that Hildreth was able to successfully draft documents, the district court found the prison's accommodations reasonable as a matter of law and granted summary judgment to Butler and Oakley on this claim. Hildreth appealed.

II. Discussion

Summary judgment is proper when the admissible evidence shows no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56; *Barnes v. City of Centralia*, 943 F.3d 826, 830 (7th Cir. 2019). We review de novo the district court's

grant of summary judgment and construe all facts and reasonable inferences in Hildreth's favor. *See Barnes*, 943 F.3d at 828.

A. Section 1983 Claim

We start with Hildreth's Eighth Amendment claim against Wexford, which he brought under § 1983's policy-or-custom framework of *Monell v. NYC Soc. Serv.*, 436 U.S. 658 (1978).[3] Deliberate indifference to a prisoner's serious medical needs may constitute cruel and unusual punishment under the Eighth Amendment. *Campbell v. Kallas*, 936 F.3d 536, 544–45 (7th Cir. 2019) (citing *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)). To prevail on such a claim, a plaintiff must show his condition was objectively, sufficiently serious and that the prison officials manifested deliberate indifference to his serious medical needs. *Id.* at 545. To be sure, negligence, gross negligence, or even recklessness as the term is used in tort cases is not enough—the prison officials' state of mind must rise to the level of deliberate indifference. *Burton v. Downey*, 805 F.3d 776, 785 (7th Cir. 2015) (holding alleged two-day delay

[3] In the alternative, Hildreth asks this court to apply a *respondeat superior* theory of liability to private corporations, like Wexford. This argument is new on appeal and thus forfeited. *See Hahn v. Walsh*, 762 F.3d 617, 639 (7th Cir. 2014) (holding "plaintiffs have waived the issue of [a private company's] respondeat superior liability [under § 1983] because they failed to raise it before the district court"). While courts, including ours, have at times used the terms waiver and forfeiture interchangeably, this court recently clarified that forfeiture occurs where, as here, a party inadvertently fails to raise an argument in the district court. *United States v. Flores*, 929 F.3d 443, 447 (7th Cir. 2019) ("Waiver occurs when a party intentionally relinquishes a known right and forfeiture arises when a party inadvertently fails to raise an argument in the district court.").

providing medication to detainee was not deliberate indifference).

Because Wexford is a "private corporation that has contracted to provide essential government services [it] is subject [under § 1983] to at least the same rules that apply to public entities." *Glisson v. Ind. Dep't of Corr.*, 849 F.3d 372, 378–79 (7th Cir. 2017) (en banc). Hildreth does not point to an official unconstitutional policy; instead, he claims Wexford has a custom of delaying prescriptions.[4]

To support a § 1983 claim on this theory, Hildreth must show: (1) defendants' practice in refilling prescriptions violated his constitutional rights; and (2) that practice was "so pervasive that acquiescence on the part of policymakers was apparent and amounted to a policy decision." *Phelan v. Cook Cty.*, 463 F.3d 773, 789, 790 (7th Cir. 2006). This requires "more than a showing of one or two missteps." *Id.* There must be "systemic and gross deficiencies." *Id.* Even if such deficiencies exist, Hildreth must show policymakers knew of the deficiencies and failed to correct them, manifesting deliberate indifference. *Id.*

We put the first requirement to the side because Hildreth has not provided enough evidence on the second to show a practice of delaying prescriptions was widespread, which is

[4] Our dissenting colleague labels Hildreth's allegations a "policy" claim, although the dissent admits Hildreth uses the term "custom" in his briefing, and Hildreth states "[a] corporate 'custom' is at issue here." Appellant's Br. at 31.

the "pivotal requirement" of his § 1983 claim.[5] *Grieveson v. Anderson*, 538 F.3d 763, 774 (7th Cir. 2008) (holding 4 incidents over about 11 months involving only plaintiff was insufficient to show a widespread practice or custom).

Hildreth's claim fails on two axes: first, his allegations of delays are insufficiently widespread, as they involve only him; and second, the alleged delays are insufficiently numerous, as he has substantiated only three.

1. *Incidents involving only Hildreth*

Hildreth provides evidence of delays in only his personal prescriptions. While it is not "impossible" for a plaintiff to demonstrate a widespread practice or custom with evidence limited to personal experience, "it is necessarily more difficult ... because 'what is needed is evidence that there is a true municipal policy at issue, not a random event.'" *Id.* (quoting *Calhoun v. Ramsey*, 408 F.3d 375, 380 (7th Cir. 2005)); *see Winkler v. Madison Cty.*, 893 F.3d 877, 902 (6th Cir. 2018) (affirming summary judgment in county's favor when plaintiff "discusses only [her son's] treatment, and therefore cannot establish that the County had a custom of deliberate indifference to the serious healthcare needs of all the inmates"); *Denham v. Corizon Health, Inc.*, 675 F. App'x 935, 944 (11th Cir. 2017) (holding plaintiff failed to show a custom of providing inadequate medical care when plaintiff's claims rest only on one inmate's experiences); *Payne v. Servier Cty.*, 681 F. App'x 443, 446–47 (6th Cir. 2017) (holding "five instances of alleged

[5] Because there was not enough evidence of a custom, we also need not address whether Wexford acted with deliberate indifference. *See Grieveson v. Anderson*, 538 F.3d 763, 774 (7th Cir. 2008).

misconduct, over three months, all involving the plaintiff himself is not enough to prove a custom"); *Culbertson v. Lykos*, 790 F.3d 608, 629 (5th Cir. 2015) (holding allegations "limited to the events surrounding the plaintiffs" are insufficient to establish a widespread practice or custom). This is not a case where the incidents are so numerous to satisfy the "more difficult" task of proving a custom with only evidence of personal experience. *Grieveson*, 538 F.3d at 774.

2. *Insufficient Number of Delays*

Hildreth alleges his prescription lapsed "at least three times." And the district court found three grievances for Hildreth's lapsed medication on April 8, 2014, October 25, 2014, and November 16, 2015. Other than these three personal experiences, Hildreth has not provided evidence that any other inmates experienced prescription delays.

Three instances of prescription delays over nineteen months involving solely one inmate fail to qualify as a widespread unconstitutional practice so well-settled that it constitutes a custom or usage with the force of law. Although this court has not adopted any "bright-line rules" defining a widespread practice or custom, we have acknowledged that the frequency of conduct necessary to impose *Monell* liability must be more than three. *Thomas v. Cook Cty. Sheriff's Dep't*, 604 F.3d 293, 303 (7th Cir. 2010) (noting "there is no clear consensus as to how frequently such conduct must occur to impose *Monell* liability, 'except that it must be more than one instance,' or even three") (citations omitted); *see also, e.g., Doe v. Vigo Cty.*, 905 F.3d 1038, 1045 (7th Cir. 2018) (holding a "handful of incidents of misconduct," including three incidents of sexual contact, two incidents of inappropriate comments, and two allegations of harassment over two decades

"is not enough to establish a custom or practice"); *Estate of Moreland v. Dieter*, 395 F.3d 747, 760 (7th Cir. 2005) (holding three incidents of improper pepper-spraying over a three-year period did not amount to a widespread custom); *Gable v. City of Chicago*, 296 F.3d 531, 538 (7th Cir. 2002) (holding three incidents of erroneously denying to vehicle owners that their vehicles were in the impoundment lot over a four-year period did not amount to a persistent and widespread practice).

We agree with the district court that this case is comparable to *Grieveson v. Anderson*, 538 F.3d 763 (7th Cir. 2008). In *Grieveson*, on four occasions over a period of about eleven months, jail guards gave the plaintiff his entire prescription at once, exposing him to the risk of theft by other inmates. Those four instances were insufficient to establish a widespread practice or custom. 538 F.3d at 774. As *Grieveson* explained, "evidence of four incidents that [plaintiff] alone experienced" is "simply not enough to foster a genuine issue of material fact that the practice was widespread." *Id.* at 774–75. Accordingly, granting summary judgment in Wexford's favor was proper.

Our dissenting colleague attempts to distinguish *Grieveson*. Grieveson complained once, while Hildreth complained three times, and Grieveson did not allege widespread non-compliance with official policy. But a single complaint of four incidents over eleven months is not materially different than three complaints, each of a single incident, over nineteen months. And like Grieveson, Hildreth did not allege a widespread failure. Hildreth's allegations concern only himself. He sued on his own behalf and not for others. Indeed, the term "widespread" is absent from Hildreth's amended complaint, which was filed with the assistance of counsel.

Our reasoning and conclusion here agree with other circuits that have considered the frequency of instances to establish a widespread practice or custom. Those cases have concluded that four or more incidents over varying periods—sometimes less than nineteen months—are insufficient to qualify as a widespread practice or custom.[6]

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[6] Evidence of four incidents fell "far short" of proving a widespread practice or custom. *See Jones v. Town of E. Haven*, 691 F.3d 72, 85 (2d Cir. 2012) (holding four incidents over approximately four years "fell far short" of showing a custom); *Giaccio v. City of New York*, 308 F. App'x 470, 472 (2d Cir. 2009) (holding "only four examples" of misconduct fell "far short" of establishing a widespread practice).

Evidence of five incidents involving only the plaintiff was not enough to prove a widespread practice or custom, even when those incidents occurred in a short three-month period. *See Payne v. Servier Cty.*, 681 F. App'x 443, 446–47 (6th Cir. 2017) (holding "five instances of alleged misconduct, over three months, all involving the plaintiff himself is not enough to prove a custom" and that "plaintiff cannot establish a custom solely by pointing to the facts of his own case").

Evidence of more than five incidents was insufficient to prove a widespread practice or custom over a variety of time frames. *See, e.g., Ruiz-Bueno v. Scott*, 639 F. App'x 354, 364 (6th Cir. 2016) (holding 10 incidents in the past 18 years did not demonstrate pattern of constitutional violations); *Peterson v. City of Fort Worth*, 588 F.3d 838, 851 (5th Cir. 2009) (holding 27 complaints of excessive force over 3 years were insufficient to establish a pattern); *Pineda v. City of Houston*, 291 F.3d 325, 329 (5th Cir. 2002) (holding 11 incidents of warrantless entry did not support an unconstitutional pattern), 124 F. Supp. 2d 1057, 1070 (S.D. Tex. 2000) (illustrating a four-year period for the incidents of warrantless entry); *Mettler v. Whitledge*, 165 F.3d 1197, 1204–05 (8th Cir. 1999) (holding 16 incidents ranging between August 1982 and January 1994 were insufficient to prove a custom); *Silva v. Worden*, 130 F.3d 26, 32 (1st Cir. 1997) (finding insufficient evidence of a custom when witnesses "could only remember a few instances over the last twenty years"); *Carter v. District of Columbia*, 795 F.2d 116, 123 (D.C. Cir. 1986) (holding six prior incidents of alleged

3. *Other Alleged Incidents*

Hildreth cites other incidents which he says qualify as part of a widespread practice or custom. But due to failures of proof and forfeiture, those incidents cannot be considered. Hildreth argues the district court erred in excluding evidence of two more delays in prescription refills discussed in another inmate's affidavit. Michael McGowan attested he overheard conversations between Hildreth and people whom McGowan believed to be Wexford nurses. The affidavit describes an October 2015 incident, when a nurse refused to accept Hildreth's medication refill slip because of Hildreth's demeanor. The affidavit also describes an undated incident, when a nurse said she was not going to "check on the status" of Hildreth's medication and that he needed to wait for it to arrive.

Hildreth submitted McGowan's affidavit in response to Wexford's motion for summary judgment. The district court excluded the affidavit as inadmissible hearsay. We review a district court's evidentiary decision for an abuse of discretion. *See Bordelon v. Bd. of Educ. of the City of Chi.*, 811 F.3d 984, 991 (7th Cir. 2016). Hildreth argues the district court abused its discretion by excluding this affidavit because the statements in McGowan's affidavits were made by an agent of a party

misconduct over approximately two years did not establish pattern of excessive force); *cf. Bordanaro v. McLeod*, 871 F.2d 1151, 1156 (1st Cir. 1989) (finding a widespread practice or custom when doors were broken down by officers without a warrant with a sledge hammer provided by the city and the sergeant was present at "about 20 or 30" or "50, 60" instances over his 24-year tenure as a police officer).

opponent under Federal Rule of Evidence 801(d)(2)(D) and are not hearsay.

We conclude the district court did not abuse its discretion by not considering the McGowan affidavit because there was insufficient evidence to establish that Wexford employed the nurses referenced in the affidavit. Hildreth failed to show that the nurses who allegedly made these statements were employed by Wexford, and he failed to confirm that the statements were made within the scope of employment. *Id.* at 992. Even if a Wexford nurse did make these comments, "not everything that relates to one's job falls within the scope of one's agency or employment." *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 950 (7th Cir. 1998). While the "precise reach of Rule 801(d)(2)(D) is sometimes difficult to discern," the inquiry is easy where, as here, the affidavit does not establish an employment relationship and does not establish the statements were made within the scope of such relationship. *Id.*

Even if the district court had abused its discretion and improperly excluded these two other incidents, Hildreth's claim still fails because the "practice" of medication delay was not widespread. Importantly, neither of these incidents describe a delay in the delivery of Hildreth's prescription. The first relates to a nurse refusing to accept the medication refill slip due to Hildreth's demeanor—not an allegation concerning a medication delay. The second undated incident refers to a nurse saying she would not "check on the status" of Hildreth's medication—again, not a medication delay. Without knowing when the prescription was due to be delivered, a delay cannot be presumed. So neither of these incidents can support Hildreth's claim that Wexford has an unconstitutional practice or custom of delaying prescriptions.

On appeal, Hildreth employs a kitchen-sink strategy by arguing there were three more delays (beyond the five discussed so far) for a total of eight delays that the district court failed to consider. These three further instances were not argued in the district court, so we cannot consider them. *See, e.g., Scheidler v. Indiana*, 914 F.3d 535, 540, 544 (7th Cir. 2019) (holding plaintiff forfeited her argument by not developing it in the district court); *Flournoy v. Schomig*, 418 F. App'x 528, 531 (7th Cir. 2011) (refusing to consider new evidence of deliberate indifference under § 1983 when plaintiff did not raise the issue before the district court); *see also United States v. Flores*, 929 F.3d 443, 447 (7th Cir. 2019) (explaining forfeiture arises when a party inadvertently fails to raise an argument in the district court).

Even if we were to review these three additional allegations on appeal, they are vague, they lack sufficient connection to Wexford, and at least two occurred sporadically several years before the other alleged incidents. Specifically, two incidents are dated November 3, 2009 and January 28, 2011 and were included in the "cumulative counseling summary" to Hildreth's summary judgment response on the issue of exhaustion of administrative remedies. Hildreth failed to discuss any of these incidents in his summary judgment response on the issue of inadequate care, the issue under consideration. The third incident is an undated occurrence when his medication lapsed because it was not renewed, which was also not discussed in his summary judgment response on the issue of inadequate care. The district court did not err in not considering them, as it is not the court's job to "scour the record in search of evidence to defeat a motion for summary judgment." *Harney v. Speedway SuperAmerica, LLC*, 526 F.3d 1099, 1104 (7th Cir. 2008).

Even if the hearsay, forfeiture, and relevance rules were put to the side, and we considered all eight incidents which occurred over a period of six years, courts have concluded that more than eight incidents over a shorter time period does not constitute a "widespread" practice or custom. *See, e.g., Pittman ex rel Hamilton v. Cty. of Madison*, 746 F.3d 766, 780 (7th Cir. 2014) (holding 36 suicide attempts and 3 suicides in a 5-year period was not enough evidence of a widespread inadequate suicide policy); *Peterson v. City of Fort Worth*, 588 F.3d 838, 851 (5th Cir. 2009) (holding 27 complaints of excessive force over 3 years were insufficient to establish a pattern); *Pineda v. City of Houston*, 291 F.3d 325, 329 (5th Cir. 2002) (holding 11 incidents of warrantless entry over a 4-year period did not support an unconstitutional pattern).

The dissent states we adopt a "bright-line rule" as to the number of incidents to establish an unconstitutional custom under *Monell*.[7] But rather than set a number, we have considered and applied the precedents of this and other courts to

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[7] The dissent asserts this opinion "is at odds with our approach to *Monell*, which focuses broadly on indicia of municipal or corporate responsibility rather than just the number of incidents." For this proposition the dissent cites *Dixon v. County of Cook*, 819 F.3d 343 (7th Cir. 2016), and *Daniel v. Cook County*, 833 F.3d 728 (7th Cir. 2016), but neither case is availing here. *Dixon* included an institutional claim—the implementation of a medical records policy—from which the dissent's quote emanates. 819 F.3d at 348–49. In contrast, Hildreth brought an individual claim. And the claim in *Daniel* concerned whether Cook County Jail's scheduling and record keeping resulted in medical care falling below constitutional standards as a matter of official policy, custom, or practice. 833 F.3d at 734. As *Daniel* stated, "[t]o prove an official policy, custom, or practice within the meaning of *Monell*, Daniel must show more than the deficiencies specific to his own experience, of course." 833 F.3d at 734. Again, Hildreth's claim is limited to his own experience.

these facts, nothing less and nothing more. Hildreth has not shown five incidents of prescription refill delay, much less eight. And under that law three delays over nineteen months for a single individual does not establish a widespread custom or practice of delaying medication. So we affirm the district court's grant of summary judgment to Wexford on Hildreth's § 1983 claim.

B. ADA Claim

We turn next to Hildreth's statutory claim under the ADA.[8] Under the Act, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. To establish a violation, a plaintiff must show "he is a qualified individual with a disability, that he was denied the benefits of the services, programs, or activities of a public entity or otherwise subjected to discrimination by such an entity, and that the denial or discrimination was by reason of his disability." *Wagoner v. Lemmon*, 778 F.3d 586, 592 (7th Cir. 2015) (internal quotations omitted). The ADA imposes a duty to provide reasonable accommodations to disabled persons. 42 U.S.C. § 12182(b)(2)(A)(ii) ("[D]iscrimination includes ... a failure to

[8] This claim raises a "thorny question of sovereign immunity." *Jaros v. Ill. Dep't of Corr.*, 684 F.3d 667, 671–72 (7th Cir. 2012); *see also Morris v. Kingston*, 368 F. App'x 686, 689 (7th Cir. 2010) (observing the Supreme Court "left open the question whether the ADA could validly abrogate sovereign immunity for *non-constitutional* violations"). We need not address this question, though, because we conclude the defendants' accommodations were reasonable as a matter of law.

make reasonable modifications in policies, practices, or procedures."); *see A.H. by Holzmueller v. Ill. High Sch. Ass'n*, 881 F.3d 587, 594 (7th Cir. 2018). To receive compensatory damages, Hildreth must show deliberate indifference, which occurs when defendants "*knew* that harm to a federally protected right was substantially likely and ... *failed* to act on that likelihood." *Lacy v. Cook Cty.*, 897 F.3d 847, 862 (7th Cir. 2018) (quoting *Liese v. Indian River Cty. Hosp. Dist.*, 701 F.3d 334, 344 (7th Cir. 2012)).

The key question here is whether Hildreth, given his disability, was able to draft his legal documents, with or without reasonable accommodations from the prison. *See Love v. Westville Corr. Ctr.*, 103 F.3d 558, 560 (7th Cir. 1996). As a result of the Parkinson's disease and its effect on his handwriting, Hildreth requested a typewriter in his cell to draft court documents and correspondence. Because a typewriter is prohibited in a cell, the prison officials instead provided him with an assistant to help him draft documents. They also increased his access to the library to eighteen hours per week where he could use a typewriter. Hildreth's extra library access was withdrawn only when he received an assistant. While not the around-the-clock, easy access Hildreth wants to word processing, or the well-trained writer whom he might like, Hildreth successfully drafted legal documents and never missed a court deadline. Further, he could have asked for more library time, but the record shows no such request.

The question is not whether other modifications could have been made, such as those Hildreth seeks, but whether the accommodations made were reasonable. We conclude they were. The defendants' accommodations allowed Hildreth sufficient time and access to a typewriter to draft and

file documents while taking into account the prison's reasonable security concerns with contraband. *Love*, 103 F.3d at 561 (noting the ADA's "reasonableness requirement must be judged in light of the overall institutional requirements. Security concerns, safety concerns, and administrative exigencies would all be important considerations to take into account" (citation omitted)).

Even if Butler and Oakley failed to make these reasonable accommodations, Hildreth would still not be entitled to damages because he has not shown deliberate indifference. Hildreth admits he has been moved to a different area of the prison where he may now possess a typewriter in his cell. This renders moot his claim for prospective injunctive relief. *See Simic v. City of Chicago*, 851 F.3d 734, 738 (7th Cir. 2017) (noting for a plaintiff to have standing for prospective injunctive relief, he "must face a 'real and immediate' threat of future injury as opposed to a threat that is merely 'conjectural or hypothetical'" (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). So Hildreth can now seek only compensatory damages, provided he shows deliberate indifference. *See Lacy*, 897 F.3d at 862 (7th Cir. 2018) (agreeing with the majority of circuits that "deliberate indifference [is] the proper standard for obtaining compensatory damages" under the ADA). But Hildreth never argued Butler or Oakley were deliberately indifferent and thus cannot recover compensatory damages. Accordingly, we affirm the summary judgment in defendants' favor on the ADA claim.

III. Conclusion

The district court concluded correctly that Hildreth did not show a widespread practice or custom of the defendant

delaying medication, and that prison officials reasonably accommodated his Parkinson's disease. So we AFFIRM the district court's grant of summary judgment in defendants' favor.[9]

[9] Hildreth moved to supplement the record on appeal with an October 10, 2018 letter from the Illinois Supreme Court, which stated the Illinois Supreme Court was returning his petition for leave to appeal because it was "mostly illegible" and requested that Hildreth type or rewrite his petition. Because this letter was not submitted (or in existence) during the district court proceedings, it is not permitted under Federal Rule of Appellate Procedure 10, so we deny this motion.

HAMILTON, *Circuit Judge*, dissenting. Plaintiff Hildreth has offered sufficient evidence that Wexford knew of his serious health needs—which required reliable, timely refills of his Parkinson's medication—and acted unreasonably in response to those needs. Wexford established prescription refill and renewal systems, i.e., policies, that did not include warnings and back-ups to correct inevitable and serious mistakes. That's enough to show deliberate indifference under *Farmer v. Brennan*, 511 U.S. 825, 843–44 (1994), and *Glisson v. Indiana Dep't of Corrections*, 849 F.3d 372, 382 (7th Cir. 2017) (en banc). I respectfully dissent.

I. *Discovery in Future Cases*

Before explaining where the majority opinion errs, however, I must highlight the opinion's obvious implications for discovery in the district courts. Wexford should be careful what it asks for. Its lawyers have won this case, but on theories and arguments that invite—indeed, virtually require—much broader, more intrusive, and more expensive discovery in similar cases. Plaintiffs like Hildreth will need to pursue discovery into the medical care of other prisoners and even into Wexford's personnel records. The need for district courts to recruit counsel in such cases will be even more compelling.

Consider the grounds for Wexford's victory. The first is the simplest. Important evidence is deemed inadmissible hearsay because plaintiff does not have evidence that the speakers, prison nurses whose employment shifted back and forth between Wexford and the Illinois Department of Corrections, were employees of Wexford on the days they made the disputed statements. That's incorrect as a matter of evidence law in two ways: these were not "statements" offered for their truth, and even if they had been, a person can be an

agent of a party under Federal Rule of Evidence 801(d)(2)(D) without being an employee. Nevertheless, other plaintiffs will need to prepare to meet such arguments in other cases. The only fair way to let them meet them, if Wexford or similar prison health-care companies will not stipulate, is to let plaintiffs have access to personnel records. Given Wexford's arguments and the majority opinion's reasoning here, it would be an abuse of discretion to deny such discovery in a similar case.

Second, Wexford argues and the majority opinion agrees that plaintiff does not offer evidence of sufficiently widespread problems with timely refills of critical, life-changing prescriptions at Menard or other prisons where Wexford has contracts. I explain below why I disagree. But if a similar plaintiff must prove that the system in fact fails more frequently, and not just for him, his demands for broad discovery into other inmates' experiences with Wexford and its refill system should be undeniable.

Moreover, a good deal of such evidence appears to be discoverable. Other federal lawsuits provide sources of such evidence and describe prescription refill problems at Menard during times relevant here. See, e.g., First Annual Report of Monitor Pablo Stewart, MD, at 47, *Rasho v. Walker*, No. 07-cv-1298 (C.D. Ill. May 22, 2017) ("Medication orders often expired and the offender may or may not continue receiving his or her medication … . At Menard, psychotropic medication orders were allowed to expire, and often staff did not correct the problem until an inmate had already missed a week or two of medication."); Final Report of the Court-Appointed Expert, at 23, *Lippert v. Godinez*, No. 1:10-cv-4603 (N.D. Ill. Dec. 2014) ("In the course of our reviews we noted multiple in-

stances in which patients experienced medication discontinuity for a variety of reasons, yet this went unrecognized and therefore unaddressed by the treating clinicians. Part of the problem seems to be dysfunctional medical record keeping . . . ."); *Barrow v. Wexford Health Sources, Inc.*, No. 3:14-cv-800, 2017 WL 784562, at *4 (S.D. Ill. Mar. 1, 2017) (plaintiff claimed he did not receive medication prescribed by Wexford physician at Menard in 2014; summary judgment granted for Wexford but denied for physician).

There is evidence that these conditions have persisted for years, with expert findings almost perfectly mirroring Hildreth's experiences. See Report of the 2nd Court Appointed Expert, at 83, *Lippert v. Godinez*, No. 1:10-cv-4603 (N.D. Ill. Oct. 2018) ("We found many examples of patients whose ordered medications were never provided, were delayed starting, and were stopped because the patient had not been seen by a provider to renew medication. Record reviews indicated that appointments for chronic care are not scheduled to take place prior to expiration of chronic disease medication orders."). The expert reports from the *Lippert* litigation excoriate Wexford for its oversight of Illinois prison health care—including the delivery of medication—and the first report was published in December 2014, between plaintiff Hildreth's second and third grievances.

These reports are not in this record, were not raised in these briefs, and are not appropriate subjects for judicial notice. But they may be available in future cases. They would face hearsay objections if offered to prove the matters asserted. See *Wilson v. Wexford Health Sources, Inc.*, 932 F.3d 513, 522 (7th Cir. 2019) (holding district court did not abuse its discretion excluding the Lippert Report when offered as proof

that Wexford provided substandard care). But these reports would be admissible to show corporate *knowledge* of Wexford's policy failings and of the risks that inmates faced. *Daniel v. Cook County*, 833 F.3d 728, 743 (7th Cir. 2016) (holding documents from other jail-condition case were "inadmissible hearsay to the extent they are offered to prove the truth of the statements they contain" but "may be admissible to show that the defendants were on notice of their contents").

In addition, plaintiffs in similar cases should be able to find ways to put these reports (or testimony from their authors) into evidence for the truth of the matters asserted to establish a more extensive record of Wexford's similar failures with other prisoners. And of course, evidence about Wexford's contracts and the financial incentives it faces in delivering, or not delivering, health care to Illinois prisoners would also be relevant in evaluating the company's policies and whether they amount to deliberate indifference to serious health risks. Given the majority opinion's reasoning here, these additional paths of discovery should be available and would potentially be compensable by Wexford in the end. See 42 U.S.C. § 1988. Given the majority opinion's reasoning, it would be an abuse of discretion to deny similar plaintiffs access to these lines of discovery to satisfy the standard applied in this case.

II. *Wexford's Prescription Policies and the Lapses in Hildreth's Prescription*

Returning to this case and this record, plaintiff Hildreth has come forward with evidence that defendant Wexford's policies for renewing and refilling prescriptions reflect deliberate indifference to the serious medical needs of Hildreth himself and other prisoners who depend on reliable refills of

prescriptions for medicines that are not kept on-site at the prison. In reviewing a grant of summary judgment, we view the facts in the light most reasonably favorable to plaintiff as the non-moving party. *Dixon v. County of Cook*, 819 F.3d 343, 346 (7th Cir. 2016).

Hildreth suffers from Parkinson's disease, a neurological disease that causes reduced levels of dopamine in the brain, causing in turn tremors and problems in movement and balance, among other serious symptoms. Parkinson's has no known cure, but medication can help control the symptoms by mimicking the effects of dopamine.

Hildreth needs a drug called Mirapex to manage his symptoms. Without Mirapex, his Parkinson's symptoms return within a day or two, and he suffers from poor balance, stiffness, shaking, fevers, memory problems, and freezing episodes. This leaves him "immobile" and "balled up in bed." Any lapse in medication causes pain and puts him at risk of injury. During one such lapse, he lost his balance and fell in the shower. For Hildreth, the difference between having medication and not having it is "night and day."

As an inmate at the Menard Correctional Center, Hildreth must rely on Wexford—a private health-care contractor—and the Illinois Department of Corrections (IDOC) to provide him with health care, including his Parkinson's medication.[1] Both

[1] Since the late 1970s, states have increasingly contracted with private corporations to provide health-care services in prisons. The Pew Charitable Trusts, *Prison Health Care: Cost and Quality* 11 (2017). As of 2015, twenty-eight states either contracted out most health-care delivery services or split responsibility between state employees and contractors. Many states, including Illinois, have a capitated payment model, which means that they pay contractors a fixed per-patient rate for care. *Id.* at 98.

Wexford and IDOC play a role in providing health care, and IDOC employs some health-care workers. Wexford, however, has primary responsibility for overseeing prisoner treatment, including prescribing medication and setting prescription policies. The site medical director at Menard, a Wexford employee, was supposed to provide oversight. During the events of this lawsuit, however, this key position was first vacant, then filled temporarily, occupied briefly by one doctor, and then by another doctor who soon left the position because he was not working the required 40 hours per week and "would leave early."

Wexford treats the Mirapex that Hildreth needs as a "nonformulary medication." This means that the drug is not kept in stock at the prison but is shipped as needed from an outside provider, Boswell Pharmacy Services. Wexford's nonformulary medication refill policy requires a sequence of actions to get the medicine to an inmate. Hildreth receives one month's supply of Mirapex at a time. When he receives the pack of pills, he also receives a sticker that he must turn in to a nurse *at most* seven days before he runs out. After he returns the sticker to a nurse, Wexford is supposed to send the sticker to Boswell. Boswell is then supposed to ship a refill to Menard, and the nursing staff is supposed to deliver the refill to Hildreth. Nurses can be employed by either Wexford or IDOC.

Illinois prisons have among the lowest per-inmate staffing and spending levels in the country. In 2015, Illinois had the second-lowest per-inmate staffing and the eighth-lowest per-inmate health-care spending. Its spending of $3,619 per year was 37 percent below the national median. *Id.* at 8, 20.

In addition to the refill policy, Wexford has a prescription renewal policy for inmates like Hildreth with chronic illnesses. Such inmates are supposed to be signed up automatically for clinic visits at least every six months. These visits serve a key function in coordinating care for chronically ill patients and making sure their medical needs are met. At these clinics, patients are seen by a Wexford physician or nurse practitioner who will then write any necessary prescriptions, which will last between six months and one year.

These policies look good on paper, but these are human systems and people make mistakes. Hildreth did not regularly receive passes for the chronic clinic and did not go every six months. Instead, he was seen by doctors at irregular intervals and was sometimes just told that his prescription was being renewed "automatically." At least one time, Hildreth did not receive his medication on time because his prescription had lapsed. Another time, a Wexford nurse refused to accept Hildreth's renewal sticker because "she did not like Scott Hildreth's demeanor."[2]

In effect, Wexford policy relied on what a manufacturer would call "just-in-time" supply control. When a manufacturer relies on such a system, it knows it must monitor progress closely so that mistakes don't shut down the assembly line. When the just-in-time system is used to provide critical medicine, the stakes are even higher. The need for a policy to catch and correct mistakes before they cause harm is greater. Without such elements in the Wexford policy, plaintiff was left without medication he needed to control his Parkinson's

[2] The majority opinion treats this statement as inadmissible. Ante at 15. I disagree for reasons explained below.

symptoms for days and sometimes more than a week at a time. As applied, then, the formal policies did not reliably supply Hildreth with his Parkinson's medication. The record contains evidence of at least three medication lapses over a period of nineteen months. In each instance, Hildreth did the only things he could to bring the lapse to the attention of those responsible for his care—speaking to the nurses on duty and filing grievances.

On April 8, 2014, Hildreth filed his first grievance in the record about a medication lapse: "I am out of my Parkinsons meds (AGAIN) ... I have serious mobility problems ... I've been telling C/Os [correctional officers] and nurses *for days* I did not get refill[.] *I turned in sticker on time*[.] Been without *for days*." (Emphasis added). The next day, Hildreth's prescription was renewed, indicating that the lapse took place because his prescription had expired and had not been renewed on time. The record does not indicate when Hildreth received his refill, but he likely would have gone at least another couple of days because of the turnaround time from Boswell.

On October 25, 2014, he filed another grievance: "I have gone thru this before?! I don't know why I bother with your griev[ance] syst[em]? I am about to run out of my [.] Mirapex for Parkison's ... I've told the nurses for a couple days now." Hildreth received the medication on October 30, and Hildreth said that this meant he had a lapse of two or three days. Hildreth had become so accustomed to medication delays that he had started preemptively telling nurses about lapses. When he was told to "wait and see" if the medication came in, he would preemptively file a grievance to help ensure that he had only a minimal lapse.

On November 16, 2015, Hildreth filed yet another grievance regarding the same problem: "Been without Parkinsons meds again! Since Friday 13th. This is why I filed law suit." He said that he had "told nurses" about the situation, but to "no avail as usual." This grievance was not reviewed until a full week later, on November 23. Upon review, the Healthcare Unit Administrator—an IDOC employee—noted that the "non-formulary for his meds have expired. The request to continue use was sent into the pharmacy. We are waiting to hear back." During this incident, Hildreth went without his medication for at least ten days. In reviewing the grant of summary judgment, we must assume that such a long lapse was exceptionally painful and dangerous for Hildreth. We must also assume that Hildreth did his part by complying with Wexford's prescription refill and renewal policies.

III. *Analysis—The Eighth Amendment and Monell*

It's worth remembering why modern federal courts devote so much attention to health care in prisons. "An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical 'torture or a lingering death' .... In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose. The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency ... ." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (citations omitted). That's why deliberate indifference to inmates' serious medical needs violates the Eighth Amendment's prohibition on cruel and unusual punishment. *Daniel v. Cook County*, 833 F.3d 728, 733 (7th Cir. 2016), citing

Estelle, 429 U.S. at 104. A plaintiff shows deliberate indifference by establishing that those responsible for inmate health know that an inmate faces a "substantial risk of serious harm" and disregard that risk by "failing to take reasonable measures to abate it." *Farmer v. Brennan*, 511 U.S. 825, 847 (1994).

For claims against municipal governments under 42 U.S.C. § 1983, we apply the familiar *Monell* standard: respondeat superior liability does not apply, and the plaintiff must show instead that the constitutional violation was caused by a municipal policy or a custom or practice so pervasive as to reflect municipal policy. *Monell v. Dep't of Social Services*, 436 U.S. 658, 691 (1978). The Supreme Court has not applied the *Monell* standard to private corporations that act under color of state law, like prison and jail health-care providers. Our precedents have applied *Monell* to such private corporations, though that doctrine has been questioned within the court and the academy. See *Shields v. Illinois Dep't of Corrections*, 746 F.3d 782, 789–90 (7th Cir. 2014).

In this case, the correct focus is on Wexford's systems (i.e., its policies) for prescription refills and renewals. *Monell* liability may apply even in the absence of individual liability where the institutional policies themselves show deliberate indifference to inmates' serious medical needs. *Glisson v. Indiana Dep't of Corrections*, 849 F.3d 372, 378 (7th Cir. 2017) (en banc) (contractor chose not to provide for coordinated care for prisoners with multiple, complex illnesses); see also *Daniel*, 833 F.3d at 733–34 ("individual defendants can defend themselves by shifting blame to other individuals or to problems with the 'system,' particularly where no one individual seems to be responsible for an inmate's overall care").

This doctrinal niche is often relevant in prison health-care cases, particularly where health care is delivered by a combination of government employees and a private contractor like Wexford. The combination diffuses responsibility between government and contractor and among many individuals. Inmates can suffer because of health-care providers' lack of policy, systematic failures to follow official policy, or obvious gaps in policy. E.g., *Glisson*, 849 F.3d at 378; *Daniel*, 833 F.3d at 735; *Thomas v. Cook County Sheriff's Dep't*, 604 F.3d 293, 303 (7th Cir. 2010). In such cases, it may be that no facially unconstitutional policy tells employees to take actions that violate someone's constitutional rights. Instead, the government or its contractor adopts or tolerates practices that predictably lead to constitutional harms.

A. *Evidentiary Dispute*

I need to address briefly the erroneous exclusion of evidence that helps demonstrate why Wexford's system needs to have warning systems and back-ups. In opposing summary judgment, Hildreth offered an affidavit from another inmate, Michael McGowan, who testified that he overheard two relevant conversations. In October 2015, Susan Kirk—a nurse who McGowan believed worked for Wexford—refused to accept Hildreth's medication refill sticker, "indicating she did not like Scott Hildreth's demeanor." In a second encounter, Angie Walters—another nurse who McGowan believed worked for Wexford—refused to check on the status of Hildreth's medication refill when he reported that he had run out. The district court excluded McGowan's testimony about these statements as hearsay, and the majority opinion upholds those rulings.

As a matter of elementary evidence law, this is just clearly wrong. Hildreth did not offer the affidavit to prove that what the nurses said was true. He offered the affidavit to prove their *actions*. One nurse refused to accept plaintiff's refill sticker. The other refused to check on the status of his refill when he had already run out. The conversations were not hearsay at all but instead verbal acts—refusals—falling completely outside the definition of hearsay in Federal Rule of Evidence 801(c): an out-of-court "statement" offered "to prove the truth of the matter asserted in the statement." See *Carter v. Douma*, 796 F.3d 726, 735 (7th Cir. 2015) (informant request for drugs was not hearsay because it was a verbal act); *Schindler v. Seiler*, 474 F.3d 1008, 1010 (7th Cir. 2007) (verbal acts are not hearsay because they "are not offered for their truth"); see generally 30B Wright & Bellin, Federal Practice & Procedure, Evidence § 6722 at 66 (2017). The affidavit was offered as evidence that the system (read, policy) that Wexford had designed could fail and did fail plaintiff because of eminently human failings like impatience and perhaps spite. The affidavit offered admissible evidence to oppose summary judgment.[3]

[3] The parties have skipped the "statement" issue and debated whether Federal Rule of Evidence 801(d)(2)(D) should apply. It excludes from the definition of hearsay statements by an opposing "party's agent or employee on a matter within the scope of that relationship and while it existed." As noted above, the debate on this issue shows the need for broader discovery into Wexford's or similar contractors' personnel files to determine who employed the nurses at the relevant times. The only evidence is that the affiant said that he believed they were Wexford employees. Wexford obviously has records that could settle that issue, but it has not come forward with them. Future plaintiffs facing similar gamesmanship will have to obtain personnel records to prepare to meet such arguments. At a more fundamental level, however, *employment* is not the issue. *Agency* is

B. *Unreasonable Response to Danger of Inevitable Mistakes*

Hildreth has presented sufficient evidence of a *Monell* policy or custom for his claim to survive. A jury could conclude that "the failure to establish adequate systems" for providing essential medication "was so pervasive that acquiescence on the part of policymakers was apparent and amounted to a policy decision." *Daniel*, 833 F.3d at 734, citing *Dixon v. County of Cook*, 819 F.3d 343, 348 (7th Cir. 2016). Hildreth has identified a policy—or rather, a network of policies and key policy gaps—that can form the basis of Wexford's Eighth Amendment liability. The issue is not exactly how often the policy failed Hildreth. The issue is whether the system established by Wexford policymakers reflected deliberate indifference to the inevitability of human mistakes.

A prisoner asserting a deliberate-indifference claim must show that the defendant had actual knowledge of the danger or serious condition the prisoner faced, and that the defendant failed to take reasonable steps in the face of the risk. *Farmer v. Brennan*, 511 U.S. 825, 843–44 (1994); *Ortiz v. Jordan*, 562 U.S. 180, 190 (2011) (reinforcing *Farmer's* reasonableness requirement); *LaBrec v. Walker*, 948 F.3d 836, 841 (7th Cir.

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the issue. See, e.g., *Mister v. Northeastern Illinois Commuter R.R. Corp.*, 571 F.3d 696, 698 (7th Cir. 2009); *United States v. Swan*, 486 F.3d 260, 264–65 (7th Cir. 2007); *Young v. James Green Mgmt., Inc.*, 327 F.3d 616, 622 (7th Cir. 2003). The majority opinion further speculates that the statements may not have been within the scope of the nurses' employment (or agency). Ante at 15. Even Wexford didn't try to make this argument, and it's hard to imagine how these statements or actions by nurses responsible for refilling prescriptions and dispensing drugs could fall outside the scope of their agency or employment. See *Thomas*, 604 F.3d at 309–10 (prison nurse's statement that an ill inmate was "just dope sick" was "not hearsay" under Rule 801(d)(2)(D)).

2020); *Glisson*, 849 F.3d at 381. The Supreme Court explained in *Farmer* that a plaintiff can prove actual knowledge with circumstantial evidence, of course, and that the very obviousness of the danger can support an inference of actual knowledge. 511 U.S. at 842; see also *LaBrec*, 948 F.3d at 841 (citing *Farmer*); *Petties v. Carter*, 836 F.3d 722, 729 (7th Cir. 2016) (en banc) ("If a risk from a particular course of medical treatment (or lack thereof) is obvious enough, a factfinder can infer that a prison official knew about it and disregarded it.").

Hildreth has offered evidence to satisfy this demanding standard. Ample evidence showed that Wexford had actual knowledge of Hildreth's Parkinson's disease, his prescription, and the need to ensure a steady supply of the medicine. Wexford surely had actual knowledge that some prisoners would have similarly urgent needs for critical prescriptions not available on-site at the prison. Given that actual knowledge of serious medical needs, Wexford had a constitutional duty to take reasonable steps to avoid or minimize the risk of lapses in medication. In other words, Wexford had a constitutional duty to put in place a reasonably reliable system for renewing and refilling such critical non-formulary drugs and to monitor the performance of that system.

A jury could easily find that Wexford's system was not reasonably calculated to be reliable because the system had no warning channel and back-up mechanisms by which it could fix mistakes without unnecessary suffering. Wexford's system is not required to be perfect and fail-safe. But for a system so critical to health—and one with many possible points of failure—it lacked warnings to alert Wexford to inevitable mistakes or oversights. This not only prevented Wexford

from catching mistakes before patients suffered but apparently prevented Wexford from learning about even repeated failures. Such an unreasonable "conscious decision not to take action" in the face of a serious medical risk is akin to the decision of the defendant in *Glisson* to forgo a protocol for coordinated care to chronically ill inmates. 849 F.3d at 381. Where there is an obvious risk created by a health-care policy gap—like coordinated care in *Glisson* or medication refill oversight here—a plaintiff need not show some minimum number of injuries to prevail. *Id.* at 382, citing *Woodward v. Correctional Medical Services*, 368 F.3d 917, 929 (7th Cir. 2004) ("CMS does not get a 'one free suicide' pass.").

Compare Hildreth's situation to that of a hospital patient on a ventilator that is keeping the patient alive. The machine runs on electricity. Electrical power will be interrupted from time to time by storms and equipment failures. Machines like ventilators occasionally break down. Any reasonable hospital must anticipate the possibility of those interruptions and breakdowns, and it must have alerts and a back-up system in place. Similarly here, Wexford may be deemed to have actual knowledge of both the obvious possibility, even the inevitability, of mistakes or lapses in its renewal and refill systems and of the serious consequences for patients if those were not corrected. Wexford thus had a constitutional duty to take reasonable steps—warnings and back-up systems—to mitigate the effects of inevitable mistakes and oversights.

In Hildreth's case, Wexford's system for providing medication led to a series of serious delays in providing him with his medication—at least three times in nineteen months. Each time this happened, we must assume, Hildreth did every-

thing he could to avoid the problem and then to make Wexford aware of it. He told the nurses and filed formal grievances. In these grievances, he said that this was an ongoing problem and that the nurses were not responsive to his needs. The longest lapse in medication—at least ten days—occurred after he had recently submitted two grievances related to other lapses.

Wexford argues that Hildreth's grievances cannot be used to infer that it knew about the systemic failure of its medication policies and that this precludes liability:

> Wexford is not involved in the grievance process, and would not know of the contents of a grievance unless an IDOC employee notifies Wexford about it. Even then, that individual would have been a member of the onsite healthcare staff, not necessarily a policymaker. As such, Wexford policymakers had no reason to know that any alleged issue existed.

Brief for Appellee Wexford at 21. This argument has things exactly backwards: Wexford's lack of involvement in the grievance process makes it *more* culpable and *strengthens* Hildreth's claim. Humans make mistakes. In implementing systems known to be critical to life, health, and safety, a company like Wexford must allow for such mistakes and take reasonable steps to provide warnings and back-up systems. Federal courts do not and should not design the specifics. As noted, though, the Eighth Amendment requires reasonable responses to known risks where prisoners cannot protect their own health and safety. Wexford's admission that it lacked any policy to learn about inmates' complaints supports the conclusion that its prescription policies created an unacceptable

risk of harm resulting from this form of deliberate indifference to Hildreth's serious medical needs.

Daniel v. Cook County addressed this point: "If a grievance system is part of a jail's or prison's system for communicating and responding to health care requests, and if the system fails in a way that causes a deprivation of needed health care, then the problem with the grievance system may be an important part of the plaintiff's case for deliberate indifference to his health care needs." 833 F.3d at 737. We have also said, of course, that "the dangers of delayed responses to medical requests are readily apparent." *Thomas*, 604 F.3d at 304. In the face of such danger, it is unreasonable for a medical policymaker to cut itself off from important feedback about failures or lapses in its policies.

Dividing responsibility between private contractors and state agencies can increase these risks. In such cases, the law should and does provide incentives for actors to take reasonable steps to mitigate known dangers. The law should not do what the majority opinion's reasoning does here: reward divided responsibility and deliberate ignorance by those who control prisoners' only access to health care. Hildreth's grievances give the impression of a person in pain, screaming into a void. Wexford ignored Hildreth's grievances, seemingly by design. And when Hildreth used the only other avenue available—communication with nurses—he was told only to "wait and see" if the refill would come. On this record, we should reverse summary judgment for Wexford.

C. *The Majority Opinion's Approach to Custom*

The majority opinion adopts a highly restricted approach to establishing a *Monell* custom that is at odds with our precedent. The majority looks only to the raw number of alleged failures and the time period over which they took place. Ante at 11–13. It views the broader policy decisions and context surrounding the violations as immaterial. This approach divorces the legal doctrine from its purpose of identifying those cases in which a government or corporate policy causes and fails to address predictable failures to provide needed medical care. After acknowledging that we have adopted no "bright-line rules" for establishing a *Monell* custom, the majority opinion adopts one by saying that the number of possibly unconstitutional incidents "must be more than three." Ante at 11.

There are at least two problems with the approach. First, Hildreth does not present the kind of pure custom case where institutional culpability is inferred solely from repeated employee misconduct and the question is whether the corporation can be held liable for tolerating them. While Hildreth uses the term "custom" in his briefing—presumably because he asks us to infer something from the repeated medication lapses he experienced—his theory of *Monell* liability implicates both official policies and unofficial customs. Hildreth specifically points to Wexford's admission that it is "not involved in the grievance process" as evidence of its deliberate indifference. He asks us to infer from Wexford's medication refill policy, its prescription renewal policy, a pattern of noncompliance with each of those policies, a pattern of medication lapses, and—importantly—the utter failure of Wexford to provide a functioning pathway to fix these problems, that

Wexford tolerated "systematic and gross deficiencies" in its process for providing inmates with medication. *Dixon*, 819 F.3d at 348. And as described above, the lack of a policy for reporting and correcting failures—undoubtedly a failing attributable to Wexford itself rather than a rogue employee—should be decisive.

Second, even when addressing what could be called pure custom cases, we have never held that some minimum number of incidents is needed to establish municipal liability. Rather, the question is one of corporate knowledge and responsibility, as is always the case under *Monell*. "[M]unicipal liability can ... be demonstrated indirectly 'by showing a series of bad acts and inviting the court to infer from them that the policymaking level of government was bound to have noticed what was going on.'" *Woodward*, 368 F.3d at 927, quoting *Estate of Novack v. County of Wood*, 226 F.3d 525, 530 (7th Cir. 2000). The majority opinion's per se rule is at odds with our approach to *Monell*, which focuses broadly on indicia of municipal or corporate responsibility rather than just the number of incidents. E.g., *Dixon*, 819 F.3d at 348 ("[W]e look to see if a trier of fact could find systemic and gross deficiencies in staffing, facilities, equipment, or procedures in a detention center's medical care system.") (internal quotation marks omitted); *Daniel*, 833 F.3d at 734 ("[A]n inmate can meet this burden by offering 'competent evidence tending to show a general pattern of repeated behavior (i.e., something greater than a mere isolated event).'"), quoting *Davis v. Carter*, 452 F.3d 686, 694 (7th Cir. 2006). As we said in *Woodward*, a prison health-care company "does not get a 'one free suicide' pass." 368 F.3d at 929.

Grieveson v. Anderson, 538 F.3d 763 (7th Cir. 2008), which the majority opinion treats as controlling, is easily distinguishable. An inmate alleged that the jail maintained a customary practice of failing to distribute inmate prescriptions properly after four instances in which his entire prescription was distributed at once and then stolen by other inmates. *Id.* at 774. We held that these four incidents were insufficient to establish a custom. *Grieveson* differs in two critical ways from this case: the inmate complained to the prison officials only once, and the inmate did not allege widespread noncompliance with official policy. Here, by contrast, Hildreth filed at least three grievances and made even more frequent complaints to nurses where Wexford's system failed, and nothing happened. And he described frequent noncompliance with Wexford's refill and renewal policies. Wexford's just-in-time refill system left little room for mistakes, and such a system demands warnings and back-ups where health and safety are at stake. The repeated and foreseeable mistakes in refilling Hildreth's prescription and the failure to respond to his complaints make for a much stronger case of systemic deficiencies here than in *Grieveson*.

I would reverse and remand for trial, and I would add a strong suggestion that Hildreth be permitted to pursue additional discovery to expand the evidence of deliberate indifference.

CERTIFICATE OF COMPLIANCE

This petition for rehearing or rehearing en banc complies with the type-volume limit of Federal Rules of Appellate Procedure 35(b)(2)(A) and 40(b)(1) because, excluding parts of the petition exempted by Federal Rule of Appellate Procedure 32(f), it contains 3,720 words. This petition also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Seventh Circuit Rule 32(b), as well as the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6), because it was prepared in a proportionally spaced typeface in 12-point Palatino Linotype using Microsoft Word 2016.

June 16, 2020

s/ Benjamin G. Minegar
Benjamin G. Minegar

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

SCOTT HILDRETH,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 3:15-CV-00831-NJR-DGW
	)	
KIM BUTLER, NEAL R. SCHWARZ, LORI OAKLEY, MARVIN BOCHANTIN, C/O DEJOHN, C/O MOUI, DR RAHREM, LT TORIVILLE, SGT BENETT, C/O CHANDLER JACQUELINE LASHBROOK, DAWN MARCINKOWSKA, DAVID L. DWIGHT, WEXFORD HEALTH, JOHN DOE and JANE DOE,	)	
	)	
Defendants.	)	

JUDGMENT IN A CIVIL ACTION

DECISION BY THE COURT.

IT IS ORDERED AND ADJUDGED that, pursuant to the Court's Order dated November 4, 2016 (Doc. 49), Defendants Neal Schwarz and Jacqueline Lashbrook were **DISMISSED without prejudice.**

IT IS FURTHER ORDERED AND ADJUDGED that, pursuant to the Amended Complaint dated April 13, 2016 (Doc. 26), Defendants C/O DeJohn, C/O Moui, Dr. Rahrem, Lt. Toriville, Sgt. Benett and C/O Chandler were **DISMISSED without prejudice.**

IT IS FURTHER ORDERED AND ADJUDGED that, pursuant to the Court's Order dated June 16, 2017 (Doc. 65), Defendants Marvin Bochantin, Dawn Marcinkowska, and David L. Dwight were **DISMISSED without prejudice.**

RSA30

IT IS FURTHER ORDERED AND ADJUDGED that, pursuant to the Court's Order dated July 17, 2018 (Doc. 97), Defendants Jane Doe and Lieutenant John Doe were **DISMISSED without prejudice.** Judgment is entered in favor of Defendants Kim Butler, Lori Oakley, and Wexford Health Sources, Inc. on the remaining claims. Plaintiff Scott Hildreth shall recover nothing, and this action is **DISMISSED with prejudice.**

DATED: July 17, 2018

JUSTINE FLANAGAN, Acting Clerk

By: s/ Deana Brinkley
Deputy Clerk

APPROVED: Nancy J. Rosenstengel
NANCY J. ROSENSTENGEL
United States District Judge

RSA31

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

SCOTT HILDRETH,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 3:15-CV-00831-NJR-DGW
	)	
KIM BUTLER, LORI OAKLEY, and WEXFORD HEALTH SOURCES, INC.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

ROSENSTENGEL, District Judge:

This matter comes before the Court on the Report and Recommendation of Magistrate Judge Donald G. Wilkerson, which recommends denying the Motion for Summary Judgment filed by Defendant Wexford Health Sources, Inc.[1] ("Wexford") (Doc. 79) and the Motion for Summary Judgment filed by Defendants Kim Butler and Lori Oakley (Doc. 82). For the following reasons, the Court respectfully rejects the Report and Recommendation and grants both motions.

INTRODUCTION

Plaintiff Scott Hildreth, an inmate of the Illinois Department of Corrections ("IDOC") currently incarcerated at Menard Correctional Center, filed this civil rights lawsuit pursuant to 42 U.S.C. § 1983 complaining Defendants violated his constitutional rights. Hildreth is proceeding on two claims. First, Hildreth claims Defendant Butler, the former Assistant Warden and Americans with Disabilities Act ("ADA") Coordinator at Menard, and

[1] The Clerk's Office is **DIRECTED** to correct Defendant's name on the docket sheet. Furthermore, pursuant to the Court's Order of June 16, 2017, Defendants Marvin Bochantin, Dawn Marcinkowska, and David Dwight were dismissed without prejudice (Doc. 65). Finally, Defendants Jane Doe and Lieutenant John Doe were never identified. Accordingly, the Clerk's Office is **DIRECTED** to terminate these Defendants as parties to this matter.

Defendant Oakley, a Grievance Officer, discriminated against him and denied him reasonable accommodations for his Parkinson's disease. Specifically, he claims Defendants denied him access to a typewriter or word processor and/or access to the prison law library, in violation of the ADA (Doc. 26). Second, Hildreth claims Defendant Wexford maintains unconstitutional policies, practices, and customs of intentionally not refilling its stock of Parkinson's medicine such that Hildreth's prescriptions can be refilled in a timely manner (*Id.*). Hildreth alleges his prescription medication has run out multiple times and has not been refilled within a reasonable amount of time, thus causing him to suffer relapses and withdrawal symptoms (Doc. 26). Hildreth claims this practice is motivated by Wexford's deliberate indifference to his and other inmates' medical needs, which are placed at a lower priority than Wexford's business interests and profits (*Id.*).

BACKGROUND

Hildreth was diagnosed with Parkinson's disease in 1996 (Doc. 83-1, p. 18). The disease causes Hildreth to lose his balance, slide out of his chair, and move uncontrollably (*Id.*, pp. 21-22). It also affects his handwriting and causes him to "shuffle" when walking or to freeze up and fall over (*Id.*).

Because his handwriting is shaky, Hildreth purchased a typewriter to keep in his cell in order to write court documents and other correspondence. In 2012, the prison confiscated his typewriter because it was considered contraband (*Id.*, pp. 38-39). Hildreth filed a grievance in July 2012 and sought a permit allowing him to possess the typewriter and/or a word processor (*Id.*, p. 143). Grievance Officer Oakley found the grievance moot, stating the issue was discussed with the prison's ADA Coordinators, Assistant Warden Butler, Assistant A. Grott, the Healthcare Unit, and the Warden, and it was determined that the

typewriter would not be returned to Hildreth (*Id.*, pp. 40, 50, 143). He would, however, be placed on the automatic call line to the law library when he was 90 days out from a court deadline, he could contact an officer in emergency situations, and a counselor would be making increased contact to assist him (*Id.*).

Hildreth testified that the counselor did make increased contact with him, and Defendant Butler gave him three days a week in the law library from 8 a.m. to 2 p.m. to use the typewriter (*Id.*, p. 42). On October 30, 2014, Hildreth filed another grievance stating that he needed staff assistance to file grievances. In March 2015, Grievance Officer Oakley reviewed the grievance and found it moot, as Hildreth, at that point, was already receiving increased law library access and assistance with his grievances when necessary (Doc. 46-9).

On July 9, 2015, Hildreth's extra library access was rescinded because he was assigned an ADA attendant to help him write grievances and pleadings (Doc. 83-3). Hildreth went back to attending the law library about once every other week (Doc. 83-1, pp. 45-49). According to Hildreth, the attendant did not have his GED, couldn't spell, and his writing was nearly as sloppy as Hildreth's. Using the attendant is "not even worth it." (*Id.*, p. 85). The current ADA Coordinator, Angela Crain, attested that if Hildreth does not want to use the ADA attendant, "he can simply request extra library time again in lieu of the attendant and the ADA attendant will then be assigned to another inmate." (Doc. 83-3).

Hildreth testified that while he has not missed any court deadlines and has been able to file motions and complaints without a typewriter, he is only able to do a portion of what he used to do, which was spend at least six hours a day working on court filings in his cell (*Id.*, pp. 52-53). Meanwhile, other inmates are given time and supplies in their cells to draft documents, which he cannot do (*Id.*, pp. 50-51).

Hildreth stated that he sued Defendant Butler because he thinks she improperly denied him access to a typewriter (*Id.*, p. 117). He sued Defendant Oakley because she mooted his grievances, and "[s]he's the only avenue I got to raise the issues . . . And I think she hasn't done her job to help me find avenues to—to correct it." (*Id.*, p. 119).

Hildreth's Prescription Medication

To alleviate the symptoms of Hildreth's Parkinson's disease, a prison doctor prescribed Mirapex. According to Hildreth, Mirapex has made a "day and night" difference for him (*Id.*, pp. 89, 92). Hildreth takes Mirapex three times a day and receives his pills monthly, meaning he receives 90 pills at a time (*Id.* pp. 89-90).

Hildreth is supposed to see the doctor every six months to have his prescription renewed, but he testified that he thought the doctor sometimes automatically renewed it (*Id.*, p. 94). To refill his monthly prescription, Hildreth must turn in the refill sticker within seven days of the end of the prescription to a nurse or a medic, who then takes it to the pharmacy (*Id.*, p. 90). Hildreth usually receives his refill when he has three to five days of medication left (*Id.*, p. 91). He testified that if the medicine is not there by then, he knows he's "got problems." (*Id.*). He would tell his gallery officer, who would then instruct him to tell the nurse on duty; however, the nurses would tell him to wait and see if it comes in time (*Id.*). If the Mirapex did not come in time, then he would file a grievance (*Id.*). Hildreth testified he would begin experiencing withdrawal symptoms the second day, "if not late in the first day," without his medication (*Id.*, pp. 95-96).

According to Hildreth, his Mirapex prescription lapsed "at least three times" (*Id.*, pp. 93, 103). The longest amount of time he went without Mirapex was at least ten days. (*Id.*, p. 95). Without his medication, Hildreth experiences hot flashes, poor balance, stiffness, ticks

and shakiness, and his gait becomes shuffled. He has freezing episodes, where his body can't move, so he stays in his cell and eats food from the commissary rather than walking to chow for meals (*Id.*, p. 98).

The record contains three grievances[2] in which Hildreth complained of a lapse in receiving his Parkinson's medication. Hildreth testified that he wrote a grievance dated April 8, 2014, stating he was out of his Parkinson's medication again. The grievance was determined by the Warden to be an emergency (Doc. 83-1, p. 72). The Warden responded that the Healthcare Unit said Hildreth was seen on the doctor call line on April 9, 2014, and that his medication was renewed for one year (*Id.*). Hildreth explained that while his prescription may have been renewed on that date, he would not have received it that day. Rather, it would have been ordered on April 9 to be received later (*Id.*, p. 73).

Hildreth wrote a second grievance regarding his Mirapex prescription on October 25, 2014 (*Id.*, p. 76). Within this grievance, Hildreth stated he was about to run out of his prescription for Mirapex, which can cause adverse side effects (Doc. 46-6). Hildreth testified he probably had two or three days' worth of medication left when he wrote the grievance (Doc. 83-1, p. 100). The Warden expedited this grievance as an emergency (Doc. 46-6). The Grievance Officer then contacted the Healthcare Unit, which stated that Hildreth received his Mirapex on October 30, 2014 (Doc. 83-1, p. 76).

Hildreth's third grievance is dated November 16, 2015 (Doc. 43-4). Hildreth wrote that he had been out of his Parkinson's medication since November 13 (*Id.*). The Warden determined that this grievance would be handled on an expedited basis, and the Grievance Officer responded on November 23, 2015, finding the grievance moot (Doc. 43-5). The

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[2] Hildreth testified he wrote a grievance each time he was out of his medicine (*Id.*, p. 94).

Healthcare Unit Administrator had advised the Grievance Officer that Hildreth's non-formulary prescription had expired and the request to continue using Mirapex was sent to the pharmacy (*Id.*). The Healthcare Unit was "waiting to hear back." (*Id.*). The Warden concurred in the decision on November 25, 2015 (*Id.*). The record is silent as to when Hildreth received his prescription.

Hildreth also supplied the Court with an affidavit from Michael McGowan, a fellow inmate at Menard who lived in the same gallery as Hildreth. McGowan attests that he overheard conversations between Hildreth and who he believed to be Wexford nurses on two occasions (Doc. 84-3). The contents of these conversations are inadmissible hearsay, however, and may not be relied upon to defeat summary judgment. *See* FED. R. EVID. 802; FED. R. CIV. P. 56(c)(4); *Maddox v. Jones*, 370 F. App'x 716, 720 (7th Cir. 2010) (citing *Haywood v. Lucent Technologies, Inc.*, 323 F.3d 524, 533 (7th Cir. 2003) (inadmissible hearsay cannot be used to overcome a properly supported motion for summary judgment). Thus, the Court will not consider this affidavit.

Prescription Refill Process

Wexford contracts with the IDOC to provide certain medical services to IDOC prison facilities including Menard (Doc. 34, ¶ 21). Dr. Roderick Matticks, Wexford's Lead Regional Medical Director in Illinois, testified that Wexford's site medical director would oversee the treatment of Hildreth's Parkinson's disease, including his prescription medication, while Wexford's nursing staff would oversee delivery of the medication (*Id.*, pp. 4-5). Boswell Pharmacy, which is not owned by Wexford, is responsible for filling prescriptions written for inmates at Menard (Doc. 80-2, p. 8).

Dr. Matticks further testified to the prescription medication process at Menard. Once

a Wexford doctor writes a prescription, a nurse reviews the order, signs off on it, and submits it to the pharmacy department (*Id.*, pp. 6-7). The pharmacy technician then sends the prescription to Boswell to have the medication filled (*Id.*, p. 7). Dr. Matticks explained the prescription is generally transmitted to Boswell within a few hours so that it can be filled and returned to Menard the following day to up to two days later (*Id.*, p. 13). Once Boswell returns the medication to the Healthcare Unit, it is generally dispensed to the patient within a day by either Wexford or IDOC-employed nurses (*Id.*, pp. 7, 17-18). When a patient needs a refill, he is instructed to turn in the refill sticker within seven days of the end of the prescription packet to a nurse or the Healthcare Unit (*Id.*, p. 19). The patient is responsible for turning in his own refill sticker (*Id.*).

Dr. Matticks also explained the difference between formulary and non-formulary prescriptions (*Id.*, p. 9). While formulary medications are available without any prior approval, non-formulary medications require a prescription along with an explanation of what medications have been tried in the past, the doses tried, how long they were tried, and why the non-formulary medicine is necessary versus medication that is currently on the formulary (*Id.*, pp. 9-10). That information is sent to Boswell, where clinical pharmacists review the information and have the option of approving the medication at that time or sending the prescription back for further information and clarification (*Id.*, p. 10). Mirapex was a non-formulary medication, meaning it was not kept in stock at Menard but rather had to be filled by Boswell (*Id.*, pp. 10-11).

As to Hildreth specifically, Dr. Matticks testified that he was aware of two or three instances where Hildreth "had some perceived delays in obtaining refills on his medications, and those have occurred around—a couple of those that I recall occurred around the time

that the chronic clinics would have occurred . . . They were about six months apart. And it appears he did not make it to the chronic clinic . . . and so did not see the physician. So at that time, you know . . . that's when the time lapse could have occurred." (*Id.*, pp. 14-15).

THE REPORT AND RECOMMENDATION

Defendants Butler and Oakley filed a motion for summary judgment as to Hildreth's ADA claim, in which they argue that Hildreth's constitutional rights were not violated when reasonable accommodations were provided to him. Defendants also argue they are entitled to qualified immunity and that Defendant Butler lacks any personal involvement after April 2014 when she became Warden and was no longer the ADA coordinator.

Wexford also filed a motion for summary judgment as to Hildreth's delayed medical attention claim, in which it makes three primary arguments. First, Wexford argues Hildreth's *Monell* claim must fail because he has not shown any Wexford employee was deliberately indifferent to his serious medical needs. In other words, because there is no underlying deliberate indifference claim against a Wexford employee, Hildreth cannot demonstrate that any Wexford custom or policy caused the individual to act with deliberate indifference. Second, Wexford argues that there is no evidence its official policies are unconstitutional and were the motivating force behind any alleged constitutional violation. Finally, Wexford argues Hildreth has not put forth sufficient evidence to infer a widespread custom or practice was the direct cause of Hildreth not receiving his Mirapex prescription on time. Wexford asserts that Hildreth's medication was late only three times, which is not enough to infer a custom or practice of deliberate indifference by Wexford, especially when IDOC employees and Boswell Pharmacy could have caused or contributed to the delay.

In the Report and Recommendation, Magistrate Judge Wilkerson concluded that

Defendants Butler and Oakley were not entitled to summary judgment because a question of fact existed as to whether the accommodations provided to Hildreth were reasonable. Magistrate Judge Wilkerson noted that Hildreth's increased access to the law library ended at some point, and now Hildreth only has access once every other week. Furthermore, the assistance he received from his counselor was limited, and the "legal assistant" they assigned to him is another inmate who lacks a GED, spells poorly, and has illegible handwriting. Finally, Magistrate Judge Wilkerson concluded Defendants Butler and Oakley are not entitled to qualified immunity.

With regard to Wexford, Magistrate Judge Wilkerson first rejected the argument that because there are no deliberate indifference claims pending against any Wexford employees, there can be no valid policy or practice claim against Wexford. Magistrate Judge Wilkerson then concluded that the Court need not determine the number of incidents required to show a custom or practice because the number of times Hildreth's Mirapex arrived late is a contested issue of material fact. Nevertheless, Magistrate Judge Wilkerson then concludes that there was a minimum of five incidents in which Hildreth did not receive his medication on time, and a jury could infer from these five incidents that there existed a pattern or custom of not filling his prescriptions on time.

Wexford objected to the Report and Recommendation on three grounds. First, Magistrate Judge Wilkerson omitted facts regarding the prescription refill process, including how an inmate requests and then obtains a refill of his medication. Second, Wexford argues the facts are insufficient to support a finding that it has a *widespread* custom or practice that proximately caused Hildreth's injuries when there is no evidence other inmates were affected or that only Wexford employees caused the alleged untimely refills. Third, Wexford

objects to Magistrate Judge Wilkerson's conclusion that an underlying constitutional violation by an individual is not a necessary prerequisite for a *Monell* claim.

Defendants Butler and Oakley did not object to the Report and Recommendation.

LEGAL STANDARD

Where timely objections are filed, this Court must undertake a *de novo* review of the Report and Recommendation. 28 U.S.C. § 636(b)(1)(B), (C); FED. R. CIV. P. 72(b); SDIL-LR 73.1(b); *Harper v. City of Chicago Heights*, 824 F. Supp. 786, 788 (N.D. Ill. 1993); *see also Govas v. Chalmers*, 965 F.2d 298, 301 (7th Cir. 1992). If no objection is made, the Court reviews the Report and Recommendation only for clear error. *Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 739 (7th Cir. 1999). In reviewing the Report and Recommendation, the Court must look at all of the evidence contained in the record and give fresh consideration to those issues to which specific objections have been made. *Id.* (quoting 12 Charles Alan Wright et al., *Federal Practice and Procedure* § 3076.8, at p. 55 (1st ed. 1973) (1992 Pocket Part)). The Court may then "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1).

Because Defendant Wexford has objected to the Report and Recommendation as it applies to Wexford, the Court must review that portion of the analysis *de novo*. Because Defendants Butler and Oakley did not object, however, the portion of the Report and Recommendation pertaining to them will be reviewed only for clear error.

Summary Judgment

Summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Spath v. Hayes*

Wheels Int'l-Ind., Inc., 211 F.3d 392, 396 (7th Cir. 2000). The Court must construe the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of that party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Chelios v. Heavener*, 520 F.3d 678, 685 (7th Cir. 2008). The moving party bears the burden of establishing that no material facts are in genuine dispute; any doubt as to the existence of a genuine issue must be resolved against the moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160 (1970).

In responding to a motion for summary judgment, the nonmoving party may not simply rest upon the allegations contained in the pleadings, but must present specific facts to show that a genuine issue of material fact exists. *Celotex*, 477 U.S. at 322–26; *Anderson*, 477 U.S. at 256–57. A genuine issue of material fact is not demonstrated by the mere existence of "some alleged factual dispute between the parties," *Anderson*, 477 U.S. at 247, or by "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, a genuine issue of material fact only exists if "a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented." *Anderson*, 477 U.S. at 252.

DISCUSSION

A. Deliberate Indifference as to Wexford Health Sources, Inc.

The Supreme Court has recognized that "deliberate indifference to serious medical needs of prisoners" may constitute cruel and unusual punishment under the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). In order to prevail on such a claim, a plaintiff must show first that his condition was "objectively, sufficiently serious" and second that the "prison officials acted with a sufficiently culpable state of mind," namely, deliberate

indifference. *Greeno v. Daley*, 414 F.3d 645, 652-653 (7th Cir. 2005) (citations and quotation marks omitted).

"Deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain.'" *Estelle*, 429 U.S. at 104 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)). "The infliction of suffering on prisoners can be found to violate the Eighth Amendment only if that infliction is either deliberate, or reckless in the criminal law sense." *Duckworth v. Franzen*, 780 F.2d 645, 652-53 (7th Cir. 1985). Negligence, gross negligence, or even "recklessness" as that term is used in tort cases, is not enough. *Id.* at 653; *Shockley v. Jones*, 823 F.2d 1068, 1072 (7th Cir. 1987).

While Wexford is a private corporation, under Seventh Circuit law, a private company that has contracted to provide essential government services, such as health care for prisoners, can be held liable if the constitutional violation was caused by an unconstitutional policy, practice, or custom of the corporation itself. *Shields v. Illinois Dep't of Corr.*, 746 F.3d 782, 789 (7th Cir. 2014); *see also Monell v. Dep't of Social Services of City of New York*, 436 U.S. 658 (1978).

In this case, Hildreth does not point to an official Wexford policy that is allegedly unconstitutional. Instead, he claims Wexford has a widespread practice or custom of failing to deliver prescription refills on time. To demonstrate that Wexford is liable for a harmful custom or practice, Hildreth must present evidence that (1) the prescription refill process is an unconstitutional practice and (2) the practice is widespread, that is, "so pervasive that acquiescence on the part of policymakers was apparent and amounted to a policy decision." *Dixon v. Cty. of Cook*, 819 F.3d 343, 348 (7th Cir. 2016) (quoting *Phelan v. Cook Cty.*, 463 F.3d 773, 790 (7th Cir. 2006)); *Grieveson v. Anderson*, 538 F.3d 763, 773 (7th Cir. 2008).

The Seventh Circuit has not adopted any bright-line rule defining "a widespread custom or practice," except that the conduct must occur more than once "or even three" times to impose *Monell* liability. *Id.* "[T]he plaintiff must demonstrate that there is a policy at issue rather than a random event. This may take the form of an implicit policy or a gap in expressed policies . . . or a series of violations to lay the premise of deliberate indifference." *Id.* (citation omitted). As explained by the Court of Appeals, "[t]his requires more than a showing of one or two missteps." *Id.* Rather, the Court must determine whether a trier of fact could find "systemic and gross deficiencies" in the defendant's procedures. *Id.* Even then, a *Monell* claim can only prevail if policymakers knew of the deficiencies and failed to correct them. *Id.; see also Thomas v. Cook Cty. Sheriff's Dep't*, 604 F.3d 293, 303 (7th Cir. 2010).

For the purposes of summary judgment, Wexford does not dispute that Hildreth suffers from an objectively serious medical need. Accordingly, the Court assumes without deciding that Hildreth's Parkinson's disease was a serious medical need. The issue at hand is whether Wexford was deliberately indifferent to that need due to some unconstitutional practice or custom.

The Court first notes while the Report and Recommendation states there are at least five instances in the record where Hildreth did not receive his medication on time, it appears there are only three documented instances. Hildreth filed grievances relating to his medicine on April 8, 2014, October 25, 2014, and November 16, 2015. Hildreth's October 30, 2014 grievance actually complains of the need for staff assistance in writing grievances related to his medication refills, not about the refills themselves (Doc. 46-8). Further, the notation on January 15, 2016, in Hildreth's grievance history, referred to by Magistrate Judge Wilkerson, appears to refer to the ARB's return of his November 16, 2015 grievance (Docs 43-3, 43-4).

That leaves, as summary judgment evidence, Hildreth's testimony that he filed a grievance any time his medication did not arrive on time, three grievances—filed over the span of a year and a half—complaining that he did not get his medicine on time, and his testimony that his Mirapex arrived late at least three times.[3] On two of those occasions, the record indicates Hildreth received his medication within a couple of days of his prescription lapsing (and there is no evidence as to when he submitted his refill sticker on those two occasions). The third time, the Healthcare Unit advised that Hildreth's prescription had expired, and the request to continue using Mirapex was sent to the pharmacy. Dr. Matticks explained that Mirapex is a non-formulary medication, meaning it is not kept in stock at Menard but rather has to be filled by Boswell Pharmacy after approval by the pharmacy's clinical pharmacists. Dr. Matticks further testified that at least one of Hildreth's lapses occurred around the chronic clinics, which Hildreth apparently did not attend, thereby causing the delay. Hildreth has presented no evidence that any other inmates were affected by this alleged unconstitutional practice.

The Seventh Circuit has held that while "it is not impossible for a plaintiff to demonstrate the existence of an official policy or custom by presenting evidence limited to his experience . . . it is necessarily more difficult . . . because what is needed is evidence that there is a true municipal policy at issue, not a random event. *Grieveson v. Anderson*, 538 F.3d 763, 774 (7th Cir. 2008) (citations omitted). In *Grieveson*, the Court found that four incidents in which jail guards gave the plaintiff his entire prescription at once, thereby exposing him to the risk of having his medication stolen by other inmates, was not evidence of a widespread practice or reflective of a policy choice by the defendant. *Id.* The Court explained

[3] Hildreth's April 8, 2014 grievance does complain he is out of his medicine "again." When asked whether the number of times his medicine was delayed was less than ten times, Hildreth responded, "could be."

that evidence of four incidents that the plaintiff alone experienced "simply is not enough to foster a genuine issue of material fact that the practice was widespread—from that evidence alone an inference does not arise that the *county itself* approved, acquiesced, or encouraged the disbursement of entire prescriptions at once." *Id.* at 774-75.

Hildreth argues in his summary judgment response that *Grieveson* is distinguishable because, in that case, the plaintiff was complaining about a deviance from an actual written policy, whereas here there is no evidence of a written policy that instructs Wexford's employees how to act in a constitutional manner. Thus, Hildreth argues, whether Wexford's policy of "condon[ing] whatever practices its employees develop" is constitutional is a question for the jury. This argument fails for two reasons. First, the portion of *Grieveson* cited to by Hildreth was discussing the plaintiff's challenge to the prison's grievance procedure, which is irrelevant to this case. Second, Dr. Matticks testified to Wexford's policies related to prescription medications. Dr. Matticks was not at all uncertain as to how prescription medication is dispensed at Menard, nor was he only describing the process by "vague references to the customs and practices of its employees." These are not questions of fact for a jury.

The Court instead finds *Grieveson* quite on point with this case. Hildreth has evidence of only three instances over the span of a year and a half in which his own medication was delayed. Based on this record, there is not enough evidence for a reasonable jury to find that Wexford encouraged a widespread practice of failing to timely refill prescriptions. Therefore, Wexford is entitled to summary judgment.

B. ADA Claim as to Defendants Butler and Oakley

Title II of the ADA provides that "no qualified individual with a disability shall,

because of that disability . . . be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (2006). "In the prison context, a plaintiff can make out a prima facie case of discrimination under both the ADA . . . by showing: (1) he is a qualified person; (2) with a disability; (3) the Department of Corrections denied him access to a program or activity because of his disability or otherwise subjected him to discrimination; and (4) the denial or discrimination was by reason of his disability." *Farris v. Kurr*, No. 16-CV-272-SMY-RJD, 2018 WL 3036130, at *3 (S.D. Ill. June 19, 2018) (citing *Jaros v. Illinois Dep't of Corr.*, 684 F.3d 667, 672 (7th Cir. 2012)).

Failure to make reasonable accommodations to ensure participation in the public entity's programs or services by a person with a disability qualifies as "discrimination." 42 U.S.C. § 12112(b)(5)(A). Evaluating the reasonableness of a particular accommodation in the prison context is particularly fact-intensive and determined on a case-by-case basis by balancing the cost to the defendant and the benefit to the plaintiff. *Golden v. Illinois Dep't of Corr.*, No. 12-CV-7743, 2016 WL 5373056, at *4 (N.D. Ill. Sept. 26, 2016) (citing *Dadian v. Vill. of Wilmette*, 269 F.3d 831, 838 (7th Cir. 2001); *Holmes v. Godinez*, 311 F.R.D. 177, 226 (N.D. Ill. 2015)). "Security concerns, safety concerns, and administrative exigencies [are] important considerations to take into account." *Id.* (citing *Love v. Westville Corr. Ctr.*, 103 F.3d 558, 561 (7th Cir. 1996)). The key question is whether the inmate was able to participate in the activities in question, given his disability, with or without reasonable accommodations from the prison. *Love*, 103 F.3d at 560.

As discussed above, Magistrate Judge Wilkerson found Defendants Butler and Oakley were not entitled to summary judgment because a question of fact existed as to

whether the accommodations provided to Hildreth were reasonable. Magistrate Judge Wilkerson noted that Hildreth's increased access to the law library ended at some point, and now Hildreth only has access once every other week. Furthermore, the assistance he received from his counselor was limited, and the "legal assistant" Defendants assigned to him is another inmate who lacks a GED, spells poorly, and has illegible handwriting.

When considering the prison's safety and security concerns (Menard is a maximum-security prison), as well as the fact that Hildreth has been able to draft legal documents and other correspondence, the Court finds that the accommodations provided are reasonable as a matter of law. From August 2013 to July 9, 2015, Hildreth was able to attend the law library and access a typewriter three times a week for six hours a day. He also could contact an officer in emergency situations, and a counselor was available to assist him.[4] The increased access to the law library was only rescinded when Hildreth was assigned a personal ADA attendant to write for him. While Hildreth complains the attendant cannot spell and has sloppy handwriting, he also admits he has not missed any deadlines or had any court filings returned as a result. Thus, with the accommodations made available to him, Hildreth is able to write documents. Finally, while Hildreth complains about the skills of his attendant, the Report and Recommendation overlooks the affidavit from the current ADA Coordinator, Angela Crain, who attested that if Hildreth does not want to use the ADA attendant, "he can simply request extra library time again in lieu of the attendant and the ADA attendant will then be assigned to another inmate." (Doc. 83-3).

Because these accommodations are reasonable as a matter of law, the Report and

[4] The counselor was available from July 2, 2012 to September 12, 2012. At that time, it was determined Hildreth could write on his own and did not require a counselor's assistance. Hildreth was advised, however, that emergency staff assistance was still available anytime (Doc. 46-13).

Recommendation is clearly erroneous in recommending that summary judgment be denied as to Defendants Butler and Oakley.

CONCLUSION

For these reasons, the Court respectfully **REJECTS** the Report and Recommendation (Doc. 90) and **GRANTS** the motion for summary judgment filed by Wexford Health Sources, Inc. (Doc. 79) and the motion for summary judgment filed by Defendants Kim Butler and Lori Oakley (Doc. 82). This action is **DISMISSED**, and the Clerk is **DIRECTED** to enter judgment accordingly.

IT IS SO ORDERED.

DATED: July 17, 2018

NANCY J. ROSENSTENGEL
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

SCOTT HILDRETH, Plaintiff, v. **KIM BUTLER, LORI OAKLEY, and WEXFORD HEALTH SOURCES,** Defendants.	Case No. 3:15-cv-831-NJR-DGW

REPORT AND RECOMMENDATION

WILKERSON, Magistrate Judge:

This matter has been referred to United States Magistrate Judge Donald G. Wilkerson by United States District Nancy J. Rosenstengel pursuant to 28 U.S.C. § 636(b)(1)(B), Federal Rule of Civil Procedure 72(b), and SDIL-LR 72.1(a) for a Report and Recommendation on the Motion for Summary Judgment filed by Wexford Health Sources (Doc. 79) and the Motion for Summary Judgment filed by Defendants Butler and Oakley (Doc. 82). For the reasons set forth below, it is **RECOMMENDED** the motions be **DENIED**, and that the Court adopt the following findings of fact and conclusions of law.

FINDINGS OF FACT

On July 30, 2015 Plaintiff Scott Hildreth filed a complaint in this action (Doc. 1). The Court conducted a threshold review, but due to the "illegibility and fragmented nature" of the document, had difficulty discerning Plaintiff's claims (Doc. 6, p. 3). The complaint was dismissed

for failure to state a claim, but counsel was appointed to represent Hildreth and was given leave to file an Amended Complaint (Doc. 6). Currently pending before the Court are the following claims:

> **Count 1 – Discrimination and Deprivation of Rights,** against Defendants Butler, Oakley, for discriminating against Plaintiff and denying him reasonable accommodation for his disabling Parkinson's disease condition (specifically, access to the prison law library) in violation of the Americans With Disabilities Act and 42 U.S.C. § 1983;
>
> **Count 3 – Delayed Medical Attention**, against Defendant Wexford Health.

Hildreth suffers from Parkinson's disease which results in "freezing" episodes where he is unable to move, loses his balance, shuffles his feet to move, has hand tremors, and loss of concentration (Doc. 26, ¶ 3). He has been prescribed Mirapex to treat his symptoms, which is a "non-formulary" medication (Doc. 84, p. 1; Doc. 80, ¶ 7). Wexford Health Sources contracts with the IDOC to provide medical services, including evaluating patients and prescribing medication (Doc. 80, ¶ 4). The prescribing physician, a Wexford employee, is responsible for preparing any request forms for non-formulary medications such as Mirapex (Doc. 80, ¶ 9). While Boswell pharmacy is responsible for filling the prescriptions, the pharmacy will contact the Wexford physician for clarification if it has concerns about the prescription (Doc. 80, ¶ 9). Nursing staff, some Wexford employees and others IDOC employees, dispense and are responsible for taking care of refills of medication (Doc. 80, ¶¶ 11). Hildreth alleges refills of his medication are regularly delayed resulting in dangerous and debilitating symptoms (Doc. 84, p. 1).

Because Hildreth is unable to write legibly when suffering from his symptoms (Doc. 26, ¶ 3), he requires the use of a typewriter or other assistive technology. Hildreth alleges that other inmates were permitted supplies in their cells to draft documents and communications (Doc. 84-1, 50:20-51:12). It is undisputed that Hildreth requested to keep a typewriter (that he purchased himself) or a word processor in his cell, but those requests were denied by the prison (Doc. 83, p.

4).

Instead, Defendants Butler and Oakley state they authorized Hildreth to use a typewriter in the library three days a week, made arrangements for a counselor to "come around" on the other days to help Hildreth, and placed him on the automatic call line to the law library when he was 90 days out from a court deadline (Doc. 83, ¶¶ 7, 8). Defendants admit, however, that "at some point" the three days a week access to the library was stopped (Doc. 83, ¶¶ 11, 12). Further, the record indicates the counselor only provided additional assistance to Hildreth for approximately two months, in 2012 (Doc. 46-13, pp. 2, 5). Thus, the only accommodation Hildreth currently appears to have is access to the law library every other week (Doc. 83, ¶¶ 11, 12) and an "ADA assistant" (Doc. 83, ¶¶ 11, 12). According to Hildreth's deposition testimony, however, this assistant is another inmate with no specific training, who never graduated from High School, spells poorly and produces handwriting barely more legible than his own (Doc. 84-1, 20:16-20). Further, Hildreth testified that despite requests by both himself and his "assistant," the prison has refused to provide a more qualified replacement (Doc. 84-1, 21:8-22:2).

CONCLUSIONS OF LAW

I. Wexford Health Sources

The Supreme Court has recognized deliberate indifference to the serious medical needs of prisoners may constitute cruel and unusual punishment under the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). In order to prevail on a claim for deliberate indifference to a serious medical need, however, there are "two high hurdles, which every inmate-plaintiff must clear." *Dunigan ex rel. Nyman v. Winnebago Cnty.*, 165 F.3d 587, 590 (7th Cir. 1999). First, the plaintiff must demonstrate he suffered from an objectively serious medical condition. *Id.* at 591-92. Because Wexford does not address the first element in its motion or memorandum of law

(Doc. 80), the Court finds it conceded for purposes of summary judgment.

Second, the plaintiff must establish the defendant was deliberately indifference to that serious medical condition. *Dunigan*, 165 F.3d at 591-92. When the defendant is a corporation, liability is limited to those situations where the corporation maintains a policy or practice that causes the underlying constitutional violation. *Woodward v. Corr. Med. Serv. of Ill., Inc.*, 368 F.3d 917, 927 (7th Cir. 2004). The plaintiff must present evidence of such a policy or practice at the summary judgment stage and has the burden of showing that the policy or custom was the moving force behind the alleged constitutional violation. *Grieveson v. Anderson,* 538 F.3d 763, 771 (7th Cir. 2008).

There are three possible forms of unconstitutional policies or practices: (1) an express policy; (2) a widespread practice that constitutes a custom or usage even if informal in nature; and (3) an allegation that the injury was caused by a person with final policy making authority. *Palmer v. Marion County,* 327 F.3d 588, 594-95 (7th Cir. 2003). Here, the only policy or practice at issue in that relating to a widespread practice that constitutes a custom or usage.[1] When alleging a policy exists as demonstrated by a widespread practice, the Seventh Circuit has been clear that evidence of isolated acts is insufficient; rather the plaintiff must present evidence of a series of violations. *Palmer v. Marion County,* 327 F.3d 588, 596 (7th Cir. 2003) (citing *Jackson v. Marion County,* 66 F.3d 151, 152 (7th Cir. 1995)).

Wexford first argues they are entitled to summary judgment because there are no deliberate indifference claims pending against any Wexford employees, which Wexford argues is a necessary precursor for a policy and practice claim (Doc. 80, p. 8). In support of this contention,

[1] Plaintiff states the issue is whether Wexford's custom or practice failed to ensure Hildreth's Mirapex was refilled in a timely manner (Doc. 84, p. 13). Thus, it appears Plaintiff is not arguing the existence of a formal written policy. Several of the arguments made by Defendants are applicable to either a written policy or a custom and practice claim. Thus, the Court will consider the arguments as they relate to a custom and practice claim, even if they were raised in a section of Defendant's brief relating to a written policy.

Wexford relies on *Minix v. Canarecci.*[2] In *Minix,* a corporation's employee allegedly conducted an insufficient suicide assessment of a prisoner. *Minix v. Canarecci,* 597 F.3d 824, 832 (7th Cir. 2010). Subsequently, other actors not employed by the corporation, intervened and set into motion the events leading to the plaintiff's death. *Id.* The Seventh Circuit focused on these intervening facts, finding there was no evidence the corporation's actions were the "direct cause" of the injury. *Id.* at 832-33. Thus, the Seventh Circuit found the facts in the case insufficient to prove a practice of the corporation caused the prisoner's death. *Id.* at 833. The Court did not create a *per se* rule that a policy and practice claim cannot exist absent a contemporaneous legal claim against a corporation's employee.

More in line with the *Minix* decision, Wexford also argues Plaintiff has failed to produce evidence that Wexford's practices caused the delay in Hildreth obtaining his Parkinson's medication. While isolated acts are insufficient to prove a practice or custom, the Seventh Circuit has been clear that a corporation's failure to respond to a series of bad acts by employees is evidence it encouraged or condoned the behavior; and therefore proof of deliberate indifference. *Woodward v. Correctional Medical Services of Ill, Inc.,* 368 F.3d 917, 927 (7th Cir. 2004).

Wexford claims the only evidence of failure to refill Hildreth's prescriptions that can be considered by the Court are those grievances that were found to be administratively exhausted; thus limiting the evidence to three of Hildreth's grievances (*See* Doc. 80, pp. 2, 13). Wexford then argues that these three incidents are *per se* insufficient to show a practice or custom (Doc. 80, pp. 12-13).[3] Wexford cites to no authority, however, for the proposition that only fully grieved

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[2] Wexford also cites to *Lang v. City of Round Lake Park,* 87 F.Supp.2d 836, 841 (N.D. Ill. 2000). The citation provided by Wexford is to a single sentence relating to the sustainability of a claim against a municipality in a Fourth Amendment search and seizure case. Thus, the Court finds the case inapposite.

[3] In making its argument, Wexford cites to three cases. The first, *Grieveson v. Anderson,* 538 F.3d 763, 774-75 (7th Cir. 2008), the Court held that four incidents of an inmate receiving a full bottle of pills was insufficient to show a custom or practice. In *Estate of Moreland v. Dieter,* 395 F.3d 747, 760 (7th Cir. 2005) the Court found that three

allegations can be considered as evidence of a custom or practice in a *Monell* claim, and the Court finds no basis for doing so.

Further, the Court need not determine what, if any, minimum number of incidents is required to show a custom or practice, because how many incidents occurred here is a contested material issue of fact. Included in the record are four grievances complaining about a failure to provide medication in a timely manner between April 8, 2014 and November 16, 2016 (Doc. 46-4; 46-6; 46-8; and 43-4). There is also a notation to an additional grievance in Hildreth's "inmate history" dated January 15, 2016 (Doc. 43-3). Further, in his first grievance (Doc. 46-4) Hildreth states "I am out of my Parkinson's meds (AGAIN)" indicating Hildreth had earlier and additional difficulties obtaining his medication in a timely manner. Thus, construing the evidence in the light most favorable to the non-movant, the Court finds there is evidence of a minimum of five incidents of Hildreth failing to receive his medication in a timely manner. It is certainly possible that a jury could infer, based on the number of incidents in the record, that there existed a pattern or custom of not filling Hildreth's prescriptions in a timely manner.[4]

Because material issues of fact exist it is **RECOMMENDED** the Court **DENY** Wexford's Motion for Summary Judgment (Doc. 79).

II. Defendants Butler and Oakley

Defendants Butler and Oakley argue they are entitled to summary judgment because they

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individual incidents of pepper spraying three separate inmates was insufficient to show a custom or practice. In *Palmer v. Marion Cnty.*, 327 F.3d 588, 595 (7th Cir. 2003), the Court held evidence of two incidents of inmate-on-inmate violence over the course of a year was insufficient to show a widespread practice. While the *Grieveson* case is the most analogous to the facts here, the Court is not convinced that the case creates a *per se* rule as opposed to a finding based on the particular facts of the case.

[4] Wexford's also argues that because multiple people and corporations are involved with the prescribing, processing and distribution of prescriptions "it could be very well be that a non-Wexford employee...played a substantial role in the alleged medication lapses" (Doc. 80, p. 11). At best, this argument raised a material issue of fact. A reasonable jury could certainly infer that Wexford, as the party responsible for ensuring Hildreth was prescribed and received proper medication, combined with the repeated delays in providing him with that medication, evidence Wexford's deliberate indifference despite the fact that other agencies assist Wexford in providing its services.

reasonably accommodated Hildreth's disability, and are therefore not liable under the Americans with Disabilities Act (Doc. 83, p. 6). In the alternative, they argue they are entitled to qualified immunity because their actions did not violate clearly established statutory or constitutional law (Doc. 83, p. 8).

A. Americans with Disabilities Act

Title II of the ADA states "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. A plaintiff will make out a prima facie case of discrimination under the ADA by showing they: (1) suffer from a disability as defined in the statutes, (2) are qualified to participate in the program in question, and (3) were either excluded from participating in or denied the benefit of that program based on a disability. *Novak v. Bd. of Trustees of S. Ill. Univ.*, 77 F.3d 966, 974 (7th Cir. 2015) (citing *Jackson v. City of Chicago*, 414 F.3d 806, 810 (7th Cir. 2005)). Here, Defendants Butler and Oakley do not dispute Hildreth qualifies as a person with a disability (Doc. 83, p. 7). They also raise no argument that Hildreth was unqualified to participate in the prison programs, thereby conceding that issue. Thus, the Court finds the only remaining issue is whether Hildreth was excluded from participating in or denied the benefit of a prison program because of his disability.

Failure to make reasonable accommodations to ensure participation in the public entity's programs or services by a person with a disability qualifies as "discrimination." 42 U.S.C. § 12112(b)(5)(A); *Wisc. Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 753 (7th Cir. 2006). Although somewhat inarticulately, Hildreth testified in his deposition that other inmates were permitted supplies in their cells to draft documents and communications (Doc. 84-1, 50:20-51:12).

Because Hildreth has difficulty writing by hand due to his Parkinson's, he states he cannot write in his cell like non-disabled inmates without a typewriter or word processor (Doc. 85, p. 7). The typewriter Hildreth had purchased, however, was confiscated by the prison and his request for a word processor was denied on the grounds that word processors are obsolete (Doc. 84-1, p. 27; Doc. 83, p. 11). The Seventh Circuit has held the inability of a disabled inmate to access prison services *on the same basis* as non-disabled inmates means the prison had failed to provide a reasonable accommodation. 684 F.3d 667, 672 (7th Cir. 2012) (emphasis added). Thus, because Hildreth was not provided the means to produce legal documents or other forms of communication in his cell, like the non-disabled inmates, a jury could find he was denied access to the same programs and services.

Defendants argue, however, they provided other accommodations that were sufficient. Specifically, that Hildreth was allowed to use a typewriter in the library several times per week, more often when a court deadline was approaching (Doc. 83, p. 8), and that on the days Hildreth could not access the library a counselor would come by to assist him with writing (Doc. 84-1, 42:4-16). Defendants admit the increased access to the library, however, ended at some unidentified point and that Hildreth now only has access once every other week (Doc. 83, p. 3). According to the Cumulative Counseling Summary, the counselor's assistance was quite limited, only provided for approximately two months — between July 3, 2012 and September 10, 2012 (Doc. 46-13, pp. 2, 5). Defendants allege they have further accommodated Hildreth by assigning him a "legal assistant" (Doc. 83, ¶ 14). According to Hildreth's deposition testimony, however, the individual assigned to him is another inmate with no specific training, who never graduated from High School, spells poorly and produces handwriting barely more legible than his own (Doc. 84-1, 20:16-20). Further, Hildreth testified that despite requests by both himself and his "assistant," the

prison has refused to provide a more qualified replacement (Doc. 84-1, 21:8-22:2). Thus, a question of fact exists as to whether the accommodations provided by Butler and Oakley were in fact reasonable, making summary judgment improper.

B. Qualified Immunity

Finally, Defendants argue they are entitled to qualified immunity (Doc. 83, pp. 8-9). Qualified immunity protects government officials from liability for civil damages as long as their "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). To determine whether a defendant is entitled to qualified immunity, the Court must consider two questions. First, do the facts alleged by the plaintiff state a violation of a constitutional right? *Pearson*, 555 U.S. at 232; *Saucier v. Katz*, 533 U.S. 194, 201 (2001). As discussed above, Hildreth has alleged facts sufficient to state a violation of the ADA. Thus, the first element is met.

The second question is whether the violated right was clearly established at the time of the alleged misconduct. *Id.* In determining whether a right is clearly established, the relevant question is whether it would be clear to a reasonable individual the conduct was unlawful in the situation. *Saucier*, 533 U.S. at 202. As discussed above, the Seventh Circuit has held the inability of a disabled inmate to access prison services on the same basis as non-disabled inmates means the prison had failed to provide a reasonable accommodation. 684 F.3d 667, 672 (7th Cir. 2012). That is precisely what Hildreth is arguing happened here, that he was not allowed to write in his cell like the non-disabled inmates because he was denied an accommodation necessary for him to do so. Since there is Seventh Circuit precedent on point, the Court finds the law in this case is clearly established. [5] Thus, Defendants are not entitled to qualified immunity and it is

[5] Defendants' analysis of qualified immunity is extremely limited. The only argument Defendants make is that they provided reasonable accommodations to Hildreth, and to find they did not would constitute imposition of a

RECOMMENDED the Court **DENY** Defendants Butler and Oakley's Motion for Summary Judgment (Doc. 82).

RECOMMENDATIONS

For the foregoing reasons, it is **RECOMMENDED** the Motion for Summary Judgment filed by Wexford Health Sources (Doc. 79) and the Motion for Summary Judgment filed by Defendants Butler and Oakley (Doc. 82) be **DENIED,** and that the Court adopt the foregoing findings of fact and conclusions of law.

It these recommendations are accepted, the following claims would remain before the Court:

> **Count 1 – Discrimination and Deprivation of Rights,** against Defendants Butler, Oakley, for discriminating against Plaintiff and denying him reasonable accommodation for his disabling Parkinson's disease condition (specifically, access to the prison law library) in violation of the Americans With Disabilities Act and 42 U.S.C. § 1983;
>
> **Count 3 – Delayed Medical Attention**, against Defendant Wexford Health.

Pursuant to 28 U.S.C. § 636(b)(1) and SDIL-LR 73.1(b), the parties shall have fourteen (14) days after service of this Report and Recommendation to file written objection thereto. The failure to file a timely objection may result in the waiver of the right to challenge this Report and Recommendation before either the District Court or the Court of Appeals. *Snyder v. Nolen*, 380 F.3d 279, 284 (7th Cir. 2004); *United States v. Hernandez-Rivas*, 348 F.3d 595, 598 (7th Cir. 2003).

DATED: May 16, 2018

DONALD G. WILKERSON
United States Magistrate Judge

"heightened standard" (Doc. 83, p. 9). What the alleged heightened standard is and why it means the law was not clearly established is not addressed. Thus, the Court declines to address the argument.