In the

United States Court of Appeals

For the Seventh Circuit

No. 21-2910

GERALD HACKER,

Plaintiff-Appellant,

v.

THOMAS J. DART, Sheriff of Cook County, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 17-cv-4282 — **Steven Charles Seeger**, *Judge*.

ARGUED SEPTEMBER 9, 2022 — DECIDED MARCH 16, 2023

Before ROVNER, HAMILTON, and SCUDDER, *Circuit Judges*.

SCUDDER, *Circuit Judge*. Gerald Hacker is almost entirely deaf. He has no hearing in his left ear and only 10% remaining in his right. While incarcerated at the Cook County Jail in 2017, he filed four grievances related to his hearing impairment, only then to sue the Sheriff of Cook County, Cook County itself, and various other officials at the Cook County Jail. The district court entered summary judgment for the defendants, reasoning that Hacker failed both to exhaust his

claims under the Prison Litigation Reform Act and to comply with other requirements imposed by the statute. We agree with parts, but not all, of the district court's analysis.

I

The Prison Litigation Reform Act bars prisoners from bringing federal claims challenging prison conditions, including medical care, "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Prisoners must comply strictly with the prison's own rules and processes governing grievances to satisfy this exhaustion requirement. See *Reid v. Balota*, 962 F.3d 325, 329 (7th Cir. 2020). If the institution provides an administrative appeals process, prisoners must exhaust that process too. See *id.* Exhaustion is an affirmative defense, which means prison officials bear the burden of showing that a prisoner failed to exhaust administrative remedies. See *id.*

Congress made clear in § 1997e(a) that prisoners only have to exhaust available remedies, not remedies that are unavailable. 42 U.S.C. § 1997e(a). An administrative remedy is not "unavailable" if it is merely confusing or ambiguous. See *Ross v. Blake*, 578 U.S. 632, 644 (2016). But when a remedy is so opaque that it becomes "essentially 'unknowable,'" then prisoners are no longer required to exhaust. *Id.* at 643–44 (quoting *Goebert v. Lee County*, 510 F.3d 1312, 1323 (11th Cir. 2007)). In our recent cases addressing the PLRA's exhaustion requirement, we have stressed that prisons should create understandable grievance procedures, ones clear and transparent enough to allow ordinary inmates to navigate them. See *Reid*, 962 F.3d at 330 (citing *Williams v. Wexford Health Sources, Inc.*, 957 F.3d 828, 834 (7th Cir. 2020)).

The PLRA also establishes limits on recovery for mental or emotional injuries. Prisoners must make a "prior showing" of physical injury or the commission of a sexual act before recovering for these injuries. 42 U.S.C. § 1997e(e). But this limitation applies only to compensatory damages—not nominal damages, punitive damages, or injunctive relief. See *Thomas v. Illinois*, 697 F.3d 612, 614 (7th Cir. 2012). Certain dignitary harms, like violations of particular constitutional rights, are also not subject to the physical injury requirement. See *Rowe v. Shake*, 196 F.3d 778, 781–82 (7th Cir. 1999) (holding that a First Amendment violation, by itself, is distinct from an emotional or mental injury). To satisfy § 1997e(e), prisoners must show an injury that is more than negligible although not necessarily significant. See, *e.g.*, *Mitchell v. Horn*, 318 F.3d 523, 536 (3d Cir. 2003); *Flanory v. Bonn*, 604 F.3d 249, 254 (6th Cir. 2010); *Oliver v. Keller*, 289 F.3d 623, 627 (9th Cir. 2002).

II

We now turn to applying this framework to each of Hacker's claims. And we describe those claims by construing the facts from the summary judgment record in the light most favorable to Hacker. See *Reid*, 962 F.3d at 327. What transpired here is messy and detailed. An extra ounce or two of patience will make it easier to see the analysis come together around each of the contentions Hacker presses on appeal.

A

We start with a claim that Hacker brought under 42 U.S.C. § 1983 against Officer D. Sandoval for using unreasonable force against him within the Cook County Jail.

On March 28, 2017, Officer Sandoval encountered Hacker standing in a doorway and ordered him to return to his bed,

but Hacker—unable to hear—did not comply. Officer Sandoval responded by shoving Hacker, knocking him unconscious. Hacker later awoke at Cermak Health Services, handcuffed to a bed. He responded to the incident by filing an administrative grievance with the jail.

Later that same day, Hacker received a written notice that his grievance had been referred for investigation to the Office of Professional Responsibility and the Divisional Superintendent. The referral was no surprise. The Cook County Jail had a policy of referring to OPR all grievances involving staff misconduct. The notice further informed Hacker that he could follow up on the investigation by contacting OPR directly or requesting to speak with the Divisional Superintendent.

Attached to the OPR referral notice was a form allowing Hacker to appeal within 15 days. The form included standard language warning Hacker that he had to appeal the prison's response to exhaust his remedies. The jail had also given Hacker an Inmate Handbook, which reiterated the general appeals requirement. To be sure, though, neither the handbook nor the jail's response told Hacker what to do, if anything, when the written response only informed him that his complaint about Officer Sandoval had been referred to OPR. And neither document gave any timeline for OPR or the Divisional Superintendent's disposition of Hacker's grievance.

More than three months later—well after the 15 days to appeal the referral had lapsed—an OPR investigator issued a memorandum concluding he could not substantiate Hacker's claims against Officer Sandoval and recommending that OPR close the investigation. The investigator addressed the memorandum to his superior officer, who signed at the bottom to approve the closure of the referral.

The defendants tell us that Hacker received a copy of this closure memorandum. Perhaps. Regardless, no part of the document speaks directly to Hacker or clearly states that the grievance process as a whole—including the Divisional Superintendent's review—had come to its end. The memorandum also makes no mention of an appeals process and did not attach a second appeals form. And the record does not show that Hacker ever received any communication from the Divisional Superintendent.

Hacker never returned the original appeals form in response to either the referral or the OPR memorandum. By the time OPR closed its investigation, he had already sued in federal court.

B

We begin by observing that Hacker's arguments have evolved since summary judgment. In its motion for summary judgment, the Cook County Jail invoked the PLRA's exhaustion requirement and argued that Hacker had fallen short by failing to appeal the OPR referral notice within 15 days of receiving the form. For his part, Hacker thought that he had no obligation to appeal—largely because there was nothing in the referral notice that was worth challenging. Hacker's concerns with the OPR process overlapped in substantial part with the issue of whether the OPR process was so cryptic and confusing to be unavailable to him. But he did not develop his position in those terms.

The district court rejected the jail's 15-day deadline to appeal. As the court saw it, the referral allowed Hacker to delay his appeal until he heard back from OPR. But he was still

required to appeal at some point. So the district court dismissed the § 1983 claim for failure to exhaust.

In his opening brief on appeal, Hacker contended that the district court had not made the factual findings necessary to support its position. But Hacker nowhere mentioned his prior argument that there was nothing for him to appeal in the referral notice. Nor did he argue that the OPR process was unknowable or otherwise unavailable to him. Instead, Hacker waited until filing his reply brief to articulate and develop this argument—that the grievance system was so opaque and confusing as to be unavailable to him—for the first time.

We require litigants to raise and develop all of their arguments in their opening appellate brief to ensure "that the opposing party has an opportunity to reflect upon and respond in writing to the arguments that his adversary is raising." *Berkman v. Vanihel*, 33 F.4th 937, 947 n.45 (7th Cir. 2022) (quoting *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1319 (11th Cir. 2012)). By failing to advance his contention that the grievance process was unavailable until his reply brief, Hacker forfeited the position. See *id.*

Ordinarily, we will not consider arguments forfeited by a civil litigant. See *Henry v. Hulett*, 969 F.3d 769, 786 (7th Cir. 2020) (en banc). Our "underlying concern is to ensure that the opposing party is not prejudiced by being denied sufficient notice to respond to an argument." *Id.* at 785 (quoting *Hernandez v. Cook County Sheriff's Office*, 634 F.3d 906, 913 (7th Cir. 2011)). But we may review a forfeited argument for plain error in the infrequent case where "(1) exceptional circumstances exist; (2) substantial rights are affected; and (3) a miscarriage of justice will occur if plain error review is not applied." *Id.* at 786 (quoting *Thorncreek Apartments III, LLC v.*

Mick, 886 F.3d 626, 636 (7th Cir. 2018)). These criteria do not apply mechanically—rather, the "matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to [our] discretion." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

This is one of those rare issues that we will consider—and resolve in Hacker's favor—for the first time on appeal. *First*, Hacker has identified a plain error. Start with the notice informing Hacker of the referral of his complaint to OPR. Without clear instruction, Hacker could not have known he was supposed to appeal that decision. The referral did not indicate that OPR's involvement would lead to a negative disposition of the underlying grievance or rule out other remedial steps in the future. Indeed, the clear and sensible takeaway from the notice was that Hacker should stand by while OPR investigated his complaint against Officer Sandoval.

Do not lose sight of the bigger picture either. The notice of OPR's referral told Hacker next to nothing, for OPR's responsibility included investigating allegations of guard abuse. So anyone receiving the notice of referral would have reacted by thinking the process was working and moving forward as it should—not by concluding there was anything to appeal. We can come up with no reason why Hacker would contest the jail's (correct) characterization of his grievance as a staff misconduct issue. Put simply, no ordinary prisoner would think to appeal an update that the jail was following its own rules.

The defendants told us at oral argument that Hacker should have appealed because the jail had failed to take other steps in response to the grievance, like allowing him to press charges against Officer Sandoval. But the defendants could not explain why Hacker would believe the referral ruled out

these other steps being taken in the future, much less that he should appeal immediately to register his objection.

Nor did the Cook County Jail tell Hacker to appeal after OPR made its final decision. Recall that the jail had not provided so much as a rough timeline for how long OPR (or the Divisional Superintendent) would take to complete its investigation. If Hacker believed he needed to hear from either or both entities before suing, he would have resigned himself to an indefinite wait—and might have continued to wait even after OPR closed its investigation. It is unclear why Hacker would have known this wait was required. And in any case, the jail suggested that the OPR process operated separately and apart from formal grievance channels by telling Hacker to "follow up" on the investigation by contacting OPR or the Divisional Superintendent directly.

OPR's closing memorandum reinforced that message. Hacker now suggests that he did not receive this memorandum, but we do not need to resolve that factual dispute. The OPR process is unknowable regardless of whether Hacker received the closing memorandum, as that document made no reference to appealing or otherwise responding to its decision. Indeed, the only appeals form that the jail had sent to Hacker was attached to a different document (the notice of referral) and had apparently expired long before OPR closed the investigation. All of this suggested to Hacker that there was nothing left for him to do.

In light of these communications, we have little trouble concluding that the Cook County Jail's grievance procedures became unavailable to Hacker after the jail involved OPR. Consider what happened from the vantage point of an ordinary prisoner standing in Hacker's shoes: while the jail

allowed him to appeal within 15 days of receiving the notice of referral, there was no reason for him to do so. And although Hacker had reason to appeal OPR's final disposition, the jail consistently suggested that he was not supposed to. This messaging "so obscured the process that there was no conceivable next step for [Hacker] to take," *Reid*, 962 F.3d at 330, forcing Hacker to "go beyond the established system and guess" what he needed to do, *Williams*, 957 F.3d at 834.

Second, the circumstances of Hacker's case are exceptional because of the consequences for Hacker and for others. Hacker—and other prisoners at the Cook County Jail—faced a labyrinthine and confusing process in circumstances where, as here, the jail referred grievances against correctional officers to OPR. Truth be told, we have a difficult time understanding the process ourselves. Not even the defendants could offer us a meaningful defense of that process at oral argument. That confusion carries significant implications for civil litigants who, like Hacker, risk being locked out of court entirely for some of the most serious claims they could bring. We apply plain error review more readily in cases like these, where we can resolve issues of great significance for other parties. See *CNH Indus. Am. LLC v. Jones Lang LaSalle Ams., Inc.*, 882 F.3d 692, 705 (7th Cir. 2018) (considering whether the forfeited issue "has the potential to affect large numbers of people beyond the parties to this case").

Exercising our discretion to review Hacker's claims has the added and important benefit of allowing us to provide much-needed guidance to the district courts. See *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 391 (7th Cir. 2007). For years now, district courts struggling to understand the OPR process have come to conflicting conclusions. See *Johnson v. Cook*

County Jail, Nos. 14-c-0007, 14-c-0028, 2015 WL 2149468, at *3–4 (N.D. Ill. May 6, 2015) (finding a prisoner must appeal the referral to OPR, and the deadline is not tolled); *Crayton v. Graffeo*, 10 F. Supp. 3d 888, 895 (N.D. Ill. 2014) (finding a prisoner does not need to appeal before receiving the disposition of the OPR investigation); *Smith v. Cook County*, No. 14-c-1789, 2017 WL 3278914, at *6 (N.D. Ill. Aug. 2, 2017) (reaching the same result as *Crayton*); *Jackson v. Dart*, No. 13-c-7713, 2016 WL 5390954, at *3 (N.D. Ill. Sept. 27, 2016) (reaching the same result as *Smith* and *Crayton*). The lower courts' frustration is palpable. See *Jackson*, 2016 WL 5390954, at *3 ("It defies common sense to read that response [notifying the prisoner that OPR is handling his grievance] as negative action on his grievance, such that an appeal was appropriate.").

There is no better time than now to clarify the issue for all involved—first and foremost prisoners, but also prison officials, the Sheriff of the Cook County Jail, and the district courts. See *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 750 (7th Cir. 1993). The underlying concern behind forfeiture is the risk that reviewing a forfeited argument will prejudice others, most of all the opposing party. But in this instance, we have a developed record: the parties have provided us with the Inmate Handbook that Hacker received, the notice of referral to OPR, the attached appeals form, and the memorandum between OPR officers closing the investigation. See *Jackson v. Parker*, 627 F.3d 634, 640 (7th Cir. 2010) (considering whether the record is adequately developed to review a forfeited argument). All sides agree on the critical facts. And the defendants aggressively litigated the core problem of what the grievance process required and what notice of these requirements Hacker received—a problem the district court managed to tackle on this record as well. Reviewing Hacker's

argument under these circumstances will not cause harm to the defendants or anyone else.

Third, substantial rights are at stake. This dimension of the plain error inquiry asks whether the alleged error prejudiced the forfeiting party. See *Perry v. City of Chicago*, 733 F.3d 248, 253 (7th Cir. 2013) (considering whether the error impacted the forfeiting party's "right to a fair trial"). The error in this case prejudiced Hacker because the only basis for dismissing his claim against Officer Sandoval was his apparent failure to exhaust by not appealing the referral to OPR or OPR's later closure of its investigation. Had Hacker raised this argument before the district court and won, his claim (that Officer Sandoval had used enough force against him to knock him unconscious and send him to the hospital) would have survived summary judgment.

Fourth, a miscarriage of justice looms if we do not apply plain error review. The Cook County Jail's grievance process was not just a confusing annoyance. It was an incomprehensible trap that risked locking Hacker—and potentially other inmates as well—out of court altogether on serious claims. See *Henry*, 969 F.3d at 787 (considering whether the forfeiting party remained able to raise the same argument later in the proceedings despite the forfeiture). No doubt Hacker should have raised the availability issue sooner. But in the totality of the circumstances before us, we conclude it is "in the interests of justice" to address the issue now. *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 391 (7th Cir. 2007).

No one is better positioned to amend its grievance procedures than the Cook County Jail itself. Perhaps it already has, although it has not told us so. But our focus is on the hopelessly confusing process in place when Hacker filed his

grievance against Officer Sandoval in 2017. We have stressed that grievance procedures should be transparent enough for ordinary prisoners to navigate. The OPR process that Hacker faced, which implicated some of the most serious grievances at the Cook County Jail, fell well short of that measure. The PLRA therefore did not require Hacker to exhaust the grievance process for his § 1983 claim before suing in federal court.

III

We turn now to a separate exhaustion issue under the PLRA involving a different one of Hacker's claims. Hacker brought this claim under the ADA and Rehabilitation Act to challenge the Cook County Jail's provision of medication. The claim involved two different grievances that Hacker filed, one that makes no mention of medications (but was filed and exhausted on time) and another that discusses medication (but was filed too late to satisfy the PLRA's exhaustion requirement).

Hacker filed the first grievance in May 2017. He made no mention that he was not receiving medications and instead complained that he lacked access to assistive listening devices, which the parties refer to as ALDs. The parties dispute how much listening devices help Hacker, but he says that without them he cannot hear and understand what others are saying to him—a disability that becomes a major problem for an incarcerated person subject to all sorts of direction from prison guards. At the Cook County Jail, however, Hacker had access to listening devices only when he attended drug programs and court hearings. These circumstances led him to submit a one-sentence grievance complaining that the jail had not provided him "with [an] available hearing device to accommodate [his] disability in violation of [the] A.D.A." The

jail responded by telling Hacker that the ADA did not require furnishing him with a personal listening device. Hacker appealed. The jail then denied his appeal, fully exhausting the grievance process.

Meanwhile, Hacker was experiencing periodic issues with receiving medication within the jail. Medical staff dispensed medications by taking the medicine to units within the jail and then calling prisoners up by name. But Hacker could not always hear staff calling his name. These issues came to a head when Hacker suffered a dental abscess and did not receive his antibiotics and pain medications on multiple occasions. He says that missing the medications left him in pain and delayed his tooth extraction for months. Hacker's dentist reported needing to reorder multiple courses of antibiotics, something she later stated "[y]ou do not want to [do] if you can help it."

Hacker responded by submitting a grievance in July 2017, after he had already filed this lawsuit in federal court. Unlike the prior listening device grievance, Hacker discussed his problems with medications in detail in the second grievance. The Cook County Jail sent the grievance to Cermak Health Services, the entity that managed health care within the institution. Cermak reviewed Hacker's medical records and concluded his complaint lacked merit. But Hacker did not learn of Cermak's denial until October 2017. He appealed soon after, and Cermak denied his appeal in December 2017.

A prisoner must exhaust their claims *before* commencing litigation. See 42 U.S.C. § 1997e(a). Hacker acknowledged that the medication-related grievance from July 2017—filed and exhausted after Hacker had sued—came too late. But he believed his prior grievance—the one from May 2017 about the

listening devices, which he fully exhausted before filing suit—had effectively put the jail on notice that Hacker would not be able to get his medications. The district court disagreed and dismissed the claim about medication access.

The district court got this right. We ordinarily leave grievance requirements to prisons and review for strict compliance with the rules they develop. See *Dole v. Chandler*, 438 F.3d 804, 809 (7th Cir. 2006). In this case, however, the defendants opted not to focus on whether Hacker complied with the jail's rules and instead invoked the underlying purpose of the exhaustion requirement. That purpose is to "afford[ ] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Porter v. Nussle*, 534 U.S. 516, 525 (2002). We have therefore said that the exhaustion requirement "serve[s] its function" if it provides "prison officials a fair opportunity to address [a prisoner's] complaint." *Maddox v. Love*, 655 F.3d 709, 713 (7th Cir. 2011).

We cannot say that Hacker's May 2017 grievance challenging his access to listening devices afforded jail officials a fair opportunity to respond to his concern about not receiving medications. The grievance identified the remedy Hacker wanted—a personal listening device. But Hacker never described or alluded to any problems with receiving medication, access to Cermak Health's medical services, or access to prison services more generally. Without that link, prison officials did not have fair notice that Hacker wanted the personal listening device because he could not hear medical staff calling out his name while dispensing medication. Because the grievance did not put prison officials on notice about the medication issues, we do not need to address the Sheriff's

contention that Hacker should have sent his grievance to Cermak Health and not to the Cook County Jail.

IV

Hacker's claim about his access to medications was not the only one that he brought under the ADA and Rehabilitation Act. He also invoked those statutes to challenge his limited access to listening devices and his limited access to a special telephone for the hearing impaired. Focusing on those two other claims, we now look at whether Hacker satisfied another PLRA requirement—that a prisoner makes a "prior showing of physical injury or the commission of a sexual act" before recovering compensatory damages for "mental or emotional injury." 42 U.S.C. § 1997e(e).

A

We start with the claim that Hacker brought to challenge his limited access to listening devices at the Cook County Jail. While the substance of this claim overlaps significantly with the claim challenging Hacker's limited access to medications, the two are distinct. Hacker also fully exhausted his claim about listening devices with his May 2017 grievance, which specifically requested a listening device.

Hacker had requested compensatory damages and injunctive relief for this claim, but not nominal or punitive damages. The request for injunctive relief had become moot by summary judgment because Hacker had left the Cook County Jail. That left only compensatory damages, which Hacker sought for his stress, discomfort, and exhaustion. Because these symptoms describe mental or emotional injuries, they were subject to the PLRA's physical injury requirement.

The defendants argued in the district court that Hacker had not connected a physical injury to the listening devices claim and thus could not recover anything. After Hacker failed to respond directly in his summary judgment briefing, the district court agreed with the defendants and dismissed this claim as well.

We see things differently than the district court. Remember that Hacker had complained about missing pain medications and antibiotics to treat his abscessed tooth because he could not hear his name being called during medication passes. And Hacker made clear that missing the medications resulted in the tooth extraction being delayed for months. This allegation suffices to allege physical injury for purposes of the PLRA—a dental abscess is a "serious medical condition requiring prompt treatment." *Dobbey v. Mitchell-Lawshea*, 806 F.3d 938, 940 (7th Cir. 2015).

Hacker also sufficiently linked his alleged physical injury to his claim involving listening devices. He suggested at summary judgment that he experienced the dental abscess injury because of the Sheriff's failure to provide accommodations—including, presumably, the denial of a personal listening device—when he complained he was "treated unequally because he did not have an [assisted listening device] when communicating with providers and was not accommodated during periods when he required antibiotics prior to the extraction of an abscessed tooth." Hacker also laid the blame squarely on the Sheriff's office by claiming "the Jail" was responsible for denying him a listening device.

Summary judgment requires viewing the facts in the light most favorable to Hacker, the non-movant. See *Reid*, 962 F.3d at 327. In that light, we see an adequate causal link between

the listening device claim and the dental injury: without a personal listening device, Hacker could not hear medical staff call his name and therefore missed his medications for the dental abscess. He has done enough with this claim to survive summary judgment.

B

That brings us to Hacker's final claim and the question of whether he adequately alleged a physical injury in connection with that claim. Once again invoking the ADA and Rehabilitation Act, Hacker complained of inadequate access to a special telephone for the hearing impaired, known as a teletype phone. Other inmates enjoyed daily access to phones in their living units. Hacker, by contrast, had to submit a request form to use a teletype phone. The parties dispute just how frequently Hacker was able to make calls using a teletype phone. But whatever that access was, Hacker alleged it was insufficient. He filed a grievance in May 2017 complaining about the limited phone access and appealed when jail offices rejected his complaint.

Like the listening device claim, the defendants persuaded the district court that the damages Hacker sought were unavailable because he had not shown a physical injury. Hacker altogether failed to respond before the district court. In these circumstances, he forfeited the claim, leaving us to review only for plain error. See *Henry*, 969 F.3d at 786.

Here, we agree with the district court. Unlike the listening device claim, Hacker never connected the issues with teletype phones to his physical injuries from the dental abscess or the alleged assault by Officer Sandoval. That left him with no showing of physical injury under the PLRA.

Absent that showing, Hacker cannot recover compensatory damages for mental or emotional injuries. Yet the *only* relief Hacker sought was just that—damages for mental and emotional injuries. He never sought nominal or punitive damages, and his request for injunctive relief was moot by summary judgment. What remained were compensatory damages, which Hacker characterized as mental or emotional in nature before the district court: he said that he was stressed, exhausted, and uncomfortable when he could not communicate with others.

Hacker repeats that characterization on appeal, telling us his damages are compensable under the ADA as "inconvenience" and "loss of enjoyment of life." We do not see any way to interpret these damages other than as compensation for harm to Hacker's mental or emotional health. Loss of enjoyment of life describes an injury to Hacker's mental well-being. When Hacker says he should be able to recover damages for inconvenience, he is looking to be compensated for the stress or emotional pain of being deprived of teletype phones—a harm that is also mental or emotional. The district court properly entered summary judgment for the defendants on Hacker's teletype phone claim.

For his part, Hacker thinks the compensatory damages he seeks fall entirely outside the PLRA's physical injury provision. He urges this conclusion by relying on our decisions in *Robinson v. Page*, 170 F.3d 747 (7th Cir. 1999), and *Cassidy v. Indiana Department of Corrections*, 199 F.3d 374 (7th Cir. 2000).

In *Robinson*, we explained that a future risk of physical harm, like the risk posed by a prisoner's exposure to lead contaminants, was not a mental or emotional injury and hence was not subject to the physical injury requirement. 170 F.3d at

749. We went a step further in *Cassidy*. We allowed a prisoner with no physical injury to pursue damages for certain discrete harms, including loss of access to programs and activities in the prison. 199 F.3d at 375–77. But *Cassidy* still barred the prisoner from pursuing damages for emotional and mental harm that resulted from his inability to participate in those activities. See *id.* at 376–77. Hacker believes that much like *Robinson* and *Cassidy*, the damages he requested on this telephone claim are not for mental or emotional injuries and hence are not subject to the PLRA's physical injury requirement.

We are not convinced. *Robinson* addressed the narrow issue of future harm that is purely physical. Hacker, by contrast, described his own damages in terms of his present emotional and mental well-being. As for *Cassidy*, we permitted the prisoner there to pursue damages only insofar as they were separate from damages for the mental or emotional harms of being denied access to prison programming. But in telling us that his damages are compensable *because* they caused him to experience inconvenience and loss of enjoyment of life, Hacker made clear that he was seeking exactly what we had barred the plaintiff from recovering in *Cassidy*: damages for "emotional and mental harm, embarrassment, and humiliation resulting from not being able to pursue the same activities as the non-disabled." *Id.* at 375.

Hacker suggests that if nothing else, he should be allowed to pursue nominal damages, which are not subject to the PLRA's physical injury provision. (Punitive damages are unavailable for Hacker's ADA and Rehabilitation Act claims. See *Barnes v. Gorman*, 536 U.S. 181, 189–90 (2002).) Hacker believes he is free to pursue nominal damages despite not requesting them in his complaint.

We find no plain error in the district court's treatment of this claim. Such a claim for nominal damages can present some challenging legal issues, including whether Congress authorized them under the ADA or the Rehabilitation Act, as well as other questions left unanswered by the Supreme Court's holding on Article III standing in *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021). We also doubt that a district court is required to assume that a plaintiff wants to pursue only nominal damages if the plaintiff has not indicated as much. Applying the plain-error standard to Hacker's claims for limited access to the teletype phone, we are not persuaded that there was an error, let alone a plain one. Neither are we persuaded that any error affected Hacker's substantial rights or resulted in a miscarriage of justice. Like the district court, we therefore conclude that Hacker has nothing to recover on this claim.

* * *

For these reasons, we VACATE the entry of summary judgment for the defendants and REMAND for further proceedings.