

## Opinions for the week of February 29 - March 4, 2016

### **Christopher White v. George Keely** No. 15-1922

Argued January 6, 2016 — Decided February 29, 2016

Case Type: Civil

Southern District of Indiana, Indianapolis Division. No. 1:14-cv-00471-TWP-DML — **Tanya Walton Pratt**, *Judge*.

Before POSNER and WILLIAMS, *Circuit Judges*, and PALLMEYER, *District Judge*.

PALLMEYER, District Judge. Plaintiffs-appellants Christopher White and his company Reffco II, L.P. (collectively, “White”) filed suit against several current and former officers of the National Bank of Indianapolis (“NBI Employees”) pursuant to the Federal Reserve Act, 12 U.S.C. § 503. That statute establishes civil liability for bank officers and directors who violate certain substantive provisions of the Federal Reserve Act and the False Entry Statute. White’s complaint alleges that the NBI Employees violated the False Entry Statute, 18 U.S.C. § 1005, by falsifying official bank reports in order to cover up unauthorized transfers made from White’s business accounts at the National Bank of Indianapolis (“NBI”). White claims these § 1005 violations caused him to suffer harm and that the NBI Employees are liable to him pursuant to 12 U.S.C. § 503. The district court dismissed White’s complaint for failure to allege that he relied on the false statements, and White timely appeals that decision. The NBI Employees contend the appeal is frivolous and have asked for an award of sanctions pursuant to Federal Rule of Appellate Procedure 38. Because White has not pleaded that he was harmed as a consequence of the alleged § 1005 violations, we affirm the district court’s dismissal of White’s complaint. We further agree with defendants-appellees that White’s appeal is frivolous, and therefore grant their motion for sanctions.

### **Cause of Action v. CTA** No. 15-1143

Argued September 10, 2015 — Decided February 29, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 1:12-cv-09673 — **Robert M. Dow, Jr.**, *Judge*.

Before FLAUM, RIPPLE, and SYKES, *Circuit Judges*.

RIPPLE, Circuit Judge. Cause of Action, a nonprofit government watchdog organization, brought this action against the Chicago Transit Authority (“CTA”) under the qui tam provision of the False Claims Act (“FCA” or “Act”), 31 U.S.C. § 3730. Cause of Action alleged that, for several decades, the CTA had been misreporting fraudulently transit data to the Federal Transit Administration (“FTA”) in order to secure inflated federal grant allocations. The district court dismissed the action, holding that it lacked subject matter jurisdiction over Cause of Action’s FCA claims because its allegations of wrongdoing had been publicly disclosed at the time the action was filed. We agree that the allegations had been publicly disclosed and therefore affirm the judgment of the district court.

### **James Hugunin v. Land O’Lakes, Inc.** No. 15-2815

Argued January 21, 2016 — Decided March 1, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 11 C 9098 — **Joan B. Gottschall**, *Judge*.

Before POSNER, EASTERBROOK, and KANNE, *Circuit Judges*.

POSNER, Circuit Judge. James Hugunin, the principal plaintiff (the others are two companies he owns), manufactures and sells fishing tackle. Although he lives in Illinois and his companies are incorporated there, he began selling his tackle in a town in northeastern Wisconsin called Land O’ Lakes because it is located in a region dotted with lakes and therefore attractive to fishermen—the region is also called Land O’ Lakes. Since his first sale, made in 1997 to a Wisconsin bait shop, Hugunin’s enterprise has grown to a point at which his fishing tackle is sold to retailers in a number of states. In 2000 the U.S. Patent and

Trademark Office registered LAND O LAKES as the trademark of his fishing tackle. As it happens, Minnesota, which adjoins Wisconsin, is the home of a large agricultural cooperative named Land O'Lakes, Inc. that sells butter and other dairy products throughout the United States. It uses the same trademark on its products as Hugunin's companies do on their products—LAND O LAKES—and has been doing so since the 1920s, when the company was formed... having learned that Hugunin had registered LAND O LAKES as the trademark of his fishing tackle, the dairy company wrote him that LAND O LAKES was its trademark, was "famous" because it had been in use since long before Hugunin had appeared on the scene, and that Hugunin was infringing it and to be permitted to continue using it would need a license from the dairy company. He refused either to apply for a license or to give up the trademark, thereby precipitating a proceeding by the dairy company in the Trademark Trial and Appeal Board of the U.S. Patent and Trademark Office opposing registration of Hugunin's trademark... in this unusual case two firms sued each other though neither had been, is, or is likely to be harmed in the slightest by the other. The suit was rightly dismissed.

**Mitchell Alicea v. Aubrey Thomas** No. 15-1255

Argued September 11, 2015 — Decided March 1, 2016

Case Type: Prisoner

Northern District of Indiana, Hammond Division. No. 2:11-cv-445 — **Theresa L. Springmann**, *Judge*.  
Before BAUER, WILLIAMS, and HAMILTON, *Circuit Judges*.

WILLIAMS, Circuit Judge. This appeal arises out of serious injuries suffered by Mitchell Alicea during the course of an arrest by the Hammond Police. Alicea sued Sergeant Aubrey Thomas and Officer Alejandro Alvarez under 42 U.S.C. § 1983 for violating the Fourth Amendment by using excessive and unreasonable force to arrest him. The district court granted the defendants' motions for summary judgment, finding that Thomas and Alvarez did not use excessive force against Alicea, and that they were entitled to qualified immunity. Be-cause we find that the facts taken in the light most favorable to Alicea create a material dispute as to whether each officer's actions violated clearly established law, we reverse the district court's grant of summary judgment.

**Mark Gekas v. Peter Vasiliades** No. 15-1226

Argued February 10, 2016 — Decided March 1, 2016

Case Type: Civil

Central District of Illinois. No. 3:10-cv-03066-RM-TSH — **Richard Mills**, *Judge*.  
Before BAUER, FLAUM, and SYKES, *Circuit Judges*.

BAUER, Circuit Judge. Plaintiff-appellant, Mark Gekas ("Gekas"), filed suit against several individual members of the Illinois Department of Financial and Professional Regulation (hereinafter the "Department"), claiming they retaliated against him in violation of his constitutional First Amendment rights and were liable to him under the provisions of 42 U.S.C. § 1983. Specifically, Gekas sued Peter Vasiliades, Frank Maggio, Mary Ranieli, John Lagatutta, and John Krisko (collectively the "Defendants") for the claimed violations. The Defendants filed a motion for summary judgment, which the district court granted. Gekas appealed. For the reasons that follow, we affirm.

**NLRB v. Staffing Network Holdings, LLC** Nos. 15-1354 & 15-1582

Argued November 5, 2015 — Decided March 2, 2016

Case Type: Agency

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board. No. 13-CA-105031  
Before FLAUM, MANION, and ROVNER, *Circuit Judges*.

ROVNER, Circuit Judge. The National Labor Relations Board (“NLRB” or “Board”) concluded that Staffing Network Holdings, LLC (“Staffing Network”) violated the National Labor Relations Act by twice threatening employees with discharge for engaging in protected, concerted activity, and for actually discharging employee Griselda Barrera for engaging in protected, concerted activity... The NLRB ordered Staffing Network to offer Barrera reinstatement and to make her whole for lost wages. Staffing Network petitions this court for review of that decision and asks that we reverse the Board’s decision in its entirety. The NLRB cross-petitions for enforcement of its Order. We deny Staffing Network’s petition for review and grant the NLRB’s petition for enforcement.

**USA v. Perry Harrington** Nos. 14-3010 & 14-3028  
Argued January 27, 2016 — Decided March 2, 2016  
Case Type: Criminal  
Central District of Illinois. No. 12-10118 — **James E. Shadid**, *Chief Judge*.  
Before POSNER, KANNE, and HAMILTON, *Circuit Judges*.

HAMILTON, Circuit Judge. Appellant Perry Harrington contends in this appeal that he was deprived of his right to counsel for his sentencing hearing. Harrington had persuaded the district court to discharge court-appointed counsel (twice) and to let him proceed pro se to make post-trial motions. On appeal Harrington argues that he did not validly waive his right to counsel for his sentencing hearing. We disagree and affirm the judgment.

**Christopher McCoy v. USA** No. 14-2741  
Argued November 3, 2015 — Decided March 2, 2016  
Case Type: Prisoner  
Southern District of Illinois. No. 13-cv-1318-DRH — **David R. Herndon**, *Judge*.  
Before WOOD, *Chief Judge*, EASTERBROOK, *Circuit Judge*, and BRUCE, *District Judge*.

BRUCE, District Judge. Christopher H. McCoy, appeals the dismissal of his motion to vacate, set aside, or correct sentence under 28 U.S.C. §2255. On appeal, McCoy argues that the magistrate judge who accepted his felony guilty plea exceeded his authority under the Federal Magistrates Act (28 U.S.C. §636) and Article III of the U.S. Constitution. This argument was neither raised on direct appeal or in the §2255 proceedings before the district court. Rather, it is raised for the first time in this court on this appeal. Because McCoy did not demonstrate sufficient cause for his failure to present this claim in the earlier proceedings, we affirm the district court’s dismissal of his §2255 motion.

**Richard Lewis v. Dominick's Finer Foods, LLC** No. 15-2317  
Argued December 16, 2015 — Decided March 3, 2016  
Case Type: Civil  
Northern District of Illinois, Eastern Division. No. 13 C 530 — **Harry D. Leinenweber**, *Judge*.  
Before DANIEL A. MANION, *Circuit Judge*; MICHAEL S. KANNE, *Circuit Judge*; ANN CLAIRE WILLIAMS, *Circuit Judge*.

## **ORDER**

Richard Lewis had worked as a butcher at Dominick’s for 26 years when he was suspended for not telling the company that his absences from several scheduled shifts had occurred because he was in jail after being charged with murder. After his union tried unsuccessfully to get Lewis reinstated, he sued Dominick’s and the union claiming that, because his arrest and brief stint in jail had been unrelated to his job performance, the suspension violated the collective bargaining agreement’s prohibition against suspensions “without just cause.” Lewis later voluntarily dismissed the union as a defendant, but he could not recover from Dominick’s for its alleged violation of the CBA without also establishing, in this “hybrid”

action under § 301 of the Labor Management Relations Act, see 29 U.S.C. § 185(a), that the union had breached its duty of fair representation. See *Olson v. Bemis Co., Inc.*, 800 F.3d 296, 299 (7th Cir. 2015). In granting summary judgment for Dominick's, the district court concluded that a jury could not reasonably find from the evidence that the union had breached that duty or engaged in "unreasonable or irrational" conduct. We agree with that reasoning and further conclude that Lewis did not file his complaint within the 6-month statute of limitations for hybrid claims.

**USA v. Andre Forbes** No. 15-1965

Submitted February 11, 2016 — Decided March 3, 2016

Case Type: Criminal

Northern District of Indiana, South Bend Division. No. 3:14CR026-001 — **Jon E. DeGuilio**, *Judge*.  
Before DIANE P. WOOD, *Chief Judge*; RICHARD A. POSNER, *Circuit Judge*; ANN CLAIRE WILLIAMS, *Circuit Judge*.

**ORDER**

Andre Forbes pleaded guilty to distributing a controlled substance, 21 U.S.C. § 841(a)(1), as well as possessing a firearm as a felon, 18 U.S.C. § 922(g)(1), and tampering with a witness, 18 U.S.C. § 1512(b)(1). He was sentenced to a total of 216 months' imprisonment, within the guidelines range. As part of the parties' plea agreement, the government dropped a charge of possessing a firearm in furtherance of a drug trafficking crime, 18 U.S.C. § 924(c)(1), which would have added a consecutive 60-month term to his sentence. Although the plea agreement also includes an appeal waiver, Forbes filed a notice of appeal, and his appointed counsel now seeks to withdraw on the ground that the appeal is frivolous... we GRANT counsel's motion to withdraw and DISMISS the appeal.

**Citizens for Appropriate Rural Roads v. Anthony Foxx** No. 15-1554

Argued October 27, 2015 — Decided March 3, 2016

Case Type: Civil

Southern District District of Indiana, Indianapolis Division. No. 11-CV-1031 — **Sarah Evans Barker**, *Judge*.  
Before KANNE, *Circuit Judge*; ROVNER, *Circuit Judge*; and BRUCE, *District Judge*.

BRUCE, District Judge. This case involves the extension of Interstate 69 (I-69) in Southern Indiana. The extension, which will connect Evansville and Indianapolis, has evolved over several decades and is scheduled to be completed in the coming years. Plaintiffs filed a complaint on August 1, 2011, raising several challenges to the extension. The district court dismissed part of Plaintiffs' complaint when ruling on Defendants' motion to dismiss, and granted summary judgment in favor of Defendants on all other counts. We affirm.

**Firas Ayoubi v. Thomas Dart** No. 14-2964

Submitted February 11, 2016 — Decided March 3, 2016

Case Type: Prisoner

Northern District of Illinois, Eastern Division. No. 14 C 50 — **Charles R. Norgle**, *Judge*.  
Before DIANE P. WOOD, *Chief Judge*; RICHARD A. POSNER, *Circuit Judge*; ANN CLAIRE WILLIAMS, *Circuit Judge*.

**ORDER**

Firas Ayoubi, a pretrial detainee at the Cook County Jail, sued several members of the jail's staff under 42 U.S.C. § 1983 for violating the Eighth Amendment by punching him and ignoring his resulting chest pains. Four months after he sued, the judge found that, in asking the court to grant him greater access to the jail's law library, Ayoubi had lied about how often he was allowed in that library. To punish his fraud,

the court dismissed the case with prejudice. Ayoubi twice moved for reconsideration, arguing that he had made an innocent mistake. The district court considered his submissions, but disbelieved him and denied his motions. Although the district judge should have asked for Ayoubi's response before dismissing the suit, we conclude that the misstep was harmless: The judge entertained the motions to reconsider, the renewed fraud findings were not clearly wrong, and the sanction was reasonable. We therefore affirm the judgment.

**Carla Boston v. United States Steel Corp.** No. 15-2795

Argued February 10, 2016 — Decided March 4, 2016

Case Type: Civil

Southern District of Illinois. No. 13-cv-00532 — **David R. Herndon**, *Judge*.

Before BAUER, FLAUM, and SYKES, *Circuit Judges*.

FLAUM, Circuit Judge. Plaintiff-appellant Carla Boston worked at defendant-appellee U.S. Steel Corporation ("U.S. Steel") for eighteen years before she was laid off in December 2008, along with a number of other employees. While on layoff status, Boston remained eligible to bid on posted positions for which she was qualified. Between September 2010 and January 2012, Boston was awarded, and subsequently disqualified from, three different clerical positions at the plant. On April 10, 2012, Boston filed a complaint with the Equal Employment Opportunity Commission ("EEOC") asserting that she was laid off on January 10, 2012 in retaliation for an earlier EEOC discrimination charge she had filed in October 2010. She filed suit in federal court on June 3, 2013, seeking relief for retaliation under Title VII and the Age Discrimination and Employment Act ("ADEA"). She also asserted a common law claim for intentional infliction of emotional distress ("IIED"). The district court granted U.S. Steel's motion for summary judgment as to both claims. We affirm.

**Abduwali Muse v. Charles A. Daniels** No. 15-2646

Submitted February 22, 2016 — Decided February 24, 2016

Case Type: Prisoner

Southern District of Indiana, Terre Haute Division. No. 2:15-cv-00213-JMS-DKL — **Jane E. Magnus-Stinson**, *Judge*.

Before EASTERBROOK, KANNE, and SYKES, *Circuit Judges*.

EASTERBROOK, Circuit Judge. Abduwali Muse pleaded guilty to piracy, 18 U.S.C. §2280, among other crimes, for his role in boarding the MV Maersk Alabama in 2009 in international waters off the coast of Somalia and taking its captain hostage... He pleaded guilty and was sentenced to 405 months' imprisonment. The plea agreement contains a clause promising "not to seek to withdraw his guilty plea or file a direct appeal or any kind of collateral attack challenging his guilty plea or conviction based on his age either at the time of the charged conduct or at the time of the guilty plea." Notwithstanding the waiver, Muse filed a proceeding under 28 U.S.C. §2255 asking the Southern District of New York to set aside his conviction... Chief District Judge Preska denied that motion, relying on the waiver in the plea agreement. Muse appealed, but the Second Circuit declined to issue a certificate of appealability. Turning to the Southern District of Indiana, where he is imprisoned, Muse filed a petition for a writ of habeas corpus under 28 U.S.C. §2241. Again he lost, this time because the district court concluded that §2255(e) applies... AFFIRMED.

**United Central Bank v. Davenport Estate LLC** No. 15-2406

Argued January 22, 2016 — Decided March 4, 2016

Case Type: Civil

Northern District of Illinois. No. 1:10-CV-03176 — **Andrea R. Wood**, *Judge*.

Before BAUER, FLAUM, and HAMILTON, *Circuit Judges*.

FLAUM, Circuit Judge. In 2008, the predecessor to United Central Bank (“UCB”) made a \$700,000 loan to a group of investors. UCB and the investors agreed that the money would be placed in escrow but did not record their understanding in a written escrow agreement. Later, the investors repeatedly asked UCB for the \$700,000 but never received it. In 2010, the investors brought a breach of contract claim, and UCB moved to dismiss under Federal Rule of Civil Procedure 12(b)(6). The district court granted UCB’s motion to dismiss since there was no written agreement as required by the Financial Institutions Reform, Recovery, and Enforcement Act (“FIRREA”) and the Illinois Credit Agreement Act (“ICAA”). We affirm.

**Peggy Zahn v. North American Power & Gas, LLC** No. 15-2332

Argued December 2, 2015 — Decided March 4, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 14 C 8370 — **Virginia M. Kendall**, *Judge*.

Before KANNE and SYKES, *Circuit Judges*, and GILBERT, *District Judge*.

KANNE, Circuit Judge. Prior to 1997, Illinois did not have a competitive electricity market. Residents could only purchase power from the local public utility, whose rates were regulated by the Illinois Commerce Commission (“ICC”). If a resident had a dispute regarding rates or charges and wanted to recover damages, then the resident had to file a claim against the public utility with the ICC because it had exclusive jurisdiction to hear such claims under the Public Utilities Act... According to Zahn, Illinois lawmakers did not intend to give the ICC exclusive jurisdiction over claims like hers, i.e., statutory fraud, breach of contract, and unjust enrichment claims due to overcharging by an ARES. Defendant North American Power & Gas, LLC (“NAPG”), an ARES, argues that the Rate Relief Law does provide Zahn her cause of action and remedy, and, therefore, the ICC has exclusive jurisdiction to hear her claims. The district court below agreed with NAPG and granted its motion to dismiss for lack of subject-matter jurisdiction, as well as for failure to state a claim... we respectfully request the Illinois Supreme Court to answer the following controlling question of law: “Does the ICC have exclusive jurisdiction over a reparation claim, as defined by the Illinois Supreme Court in *Sheffler v. Commonwealth Edison Company*, 955 N.E.2d 1110 (Ill. 2011), brought by a residential consumer against an Alternative Retail Electric Supplier, as defined by 220 ILCS 5/16-102?” We invite the justices of the Illinois Supreme Court to reformulate this question should they find it necessary. Of course, nothing in this certification opinion can or would seek to limit the scope of the Illinois Supreme Court’s inquiry... QUESTION CERTIFIED.

**Schaumburg Bank & Trust Company v. Richard S. Alsterda** No. 15-1894

Argued November 3, 2015 — Decided March 4, 2016

Case Type: Bankruptcy from District Court

Northern District of Illinois, Eastern Division. No. 14-cv-10095 — **John W. Darrah**, *Judge*.

Before WOOD, *Chief Judge*, EASTERBROOK, *Circuit Judge*, and BRUCE, *District Judge*.

BRUCE, District Judge. Schaumburg Bank and Trust Company, N.A. (“the Bank”), appeals from an order of the district court affirming a decision by the bankruptcy court that the Bank, a creditor of Chapter 7 bankruptcy debtor Hartford & Sons LLC (“the Debtor”), had not been assigned the right to pursue a claim for fraudulent transfer in state court, because that claim properly belonged to the bankruptcy estate. Neither party, in their briefs, argued that there was any issue with appellate jurisdiction in this matter. Upon our review of the record, however, we conclude that no final judgment or appealable order was entered by the bankruptcy court, and thus we lack appellate jurisdiction to review the district court’s decision at this time.

**EEOC v. Aerotek, Inc.** No. 15-1690

Argued December 11, 2015 — Decided March 4, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 1:15-cv-00275 — **Milton I. Shadur**, *Judge*.  
Before KANNE, ROVNER, and HAMILTON, *Circuit Judges*.

ROVNER, Circuit Judge. The Equal Employment Opportunity Commission (“EEOC”) is investigating Aerotek, Inc., a staffing company, to determine if Aerotek or its clients are engaged in age-related employment discrimination. In the course of its ongoing investigation, the EEOC issued two administrative subpoenas to Aerotek seeking information regarding the company’s clients. Aerotek has partially complied with those subpoenas but refuses to supply the EEOC with all of the information it seeks. The district court granted the EEOC’s application for enforcement of its subpoenas and Aerotek appeals. We affirm.

**David Conrad v. USA** No. 14-3216

Argued December 15, 2015— Decided March 4, 2016

Case Type: Prisoner

Northern District of Illinois, Eastern Division. No. 14 C 4343 — **Amy J. St. Eve**, *Judge*.  
Before BAUER, POSNER, and HAMILTON, *Circuit Judges*.

POSNER, Circuit Judge. This appeal is from the denial of the defendant’s motion to vacate his sentence under 28 U.S.C. § 2255 on the ground that *Peugh v. United States*, 133 S. Ct. 2072 (2013), forbids subjecting a criminal defendant to an increase in his guidelines sentencing range made by the Sentencing Commission after the defendant had committed the crime for which he is being sentenced. When the defendant in the present case was sentenced, the guidelines range applicable to his multiple violations of the federal laws relating to child pornography was 360 months to life; the judge sentenced him to 198 months, and we affirmed the conviction and sentence in *United States v. Conrad*, 673 F.3d 728 (7th Cir. 2012). Yet under the version of the guidelines in force years earlier, when the defendant had committed the crimes for which he was convicted, the guidelines range had been only 121 to 151 months. *Peugh* was decided five months after the defendant’s conviction and sentence became final, and consistently with 28 U.S.C. § 2255(f)(3) he filed his section 2255 petition exactly one year after the decision in *Peugh*... AFFIRMED.

**Essex Insurance Company v. Galilee Medical Center S.C.** Nos. 14-1791 & 14-1801

Argued February 10, 2016 — Decided March 4, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 11-CV-06934 — **John W. Darrah**, *Judge*.  
Before BAUER, FLAUM, and SYKES, *Circuit Judges*.

FLAUM, Circuit Judge. Plaintiff Essex Insurance Company (“Essex”) filed a declaratory judgment action against Galilee Medical Center S.C., doing business as MRI Lincoln Imaging Center (“Galilee”), and Luis Angarita, M.D., a physician employed by Galilee, seeking rescission of an insurance policy issued to Galilee. The district court entered summary judgment for Essex, reasoning that rescission was warranted because defendants had made material misrepresentations in their insurance policy applications. For the reasons that follow, we affirm the judgment of the district court.

Only the text of the opinions is used. No editorial comment is added. For back issues or to send a comment, please contact [Sonja Simpson](#).