

Opinions for the week of January 25 - January 29, 2016

Ravi K. Kadiyala v. Bank of America, N.A. No. 14-3342

Argued January 21, 2016 — Decided January 25, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 13 C 4533 — **Joan H. Lefkow**, *Judge*.

Before RICHARD A. POSNER, *Circuit Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; MICHAEL S. KANNE, *Circuit Judge*.

Order

After Ravi Kadiyala purchased 49% of the stock of Euro International Mortgage, Inc. (EIM), the firm opened a new account (Account 9378) at Bank of America. Kadiyala was an authorized signatory on that account. EIM provided him with credentials (username and password) that afforded him access to EIM's other accounts at the Bank. He used those credentials to transfer \$200,000 out of Account 3998, of which he was not a signatory, into Account 9378. He then instructed the Bank to issue cashier's checks against the new balance in Account 9378. When he learned what Kadiyala had done, Mark Pupke, an authorized signatory on both accounts (and owner of the other 51% of EIM's stock), told the Bank to cancel the transfer and restore the funds to Account 3998. The Bank complied. Kadiyala contends in this suit under the diversity jurisdiction that, by reversing the transfers and cancelling the checks, the Bank violated his rights under the deposit contracts. The district court granted summary judgment to the Bank...

AFFIRMED.

Estate of Harold Stuller v. USA No. 15-1545

Argued November 30, 2015 — Decided January 26, 2016

Case Type: Civil

Central District of Illinois, Springfield Division. Case No. 3:11-CV-3080-RM-TSH — **Richard Mills**, *Judge*.
Before ROVNER and WILLIAMS, *Circuit Judges*, and SHAH, *District Judge*.

SHAH, *District Judge*. Wilma Stuller and her late husband, Harold, bred Tennessee Walking Horses on their horse farm in Tennessee.¹ They incorporated the horse-breeding operation as L.S.A., Inc., and claimed its substantial losses as deductions on their tax returns. But the IRS determined that the horse-breeding was not an activity engaged in for profit and so assessed taxes and penalties against the Stullers. The IRS also penalized the Stullers for failing to timely file their 2003 return. After paying up, the appellants, Wilma Stuller, Harold's estate, and LSA, sued the government for a refund. At a bench trial, the district court excluded the Stullers' proposed expert, found that LSA was not run as a for-profit business under 26 U.S.C. § 183, and determined that the Stullers lacked reasonable cause for failing to timely file their 2003 tax return. The court also denied a request to amend the judgment and effectively refund the taxes paid by the Stullers on rental income received from LSA. We affirm.

Ratna Bagwe v. Sedgwick Claims Management Services, Inc. No. 14-3201

Argued September 10, 2015 — Decided January 26, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 1:11-cv-02450 — **Young B. Kim**, *Magistrate Judge*.

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

RIPPLE, *Circuit Judge*. Ratna Bagwe, who was born in India and is of Indian descent, brought this action in the United States District Court for the Northern District of Illinois against Sedgwick Claims Management Services, Inc. ("Sedgwick") and her former supervisors, Tammy LeClaire¹ and Angela Papaioannou. Alleging claims under the Civil Rights Act of 1866, 42 U.S.C. § 1981, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and the Illinois Human Rights Act ("IHRA"), 775 ILCS 5/1, she stated that Sedgwick had paid her a comparatively low salary because of her race and national origin.

She also alleged that she was terminated for retaliatory and racially discriminatory reasons. The district court granted summary judgment to the defendants on all counts. Ms. Bagwe now seeks reversal of that judgment. For the reasons set forth in this opinion, we affirm.

Window World of Chicagoland v. Window World, Inc. No. 15-2224

Argued January 7, 2016 — Decided January 27, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 13 C 4624 — **John Robert Blakey**, *Judge*.
Before EASTERBROOK, MANION, and SYKES, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Between 2005 and 2009 David Hampton and his business (collectively Hampton) entered into several contracts with Window World, Inc., which allowed Hampton to use its trademarks and business methods for the retail sale and installation of windows and doors. In 2011 Window World alerted Hampton that their dealings were subject to the Illinois Franchise Disclosure Act, 815 ILCS 705/1 to 705/44. (Earlier in 2011 the Attorney General of Illinois had sued Window World under that Act; the case was settled and a consent decree entered a month after Window World notified Hampton.) Window World told Hampton that he had 35 days to elect between rescinding the contracts (which would mean stopping the use of Window World's intellectual property) and signing a formal franchise agreement. Hampton did not pursue either alternative. Instead he filed a federal suit, under the diversity jurisdiction, accusing Window World of violating the Act, of fraud, and of other wrongs, all under state law. This suit, No. 12 C 579, was assigned to Judge Lindberg. We call it Suit 1. While Suit 1 was pending, Window World filed litigation of its own, under the Lanham Act, seeking (among other things) damages for continued use of its intellectual property after the 35-day option had expired, and an injunction against future use of its marks and methods. That suit, No. 12 C 4329, also was assigned to Judge Lindberg. We call it Suit 2... Suppose this is wrong, however, and that Suits 2 and 3 have been fully consolidated. The fact remains that Hampton is subject to a permanent injunction—and an injunction is immediately appealable under 28 U.S.C. §1291(a) even though the award of trademark damages could not have been appealed (given the assumption of full consolidation) in the absence of a partial final judgment under Fed. R. Civ. P. 54(b). The right doctrine for full consolidation would be law of the case rather than claim preclusion, because the relief Hampton seeks under state law would be inconsistent with the relief Window World already has received. See *Pepper v. United States*, 562 U.S. 476, 506 (2011). Hampton gave up his chance to have the judgment in Window World's favor set aside, and there is no other plausible exception to law of the case, which means that it just does not matter which doctrine applies. If the suits are separate, claim preclusion blocks Hampton's current claims; if they are fully consolidated, law of the case leads to the same outcome. AFFIRMED

Hedeen International, LLC v. Zing Toys, Inc. No. 15-1749

Argued November 4, 2015 — Decided January 27, 2016

Case Type: Civil

Eastern District of Wisconsin No. 1:14-cv-00304-WCG — **William C. Griesbach**, *Chief Judge*.
Before KANNE, ROVNER, and SYKES, *Circuit Judges*.

ROVNER, *Circuit Judge*. On March 21, 2014, Hedeen International, LLC ("Hedeen") filed suit in the United States District Court for the Eastern District of Wisconsin alleging breach of contract and unjust enrichment against two corporations, OzWest, Inc. and Zing Toys, Inc., and against Peter Cummings who was the leading shareholder in those companies. Cummings is an Australian citizen who resides in Hong Kong and has never visited Wisconsin. The amended complaint identifies him as a principal of OzWest, which is an Oregon company, and he is OzWest's signatory on the license agreement which underlies this case. The district court granted Cummings' motion to dismiss for lack of personal jurisdiction, and Hedeen now appeals that determination. Hedeen argues that Cummings waived the right to challenge personal jurisdiction because he did not file a motion within 21 days of service of the

complaint... Litigators should be able to rely on the plain language of the Rules in conducting litigation in federal court. Under a straightforward reading of Rule 12, a challenge to personal jurisdiction may be asserted either in a responsive pleading filed within 21 days, or in a motion with no similar time limit specified. That does not mean the time for filing such a motion is unbounded or that the plaintiff was without recourse. Failure to file a motion or responsive pleading in 21 days may result in the issuance of a default judgment against the defendant. Moreover, a personal jurisdiction defense may be waived if a defendant gives a plaintiff a reasonable expectation that he will defend the suit on the merits or where he causes the court to go to some effort that would be wasted if personal jurisdiction is subsequently found lacking. *H-D Michigan, LLC v. Hellenic Duty Free Shops S.A.*, 694 F.3d 827, 848 (7th Cir. 2012); *Mobile Anesthesiologists Chicago, LLC v. Anesthesia Associates of Houston Metroplex, P.A.*, 623 F.3d 440, 443 (7th Cir. 2010). But Hedeem has declined to argue that the delay in filing the motion met those standards, relying solely on the argument that it was untimely because filed more than 21 days after service of the complaint. We agree with the district court that the defense was not waived by the failure to file the motion within 21 days. The decision of the district court is AFFIRMED.

USA v. Ambrose Clayton No. 15-2553

Submitted January 7, 2016 — Decided January 28, 2016

Case Type: Criminal

Eastern District of Wisconsin. No. 13-CR-2 — **Rudolph T. Randa**, *Judge*.

Before RIPPLE, WILLIAMS, and HAMILTON, *Circuit Judges*.

PER CURIAM. Ambrose "Lamont" Clayton sought to reduce this 91-month prison sentence based on Amendment 782 to the federal sentencing guidelines. That amendment retroactively reduced the guideline range for his conviction for conspiracy to possess with intent to distribute cocaine and heroin. The district court declined to reduce the sentence. Because the district court did not abuse its discretion, we affirm the judgment.

USA v. Terry Smith Nos. 14-3744, 14-3721

Argued January 6, 2016 — Decided January 28, 2016

Case Type: Criminal

Southern District of Indiana, Terre Haute Division. No. 2:14-cr-00006-WTL-CMM-1 — **William T. Lawrence**, *Judge*.

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

POSNER, *Circuit Judge*. Terry Joe Smith, a police officer in Putnam County, Indiana (roughly midway between Indianapolis and Terre Haute), was convicted by a jury in federal court of violating 18 U.S.C. § 242 by depriving two persons, under color of state law (which is to say in Smith's capacity * as a police officer), of their constitutional right not to be subjected to the intentional use of unreasonable and excessive force. Sentenced to 14 months in prison to be followed by two years of supervised release, Smith appeals his conviction and the government appeals his sentence, the brevity of which, it contends, the judge failed to justify... In the last case the judge discussed, *United States v. Bartlett*, 567 F.3d 901 (7th Cir. 2009), three police officers were convicted of severely beating, kicking, and otherwise brutally assaulting two people they suspected of having stolen the badge of one of the officers. One victim's face was cut, and the other was threatened with being killed, had a pen thrust deep into his ear canal, suffered several broken bones, and was left lying naked in the street in a pool of his own blood. Two of the officers were sentenced to 188 months in prison—more than 13 times the length of the sentence imposed on Smith for his unjustified assaults on his two victims—and the third was sentenced to 208 months—roughly 15 times the length of Smith's sentence. Were Smith's crimes so slight a fraction of theirs? In short, does the judge's review of these cases provide *any* basis for thinking 14 months a proper sentence for Smith? Apart from the judge's reference to anger management and comments on Smith's minor good works in the community, no reason for the light sentence he imposed can be found in the transcript of the sentencing hearing. We add that the judge imposed the standard conditions of supervised release without

stating them in the sentencing hearing. That was error too; the entire sentence must be given orally. E.g., *United States v. Harper*, 805 F.3d 818, 822 (7th Cir. 2015). Conviction affirmed, sentence vacated, case remanded for full resentencing.

Charles Donelson v. Randy Pfister No. 14-3395

Submitted May 26, 2015 — Decided January 28, 2016

Case Type: Prisoner

Central District of Illinois. No. 13-CV-1523 — **Joe Billy McDade**, *Judge*.

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

HAMILTON, *Circuit Judge*. In this appeal we address an unusual state court ruling denying a prisoner's challenge to discipline that deprived him of liberty, he says, without having an opportunity to call supporting witnesses and to offer supporting evidence. The state appellate court denied relief without reaching the merits. The court's reason, not mentioned at any earlier stage of the case, was that the prisoner had not followed the instruction on the paper form for requesting witnesses or evidence to tear off the top portion of the form. As we explain below, this novel ruling carried bureaucratic concerns about paperwork to an unreasonable extreme and does not bar federal consideration of the prisoner's constitutional claim on the merits. Appellant Charles Donelson, an Illinois prisoner, lost a year of accumulated good time as punishment for two incidents involving the same guard. After unsuccessfully challenging that punishment in state court, Donelson filed in the federal district court a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Donelson claims that the prison adjustment committee violated his right to due process by disciplining him without adequate evidence and by not allowing him to call witnesses or to have access to exculpatory video and audio recordings. The district court ruled against Donelson, partly on the merits and partly on a procedural ground. We agree with the partial merits ruling but disagree with the procedural ruling. We therefore vacate the judgment and remand for further proceedings.

Michael Belleau v. Edward Wall No. 15-3225

Argued January 8, 2016 — Decided January 29, 2016

Case Type: Civil

Eastern District of Wisconsin. No. 12-CV-1198-WCG — **William C. Griesbach**, *Chief Judge*.

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

FLAUM, *Circuit Judge*, concurring in the judgment.

POSNER, *Circuit Judge*. In 1992 the plaintiff, who was then 48 years old, was convicted in a Wisconsin state court of having sexually assaulted a boy repeatedly for five years beginning when the boy was eight years old. (The plaintiff was and is a resident of that state and his crimes occurred there.) Oddly, he was given only a year in jail and probation for these assaults, but before the period of probation expired he was convicted of having in 1988 sexually assaulted a nine-year-old girl. Sentenced to 10 years in prison for that crime, he was paroled after 6 years. But his parole was revoked a year later after he admitted that he had had sexual fantasies about two girls, one four years old and the other five, and that he had "groomed" them for sexual activities and would have molested them had he had an opportunity to do so. Scheduled to be released from prison in 2005, instead he was civilly committed to the Sand Ridge Secure Treatment Center in 2004 as a "sexually violent person," Wis. Stat. ch. 980, after a civil trial in which he was found to be "dangerous because he ... suffers from a mental disorder that makes it likely that [he] will engage in one or more acts of sexual violence." Wis. Stat. §§ 980.01(7), 980.06; see *id.* §§ 980.01(2), (6). He was released in 2010 on the basis of the opinion of a psychologist that he was no longer more likely than not to commit further sexual assaults. But in 2006 Wisconsin had enacted a law requiring that persons released from civil commitment for sexual offenses wear a GPS monitoring device 24 hours a day for the rest of their lives. Wis. Stat. § 301.48. The statute applied to any sex offender released from civil commitment on or after the first day of 2008 and thus

applied (and continues to apply) to the plaintiff. And therefore ever since his release from civil commitment he has been forced to wear an ankle bracelet that contains a GPS monitoring device... To return to our traffic analogy briefly: no one thinks that a posted speed limit is a form of punishment. It is a punishment trigger if the police catch you violating the speed limit, but police are not required to obtain a warrant before stopping a speeding car. The anklet monitor law is the same: it tells the plaintiff—if you commit another sex offense, you'll be caught and punished, because we know exactly where you are at every minute of every day. Similar statutes in other states have reduced sex-crime recidivism. And though no one doubts the propriety of parole supervision of sex criminals though it diminishes parolees' privacy, a study by the National Institute of Justice finds that GPS monitoring of sex criminals has a greater effect in reducing recidivism than traditional parole supervision does. Gies et al., *supra*, at vii, 3-11, 3-13.

REVERSED

Stark Excavating, Incorporated v. Thomas Perez No. 14-3809

Argued September 24, 2015 — Decided January 29, 2016

Case Type: Agency

Occupational Safety and Health Review Commission OSHC-1:09-0004

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

ROVNER, *Circuit Judge*. Stark Excavating, Inc. ("Stark"), an excavation and paving company that typically handles about 250 jobs per year throughout central and southern Illinois, was issued a number of citations at two different worksites in June, 2008, following inspections by the Occupational Safety and Health Administration (OSHA). On June 5, 2008, an OSHA inspector issued three citations to Stark relating to its Peoria, Illinois, worksite for a serious eyewear violation under 29 C.F.R. § 1926.102(a)(2), a willful excavation cave-in protection violation under 29 C.F.R. § 1926.652(a)(1), and a repeat excavation spoil piles violation under 29 C.F.R. § 1926.651(j)(2). Seventeen days later, on June 22, another OSHA inspection, at a Stark worksite in Champaign, Illinois, resulted in a citation for a willful excavation cave-in protection violation under 29 C.F.R. § 1926.652(a)(1). The Secretary proposed penalties of \$2000 for the eyewear violation, \$35,000 for the spoil piles violation, and \$70,000 each for the cave-in protections violations. Stark contested the citations, which were consolidated for hearing before an Administrative Law Judge (ALJ). After a trial, the ALJ affirmed the citation for the eyewear violation and the \$2000 penalty, affirmed the spoil piles violation and awarded a \$20,000 penalty, and determined that the cave-in protection violations were serious violations rather than willful violations and imposed a \$7,000 penalty for each of those violations, for a total penalty of \$36,000... The petition for review is DENIED.

USA v. Patrick Armand No. 14-3757

Argued December 15, 2015 — Decided January 29, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 12 CR 400 — **James B. Zagel**, *Judge*.

Before WILLIAM J. BAUER, *Circuit Judge*; RICHARD A. POSNER, *Circuit Judge*; DAVID F. HAMILTON, *Circuit Judge*.

ORDER

Patrick Armand pleaded guilty to distributing a controlled substance, 21 U.S.C. § 841(a)(1), and was sentenced to 108 months' imprisonment, 3 months above the high end of the guidelines range. He appeals his sentence, contending that the district court misstated the imprisonment range, ignored two of his arguments in mitigation, failed to justify the length of his terms of imprisonment and supervised release or the conditions of supervised release, and imposed conditions of supervised release that have been invalidated by this court. We agree with Armand that he must be resentenced because, as the government concedes, the district court imposed unconstitutionally vague conditions of supervised

release and did not justify those discretionary conditions or the length of supervision... Armand's sentence is **VACATED**, and the case is **REMANDED** for a full resentencing consistent with this decision.

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](#).