

Opinions for the week of May 9 - May 13, 2016

Polycon Industries, Inc. v. National Labor Relations Board Nos. 15-3675, 15-3859

Argued April 19, 2016 — Decided May 9, 2016

Case Type: Agency

Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board. No. 13-CA-104249

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

POSNER, *Circuit Judge*. Polycon Industries, of Merrillville Indiana (a town in the northwestern corner of the state), is a manufacturer of plastic bottles and containers. Steven A. Johnson, a lawyer in the town, represented Polycon in collective bargaining with a Teamsters local (Teamsters Local Union No. 142) and in the ensuing litigation now before us; Polycon's brief describes Johnson as "Polycon's representative." In a decision reported at 363 N.L.R.B. No. 31 (Oct. 29, 2015), the National Labor Relations Board determined that the company had violated sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (5), which prohibit unfair labor practices in interstate commerce, by refusing to sign a collective bargaining agreement after agreeing to its terms... the Board, in the order before us that Polycon challenges, has directed Polycon to sign the agreement and comply with its terms until it expires. The order is so clearly correct that Polycon's challenge borders on the frivolous... Attorney Johnson insists that not his but Polycon's approval of the new language was required before the parties could be deemed to have approved it. But he provides no evidence, his own or Polycon's, that he hadn't been authorized to speak for the company when he told the union that the suggested addition was fine. Polycon could have asked for correction of any material mistakes before signing the contract but could not refuse to review and sign it because of the mere possibility that it contained a mistake. The Board's order is ENFORCED.

USA v. Phillip Crockett No. 15-2817

Submitted May 6, 2016 — Decided May 9, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 93 cr 746 — **Ronald A. Guzmán**, *Judge*.

Before JOEL M. FLAUM, *Circuit Judge*; DANIEL A. MANION, *Circuit Judge*; ANN CLAIRE WILLIAMS, *Circuit Judge*.

ORDER

Phillip Crockett pleaded guilty in 1994 to conspiracy to distribute cocaine, see 21 U.S.C. §§ 846, 841(a)(1), and was sentenced to 136 months' imprisonment and 60 months' supervised release. Crockett had completed his prison term and was on supervised release when, in 2009, his supervision was revoked because of his conviction for a state crime. He was sentenced to 1 day's imprisonment and 50 more months' supervised release. In 2014 Crockett again was convicted of a state crime, and the government again sought revocation, see 18 U.S.C. § 3583(e), alleging that Crockett had violated the conditions of his release by committing the state crime of identity theft. After Crockett admitted the violation, the district court revoked his supervised release and imposed 12 months and 1 day of imprisonment and no further supervised release. Crockett filed a notice of appeal, but his appointed attorney asserts that the appeal is frivolous and seeks to withdraw... Counsel's motion to withdraw is GRANTED, and the appeal is DISMISSED.

Donald McDonald v. Marcus Hardy No. 15-1102

Submitted January 7, 2016 — Decided May 9, 2016

Case Type: Prisoner

Northern District of Illinois, Eastern Division. No. 1:13-cv-02046 — **Joan B. Gottschall**, *Judge*.

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

RIPPLE, *Circuit Judge*. Donald McDonald was diagnosed with arthritis and high cholesterol while serving a life sentence at Stateville Correctional Center (“Stateville”), a maximum-security prison in Illinois. Over the ten years following his diagnosis, he received a low-cholesterol diet planned by a dietician at the facility. In 2009, however, a new warden took the helm at Stateville, and he promptly discharged the dietician and cancelled all special diets, including Mr. McDonald’s. The new warden also decreased the frequency of outdoor recreation for inmates to two days each week and altered the prison’s job-assignment policy to restrict inmates from working in a particular job for more than one year. As a result of these changes, Mr. McDonald brought this action under 42 U.S.C. § 1983 against Marcus Hardy, the new warden, Daryl Edwards, an assistant warden, and Salvador Godinez, then the director of the Illinois Department of Corrections. Mr. McDonald claimed that Warden Hardy, with the support of Assistant Warden Edwards, had violated the Eighth Amendment’s prohibition on cruel and unusual punishment by cancelling his prescribed low-cholesterol diet, decreasing his outdoor-recreation time, and changing the job-assignment system. Mr. McDonald also alleged that Director Godinez had violated the Equal Protection Clause by allowing inmates at the other maximum-security prisons in Illinois to have prescription diets and more time for outdoor recreation. Mr. McDonald sought both damages and injunctive relief... The district court erred in granting the defendants’ motion for summary judgment on Mr. McDonald’s claim that Warden Hardy and Assistant Warden Edwards displayed deliberate indifference to his high cholesterol by cancelling and refusing to reinstate his low-cholesterol diet. Accordingly, we vacate the grant of summary judgment on that claim, and we remand that claim for further proceedings. In all other respects we affirm the district court’s judgment.

USA v. Eugene Sweeney No. 14-3785

Argued September 11, 2015 — Decided May 9, 2016

Case Type: Criminal

Eastern District of Wisconsin. No. 14-CR-20 — **Lynn Adelman**, *Judge*.

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

HAMILTON, *Circuit Judge*. Defendant Eugene Sweeney used a gun to rob a Milwaukee tavern where he had worked before. He was convicted of armed robbery under the Hobbs Act, 18 U.S.C. § 1951(a), brandishing a firearm during a crime of violence, 18 U.S.C. § 924(c), and possessing a firearm as a felon, 18 U.S.C. § 922(g)(1). He was sentenced as an armed career offender under 18 U.S.C. § 924(e). Sweeney appeals both his convictions and his sentence... The defendant’s convictions are AFFIRMED, but his sentence is VACATED and the case is REMANDED for resentencing consistent with this opinion.

Eric Trotter v. Harleysville Insurance Company No. 15-3654

Argued April 18, 2016 — Decided May 10, 2016

Case Type: Civil

Northern District of Illinois, Western Division. Nos. 14 C 9834, 14 C 9837 & 14 C 9844 — **Frederick J.**

Kapala, *Judge*.

Before EASTERBROOK and SYKES, *Circuit Judges*, and ADELMAN, *District Judge*.

ADELMAN, *District Judge*. On July 14, 2011, Donna Powers drove through a stop sign and caused a four-vehicle accident. The plaintiffs in this case occupied one of the vehicles involved in the accident and suffered personal injuries... Powers was insured under a personal automobile policy with liability limits of \$250,000 per person and \$500,000 per accident. The plaintiffs eventually settled with Powers’s insurer for the per-accident limit of \$500,000... The plaintiffs contend that the amounts they received under the Powers policy did not make them whole. Thus, after exhausting the limits of that policy, they each submitted claims to Harleysville Insurance Company, the defendant in this case... Harleysville denied their claims for underinsured motorist coverage... The plaintiffs contend that Harleysville’s policy does not unambiguously state that underinsured motorist coverage is limited to \$500,000 per accident. Instead, they argue, the policy can reasonably be construed to mean that the \$500,000 policy limit applies on a

per-person, rather than a per-accident, basis... When Harleysville refused to accept the plaintiffs' construction of the policy, each plaintiff filed a separate suit against it in Illinois state court. Harleysville removed the cases to the Northern District of Illinois under the diversity jurisdiction, see 28 U.S.C. § 1332, and the district court consolidated the three cases into a single action. The parties then filed cross-motions for summary judgment on the issue of whether the insurance policy is ambiguous. The district court concluded that the policy is not ambiguous and that the limit of underinsured motorist coverage is \$500,000 per accident. It entered summary judgment in favor of Harleysville and denied the plaintiffs' motion for summary judgment. The plaintiffs appeal... the judgment of the district court is AFFIRMED.

USA v. Joyce Adent No. 15-3554

Argued April 19, 2016 — Decided May 10, 2016

Case Type: Civil

Eastern District of Wisconsin. No. 2:12-cv-01286-RTR — **Rudolph T. Randa**, *Judge*.
Before BAUER, POSNER, and FLAUM, *Circuit Judges*.

BAUER, *Circuit Judge*. Following the ratification of the United States Constitution, Benjamin Franklin wrote: “[I]n this world nothing can be said to be certain, except death and taxes.” These words are as true today as when Franklin wrote them in 1789. And when taxes are not paid, the federal government has many means to ensure prompt collection of those taxes. So the defendants-appellants found out the hard way. Leonard and Joyce Adent failed to pay their taxes and the government filed suit to foreclose on its tax liens attached to the Adents' property. The Adents, with their son Derek Adent, who is also a defendant-appellant (collectively the “Adents”), appeal the district court's order granting the government's motion for summary judgment in its tax lien foreclosure action with regard to two parcels of real property. The Adents argue that the government failed to bring its foreclosure action within the applicable statute of limitations period and that the properties should not be forcibly sold because of the resulting prejudice to innocent, non-delinquent parties (Joyce and Derek). We reject all of the Adents' arguments and affirm the district court's order.

Karla Steimel v. John J. Wernert No. 15-2377

Michael Beckem v. Indiana Family and Social Services Administration No. 15-2389

Argued January 5, 2016 — Decided May 10, 2016

Case Type: Civil

Southern District of Indiana, Indianapolis Division. Nos. 13-cv-00957, 14-cv-00668 — **Jane E. Magnus-Stinson**, *Judge*.
Before WOOD, Chief Judge, and KANNE and ROVNER, *Circuit Judges*.

WOOD, *Chief Judge*. No one would accuse the Medicaid program of simplicity. Our task in this appeal is to consider whether Indiana has chosen an acceptable way to deliver certain home- and community-based services. It does so through so-called waiver programs that are operated by state Medicaid agencies. The word “waiver” is used because the default assumption under Medicaid is that these kinds of services will be delivered in institutions. Congress has recognized, however, that many people are better served by and prefer community-based care. For these people, it uses waiver programs under which the state (and the federal government) will pick up the tab. The Indiana Family and Social Services Administration (the Agency) runs three waiver programs relevant to this case: the Aged and Disabled Medicaid Waiver Program (A&D waiver), the Community Integration and Habilitation Medicaid Waiver Program (CIH waiver), and the Family Supports Medicaid Waiver Program (FS waiver). Importantly for our case, the programs vary in how much money each client can receive, what must be demonstrated to qualify for aid, and who is entitled to assistance... Until 2011, the Agency placed many people with developmental disabilities on the A&D waiver, which has no cap on services. That changed when the Agency decided that it had not been adhering to certain A&D rules. In order to fix its mistakes, it enacted a policy change that rendered many developmentally disabled persons, including the plaintiffs, ineligible for care under the A&D waiver. These people were moved to the FS waiver, under which they may

receive services worth no more than \$16,545 annually. Developmentally disabled people who were switched from the A&D waiver to the FS waiver may apply for the CIH waiver, which is uncapped. But not everyone qualifies for the CIH waiver, and so this possibility is an empty one for many. The plaintiffs in the two cases we have consolidated for disposition are developmentally disabled persons who were moved from the A&D waiver to the FS waiver. They argue that their new assignment violates the integration mandate of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 et seq., because it deprives them of community interaction and puts them at risk of institutionalization. They also seek class certification. The district court granted summary judgment to the defendants on the integration-mandate claims and denied class certification. We conclude that there is a genuine dispute of material fact with respect to the individual claims based on the integration mandate, and so judgment for the defendants to that extent was premature. The district court did not abuse its discretion, however, in declining to certify the class, because the proposed class is too vague... we REVERSE the judgment of the district court and REMAND for further proceedings consistent with this opinion. We AFFIRM the district court's decision not to certify the proposed class.

Marion Makeda-Phillips v. Illinois Secretary of State No. 15-2338

Submitted May 6, 2016 — Decided May 10, 2016

Case Type: Civil

Central District of Illinois. No. 12-3312 — **Sue E. Myerscough**, *Judge*.

Before JOEL M. FLAUM, *Circuit Judge*; DANIEL A. MANION, *Circuit Judge*; ANN CLAIRE WILLIAMS, *Circuit Judge*.

ORDER

Marion Makeda-Phillips appeals the grant of summary judgment against her in this lawsuit asserting employment discrimination and civil rights violations arising out of her work at the office of the Illinois Secretary of State. The district court concluded that Makeda-Phillips could point to no admissible evidence supporting her claims and granted summary judgment to the defendants. We affirm.

Craig Kunkel v. CIR No. 15-2232

Argued April 4, 2016 — Decided May 10, 2016

Case Type: Tax

Appeal from the United States Tax Court. Nos. 3279-13 et al. — **Mary Ann Cohen**, *Judge*.

Before EASTERBROOK and HAMILTON, *Circuit Judges*, and PEPPER, *District Judge*.

EASTERBROOK, *Circuit Judge*. After conducting an audit of the returns that Integra Engineering and its principal owners, Craig and Kim Kunkel, had filed for 2008, 2009, and 2010, the Internal Revenue Service concluded that they owed more taxes. The Kunkels hired Frank W. Bastian, a lawyer and CPA, to represent them and the firm in an effort to persuade the IRS otherwise. As the statute of limitations for the 2008 tax year approached, the IRS asked Bastian to sign a waiver that would permit the IRS to delay making its assessment... in November 2012 the IRS sent notices of deficiency, which Integra and the Kunkels contested in the Tax Court. For tax years 2008 through 2010 combined, the IRS sought about \$456,600 from the Kunkels (who had filed joint re-turns) and \$322,800 from Integra. The amount demanded from the Kunkels included a 20% penalty under 26 U.S.C. §6662(a) for filing substantially inaccurate returns. More negotiations ensued, reducing the amounts the IRS claimed as due. Integra and the Kunkels (collectively Tax-payers) decided not to contest the IRS's revised calculations of what they owed for 2009 and 2010. But they contended that they owed nothing for 2008 because the notice in November 2012 came after the deadline. Taxpayers conceded that Bastian had signed waivers, that he had actual authority to do this, and that the waivers gave the IRS until the end of December 2012 to assess taxes. But they insisted that these waivers applied to the 2011 tax year, not the 2008 tax year...

According to Taxpayers, it did not matter that the IRS had asked them to extend the time for the 2008 tax year, and that Bastian had agreed on their behalf, because all Bastian had signed was a document relating to the 2011 tax year. But the IRS asked the Tax Court to reform the document to cure a mutual

mistake, and the court agreed... The court then entered judgment in favor of the IRS on the 2008 taxes and penalties as calculated by the post-assessment negotiations: for the Kunkels \$61,514 in tax plus \$12,302.80 in penalty, and for Integra \$6,570 in tax. In this court, Taxpayers concede that the Tax Court has authority to reform a waiver, no matter how explicit the form's language. But they say that the Tax Court may do this only if clear and convincing evidence shows the taxpayer's true intent—and, since neither Taxpayers nor the IRS offered evidence from the persons who filled in the blanks and signed the forms, it is impossible to meet that standard... AFFIRMED.

David Novoselsky v. Dorothy Brown No. 15-1609

Argued October 1, 2015 — Decided May 10, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 11 CV 03702 — **Charles R. Norgle**, *Judge*.
Before POSNER, MANION, and HAMILTON, *Circuit Judges*.

HAMILTON, *Circuit Judge*. The parties in this action have a long and litigious relationship. Over the past decade, plaintiff David Novoselsky has filed many lawsuits alleging improprieties by defendant Dorothy Brown in her capacity as Clerk of the Circuit Court of Cook County, Illinois. Brown later made statements to the public and to private parties accusing Novoselsky of being an unscrupulous attorney. Those statements form the basis of this case. Novoselsky brought this suit against Brown under state law for defamation and under 42 U.S.C. § 1983 for First Amendment retaliation, and he seeks to hold Cook County liable for Brown's actions pursuant to *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Brown moved for summary judgment based on arguments that her communications are protected from liability by a web of immunity defenses. The district court denied defendants' motion for summary judgment, and defendants have taken this interlocutory appeal from the rejection of the immunity defenses. We reverse.

USA v. Wilson Titus No. 15-3054

Argued April 19, 2016 — Decided May 12, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. 13-cr-761 — **Charles R. Norgle, Sr.**, *Judge*.
Before BAUER, POSNER, and FLAUM, *Circuit Judges*.

FLAUM, *Circuit Judge*. Defendant Wilson Titus pled guilty to bank fraud arising out of an extensive mortgage fraud scheme involving ten defendants and fifty-two residential properties. He was sentenced to thirty-six months in prison. He appeals, claiming that his sentence was procedurally unreasonable because the district court did not support the sentence with sufficient factual findings. We agree with Titus, and accordingly, we vacate his sentence and remand for resentencing.

Jamie Becker v. Zachary Effriechs No. 15-1363

Argued September 17, 2015 — Decided May 12, 2016

Case Type: Civil

Southern District of Indiana, Evansville Division. No. 12-cv-00182 — **William G. Hussman, Jr.**,
Magistrate Judge.
Before FLAUM, MANION, and SYKES, *Circuit Judges*.

MANION, *Circuit Judge*. Jamie Becker sued Evansville, Indiana police officer Zachary Elfreich under 42 U.S.C. § 1983, alleging Officer Elfreich used excessive force in arresting him in violation of his Fourth Amendment rights. Becker claimed Officer Elfreich used excessive force because, after Becker had surrendered, Officer Elfreich pulled him down three steps and placed his knee on his back while allowing a police dog to continue to bite him. Officer Elfreich moved for summary judgment, arguing he was

entitled to qualified immunity because his conduct did not constitute excessive force or, alternatively, that it did not violate clearly established constitutional law. The district court denied Officer Elfreich's motion for summary judgment. Officer Elfreich appeals, interlocutorily, arguing that he is entitled to qualified immunity. We conclude that based on the record, Officer Elfreich has not established that he is entitled to qualified immunity. We affirm and remand for further proceedings consistent with this opinion.

Leonard Fuqua v. Megan Brennan No. 15-3226

Submitted May 13, 2016 — Decided May 13, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 12 C 6977 — **Thomas M. Durkin**, *Judge*.

Before MICHAEL S. KANNE, *Circuit Judge*; DIANE S. SYKES, *Circuit Judge*; DAVID F. HAMILTON, *Circuit Judge*.

ORDER

Leonard Fuqua, a former postal worker, appeals the district court's (1) grant of summary judgment for the Postal Service on his claim that he was discriminated against based on his age, in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 633a(a), (c); (2) dismissal of his "hybrid" claims under the Postal Reorganization Act, 39 U.S.C. § 1208(b), that the United States Postal Service breached a collective bargaining agreement and that his union breached its duty of fair representation by failing to challenge the Postal Service's actions; and (3) denial of his petition for a writ of mandamus ordering the clerk of the district court to issue a default judgment against a non-party. We affirm.

USA v. Richard Clark No. 15-3002

Submitted May 13, 2016 — Decided May 13, 2016

Case Type: Civil

Eastern District of Wisconsin. No. 15-CV-100-JPS — **J.P. Stadtmueller**, *Judge*.

Before MICHAEL S. KANNE, *Circuit Judge*; DIANE S. SYKES, *Circuit Judge*; DAVID F. HAMILTON, *Circuit Judge*.

ORDER

The government sued Richard Clark in federal court seeking to collect more than \$180,000 in unpaid income taxes and penalties. See 26 U.S.C. §§ 7401, 7403; 28 U.S.C. §§ 1340, 1345. The district court entered summary judgment for the government, and Clark now asks us to overturn that decision. We conclude, however, that Clark's notice of appeal was untimely, and we thus dismiss the appeal for lack of jurisdiction.

Felix D. Guzman-Rivadeneira v. Loretta E. Lynch No. 14-3734

Argued April 26, 2016 — Decided May 13, 2016

Case Type: Agency

Petition for Review of an Order of the Board of Immigration Appeals. No. A044 666 731

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

HAMILTON, *Circuit Judge*. Petitioner Felix Guzman-Rivadeneira, a citizen of Ecuador, seeks review of a Board of Immigration Appeals decision upholding an order of removal. He asks us to address an underlying question of law, whether his 1993 conviction in California for possessing counterfeit prescription blanks was properly deemed a "crime involving moral turpitude" for purposes of immigration law. We conclude, however, that too many layers of procedural defaults prevent us from reaching that question of law... we DENY the petition for review.

USA v. Jerry Brown, et al. Nos. 14-1363, 14-1364, 14-1426 & 14-2689

Argued November 9, 2015 — Decided May 13, 2016

Case Type: Criminal

Central District of Illinois. No. 12-cr-40031 — **Sara Darrow**, *Judge*.

Before WOOD, *Chief Judge*, ROVNER, *Circuit Judge*, and SHAH, *District Judge*.

WOOD, *Chief Judge*. This case involves a conspiracy to distribute crack cocaine in Kewanee, Illinois, and surrounding areas. Spotting the opportunity for profit, Chicago drug dealer Frederick Coleman and a colleague began to focus on Kewanee in late 2008. Eventually, Jerry Brown, Darrion Capers, Nicholas Clark, Qubid Coleman, and James Tatum (among others) joined their operation. The police eventually caught up with them, and in 2012 they were charged by a grand jury with conspiracy to distribute and possess with intent to distribute at least 280 grams of crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846. Qubid Coleman and Tatum pleaded guilty and are not part of this appeal. Frederick Coleman, Brown, Capers, and Clark were convicted after a jury trial and sentenced to varying terms of imprisonment and supervised release. These four have appealed. Before this court, they raise challenges to both their convictions and their sentences. Finding no reversible error, we affirm the judgments 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](#).