

Opinions for the week of October 24 - October 28, 2016

Jairo Ramos v. Gary Hamblin No. 15-3052

Argued September 9, 2016 — Decided October 24, 2016

Case Type: Prisoner

Western District of Wisconsin. No. 1:13-cv-00044-WCG — **William C. Griesbach**, *Chief Judge*.
Before POSNER, MANION, and WILLIAMS, *Circuit Judges*.

POSNER, *Circuit Judge*. The plaintiff, who is appealing the dismissal, resulting from the judge's grant of the defendants' motion for summary judgment, of the plaintiff's suit under 42 U.S.C. § 1983 alleging punishment that violated the Eighth Amendment, was at the time relevant to this suit a prisoner at Stanley Correctional Institution, a Wisconsin medium-security prison, serving a long prison term for homicide. In the fourteenth year of his imprisonment (though only his fifth year at Stanley), he was placed in a cell with a prisoner in his second year at Stanley named DaSilva, who one night twelve days later sexually assaulted the plaintiff in the cell... The plaintiff promptly reported DaSilva's sexual assault of him to a correctional officer, who notified her superiors, who conducted a thorough investigation that resulted in a criminal charge being lodged against DaSilva, also a disciplinary charge against him for disobeying prison regulations regarding sexual assault, and finally an official notice that the plaintiff and DaSilva were not to share a cell. The complaint charges the defendants, who are supervisory personnel at Stanley, including its warden, with deliberate indifference to the danger of the plaintiff's being sexually assaulted by DaSilva... the plaintiff has no case, and so his suit was rightly dismissed by the district court. AFFIRMED.

Central States, Southeast and v. AIG No. 15-2237

Argued December 7, 2015 — Decided October 24, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 14 C 5195 — **John Z. Lee**, *Judge*.
Before FLAUM, WILLIAMS, and SYKES, *Circuit Judges*.

SYKES, *Circuit Judge*. A self-funded ERISA plan has sued several independent health insurers seeking reimbursement for medical expenses it paid on behalf of beneficiaries who were covered under both the plan and the insurers' policies. We're asked to decide whether a lawsuit like this one—a "coordination of benefits" dispute—seeks "appropriate equitable relief" under section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3). Six circuits have held that section 502(a)(3) does not authorize suits of this type because the relief sought is legal, not equitable. We join this consensus and affirm the dismissal of the ERISA plan's suit.

USA v. Sanford-Brown, Limited No. 14-2506

Argued January 8, 2015 — Decided October 24, 2016

Case Type: Civil

Eastern District of Wisconsin. No. 12-cv-00775 — **J. P. Stadtmueller**, *Judge*.
Before BAUER, MANION, and ROVNER, *Circuit Judges*.

MANION, *Circuit Judge*. This matter is before us on remand from the United States Supreme Court for reconsideration in light of its recent decision in *Universal Health Services, Inc. v. United States*, 136 S. Ct. 1989 (2016)... The only part of our previous opinion, *United States v. Sanford-Brown, Ltd.*, 788 F.3d 696 (7th Cir. 2015), that is affected by the holding in *Universal Health* is part IV(B)(2), which addressed the plaintiff-relator's false presentment claim under 31 U.S.C. § 3729(a)(1)(A) of the False Claims Act. We readdress that claim here in light of *Universal Health* and substitute the following discussion for part IV(B)(2) of our earlier opinion. The remainder of our previous opinion is reinstated, and we once again affirm the district court in all respects.

USA v. Matthew Elder No. 15-2584

Argued September 9, 2016 — Decided October 25, 2016

Case Type: Criminal

Southern District of Indiana, Evansville Division. No. 13-cr-00017 — **Richard L. Young**, *Chief Judge*.
Before POSNER, MANION, and WILLIAMS, *Circuit Judges*.

MANION, *Circuit Judge*. Matthew Elder was convicted for conspiracy to distribute methamphetamine and sentenced to a mandatory term of life imprisonment. He now appeals his conviction and sentence. For the reasons that follow, we affirm Elder's conviction but vacate his sentence and remand for resentencing.

George David v. Wal-Mart Stores, Inc. No. 16-2366

Submitted October 27, 2016 — Decided October 27, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 11 C 8833 — **Gary Feinerman**, *Judge*.
Before WILLIAM J. BAUER, *Circuit Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; MICHAEL S. KANNE, *Circuit Judge*.

ORDER

A district court granted George David's application for leave to proceed in forma pauperis in this lawsuit alleging that his former employer violated the Americans with Disabilities Act by laying him off in 2008. But when the district court learned that David had concealed assets from his application, the court found that his allegation of poverty was a lie, and it dismissed the suit with prejudice. We conclude that the district court properly exercised its discretion, and thus we affirm the judgment.

USA v. Oscar Rash No. 16-1672

Argued October 5, 2016 — Decided October 27, 2016

Case Type: Criminal

Eastern District of Wisconsin. No. 07 CR 201 — **Charles N. Clevert, Jr.**, *Judge*.
Before BAUER, FLAUM, and KANNE, *Circuit Judges*.

BAUER, *Circuit Judge*. Oscar Rash, who was convicted of possessing a firearm as a felon, see 18 U.S.C. § 922(g)(1), challenges the district court's decision to apply a two-level upward adjustment for obstruction of justice. At his trial Rash had conceded to possessing the gun, but the district court found at sentencing that he had also deceptively downplayed his involvement with the gun. Rash argues that, because he conceded possession, his false testimony about his connection to the gun was immaterial to his conviction. But because the district court reasonably concluded that Rash's lie could have misled the jury to acquit him, the lie was material and the adjustment for obstruction was proper. Therefore we affirm.

Jamell Malone v. Securitas Security Services No. 16-1638

Submitted October 27, 2016 — Decided October 27, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 13 C 8747 — **John Robert Blakey**, *Judge*.
Before WILLIAM J. BAUER, *Circuit Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; MICHAEL S. KANNE, *Circuit Judge*.

ORDER

Jamell Malone appeals from the dismissal of this lawsuit claiming that his employer fired him unlawfully and that his union breached a duty to challenge the dismissal. The district court dismissed the action for failure to prosecute but noted that, regardless, his claims were untimely. We conclude that the court properly exercised its discretion in dismissing the suit and affirm the judgment.

Chance Kelham v. CSX Transportation, Inc. No. 16-1544

Argued September 22, 2016 — Decided October 27, 2016

Case Type: Civil

Northern District of Indiana, Hammond Division. No. 2:12-cv-00316 — **Andrew P. Rodovich**, *Magistrate Judge*.

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

POSNER, *Circuit Judge*. The plaintiff, Chance Kelham, a railroad engineer, sued the railroad that employed him, accusing it of having negligently caused him to be injured, for which he seeks compensation under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq. The case was tried to a jury, which exonerated the railroad, precipitating this appeal... AFFIRMED.

USA v. Charles Haney No. 16-1513

Argued October 5, 2016 — Decided October 27, 2016

Case Type: Criminal

Central District of Illinois. No. 15-30041 — **Sue E. Myerscough**, *Judge*.

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

PER CURIAM. Charles Haney pled guilty to possessing a gun as a felon. See 18 U.S.C. § 922(g)(1). The district court found that Haney had at least three prior convictions that qualified as "violent felonies" under the Armed Career Criminal Act and sentenced him to the mandatory minimum of fifteen years' imprisonment. See *id.* § 924(e)(1). On appeal Haney argues that, in light of recent decisions by this court and the Supreme Court, his prior convictions for burglary in Illinois are not appropriate predicates under the ACCA. We agree, vacate the district court's judgment, and remand for resentencing.

Jacquelyn Carlson v. Christian Brothers Services No. 15-3807

Argued September 28, 2016 — Decided October 27, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 15 C 1154 — **John Robert Blakey**, *Judge*.

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

POSNER, *Circuit Judge*. The plaintiff filed this suit against her former employer, defendant Christian Brothers Services (the parties refer to it as CBS), charging disability discrimination. CBS is a religious organization headquartered near Chicago that provides health and a number of other services to the Roman Catholic community in Illinois, other parts of the United States, and Canada... The plaintiff, a senior customer service representative of the defendant, was in an automobile accident in March 2011 as a result of which she had to use a cane, and limped, and she was fired on February 1, 2012, because (she contends) of a perceived disability (mobility impairment) caused by the accident that had required her to take time off from work and to use her health insurance to pay the costs she'd incurred as a result of the accident. She argues that in these circumstances her employer's firing her violated the Americans with Disabilities Act... AFFIRMED.

Jason Hosea v. Willis Slaughter No. 15-2660

Submitted October 27, 2016 — Decided October 27, 2016

Case Type: Civil

Central District of Illinois. No. 14-1397 — **James E. Shadid**, *Chief Judge*.

Before RICHARD A. POSNER, *Circuit Judge*; JOEL M. FLAUM, *Circuit Judge*; KENNETH F. RIPPLE, *Circuit Judge*.

ORDER

Jason Hosea challenges the dismissal of his suit under 42 U.S.C. § 1983 against the manager and owner of a storage lot (Willis Slaughter and Steve Timmerman), a police officer (Todd Keil), and two municipalities. His complaint appears to arise out of a dispute relating to cars that he stores at the lot. He alleges that Slaughter and Timmerman “racially discriminat[ed]” against him by “trying to cheat” him out of his “vehicles” and “involving” the police to “make it look legal.” The district court dismissed Hosea’s complaint for failure to state a claim. It reasoned that Hosea did not allege that either Slaughter or Timmerman acted “under color of state law,” as required for claims under § 1983. It also explained that Hosea did not allege that Keil violated any of Hosea’s constitutional rights or that his injuries arose from a municipal practice. Because this reasoning is correct, we affirm the district court’s judgment.

Wanda E. Torrence v. Comcast Corporation No. 16-2544

Submitted October 27, 2016 — Decided October 28, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 15 C 6651 — **Robert W. Gettleman**, *Judge*.

Before WILLIAM J. BAUER, *Circuit Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; MICHAEL S. KANNE, *Circuit Judge*.

ORDER

Wanda Torrence appeals from the district court’s judgment upholding a bankruptcy court’s dismissal of her adversary complaint. In that complaint, she asserted various tort and consumer-protection claims based on Comcast’s violation of the stay that took effect automatically upon the filing of her bankruptcy petition. We affirm.

Barry Donohoo v. Douglas Hanson No. 16-2405

Submitted October 27, 2016 — Decided October 28, 2016

Case Type: Civil

Western District of Wisconsin. No. 14-cv-309-wmc — **William M. Conley**, *Chief Judge*.

Before WILLIAM J. BAUER, *Circuit Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; MICHAEL S. KANNE, *Circuit Judge*.

ORDER

Barry Donohoo appeals the grant of summary judgment against his claim that local officials in Douglas County, Wisconsin, violated his constitutional rights when they denied him a land-use permit. The district court concluded that this was a matter for local land-use agencies or the state court, and that Donohoo failed to offer proof that any of his constitutional rights had been violated. We affirm.

Corky Terry v. Donald Stolworthy No. 16-1349

Submitted October 27, 2016 — Decided October 28, 2016

Case Type: Prisoner

Central District of Illinois. No. 15-1212 — **Joe Billy McDade**, *Judge*.

Before WILLIAM J. BAUER, *Circuit Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; MICHAEL S. KANNE, *Circuit Judge*.

ORDER

Corky Terry, an Illinois prisoner, filed this suit under 42 U.S.C. § 1983, contending that prison officials placed him in administrative detention at Pontiac Correctional Center without due process. The district court screened Terry's amended complaint under 28 U.S.C. § 1915A and dismissed his suit for failure to state a claim. It concluded that his placement in administrative detention did not deprive him of liberty, so no process was due. For slightly different reasons, we agree with the district court that Terry failed to state a claim, so we affirm the judgment.

USA v. Kenneth Harris, Jr. No. 16-1301

Submitted October 27, 2016 — Decided October 28, 2016

Case Type: Criminal

Southern District of Illinois. No. 4:15-CR-40041-SMY — **Staci M. Yandle**, *Judge*.

Before WILLIAM J. BAUER, *Circuit Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; MICHAEL S. KANNE, *Circuit Judge*.

ORDER

Kenneth Harris pleaded guilty to escaping from a halfway house... and was sentenced to 21 months' imprisonment and 3 years' supervised release. Harris filed a notice of appeal, but his appointed counsel asserts that the appeal is frivolous and moves to withdraw... we GRANT counsel's motion to withdraw and DISMISS the appeal.

Dennis Tonn v. Michael Meisner No. 15-3888

Submitted October 27, 2016 — Decided October 28, 2016

Case Type: Prisoner

Western District of Wisconsin. No. 14-cv-481-jdp — **James D. Peterson**, *Judge*.

Before RICHARD A. POSNER, *Circuit Judge*; JOEL M. FLAUM, *Circuit Judge*; KENNETH F. RIPPLE, *Circuit Judge*.

ORDER

Dennis Tonn, a Wisconsin inmate formerly incarcerated at Columbia Correctional Institution, sued several prison officers under 42 U.S.C. § 1983 for due process violations in connection with restitution he was ordered to pay after being found to possess medication that was not prescribed to him. The district court concluded that he failed to exhaust administrative remedies and granted summary judgment against him. We affirm because we agree that Tonn did not follow the required administrative procedures for filing his complaint.

USA v. Pawel W. Wrobel and Marek Stanislawczyk Nos. 15-2511 and 15-3106

Argued September 20, 2016 — Decided October 28, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 12 CR 650 — **Rebecca R. Pallmeyer**, *Judge*.

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

BAUER, *Circuit Judge*. On August 14, 2012, Slawomir Wieckowicz, a confidential informant, alerted FBI agents of a phone call he had with Zbigniew Oziemski, in which Oziemski solicited Wieckowicz's help in planned robberies that were to occur in New York. Wieckowicz told the FBI agents of Oziemski's plan to travel from Poland to New York, and then to Chicago. In Chicago, Oziemski would meet with Marek Stanislawczyk, and then they would travel to New York to commit the robberies... Assuming a successful robbery, Wrobel and Stanislawczyk expected to sell the stolen diamonds to an individual Wrobel knew as "Alex," purportedly a former business partner of Reichman. They predicted that the robbery would net between one to three million dollars... Under the supervision of the FBI, Wieckowicz rented a van

equipped with both New York license plates and a sliding door. The FBI also equipped the rental van with a recording device... On August 21, 2012, the group checked into a Comfort Inn near Linden, New Jersey, at approximately 6:30 a.m. Shortly thereafter, Stanislawczyk, Wrobel, and the two others (including the confidential informant) were arrested by the FBI... On November 6, 2012, Wrobel, Stanislawczyk, and Oziemski were charged in an indictment with conspiring to obstruct, delay, and affect commerce by robbery of diamonds and other valuables, in violation of the Hobbs Act, 18 U.S.C. § 1951(a) (Count 1); and, attempting to obstruct, delay, and affect commerce by robbery in violation of § 1951(a) (Count 2). On October 8, 2013, a Superseding Indictment added a third count, and extortion allegations to Counts 1 and 2. Prior to the case going to the jury, the government dismissed the extortion allegations from Counts 1 and 2, and Count 3 in its entirety... we AFFIRM Wrobel and Stanislawczyk's convictions, and AFFIRM Stanislawczyk's sentence.

Derrick Harrison v. Wexford Health Services No. 15-2606

Submitted October 27, 2016 — Decided October 28, 2016

Case Type: Prisoner

Northern District of Illinois, Eastern Division. No. 13 C 3256 — **Thomas M. Durkin**, *Judge*.

Before RICHARD A. POSNER, *Circuit Judge*; JOEL M. FLAUM, *Circuit Judge*; KENNETH F. RIPPLE, *Circuit Judge*.

ORDER

Derrick Harrison, an Illinois inmate, sued two prison employees, Wexford Health Sources, and the prison's medical director for deliberate indifference in treating his back injury after he fell while trying to close several high windows. The district court granted the defendants' motions for summary judgment. We affirm.

USA v. Antonio Crawford No. 15-2398

Submitted October 27, 2016 — Decided October 28, 2016

Case Type: Criminal

Central District of Illinois. No. 13-10048-001 — **James E. Shadid**, *Chief Judge*.

Before WILLIAM J. BAUER, *Circuit Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; MICHAEL S. KANNE, *Circuit Judge*.

ORDER

Antonio Crawford, an Illinois prisoner, mailed to the federal courthouse in Portland, Maine, several letters vowing that federal judges and prosecutors in that district would "pay" just as he had "paid all my money to see most of yall dead." He also wrote that he would rape the assistant United States attorney allegedly responsible for prosecuting his "brother." Crawford was charged with mailing threatening communications in violation of 18 U.S.C. § 876(c). That provision makes it a crime to send by mail an objectively threatening communication with intent to communicate a threat or with knowledge (or, possibly reckless disregard) that the communication will be viewed as threatening... Crawford was evaluated and found competent to stand trial. He then pleaded guilty after trying unsuccessfully to have the § 876(c) charge dismissed on the ground that his threats were speech protected under the First Amendment. The district court sentenced him at the low end of the guidelines range to 70 months' imprisonment, running consecutively to his undischarged state sentence.

Crawford filed a notice of appeal, but his newly appointed attorney asserts that the appeal is frivolous and seeks to withdraw... we GRANT the motion to withdraw and DISMISS the appeal.

Mustafa Ozsusamlar v. David Szoke No. 15-1841

Submitted October 27, 2016 — Decided October 28, 2016

Case Type: 15-1841

Southern District of Illinois. No. 3:11-cv-844-DGW — **Donald G. Wilkerson**, *Magistrate Judge*.
Before WILLIAM J. BAUER, *Circuit Judge*;FRANK H. EASTERBROOK, *Circuit Judge*;MICHAEL S.
KANNE, *Circuit Judge*.

ORDER

Mustafa Ozsusamlar, a federal prisoner, brought suit under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), contending that prison physician David Szoke violated the Eighth Amendment by deliberately withholding necessary medical treatment for a nasal infection, dental problems, an inguinal hernia, and kidney stones. A magistrate judge, presiding by consent, see 28 U.S.C. § 636(c), granted summary judgment for Szoke, reasoning that Ozsusamlar had not introduced evidence from which a jury reasonably could conclude that Szoke's treatment was plainly deficient. Ozsusamlar has appealed that decision, but after the parties had filed their briefs we discovered that he sought and obtained leave to proceed with this appeal in forma pauperis despite knowing he was ineligible to do so because he already had accumulated three "strikes" under the Prison Litigation Reform Act. See 28 U.S.C. § 1915(g). We thus dismiss his appeal.

Ronald M. Carpenter, Jr. v. Timothy Douma No. 15-1688

Argued September 8, 2016 — Decided October 28, 2016

Case Type: Prisoner

Eastern District of Wisconsin. No. 14-CV-771 — **J. P. Stadtmueller**, *Judge*.

Before WOOD, *Chief Judge*,and KANNE and HAMILTON, *Circuit Judges*.

KANNE, *Circuit Judge*.A jury convicted Ronald Marion Carpenter, Jr. of kidnapping, false imprisonment, and several counts of sexual assault. Carpenter challenged his conviction on both direct and collateral review in Wisconsin state court. His conviction was affirmed, and his state petition for a writ of habeas corpus was denied. Carpenter then filed a petition for a writ of habeas corpus in the Eastern District of Wisconsin. By the time he filed this federal petition, however, the one-year statutory limitation period had already passed. The district court dismissed Carpenter's petition as untimely. Carpenter does not dispute that his petition was untimely; instead, he argues that his delay should be equitably tolled and that we should hear the merits of his case. Because Carpenter has not met the standard for equitable tolling, we agree with the district court. We hold that Carpenter's petition is untimely and thus was properly denied.

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](#).