

## Opinions for the week of January 11 - January 15, 2015

**William I. Babchuk, M.D., P.C. v. Indiana University Health, Inc.** No. 15-1816

Argued October 2, 2015 — Decided January 11, 2016

Case Type: Civil

Southern District of Indiana, Indianapolis Division. No. 1:13-cv-01376-JMS-DML — **Jane E. Magnus-Stinson**, *Judge*.

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

POSNER, *Circuit Judge*. Dr. William Babchuk, a radiologist, brought this suit against Indiana University Health Tipton Hospital, Inc. (Tipton Hospital for short), under 42 U.S.C. § 1983, which creates a federal remedy for violations of constitutional rights by what are called “state actors.” See *West v. Atkins*, 487 U.S. 42, 49–50 (1988). In 2003 Tipton awarded Babchuk medical staff privileges, and either then or later also gave his professional corporation an exclusive contract to provide radiology services at the hospital. The suit charges that the hospital and its administrators deprived him of property without due process of law, in violation of the Fourteenth Amendment, when in 2012 it cancelled both his medical privileges and his corporation’s contract. His professional corporation is an additional plaintiff. The defendants include besides Tipton Hospital the hospital’s owner, Indiana University Health, Inc., plus some persons employed by the corporate defendants—but we can ignore those persons. The district judge granted summary judgment in favor of all the defendants. She reasoned that the plaintiffs had failed to prove they had a federally protected property interest in Dr. Babchuk’s hospital privileges or in the contract between his professional corporation and the hospital. An alternative ground for affirmance urged by the defendants is that the conduct of which Babchuk complains is not state action and is therefore not actionable under 42 U.S.C. § 1983... So this is not a case in which “it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains.” *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (emphasis in original). The fact that some of Tipton Hospital’s revenues are siphoned off to the state university no more makes the hospital a state actor than the fact that tax laws siphon income from private companies and individuals to state and federal treasuries. The university may well exert pressure direct and indirect on Tipton Hospital, just as federal and state governments in manifold ways exert pressure on private institutions. Government is omnipresent; that doesn’t make all employees of private entities state actors. The judgment in favor of the defendants is AFFIRMED.

**Delbert Heard v. Andrew Tilden** No. 15-1732

Submitted December 4, 2015\* — Decided January 11, 2016

Case Type: Prisoner

Central District of Illinois No. 14-1027 — **Joe Billy McDade**, *Judge*.

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

PER CURIAM. Delbert Heard, an Illinois inmate, claims in this lawsuit under 42 U.S.C. § 1983 that the defendants— Dr. Lewis Shicker, the medical director for the Department of Corrections; Wexford Health Sources, which contracts with the Department to provide medical care for inmates; and Dr. Andrew Tilden, a Wexford employee—violated the Eighth Amendment’s ban on cruel and unusual punishment by delaying surgery for a hernia. At screening, see 28 U.S.C. § 1915A, the district court concluded that Heard’s complaint states a claim of deliberate indifference to a serious medical need, see FED. R. CIV. P. 12(b)(6). The court, though, did not allow Heard to proceed against Dr. Shicker, reasoning that the medical director was sued in his official capacity and thus, as a substitute for the State of Illinois, was not a “person” subject to liability under § 1983. See *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989). Later the court granted summary judgment for Wexford and Dr. Tilden, who argued that Heard had released them from liability when he settled two earlier lawsuits. Those lawsuits alleged, as here, that Wexford and its physicians had delayed surgery for hernias. On appeal Heard argues, and we agree, that both rulings are erroneous... The judgment in favor of Dr. Shicker, Wexford, and Dr. Tilden is VACATED, and the case is remanded for further proceedings consistent with this opinion. We express no view about the merits of Heard’s claim of deliberate indifference as to any of these defendants but

recommend that the district court consider appointing counsel to represent Heard in this action. The judgment is AFFIRMED with respect to the dismissal of Dr. Funk.

**Sergio Isunza v. Loretta E. Lynch** No. 15-1286

Argued November 30, 2015 — Decided January 11, 2016

Case Type: Agency

Board of Immigration Appeals No. A044-567-013.

Before ROVNER, and WILLIAMS, *Circuit Judges*, and SHAH, *District Judge*.

SHAH, *District Judge*. Sergio Isunza seeks judicial review of a decision of the Board of Immigration Appeals denying reconsideration of its dismissal of Isunza's appeal. Our jurisdiction to review such a decision is quite limited because Isunza did not seek review of the Board's original dismissal of his appeal and he is removable because he committed a controlled substance offense. The Board exercised its discretion not to reconsider its decision and it committed no legal error in applying precedent to Isunza's appeal. The petition is dismissed in part for lack of jurisdiction and denied in part.

**Peter Enger v. Chicago Carriage Cab Corp.** No. 15-1057

Argued December 7, 2015 — Decided January 11, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 1:14-CV-02117 — **Andrea R. Wood**, *Judge*.

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

FLAUM, *Circuit Judge*. Plaintiff taxi drivers (collectively, "the drivers") brought a class action suit against their taxi company employers. The drivers contend that defendants violated the Illinois Wage Payment and Collection Act, 820 ILCS 115 *et seq.* ("IWPCA"), by improperly charging them to work and forcing them to bear their own operating expenses, among other things. The drivers also assert a cause of action based on a theory of unjust enrichment. Defendants filed a motion to dismiss. The IWPCA provides employees with a cause of action against employers for the timely and complete payment of earned wages. The Act defines "wages" narrowly—a wage is compensation owed *by the employer* pursuant to an employment agreement between the parties. See 820 ILCS 115/2. The district court assumed for purposes of the motion to dismiss that the drivers were employees and that the parties had entered into an employment agreement. But the court granted defendants' motion to dismiss because that employment agreement did not obligate defendants to compensate the drivers, and thus, the drivers' claims regarding improper fees could not be brought under the IWPCA. For the reasons that follow, we affirm the judgment of the district court.

**Laura Kubiak v. City of Chicago** No. 14-3074

Argued December 7, 2015 — Decided January 11, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 14-CV-1159 — **Samuel Der-Yeghiayan**, *Judge*.

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

FLAUM, *Circuit Judge*. Officer Laura Kubiak was working in the Chicago Police Department's Office of News Affairs ("ONA") when she was verbally assaulted by her colleague, Officer Veeja Zala. Kubiak reported Zala to (1) ONA Director Melissa Stratton, (2) Kubiak's supervising Lieutenant, Maureen Biggane, and (3) the Internal Affairs Division ("IAD"). Three months later, Biggane ordered Kubiak to leave ONA and return to her prior position as a beat patrol officer. Kubiak filed a complaint against the City of Chicago, Stratton, and Biggane, alleging retaliation in violation of the First Amendment and conspiracy to deprive her of her constitutional rights pursuant to 42 U.S.C. § 1983. The district court

granted defendants' motion to dismiss for failure to state a claim on which relief can be granted. Kubiak appeals. We affirm.

**Ulises Martinez Lopez v. Loretta E. Lynch** No. 14-3805  
Argued November 12, 2015 — Decided January 12, 2016  
Case Type: Agency  
Board of Immigration Appeals. No. A087-774-862  
Before BAUER, FLAUM, and MANION, *Circuit Judges*.

BAUER, *Circuit Judge*. Petitioner, Ulises Martinez Lopez ("Petitioner"), filed a petition for review with this court seeking to vacate the order from the Board of Immigration Appeals ("BIA") that upheld his removal from the United States due to his conviction of a particularly serious crime. For the reasons that follow, we affirm the BIA's decision.

**Kevin Loveless v. Carolyn Colvin** No. 15-2235  
Argued December 16, 2015 — Decided January 13, 2016  
Case Type: Civil  
Northern District of Indiana, Hammond Division at Lafayette. No. 4:14-cv-36 — **Joseph S. Van Bokkelen**, *Judge*.  
Before MANION, KANNE, and WILLIAMS, *Circuit Judges*.

KANNE, *Circuit Judge*. Kevin Loveless applied for Disability Insurance Benefits claiming that he could not work because of a shoulder impairment, diabetes, and pancreatitis. An Administrative Law Judge concluded, however, that Loveless could perform light work with restrictions. The Appeals Council and the district court upheld that determination, but Loveless insists that the ALJ erred by minimizing the opinion of his personal physician and disbelieving his own testimony about the limiting effects of his impairments. We reject these contentions.

**Luis Gutierrez-Rostran v. Loretta Lynch** No. 15-2216  
Argued December 15, 2015 — Decided January 13, 2016  
Case Type: Agency  
Board of Immigration Appeals. No. A200-882-317  
Before BAUER, POSNER, and HAMILTON, *Circuit Judges*.

POSNER, *Circuit Judge*. The petitioner, Luis Gutierrez-Rostran, a Nicaraguan citizen, entered the United States illegally in 2006, and decided to stay. Although his stated motive for immigrating was fear that the government of Nicaragua would encourage or condone his being murdered by its supporters because of his and his family's political views, he did not make a timely application for asylum. See 8 U.S.C. § 1158(a)(2)(B). In 2010 he was convicted of public intoxication and driving under the influence. After eight days in jail he was issued a Notice to Appear for immigration proceedings and released on bail the same day. Eventually he was ordered to be removed to Nicaragua. He then applied for asylum under 8 U.S.C. § 1158, and for withholding of removal under 8 U.S.C. § 1231(b)(3)(A) (formerly 8 U.S.C. § 1253(h)(1)(1990)) in the alternative. To obtain the second form of relief he had to show that his "life or freedom would be threatened in [Nicaragua] because of [his] race, religion, nationality, membership in a particular social group, or political opinion." The immigration court turned him down and the Board of Immigration Appeals affirmed, precipitating the petition for review that brings his case to us. ... The denial of withholding of removal and the affirmance of that denial by the BIA member who as the (entire) appeal "panel" denied the petitioner's appeal were not adequately reasoned and so must be set aside and the case returned to the Board for further proceedings consistent with this opinion. The petition for asylum is dismissed, however, as noted earlier in this opinion.

**Roberta Jaburek v. Anthony Foxx** No. 15-2165

Argued December 8, 2015 — Decided January 13, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 13 C 2150 — **Andrea R. Wood**, *Judge*.

Before WOOD, *Chief Judge*, and BAUER and WILLIAMS, *Circuit Judges*.

BAUER, *Circuit Judge*. Plaintiff-appellant, Roberta Jaburek, appeals the district court's grant of summary judgment in favor of defendant-appellee, Anthony Foxx, United States Secretary of Transportation. Appellant alleges that her employer, the Federal Aviation Administration, a division of the Department of Transportation, discriminated against her because of her national origin and sex. Specifically, she alleges that the FAA paid her less than other employees who did the same work that she did but did not share her protected class status, and that the FAA retaliated against her for complaining about such discrimination. She brings three causes of action: failure to promote in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*; violation of the Equal Pay Act, 29 U.S.C. § 206(d); and a Title VII retaliation claim. Because Appellant failed to produce the necessary evidence to establish *prima facie* claims for any of her causes of action, the district court granted summary judgment for Foxx on all counts. We affirm.

**USA v. Acasio Sanchez** No. 15-1356

Argued November 18 2015 — Decided January 13, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 13-cr-00576— **Robert M. Dow, Jr.**, *Judge*.

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

MANION, *Circuit Judge*. Acasio Sanchez pleaded guilty to conspiring to possess with intent to distribute and to distribute heroin and cocaine, 21 U.S.C. §§ 846, 841(a)(1), and was sentenced below the guidelines range to 40 months' imprisonment. Sanchez argues that the district court erred by applying a two-level enhancement for "maintain[ing] a premise for the purposes of manufacturing or distributing a controlled substance." U.S.S.G. § 2D1.1(b)(12). But the district court properly found that the enhancement was warranted and explained that it would have imposed the same sentence regardless. We affirm his sentence.

**Judy Fahrner v. Tiltware, LLC** Nos. 15-1885, 15-1887

**Kelly Sonnenberg v. Amaya Group Holdings, Ltd.**

Argued November 2, 2015 — Decided January 15, 2016

Case Type: Civil

Southern District of Illinois, Nos. 3:13-cv-00227-DRH-SCW, 3:13-cv-00344-DRH-SCW — **David R. Herndon**, *Judge*.

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

POSNER, *Circuit Judge*. The four plaintiffs have filed between them two diversity suits, governed by the substantive law of Illinois, against a variety of persons and companies that host Internet gambling websites. They contend that the defendants owe them the money that two of the plaintiffs (Casey Sonnenberg and Daniel Fahrner) lost in gambling on the defendants' websites. The district court granted the defendants' motions to dismiss, precipitating these two appeals. Although both suits are in federal court under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2), the district judge had not yet decided whether to certify the classes when he dismissed the complaints, and no class-action issue is presented by the appeals. ... Creating legal remedies for gambling losses as a way to discourage gambling seems a lost cause, since the usual gambling "loss" is not a real loss and hence is not a real spur to litigation

unless the game is rigged. A gambler knows that the money he puts in the pot is at risk. It is not a risk he *has* to take; he takes it because he hopes to win the pot, or simply because he likes gambling or risk taking in general. If he loses \$50 he may well say to himself “I’d rather have won, but \$50 wasn’t too high a price to pay for a night of gambling, and en route to losing \$50 I did after all win some nice pots and get compliments from the guys I was playing with.” The judgment dismissing the suits is AFFIRMED.

**Isaac Faulkner v. James Fenoglio** No. 15-1052

Submitted January 7, 2016 — Decided January 15, 2016

Case Type: Prisoner

Southern District of Illinois. No. 3:13-cv-00762-PMF — **Philip M. Frazier**, *Magistrate Judge*.

Before KENNETH F. RIPPLE, *Circuit Judge*; ANN CLAIRE WILLIAMS, *Circuit Judge*; DAVID F. HAMILTON, *Circuit Judge*.

**ORDER**

Isaac Faulkner, an Illinois inmate, appeals the grant of summary judgment against him in this suit under 42 U.S.C. § 1983 asserting that Dr. James Fenoglio, the prison’s medical director, was deliberately indifferent in treating his fractured wrist. A magistrate judge concluded that Faulkner had not produced evidence from which a jury reasonably could find that the doctor was deliberately indifferent. We affirm.

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](#).