

## **Opinions for the week of July 11 - July 15, 2016**

### **Hugo Angeles-Moran v. Loretta Lynch** No. 15-3609

Argued May 20, 2016 — Decided July 11, 2016

Case Type: Agency

Board of Immigration Appeals No. A200-808-046

Before JOEL M. FLAUM, *Circuit Judge*; DANIEL A. MANION, *Circuit Judge*; JORGE LUIS ALONSO, *District Judge*.

### **ORDER**

An Immigration Judge (“IJ”) found that Hugo Angeles-Moran was a citizen of Mexico and was removable. The Board of Immigration Appeals (“Board”) affirmed. Angeles-Moran appeals, arguing that the government failed to establish that he was a citizen of Mexico because an I-213 form (which established this fact) was not part of the removal record. It was part of the record, and we affirm.

### **Susan Shott v. Robert Katz** No. 15-3528

Argued April 26, 2016 — Decided July 11, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 15 C 4863 — **Virginia M. Kendall**, *Judge*.

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

HAMILTON, *Circuit Judge*. Susan Shott, a tenured associate professor of biostatistics at Rush University Medical Center, brought this lawsuit under 42 U.S.C.

§ 1981 alleging that one of her colleagues, Dr. Robert Katz, retaliated against her for complaining about anti-Jewish discrimination in the work-place. The district court dismissed her complaint for failure to state a claim. We affirm.

### **Ana Veronica Jimenez Ferreira v. Loretta Lynch** No. 15-2603

Argued June 8, 2016 — Decided July 12, 2016

Case Type: Agency

Board of Immigration Appeals. No. A200-892-195

Before WILLIAM J. BAUER, *Circuit Judge* DANIEL A. MANION, *Circuit Judge* MICHAEL S. KANNE, *Circuit Judge*

### **ORDER**

Ana Veronica Jimenez Ferreira, a 40-year-old native and citizen of the Dominican Republic, applied for asylum and withholding of removal based on her membership in a social group that she describes as Dominican women in relationships they cannot leave. Jimenez testified in immigration court that she fled to the United States because the government of her home country would not protect her from her common-law husband, who had raped, beaten, and kidnapped her, and who continually stalked her and threatened to kill her and her two children. The immigration judge denied relief on the grounds that Jimenez was not credible and lacked corroborating evidence, and the Board of Immigration Appeals upheld the IJ’s decision. The agency’s adverse credibility determination was based largely on purported inconsistencies between Jimenez’s testimony at the removal hearing and her earlier statements to an asylum officer during a “credible-fear” interview. We conclude that the agency erred by (1) failing to address Jimenez’s argument that the notes from the credible-fear interview are unreliable and therefore an improper basis for an adverse credibility finding and (2) ignoring material documentary evidence that corroborates Jimenez’s testimony. Accordingly, we grant Jimenez’s petition for review and remand for further proceedings.

**American Alternative Insurance v. Metro Paramedic Services, Inc.** No. 15-2310

Argued December 8, 2015 — Decided July 12, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 14 C 01235 — **John J. Tharp, Jr.**, *Judge*.  
Before WOOD, *Chief Judge*, and BAUER and WILLIAMS, *Circuit Judges*.

WOOD, *Chief Judge*. This is a dispute over who is entitled to coverage under a liability insurance policy. In the underlying lawsuit, three female employees of Metro Paramedic Services sued Metro Paramedic Services and Antioch Rescue Squad, two Illinois ambulance services, alleging an unrelenting practice of egregious sexual harassment, assault and battery, retaliation for whistleblowing, and failure to supervise. Two of the employees resolved their claims on the basis of an offer of judgment from Metro and Antioch; the third reached a settlement with both. American Alternative Insurance Corporation (AAIC) is Antioch's liability insurer. In the underlying suit, AAIC covered Antioch's defense costs and indemnified its offers of judgment and settlement. It insisted, however, that it had no obligation to cover Metro under Antioch's policy. Seeking a declaratory judgment to this effect, it filed this suit. On cross-motions for judgment on the pleadings, the district court found that AAIC owed Metro a duty to defend. We conclude that this is indeed what the policy provides, and so we affirm the district court's judgment.

**Logan Gaylord v. USA** No. 15-1297

Argued June 1, 2016 — Decided July 12, 2016

Case Type: Prisoner

Central District of Illinois. No. 4:14-cv-4092 — **James E. Shadid**, *Chief Judge*.  
Before WOOD, *Chief Judge*, and BAUER and FLAUM, *Circuit Judges*.

FLAUM, *Circuit Judge*. Logan Gaylord pled guilty to conspiracy to distribute and to distribution of oxycodone. Ryan Evins ingested the oxycodone pills distributed by Gaylord, as well as cocaine from another source, and died. Gaylord was sentenced to 240 months imprisonment, the mandatory minimum sentence when death results from the distribution of a controlled substance under 21 U.S.C. § 841(b)(1)(C). Gaylord later brought a 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence, arguing that as a result of ineffective assistance of counsel, the "death results" enhancement of § 841(b)(1)(C) was inappropriately applied to his sentence. Specifically, Gaylord contended that the oxycodone he distributed was not shown to be the but-for cause of Evins's death, and thus counsel was ineffective for failing to object to the sentencing enhancement incorporated in the plea agreement. The district court dismissed Gaylord's § 2255 motion. For the reasons that follow, we vacate the district court's dismissal of Gaylord's § 2255 motion and remand to the district court for an evidentiary hearing on Gaylord's claim of ineffective assistance of counsel.

**Kathryn Marchetti v. Chicago Title Insurance Company** No. 15-1240

Argued October 28, 2015 — Decided July 12, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 12 C 5985 — **Sharon Johnson Coleman**, *Judge*.  
Before WOOD, *Chief Judge*, and EASTERBROOK and HAMILTON, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. In May 2008 Kathryn and Jonathon Marchetti purchased a parcel of real estate in Cook County, Illinois, for \$180,000. Peotone Bank and Trust lent them the entire price, plus \$155,000 to pay for improvements that the Marchettis planned to make. Jonathon Marchetti acted as buyer, real estate broker (he had a license from Illinois), mortgage broker, and general contractor for the

improvements. The Bank put up this \$335,000 notwithstanding the fact that, three months earlier, Jonathon had been indicted for mortgage and wire fraud regarding other real-estate transactions. He pleaded guilty in August 2008. This transaction, too, was affected by fraud, though this time Jonathon Marchetti was a victim. The parcel, which the Marchettis nominally acquired from Seville Development Corporation, actually was owned by an Illinois land trust established for the benefit of Carla Lekich. A series of sham transactions orchestrated by John Hodgman made it look as if Seville held title. In 2010 Lekich and her trust filed suit, seeking to quiet title in the parcel... There was a loss on this transaction, but it was incurred entirely by the Lender, which put in \$335,000 and got back \$110,000. It is not complaining, however, about the difference between \$110,000 and the policy limit of \$198,000, having settled with Chicago Title. The Marchettis have no remaining liability to the Lender, which gave them a complete release as part of the settlement. Lekich and her trust did not give the Marchettis a release, but they dismissed their suit, so the Marchettis have the benefit of the judgment's preclusive effect. If Lekich and the trust were to file a new suit, despite the judgment, Chicago Title might have a duty to defend, but that remote possibility cannot be the basis of the monetary relief that the Marchettis want now. AFFIRMED

**Gilbert Knowles v. Randy Pfister** No. 15-1703

Submitted June 15, 2016 — Decided July 13, 2016

Case Type: Prisoner

Central District of Illinois. No. 1:14-cv-01129-JES — **James E. Shadid**, *Chief Judge*.

Before WOOD, *Chief Judge*, and POSNER and FLAUM, *Circuit Judges*.

POSNER, *Circuit Judge*. The plaintiff, a prisoner in Illinois's Pontiac Correctional Center, appeals from the denial of his motion in the district court for a preliminary injunction that would allow him to wear a religious medal called a "pentacle medallion"—a five-pointed silver star set in a circle less than an inch in diameter. Here is a typical such medallion: ... The pentacle medallion is to the Wiccan religion what the cross is to many Christians; the plaintiff claims that it protects his body and his spirit against "harm, evil entities, and negative energy." The Wiccan religion (or "Wicca") is a neo-pagan, polytheistic, and pantheistic faith based on beliefs that predate Christianity. See *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 400 (7th Cir. 2003), citing Phyllis W. Curlott, *Wicca and Nature Spirituality, in Sourcebook of the World's Religions* 113 (Joel Beversluis ed., 3d ed. 2000); see also Selena Fox, "Introduction to the Wiccan Religion and Contemporary Paganism," *Circle Sanctuary*, [www.circlesanctuary.org/index.php/about-pagpaganism/introduction-to-the-wiccan-religion-and-contemporary-paganism](http://www.circlesanctuary.org/index.php/about-pagpaganism/introduction-to-the-wiccan-religion-and-contemporary-paganism) (visited July 12, 2016, as was the other web-site cited in this opinion). Although there is variation within the Wiccan community, most Wiccans practice witchcraft, worship nature, meditate, and participate in rituals celebrating the new and full moon. John Gordon Melton, "Wicca," *Encyclopædia Britannica*, [www.britannica.com/topic/Wicca](http://www.britannica.com/topic/Wicca). Courts have recognized that "the Church of Wicca occupies a place in the lives of its members parallel to that of more conventional religions." E.g., *Dettmer v. Landon*, 799 F.2d 929, 932 (4th Cir. 1986). The plaintiff, who is a Wiccan, obtained a one-inch pentacle medallion attached to a chain to wear around his neck. The medallion was small enough to comply with prison regulations regarding jewelry worn by prisoners. But the day after issuing him a jewelry retention permit the prison confiscated the medallion, precipitating this suit against the prison's warden under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1. The plaintiff filed this suit after failing to obtain relief through the prison's administrative process... The plaintiff tendered an affidavit from another Wiccan prisoner, who had prevailed in a suit to prevent the confiscation of *his* pentacle medallion. See *Goodman v. Walker*, No. 03-CV-202-WDS (S.D. Ill. Aug. 13, 2007). The affiant attested that he'd worn his medallion in maximum security prisons since 1998 without ever experiencing threats or violence from other inmates. The plaintiff has demonstrated his entitlement to the preliminary injunction that he is seeking. His freedom of religion has been gratuitously infringed by the prison. The judgment of the district court is reversed with instructions to grant the preliminary injunction sought by the plaintiff. REVERSED AND REMANDED, WITH INSTRUCTIONS

**USA v. Brian Miller** No. 15-2239

Argued February 25, 2016 — Decided July 14, 2016  
Case Type: Criminal  
Central District of Illinois. No. 13-CR-10098 — **James E. Shadid**, *Chief Judge*.  
Before BAUER, MANION, and KANNE, *Circuit Judges*.

KANNE, *Circuit Judge*. Defendant Brian Miller filmed at least five minor girls undressing and showering using a hole he made in his basement-bathroom wall. After a bench trial, the district court convicted him of twenty-two counts of sexual exploitation of children. Miller appeals, arguing that there was insufficient evidence to find that the videos he created were “lascivious.” He also challenges various aspects of his sentence and conditions of supervised release. We affirm.

**Laura Hatcher v. Board of Trustees of Southern** No. 15-1599

Argued November 30, 2015 — Decided July 14, 2016  
Case Type: Civil  
District of Illinois. No. 3:13-cv-00407 — Nancy J. Rosenstengel, Judge.  
Before ROVNER and WILLIAMS, *Circuit Judges*, and SHAH, *District Judge*.

WILLIAMS, *Circuit Judge*. Dr. Laura Hatcher was denied tenure by Southern Illinois University (SIU), and claims that it was because she is a woman, assisted a student in reporting an incident of sexual harassment by an SIU faculty member, and filed a charge against SIU with the Equal Employment Opportunity Commission. SIU responds that it denied Dr. Hatcher tenure because she produced insufficient scholarship. We agree with the district court that Dr. Hatcher did not produce evidence from which a jury could conclude that SIU was lying about its reason for denying her tenure. We also agree that she was not engaging in speech protected under Title VII or by the First Amendment when she assisted the student with the sexual harassment report. But because her complaint stated a plausible claim of retaliation under Title VII for filing a charge with the EEOC, we reverse and remand the dismissal of that claim.

**John Dawkins v. USA** No. 16-2683

Submitted June 24, 2016 — Decided July 15, 2016  
Case Type: Original Proceeding  
On Motion for an Order Authorizing the District Court to Entertain a Second or Successive Motion for Collateral Review  
Before WOOD, *Chief Judge*, and POSNER and HAMILTON, *Circuit Judges*.

PER CURIAM. John Dawkins has filed an application pursuant to 28 U.S.C. § 2244(b)(3), seeking authorization to file a successive motion to vacate under § 2255. Dawkins, who was sentenced as a career offender, wants to challenge his sentence under *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held that the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii) is unconstitutionally vague. We assume for purposes of this opinion that *Johnson* also invalidates the similar residual clause in the career-offender guideline. Dawkins was convicted of bank robbery, 18 U.S.C. § 2113(a), and using a firearm in furtherance of a crime of violence, *id.* § 924(c). He was sentenced as a career offender to 262 months’ imprisonment. His classification as a career offender rests on Illinois convictions for aggravated vehicular hijacking, 720 ILCS 5/18-4 (1993), and residential burglary, 720 ILCS 5/19-3 (1985). He previously has been denied permission to file a successive § 2255 motion under *Johnson v. United States*, 135 S. Ct. 2551 (2015). See *Dawkins v. United States*, 809 F.3d 953 (7th Cir. 2016). In denying the previous application, we concluded that residential burglary in Illinois is equivalent to generic burglary of a dwelling, which is enumerated as a crime of violence in the sentencing guidelines. See *id.* at 956;

U.S.S.G. § 4B1.2(a)(2)... Accordingly, we **DENY** authorization and **DISMISS** Dawkins's application.

**Kim Stevenson v. Carolyn Colvin** No. 15-3652

Argued June 8, 2016 — Decided July 15, 2016

Case Type: Civil

Northern District of Indiana, Hammond Division. No. 2:14-CV-203 — **Joseph S. Van Bokkelen**, *Judge*.  
Before WILLIAM J. BAUER, *Circuit Judge*; DANIEL A. MANION, *Circuit Judge*; MICHAEL S. KANNE, *Circuit Judge*.

**ORDER**

Kim Stevenson was denied disability benefits after claiming that she was disabled primarily by a left-wrist injury. An administrative law judge found that, despite this injury and its attendant limitations, she retained the residual functional capacity to perform past relevant work as a teacher aide-computer coach. Stevenson challenges both the adequacy of the ALJ's RFC finding and the ALJ's decision not to give more weight to the opinions of her primary-care physician. Because substantial evidence supports the ALJ's decision, we affirm.

**Bank of Commerce et al. v. Kenneth Hoffman, Jr.** Nos. 15-3326 & 15-3327

Argued April 13, 2016 — Decided July 15, 2016

Case Type: Civil

Central District of Illinois. Nos. 13-cv-04001 & 13-cv-04075 — **Sara Darrow**, *Judge*.  
Before EASTERBROOK, MANION, and ROVNER, *Circuit Judges*.

MANION, *Circuit Judge*. This litigation centers on the meaning of a settlement agreement and release signed by Kenneth Hoffman. Hoffman had several loan obligations to Country Bank, for which Bank of Commerce is now the successor in interest, and the settlement released Hoffman from his smallest loan. He urges that the release covered a bigger loan guarantee, too. We conclude that the release agreement did not, however, free him from that larger obligation. As a result, we affirm the district court's decision to grant summary judgment in favor of the Bank of Commerce.

**Robert Schaefer v. Walker Bros. Enterprises, Inc.** No. 15-1058

Argued September 25, 2015 — Decided July 15, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 10 C 6366 — **Charles Ronald Norgle**, *Judge*.  
Before WOOD, *Chief Judge*, and BAUER and EASTERBROOK, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Through corporations he controls, Ray Walker operates six Original® Pancake House restaurants in Illinois. Robert Schaefer, who worked as a server at three of these restaurants, contends that they violate the Fair Labor Standards Act, 29 U.S.C. §§ 201–19, and its state equivalent the Illinois Minimum Wage Law, 820 ILCS 105/1 to 105/15. Federal and state laws provide that tips count toward the minimum wage and permit employers to pay less in the expectation that tips will make up the difference. Both statutes require some cash payment from the employer, however, no matter how much a worker receives in tips. In Illinois the employer must pay at least 60% of the normal minimum wage. 820 ILCS 105/4(c). This is called the tip?credit rate in both state and federal nomenclature. Because the Illinois floor is higher than the federal minimum set by 29 U.S.C. §203(m)(1), the restaurants paid all servers the Illinois rate. The district court certified this suit as a class action on behalf of the approximately 500 servers who worked in the restaurants within the period of limitations. The class seeks recovery under Illinois law. Suits under the Fair Labor Standards Act cannot proceed as class actions. Instead they are opt-in representative actions. 29 U.S.C. §216(b) ("No employee shall be a party plaintiff to

any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.”). Twenty-four members of the state-law class agreed to be plaintiffs in the federal-law action; of these, 13 accepted offers of judgment, leaving 11 in addition to Schaefer. For convenience, we use Schaefer’s name to designate both the class members and the federal-law plaintiffs... Schaefer asserts that the poster is “not enough” but does not explain *why* it is inadequate. If posters don’t count, what’s the point of requiring them? In lieu of making an argument, Schaefer points us to *Driver v. Applellinois, LLC*, 917 F. Supp. 2d 793, 801–03 (N.D. Ill. 2013). *Driver* thought the Department of Labor’s own pre-2011 poster inadequate because it did not contain all five pieces of information specified by the 2011 regulation, and in particular omitted the requirement that employees keep their tips unless the employer uses tip pooling. But regulatory changes are not retroactive, see *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), and we have explained why the statute on its own does not necessarily call for all of the advice required by the regulation. It would be hard to fault an employer for providing exactly the information the Department of Labor then required, in the Department’s own words. Schaefer does not contend that he was unable to keep all tips he received. The handbook and poster together supply the restaurants’ workers with the three pieces of information that we believe constitute the statutory minimum. AFFIRMED

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](#).