

## Opinions for the week of October 17 - October 21, 2016

### **Donald McDonald v. George Adamson** No. 15-1305

Argued September 22, 2016 — Decided October 17, 2016

Case Type: Prisoner

Northern District of Illinois, Eastern Division. No. 13-cv-2262 — **Joan B. Gottschall**, *Judge*.  
Before BAUER, POSNER, and MANION, *Circuit Judges*.

MANION, *Circuit Judge*. In 2013, Illinois state prison inmate Donald McDonald filed what should have been a typical federal constitutional suit under 42 U.S.C. § 1983. McDonald alleged that Defendants Warden Marcus Hardy, Assistant Warden Daryl Edwards, and Chaplain George Adamson were denying the First Amendment free exercise rights as a practicing Muslim. He sought only injunctive relief in the district court. McDonald's case hit a procedural snag because three years earlier he had filed a claim for damages based on the same facts in the Illinois Court of Claims. More than two years later, when he had received no decision from the Court of Claims, he filed this case *pro se* in the district court. After the Court of Claims denied McDonald's request for relief, the district court dismissed his federal complaint as barred by *res judicata*. On appeal, defendants concede that McDonald's suit is not barred by *res judicata*. Therefore, we reverse the judgment of the district court and remand for proceedings in conformity with this opinion. We express no opinion regarding the merits of defendants' remaining arguments on appeal, which are not properly before the court at this stage.

### **Jocelyn Chatham v. Randy Davis** No. 14-3318

Argued October 26, 2015 — Decided October 17, 2016

Case Type: Civil

Southern District of Illinois. No. 11-cv-00650 — **Stephen C. Williams**, *Magistrate Judge*.  
Before WOOD, *Chief Judge*, and BAUER and SYKES, *Circuit Judges*.

SYKES, *Circuit Judge*. Marvin McDonald died after suffering an asthma attack while he was an inmate at Pinckneyville Correctional Center, an Illinois prison. His estate, administered by Jocelyn Chatham, sued the prison's warden, Wexford Health Services (a private corporation contracted to run the prison's healthcare unit), a prison doctor and nurse, and several prison guards under 42 U.S.C. § 1983. Chatham claimed that the defendants were deliberately indifferent to McDonald's serious medical needs, violating his rights under the Eighth Amendment. A magistrate judge entered summary judgment for the warden and Wexford. The other claims went to trial, and a jury found for the remaining defendants. Chatham now appeals, challenging the order granting summary judgment for the warden and Wexford. She also challenges the denial of her motions for leave to amend her complaint, for discovery sanctions, and for a new trial. We affirm. The magistrate judge was right to enter summary judgment for the warden and Wexford. Chatham did not produce evidence to support a reasonable inference that the warden consciously disregarded a substantial risk of harm to McDonald. Nor did she have evidence showing that a Wexford policy, practice, or custom caused a constitutional injury. Finally, the judge did not abuse his discretion in declining to allow leave to amend, impose a discovery sanction, or grant a new trial.

### **Jan Kowalski v. Cook County Sheriff's Police Dep't.** No. 16-1460

Argued October 6, 2016 — Decided October 18, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 15 CV 6500 — **Thomas M. Durkin**, *Judge*.  
Before DIANE P. WOOD, *Chief Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; DANIEL A. MANION, *Circuit Judge*.

## **ORDER**

Jan Kowalski sued several law enforcement officers for using excessive force against her in violation of the Eighth and Fourteenth Amendments, *see* 42 U.S.C. § 1983. But after she missed a deadline for filing her amended complaint and did not appear for two status hearings, the district court dismissed her suit with prejudice for failure to prosecute. Because the court did not abuse its discretion in dismissing the suit, we affirm the judgment.

**Eric T. Alston v. Judy P. Smith** No. 16-1308

Argued September 22, 2016 — Decided October 18, 2016

Case Type: Prisoner

Western District of Wisconsin. No. 3:15-cv-00325-bbc — **Barbara B. Crabb**, *Judge*.  
Before BAUER, POSNER, and MANION, *Circuit Judges*.

BAUER, *Circuit Judge*. Petitioner-appellant, Eric Alston, challenged the revocation of his probation by an administrative law judge (ALJ), claiming that certain information the ALJ learned prior to his revocation hearing created a risk of bias in violation of his due process rights. Alston's appeal was denied by the Administrator of the Wisconsin Division of Hearings and Appeals, the Dane County Circuit Court, and finally the Wisconsin Court of Appeals. After the Wisconsin Supreme Court declined to review the case, Alston filed a petition for a writ of habeas corpus in federal district court. The district court denied the petition, holding that the Wisconsin Court of Appeals was not unreasonable in concluding that there was no impermissibly high risk of bias. We affirm.

**Cbeyond Communications, LLC v. Brien J. Sheahan** No. 16-1237

Argued September 14, 2016 — Decided October 18, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 13 C 3731 — **Charles R. Norgle**, *Judge*.  
Before POSNER, EASTERBROOK, and SYKES, *Circuit Judges*.

POSNER, *Circuit Judge*. The plaintiff, Cbeyond, provides telephone and broadband telecommunications service to small and medium-sized business customers in Illinois. It endeavors to send data through telephone lines with maximum efficiency. The principal defendant, a local exchange carrier that the parties mainly refer to as AT&T Illinois, provides telecommunications service similar to Cbeyond's but on a much larger scale. The two firms' networks are inter-connected; federal law entitles a new entrant (Cbeyond entered the Illinois market in 2005) to connect with existing local exchange carriers on terms favorable to the entrant so that it can serve more customers without having to create its own network. See 47 U.S.C. § 251; *Sprintcom, Inc. v. Commissioners of Illinois Commerce Commission*, 790 F.3d 751, 753–54 (7th Cir. 2015); *MCI Telecommunications Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 328 (7th Cir. 2000). Those terms are in the first instance negotiated by the local exchange carrier and the new entrant, see 47 U.S.C. § 252(a)(1), but if the parties are unable to agree on terms the issue is referred to arbitration. 47 U.S.C. § 252(b). Whatever agreement emerges either from voluntary negotiations or from arbitration must be submitted to a state commission (in this case the Illinois Commerce Commission) for approval. § 252(e)... So we can't find a violation of federal law by the Illinois Commerce Commission or AT&T Illinois. All we discern is a dispute over a price term in a contract, and the resolution of such a dispute, as of Cbeyond's other state-law claims, is a matter for state rather than federal law. *Illinois Bell Telephone Co., Inc. v. Global NAPS Illinois, Inc.*, 551 F.3d 587, 591 (7th Cir. 2008); *Illinois Bell Telephone Co. v. Worldcom Technologies, Inc.*, 179 F.3d 566, 572, 574 (7th Cir. 1999). Although a federal district court can resolve state-law disputes under its supplemental jurisdiction if (as in this case) it has original jurisdiction (in this case because of Cbeyond's claims), see 28 U.S.C. § 1367, exercising supplemental jurisdiction over the state-law claims in this case would require us first to decide that the state (Illinois) cannot invoke its sovereign immunity—a doubtful proposition in light of *MCI Telecommunications Corp. v. Illinois Commerce Commission*, 168 F.3d 315, 320 (7th Cir. 1999), where we said that it was “clear that ... federal courts may review a state commission's actions with respect to an agreement only for compliance with the requirements of § 251 and § 252 of the Telecommunications Act, and not for compliance with state law” (emphasis added). And state sovereign immunity to one side, Cbeyond has imposed an excessive and unnecessary burden on the district court by bringing this sloppy lawsuit, and should not be permitted to impose further on the district court or our court. AFFIRMED

**USA v. Becky Holman** No. 15-3414

Argued September 21, 2016 — Decided October 18, 2016

Case Type: Criminal

Eastern District of Wisconsin. No. 12-CR-217 — **C.N. Clevert, Jr.**, *Judge*.  
Before FLAUM, KANNE, and WILLIAMS, *Circuit Judges*.

FLAUM, *Circuit Judge*. Becky Holman pled guilty to conspiracy to distribute heroin and was initially sentenced to thirty-six months in prison. She appealed, and for reasons unrelated to this appeal, we vacated Holman's sentence and remanded for resentencing. On remand, the district court sentenced Holman to thirty-three months' imprisonment. Holman now appeals, arguing that the district court procedurally erred at resentencing by lengthening her prison term to promote rehabilitation from her heroin addiction. For the reasons that follow, we affirm the district court's sentence.

**Kathleen Wagner v. Teva Pharmaceuticals USA, Inc.** No. 15-2294

Argued February 12, 2016 — Decided October 18, 2016

Case Type: Civil

Western District of Wisconsin. No. 13-CV-497-JDP — **James D. Peterson**, *Judge*.

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

BLAKEY, *District Judge*. Appellant Kathleen Wagner appeals the decision of the district court granting judgment on the pleadings in favor of Appellees Teva Pharmaceuticals USA, Barr Pharmaceuticals and Barr Laboratories. For the reasons explained below, the decision of the district court is affirmed.

**Shannon Volling v. Kurtz Paramedic Services, Inc.** No. 15-3572

Argued September 15, 2016 — Decided October 19, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 14-cv-4423 — **Sharon Johnson Coleman**, *Judge*.

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

FLAUM, *Circuit Judge*. Plaintiffs Shannon Volling and Allen Springer brought federal and state retaliation claims against Antioch Rescue Squad ("ARS") and its subcontractor, Kurtz Paramedic Services, Inc. ("Kurtz"). Plaintiffs allege the companies wrongfully refused to hire them as emergency medical technicians ("EMTs") because of plaintiffs' earlier complaints alleging sexual harassment against ARS and Metro Paramedic Services, Inc. ("Metro"). Plaintiffs settled with ARS, and Kurtz moved to dismiss plaintiffs' claim. The district court dismissed the case with prejudice. We affirm, in part, and reverse, in part.

**Eric Tapley v. Andrew Chambers** No. 15-3013

Argued September 21, 2016 — Decided October 19, 2016

Case Type: Civil

Central District of Illinois No. 15-cv-1051 — **James E. Shadid**, *Chief Judge*.

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

KANNE, *Circuit Judge*. Plaintiff-appellant Eric Tapley, along with William Hosea and Clifford Pugh, request that we review the district court's decisions in two different cases, one from 2012 (numbered 12-cv-1339) and the other from 2015 (numbered 15-cv-1051). Yet they failed to provide the record from the 2012 case on appeal. For that reason, we dismiss the appeal of that case. We address the merits of the 2015 case only—and we affirm.

**Lend Lease (US) Construction Inc. v. Administrative Employer Services, Inc.** Nos. 16-1294 and 16-1739

Argued September 16, 2016 — Decided October 20, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 1:15-cv-04318 — **Samuel Der-Yeghiayan**, *Judge*.

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

POSNER, *Circuit Judge*. In 2014, Lend Lease construction company, the construction manager of the River Point Tower Project—a project to build an ultramodern office building in downtown Chicago—hired Cives Corporation to be a subcontractor on the project. Cives in turn hired Midwest Steel, Inc., to be a

sub-subcontractor. Midwest had, years before, hired Administrative Employer Services, Inc. (AES) to supply Midwest with additional workers, who would be co-employed by Midwest and AES. These workers would work on the River Point Project. In order to provide workers' compensation insurance to all the workers on the project, Lend Lease entered into what is called a "contractor controlled insurance program" with an insurance company named Starr Liability & Indemnity Co. The Starr policy provided for a \$500,000 deductible; that is, Lend Lease would have to pay the first \$500,000 of any claims, covered by the policy, of injured workers. All sub-contractors were supposed to join in the policy; Lend Lease alleges that Midwest enrolled and therefore its workers were covered. Lend Lease also alleges that AES had several years earlier obtained workers' compensation for its workers from Technology Insurance Co. (referred to by the parties as "TIC"), which meant that injured AES-Midwest workers could obtain workers' compensation from either Starr (or Lend Lease if it hadn't used up its deductible) or TIC... Last, Lend Lease appeals the denial of its motion under Federal Rule of Civil Procedure 59(e) asking the district judge to change judgment from dismissal with prejudice to dismissal without prejudice in order to allow Lend Lease to file a fourth complaint that would add Starr as a plaintiff and Midwest as a defendant, and assert new claims against AES. But Lend Lease has already had three chances to plead correctly—making this a case of three strikes and you're out—and Starr can litigate its own claims against TIC. The judgment of the district court is AFFIRMED.

**Iv'Leania Parker v. Carolyn W. Colvin** No. 16-1030

Argued October 5, 2016 — Decided October 20, 2016

Case Type: Civil

Northern District of Indiana, Hammond Division. No. 2:14cv10 — **Robert L. Miller, Jr.**,

Before WILLIAM J. BAUER, *Circuit Judge*; JOEL M. FLAUM, *Circuit Judge*; MICHAEL S. KANNE, *Circuit Judge*.

**ORDER**

Iv'Leania Parker applied for Disability Insurance Benefits and Supplemental Security Income claiming disability based on her history of breast cancer, fibromyalgia, carpal tunnel syndrome, and glaucoma. An administrative law judge denied benefits, and the Appeals Council and district court upheld that decision. Because the ALJ's decision is supported by substantial evidence, we affirm the decision.

**Stephen Wesbrook v. Karl Ulrich** No. 15-3870

Argued September 8, 2016 — Decided October 20, 2016

Case Type: Civil

Western District of Wisconsin. No. 13-cv-494-wmc — **William M. Conley**, *Chief Judge*.

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

HAMILTON, *Circuit Judge*. This appeal presents issues under Wisconsin law on the scope of tort remedies a fired at-will employee might have not against his employer but against individual supervisors and co-workers. Plaintiff Dr. Stephen Wesbrook, a former employee of the Marshfield Clinic Research Foundation, brought this lawsuit against Dr. Edward Belongia, a former colleague, and Dr. Karl Ulrich, the chief executive officer of the Marshfield Clinic. Wesbrook contends that Belongia and Ulrich tortiously interfered with his at-will employment, engineering his termination by publishing defamatory statements about him to the Marshfield Clinic board of directors. The district court granted summary judgment to the defendants. Wesbrook has appealed. Wisconsin tort law governs this case, which is within the federal courts' diversity jurisdiction under 28 U.S.C. § 1332. The undisputed facts show that the defendants' statements about the plaintiff were true or substantially true and therefore privileged. Under Wisconsin law, an at-will employee cannot recover from former co-workers and supervisors for tortious interference on the basis of their substantially truthful statements made within the enterprise, no matter the motives underlying those statements. We therefore affirm the judgment of the district court.

**Kevin Culp v. Lisa Madigan** No. 15-3738

Argued September 22, 2016 — Decided October 20, 2016

Case Type: Civil

Central District of Illinois. No. 3:14-CV-03320 — **Sue E. Myerscough**, *Judge*.  
Before BAUER, POSNER, and MANION, *Circuit Judges*.  
MANION, *Circuit Judge*,dissenting.

POSNER, *Circuit Judge*.Illinois' Concealed Carry Act, 430 ILCS 66/1 *et seq.*, authorizes an Illinois resident to carry, on his person or next to him in a car, a loaded or unloaded fire-arm as long as it is fully or partially concealed and he (or she) meets the qualifications set forth in the Act. We held in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), that the Second Amendment entitles qualified persons to carry guns outside the home; just a few months ago we said that “the constitutional right to ‘keep and bear’ arms means that states must permit law-abiding and mentally healthy persons to carry loaded weapons in public.” *Berron v. Illinois Concealed Carry Licensing Review Bd.*, 825 F.3d 843, 845 (2016). But “qualified,” “law-abiding,” and “mentally healthy” are significant limitations on the right of concealed carry... So the Illinois law regulating the concealed-carry rights of nonresidents is imperfect. But we cannot say that it is unreasonable, so imperfect as to justify the issuance of a preliminary injunction. Cf. *Moore v. Madigan*, *supra*, at 940. The critical problem presented by the plaintiffs’ demand—for which they offer no solution—is verification. A nonresident’s application for an Illinois concealed-carry license cannot be taken at face value. The assertions in it must be verified. And Illinois needs to receive reliable updates in order to confirm that license-holders remain qualified during the five-year term of the license. Yet its ability to verify is extremely limited unless the nonresident lives in one of the four states that have concealed-carry laws similar to Illinois’ law. A trial in this case may cast the facts in a different light, but the plaintiffs have not made a case for a preliminary injunction. AFFIRMED

**USA v. Maurice Davis** No. 16-1879

Submitted September 20, 2016 — Decided October 21, 2016

Case Type: Criminal

Eastern District of Wisconsin. No. 11–CR–63 — **Pamela Pepper**, *Judge*.

Before WILLIAM J. BAUER, *Circuit Judge*; MICHAEL S. KANNE, *Circuit Judge*; DIANE S. SYKES, *Circuit Judge*.

## ORDER

An amendment to the Sentencing Guidelines in 2014 has produced this successive appeal regarding a term of imprisonment imposed on the defendant/appellant, Maurice Davis. Although the history of this case is somewhat complicated, the effect of the Guidelines amendment is straightforward, and we affirm the decision of the district court to deny reconsideration of the reduced sentence imposed on July 20, 2015.

**Heartland Alliance National Immigrant Justice Center v. Department of Homeland Security** No. 16-1840

Argued September 28, 2016 — Decided October 21, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 12 C 9692 — **Charles R. Norgle**, *Judge*.

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

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

POSNER, *Circuit Judge*.Heartland Alliance’s National Immigrant Justice Center (sometimes referred to as Heartland Alliance National Immigration Justice

Center—we’ll just call it the Center) is, we read on its website, [www.immigrantjustice.org/about-nijc](http://www.immigrantjustice.org/about-nijc) (visited October 19, 2016), “dedicated to ensuring human

rights protections and access to justice for all immigrants, refugees and asylum seekers. [The Center] provides direct legal services to and advocates for these populations through policy reform, impact litigation, and public education. Since its founding three decades ago, [the Center] has been unique in

blending individual client advocacy with broad-based systemic change.” In the fall of 2011 the Center submitted to the Department of Homeland Security (and

to other federal agencies as well, but we can ignore them) a request under the Freedom of Information Act, 5 U.S.C. § 552, for information relating to Tier III terrorist organizations, defined by the Immigration

and Nationality Act in 8 U.S.C. § 1182(a)(3)(B)(vi)(III). The Department provided only some of the information requested by the Center, so the Center brought this suit to enjoin the Department from withholding the other information that the Center had sought—the names of what are referred to as “Tier III terrorist organizations.” Membership in any of the tiers makes one inadmissible to the United States, with narrow exceptions... We learn in the Center’s reply brief that its primary concern is not with names but with the Tier III category itself, for it says for example that “the designation of Tier III organizations is often doubtful.” It hopes that if it can obtain the names of *all* the organizations—its goal in this litigation—it will be able to discredit some or perhaps many of them. Deeply distrustful of the U.S. government, by the tone and content of its briefs the Center signals its disbelief that the government has secrets worth keeping from asylum seekers and their helpers (such as the Center), but it does not explain what the government would gain by pretending that harmless organizations are actually terrorist groups. The government makes mistakes, but the Center has not shown that they’re willful, or that Exemption 7(E), on which this litigation pivots, is either invalid—in fact the Center concedes that the exemption is valid—or inapplicable to the withheld names. The judgment of the district court is AFFIRMED.

**Erik Israel v. Carolyn Colvin** No. 15-3220

Argued September 8, 2016 — Decided October 21, 2016

Case Type: Civil

Eastern District of Wisconsin. No. 2:14-cv-01155-WED — **William E. Duffin**, *Magistrate Judge*.  
Before FLAUM, ROVNER, and SYKES, *Circuit Judges*.

ROVNER, *Circuit Judge*. Erik Israel applied for Social Security disability benefits in 2007, and diligently pursued his claim through administrative review. After many years of review, error and delay, the Acting Commissioner of the Social Security Administration (hereafter “Commissioner” or “Agency”) issued a final decision denying his claim. Israel filed suit in the district court to challenge that decision. The Commissioner conceded in the district court that her decision was not supported by substantial evidence and requested remand to conduct additional proceedings. Israel, frustrated with years of delay, sought a direct award of benefits. The district court remanded the case to the Agency for additional proceedings because the record, as it stands, does not compel a finding of disability. *Israel v. Covin*, No. 14-CV-1155, slip op. at 6-7 (E.D. Wisc. Aug. 28, 2015). Because the district court did not abuse its discretion in ordering a remand, we affirm. On remand, the Agency should expedite proceedings so that the matter may be resolved once and for all.

**William Viramontes v. City of Chicago** No. 15-2826

Argued September 13, 2016 — Decided October 21, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 13 C 6251 — **Virginia M. Kendall**, *Judge*.  
Before BAUER, KANNE, and HAMILTON, *Circuit Judges*.  
HAMILTON, *Circuit Judge*. concurring.

KANNE, *Circuit Judge*. William Viramontes was convicted in Illinois state court of aggravated assault and resisting arrest. Despite the conviction, Viramontes filed this § 1983 suit against the officers involved in the altercation alleging that they used excessive force in violation of his Fourth Amendment rights. The jury returned a verdict for the officers. Viramontes sought a new trial for two reasons: (1) because the district court instructed the jury that it had to take as true the facts underlying the state-court conviction, and (2) because defense counsel made improper statements during closing argument. The district court denied the motion, holding that the jury instruction was proper and that, although defense counsel’s statements during closing argument were improper, they did not warrant a new trial. We agree and affirm.

**State of Wisconsin Local Government Property Insurance Fund v. Lexington Insurance Company**  
No. 15-1973

Argued February 19, 2016 — Decided October 21, 2016

Case Type: Civil

Eastern District of Wisconsin. No. 15-CV-00142-JPS — **J. P. Stadtmueller**, *Judge*.  
Before MANION and ROVNER, *Circuit Judges*, and BLAKEY, *District Judge*.

BLAKEY, *District Judge*. This dispute arises from the 2013 fire at the Milwaukee County Courthouse (the "Courthouse"). Milwaukee County (the "County") maintained its primary insurance policy covering the Courthouse with the State of Wisconsin Local Government Property Insurance Fund (the "Fund"). The Fund in turn engaged defendant Lexington Insurance Company ("Lexington") as either its reinsurer or excess insurer (the parties disagree). The County also maintained a separate insurance policy with The Cincinnati Insurance Company ("Cincinnati") that covered machinery and equipment at the Courthouse.

Shortly after the fire, the County filed a claim with the Fund. The Fund paid all but a small portion of the County's claimed losses. The Fund insisted that the remaining unpaid portion of the County's claim should be paid by Cincinnati. Pursuant to separate Joint Loss Agreements in the County's policies with the Fund and Cincinnati, the Fund and Cincinnati agreed to arbitrate their dispute. This appeal concerns Lexington's attempt to insert itself in that arbitration between the Fund and Cincinnati. The district court denied Lexington's motion to compel arbitration after concluding that Lexington's participation was not contemplated by the plain language of the Joint Loss Agreements. Lexington appealed. For the reasons explained below, 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](#).