Firm ID No. 90747

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

MARQUITA MCDONALD, individually and on behalf of all other similarly situated,

Plaintiff,

v.

SYMPHONY BRONZEVILLE PARK LLC, SYMCARE HEALTHCARE LLC, and SYMCARE HMG LLC.

Defendants.

Case No. 2017-CH-11311

Calendar: 02

Honorable Raymond Mitchell

DEFENDANT SYMPHONY BRONZEVILLE PARK LLC'S REPLY IN SUPPORT OF ITS MOTION FOR RECONSIDERATION OR, ALTERNATIVELY, TO CERTIFY QUESTIONS FOR IMMEDIATE APPEAL UNDER ILLINOIS SUPREME COURT RULE 308

DATED: September 12, 2019

Respectfully submitted,

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What Symphony established in its Motion remains unrefuted. In light of the plain language of the Workers' Compensation Act and an unflinching line of Illinois Supreme Court precedent, the Court erred in holding that McDonald's injury is not "compensable" such that reconsideration is appropriate. In short, the Workers' Compensation act preempts any "***statutory right*** to recover damages from the employer * * * for injuries incurred in the course of her employment." *See Richardson v. Cty. of Cook*, 250 Ill. App. 3d 544, 547 (1st Dist. 1993) (emphasis added; internal quotation omitted); 820 ILCS § 305/5(a); 820 ILCS § 305/11. Accordingly, McDonald cannot bring a damages claim under BIPA for injuries arising from clocking in and out of work, and the Court misapplied the plain language of the Workers' Compensation Act and Illinois Supreme Court precedent in ruling to the contrary. And should the Court decline reconsideration, Symphony respectfully requests, in the alternative, that the Court certify Symphony's proposed questions for immediate appeal in accordance with Illinois Supreme Court Rule 308, so that this case and countless others can be materially advanced by appellate court guidance on the potentially case-dispositive issue of Workers' Compensation exclusivity.

ARGUMENT

I. Reconsideration Is Warranted Because The Court's Ruling Conflicts With The Plain Language of the Workers' Compensation Act and Illinois Supreme Court Precedent.

The Court's ruling on Symphony's motion to dismiss cannot be reconciled with the plain language of the Workers' Compensation Act. The exclusivity provisions of that Act apply to any "injury * * * sustained by any employee while engaged in the line of his duty as such employee," 820 ILCS § 305/5(a), or "arising out of and in the course of [] employment," 820 ILCS § 305/11. Thus, if McDonald has suffered a "real and significant injury" from a BIPA violation (Ex. A to Def.'s Motion at 2) or the "bodily injury in the form of mental anguish" that she alleges (Ex. B to Def.'s Motion at ¶36), then the plain language of the Workers' Compensation Act bars McDonald from pursuing a "statutory right" to recover damages for those injuries from her employer, Symphony.

See Richardson, 250 Ill. App. 3d at 547 (holding that Workers' Compensation exclusivity means that an employee has "[n]o common law ***or statutory right*** to recover damages from the employer * * * for injuries incurred in the course of her employment") (emphasis added; internal quotation omitted). The Court's ruling is inconsistent with this plain language because the statute does not except invasion-of-privacy-type injuries or any other type of injury. (Ex. A to Def.'s Motion at 3) Rather, the statute categorically preempts all claims for damages—whether based on common-law or a statute—brought by an employee for any injury arising out of, and during the course of, employment.

McDonald tacitly concedes that the plain language of the statute defeats her claim for damages. In her response, McDonald does not mention the language of the exclusivity provisions, much less explain how the Court's ruling can be reconciled with them. (Pl.'s Resp. at 1-7) Instead, McDonald resorts to empty platitudes (*see, e.g.,* Pl.'s Resp. at 1-1 (contending that Symphony is "ask[ing] that the Court allow it a second bite at the dismissal apple")) and baseless contentions, like her contention that Symphony failed to set forth "how the Court purportedly erred" (Pl.'s Resp. at 1). (*See also* Pl.'s Resp. at 2 ("Symphony hides behind a thin veil of additional citations"); *cf.* Pl.'s Resp. at 4 (contending that "Symphony offers no existing law" in support of its request for reconsideration)) The purported error here—which Symphony set forth before (Def.'s Motion at 5-10) and will set forth here again—is that the Court carved out an exception to Workers' Compensation exclusivity that conflicts with the statute's plain language and, in doing so, contravened "a cardinal rule" of statutory construction: that a court "cannot rewrite a statute, and depart from its plain language, by reading into it exceptions, limitations or conditions not expressed by the legislature." *See also People ex rel. Birkett v. Dockery*, 235 Ill. 2d 73, 81 (2009).

The Court's ruling also cannot be squared with Illinois Supreme Court precedent. According to that precedent, an injury is "compensable" for purposes of Workers' Compensation

exclusivity so long as the injury "aris[es] out of and in the course of the employment." *Folta v. Ferro Eng'g*, 2015 IL 118070, ¶¶14, 18-30 ("In discussing the scope of the exclusivity provisions under the Workers' Compensation Act, this court has indicated that the Act generally provides the exclusive means by which an employee can recover against an employer for a work related injury"); *Sjostrom v. Sproule*, 33 Ill. 2d 40, 43 (1965) ("the 'line of duty' test is therefore construed as identical to the general test of compensability, 'arise out of and in the course of employment'"); *Unger v. Continental Assurance Co.*, 107 Ill. 2d 79, 85 (1985) (stating that "[t]he pivotal question . . . is whether the injury alleged is compensable under the Act. An injury will be found to be compensable if it arises out of and in the course of the employment'") (internal quotation omitted). Accordingly, there is no basis under that precedent to hold that exclusivity applies only to "psychological injuries caused by a physical trauma or injury." (Ex. A to Def.'s Motion at 3.) Indeed, the Illinois Supreme Court has held that "humiliation" and other similar injuries ***are*** preempted by the Workers' Compensation Act even when those injuries are unrelated to a physical harm. *See Meerbrey v. Marshall Field & Co.*, 139 Ill. 2d 455, 467–68 (1990) (holding that "humiliation" and other similar injuries were "compensable" where the plaintiff asserted theories of false imprisonment, false arrest or malicious prosecution unrelated to any physical harm: "plaintiff offers no principled basis for distinguishing between the emotional injuries which he allegedly suffered in the course of his employment, and those deemed compensable in *Pathfinder* and *Collier*"). This result makes particularly good sense given the dictionary definition of the key statutory term "injury." *See* BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "injury" to mean "[t]he violation of another's legal right, for which the law provides a remedy; a wrong or injustice"); *see also* 820 ILCS § 305/5(a); 820 ILCS § 305/11.[1] Thus, the

[1] Symphony will note parenthetically that invasion-of-privacy-type claims involve "psychological" injuries, which is another reason why they should not be treated differently for purposes of Workers' Compensation exclusivity. *See, e.g., Schmidt v. Ameritech Illinois*, 329 Ill. App. 3d 1020, 1035 (1st. Dist. 2002) (discussing "mental anguish" in considering whether the plaintiff stated an actual injury sufficient to sustain an intrusion upon seclusion claim); *see also, e.g., Braun v. Flynt*, 726 F.2d 245, 250 (5th

Court's ruling conflicts not only with the plain language of the statute, but also with Illinois Supreme Court precedent, the latter being a point that McDonald again concedes by lack of contrary argument.[2]

Plus, if the result were any different, then an employer would have ***greater*** protection from damages claims brought by plaintiffs who ***have*** suffered actual psychological (or physical) harm and ***no*** protection whatsoever from massive (and potentially ruinous) damages claims brought by plaintiffs who ***have not*** suffered an actual injury at all. *See Goins v. Mercy Ctr. for Health Care Servs.*, 281 Ill. App. 3d 480, 487–88 (2d Dist. 1996) (holding that an employee's claim under the AIDS Confidentiality, 410 ILCS 305/1 *et seq.* would have been preempted by Workers' Compensation exclusivity but for the determination that the employer, a hospital, was acting not in its capacity as an employer, but rather as a medical provider to an injured employee); *see also Bank of New York Mellon v. Laskowski*, 2018 IL 121995, ¶12 (a court presumes that the legislature did not intend absurd results). Regardless, the point remains: this Court is bound by the plain language of the Workers' Compensation Act and Illinois Supreme Court precedent, which do not carve out invasion-of-privacy injuries from exclusivity.

The Court thus erred by misapplying controlling law regarding what constitutes a "compensable" injury. *See Horwitz v. Bankers Life & Cas. Co.*, 319 Ill. App. 3d 390 (1st Dist. 2001) (one "intended purpose of a motion to reconsider is to bring to the court's attention * * * errors in the court's previous application of existing law"); *Hart v. Valspar Corp.*, 252 Ill. App. 3d 1005, 1009

Cir. 1984) (recognizing "that the principal element of injury in a defamation action is impairment of reputation while an invasion of privacy claim is founded on mental anguish"); *Bolduc v. Bailey*, 586 F. Supp. 896, 902 (D. Colo. 1984) ("invasion of privacy involves injury to the person, primarily through mental and emotional distress").

[2] McDonald does not address *Folta* or *Meerbrey* or any of the Illinois Supreme Court cases that Symphony cited in its Motion. (Pl.'s Resp. at 1-7.) And, notably, McDonald does not cite an Illinois Supreme Court case that supposedly sustains her principal contention that invasion-of-privacy injuries are excepted from exclusivity. (*Id.*) One would think that if either the statutory language or Illinois Supreme Court precedent actually supported her contention, then McDonald would have so stated in her response. That she did not do so speaks volumes.

(1st Dist. 1993) (similar). The question of "compensability" does not rest on whether McDonald suffered a "psychological injur[y] caused by a physical trauma or injury" (Ex. A to Def.'s Motion at 2),[3] but rather whether her injury arises from, and during the course of her employment, for that is the test that the Illinois Supreme Court applies. *See, e.g., Folta*, 2015 IL 118070 at ¶¶14, 18-30; *Sjostrom*, 33 Ill. 2d at 43; *Unger*, 107 Ill. 2d at 85; *see also* 820 ILCS § 305/5(a) (stating that an employee shall have "no common law or statutory right to recover damages from the employer * * * for injury * * * sustained by any employee while engaged in the line of his duty as such employee"); 820 ILCS § 305/11 (similar). Because McDonald's alleged injury undoubtedly arises out of her employment (*see, e.g.,* Ex. B to Def.'s Motion at ¶¶2, 21-23, 29, 31, 35, 36; *see also* Ex. B to Def.'s Motion at ¶59 (alleging that Symphony "owed Plaintiff a heightened duty—under which [it] assumed a duty to act carefully and not put Plaintiff at undue risk of harm—because of the employment relationship of the Parties")), then that injury is "compensable." No other result can be squared with the plain language of the Workers' Compensation Act or Illinois Supreme Court precedent.

In addition, there is a more fundamental problem with McDonald's position: it conflicts with her own allegations. McDonald did not merely allege as her injury that she lost "control of her biometric privacy," as she now contends (Pl.'s Resp. at 2), but rather that she suffered "bodily injury in the form of mental anguish" (Ex. B to Def.'s Motion at ¶36). (*Cf.* Pl.'s Resp. at 2 (McDonald

[3] The case the Court cited—*Schroeder v. RGIS, Inc.*, 2013 IL App (1st) 122483, ¶30—is not to the contrary. In that case, the appellate court did not pass upon the issue of whether an injury like the one McDonald alleges here is compensable; instead, the court held that the injury at issue ***was*** compensable and, as a result, it had no reason to opine on the limits of exclusivity. *Id.*; *cf. Goins*, 281 Ill. App. 3d at 487–88. And to the extent that case could be viewed as setting forth a limiting principle as to exclusivity, it still would not control this issue here because any such holding would be inconsistent with both prior and subsequent Illinois Supreme Court authority. *See Folta*, 2015 IL 118070 at ¶¶14, 18-30; *Meerbrey*, 139 Ill. 2d at 467–68 (applying Workers' Compensation exclusivity where plaintiff alleged, among other things, that she suffered "humiliation" even though no physical injury was alleged). The same is true of the one case that McDonald cites as supposedly demonstrating Symphony's "fallacious" reasoning. *See Mytnik v. Illinois Workers' Comp. Comm'n*, 2016 IL App (1st) 152116WC, ¶39 (finding injury at issue to be "compensable").

contending despite the allegations in her Complaint that her injury "was not the type of 'physical or emotional' injury compensable under the [Workers' Compensation Act]").) Therefore, even under the Court's reasoning, exclusivity principles would nonetheless be brought to bear because McDonald alleges a physical (*i.e.*, "bodily") injury and a psychological injury (*i.e.*, "mental anguish") such that dismissal of her damages claim is appropriate. For all these reasons, reconsideration is warranted.

II. The Court Erred In Holding that BIPA Repeals the Exclusivity Provision in the Workers' Compensation Act.

That "BIPA specifically defines written release in the employment context" does not counsel a different result.[4] While it is true, as the Court noted (Ex. A to Def.'s Motion at 3), that BIPA contains such a definitional provision, that does not mean an employee can pursue a statutory claim for damages against her employer for an injury arising from clocking in and out of work. Of course, a mere definition in one statute does not constitute an "express repeal" of another. *See, e.g., Feret v. Schillerstrom*, 363 Ill. App. 3d 534, 540 (2d Dist. 2006). Accordingly, the overwhelming presumption is that the Legislature did not intend to repeal the Workers' Compensation Act, which, by its exclusivity provisions, provides protection for employers against statutory claims for damages brought by employees for injuries that arise in the workplace, *see Jahn v. Troy Fire Prot. Dist.*, 163 Ill. 2d 275, 279 (1994); *In re May 1991 Will Cty. Grand Jury*, 152 Ill. 2d 381, 388 (1992); *Fischetti v. Vill. of Schaumburg*, 2012 IL App (1st) 111008, ¶6. To the extent McDonald can demonstrate that injunctive or declaratory relief is appropriate, then she can seek redress under BIPA; but to the extent she seeks a "statutory right" to damages under BIPA, her claim is preempted by the exclusive remedies

[4] The second question that Symphony proposes for certification pertains to the Court stating in its dismissal order that "BIPA specifically defines written release in the employment context showing the drafters intended for BIPA to apply to violations by employers in the workplace." (Ex. A. to Def.'s Motion at 3 (citing 740 ILCS § 14/10)). Given this language, Symphony does not understand why McDonald asserts that "whether BIPA impliedly repealed the WCA—was ***never*** at issue here." (*See* Pl.'s Resp. at 5 (emphasis in original))

afforded under the Workers' Compensation Act. And because McDonald does not meaningfully address this issue in her response (*see* Pl.'s Resp. at 5), Symphony will rest on the arguments it previously asserted in its Motion (Def.'s Motion at 8-10).

III. Certification of Questions Under Illinois Supreme Court Rule 308 Is Appropriate And Will Materially Advance This Case and Hundreds of Other Pending BIPA Cases.

In the alternative to reconsideration, certifying questions for interlocutory appeal is warranted, and nothing in McDonald's response demands otherwise. *See also* Ill. S. Ct. R. 308 (authorizing appeal from an interlocutory order not otherwise appealable if the Court finds: [1] the order at issue involves questions of law as to which there is substantial ground for difference of opinion and [2] an immediate appeal from the order may materially advance the ultimate termination of the litigation). Foremost, as Symphony established in its Motion, questions relating to statutory construction or the interplay between two statutes are pure questions of law that are appropriately certified under Rule 308, *see, e.g., Bowman v. Ottney*, 2015 IL 119000, ¶8 (construing effect of two statutes on one another); *Johnston v. Weil*, 241 Ill. 2d 169, 175 (2011) (same); *see also Solon v. Midwest Medical Records Ass'n*, 236 Ill. 2d 433, 439 (2010) (issue of statutory construction appropriate for review under Rule 308); *Bass v. Cook Cty. Hosp.*, 2015 IL App (1st) 142665, ¶13 (same); *In re Marriage of Akula*, 404 Ill. App. 3d 350, 355 (1st Dist. 2010) (same); so, too, are novel questions of law yet to be considered by a court of review, as McDonald acknowledges (Pl.'s Resp. at 5-6 (citing *Rozsavolgyi v. City of Aurora*, 2017 IL 121048, ¶32 for the proposition that the "substantial grounds for difference of opinion prong in Rule 308 has been satisfied in instances where the question of law had not been directly addressed by the appellate or supreme court"). *See also Doe v. Sanchez*, 2016 IL App (2d) 150554, ¶20 (addressing certified questions under Rule 308 where there was "no directly applicable case law"); *Costello v. Governing Bd. of Lee County Special Educ. Ass'n*, 252 Ill. App. 3d 547, 552 (2nd Dist. 1993) (similar regarding issue of "first impression"). McDonald's response in effect demonstrates that Symphony has carried its burden in this regard because the only cases McDonald

cites for the proposition that BIPA "controls" over the Workers' Compensation Act are ***Circuit Court*** decisions. (Pl.'s Resp. at 6-7)

Moreover, Symphony again submits that reasonable minds could differ as to whether a statutory claim for damages can proceed [1] in light of an exclusivity provision that bars an employee's "statutory right to recover damages from the employer * * * for [an] injury [ ] sustained by any employee while engaged in the line of his duty," 820 ILCS § 305/5, or [2] in light of the long line of Illinois Supreme Court cases holding that the analysis of whether an injury is "compensable" hinges upon whether an injury arose in connection with, and during the course of, employment. *See also Goins*, 281 Ill. App. 3d at 487–88. Again, McDonald's own response brief in effect establishes as much. If the analysis were as "well settled" as she says it is (Pl.'s Resp. at 5), then why didn't she address the plain language of the statute or the Illinois Supreme Court cases setting forth the standard for compensability? The first requirement for certifying questions is satisfied.

The second requirement is satisfied, as well. To be sure, answers to the questions that Symphony proposes for certification would materially advance the ultimate termination of this litigation by conclusively establishing whether the exclusivity provision of the Workers' Compensation Act bars an employee's claim for money damages under BIPA. *See Voss v. Lincoln Mall Mgmt. Co.*, 166 Ill. App. 3d 442, 448 (1st Dist. 1988) (explaining that interlocutory appeals are typically granted in cases that may either be "potentially long and expensive" or "involve 'controlling' questions of law as to which one possible resolution would necessarily dispose of the case"). Not only would answers be case dispositive—because it is the potential for bet-the-company damages that is driving this litigation—but they would also provide much needed appellate guidance

in the hundreds of currently pending BIPA class actions, the vast majority of which arise within the employment context.[5]

CONCLUSION

If McDonald "suffered bodily injury in the form of mental anguish" by clocking in and out from work, as she contends (*see* Compl. at ¶36), then she cannot recover damages under BIPA because, under the Illinois Workers' Compensation Act, she has no "***statutory right*** to recover damages from the employer * * * for injuries incurred in the course of her employment." *See Richardson*, 250 Ill. App. 3d at 547 (emphasis added; internal quotation omitted); 820 ILCS § 305/5(a); 820 ILCS § 305/11. And not only does the plain language of the Illinois Workers' Compensation Act bar McDonald's request for damages, but so does a long line of Illinois Supreme Court precedent that broadly construes Workers' Compensation exclusivity and holds that an injury will be found to be "compensable under the Act" whenever it "aris[es] out of and in the course of the employment." *See Folta*, 2015 IL 118070 at ¶¶12, 18-30. In light of this plain statutory language and apposite Illinois Supreme Court precedent, Symphony respectfully requests reconsideration because the Court misapplied controlling law in ruling that McDonald could proceed on a statutory claim for damages against her employer for an injury arising during the course of her employment.

In the alternative, Symphony respectfully submits that the dismissal order involves questions of law as to which there is substantial ground for a difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation. Accordingly, Symphony requests that the Court certify the two questions it proposes for immediate appeal pursuant to Rule 308 and that the Court grant a corresponding stay of proceedings pending the resolution of those questions.

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[5] According to *amicus* briefing submitted in *Rosenbach*, approximately 88% of then-pending BIPA cases pertain to the employment context. (*See* Amicus Br. at 1, available at: https://epic.org/amicus/bipa/rosenbach/Rosenbach-v-Six-Flags-Restaurant-Law-Center-Amicus.pdf).

CERTIFICATE OF SERVICE

I, Joseph A. Donado, an attorney, do hereby certify that I have caused a true and correct copy of the foregoing **DEFENDANT SYMPHONY BRONZEVILLE PARK LLC'S REPLY IN FURTHER SUPPORT OF ITS MOTION FOR RECONSIDERATION OR, ALTERNATIVELY, TO CERTIFY QUESTIONS FOR IMMEDIATE APPEAL UNDER ILLINOIS SUPREME COURT RULE 308** to be served upon the following by email on this 12th day of September 2019:

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