

NO. 126511

In the
Supreme Court of Illinois

MARQUITA McDONALD,

Plaintiff-Appellant

v.

SYMPHONY BRONZEVILLE PARK, LLC.,

Defendants-Appellees

On Appeal from the Illinois Appellate Court, First District
Case No. 1-19-2398

On a Rule 308 Certified Question Presented
By the Circuit Court of Cook County, Case No. 2017 CH 11311
Honorable Raymond Mitchell, Judge Presiding.

**BRIEF OF AMICUS CURIAE
WORKERS' COMPENSATION LAWYERS ASSOCIATION
IN SUPPORT OF MARQUITA McDONALD**

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INTERESTS OF *AMICUS CURIAE*

The Illinois Workers' Compensation Lawyer's Association (WCLA) submits this brief *amicus curiae*, in support of the decision of the Illinois Appellate Court and the Plaintiff-Appellant, Marquita McDonald. The WCLA is a bipartisan organization established to (a) promote fellowship among members of the Bar engaged in the trial of workers' compensation matters; (b) promote, foster and sponsor legislation relating to workers' compensation and its administration; (c) aid, assist and cooperate with judicial tribunals and administrative bodies in matters relating to the administration of workers' compensation laws; and (d) improve the quality of service to general public for workers' compensation legal services. Members of the organization represent injured workers or employers in workers' compensation cases. The over 700 members of the WCLA are uniquely qualified to understand and comment on the functions of the Illinois Workers' Compensation Commission, including jurisdictional issues.

ARGUMENT

In today's society, individuals connect with information technology in all aspects of their life, including in their personal lives and in the work place. Individuals use information technology to conduct their banking, do their shopping and to connect with friends and family. Biometrics is just one form of information technology, using a person's biologically unique identifiers, such as finger prints, iris scans, voice prints or face geometry, as a form of identification. The Federal and State governments are legitimately concerned with how the information is retained and used. Illinois adopted the *Biometric Information Privacy Act* (BIPA) in 2008, regulating how biometric information is collected, used, stored, safeguarded, retained and destructed in Illinois to protect the citizens of Illinois. 740 ILCS 14/5(g).

BIPA created a cause of action for an aggrieved person in state circuit court or as a supplemental claim in the federal district court against the party who violated the provisions of BIPA and set forth the damages the aggrieved party is entitled to recover. To bring a BIPA claim and prevail, the aggrieved party need not prove there was an actual injury beyond the violation of their rights under BIPA. *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, 432 Ill.Dec. 654, 129 N.E.2d 1197. BIPA is a privacy rights law that applies "inside and outside the workplace" and "[s]imply because an employer opts to use biometric data, like fingerprints, for timekeeping purposes does not transform" the claim into something more, such as a wages and hours claim as was alleged by the plaintiff in the Liu case. *Liu v. Four Seasons Hotel, Ltd.*, 2019 IL App (1st) 182645, ¶ 30.

The primary purpose for the Illinois Workers' Compensation Act has been stated repeatedly by this Court "to provide employees a prompt, sure and definite compensation, together with a quick and efficient remedy, for injuries or death suffered by such employees in the course of their employment." *See, O'Brien v. Rauteubush*, 10 Ill.2d 167, 139 N.E.2 222, 226 (1986). The remedial purpose of the Act is thus to provide the injured worker financial protection from injuries sustained arising out of and in the course of their employment until they can return to work. This Court has also repeatedly stated the jurisdiction of the Illinois Workers' Compensation Commission (hereinafter "the Commission") is limited to that conferred to it by the Workers' Compensation Act. *Michelson v. Industrial Commission* 375 Ill. 462, 466, 31 N.E.2d 940 (1941). The Workers' Compensation Act does not accord the Commission with jurisdiction over BIPA claims. Instead, BIPA expressly excluded jurisdiction from the Commission. In the instance of BIPA, the Commission is not the appropriate forum to determine whether a violation of BIPA occurred and what the associated damages are for several reasons.

Neither the Workers' Compensation Act nor BIPA give the Commission jurisdiction over violations arising under BIPA. BIPA states a claim can be brought in the state circuit court or as a supplemental claim in the federal district court. 740 ILCS 14/20. It does not state a claim can be brought before the Commission. When the General Assembly enacted BIPA, the General Assembly did not amend the Workers' Compensation Act allowing for jurisdiction of BIPA claims.

In *Interstate Scaffolding v. Illinois Workers' Compensation Commission*, 236 Ill.2d 132 (2010), this Court addressed the question of whether the Commission could determine if the termination of employment for cause was a basis to terminate the injured workers'

entitlement to temporary total disability benefits when the employer would otherwise have accommodated the employee's restrictions. The Court answered the question in the negative. The Court stated the determination of whether the employee was discharged for a valid cause or whether the termination violated public policy were inquiries foreign to the Illinois workers' compensation system. The sole inquiry for the Commission was whether the injured workers' condition had stabilized. Similarly, the determination of whether a violation occurred under BIPA is an inquiry foreign to the Illinois workers' compensation system and goes beyond the jurisdiction granted to the Commission by statute. As the Court held in *Interstate Scaffolding*, the Commission's jurisdiction is limited to that conferred upon it by the General Assembly. Placing the adjudication of BIPA claims before the Commission is contrary to the jurisdiction the General Assembly established for BIPA claims and charges the Commission with adjudicating claims foreign to it.

The Illinois Workers' Compensation Act only covers claims for a "compensable injury and emotional distress arising out of a physical injury, or a psychological injury stemming from a definite time and place." *Sharp v. Gallagher*, 95 Ill. 2d 322, 326 (Ill. 1983). The remedial purpose of the Act is to afford the injured worker financial protection from injuries sustained arising out of and in the course of their employment until they can return to work. This Court stated in *Pathfinder* "the test of existence of injury" in terms of workers' compensation is "whether there was a harmful change in the human organism-not just its bones and muscles, but its brain and nerves as well." *Pathfinder Co. v. Industrial Commission*, 62 Ill. 2d. 556 (1976). In contrast, a plaintiff need not prove an actual injury beyond the privacy violation alleged to bring a BIPA claim; accordingly, the exclusive

remedy provisions of the Workers' Compensation Act are not applicable, given their need not be an injury stemming from a definite time and place for a BIPA claim to arise.

The Commission is an administrative body with its own rules and procedures. Many of the rules and procedures could greatly impair the ability of the parties to either bring or defend against a BIPA claim and the Commission's ability to handle such claims. The Commission is without general or common law powers, including those of discovery. *Chicago v. Fair Employment Practices Commission*, 65 Ill.2d 10, 113, 2 Ill. Dec. 711, 357 N.E.2d 1154 (1976). Claims filed with the Commission are not subject to the Illinois Rules of Civil Procedure. This Court has stated, "[The Commission] lacks the inherent powers of a court and can only make such orders as are within the powers granted to it by the legislature." *Ferris, Thompson & Zweig, Ltd. v. Esposito*, 2015 IL 117443, 25 N.E.3d 637.

Consequently, the Illinois workers' compensation system has no motion practice and allows for no pre-trial discovery. The Commission has no power to order or oversee pre-trial discovery, including the answering of interrogatories, pre-trial depositions and limited authority for the issuance of subpoenas for documents. An answer to a subpoena is only returnable at the time of trial, and the Commission does not even enforce its own subpoenas. Enforcement of a subpoena, if requested by the Commission, is then shifted to the Circuit Court by the Workers' Compensation Act. 820 ILCS 305/16. BIPA claims should be handled by a forum, such as the state circuit courts, where the Code of Civil Procedure's discovery and pre-trial provisions give both parties to the proceeding an opportunity to engage in pre-trial discovery and provide ways to dismiss unsupported claims.

If the Appellate Court's decision in *McDonald v. Symphony Bronzeville Park, LLC* is set aside, the consequence will be an influx of BIPA claims before the Commission in a forum that does not have jurisdiction over the claims or the discovery procedures to handle such claims. It will result in a slew of individual claims with no mechanism in place to put violations together in a class action because class actions cannot be brought before the Commission. The Commission will be bogged down in BIPA claims and unable to handle claims for actual work injuries. The Commission will be unable to give effect to the primary purpose of the Act by providing injured workers with "prompt, sure and definite compensation, together with a quick and efficient remedy." This all runs contrary to public policy and the purpose for the Workers' Compensation Act.

Privacy violations and claims do not belong before the Commission. The damages in a privacy claim are different from the medical expenses and loss of income compensated under the Workers' Compensation Act. Any financial losses suffered by an employee for a privacy violation under BIPA cannot be compensated by the payment of medical bills, lost time and permanency. The provisions of the Act do not provide compensation for the losses suffered by an individual from privacy violations. This Court has said compensability exists when there is a "demonstrable medical evidence of injury." *Toothman v. Hardee's Food Systems, Inc.*, 304 Ill. App. 3d 521, 533 (5th Dist. 1999). Preventing an employee from pursuing a BIPA violation before the Circuit Court based on the exclusivity provisions would leave the employee with no remedy whatsoever for financial losses, which is not the intent of BIPA, the Workers' Compensation Act or public policy.

Moreover, workers' compensation insurance policies do not include coverage and defenses for privacy related claims. A workers' compensation policy covers loss under the Act, limiting the liabilities to related medical expenses, lost time and permanency compensation. The Act contains no provision for damages claimed for a privacy violation, and workers' compensation insurance policies do not contain provisions covering such losses. Shifting BIPA claims to the Commission, which as previously discussed does not have jurisdiction over such claims, would leave employers unprotected before the Commission as such claims and losses would not be covered by their workers' compensation policies.

If the intent was to confer jurisdiction of BIPA claims with the Commission, then the Illinois General Assembly would have provided as such in the statute. In its decision, the Appellate Court recognized this was not the intent of BIPA or the Workers' Compensation Act. The Appellate Court's decision was consistent with the decision it reached in *Liu v. Four Seasons Hotel, Ltd.*, 2019 IL App (1st) 182645, 435 Ill.Dec. 13, 138 N.E.3d 201 (1st Dist. 2019). In *Liu*, the question was whether an employer's use of biometric data for timekeeping purposes transformed a BIPA claim to a wages and hours dispute when there was no associated allegation the employer withheld compensation or required employees to work excessive hours. The Appellate Court determined it did not and rejected the employer's arguments. Similarly, in the present case, the question is whether a privacy violation under BIPA is converted into a workers' compensation claim the exclusive jurisdiction and remedy is at the Commission. For the reasons set forth, the limitations on the jurisdiction of the Commission and the Commission's unique procedures would support the same conclusion – a privacy violation under BIPA is not transformed

into a workers' compensation claim merely because the employer used biometrics for identification purposes in the workplace.

CONCLUSION

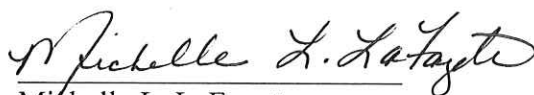
If the General Assembly intended for BIPA claims to arise under the provisions of the Illinois Workers' Compensation Act, it would have so provided as such in the statute. The Commission is not the appropriate forum to adjudicate such claims, given the inquiries are foreign to the workers' compensation system and the system's limited discovery provisions and lack of motion practice preclude for prompt and efficient handling of such claims. Finally, the primary purpose of the Workers' Compensation Act would not be given its full effect. BIPA claims before the Commission would flood a system not equipped to handle the claims and impede the Commission's ability to adjudicate claims for legitimate work injuries. The WCLA encourages the Court to preserve the purpose of the Commission and the Illinois Workers' Compensation Act.

Respectfully Submitted,

ON BEHALF OF THE WORKERS' COMPENSATION
LAWYERS ASSOCIATION.



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CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding pages or words contained in the Rule 341(c) cover, the Rule 341(h)(1) table of contents and the statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service and those matters to be appended to the brief under Rules 342(a) is 9 pages.

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