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Judicial erosion of workers' compensation's exclusive remedy

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When the majority of an appellate court panel ignores "largely unassailable legal precedent" cited by the dissent to reach a conclusion based upon the subjective understanding of the plaintiff, the rule of law breaks down. This is especially so when that understanding is contrary to the clearly established and longstanding public policy annunciated by the Illinois General Assembly and recognized by the courts.

But that is exactly what happened in *Quintana v. Ferrara Candy Company*, 2020 IL App (3d) 190414-U, in yet another assault on Illinois' workers' compensation system.

In the process of extolling the virtues of the Senate and the long terms of service and selection by state legislatures that combine to act as a ballast to the new government, in Federalist No. 62, Publius wrote:

"The internal effects of a mutable policy are still more calamitous. It poisons the blessing of liberty itself. It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?"

The rule of law is a phrase has been expanded to refer to action that should be taken to combat criminality and lawlessness. Its core meaning is to contrast with the rule of men and vicissitudes that accompany it. The rule of law is a necessary, if insufficient, condition to freedom.

As articulated in this space on May 18, until PA 101-0006 and since 1911, the exclusive remedy available to employers (and employees) has been largely untouched. Under Illinois law the exclusive remedy provision found in the acts "is part of the quid pro quo in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, he is relieved of the prospect of large damage verdicts." *Meerbrey v. Marshall Field & Co., Inc.*, 139 Ill.2d 455, 462 (1990). "This trade-off between employer and employee promoted the fundamental purpose of the Act, which was to afford protection to employees by providing them prompt and equitable compensation for their injuries." *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 180-81 (1978).

Consistent with this trade off, 820 ILCS 305/5(a) has been interpreted to included borrowing employers within the ambit of those covered by the exclusive remedy of workers' compensation through a two-factor test — (1) whether the borrowing employer has the right to control the plaintiff's work, and (2) whether the

plaintiff gave express or implied consent to a borrowed employment relationship. *Chavez v. Transload Services, LLC*, 379 Ill.App.3d 858, 862 (1st Dist., 2008).

In *Quintana*, the plaintiff worked for a staffing company who placed him with Ferrera Candy Company. Quintana was allegedly injured by the actions of a co-employee. Quintana filed a civil action against Ferrara. Ferrara moved to dismiss pursuant to 735 ILCS 5/2-619(a)(9) which was granted. There was no dispute that Ferrara controlled Quintana's work and satisfied the first prong. The issue was whether a waiver of benefits offered by Ferrara and signed by Quintana meant that he was not an employee for the purposes of workers' compensation. The court found the waiver ambiguous for an unsophisticated employee and therefore reversed the grant of summary judgment in favor of the defendant. The dissent asserted that providing workers' compensation is not waivable and that the only purpose of the waiver, when read as a whole, was to preclude Quintana from taking advantage of internal benefits programs offered by the defendant.

If allowed to stand, the majority's decision does violence to the workers' compensation system and continues the process started by PA 101-0006. The court also misapplies what it means to be ambiguous. An ambiguity is not simply something that is poorly written. Rather, an ambiguity is language that is subject to more than one reasonable alternative. *R.W. Dunteman Co. v. Village of Lombard*, 281 Ill.App.3d 929, 936 (2nd Dist. 1996). In this case, the alternative posed by the majority, that the waiver would work to eliminate the defendant's obligation to provide workers' compensation, cannot be reasonable because it would violate public policy.

This decision, even though currently unpublished, will have exactly the kind of "calamitous" consequences of a mutable policy feared by Publius. Employers have arranged their affairs in reliance on the exclusive remedy of workers' compensation being available. This decision could leave a defendant in situation like Ferrara uninsured because commercial general liability policies typically have exclusions against suits brought by employees and workers' compensation policies typically exclude actions brought in civil court. It will also likely harm the very workers it is designed to help by raising the cost of employing workers from staffing agencies and thus depriving some of the opportunities for employment that they would have otherwise.

This is not question of depriving the plaintiff of a remedy; it is question of which remedy. The General Assembly and the Illinois courts have long preserved the exclusive remedy; however, by recent actions, both have taken steps that upset that bargain, and will leave employers and employees both worse off. Before further steps are taken, consideration needs to be made of the effect of these changes in policy.

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