IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

SHEILA HILL,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 14-cv-0895-MJR-PMF**
	)	
NATHAN HEALTH CARE CENTER, LLC, and LAWRENCE WASHINGTON,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

REAGAN, Chief Judge:

A. Introduction

On July 17, 2014, Plaintiff Sheila Hill filed a complaint in St. Clair County Court, within the Southern District of Illinois, against Defendants Nathan Health Care Center, LLC ("Nathan Health") and Lawrence Washington ("Washington") (Doc. 3-2). This nine count action centered on claims of sexual harassment against the Defendants, in violation of the Illinois Human Rights Act ("IHRA"), Title VII of the Civil Rights Act of 1964 ("Title VII"), and several theories of tort under Illinois law (*Id.*). On August 16, 2014, and pursuant to 28 U.S.C. § 1446, Defendant Nathan Health removed the action to this Court (Doc. 3).

On September 4, 2014, Defendant Washington filed a Motion to Dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), apparently seeking to dismiss Counts I, II, VII, VIII, and IX (Doc. 15 at 2). The Plaintiff filed a response on September

11, 2014 (Doc. 18). On September 15, 2014, Defendant Nathan Health filed a Motion to Dismiss Counts III through VII, citing lack of subject matter jurisdiction under Rule 12(b)(1), and a failure to state a claim upon which relief could be granted under Rule 12(b)(6) (Doc. 19). Plaintiff responded on September 17, 2014 (Doc. 25) and Nathan Health replied one week later (Doc. 26). Both motions are now fully ripe and before the Court. For the reasons cited below the Court **DENIES** Defendant Washington's motion to dismiss (Doc. 15), and **GRANTS** Defendant Nathan Health's motion to dismiss (Doc. 19).

B. Background Facts

Plaintiff was an employee of Nathan Health, working under the direct supervision of Washington (Doc. 3-2 at 2). She notes that Washington's supervisor was his wife, and that she believed that the human resources manager was also related to Washington (*Id.* at 2). Plaintiff states that during her employment at Nathan Health, she was subject to "egregious sexual harassment on account of her sex by defendant Washington" (*Id.* at 3). Plaintiff lists several unlawful employment practices which she contends Defendant Nathan Health (in the person of Washington) engaged in, including requests by Washington to perform various sexual acts, discussion of Washington's sexual fantasies in the Plaintiff's presence, direct physical contact of a sexual nature, and Washington touching himself in front of Hill (*Id.* at 3-4). The claims raised by Hill against Nathan Health and Washington are summarized as follows:

Count Number	Claim	Defendant
I	Violation of the IHRA – Sexual Harassment	Nathan
II	Violation of Title VII	Nathan
III	Negligent Supervision	Nathan
IV	Negligent Hiring	Nathan
V	Intentional Infliction of Emotional Distress	Nathan
VI	Negligent Infliction of Emotional Distress	Nathan
VII	Negligent Infliction of Emotional Distress	Washington
VIII	Intention Infliction of Emotional Distress	Washington
IX	Battery	Washington

C. Legal Standards

1. Motion to Dismiss

In reviewing a 12(b)(6) dismissal, a court will construe all well-pleaded facts and draw all inferences in the light most favoring the non-moving party. ***Vesely v. Armstlist LLC*, 762 F.3d 661, 664 (7th Cir. 2014) (citing *Reynolds v. CB Sports Bar, Inc.*, 623 F.3d 1143, 1146 (7th Cir. 2010).** To survive a motion to dismiss, a plaintiff must allege "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" ***Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, (2007)).** A court need not accept as true any legal assertions or recital of the elements of a cause of action "supported by mere conclusory statements." ***Alam v. Miller Brewing Co.*, 709 F.3d 662, 666 (7th Cir. 2013)**. Stated another way:

> The pleading standard [Federal] Rule [of Civil Procedure] 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement."

***Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555, 557) (internal citations removed).**

D. Application

1. Defendant Washington's Motion to Dismiss (Doc. 15)

In his motion, Defendant Washington seeks to dismiss claims against pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that Plaintiff's complaint against him fails to state a claim upon which relief may be granted. As Plaintiff notes in her response, Defendant's motion is confusing at best. Washington argues that "Illinois courts have consistently held there is no individual liability under Title VII or Illinois Human Rights Act" (Doc. 15 at 2). The motion continues by stating that Count I and II should be dismissed as to Washington.

Washington's actions as a supervisor, if true, could make Nathan Health liable under Title VII. ***See, e.g. Vance v. Ball State University*, 133 S. Ct. 2434, 2439-40 (2013); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 755-56 (1998); *Faragher v. Boca Raton*, 524 U.S. 775, 807 (1998); *Lambert v. Peri Formworks Systems, Inc.*, 723 F.3d 863, 866-67 (7th Cir. 2013).** Moreover, under the IHRA, an employer can be found strictly liable for a supervisory employee's harassment. ***Sangamon County Sheriff's Dept. v. Ill. Human Rights Comm'n*, 908 N.E. 2d 39, 45 (Ill. 2009).** However, Plaintiff's complaint, while mentioning Washington as the individual who allegedly discriminated against the Plaintiff, clearly indicates that Counts I and II are properly against Nathan Health (as the employer), and not Washington (Doc. 3-2 at 2-9). Claims made under Title VII

and the IHRA are, with only a few exceptions, exclusively against employers, which Nathan Health is and which Washington is not. ***Williams v. Banning*, 72 F.3d 552, 555 (7th Cir.1995) (holding that no individual liability exists for a supervisor under Title VII); *Zayadeen v. Abbott Molecular, Inc.*, 2013 WL 361726, at *5 (N.D. Ill. Jan. 30, 2013) ("[Section] 1981 provides for individual liability while Title VII and the IHRA do not.").** Thus, while Defendant Washington is technically correct that neither Title VII nor the IHRA allow for individual liability, he is incorrect in his suggestion that Plaintiff's complaint stated otherwise. Defendant's motion as to Counts I and II is **DENIED**.

As noted in the above chart, only Counts VII, VIII, and IX are made against Washington, and the Defendant seeks the dismissal of these claims as well. The Defendant notes that "tort claims are pre-empted by the IHRA when such claims depend on factual allegations identical to those set forth in a sexual harassment claim" (Doc. 15 at 2). Put simply, Defendant argues that Plaintiff's claims against him in Counts VII-IX are preempted by the IHRA.

Preemption by the IHRA of claims in tort has been addressed numerous times by the Illinois Supreme Court and the Seventh Circuit Court of Appeals. ***See e.g., Naeem v. McKesson Drug Co.*, 444 F.3d 593, 602-04 (7th Cir. 2006).** Even more recently, the Seventh Circuit clarified that:

> A claim is inextricably linked with the Act if the Act furnishes the legal duty that the employer is alleged to have violated, such as the duty to refrain from discriminating against or sexually harassing an employee. Where the complaint alleges a tort recognized at common law, such that the elements of the tort can be

> established without reference to the legal duties created by the Act, the state law claim is not preempted by the Act.

***Mendez v. Perla Dental*, 646 F.3d 420, 422 (7th Cir. 2011) (citing *Bannon v. University of Chicago*, 503 F.3d 623, 630 (7th Cir. 2007); *Naeem*, 444 F.3d at 604; *Maksimovic v. Tsogalis*, 687 N.E.2d 21, 23 (Ill. 1997)).**

The Seventh Circuit's statement in ***Mendez*** makes quite clear that while preemption may exist under a given set of facts, it will only occur where the legal duty established by the IHRA overlaps with the legal duties established in tort. In this case, Defendant Washington argues, and would have this Court agree, that the claims asserted in Counts I and II (against Nathan Health and related to its duties to the Plaintiff) preempt the claims established in Counts VII-IX (against him, and relating to his duties to the Plaintiff). Were all counts against Washington, the Defendant might have an argument, pending an analysis under ***Mendez***. As it is, no such argument can be made, as Washington cannot assert the necessary overlap in duty, as the IHRA does not create a duty for Washington. Defendant Washington's Motion is **DENIED**.

2. Defendant Nathan Health's Motion to Dismiss (Doc. 19)

Nathan Health has also filed a motion to dismiss, specifically as to Plaintiff's state tort claims against it—Counts III-VI. Nathan Health argues that these counts are preempted, either by the Illinois Workers' Compensation Act ("IWCA"), or in the alternative by the IHRA.

The IWCA provides a mechanism of employee compensation of job related injuries, regardless of fault. ***See* 820 ILCS 305/1 *et seq*.** Section 11 of the IWCA

provides: "The compensation herein provided, together with the provisions of this Act, shall be the measure of the responsibility of any employer . . . for accidental injuries sustained by any employee arising out of and in the course of the employment according to the provisions of this Act . . . ." **820 ILCS 305/11.** Additionally, the IWCA holds that:

> No common law or statutory right to recover damages from the employer . . . for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act . . . .

820 ILCS 305/5(a).

Thus, the IWCA provides an exclusive and preemptive remedy for accidental workplaces injuries. ***Hunt-Golliday v. Metro. Water Recl. Dist. of Greater Chicago*, 104 F.3d 1004, 1016 (7th Cir. 1997).** As the Seventh Circuit notes: "In return for not having to prove fault, employees receive only workers' compensation benefits from their employers and cannot sue their employers to receive more damages." ***Baltzell v. R&R Trucking Co.*, 554 F.3d 1124, 1127 (7th Cir. 2009) (citing 820 ILCS 305/5(a)).**

In 1990, the Illinois Supreme Court stated that the IWCA, as an exclusive remedy, bars an employee from bringing common law actions against an employer unless the employee can prove that the injury:

1) was not accidental;

2) did not arise from the employee's employment;

3) was not received during the course of employment; or

4) was not compensable under the IWCA.

***Meerbrey v. Marshall Field and Co., Inc.*, 564 N.E.2d 1222, 1225-26 (Ill. 1990).** ***See also TKK USA, Inc., v. Safety Nat. Cas. Corp.*, 727 F.3d 782, 787 (7th Cir. 2013).** Thus, for Plaintiff to prove this disjunctive (and remove the preemptive bar of the IWCA), one of the four conditions must be shown. In its motion, Nathan Health contends that the Plaintiff can prove none of the four. Based upon the pleadings and applicable law, the Court agrees with the Defendant.

a. Injury was accidental

While the other ***Meerbrey*** conditions generate some argument between the parties, the question of whether the injury allegedly suffered at the hands of the Defendants was accidental is likely the central question in this case. For purposes of IWCA exclusivity, the Illinois Supreme Court has held that "accidental" is defined as "anything that happens without design, or an event which is unforeseen by the person to whom it happens." ***Meerbrey*, 564 N.E.2d at 1226**. The court continues by noting:

> Thus, injuries inflicted intentionally upon an employee by a co-employee are "accidental" within the meaning of the Act, since such injuries are unexpected and unforeseeable from the injured employee's point of view. Such injuries are also accidental from the employer's point of view, at least where the employer did not direct or expressly authorize the co-employee to commit the assault. Because injuries intentionally inflicted by a co-worker are accidental from the employer's point of view, the employer has a right to consider that the injured employee's sole remedy against the employer will be under the workers' compensation statute.

***Id.* (citing *Collier v. Wagner Castings Co.*, 408 N.E.2d 198, 202 (Ill. 1980).** ***See also Hunt-Golliday*, 104 F.3d at 1016.**

Within this construct, Illinois courts have made clear that the preclusion bar does not extend to those situations where the employer, *or its alter ego*, intentionally causes

injury to an employee. ***Meerbrey*, 564 N.E.2d at 1226**. This makes sense, as without this rule, an employer could "assert that the injury was accidental, and therefore under the exclusive provisions of the Act, when he himself committed the act." ***Id.* (internal quotation marks removed).**

Plaintiff's complaint does not allege that Nathan Health intentionally caused injury to the Plaintiff. It is clearly written with the alter ego exception to the preclusive bar of the IWCA in mind. At several points, it notes that "Washington was the alter ego of Defendant Nathan [Health]" (Doc. 3-2 at 2, 6). According to the Plaintiff, the appropriate question is, "what is needed to allege an alter-ego?" (Doc. 25 at 2). Equally as important is whether the Plaintiff has sufficiently alleged alter-ego in this case.

Illinois law provides that a corporation is generally separate and distinct from affiliated shareholders, officers, directors, and parent or subsidiary corporations. ***Main Bank of Chicago v. Baker*, 427 N.E. 2d 94, 101 (Ill. 1981).** As the *Main Bank* court stated "it must be shown that [the corporation] is so controlled and its affairs so conducted that it is a mere instrumentality of another, and it must further appear that observance of the fiction of separate existence would, under the circumstances, sanction a fraud or promote injustice." ***Id.*** Where this can be shown, it is possible for a Court to "pierce a corporation's veil" or, in this case, potentially remove the bar of the IWCA's preclusion.

Defendant properly notes that the Plaintiff has at no point demonstrated that Nathan Health is an alter ego of Washington. Plaintiff, in her reply to the Nathan Health's motion, argues that, from the Plaintiff's perspective, "Washington was Nathan Health," as he was the head of the housekeeping department where she worked at

Nathan Health (Doc. 25 at 5). Plaintiff's complaint notes that Washington was her direct supervisor (having control over the terms and conditions of Plaintiff's employment), that Washington's direct supervisor was his wife, and that the human resources director may also be related to the Defendant (Doc. 3-2 at 2). While these facts certainly suggest that the Plaintiff may have felt she had limited avenues for reporting Defendant Washington's alleged behavior, it in no way suggests that he was an alter ego of the housekeeping department, much less Nathan Health. As this Court has previously noted, "[j]ust being a manager or supervisor does not render an employee his employer's alter ego. ***Collman v. DG Retail, LLC*, 2013 WL 5291935, at *7 (S.D. Ill. Sep. 19, 2013).** Plaintiff's conclusory statements of Washington as alter ego of Nathan Health are not sufficient and, as there are no allegations that Nathan Health intentionally injured the Plaintiff, her injuries were accidental under the definition provided by the Illinois Supreme Court.

b. Injury rose out of and occurred during the course of employment

In its Motion, Nathan Health collapses the second and third condition into a single statement (Doc. 20 at 5-6). The Illinois Supreme Court has often done the same. ***Baggett v. Indus. Comm'n*, 775 N.E.2d 908, 912-13 (Ill. 2002).** As noted above, to be compensable under the Act, an injury must be "arising out of and in the course of the employment." 820 ILCS 305/2. The ***Baggett*** court went one step further, defining these terms, stating:

> An injury "arises out of" one's employment if it originates from a risk connected with, or incidental to, the employment, involving a causal connection between the employment and the accidental injury. An injury

> is sustained "in the course" of employment when it occurs during employment, at a place where the worker may reasonably perform employment duties, and while a worker fulfills those duties or engages in some incidental employment duties.

***Baggett*, 885 N.E.2d at 912-13 (citing *Parro v. Indus. Comm'n*, 657 N.E.2d 882, 885 (Ill. 1995)).** Nathan Health states that by the Plaintiff's own allegations, the alleged injuries both arose out of and occurred during her employment (Doc. 20 at 5-6, citing to Plaintiff's Complaint). The Plaintiff, appearing willing to cede the argument as to "in the course of employment," argues that her injury did not "arise out of" her employment, as the events which she alleges to have occurred were not "within the scope of her employment" (Doc. 25 at 6).

Plaintiff alleges that injuries occurred while an employee of Nathan Health, under the supervision of Washington (Doc. 3-2 at 2-3). Events that occur "in the course of employment refer 'to the time, place, and circumstances under which the claimant is injured.'" ***Litchfield Healthcare Center v. Indus. Comm'n*, 812 N.E.2d 401, 405 (Ill. App. 5th 2004) (citing *Scheffler Greenhouses, Inc. v. Indus. Comm'n*, 362 N.E.2d 325, 366 (Ill. 1977)).** Plaintiff's alleged injuries occurred within the course of her employment.

The question of whether Plaintiff's injuries "arose out of" her employment is somewhat more complicated. In 1992, the Seventh Circuit noted that the question of whether sexual harassment was an injury that "arises out of" employment was, at the time, a matter of first impression for Illinois courts. ***Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 323-24 (7th Cir. 1992)**.

The ***Juarez*** court began its analysis by noting that "assaults by co-employees in the workplace that are motivated by general racial or ethnic prejudice are best treated as compensable 'neutral' risks arising out of employment." ***Id.* at 323 (quoting *Rodriguez v. Indus. Comm'n*, 447 N.E.2d 186, 190 (1982).** The court then analogized such prejudices and slurs to sexual harassment. ***Juarez*, 957 F.2d at 323-24.** Finally, it noted that emotional distress injuries inflicted by a co-worker could rise out of employment. ***Id.* at 324 (citing *Collier v. Wagner Castings Co.*, 408 N.E.2d 198, 200 (Ill. 1980)).** Based upon the underlying facts in the case, the Seventh Circuit concluded that the plaintiff's risk of emotional distress was increased due to her employment and thus her tort claim was barred by the IWCA. ***Juarez*, 957 F.2d at 324**. ***See also Zabkowicz v. West Bend Co., Div. of Dart Industries, Inc.*, 789 F.2d 540 (7th Cir. 1986) (interpreting similar Wisconsin statute, harassment was deemed to arise out of employment without comment by the court).**

The notion as to whether sexual harassment by one employee against a co-employee "arises out of employment" and therefore barred by relevant Workers' Compensation statutes is a matter of dispute in courts throughout the nation. A cursory examination of similar cases finds that rulings are fairly mixed, even where the underlying facts and the relevant statutes are similar. ***Compare Western Heritage Ins. Co. v. Magic Years Learning Ctrs. and Child Care, Inc.*, 45 F.3d 85, 89–90 (5th Cir.1995) (sexual harassment arises out of employment), *and Wendt v. Charter Communications, LLC*, 2014 WL 7357247 (D. Minn. Dec. 23, 2014) (same), *with SCI Liquidating Corp. v Hartford Ins. Co.*, 52 S.E.2d 555, 557 (Ga. 2000) (sexual harassment**

does not arise out of employment), ***and Anderson v. Save-A-Lot, Ltd.*****, 989 S.W.2d 277, 287-88 (Tenn. 1999) (same).**[1] The Court finds the ruling in ***Anderson*** to be particularly instructive, wherein the Tennessee Supreme Court stated that the alleged injury did not arise out of the plaintiff's employment, as the harassment "was an unanticipated risk that was not a condition of [the plaintiff's] employment" and could not be considered a "normal component of [the plaintiff's] employment relationship." ***Id.*** **at 288.** Were the Court doing its own first impression analysis of this issue, it might very well agree with the findings in ***Anderson***. However, the ruling in ***Juarez*** remains precedent for this district, and the Court finds the alleged sexual harassment arose out of the Plaintiff's employment.

c. Injury is compensable under the IWCA.

Rulings in this Circuit and Illinois clearly demonstrate that Plaintiff's alleged injuries are compensable under the IWCA. ***Juarez*****, 957 F.2d at 323-24.** ***See also Hunt-Golliday*****, 104 F.3d at 1016-17;** ***Meerbrey*****, 564 N.E.2d at 1226;** ***Collier v. Wagner Castings Co.*****, 408 N.E.2d 198, 202 (Ill. 1980 ("emotional distress is compensable under the [IWCA]").**

Counts III through VI are preempted by the Illinois Workers' Compensation Act, as the alleged injury was accidental, arises from and occurred during the Plaintiff's course of employment, and is compensable under the IWCA. Accordingly, the Court **GRANTS** Defendant Nathan Health's Motion to Dismiss (Doc. 19). As the IWCA is

[1] Even within this circuit, the precedent set by ***Juarez*** has not been uniformly followed. ***Zakutansky v. Bionetics Corp.*****, 806 F.Supp. 1362, 1366-67 (N.D. Ill. 1992) (stating that Seventh Circuit's ruling in Juarez was partially at odds with Illinois Supreme Court rulings as to the IWCA's bar of intentional torts in sexual harassment cases).**

sufficient to bar these claims, the Court need not, and does not evaluate whether the claims are otherwise barred by the Illinois Human Rights Act.

E. Conclusion

As noted above, the Court **DENIES** Defendant Washington's Motion to Dismiss (Doc. 15) and **GRANTS** Defendant Nathan Health's Motion to Dismiss (Doc. 19). Counts III, IV, V, and VI are dismissed. Counts I and II remain active as to Defendant Nathan Health, and Counts VII, VIII, and IX remain active as to Defendant Washington.

IT IS SO ORDERED.

DATED: January 13, 2015

s/ Michael J. Reagan
MICHAEL J. REAGAN
United States District Judge