No. 17-

IN THE

Supreme Court of the United States

MARTYN BAYLAY,

Petitioner,

v.

ETIHAD AIRWAYS P.J.S.C.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Does the Foreign Sovereign Immunities Act permit adjudication of claims against a "foreign state" (as defined by 28 U.S.C. § 1603(a)) outside of federal and state courts?

(2) In drafting the Foreign Sovereign Immunities Act, did Congress intend to create a two-stage process for a claimant to pursue his claim for work-related injuries when his employer is a "foreign state" and the state where the injury occurred has state agency that adjudicates such claims?

(3) May the executive branch of the government of the State of Illinois (*i.e.*, Industrial Commission of Illinois) exercise authority/jurisdiction to decide a claim against a "foreign state", and its agencies and instrumentalities, when Congress, in enacting the Foreign Sovereign Immunities Act, transferred all issues related to a foreign state's immunity (or any waiver thereof) to the judiciary and away from the executive branch of government.

PARTIES TO THE PROCEEDINGS

The names of all parties to the proceeding in the court below whose judgment is sought to be reviewed are contained in the caption of this case. Rule 14.1(b).

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Petitioner, Martyn Baylay, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The district court's decision (App., *infra*, 1a) is reported at *Baylay v. Etihad Airways P.J.S.C.*, 222 F. Supp. 3d 698 (N.D. Ill. Nov. 29, 2016). The Seventh Circuit's opinion (App., *infra*, 2a) is reported at *Baylay v. Etihad Airways P.J.S.C.*, Nos. 16-4113 and 17-1958 (7th Cir. Feb. 7, 2018).

JURISDICTION

The court of appeals entered its judgment on February 7, 2018. (App., *infra*, 2a) Baylay's petition for panel rehearing was denied on March 7, 2018. (App., *infra*, 3a) This petition is filed within 90 days of the judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

I. United States Constitution.

Article III, Section 2 of the Constitution of the United States provides, in relevant part: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;…to controversies…between a state, or the citizens thereof, and foreign states, citizens or subjects." U.S. Const. art. III, § 2.

Article VI, Section 2 of the Constitution of the United States provides, in relevant part: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. Const., art. VI, § 2.

II. Illinois Constitution of 1970.

Article 6, Section 9 of the Illinois Constitution of 1970 provides as follows: "Circuit Courts shall have original jurisdiction of all justiciable matters except when the Supreme Court has original and exclusive jurisdiction relating to redistricting of the General Assembly and to the ability of the Governor to serve or resume office. Circuit Courts shall have such power to review administrative action as provide by law." Ill. Const., art. VI, § 9.

STATEMENT OF THE CASE

Petitioner Martyn Baylay, a pilot-employee of Etihad Airways P.J.S.C. (a foreign state), was injured by a co-worker in the course (but not the scope) of his employment with Etihad. The injuries took place on a mandatory layover in Chicago.

Without deciding whether a "foreign state" constitutes an "employer" under Section 1(a) the Illinois Workers' Compensation Act ("IWCA") (820 ILCS 305/1), both the district court and the court of appeals concluded that Baylay's claim against Etihad belong before the Illinois

Workers' Compensation Commission (an agency of the executive branch of Illinois). However, the court of appeals, also, concluded that in order for Baylay to get his claim before the state agency, a court must decide whether Etihad waived its sovereign immunity.

Nothing in the text of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602, *et seq.* ("FSIA" or "the Act") provides that any claim against a foreign sovereign may be adjudicated in any venue outside of the courts (either federal or state). The Act reflects Congress's solicitude for the "rights of both foreign states and litigants in United States Courts." 28 U.S.C. § 1602. Section 1604 of the FSIA sets forth the general rule that "a foreign state shall be immune from the jurisdiction of the <u>courts</u> of the United States and of the States except as provided in Section 1605 to 1607 of this chapter." 28 U.S.C. § 1604 (emphasis added). Section 1605, then, provides that "[a] foreign state shall not be immune from the jurisdiction *of courts* of the United States or of the States in any case" in which the action is based upon a commercial activity carried on in the United States by the foreign state. 28 U.S.C. § 1605 (emphasis added)

I. Proceedings In The Trial Court.

A. The Court of Appeals' summary of facts from the trial record.

"Etihad Airways is a public joint stock company established by Emiri Decree and incorporated in the Emirate of Abu Dhabi, United Arab Emirates. Martyn Baylay, a British citizen, worked as a pilot for Etihad in 2013." (App., *infra*, 2a, p2)

"That October, Etihad assigned Baylay to a flight crew that also included Saravdeep Mann. The crewmembers flew from Abu Dhabi to Chicago. After arrival, Etihad arranged for the crewmembers' transportation to The Westin on Michigan Avenue in Chicago for an overnight layover. Etihad paid for the accommodations." (App., *infra*, 2a, pp2-3)

"The crewmembers drank pre-dinner cocktails together that night, where Mann consumed a significant amount. It appeared to Baylay that he had imbibed before meeting the group, too. At dinner, Mann downed even more alcohol and then expressed anti-American and anti-British views while emphasizing his distaste for the British by placing his hands around Baylay's throat. Mann left the restaurant without paying his bill and without his coat. The crewmembers settled Mann's bill, and Baylay offered to take Mann's coat and return it the next day." (App., *infra*, 2a, p3)

"Back at the hotel, Baylay heard a knock on the door of his hotel room and saw Mann standing outside his room. Thinking Mann was there to apologize for his earlier actions and collect his coat, Baylay opened the door. Mann struck him on the head and leg with a bronze hotel decoration. During the attack, Mann threatened Baylay, saying, 'I'm going to kill you. You f*cking British bastard.' Baylay managed to escape, took the elevator to the lobby of the hotel, and was then transported to Northwestern Memorial Hospital. Mann was arrested and transported to the Chicago Police Department." (App., *infra*, 2a, p3)

"Mann left the United States with Etihad's help after posting bond on October 14. He never returned, criminally violating his bond." (App., *infra*, 2a, p3)

"Baylay filed the second amended complaint on February 25, 2016, in federal district court. He sued Mann; Etihad Airways; 909 North Michigan Avenue Corporation and LHO Michigan Avenue Freezeout, LLC—the Westin's corporate entities; and United Security Services, Inc.—the company that provided security for the Westin at the time of the incident. United Security Services was later voluntarily dismissed from the case." (App., *infra*, 2a, pp3-4)

"Against Etihad, Baylay brought state-law claims of negligent retention, negligence, and willful and wanton conduct. Against Mann, he brought state-law claims of negligence and willful and wanton conduct. And against the Westin's corporate entities, Baylay brought a state-law claim of negligence." (App., *infra*, 2a, p4)

B. Procedural summary.

On October 2, 2015, the original complaint at law was filed. Plaintiff's Second Amended Complaint was filed on February 25, 2016.

"In March 2016, Etihad filed a 12(b)(6) motion to dismiss Baylay's claims against it. The district court granted the motion, concluding that Baylay's state-law claims against his employer were barred by the exclusivity provisions of the Illinois Workers' Compensation Act ('the IWCA'). If Baylay wanted to pursue claims against his employer arising from the incident with Mann, he needed to do so in front of the Illinois Workers' Compensation Commission ('the Commission'). The court entered an order providing for an immediate appeal of this decision, which Baylay timely filed on December 9, 2016 (No. 16-4113)." (App., *infra*, 2a, p4)

"In early 2017, the district court asked the parties to submit jurisdictional statements addressing whether the district court still had jurisdiction over the case after Etihad's dismissal. After reviewing the submitted statements, the district court dismissed Baylay's remaining claims without prejudice on April 7, 2017. It concluded that it had no original jurisdiction over the claims and declined to exercise its supplemental jurisdiction. With all of the plaintiff's claims dismissed, the district court terminated the civil case. Baylay filed a timely notice of appeal on May 5, 2017 (No. 17-1958)." (App., *infra*, 2a, p4)

On February 7, 2018, the Court of Appeals affirmed the district court's decision. (App., *infra*, 1a) On March 7, 2018, the Court of Appeals denied Baylay's petition for panel hearing. (App., *infra*, 3a)

REASONS FOR GRANTING THE PETITION

Firstly, Petitioner contends that the Foreign Sovereign Immunities Act requires any claim against a foreign state to be fully-adjudicated in a court of law. Thus, both the district court and the court of appeals erred when each concluded that Baylay's claims against Etihad can and must be administered by the Industrial Commission of Illinois ("the Commission") after the courts decide the issue of waiver of immunity. The court of appeals, thus, erred when it opined that the Illinois Industrial Commission, its members are of the executive branch of government functioning within an agency of the State of Illinois (820 ILCS 305/13, 305/14), may exercise jurisdiction over a "foreign state" in the absence of Congressional approval.

Secondly, Petitioner contends that every state of the United States (as well as the District of Columbia) are effected by the court of appeals' erroneous interpretation of a necessary two-stage adjudicative process involving workers' compensation programs. This includes both federal and state courts that the court of appeals indicated are merely gatekeepers to a workers' compensation claim against at foreign state. This Court should clarify this issue immediately before additional confusion is permitted to exist.

I. The FSIA Preempts The IWCA, So The Commission May Not Adjudicate Claims Against A Foreign State.

The Act "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989). When a plaintiff sues a foreign state, the Act presumes immunity and then creates exceptions to the general principle. *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1320 (2017). Here, the parties agreed that Etihad is a "foreign state" and that an exception (28 U.S.C. § 1605(a)(2) ("commercial activity" exception)) to immunity exists. The parties disagreed, however, about whether the Act requires claims against a foreign state to be heard by a court of law after a court has concluded that the foreign state is not immune from suit.

"A foreign state shall not be immune from the jurisdiction *of courts* of the United States or of the States…." 28 U.S.C. § 1605(a) (emphasis added). The Act does not describe any other acceptable venues for

adjudicating claims against a foreign state. Petitioner believes that the language of the Act vests the power to resolve claims against foreign states in the judiciary alone; the Act does not contain any language suggesting to the contrary. Thus, even though the substantive law contained in the Illinois Workers Compensation Act ("IWCA") (820 ILCS 305/1 *et seq.*) may mandate that certain claims against employers must be adjudicated first in front of the Commission, the FSIA preempts the IWCA and requires claims against foreign-state employers to remain in a court of law.

The court of appeals read the Act to suggest that Congress intended only the *immunity determinations* in cases against foreign states was transferred from the executive branch to the judicial branch. *See* 28 U.S.C. § 1602 ("Claims of foreign states to immunity should henceforth be decided by courts."); *Frolova v. Union of Soviet Socialist Republics*, 558 F. Supp. 358, 361 (N.D. Ill. 1983), *aff'd*, 761 F.2d 370 (7th Cir. 1985) (noting that one of the four main objectives of FSIA was to ensure that immunity would be strictly a judicial determination); *Nat'l Airmotive Corp. v. Gov't & State of Iran*, 499 F. Supp. 401, 406 (D.D.C. 1980) ("A primary purpose of th[e] Act was to depoliticize sovereign immunity decisions by transferring them from the Executive to the Judicial Branch."). However, the Act contains no such limitation for only *immunity determinations*.

In support of its position that the Act is not intended to affect the governing substantive law that may require adjudication outside the "courts of the United States or of the States", the Court cites *First Nat'l City Bank v. Banco Para El Comercia Exterior de Cuba*, 462 U.S.

611, 620 (1983). However, *First Nat'l City Bank* does not stand for the proposition that claims against a "foreign state" may be adjudicated outside of the courts. In fact, in *First Nat'l City Bank*, the Supreme Court stated that provisions in corporate charters indicating a waiver of sovereign immunity have been construed to "enabl[e] third parties to deal with the instrumentality [of a foreign state] knowing that they may seek relief in the courts." *First Nat'l City Bank*, 462 U.S. at 625.

Article I, Section 7 of the Constitution sets out the process by which a bill becomes a law: A majority of each congressional chamber votes for it, or in the case of a Presidential veto override, a two-thirds majority of each chamber votes for it. U.S. Const. art. I, § 7. Applying a textualist approach, an act's legislative history does not pass through the Article I, Section 7 crucible and is, thus, not law. However, in an abundance of caution, Petitioner reviewed the Act's legislative history to ascertain whether any guidance could be found therein. The legislative history of the Act provides no clear answer that any venue, outside of the courts, are proper. *See* H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 6, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6605-07 (hereinafter cited as "House Report"). The legislators repeatedly emphasized that they did not intend to create an international court of claims, and that the bill was "not designed to open up our courts to all comers to litigate any dispute which any party may have with a foreign state anywhere in the world." Hearings before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, House of Representatives, 94th Cong., 2d Sess., on H.R. 11315, June 2 and 4, 1976, p. 31.

However, in subsequent discussions about the Act, the opening statement of Senator Howell Helfkin at the hearing before the Subcommittee on Courts and Administrative Practices of the Committee on the Judiciary does improve the optics considerably. *See* S. Hearing No. 103-1077, 103rd Cong., 2d Sess. 6. The hearing concerned proposed legislation to amend the FSIA to permit a foreign state to be subject to the jurisdiction of federal and state courts in any case involving an act of international terrorism. Senator Helkin stated that "[t]he Foreign Sovereignty[sic] Immunities Act only allows claims to be decided by Federal and State courts for actions which arise outside the United States in the form of commercial disputes." *Id.* at 1. Senator Stuart Schiffer, in a prepared statement, stated that "[t]he Foreign Sovereign Immunities Act provides for jurisdiction in suits against foreign states in which the action is based upon a commercial activity carried on in the United States by the foreign state…." *Id.* at 9. Senator Arlen Specter, in a prepared statement, stated that "[t]he purpose of the Foreign Sovereign Immunities Act was to shield foreign nations…from the jurisdiction of American courts for sovereign acts." *Id.* at 25.

The Act imposes liability on the foreign state "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. "[W]here state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances." *First Nat'l City Bank*, 462 U.S. at 622 n.11. Thus, if the foreign state is not immune from suit, "plaintiffs may bring state law claims that they could have brought if the defendant were a private individual." *Oveissi v. Islamic Republic of Iran*, 573 F.3d 835, 841 (D.C. Cir. 2009). But, the Act does

not give any authority for claims-adjudication outside of the courts.

II. Every State Of The United States, As Well As The District Of Columbia, Provides Some Degree Of Workers' Compensation Program.

Every state of the United States has some form of workers' compensation program: Alabama (Ala. Code § 25-5-1, *et seq.*); Alaska (Alaska Stat. § 23.30.005, *et seq.*); Arizona (Ariz. Rev. Stat. § 23-901, *et seq.*); Arkansas (Ark. Code Ann. § 11-9-101, *et seq.*); California (Cal. Labor Code Division 3, § 2700 through Division 4.7, § 6208); Colorado (Colo. Rev. Stat. § 8-40-101, *et seq.*); Connecticut (Conn. Gen. Stat. § 31-275 through 31-355a (Chapter 568)); Delaware (Del. Code Ann. tit. 19, §§ 2301-2397); District of Columbia (D.C. Code § 32-1501, *et seq.*); Florida (Fla. Stat. § 440.01, *et seq.*); Georgia (Ga. Code Ann. § 34-9-1, *et seq.*); Hawaii (Haw. Rev. Stat. § 386-1, *et seq.*); Idaho (Idaho. Code § 72-101, *et seq.*); Illinois (820 ILCS 305/1, *et seq.*); Indiana (Ind. Code § 22-3, *et seq.*); Iowa (Iowa. Code § 85.1, *et seq.*); Kansas (Kan. Stat. Ann. § 44-501, *et seq.*); Kentucky (Ky. Rev. Stat. Ann § 342.0011, *et seq.*); Louisiana (La. Stat. Ann § 23:1021, *et seq.*); Maine (Me. Stat. tit. 39-A, § 101, *et seq.*); Maryland (Md. Code Ann. § 9-101, *et seq.*); Massachusetts (Mass. Gen. Laws. ch. 152, § 1, *et seq.*); Michigan (Mich. Comp. Laws § 418.101, *et seq.*); Minnesota (Minn. Stat. ch. 175A and 176, *et seq.*); Mississippi (Miss. Code Ann. § 71-3-1, *et seq.*); Missouri (Mo. Rev. Stat. § 287.010, *et seq.*); Montana (Mont. Code Ann § 39-71-101, *et seq.*); Nebraska (Neb. Rev. Stat. § 48-101, *et seq.*); Nevada (Nev. Rev. Stat. Chapters 66A-616D and Nev. Rev. Stat. Chapter 617); New Hampshire (N.H. Rev. Stat. Ann § 281-A:1, *et seq.*); New Jersey (N.J. Stat. Ann. § 34:15-1, *et seq.*); New Mexico (N.M. Stat. Ann. §

5-1-1, *et seq.*); New York (N.Y. Workers' Comp. Law § 1, *et seq.*); North Carolina (N.C. Gen. Stat. § 97-1, *et seq.*); North Dakota (N.D. Cent. Code § 65-01, *et seq.*); Ohio (Ohio. Rev. Code Ann. § 4121.01, *et seq.* and Ohio. Rev. Code Ann. § 4123.01, *et seq.*); Oklahoma (Okla. Stat. tit. 85A, § 1, *et seq.*); Oregon (Or. Rev. Stat. § 656.001, *et seq.*); Pennsylvania (77 Pa. Con. Stat. § 101, *et seq.*); Rhode Island (Workers Compensation Insurance. R.I. Gen. Laws § 27-7.1-1, *et seq.*; 28-36-1, *et seq.* General Provisions. R.I. Gen. Laws § 28-29-1, *et seq.* Report of Injuries. R.I. Gen. Laws § 28-32-1, *et seq.* Benefits. R.I. Gen. Laws § 28-33-1, *et seq.* Occupational Diseases. R.I. Gen. Laws § 28-34-1, *et seq.* Procedure. R.I. Gen. Laws § 28-35-1. *et seq.*); South Carolina (S.C. Code Ann. § 42-1-110, *et seq.*); South Dakota (S.D. Codified Laws § 62-1-1, *et seq.*); Tennessee (Tenn. Code Ann. § 50-6-101, *et seq.*); Texas (Tex. Lab. Code Ann. § 401-001, *et seq.*); Utah (Utah Code Ann. § 34A-2-101, *et seq.*); Vermont (Vt. Stat. Ann. tit. 21, § 601, *et seq.*); Virginia (Va. Code Ann. § 65.2-100, *et seq.*); Washington (Wash. Rev. Code § 51.04.010, *et seq.*); West Virginia (W. Va. Code § 23-1-1, *et seq.*); Wisconsin (Wis. Stat. § 102.01, *et seq.*); and Wyoming (Wyo. Stat. Ann. § 27-14-101, *et seq.*).

Most, if not all, of the aforementioned workers' compensation programs require adjustment/adjudication of these claims outside the court system. Based on the Seventh Circuit's holding, every time an on-the-job injury occurs and the employee works for a "foreign state", in order to pursue his rights, a plaintiff must pay to file a lawsuit in a court (whether federal or state) to get a determination regarding waiver of immunity. Then, if the court determines that immunity was waived, the case must be dismissed and the plaintiff must, then, file (and pay a another filing fee, if applicable) another matter

before the applicable adjudicatory body responsible for workers' compensation programs in that state. Nothing in the FSIA or its legislative history suggests this was Congress's intent, namely, to create a two-stage process.

Finally, given the court of appeals' decision, every adjudication of a workers' compensation claim against a "foreign state" that was rendered without first obtaining a decision from a court about whether immunity had been waived is *void* because it was reached without the authority to do so.

CONCLUSION

The petition for a writ of certiorari should be granted for the reasons given above.

Respectfully submitted,

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Dated: June 18, 2018

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION, FILED NOVEMBER 29, 2016

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Case No. 15-cv-08736

MARTYN BAYLAY,

Plaintiff,

v.

ETIHAD AIRWAYS P.J.S.C., et al.,

Defendants.

Joan B. Gottschall,
United States District Judge.

November 29, 2016, Decided;
November 29, 2016, Filed

MEMORANDUM OPINION AND ORDER

Defendant Etihad Airways P.J.S.C. ("defendant") moves pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss Counts I, II, and III of plaintiff Martyn Baylay's Second Amended Complaint on the basis that these three counts are barred by the exclusivity provisions

of the Illinois Workers' Compensation Act ("IWCA") [33]. In response, the plaintiff alleges that the IWCA has no preclusive effect upon his claims against the defendant because the Foreign Sovereign Immunities Act ("FSIA") provides exclusive jurisdiction over "foreign states" such as defendant and thereby divests Illinois state courts, and the Illinois Workers' Compensation Commission ("IWCC"), of jurisdiction over this matter. For the reasons set forth below, the court grants the defendant's motion to dismiss.

I. BACKGROUND

The following facts are drawn from the plaintiff's Second Amended Complaint [32] and are taken as true for purposes of this motion to dismiss. The plaintiff is a citizen of the United Kingdom who was employed as a pilot by defendant Etihad Airways P.J.S.C. The defendant is a Public Joint Stock Company that operates a fleet of aircraft serving international routes, including North American, Europe, and the Middle East. On the night giving rise to the events of this lawsuit, October 13, 2013, the plaintiff and three other pilots, including defendant Saravdeep Mann ("Mann"), were on a layover in Chicago, Illinois following a flight from the Emirate of Abu Dhabi. That evening, the plaintiff, Mann, and the two other pilots went out for dinner and drinks. Mann consumed an excessive amount of alcohol, became verbally abusive, and even threatened the plaintiff physically by placing his hands around the plaintiff's throat. Mann ultimately left the restaurant before the other pilots at about 8:30 to 9:00 p.m., although he left his coat behind and failed to pay

for his portion of the bill. The plaintiff left the restaurant sometime later and brought Mann's coat with him back to their hotel.

At approximately midnight of that same night, the plaintiff heard a knock on his hotel door, looked through the peep hole, and saw Mann standing outside the door in the hallway. Thinking that Mann wanted to apologize for his earlier behavior and collect his jacket, the plaintiff opened the door, only to be struck on the head and leg by Mann, who was wielding a hotel decoration described as a "bronze-bladed ornament." During the attack, Mann (who is from India) verbally threatened the plaintiff by saying "I'm going to kill you. You f*cking British bastard." The plaintiff sustained a head wound and was transported to Northwestern Memorial Hospital, while Mann was arrested and transported to the Chicago Police Department, where he was charged with battery.

Mann posted bond on the morning of October 14, 2013, and left the police station. Sometime thereafter, Mann left the United States. On the plaintiff's information and belief, the defendant picked up Mann from the police station and reconfigured both pilot and flight schedules to successfully remove Mann from the United States. Mann subsequently failed to appear at his first court date in November 2013 and thus forfeited his bond. On the plaintiff's information and belief, the defendant was aware that Mann had a history of violence and alcohol problems.

II. LEGAL ANALYSIS

Federal Rule of Civil Procedure 12(b)(6) allows a defendant to move for dismissal of a complaint if it "fail[s] to state a claim for which relief can be granted." The court must accept all facts pleaded in the complaint as true, and must draw all reasonable inferences in the plaintiff's favor. *INEOS Polymers, Inc. v. BASF Catalysts*, 553 F.3d 491, 497 (7th Cir. 2009). In general, "the complaint need only contain a 'short and plain statement of the claim showing that the pleader is entitled to relief,'" *E.E.O.C v. Concentra Health Services, Inc.*, 496 F.3d 773, 776 (7th Cir. 2007) (quoting Rule 8(a)), with sufficient facts to put the defendant on notice "of what the ... claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)) (internal quotation mark omitted) (alterations in original). To survive a motion to dismiss under Rule 12(b)(6), the complaint need not present particularized facts, but "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing *Bell Atlantic*, 550 U.S. at 555).

A. The Illinois Workers' Compensation Act

The defendant argues in its motion to dismiss that the IWCA precludes the plaintiff from proceeding against it in this court. Specifically, the defendant maintains that Count I (negligent retention), Count II (negligence), and Count

III (willful and wanton conduct) of the Second Amended Complaint are barred by the ICWA's exclusivity provisions. In his responsive pleading, the plaintiff does not directly address the defendant's IWCA exclusivity arguments but instead argues that the IWCA is inapplicable to this case due to the jurisdictional requirements of the FSIA, 28 U.S.C. § 1602 et seq.[1]

The IWCA provides an administrative remedy for employee injuries "arising out of and in the course of the[ir] employment." 820 ILCS 305/11. The IWCA abrogates employer liability for all common law negligence claims, *Walker v. Doctors Hosp.*, 110 F. Supp. 2d 704, 714 (N.D. Ill. 2000), and it does so through its two exclusivity provisions. The first, Section 5(a), provides, in pertinent part:

> 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). The second, Section 11, states, among other things, that the compensation provided by the IWCA "shall be the measure of the responsibility" of an employer. *Id.* at 305/11. Illinois courts have held that the

1. As a consequence of the plaintiff's limited response to the defendant's motion to dismiss, the court requested an additional round of briefs. *See* Dkt. Nos. 108, 109, 111.

goal of the exclusivity clauses is to prevent employees from receiving double compensation for injuries suffered in the workplace; accordingly, an employee may not recover under both the IWCA and a common law claim for injuries covered by the IWCA. *James v. Caterpillar Inc.*, 242 Ill. App. 3d 538, 611 N.E.2d 95, 104, 183 Ill. Dec. 242 (Ill. App. Ct. 1993); *Witham v. Mowery*, 161 Ill. App. 3d 322, 514 N.E.2d 531, 532, 112 Ill. Dec. 868 (Ill. App. Ct. 1987).

If, as here, an employer is sued in common law, the employer may raise the IWCA's exclusivity bar as an affirmative defense. *See Arnold v. Janssen Pharmaceutica, Inc.*, 215 F. Supp. 2d 951, 956 (N.D. Ill. 2002); *Doyle v. Rhodes*, 101 Ill. 2d 1, 461 N.E.2d 382, 386, 77 Ill. Dec. 759 (1984). Once the employer raises the defense and establishes two elements—the existence of an employment relationship and the nexus between the employment and the injury—the burden shifts to the employee-plaintiff to prove one of the four exceptions to exclusivity: (1) that the injury was not accidental; (2) that the injury did not arise from his or her employment; (3) that the injury was not received during the course of employment; or (4) that the injury is not compensable under the Act. *Whitehead v. AM Int'l, Inc.*, 860 F. Supp. 1280, 1289 (N. D. Ill. 1994); *Meerbrey v. Marshall Field and Co., Inc.*, 139 Ill. 2d 455, 564 N.E.2d 1222, 1226, 151 Ill. Dec. 560 (Ill. 1990); *see also Acuff v. IBP, Inc.*,77 F. Supp. 2d 914, 922 (C.D. Ill. 1999) (IWCA bar "must be pleaded and proven by the employer"). It is important to note that because complaints in federal court need not plead or even anticipate affirmative defenses, dismissal on a Rule 12(b)(6) motion based on an affirmative defense "is appropriate

only where the defense is conclusively established by the complaint, concessions made by the plaintiff, or any other material appropriate for judicial notice."[2] *Arnold*, 215 F. Supp. 2d at 956-57.

Here, the parties do not dispute the existence of an employment relationship. Nor is there any real doubt regarding a nexus between the employment and the injury. A nexus exists if "the injury occurred within the period of employment, at a place where the employee might reasonably have been, and while he was reasonably fulfilling duties of his employment or doing something incidental thereto." *Pechan v. DynaPro, Inc.*, 251 Ill. App. 3d 1072, 622 N.E.2d 108, 121, 190 Ill. Dec. 698 (Ill. App. Ct. 1993). By the plaintiff's own admission, his "injuries were sustained during his layover in Chicago as part of his job duties with Etihad, which relate to Etihad's commercial activities as a provider of passenger travel." Dkt. 53, ¶ 14. Looking more closely at the specifics of the plaintiff's situation at the time of his injury, the court notes that the plaintiff was on a layover in Chicago when his injury occurred, that he stayed at a hotel arranged by the defendant, that he ate and drank at the hotel bar and a local restaurant, and that he then returned to his hotel, where the injury occurred. *See* SAC, Dkt. 32, ¶¶ 19-29. These factual allegations, within the layover context, are enough to establish an employment nexus. *See, e.g., Ferris*

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2. Defendant asked the court to take judicial notice of the IWCA's publicly available records, including those that show that defendant has elected to be subject to the IWCA and is a registered employer. *See* http://www.iwcc.il.gov/coverage.htm (last visited November 29, 2016).

v. Delta Air Lines, Inc., 277 F.3d 128, 135 (2d Cir. 2001) (New York's workers' compensation statute precluded state common law claims against airline stemming from a rape that occurred in a hotel room between two flight attendants during a layover and also occurred in a "work environment" for purposes of Title VII as "the circumstances that surround the lodging of an airline's flight crew during a brief layover in a foreign country in a block of hotel rooms booked and paid for by the employer are very different from those that arise when stationary employees go home at the close of their normal workday"); *Gray v. Eastern Airlines, Inc.*, 475 So. 2d 1288 (Fla. App. Ct. 1985) (flight attendant injured playing basketball while on two-day layover was eligible for workers' compensation benefits).

The court therefore turns to the four exclusivity exceptions:

1. Whether the injury was accidental

The first exception to the ICWA's exclusivity provisions addresses whether the injury was "accidental." The Illinois Supreme Court has defined the term "accidental" to be a comprehensive one that is "almost without boundaries in meaning as related to some untoward event." *Ervin v. Industrial Comm'n*, 364 Ill. 56, 4 N.E.2d 22, 24 (Ill. 1936). Both an employee's claim of employer negligence and a claim of employer willful and wanton conduct fall within the definition of "accidental" and are preempted by the ICWA. *See Lannom v. Kosco*, 158 Ill. 2d 535, 634 N.E.2d 1097, 1100-01, 199 Ill. Dec. 743 (Ill. 1994); *Jane Doe-3 v.*

McLean County Unit Dist. No. 5 Bd. of Directors, 973 N.E.2d 880, 887, 2012 IL 112479, 362 Ill. Dec. 484 (Ill. 2012) (willful and wanton conduct is simply an "aggravated form of negligence"). The Illinois Supreme Court also has found that even intentional torts committed by co-workers are "accidental" within the meaning of the IWCA because they are unexpected and unforeseeable from both the injured employee's and the employer's points of view. *Meerbrey*, 564 N.E.2d at 1226. It is only when a plaintiff establishes that the employer or its alter ego intentionally inflicted the alleged injuries that the injury ceases to be accidental. *Id.*

In this case, Counts I, II, and III each allege either negligence or willful and wanton conduct on the defendant's part. Each of these counts is barred by the ICWA. Only truly intentional torts fall outside of the IWCA exclusivity provisions, *Mier v. Staley*, 28 Ill. App. 3d 373, 329 N.E.2d 1, 8 (Ill. App. Ct. 1975). Counts I-III sound in negligence, and the plaintiff has not otherwise offered any colorable allegations indicating that the defendant intended for Mann to harm the plaintiff. The first exception to the exclusivity provision is not applicable.

2. Whether the injury arises out of the plaintiff's employment

The second exception to the ICWA's exclusivity is whether the injury "arises out of" the employee's employment. *See Kertis v. Ill. Workers' Comp. Com'n*, 2013 IL App (2d) 120252WC, 991 N.E.2d 868, 872, 372 Ill. Dec. 378 (Ill. Ct. App. 2013). The question of whether

an injury "arises out of his employment" is answered by considering whether the employee's injury occurred while he was engaging in conduct that was "reasonable and foreseeable." *Id.* at 873; *see Kornblum v. Illinois Workers' Comp. Com'n*, 2012 IL App (1st) 113521WC-U, 2012 WL 6963532 at *1 (Ill. App. Ct., 2012) (unpublished) (finding that the claimant (a pilot), who was injured while on a layover when he left a bar late at night and walked to a poorly lit and unfamiliar dock to see if jet skis could be rented, did not engage in reasonable and foreseeable conduct); *Kertis*, 991 N.E.2d at 874 (claimant who was injured in a parking lot acted reasonably and foreseeably when he parked in a parking lot near the employer's office); *U.S Indus. Prod. Mach. Div. v. Indus. Comm'n*, 40 Ill. 2d 469, 240 N.E.2d 637 (Ill. 1968) (traveling repairman who, while on an assignment, went to a motel room, consumed several drinks, and then went for midnight drive in the mountains did not engage in reasonable and foreseeable activity).

In this case, the basic facts are not in dispute. The plaintiff's Second Amended Complaint alleges that Etihad crewmembers represent Etihad at all times during layovers, and that he and the other pilots were driven in Etihad-arranged transportation to a hotel booked by Etihad. *See* Dkt. # 32, ¶¶ 16, 19-20. The plaintiff also asserts that his injuries were sustained during his layover in Chicago as part of his job duties with Etihad. *See* Dkt. 53, ¶ 14. Although the plaintiff later contends in his supplemental brief that the events of October 13, 2013 "are not alleged to have been within the boundary that defines the jobs of either Mann or Baylay," this is

not the inquiry before the court. Rather, the inquiry is whether the plaintiff's conduct and actions can be viewed as reasonable and foreseeable to the defendant. The court finds that this is the case. It was reasonable and foreseeable for the plaintiff to go out for dinner and drinks at a local restaurant with fellow pilots while on a layover, and it was reasonable and foreseeable for him to then return to his hotel room. It was also reasonable and foreseeable for the plaintiff to open the door to his fellow pilot—particularly given that he had brought Mann's jacket with him back from the restaurant. The court finds that the second exception does not apply.

3. Whether the injury was received during the course of employment

Third exception involves whether the plaintiff's injury was received during the course of his employment. The plaintiff acknowledges that he and Mann were acting within the course of their employment. *See* Dkt. 111, at ¶ 33. This exception does not apply.

4. Whether the injury is compensable under the Act

The court finds no grounds for applying the fourth exception—that the injury is not compensable under the IWCA. Workplace assaults and batteries are generally compensable under the IWCA, and, therefore, not actionable at common law. *See Damato v. Jack Phelan Chevrolet Geo, Inc.*, 927 F. Supp. 283, 291 (N.D. Ill. 1996); *Rodriguez v. Industrial Com'n.*, 95 Ill. 2d 166, 447 N.E.2d

186, 189-90, 68 Ill. Dec. 928 (Ill. 1982) (ICWA preemption applied where employee fractured his co-employee's skull while shouting epithets about the co-employee's national origin).

In sum, none of the four exceptions to the exclusivity provision of the ICWA are applicable in this case. Counts I, II and III of the plaintiff's complaint are precluded by the ICWA.

B. The Foreign Sovereign Immunities Act

The plaintiff's chief argument in response to the defendant's motion to dismiss is that the IWCA is completely inapplicable in this case because the FSIA vests exclusive jurisdiction over this matter with the federal courts. This argument has no merit.

The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443, 109 S. Ct. 683, 102 L. Ed. 2d 818, (1989). The Act defines "foreign state" to include a state "agency or instrumentality" of a foreign state. 28 U.S.C. § 1603(a). Section 1605 of the FSIA sets forth the general exceptions to the jurisdictional immunity of a foreign state. This section provides, in relevant part:

> **A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case ... in which the action is based upon a commercial activity**

> **carried on in the United States by the foreign state**; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2) (emphasis added). The parties do not dispute that the defendant falls within the definition of a "foreign state" under the FSIA. The defendant further concedes that it has waived immunity under the FSIA by electing to be subject to the provisions of the IWCA.

The FSIA may be the sole basis for obtaining jurisdiction over a foreign state, but that does not mean that claims against foreign states may be heard only in federal court. Indeed, the FSIA expressly states that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. § 1602; *see also Republic of Austria v. Altmann*, 541 U.S. 677, 691, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004). The Seventh Circuit held in *In re Air Crash Disaster Near Roselawn, Ind. on Oct. 31, 1994*, 96 F.3d 932, 936 (7th Cir. 1996), that "[b]y enacting the FSIA, Congress meant to encourage litigants to bring actions involving foreign states in federal courts. It also intended that such actions could continue to be brought in state courts, however." Similarly, in *Martropico Compania Naviera S.A. v. Perusahaan Pertambangan Minyak*

Dan Gas Bumi Negara (Pertamina),428 F. Supp. 1035, 1037 (S.D.N.Y. 1977), the Southern District of New York noted that upon passage of the FSIA, Congress left open the option to choose state courts to sue foreign states, thereby electing not to confer exclusive jurisdiction on the federal courts.

In sum, the FSIA provides that civil actions may be brought in state courts against a "foreign state" as defined in § 1603(a). There is simply no merit to the plaintiff's suggestion that only a federal court has jurisdiction over this matter.

Finally, the court turns to the plaintiff's last contention, which is that the IWCC "lacks authority to make any determination related to Etihad because the FSIA vests that authority solely in the federal courts." Dkt. 53, ¶ 5. This court already has put to rest the question of whether sole jurisdiction and authority over Etihad resides with the federal judiciary—it does not. State courts have concurrent jurisdiction over matters involving "foreign powers." Nor is there any merit to the plaintiff's argument that the IWCC lacks the authority to determine the rights and obligations of the parties' workplace dispute. The IWCC, pursuant to a legislative grant of power, is vested with the ultimate authority to determine workers' compensation claims. *Dodaro v. Illinois Workers' Compensation Com'n*, 403 Ill. App. 3d 538, 950 N.E.2d 256, 351 Ill. Dec. 100 (Ill. App. Ct. 2010); *Durand v. Indus. Com'n* , 862 N.E.2d at 924. All decisions of the IWCC are subject to review by Illinois circuit and appellate courts, and, if necessary, the Illinois Supreme Court. 820 ILCS

§ 305/19(f)(1)-(2); *see also Jones v. Indus. Com'n*, 188 Ill. 2d 314, 721 N.E.2d 563, 570, 242 Ill. Dec. 284 (Ill. 1999) ("We must liberally construe statutes granting a right to appeal so as to permit a case to be considered on its merits."). The plaintiff's arguments regarding the authority of state courts and the IWCC to hear this matter are unavailing.

III. CONCLUSION

For the foregoing reasons, Defendant Etihad Airways P.J.S.C.'s motion to dismiss Counts I, II, and III of Plaintiff's Second Amended Complaint [33] is granted.

Date: November 29, 2016

/s/ ______________________________
Joan B. Gottschall
United States District Judge

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED FEBRUARY 7, 2018

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 16-4113 & 17-1958

MARTYN BAYLAY,

Plaintiff-Appellant,

v.

ETIHAD AIRWAYS P.J.S.C., SARAVDEEP MANN, 909 NORTH MICHIGAN AVENUE CORPORATION, and LHO MICHIGAN AVENUE FREEZEOUT, LLC,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 15 CV 8736 — Joan B. Gottschall, Judge.

November 1, 2017, Argued; February 7, 2018, Decided

Before MANION, KANNE, and ROVNER, *Circuit Judges.*

KANNE, *Circuit Judge.* In 2013, Saravdeep Mann attacked his coworker, Martyn Baylay, with a bronze hotel decoration. The two men, members of a flight crew employed by Etihad Airways, were at a Chicago hotel for the night on a layover.

Baylay sued Etihad, Mann, and the hotel's corporate entities in federal district court. The court dismissed all of Baylay's claims against Etihad on the basis that the claims should be heard by the Illinois Workers' Compensation Commission instead. The court entered an order allowing an immediate appeal of that decision, which Baylay filed on December 9, 2016 (No. 16-4113). A few months later, the district court dismissed Baylay's remaining claims. It reasoned that it had no original jurisdiction over the claims and declined to exercise its supplemental jurisdiction. Baylay filed his notice of appeal of that decision on May 5, 2017 (No. 17-1958). The appeals have been consolidated and are before us now. We affirm the dismissal of Baylay's claims.

I. Background

The following facts are drawn from Baylay's second amended complaint. *See Vesely v. Armslist LLC*, 762 F.3d 661, 664-65 (7th Cir. 2014) (when reviewing a 12(b)(6) motion, we accept the facts in the complaint as true); *see also Sykes v. Cook Cty. Circuit Court Prob. Div.*, 837 F.3d 736, 739 (7th Cir. 2016) (when reviewing a dismissal for lack of subject-matter jurisdiction, we accept the facts in the complaint as true).

Etihad Airways is a public joint stock company established by Emiri Decree and incorporated in the Emirate of Abu Dhabi, United Arab Emirates. Martyn Baylay, a British citizen, worked as a pilot for Etihad in 2013.

That October, Etihad assigned Baylay to a flight crew that also included Saravdeep Mann. The crewmembers flew from Abu Dhabi to Chicago. After arrival, Etihad arranged for the crewmembers' transportation to The Westin on Michigan Avenue in Chicago for an overnight layover. Etihad paid for the accommodations.

The crewmembers drank pre-dinner cocktails together that night, where Mann consumed a significant amount. It appeared to Baylay that he had imbibed before meeting the group, too. At dinner, Mann downed even more alcohol and then expressed anti-American and anti-British views while emphasizing his distaste for the British by placing his hands around Baylay's throat. Mann left the restaurant without paying his bill and without his coat. The crewmembers settled Mann's bill, and Baylay offered to take Mann's coat and return it the next day.

Back at the hotel, Baylay heard a knock on the door of his hotel room and saw Mann standing outside his room. Thinking Mann was there to apologize for his earlier actions and collect his coat, Baylay opened the door. Mann struck him on the head and leg with a bronze hotel decoration. During the attack, Mann threatened Baylay, saying, "I'm going to kill you. You f*cking British bastard." Baylay managed to escape, took the elevator to the lobby of the hotel, and was then transported to Northwestern Memorial Hospital. Mann was arrested and transported to the Chicago Police Department.

Mann left the United States with Etihad's help after posting bond on October 14. He never returned, criminally violating his bond.

Baylay filed the second amended complaint on February 25, 2016, in federal district court. He sued Mann; Etihad Airways; 909 North Michigan Avenue Corporation and LHO Michigan Avenue Freezeout, LLC—the Westin's corporate entities; and United Security Services, Inc.—the company that provided security for the Westin at the time of the incident. United Security Services was later voluntarily dismissed from the case.

Against Etihad, Baylay brought state-law claims of negligent retention, negligence, and willful and wanton conduct. Against Mann, he brought state-law claims of negligence and willful and wanton conduct. And against the Westin's corporate entities, Baylay brought a state-law claim of negligence.

In March 2016, Etihad filed a 12(b)(6) motion to dismiss Baylay's claims against it. The district court granted the motion, concluding that Baylay's state-law claims against his employer were barred by the exclusivity provisions of the Illinois Workers' Compensation Act ("the IWCA"). If Baylay wanted to pursue claims against his employer arising from the incident with Mann, he needed to do so in front of the Illinois Workers' Compensation Commission ("the Commission"). The court entered an order providing for an immediate appeal of this decision, which Baylay timely filed on December 9, 2016 (No. 16-4113).

In early 2017, the district court asked the parties to submit jurisdictional statements addressing whether the district court still had jurisdiction over the case after Etihad's dismissal. After reviewing the submitted

statements, the district court dismissed Baylay's remaining claims without prejudice on April 7, 2017. It concluded that it had no original jurisdiction over the claims and declined to exercise its supplemental jurisdiction. With all of the plaintiff's claims dismissed, the district court terminated the civil case. Baylay filed a timely notice of appeal on May 5, 2017 (No. 17-1958).

We now consider the merits of both appeals.

II. Analysis

Our central focus in this appeal is on the power and propriety of the federal courts to hear Baylay's claims.

First, Baylay contends that the Foreign Sovereign Immunities Act ("the FSIA" or "the Act") requires any claim against a foreign state to be adjudicated in a court. Thus, the district court erred when it concluded that Baylay's claims against Etihad should be heard by the Commission, an administrative body. In the alternative, Baylay argues that the IWCA does not apply to his claims against Etihad, so the district court was nonetheless the proper forum for his claims.

Second, Baylay maintains that the district court had diversity jurisdiction over his remaining claims after Etihad's dismissal. In the alternative, he argues that the district court should have exercised supplemental jurisdiction over the claims.

We take—and reject—each of Baylay's arguments in turn.

A. Baylay's claims against Etihad must be resolved by the Illinois Workers' Compensation Commission.

Baylay believes that the Foreign Sovereign Immunities Act vests the power to decide claims against foreign states in the judicial branch alone. Thus, he argues that the Commission cannot adjudicate his claims against Etihad. In other words, he argues that the FSIA preempts the IWCA. Alternatively, he contends that the IWCA doesn't apply to his claims against Etihad, so the district court should have remained the arbiter of his claims.

The district court rejected these arguments. We review a 12(b)(6) dismissal *de novo*, viewing the allegations in the light most favorable to the nonmovant, and we are similarly unpersuaded. *See Vesely*, 762 F.3d at 664.

1. The FSIA does not preempt the IWCA, so the Commission may adjudicate applicable claims.

The Foreign Sovereign Immunities Act "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443, 109 S. Ct. 683, 102 L. Ed. 2d 818 (1989). When a plaintiff sues a foreign state, the Act presumes immunity and then creates exceptions to the general principle. *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1320, 197 L. Ed. 2d 663 (2017). The parties agree that Etihad is a foreign state and that an exception to immunity exists. The parties disagree, however, about whether the Act requires claims against a foreign state

to be heard by a court after that court has concluded that the foreign state is not immune from suit.

"A foreign state shall not be immune from the jurisdiction *of courts* of the United States or of the States ... ." 28 U.S.C. § 1605(a) (emphasis added). Baylay believes that this language vests the power to resolve claims against foreign states in the judiciary alone. Thus, even though the IWCA might mandate that certain claims against employers must be adjudicated first in front of the Commission, the FSIA preempts the IWCA and requires claims against foreign-state employers to remain in a court.

But by reading that provision in isolation, Baylay misconstrues the Act as a whole. Congress intended the FSIA to transfer *immunity determinations* in cases against foreign states from the executive branch to the judicial branch. *See* 28 U.S.C. § 1602 ("Claims of foreign states to immunity should henceforth be decided by courts."); *Frolova v. Union of Soviet Socialist Republics*, 558 F. Supp. 358, 361 (N.D. Ill. 1983), *aff'd*, 761 F.2d 370 (7th Cir. 1985) (noting that one of the four main objectives of FSIA was to ensure that immunity would be strictly a judicial determination); *Nat'l Airmotive Corp. v. Gov't & State of Iran*, 499 F. Supp. 401, 406 (D.D.C. 1980) ("A primary purpose of th[e] Act was to depoliticize sovereign immunity decisions by transferring them from the Executive to the Judicial Branch."). Thus, the Act preempts any other state or federal law that accords *immunity* from suit. *See Samantar v. Yousuf*, 560 U.S. 305, 313, 130 S. Ct. 2278, 176 L. Ed. 2d 1047 (2010). But it

is not intended—and has not been construed—to affect the governing substantive law. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620, 103 S. Ct. 2591, 77 L. Ed. 2d 46 (1983).

Instead, the Act imposes liability on the foreign state "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. "[W]here state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances." *First Nat'l*, 462 U.S. at 622 n.11. Thus, if the foreign state is not immune from suit, "plaintiffs may bring state law claims that they could have brought if the defendant were a private individual." *Oveissi v. Islamic Republic of Iran*, 573 F.3d 835, 841, 387 U.S. App. D.C. 366 (D.C. Cir. 2009). Applying the state-law principles that govern that state-law claim, rather than constructing a set of federal common-law principles, better serves the congressional intent behind § 1606. *Cf. id.* (concluding that the application of the forum state's choice-of-law principles, rather than federal common-law ones, better effectuates Congress's intent.). "In this way, 'the FSIA ... operates as a "pass-through" to state law principles.'" *Id.* (omission in original) (quoting *Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 12 (2d Cir. 1996)).

In sum, Congress vested the courts with the sole power to determine immunity from suit to assure litigants that immunity decisions were made in accordance with uniform and fair legal principles, *see Republic of Austria v. Altmann*, 541 U.S. 677, 716-17, 124 S. Ct. 2240, 159

L. Ed. 2d 1 (2004), but it did not intend to disturb the substantive law that applies to a claim against a foreign state if an exception to immunity applies.

The FSIA's mandates and purpose were served in this case: the district court determined that Etihad was not immune from suit and then looked to the IWCA to analyze how Baylay's claims should proceed. The IWCA is certainly substantive law. Upon its passage by the Illinois legislature, the IWCA eliminated employer liability for all common-law negligence claims and created a new scheme through which employees can be compensated for work-related injuries. Thus, the district court was correct that the FSIA should not affect the applicability and operation of the IWCA once the court determined that Etihad was not immune from its employee's claims.

We turn now to whether the district court erred in its analysis of the IWCA.[1]

2. The IWCA's exclusivity provisions apply, so the Commission must hear the claims.

The Illinois Workers' Compensation Act provides an administrative remedy for employees' injuries "arising out of and in the course of the[ir] employment." 820 Ill. Comp. Stat. 305/11. It "abrogates employer liability for all

1. Neither party raises a choice-of-law objection to the district court's application of Illinois law, so we need not concern ourselves with the circuit split on FSIA and choice of law. *See Thornton v. Hamilton Sundstrand Corp.*, No. 12 C 329, 2013 U.S. Dist. LEXIS 109937, 2013 WL 4011008, at *3 (N.D. Ill. Aug. 6, 2013).

common law negligence claims," *Walker v. Doctors Hosp.*, 110 F. Supp. 2d 704, 714 (N.D. Ill. 2000), and provides the exclusive means by which an employee can recover against an employer for a work-related injury in Illinois, 820 Ill. Comp. Stat. 305/5(a), 305/11; *see also Meerbrey v. Marshall Field & Co.*, 139 Ill. 2d 455, 564 N.E.2d 1222, 1225-26, 151 Ill. Dec. 560 (Ill. 1990). The exclusivity provisions (305/5(a) and 305/11) are "part of the *quid pro quo* in which the sacrifices and gains of employees and employers are to some extent put in balance." *Meerbrey*, 564 N.E.2d at 1225. Injured employees can recover for their injuries without establishing their employer's negligence but also "relinquish their rights to maintain common law actions against their employers." *Whitehead v. AM Int'l, Inc.*, 860 F. Supp. 1280, 1289 (N.D. Ill. 1994).

If an employer is sued in common law, the employer may raise the IWCA's exclusivity provisions as an affirmative defense. *Arnold v. Janssen Pharmaceutica, Inc.*, 215 F. Supp. 2d. 951, 956 (N.D. Ill. 2002). If it establishes the elements of the affirmative defense, then the burden shifts to the plaintiff to show that his claims are not subject to the IWCA or its exclusivity provisions. *Id.* Here, Etihad raised the IWCA's exclusivity provisions as an affirmative defense in its 12(b)(6) motion to dismiss. Baylay responded that the IWCA did not apply so his common-law claims could remain in the district court rather than being sent to the Commission. The district court granted Etihad's motion.

On appeal, Baylay argues that the IWCA does not apply to his claims against Etihad for two reasons. First, he contends that it does not apply because Etihad does

not meet the IWCA's definition of an employer. Because he raises this issue for the first time on appeal, we decline to consider its merits. *See, e.g., Fednav Int'l Ltd. v. Cont'l Ins. Co.*, 624 F.3d 834, 841 (7th Cir. 2010). Second, he asserts—as he did below—that the IWCA's exclusivity provisions do not apply to his claims against Etihad.

In order to show that the IWCA's exclusivity provisions do not apply, Baylay must demonstrate that his injury "(1) was not accidental, (2) did not arise from his ... employment, (3) was not received during the course of employment, or (4) was noncompensable under the [IWCA]." *Collier v. Wagner Castings Co.*, 81 Ill. 2d 229, 408 N.E.2d 198, 202, 41 Ill. Dec. 776 (Ill. 1980). We take each exception in turn.

First, Baylay's injuries were accidental within the meaning of the IWCA. An employee's claims of employer negligence and willful and wanton conduct fall within the definition of "accidental." *See Lannom v. Kosco*, 158 Ill. 2d 535, 634 N.E.2d 1097, 1100-01, 199 Ill. Dec. 743 (Ill. 1994). This is true even if the claims arise from an intentional tort committed by a co-worker; the tort is "accidental" within the meaning of the IWCA because it is unexpected and unforeseeable from both the injured employee's and the employer's points of view. *Meerbrey*, 564 N.E.2d at 1226. To show that a coworker's intentional tort is *not* accidental, a plaintiff must establish that the coworker was the alter ego of the employer or that the employer commanded or expressly authorized the acts. *Id.* Baylay did not include an allegation of either in his complaint.

Second, Baylay's injuries arose out of his employment. The question of whether an injury arises out of the employment of traveling employees is answered differently than for other employees. *Kertis v. Ill. Workers' Comp. Comm'n*, 2013 IL App (2d) 120252WC, 991 N.E.2d 868, 873, 372 Ill. Dec. 378 (Ill. Ct. App. 2013). "A n injury sustained by a traveling employee"—one whose work requires him to travel away from his employer's office and for whom travel is an essential element of the employment—"arises out of his employment if he was injured while engaging in conduct that was reasonable and foreseeable." *Id.* Baylay, an Etihad pilot, was unquestionably a traveling employee. He sustained his injury while in his employer-paid hotel room on a layover when his fellow crewmember knocked on his door. That a coworker would knock on Baylay's door, and that Baylay would open the door, while the crew was staying at the hotel is both reasonable and foreseeable.

Third, Baylay conceded that he was injured during the course of his employment. (Appellant's Br. at 34-35; R. 111 at 11-12.)

And fourth, Baylay failed to establish that the Commission would not compensate him for his injuries. Assaults by coworkers in the workplace "that are motivated by general racial or ethnic prejudice are best treated as compensable 'neutral' risks arising out of the employment." *Rodriguez v. Indus. Comm'n*, 95 Ill. 2d 166, 447 N.E.2d 186, 190, 68 Ill. Dec. 928 (Ill. 1982). In *Rodriguez*, an employee fractured his coworker's skull out of general hostility toward Mexicans and people of Mexican descent. *Id.* at 187-88. The attack was

compensable because "the most [the victim] ... brought to the workplace was his ethnic heritage, over which he of course had no control." *Id.* at 189. "[I]n the absence of anything that would personalize the incident, a bigoted and violence-prone co-worker is as much a risk inherent in employment in an integrated or ethnically mixed workplace as a defective machine or ceiling might be." *Id.* at 190. In the present case, like in *Rodriguez*, Mann's attack was motivated by his hostility toward Baylay's national origin. And Baylay does not allege that he brought anything to the workplace other than his national origin that would personalize Mann's attack on him. Thus, Baylay failed to show that his injuries would not be compensated under the IWCA.

The district court properly granted Etihad's motion to dismiss. Though the dismissal was based on Etihad's affirmative defense, the defense was conclusively established by the complaint and Baylay's own concessions. *Arnold*, 215 F. Supp. 2d. at 956-57 (A 12(b)(6) dismissal based on an affirmative defense "is appropriate only where the defense is conclusively established by the complaint, concessions made by the plaintiff, or any other material appropriate for judicial notice."). All that was left of Baylay's suit after this dismissal (and the voluntary dismissal of United Security Services) were his claims against Mann and the Westin' s corporate entities, which we turn to now.

B. The district court correctly concluded that it had no original jurisdiction over Baylay's remaining claims and appropriately declined to exercise its supplemental jurisdiction.

The district court concluded that it had no original subject-matter jurisdiction over Baylay's remaining claims and declined to exercise supplemental jurisdiction over them. We review the court's legal determination regarding subject-matter jurisdiction *de novo, LM Ins. v. Spaulding Enters. Inc.*, 533 F.3d 542, 547 (7th Cir. 2008), but review its decision not to exercise supplemental jurisdiction for an abuse of discretion, *Hagan v. Quinn*, 867 F.3d 816, 820 (7th Cir. 2017).

Baylay contends that the district court had diversity jurisdiction over his claims against Mann and the Westin's corporate entities, but his argument has no merit. Baylay is a British citizen, and he is the only plaintiff in this cause. Mann is a foreign citizen, and the Westin's corporate entities are citizens of U.S. states. In cases where a foreign citizen alone is suing both a foreign citizen and a citizen of a U.S. state in diversity, a federal court has no original jurisdiction. 28 U.S.C. § 1332(a) does not grant it. *See Allendale Mut. Ins. v. Bull Data Sys., Inc.*, 10 F.3d 425, 428 (7th Cir. 1993) ("The point was not so much that there were foreigners on both sides," but "that there was no citizen on one side, which took it out of [28 U.S.C. § 1332(a)(3)]; and (a)(2), when read in light of (a)(3), does not permit a suit between foreigners and a mixture of citizens and foreigners."). Baylay's misreading of *Allendale* and *Tango Music, LLC v. DeadQuick Music, Inc.*, 348 F.3d 244 (7th

Cir. 2003), does not convince us otherwise. (Appellant's Br. at 40.)

The district court properly concluded that it had only supplemental jurisdiction over Baylay's remaining claims. Baylay claims that it should have continued to exercise that jurisdiction because, he says, it had original jurisdiction over third-party contribution claims that the Westin's corporate entities filed against Etihad in the wake of Etihad's dismissal as a primary defendant.[2]

But even if Baylay is correct that the district court had original jurisdiction over those third-party contribution claims, district courts may decline to exercise supplemental jurisdiction over a claim when the supplemental claim "substantially predominates over the claim or claims over which the district court has original jurisdiction." 28 U.S.C. § 1367(c). This is the case here. After Etihad's dismissal, Baylay's remaining claims included two state-law claims against Mann and a state-law claim of negligence against the Westin's corporate entities. The corporate entities' third-party contribution claims are entirely dependent on the resolution of the underlying state-law negligence claim against them. Thus, Baylay's state-law claims substantially predominate. The district court's decision to decline to exercise supplemental jurisdiction over them was not an abuse of discretion in light of 28 U.S.C. § 1367(c).

2. Though the district court inherently dismissed the third-party contribution claims when it dismissed Baylay's supplemental claims and terminated his civil suit, the propriety of that dismissal is not before us on appeal. In fact, the Westin's corporate entities who filed the claims do not contest the dismissal.

III. Conclusion

The Foreign Sovereign Immunities Act does not affect the content of the governing substantive law. In Illinois, that governing substantive law—the IWCA—instructs courts to send to the Commission for adjudication any employee claim against his or her employer that falls within the purview of the IWCA. Baylay's claims against Etihad are covered by the IWCA. We AFFIRM the district court's dismissal of Baylay's claims in case number 16-4113.

The district court had only supplemental jurisdiction over Baylay's remaining claims against Mann and the Westin's corporate entities. It did not abuse its discretion in declining to exercise that jurisdiction. We AFFIRM the district court's dismissal of Baylay's claims in case number 17-1958.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED MARCH 7, 2018

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Nos. 16-4113 & 17-1958

No. 1:15-cv-08736

Before

DANIEL A. MANION, *Circuit Judge*
MICHAEL S. KANNE, *Circuit Judge*
ILANA DIAMOND ROVNER, *Circuit Judge*

MARTYN BAYLAY,

Plaintiff-Appellant,

v.

ETIHAD AIRWAYS P.J.S.C., SARAVDEEP MANN, 909 NORTH MICHIGAN AVENUE CORPORATION, and LHO MICHIGAN AVENUE FREEZEOUT, LLC,

Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

March 7, 2018

Joan B. Gottschall, *Judge*.

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause, all of the judges on the original panel have voted to deny a rehearing. It is, therefore, **ORDERED** that the aforesaid petition for rehearing is **DENIED**.