NELP

National Employment Law Project

NATIONAL IMMIGRATION LAW CENTER

Assessing the Impact of the Supreme Court's Decision in *Hoffman Plastic Compounds v. NLRB* on Immigrant Workers and Recent Developments

by Amy Sugimori and Rebecca Smith, National Employment Law Project (NELP)
and Ana Avendaño and Marielena Hincapié, National Immigration Law Center (NILC)

On March 27, 2002, the U.S. Supreme Court decided a case called Hoffman Plastic Compounds v. NLRB[1] that has generated concern among immigrant workers, communities, and immigrant rights and labor advocates. In Hoffman, the Supreme Court held that a worker who is undocumented could not recover the remedy of back pay under the National Labor Relations Act (NLRA).

The case involved a worker named Jose Castro who was working in a factory in California and was fired along with other co-workers in clear violation of the NLRA for his organizing activities. The National Labor Relations Board (NLRB) ordered the employer to cease and desist and put up a posting stating that it had violated the law. The employer was also ordered to reinstate Castro and provide him with back pay for the time he was not working because he had been illegally fired.

During an NLRB hearing, Castro admitted he had used false documents to establish work authorization and that he was actually undocumented. However, the D.C. Circuit Court of Appeals rejected the employer's argument that Castro should not receive back pay because he is undocumented and affirmed the NLRB's back pay award, which the agency tolled to the date when the employer first obtained evidence that Castro was undocumented. The employer appealed to the Supreme Court, which held that undocumented workers cannot receive back pay under the NLRA. In reaching this decision, the Supreme Court focused on the fact that the "legal landscape [had] now significantly changed,"[2] specifically because Congress had enacted the Immigration Reform and Control Act of 1986 (IRCA), which prohibits employers from knowingly hiring undocumented workers and set up an entire scheme for employment verification.

Prior to *Hoffman* and the passage of IRCA, the Supreme Court addressed whether an undocumented worker was eligible for reinstatement and back pay under the NLRA in *Sure-Tan, Inc. v. N.L.R.B.*.[3] In *Sure-Tan,* the Supreme Court upheld the NLRB's construction of the term "employee" in the NLRA to include undocumented workers. In so doing, the Court observed that:

> [i]f undocumented alien employees were excluded from participation in union activities and from protections against employer intimidation, there would be created a subclass of workers without a

[1] __ U.S. ___, 122 S.Ct. 1275 (2002).
[2] Id. at 1282.
[3] 467 U.S. 883.

> comparable stake in the collective goals of their legally resident co-workers, thereby eroding the unity of all the employees and impeding effective collective bargaining.[4]

Despite the enactment of IRCA, various federal courts had also addressed the question—prior to *Hoffman*—of what relief undocumented workers may seek for discrimination under Title VII of the Civil Rights Act[5], as well as wage and overtime violations under the Fair Labor Standards Act (FLSA)[6], and violations of the NLRA.

Fortunately, the *Hoffman* decision reaffirmed *Sure-Tan's* holding that undocumented workers are considered "employees" for purposes of the NLRA. While undocumented workers continue to have the right to organize, vote for, and elect a union, as well as participate in collective bargaining and other activities protected by the NLRA, the practical impact of the *Hoffman* decision is that undocumented workers fired for engaging in such "protected activities" would not be eligible for the critical remedy of back pay.

It is important to note that *Hoffman* dealt with an employer who allegedly did not know that the employee in question was undocumented and had used false documents to get his job. Consequently, the Supreme Court did not address whether back pay would be available to an undocumented worker whose employer had knowledge of her lack of work authorization.[7] However, in a pre-*Hoffman* case, the NLRB did address this issue in *NLRB v. A.P.R.A. Fuel Oil Buyers Corp., Inc.,*[8] in which the Second Circuit affirmed an NLRB award of back pay and conditional back pay to workers whose employer hired them "knowing" that they were undocumented and later retaliated against them for union activities. In *A.P.R.A.,* the NLRB ordered the undocumented workers reinstated conditioned upon their ability to "present within a reasonable time, INS Form I-9 and the appropriate supporting documents, in order to allow the [employer] to meet its obligations under IRCA."[9] With respect to back pay, the NLRB ordered that the employees "be paid from the date of their unlawful discharge until either their qualification for future employment or the expiration of the reasonable time allowed for them to comply with IRCA."[10] The court upheld this creative "conditional reinstatement" remedy awarded by the NLRB noting "[t]he time limit is intended to ensure that the Company will not be pressured to reinstate them in violation of IRCA in an effort to lessen its liability."[11]

The NLRB has determined that Hoffman *leaves certain remedies available to undocumented workers, including conditional reinstatement*

In July 2002, the general counsel (GC) of the NLRB issued guidance interpreting how *Hoffman* affects the agency's practice and procedures.[12] That guidance is important because the Supreme Court specifically

---

[4] Id. at 893.

[5] See, e.g., *Rios v. Local 638*, 860 F.2d 1168, 1173 (2d Cir. 1988); *E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504 (E.D. Cal. 1989). But see, *Egbuna v. Time Life*, 153 F.3d 184 (4th Cir. 1998) (holding that individual without work authorization was not "qualified" for job, and therefore not protected by Title VII); and *Reyes-Gaona v. North Carolina Growers' Ass'n.,* 250 F.3d 861 (4th Cir. 2001) (holding that the ADEA did not protect foreign national applying for an H-2A job because he was not authorized to work, and therefore not qualified).

[6] See, *Patel v. Quality Inn South*, 846 F.2d 700, (11th Cir. 1988)

[7] See, *Hoffman*, 122 S.Ct. at 1287 (*Dissenting* , J. Breyer*).*

[8] 134 F.3d 50 (2nd Cir. 1997).

[9] Id. at 57.

[10] Id.

[11] Id.

[12] See, "Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens After *Hoffman Plastic Compounds, Inc."* GC 02-06 (July 19, 2002), available at http://www.nlrb.gov/gcmemo/gc02-06.html.

addressed the NLRB's remedies in *Hoffman.* The GC reaffirmed that undocumented workers are covered by the NLRA, and that an employer who discharges an employee in violation of the NLRA is liable regardless of the worker's immigration status.

For purposes of back pay, the GC has decided not to distinguish between cases where the employer did not know that it had hired an undocumented worker, as in *Hoffman*, and cases where the employer "knowingly employed" undocumented workers, even though the Supreme Court did not address the latter. In essence the GC has determined that the *Hoffman* decision precludes back pay for "work not performed" as an appropriate remedy for undocumented workers. However, back pay is permitted "for work previously performed under unlawfully imposed terms and conditions." The GC left open the question of whether back pay is available to undocumented workers who have been demoted.

As to reinstatement, the GC cites to *A.P.R.A.,* stating that "[c]onditional reinstatement remains appropriate to remedy the unlawful discharge of undocumented discriminatees whom an employer knowingly hires."[13] A worker who benefits from such an order will be given a "reasonable period of time" to establish work eligibility and to comply with I-9 requirements, but they would not be entitled to back pay during that period of time.

Hoffman*'s impact on undocumented workers' rights under federal antidiscrimination laws*

While the Supreme Court's decision in *Hoffman* focused on remedies under the NLRA and did not address whether undocumented workers are eligible for back pay under other federal antidiscrimination laws, *Hoffman* makes it unlikely that traditional back pay—that is, compensation for time not worked—will be available to undocumented workers under other antidiscrimination laws.

Indeed, in rescinding its former "Enforcement Guidance on Remedies Available to Undocumented Workers under Federal Employment Discrimination Laws," the Equal Employment Opportunity Commission (EEOC) also reaffirmed that it will continue to enforce its statutes[14] on behalf of all employees, including undocumented workers.[15] The EEOC stated that "[t]he Supreme Court's decision in *Hoffman* in no way calls into question the settled principle that undocumented workers are covered by the federal employment discrimination statutes."[16] However, the EEOC has already determined that because the remedy of back pay under its statutes is so similar to back pay under the NLRA, *Hoffman's* holding prohibits the agency from awarding such a remedy to undocumented workers. The EEOC has not replaced its former guidance, and is still evaluating *Hoffman's* impact on other remedies—such as compensatory and punitive damages—and on the agency's procedures.

Warning: some courts may attempt to expand Hoffman*'s holding to deny standing to undocumented workers*

While Hoffman made clear that undocumented workers are "employees" under the statute—that is, that they have standing under the NLRA—that holding does not necessarily mean that undocumented workers have standing under other employment discrimination laws. A recent federal court in New York issued a troubling decision in an ADA case that suggested that *Hoffman* has made the issue of immigration status

---

[13] Id.

[14] The EEOC enforces Title VII, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), and the Equal Pay act (EPA).

[15] For rescission notice, visit the EEOC's website at www.eeoc.gov/docs/undoc-rescind.html.

[16] Id.

relevant to a worker's standing to sue for relief under the antidiscrimination laws. The ruling may well be an indicator of things to come. In denying a defendant's motion to dismiss in *Lopez v. Superflex, Ltd.,*[17] the court noted:

> If *Hoffman Plastic* does deny undocumented workers the relief sought by plaintiff, then he would lack standing. As that issue is not ripe for decision, we decline to rule on it at this time. However, if plaintiff were to admit to being in the United States illegally, or were to refuse to answer questions regarding his status on the grounds that it is not relevant, then the issue of his standing would properly be before us, and we would address the issue of whether *Hoffman Plastic* applies to ADA claims for compensatory and punitive damages brought by undocumented aliens.[18]

The court further observed in a footnote: "If we do ultimately reach this issue, it could result in a judicial finding that plaintiff is illegally residing in the United States and therefore is subject to deportation."[19]

The danger, of course, is that if courts rule that, in light of *Hoffman,* undocumented workers do not have standing under the antidiscrimination laws, an entire class of workers—who are already vulnerable to exploitation—would be left with no recourse.

Eligibility of undocumented workers for relief under FLSA

One of the remedies available to undocumented workers that has clearly survived *Hoffman* is the availability of "back pay" for work actually performed under the FLSA. "Back pay" under FLSA is different from back pay under the NLRA and the antidiscrimination laws. Under the other laws, back pay is payment of wages that the worker would have earned if not for the unlawful termination or other discrimination. Under FLSA, "back pay" is payment of wages the worker actually earned but was not paid.[20]

Prior to *Hoffman,* the Eleventh Circuit had held that an undocumented worker was eligible for back pay under the FLSA in *Patel v. Quality Inn South*.[21] The court concluded that "the FLSA's coverage of undocumented aliens is fully consistent with the IRCA and the policies behind it."[22] Moreover, the court concluded that the plaintiff was eligible for back pay, distinguishing the situation from the one in *Sure-Tan* on the basis that the plaintiff was "not attempting to recover back pay for being unlawfully deprived of a job. Rather, he simply seeks to recover unpaid minimum wages and overtime for work already performed."[23]

Following the Supreme Court's decision in *Hoffman*, federal courts have held that *Hoffman* is not relevant to back pay under the FLSA or the state wage and hour laws, and have made rulings favoring plaintiffs.[24]

The U.S. Department of Labor (DOL) has stated that it will fully and vigorously enforce the Occupational Safety and Health Act (OSHA), the FLSA, the Migrant and Seasonal Worker Protection Act (AWPA), and

---

[17] See, 2002 U.S. DIST. LEXIS 15538 (S.D.N.Y. 2002).
[18] Id. at *8.
[19] Id., at n.4.
[20] There is one form of back pay under the FLSA that more closely resembles back pay under the NLRA and the antidiscrimination laws. This form of back pay appears in the anti-retaliation provision of the FLSA – and is payment of wages that the worker would have earned if not for his or her unlawful termination by the employer in retaliation for having initiated a complaint under the FLSA.
[21] See, *supra n. 5*.
[22] Id., at 704.
[23] Id.
[24] See, *Flores v Albertson's, Inc, 2002 U.S. DIST. LEXIS 6171,* (C.D. Cal. 2002); and *Liu, et al. v Donna Karan International, Inc.,* 207 F. Supp. 2d 191 (S.D.N.Y. 2002).

the Mine Safety and Health Act without regard to whether an employee is documented or undocumented."[25] The DOL statement leaves unaddressed the issue of back pay for undocumented workers who suffer retaliation on the job.[26]

Moreover, at least one federal court, in an action brought under the FSLA for retaliation, has held that *Hoffman* did not bar the eligibility of undocumented workers for compensatory and punitive damages. In *Singh v. Jutla, et al.,*[27] the employer reported a former employee to the Immigration and Naturalization Service (INS) just one day after agreeing to settle the plaintiff's claim for unpaid wages. In denying the defendants' motion to dismiss, the court rejected the argument that *Hoffman* barred plaintiff's retaliation claim. The court distinguished *Hoffman* by highlighting that this defendant not only "knowingly" hired the plaintiff but actively recruited him in India and went on to exploit him for three years without paying him for work performed.

Concerns about discovery of workers' immigration status

Perhaps the greatest obstacle that advocates are facing since *Hoffman* has been persistent attempts by defendants to inquire into plaintiffs' immigration status. They have claimed that the issue of plaintiffs' immigration status is relevant to the potential damages for which the employer will be liable. However, discovery into a worker's immigration status—whether by the agency or by the employer—is likely to have a serious chilling effect on immigrant workers contemplating whether to file a claim and on those who have courageously filed claims.

Fortunately, the NLRB and the EEOC have limited such inquiries. They have concluded that while a worker's immigration status may be relevant in determining remedies under the NLRA and the federal antidiscrimination laws, immigration status has no bearing on liability. Because remedies play a central part in the EEOC's conciliation process, the issue may arise in an earlier phase of proceedings before that agency than it would before the NLRB, where remedies are determined in a separate and distinct process. The NLRB GC has determined that "[r]egions have no obligation to investigate an employee's immigration status unless a respondent affirmatively establishes the existence of a substantial immigration issue. A substantial immigration issue is lodged when an employer establishes that it knows or has reason to know that a discriminatee is undocumented."[28] Similarly, the EEOC has stated that it "will not, on its own initiative, inquire into a worker's immigration status. Nor will the EEOC consider an individual's immigration status when examining the underlying merits of a charge."[29]

Neither agency has clarified the burden employers will have to meet to establish that an immigration issue exists, thereby warranting discovery into the workers' immigration status. The NLRB, for example, has not made clear what constitutes a "substantial immigration issue," other than stating that it is not mere speculation. Neither agency has made clear whether the method by which an employer discovers that a worker lacks work authorization will any bearing on the agency's decision to accept that information. The danger is that employers may obtain that information from workers engaged in protected activity through unlawful means (for example, by threats of deportation, which clearly violate the NLRA), and then provide it to the NLRB in an effort to avoid back pay obligations. Although the NLRB GC is allowing charging parties

---

[25] U.S. Department of Labor, *Hoffman Plastic Compounds, Inc, v NLRB*, Questions and Answers.

[26] See also, Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics decision on laws enforced by the Wage and Hour Division. <available at: http://www.dol.gov/esa/regs/compliance/whd/whdfs48.htm>.

[27] *Singh v. Jutla, et al.,* 214 F. Supp.2d 1056 (N.D. Cal. 2002).

[28] See, *supra n. 10.*

[29] See, *supra n. 12.*

to respond to an employer's proffer of evidence of immigration status, that process alone does not protect workers.

Additionally, defense attorneys are increasingly using the discovery process to inquire into a plaintiff's immigration status, ostensibly to obtain information that is allegedly relevant to the damages claimed. But these measures clearly serve to intimidate the plaintiff into dropping the charges altogether, for fear potential immigration consequences should she be retaliated against. For example, in *Flores*, *et al. v Albertsons*,[30] defendants used *Hoffman* to request immigration documents from members of a class action brought by janitors in federal court for unpaid wages under state and federal law. The court held that *Hoffman* did not apply to claims of unpaid wages and noted that allowing such discovery was certain to have a chilling effect on the plaintiffs (i.e., would cause them to drop out of the case rather than risk disclosure of their status). In a similar case for unpaid wages and overtime, *Liu, et. al. v. Donna Karan International, Inc.,*[31] the defendant made a discovery request for the disclosure of plaintiff garment workers' immigration status, but the federal court denied the request on the grounds that release of such information is more harmful than relevant. In another case under Title VII, *Rivera et al., v. Nibco,* plaintiffs had secured a pre-*Hoffman* protective order,[32] which prohibited the defendant from using the discovery process to inquire into plaintiffs' immigration status. Immediately following the *Hoffman* decision, the defense moved for reconsideration of that protective order, subsequently appealing to the Ninth Circuit for an interlocutory appeal, which has been certified. The underlying case has now been stayed pending the outcome of the appeal.[33]

To address defendants' use of the discovery process in this manner, the NLRB and the EEOC should be urged to adopt a heightened evidentiary standard. For example, the agencies should allow immigration status to become relevant only after the employer proves that it lawfully obtained that information through means independent of the underlying charge. It is now more critical than ever that advocates seek protective orders to prevent immigration status from having to be disclosed, as well as using motions *in limine* and other litigation tools to prevent disclosing a plaintiff's status.

Conclusion

While most of the litigation undertaken since *Hoffman* has been at the federal court level, it is likely that some state courts will continue to limit its impact on remedies available to undocumented workers under state employment and labor laws. Of the state cases litigated thus far, none has squarely addressed the issue of continuing availability of back pay under state law, except in the context of unpaid wages for "work performed."[34] Additionally, in *Vasquez v. Eagle Alloy,* a workers' compensation case pending in the Michigan Court of Appeals, the court will determine whether time loss and medical benefits are available to undocumented injured workers.[35]

---

[30] See, *supra* n. 24.

[31] Id.

[32] See, *Rivera et al., v. Nibco,*

[33] For additional post-*Hoffman* decisions granting plaintiffs' protective orders, see, *Cortez v. Medina's Landscaping*, 2002 WL 31175471 (N.D. Ill. Sept. 30, 2002); *Flores v. Amigon d/b/a La Flor Bakery,* 02 CV 838 (SJ) (E.D.N.Y. Sept. 19, 2002); and *De La Rosa v. Northern Harvest Furniture,* 2002 WL 31007752 (Sept. 4, 2002).

[34] See, Valadez v. El Aguila Taco Shop, No. GIC 781170 (San Diego, Cal. Superior Ct. 2002) (holding that *Hoffman* does not affect an undocumented worker's right to recover unpaid wages under the California Labor Code).

[35] See, Vasquez v. Eagle Alloy, Ct. Appeals No. 23592 (Mich. Ct. App. 2002).

Strong arguments can be made that states are free to make their own policy choices under state laws regarding what remedies are available to undocumented workers. This presents an opportunity for advocates to work with their state administrative agencies to develop generous state policies that provide all workers—regardless of immigration status—with the same rights and remedies and prevent a worker's immigration status from being disclosed. Efforts at both the federal and state levels to pass legislation which addresses the Supreme Court's *Hoffman* decision are also critical. At the federal level advocates hope to introduce legislation (which has already been drafted) in the next congressional session as a bipartisan bill to turn back the *Hoffman* decision. A federal bill would basically provide that all employees, regardless of immigration status or whether they used false documents, are entitled to the same rights and remedies under all employment and labor statutes. At the state level, advocates have begun exploring possible state legislation, such as SB 1818 in California, which Governor Davis singed into law on September 29, 2002.[36] The National Employment Law Project (NELP) and National Immigration Law Center (NILC) are developing and will soon release model statements for advocates and organizers to use with their administrative agencies.

Finally, although the *Hoffman* decision has served as another anti-union and anti-immigrant tool for unscrupulous employers, it also presents us with an incredible opportunity to build strong alliances among labor unions, immigrant rights groups, community-based organizations, faith-based coalitions, and business allies who understand that denying back pay to undocumented workers actually creates greater economic incentive for abusive employers to hire and further exploit vulnerable workers, who work hard to support their families and pay taxes. Building and sustaining these alliances are critical to addressing the mid- to long-term goal of achieving legalization for immigrant workers, which recognizes their contributions, and repealing employer sanctions. These sanctions have criminalized workers, forcing immigrants like Jose Castro to purchase false documents as a means of survival, while employers like Hoffman Plastic Compounds use the immigration laws to bust unions and prevent all employees from improving their workplace conditions.

[36] The law amends the Civil, Government, Health and Safety and Labor Codes and makes declarations of existing law. It reaffirms that "[a]ll protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment who are or who have been employed, in this state." Additionally, the law states that for purposes of enforcing state labor, employment, civil rights, and employee housing laws, "a person's immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person's immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that this inquiry is necessary in order to comply with federal immigration law." *See,* CAL. CIV. CODE § 3339 (2002); CAL. GOV'T CODE § 7285, *et seq*. (2002); CAL. HEALTH & SAFETY CODE § 24000, *et seq*. (2002); CAL. LAB. CODE § 1171.5 (2002).