

STR

# 10

GCTN

DIVW

TXTHI

Catherine L. Fisk and Michael J. Wishnie

GCTT

## **The Story of *Hoffman Plastic Compounds, Inc. v. NLRB*: Labor Rights Without Remedies for Undocumented Immigrants**

T

T

Are there two sets of rules for the twenty-first century workplace, one for citizens and legal immigrants and the other for the six million undocumented workers in the United States? Are the employers of those undocumented workers free to ignore the mandates of the National Labor Relations Act, Title VII of the Civil Rights Act of 1964, the Fair Labor Standards Act, the Occupational Safety and Health Act, and other federal and state labor and employment laws, without fear of ordinary liability?

T

To an immigration lawyer, familiar with immigration law's "plenary power doctrine" and the notion of an ascending scale of rights that privileges legal immigrants over undocumented ones, the intuitive answer might be, "of course; there are frequently different rules for immigrants and citizens, and for legal immigrants and the undocumented."<sup>1</sup> Undocumented workers are non-citizens who are neither lawful permanent residents nor have an immigration status authorizing them to work in the U.S. and thus have fewer legal rights. To a labor lawyer, familiar with labor law's embrace of collective action and private rights enforcement to achieve public deterrence, the instinctive response

FNS

<sup>1</sup> See, e.g., *Johnson v. Eisentrager*, 339 U.S. 763, 770–771 (1950) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society."); *Mathews v. Diaz*, 426 U.S. 67 (1976) (approving discrimination in public benefits eligibility between citizens and permanent residents).

352 THE STORY OF *HOFFMAN PLASTIC COMPOUNDS, INC. v. NLRB*

T might be, “of course not; there are no statutory exceptions to labor law coverage based on immigration status, and the fate of all workers depends on the treatment of each.” *Hoffman Plastic Compounds, Inc. v. NLRB* is a tale of the efforts of unions, employers, civil rights advocates, legislatures, executive branch agencies, and ultimately the Supreme Court to reconcile the immigration and labor statutory schemes, to make sense of the sometimes contradictory legislative impulses these twin regimes manifest, and to develop a framework for the humane and effective regulation of both borders and markets.<sup>2</sup>

T In important ways, laws regulating our nation’s borders and its labor markets share a common ancestry that traces to early colonial rules on slavery, the slave trade, and indentured servants. Although modern lawyers are accustomed to thinking of “labor law” and “immigration law” as wildly disparate, proposals for mammoth new guest-worker programs, “earned” legalization, and a new paradigm for U.S.-Mexico relations reflect the deep connections between these two bodies of law. This common heritage is apparent as well in the competing political pressures embodied in both schemes—at times and in places protectionist, nativist, bigoted, and designed to favor the interests of management; at other times and in other places open, non-discriminatory, universalist, and designed to favor the interests of working people.

T In *Hoffman Plastic Compounds v. NLRB* five justices of the U.S. Supreme Court viewed the labor and immigration laws as fundamentally at odds with one another. The majority held that an employer who unlawfully discharges a worker for union organizing is immune from ordinary labor law liability for backpay if the worker lacks work authorization under immigration law and the employer learns of the worker’s status only after the illegal discharge. Four justices viewed the labor and immigration laws as fundamentally in harmony. In dissent, they would have allowed the National Labor Relations Board to enforce its backpay award, notwithstanding an immigration law that prohibited employers from knowingly hiring or employing unauthorized workers.

T *Hoffman* will not be the last word on labor rights for immigrants and labor obligations for their employers. It remains to be seen whether the decision helps spur broader legislative reform, strengthening the right to organize for all workers and thereby reducing an incentive for outlaw employers to prefer undocumented employees, or whether it instead promotes an already-flourishing underground economy and thereby stokes the demand for illegal immigration.

FNS <sup>2</sup> 535 U.S. 137 (2002). One author of this chapter, Michael Wishnie, participated in the *Hoffman* case at the court of appeals and Supreme Court and has been involved in legislative efforts to respond to it. Some references later in this chapter to the *Hoffman* litigation strategy and legislative responses to the Court’s decision are drawn from his knowledge.

***Social Background***

The *Hoffman* case was litigated over thirteen years amidst three important social and legislative developments. One occurred in the labor movement, one in Congress, and one in the population as a whole.

First, by the time the Supreme Court decided *Hoffman* in 2002, the union movement had significantly withered, representing only approximately 8.5% of private-sector, non-agricultural employees. This was only a fraction of union density in the post-World War II era and a figure so low as to raise fundamental questions about the capacity of unions to protect the interests of working people. To labor advocates this was especially discouraging because John Sweeney had assumed the leadership of the AFL-CIO in the mid-1990's with a pledge to reinvigorate moribund organizing campaigns. Organized labor appeared largely unable to attract enough new members or to win elections in numbers substantial enough to halt, if not reverse, a decades-long decline.

Perhaps not coincidentally, through the 1990's and into the new century, organized labor's attitudes towards immigration continued to reflect, in large measure, traditional fears that immigrants would work for lower wages than long-time residents and thus drive down wages. There were important exceptions to this attitude, such as successful organizing drives targeting high-immigrant industries initiated by unions such as SEIU and HERE, the AFL-CIO Executive Council's adoption of a pro-immigrant resolution in February 2000, and the Immigrant Worker Freedom Ride of 2003.<sup>3</sup> It was also true that labor organizers increasingly found low-wage immigrant workers more receptive to unionization drives, despite the risk of deportation, than low-wage American workers, and a number of unions came to perceive organizing immigrants as essential to their success.<sup>4</sup> Nevertheless, concerned about the impact on wage levels of large numbers of new workers, and perhaps maintaining a residual nativism, important voices within the labor movement remained unpersuaded of the wisdom of legalizing undocumented workers and repealing the employment verification system that the AFL-CIO had endorsed when enacted by Congress in 1986.<sup>5</sup>

<sup>3</sup> Among the important organizing initiatives targeting immigrant-intensive industries were SEIU's Justice for Janitors campaign, HERE's hotel industry campaigns in Las Vegas and elsewhere, and health care worker drives in California and New York. The AFL-CIO's February 2000 Executive Council statement, which advocates legalization measures and "replacing" the I-9 employment verification system that was at issue in *Hoffman*, is available at <<http://www.aflcio.org/aboutaflcio/ecouncil/ec0216200b.cfm>>. In 1986, the AFL-CIO had supported adoption of the same system.

<sup>4</sup> Telephone Interview with Muzaffar Chishti, Senior Policy Analyst, Migration Policy Institute and former Director, UNITE Immigration Project, June 3, 2004.

<sup>5</sup> Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101(a)(1), 100 Stat. 3359 (Nov. 6, 1986), codified at 8 U.S.C. § 1324a (2000).

354 THE STORY OF *HOFFMAN PLASTIC COMPOUNDS, INC. v. NLRB*

T Second, in the 1990's, as *Hoffman* worked its way through the National Labor Relations Board, Congress enacted and President Clinton signed three major anti-immigrant laws. The legislation slashed the public benefits eligibility of millions of indigent immigrants and their families, mandated detention and deportation for tens of thousands of permanent residents, and restricted traditional forms of deportation relief such as political asylum.<sup>6</sup> The human consequences of these bills were dramatic. The draconian Welfare Act of 1996, for instance, sought to achieve nearly *one-half* of its estimated savings through elimination of benefits for immigrants, even though far fewer than half of welfare recipients were non-citizens.<sup>7</sup> And the numbers of permanent residents deported for past criminal convictions, often minor, rose significantly, separating tens of thousands of long-time residents from their families, jobs, and communities.<sup>8</sup> The net effect of these laws was also significantly to increase the risk for immigrant workers of participating in a union organizing drive. For undocumented workers, deportation in the event of a retaliatory employer call to INS became more certain, and for legal immigrants, the availability of a social safety net—public benefits—in the event of a retaliatory discharge became far less likely. The trend towards ever-more punitive immigration laws continued following the terrorist attacks of September 11, 2001, although perhaps paradoxically, the USA PATRIOT Act, Homeland Security Act, and other major post-September 11 legislation have effected far less sweeping changes to the immigration statutes than did the 1996 laws.

T Third, despite the indifference of some in the labor movement towards immigrants, and despite the adoption of numerous harsh statutes in the 1980's and 1990's, the number of noncitizens in the country increased substantially. From 1970 to 2000, the overall foreign-born population in the United States tripled, to 28.4 million persons.<sup>9</sup> While

FNS <sup>6</sup> These laws were the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Title IV, 110 Stat. 1214; Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 400-451, 110 Stat. 2105; and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Division C, 110 Stat. 3009-546.

FNS <sup>7</sup> The Congressional Budget Office estimated that \$23.7 billion of the anticipated \$53.4 billion in federal savings from the 1996 welfare law would be attributable to the anti-immigrant measures. Cong. Budget Office, Federal Budgetary Implications of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, at 3 tbl. 2 (1996). Congress did subsequently restore some benefits. *See, e.g.*, Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (restoring Supplemental Security Income benefits for some legal immigrants).

FNS <sup>8</sup> In 1986, INS removed fewer than 2,000 immigrants because of past criminal convictions, a figure that rose to approximately 71,000 persons with criminal convictions removed in 2002. 2002 *Yearbook of Immigration Statistics*, at 176-77 & tbl. 46 (Oct. 2003).

FNS <sup>9</sup> U.S. Census Bureau, Profile of the Foreign-Born Population in the United States: 2000 (Dec. 2001), at 3. "Foreign born" refers to persons who are not U.S. citizens at birth,

T record figures in absolute terms, as percentages of the overall population, they are not: in 2000, 10.4 percent of the population was foreign-born, the highest proportion since 1930, but from 1860 to 1930, the percentage of foreign-born was higher still.<sup>10</sup> The increase in the non-citizen population was more dramatic, however, rising from 3.5 million in 1970 to 17.8 million in 2000.<sup>11</sup> Data on the undocumented population are notoriously imprecise, but estimates have risen from approximately five million persons in the mid-1990's to perhaps ten million in 2004.<sup>12</sup>

T Nationwide, a large and crucial segment of the workforce is undocumented. Driven by a remarkable ninety-six percent labor-force participation rate for undocumented men, there are approximately six million undocumented immigrant workers, representing five percent of the total workforce (including four percent of the urban workforce and forty-eight percent of the agricultural workforce).<sup>13</sup> An employer group estimated in 2001 that immigrants (both legal and undocumented) contribute \$1 trillion per year to the Gross Domestic Product and account for twelve percent of total

T hours worked in the U.S.<sup>14</sup> Not surprisingly, undocumented workers are concentrated in some of the lowest-paying and most dangerous jobs in the country.<sup>15</sup>

T By the time the events giving rise to *Hoffman Plastic* occurred, the effect of immigration on the California workforce had been dramatic. In

FNS and includes those who have become U.S. citizens through naturalization and those who remain non-citizens, including lawful and undocumented immigrants. Id. at 8.

FNS <sup>10</sup> Id. at 9 & Figure 1-1. The proportion was 13-15% in 1860-1920 before falling to 11.6% in 1930.

FNS <sup>11</sup> Id. at 20 & tbl. 7-1.

FNS <sup>12</sup> The INS estimated the undocumented population to be five million persons as of October 1996 and seven million as of January 2000, U.S. INS, Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990-2000 (2003), but other demographers have concluded the total undocumented population may be closer to eleven million. See Jeffrey S. Passel, Randy Capps, & Michael Fix, *Undocumented Immigrants: Facts and Figures* (2004) (estimating undocumented population at 9.3 million); Cindy Rodriguez, *Census Bolsters Theory Illegal Immigrants Undercounted*, Boston Globe, Mar. 20, 2001, at A4 (noting estimates ranging from six to eleven million persons).

FNS <sup>13</sup> Jeffrey S. Passel, et al. [format requires all names of authors] Randy Capps, & Michael Fix, *Undocumented Immigrant: Facts and Figures* 1 (2004); Orrin Bair, *Undocumented Workers and the NLRA: Hoffman Plastic Compounds and Beyond*, 19 Labor Lawyer 153, 160 (2003) (citing *How Many Undocumented: The Numbers Behind the U.S.-Mexico Migration Talk*, PEW Hispanic Center 3 (May 21, 2002)).

FNS <sup>14</sup> Id. (citing *Immigration Is Critical to Future Growth and Competitiveness*, Employment Policy Foundation, Policy Backgrounder 1 (June 11, 2001)).

FNS <sup>15</sup> Jeffrey S. Passel, et al. [format requires all names of authors] Randy Capps, & Michael Fix, *Undocumented Immigrants: Facts and Figures* 2 (2004).

356 THE STORY OF *HOFFMAN PLASTIC COMPOUNDS, INC. v. NLRB*

T many of the state's industries, including manufacturing, construction, and service work, wages and working conditions had deteriorated after employers eliminated or weakened unions in the 1970's and native workers were increasingly replaced by immigrants. Nearly one-fourth of the state's population was foreign-born (compared to one-tenth in the United States as a whole). Foreign-born Latinos constituted seventeen percent of California's total workforce, and forty-two percent of its factory operatives, one-half of its laborers, and over one-third of its service workers.<sup>16</sup> The dominance of Latino workers was especially apparent in Southern California, where the Hoffman Plastic plant was located.

T The greater Los Angeles area has a substantial amount of light manufacturing.<sup>17</sup> Most of it is concentrated in an old industrial area, the Alameda Corridor, which lies between downtown Los Angeles and the ports of Long Beach and Los Angeles. Less than ten percent of the manufacturing jobs are unionized and a majority of the workers are Latino. Many workers live in Alameda Corridor communities, thus creating the possibility of using community and religious organizations, kinship bonds, and neighborhood and ethnic ties as well as workplace solidarity to forge a union.<sup>18</sup>

TCBI

### ***Legal Background***

T

The legal background to the *Hoffman* case reflected some of these social developments as well. The NLRB had taken the position since at least the late 1970's that undocumented immigrants were "employees" covered by the National Labor Relations Act.<sup>19</sup> As employees, undocumented workers who were fired for union organizing would be entitled to the full range of remedies under the NLRA. The Board normally orders reinstatement and backpay from the date of discharge until the date of reinstatement, issues a cease-and-desist order proscribing similar misconduct in the future, and orders the employer to post a notice announcing the Board's decision and promising to abide by it. The NLRB requires employees to mitigate damages by seeking interim employment. Therefore, a backpay award may be reduced by wages an employee

FNS

<sup>16</sup> David Lopez & Cynthia Feliciano, *Who Does What? California's Emerging Plural Labor Force* in Ruth Milkman, ed., *Organizing Immigrants* (2000).

FNS

<sup>17</sup> Marla Dickerson, *L.A. County Leads U.S. in Factory Jobs*, L.A. Times, Jan. 21, 2004, at C2.

FNS

<sup>18</sup> Hector L. Delgado, *The Los Angeles Manufacturing Action Project: An Opportunity Squandered?* in Ruth Milkman, ed., *Organizing Immigrants* (2000).

FNS

<sup>19</sup> See, e.g., *Duke City Lumber Co.*, 251 NLRB 53 (1980); *Apollo Tire Co.*, 236 NLRB 1627 (1978), enfd., 604 F.2d 1180 (9th Cir. 1979); Amay's Bakery & Noodle Co., 227 NLRB 214 (1976); Hasa Chemical, Inc., 235 NLRB 903 (1978).

CATHERINE L. FISK & MICHAEL J. WISHNIE

357

T earned in interim employment or, if the employee failed to make reasonable efforts to find employment, by the amount he or she would have earned. Eligibility for backpay depends on the employee being available for work, and, therefore, a backpay award will be reduced for any period during which the employee is unavailable for work, as for example, when she or he is in jail or out of the area of the employer's operations. The Board will not order reinstatement if the employee engaged in misconduct so egregious as to make him or her unfit for reinstatement, or if the employer shows that at some point after the unlawful discharge the employee would have been terminated in any event. Interest will be computed on a backpay award.<sup>20</sup>

T In 1984, the Supreme Court endorsed the view in *Sure-Tan, Inc. v. NLRB* that undocumented workers are "employees" within the meaning of the NLRA.<sup>21</sup> In *Sure-Tan*, an employer contacted the INS shortly after his employees voted in a union. The INS visited the factory and investigated the immigration status of all Spanish-speaking employees. The INS arrested five and, by the end of the day, all were on a bus ultimately bound for Mexico. The Board found that the employer, with full knowledge that they were undocumented, invited the raid solely because the employees supported the union. The Board ordered reinstatement with backpay, leaving for the compliance hearing the question whether the deported workers were available for work, a requirement for backpay eligibility. On review, the court of appeals held that six months was a reasonable period to believe the discriminatees would have been employed absent the employer's unfair labor practice and modified the Board's order to award a minimum of six months' backpay. The Supreme Court upheld the Board's conclusion that undocumented immigrants are statutorily protected as employees under the NLRA. The Court explained: "Application of the NLRA helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment." But the Court reversed the court of appeals' mandatory minimum backpay award as too speculative. Recognizing that the discharged employees would receive no backpay because they were deported the very day they were fired, the Court nevertheless rejected the contention that the Board has the power to order minimum backpay regardless of an employee's particular circumstances. Specifically, the Court was concerned that enforcing the Board's backpay award could undermine "the objective of deterring unauthorized immigration that is embodied in the [immigration statutes]." Thus,

FNS <sup>20</sup> On general NLRB remedies in unlawful discharge cases, see 2 Patrick Hardin & John E. Higgins, Jr., *The Developing Labor Law* 2521-2529 (4th ed. 2001).

FNS <sup>21</sup> 467 U.S. 883 (1984).

358 THE STORY OF *HOFFMAN PLASTIC COMPOUNDS, INC. v. NLRB*

T in providing directions for remand, the Court stated that remedies “must be conditioned upon the employees’ legal readmittance to the United States” and that “in computing backpay, the employees must be deemed ‘unavailable’ for work (and the accrual of backpay tolled) during any period when they were not lawfully entitled to be present and employed in the United States.”

T At the time *Sure-Tan* was decided, it was not unlawful for an undocumented immigrant to be hired or to work in the United States; under the immigration laws, all that was prohibited was entering without inspection or remaining beyond the term of one’s visa. Seizing on this point, as well as the Supreme Court’s attention to the physical unavailability of the workers in *Sure-Tan*, the Ninth Circuit, the first court of appeals to consider a question left open in *Sure-Tan*—the backpay eligibility of undocumented workers who remained in the country after discharge—determined that such workers were in fact eligible.<sup>22</sup>

T Two years after the *Sure-Tan* decision, however, and only months after the Ninth Circuit had held that workers in this country were eligible for backpay regardless of their immigration status, Congress enacted the Immigration Reform and Control Act of 1986 (IRCA). IRCA embodied a bargain struck between legislators who favored increased immigration enforcement and those who favored a legalization program. The bill’s two key provisions were, first, a one-time amnesty for those who could demonstrate continuous residency since 1982, and second, adoption of the “employer sanctions” provisions, which for the first time prohibited employers from knowingly hiring or employing “unauthorized workers.”<sup>23</sup> Employer organizations such as the U.S. Chamber of Commerce opposed the employer sanctions provisions as a costly, burdensome, and inefficient strategy to compel the private sector to enforce public immigration laws. The AFL-CIO, on the other hand, endorsed employer sanctions in the hope they would reduce wage competition by deterring employment of undocumented immigrants.

T The 1986 law defined “unauthorized alien” as a non-citizen who was not, at the time of employment, either a lawful permanent resident or authorized to work—in other words, undocumented immigrants, whether they have overstayed a visa or entered the country without inspection, as well as those persons holding non-immigrant visas that did not allow employment.<sup>24</sup> IRCA did not create penalties for unauthorized

FNS <sup>22</sup> Local 512, Warehouse and Office Workers’ Union v. NLRB (Felbro), 795 F.2d 705 (9th Cir. 1986) (wrongfully discharged undocumented worker who remains in country eligible for backpay).

FNS <sup>23</sup> See 8 U.S.C. § 1324a(a)(1) (2000).

FNS <sup>24</sup> 8 U.S.C. § 1324a(h)(3) (2000) (defining “unauthorized alien” for purposes of employer sanctions). Many visas, including those for tourists and some students, do not carry work authorization.



CATHERINE L. FISK & MICHAEL J. WISHNIE

359

T workers who accepted employment; instead, Congress chose a scheme of civil and criminal penalties for *employers* who knowingly hired or employed them. This was a deliberate legislative choice that grew out of many years of congressional studies and commissions and the recognition that Congress could not hope to influence the supply of undocumented workers—the wage discrepancies between the United States and Mexico were just too great—but it could hope, through regulation, to dampen employer demand.<sup>25</sup> The “employer sanctions” regime thus obligates employers to check the work authorization status of all new employees within three days of hire by completing an INS Form I-9, indicating that the employee is either a U.S. citizen or an immigrant authorized to work in this country. Employers must retain their completed I-9s and make them available to immigration agents for inspection upon request.<sup>26</sup> Finally, when Congress enacted IRCA, it recognized that employers would need time to adjust to the law’s new requirements. Accordingly, it provided for a slow phase-in, in which the Attorney General was to issue no fines to employers in the first six months after IRCA’s enactment nor for a first employer offense committed in a subsequent grace period of twelve months, or up to June 1, 1988.<sup>27</sup>

T After IRCA made it unlawful to hire undocumented workers, employers sought to revisit the question whether undocumented workers were still protected by the NLRA. They renewed the argument that undocumented workers should not be entitled to backpay because they could not legally work in the United States and were therefore not technically “available” for work, the fundamental requirement for backpay eligibility. The first wave of post-IRCA cases involved conduct that occurred before IRCA went into effect. Courts uniformly concluded that undocumented workers were statutory employees, and moreover, that if they remained present in the country after a wrongful discharge, they were eligible for backpay.<sup>28</sup> As cases involving post-IRCA conduct began to reach the courts, the Seventh Circuit concluded undocumented work-

FNS <sup>25</sup> See Brief *Amici Curiae* of ACLU et al., No. 00-1595, 2001 WL 1631648 (discussing legislative history, including congressional acknowledgment that legislation might influence employer behavior but could not overcome wage differentials motivating employee migration).

FNS <sup>26</sup> In addition to prohibiting the knowing employment of unauthorized workers, in 1986 Congress adopted provisions barring employers from engaging in discriminatory I-9 practices based on national origin or citizenship status, 8 U.S.C. § 1324b, and later added provisions barring immigrants from tendering false documents in satisfaction of the I-9 obligation, *id.* § 1324c.

FNS <sup>27</sup> 8 U.S.C. § 1324a(i)(1)(A), (B), (2) (19902000).

FNS <sup>28</sup> See Rios v. Enterprise Ass’n Steamfitters Local 638, 860 F.2d 1168, 1172-72 & n. 2 (2d Cir. 1988); see also EEOC v. Hacienda Hotel, 881 F.2d 1504, 1517 (9th Cir. 1989) (same as to backpay under Title VII for pre-IRCA conduct).

360 THE STORY OF *HOFFMAN PLASTIC COMPOUNDS, INC. v. NLRB*

T ers were ineligible for backpay, thus raising questions about the continuing viability of the contrary view asserted by the Second and Ninth Circuits before IRCA went into effect.<sup>29</sup>

T The NLRB attempted to reconcile the divergent court of appeals opinions. In its lengthy decision in *A.P.R.A. Fuel Oil Buyers Group*, it reaffirmed the view that undocumented immigrants are employees protected by the NLRA and rejected the argument that immigration status was a flat bar to backpay. The Board held that undocumented workers were entitled to the same remedies as other employees so long as the remedies did not require the employer to violate IRCA.<sup>30</sup> Thus, the employer could be ordered to reinstate employees so long as at the time of reinstatement the employees could present verification that their immigration status enabled them to work in the U.S. The Board held that an employer could be ordered to provide backpay from the date of discharge until either the date of reinstatement or the date when the employee failed to produce evidence of eligibility to work in the U.S. In later cases, the Board made clear that the backpay would be tolled as of the date the employer learned that the employee was not legally permitted to work in the U.S. It was against this background that *Hoffman Plastic* arose.

TCBI  
T  
***Factual Background***

In May 1988, not long after IRCA went into effect and prior to the expiration of IRCA's "first offense" grace period for employers, a man whose real name may have been Samuel Perez applied for a job under the name Jose Castro at Hoffman Plastic Compounds factory in Panorama, California.<sup>31</sup> He spoke little English and so someone helped him fill out the six-page application form. On the form, he answered "Yes" to the question "Are you prevented from lawfully becoming employed in

FNS  
<sup>29</sup> Compare Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115 (7th Cir. 1992) (undocumented workers who remain in the country ineligible for back pay) with Rios v. Enterprise Ass'n Steamfitters Local 638, 860 F.2d 1168, 1172-72 & n. 2 (2d Cir. 1988) (undocumented workers eligible for backpay); EEOC v. Hacienda Hotel, 881 F.2d 1504, 1517 (9th Cir. 1989) (same). In a *sui generis* Title VII case, the Fourth Circuit adopted the Seventh Circuit's approach, arguably deepening the split. See Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184 (4th Cir. 1998) (*en banc*) (per curiam) (temporarily unauthorized worker refused reinstatement after resignation cannot state claim under Title VII, implying undocumented workers not covered by Title VII).

FNS  
<sup>30</sup> 320 NLRB 408 (1995).

FNS  
<sup>31</sup> Except where indicated otherwise, this account of Castro's employment at Hoffman Plastic Compounds and subsequent events is drawn from testimony of Castro, his niece, and other witnesses at the backpay hearing before the Administrative Law Judge in Los Angeles on March 4-5, 1993 and June 14, 1993. In the Matter of Hoffman Plastic Compounds, Inc. and Casimiro Arauz, Case No. 21-CA-26630, National Labor Relations Board.

CATHERINE L. FISK & MICHAEL J. WISHNIE

361

T this country because of visa or immigration status?” As part of the application process, he also completed the I-9 Form establishing that his immigration status permitted him lawfully to work. In that connection, Castro presented a birth certificate stating he was born in El Paso, Texas, a California ID card with his name and photograph, and a Social Security card in his name. Reflecting on this discrepancy in the file, the NLRB lawyer who litigated the case suspected that a Hoffman Plastic office employee looked at the application and explained to Castro that he could not be hired until he produced a birth certificate, picture ID, and Social Security card and that Castro went away and came back with the requested documents.<sup>32</sup> Or maybe it was simply that Castro did not understand the question when the application was translated and filled out on his behalf. In any event, Castro was hired and went to work at the factory. While working there he lived in the home of his niece, sleeping on the living room couch.

T Hoffman Plastic Compounds, a family-owned firm, produces a type of plastic, polyvinylchloride (PVC) pellets, on order for firms that use PVC to make pharmaceutical, construction, and household products. Its laboratory employees develop formulae to suit specific customer needs. The production employees then operate compounding machines that mix and cook the ingredients according to the formula, and extruding machines that press the PVC into pellets. Shipping employees bag, store, and ship the pellets to customers. Jose Castro worked as a production employee, operating compounding and extruding machines.

T Shortly before Christmas 1988, the United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, began to organize the plant. Dionisio Gonzalez, a union organizer, visited the plant frequently and gave authorization cards to employees to distribute to co-workers. Castro was one of the employees who passed out cards. In January 1989, after supervisors learned of the organizing drive and unlawfully interrogated employees about their union activity, nine employees were laid off. One of them was Castro.

T One might wonder why Jose Castro, an undocumented minimum-wage worker who had no home of his own and who had so much to lose, took the risk of speaking up for the union. According to Peter Tovar, the NLRB Regional Attorney who handled the case, Castro had been considered a good, hard-working employee and he was not a leader of the union organizing drive. He was just in the wrong place at the wrong time.<sup>33</sup> To the extent that he did actively support the union, we can only speculate about his reasons. Scholars who studied union organizing campaigns in

FNS <sup>32</sup> Telephone Interview with NLRB Region 21 Regional Attorney Peter Tovar, January 21, 2004.

FNS <sup>33</sup> Telephone Interview with Peter Tovar, January 21, 2004.

362 THE STORY OF *HOFFMAN PLASTIC COMPOUNDS, INC. v. NLRB*

T Southern California in the 1980's and 1990's found little fear. Some workers said that if they were deported they would simply come back. Others said that the possibility of INS raids seemed remote. Some Mexican and Central American immigrants have some positive experiences of unionism in their home countries and believed that, in contrast to the death threats leveled against union organizers by right-wing groups in Central America, in the U.S. the worst thing that could happen would be that they would lose a low-wage job and be deported home to family.<sup>34</sup> Some undocumented workers vow to reenter the U.S., even as they are being deported to their home countries, because the conditions are so dire at home.<sup>35</sup>

T According to Hoffman's lawyer, Ryan McCortney, the organizing drive failed and the union withdrew the election petition a few days before the date of the election. To his knowledge, there have been no other efforts to unionize the plant, which remains nonunion. Many of the employees who were fired for union activity were reinstated, although some were later terminated, according to McCortney, for other reasons.<sup>36</sup>

TCBI  
T  
***Prior Proceedings***

One of the laid-off employees, Casimiro Arauz, filed an unfair labor practice charge. In April 1990, over a year after the layoffs, an ALJ for the NLRB held a hearing on the complaint. The employees testified that the supervisors had told employees that the union was "cabron" (which the ALJ rather delicately described as "an expression in Spanish which meant 'bad' or 'something not good'") and that they "could get into trouble if management found out about [their] passing out union cards." Ron Hoffman, the company owner, denied that union activity had anything to do with the layoffs, insisting instead that they were due to a decline in orders, and further that employees were selected for layoff based on a combination of seniority, disciplinary record, and skills. The ALJ found that the plant hired employees during the time the union

FNS <sup>34</sup> Ruth Milkman, *Introduction*, in Ruth Milkman, ed., *Organizing Immigrants* at 8-9 (2000). By contrast, for those who have traveled greater distances and at greater cost, such as undocumented Chinese immigrants who may incur upwards of \$50,000 in debt to the "snakeheads" who smuggle them, with family members liable in the event of default, the consequences of deportation can be far more dire. See Peter Kwong, *Forbidden Workers: Illegal Chinese Immigrants and American Labor* (1997). Similarly, with the increased militarization of the U.S.-Mexico border since September 11, the prospects of illegal re-entry following deportation have dimmed, and the possibility of removal has become more frightening to many Mexican and Central American immigrants.

FNS <sup>35</sup> Chris Kraul, *Illegal Immigrants Receive a One-Way Ticket to Mexico*, L.A. Times (July 13, 2004).

FNS <sup>36</sup> Telephone Interview with Ryan McCortney, January 16, 2004.

CATHERINE L. FISK & MICHAEL J. WISHNIE

363

T employees had been fired and required existing employees to work overtime to keep up production. The ALJ found that the evidence was in conflict about whether Hoffman had laid off employees to rid itself of the union or for lack of work or some combination of the two. In any event, however, the ALJ found that Hoffman had selected employees for layoff based on their union activity because all of the union adherents were laid off and because supervisors had interrogated them about their support for the union.<sup>37</sup>

T Both the General Counsel and the employer filed exceptions, which is the process by which a party appeals an ALJ decision to the Board. In January 1992, the Board issued a decision that largely upheld the ALJ's findings and conclusions, except it found that one of the nine employees would have been laid off regardless of his union activity.<sup>38</sup> Eventually, the other fired employees settled their charges with Hoffman, and their immigration status never became an issue.<sup>39</sup>

T In June 1993, an ALJ conducted a compliance hearing to determine the amount of backpay owed to Castro. Hoffman's lawyer, Ryan McCortney, was a relatively young lawyer at the time of the compliance hearing. He had graduated from the University of Southern California Law School in 1987 and worked in the Los Angeles office of the Sheppard Mullin law firm since graduation. He claimed later that he had no idea at the start of the hearing that Castro might be undocumented but hit upon the possibility entirely by accident based on something Castro blurted out at the hearing.<sup>40</sup> Castro had missed an earlier compliance hearing and McCortney inquired about his absence. According to McCortney, Peter Tovar, the Regional Attorney, replied that Castro was in jail in Texas. Thinking that the jail time would toll the backpay award, McCortney hired a private investigator to figure out where he was in jail and how long he had been there. The private investigator faxed Castro's birth certificate to the jail. McCortney was surprised when informed that there was no one by that name in the jail. Suspecting that the birth certificate was faked, the investigator went to the hospital where Castro had been born and learned that the certificate was valid. Rejecting the possibility that Castro was undocumented, McCortney then asked for a background check on Castro to see whether he had been in jail at other times that would toll the backpay period. The check revealed two things: one, that Castro had a trucker's license, which led McCortney to believe that he easily could have mitigated his lost wages, and

FNS <sup>37</sup> Hoffman Plastic Compounds, Inc., 306 NLRB 100 (1992).

FNS <sup>38</sup> *Id.*

FNS <sup>39</sup> Petitioner's Brief at 3 n.1.

FNS <sup>40</sup> Telephone Interview with Ryan McCortney, January 16, 2004.

364 THE STORY OF *HOFFMAN PLASTIC COMPOUNDS, INC. v. NLRB*

T two, that he had briefly been in jail in Los Angeles County. Armed with this information, McCortney went to the compliance hearing intending to use the information to impeach Castro's credibility about his mitigation efforts.

T McCortney spent quite a bit of the first part of the hearing trying to establish where Castro had lived in the four years since his layoff. McCortney sought to show that Castro had either not been in California, and thus unavailable for work at the Hoffman plant and ineligible for backpay, or that he had not made adequate efforts to find work. In addition, there was some dispute about whether Castro had received a letter from Hoffman offering him reinstatement (which would also toll the backpay award). Castro, testifying through a translator, said that he had been employed at a variety of irregular and low-paying jobs as a gardener, carpenter's assistant, and mechanic's assistant since being fired from Hoffman and that he had spent six or seven months in El Paso. McCortney inquired why he had missed earlier compliance hearings. Castro answered that he had missed one because he was in jail for four days for drinking in public. The hearing recessed briefly for a sidebar discussion about whether McCortney could inquire further about the jail time.

T McCortney thought Castro's testimony about his mitigation efforts was evasive and he began to wonder whether he had the right Jose Castro. The Los Angeles County jail records contained a description of Castro which mentioned tattoos on his arms. When the hearing reconvened, McCortney asked: "Mr. Castro, do you have a California driver's license?" Castro answered no. McCortney later recalled that he suspected at this point that he had the wrong Jose Castro. McCortney then said, abruptly, and incomprehensibly if one were relying only on the transcript to follow the thread of the action: "If he rolls up his sleeves on his arms, that's the end of it. I mean, if the doesn't have any tattoos, then it's not the person." The ALJ asked Castro whether he had any tattoos on his arms. Castro did not. "Okay, that's not him," said McCortney. McCortney later recalled that he crumpled up the birth certificate and threw it in the wastebasket as a dramatic demonstration that this was the wrong person. The record does not reflect it, and instead simply indicates that the hearing resumed with more questions about interim earnings and efforts at mitigation.

T Tovar's theory for why Castro had not worked constantly since being laid off in 1989 was that Castro had so little education he had difficulty finding jobs.<sup>41</sup> Thus, on cross-examination, Tovar asked how much education he had received, and Castro replied that he had only two years of formal education while a young child in Mexico. That made no

FNS <sup>41</sup> Telephone Interview with Peter Tovar, January 21, 2004.

CATHERINE L. FISK & MICHAEL J. WISHNIE

365

T sense to McCortney—why would someone born and raised in Texas have left school in the second grade? It was not until Castro said he had attended school in Mexico that it occurred to McCortney that Castro had borrowed the birth certificate because he was not a legal immigrant. On redirect, McCortney asked how many years of education he had, and Castro again said two. McCortney then asked why he had stated on his employment application that he had eight years of education, and Castro replied, “So that I could obtain work.” McCortney continued, “Now, you were born in EI Paso, Texas, correct?” “No, I am Mexican,” responded Castro. “You’re not a citizen of the United States?” “No.” Over the objection of Tovar, the Regional Attorney, the ALJ permitted McCortney to ask Castro whether he had documents permitting him to work in the United States. Castro said he had the birth certificate but admitted that he had borrowed it from a friend so he could get a job.

T A few weeks after the compliance hearing, McCortney wrote the Regional Director to argue Castro was ineligible for backpay because he was not authorized to work. Peter Tovar, relying on the Board’s interpretation of *Sure-Tan*, took the position that backpay was not tolled unless or until the INS issued a deportation order, so McCortney threatened to report Castro to the INS unless Tovar stipulated that Castro was an undocumented alien who had not been legally present in the United States since before he was hired at Hoffman Plastic. The Regional Director refused to make such a stipulation, and then sought guidance from the Division of Advice. In August 1993 the General Counsel issued an Advice Memorandum concluding that Castro was indeed entitled to reinstatement and backpay.<sup>42</sup>

T At that time, the case law of the NLRB and the Ninth Circuit held that undocumented workers could be awarded backpay and reinstatement, although some of the cases predated the enactment of IRCA. Yet the ALJ rejected this authority and held that Castro was ineligible for backpay. The ALJ distinguished the Board’s 1992 decision in *A.P.R.A Fuel Oil Buyers Group*, which had ordered reinstatement of two undocumented workers, because in that case the employer knew of the employees’ undocumented status at the time of hire. He distinguished the Ninth Circuit decision in *EEOC v. Hacienda Hotel*, which awarded backpay under Title VII to undocumented workers, because their claims arose prior to IRCA’s effective date.<sup>43</sup> And he did not cite the Ninth Circuit’s decision in *Local 512 Warehouse and Office Workers’ Union v. NLRB (Felbro, Inc.)*, which held that undocumented workers were entitled to backpay under the NLRA, albeit also involving pre-IRCA miscon-

FNS <sup>42</sup> Advice Memorandum to Region 21 (Aug. 31, 1993).

FNS <sup>43</sup> 881 F.2d 1504, 1517 (9th Cir. 1989).

366 THE STORY OF *HOFFMAN PLASTIC COMPOUNDS, INC. v. NLRB*

T duct.<sup>44</sup> Rather, the ALJ followed the Seventh Circuit's decision in Del Rey Tortilleria v. NLRB, which held that undocumented workers were not entitled to backpay after IRCA.<sup>45</sup>

T McCortney was thrilled that the ALJ had rejected the Board position from *A.P.R.A. Fuel* which made immigration status irrelevant to a backpay award.<sup>46</sup> He thought it a vindication of his view that it would be unfair to award backpay to an employee who could not legally have been hired and could not legally mitigate damages by seeking interim employment. In his view, making Castro eligible for backpay would result in an unjust windfall. Peter Tovar, of course, saw the matter differently. In his view, it is simply unrealistic to think that undocumented immigrants will sit around rather than mitigate damages. "They are here to work and they do work. Castro reported to us every job he had after being fired from Hoffman, and we discounted the backpay request to reflect all his interim earnings. There was no unfairness to the employer."<sup>47</sup>

T The Regional Director filed exceptions in December 1993. In response, McCortney argued to the Board that Castro had misled Hoffman Plastic by presenting false documents, had misled the NLRB by failing to testify truthfully at the compliance hearing (having lied about his name), and could not legally have been hired by Hoffman in the first instance.<sup>48</sup> By the time the case reached the Supreme Court McCortney had come to characterize his client as entirely "innocent," without knowledge of Castro's undocumented status, and thus as an employer who did not need an NLRA backpay award to deter further hiring of undocumented workers.<sup>49</sup> In the post-hearing brief, however, McCortney did not take such a strong position. There was no evidence in the record as to whether Hoffman Plastic had knowingly hired other undocumented workers, knew of Castro's immigration status, or had a company policy against hiring undocumented workers, except the information on the employment application and the I-9 Form. The most that McCortney could argue was that the evidence about Castro's immigration status on his employment application and I-9 Form conflicted, and that it was unnecessary to show that Hoffman had a policy against hiring undocu-

FNS <sup>44</sup> 795 F.2d 705, 722 (9th Cir. 1986).

FNS <sup>45</sup> 976 F.2d 1115 (7th Cir. 1992).

FNS <sup>46</sup> Telephone Interview with Ryan McCortney, January 16, 2004.

FNS <sup>47</sup> Telephone Interview with Peter Tovar, January 21, 2004.

FNS <sup>48</sup> Answering Brief of Respondent to the Exceptions and Brief of the Counsel for the General Counsel. Case No. 21-CA-26630 (Jan. 30, 1994).

FNS <sup>49</sup> Transcript of Oral Argument, 2002 U.S. Trans Lexis 11 at 14; Petitioner's Reply Brief at 12.



CATHERINE L. FISK & MICHAEL J. WISHNIE

367

T mented workers in order to eliminate its backpay liability because the law prohibited hiring them.

T There followed an unexplained five-year delay in the case. Interestingly, William B. Gould, IV, a Stanford law professor who became Chair of the NLRB in December 1994, did not recall *Hoffman Plastic* as being the “big case” on the issue of the rights of undocumented workers.<sup>50</sup> Rather, the big case on that issue was the second decision in *A.P.R.A. Fuel Oil Buyers Group* which was issued in December 1995 while the *Hoffman* decision was pending.<sup>51</sup> In *A.P.R.A.*, four members of the Board (Gould, Browning, Cohen, and Truesdale) exhaustively considered how to reconcile the NLRA’s remedial provisions with the IRCA prohibition on the employment of unauthorized immigrants. The majority of the Board concluded that the major purpose of IRCA was to deter the employment of undocumented workers and that providing full NLRA remedies was consistent with this purpose:

T11 [T]he appeal of undocumented workers to employers is that aliens will often accept wages and conditions of employment considered unconscionable in this country. A ready supply of individuals willing to work for substandard wages in unsafe workplaces, with unregulated hours and no rights of redress, enables the unscrupulous employers that depend on illegal aliens to turn away Americans and legally working alien applicants who hesitate to accept the same conditions. In addition, the continuous threat of replacement with powerless and desperate undocumented workers would certainly chill the American and authorized alien workers’ exercise of their Section 7 rights.<sup>52</sup>

TF Thus, the Board concluded in *A.P.R.A. Fuel* that granting NLRA remedies was consistent with, and indeed necessary to, achieve the goals of IRCA. The Board noted that the employer knew from the time it first hired the workers that they were undocumented and thus that backpay was appropriate because they would have remained employed but for their union activity and the employer’s illegal retaliation for it. The Board ordered the employer to provide backpay from the dates of discharge up to the date of reinstatement or the date they failed to produce evidence required by IRCA of an immigration status authorizing them to work.<sup>53</sup> The Board pointed out in a footnote that an employer ordinarily would be permitted to cut off backpay liability by proving that the employees had engaged in conduct that would have led the employer

FNS <sup>50</sup> Telephone Interview with William B. Gould, IV, January 21, 2004.

FNS <sup>51</sup> 320 NLRB 408 (1995).

FNS <sup>52</sup> *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 NLRB 408, 414 (1995).

FNS <sup>53</sup> *Id.* at 416.

368 THE STORY OF *HOFFMAN PLASTIC COMPOUNDS, INC. v. NLRB*

TF to discharge them. Here, though, because the employer knew they were undocumented at the time of hiring it was precluded from alleging that it would have terminated them on that basis.<sup>54</sup> Two members dissented in part: Browning because the decision did not do enough to protect the undocumented workers, and Cohen because it did too much.

T By September 1998, when the Board finally issued its decision on Castro's entitlement to backpay, Board membership had changed. Cohen, Browning, and Truesdale were gone. Fox, Liebman and Hurtgen, who replaced them, seemed to have a slightly different view of the equities of remedies for undocumented workers. They followed the decision in *A.P.R.A. Fuel Oil Buyers Group* and concluded that undocumented workers are entitled to some backpay. But they found a significant difference between *Hoffman* and *A.P.R.A.*, in that in *A.P.R.A.* the employer clearly knew the employees were undocumented when it hired them, and the evidence about whether Hoffman knew Castro was undocumented was, at most, conflicting. The Board stated:

T11 [T]he record supports the Respondent's contention that it would not have offered Castro initial employment had it known of his unauthorized immigration status. In this connection, the record shows, and the judge found, that the Respondent attempted to comply with IRCA when it hired Castro, and that the Respondent did not learn until the backpay hearing that Castro used fraudulent identification in applying for employment.<sup>55</sup>

TF The Board noted in a footnote that Castro answered "yes" to the question on the application whether his immigration status prevented him from lawfully becoming employed. But the Board rejected the contention that this showed that Hoffman knew of Castro's status "because the record clearly shows that the Respondent only hired Castro after he had supplied, as the Respondent required, documents that appeared to be genuine and relate to the person presenting them." Therefore, the Board ordered that Hoffman's backpay liability terminate effective June 14, 1993, the date of the hearing at which Castro confessed to being undocumented. The Board thus determined that Castro was entitled to \$66,951 in backpay plus interest for the four and a half years from when he was fired in January 1989 until the June 1993 compliance hearing.

T There is no reason in the record why the Board took five years to rule on the case. McCortney said that some well-placed sources told him that the Board deliberately sat on the case waiting for Board member-

FNS <sup>54</sup> Id. at 416 n.44.

FNS <sup>55</sup> *Hoffman Plastic Compounds, Inc.*, 326 NLRB 1060 (1998).

CATHERINE L. FISK & MICHAEL J. WISHNIE

369

T ship to change.<sup>56</sup> Chairman Gould did not remember any such efforts, though he did recall members of the Board delaying release of the decision for some time as they disagreed about how to handle it. He remembered *Hoffman* as a somewhat controversial decision, and in fact drafted an opinion in the case (which was never issued) in which he disagreed with other members of the Board about whether Hoffman knew of Castro's immigration status.<sup>57</sup> That unpublished dispute about Hoffman's knowledge was the last time the issue was raised; for the rest of the litigation, McCortney insisted without challenge that his client did not know Castro was undocumented and would not have hired him if it had.<sup>58</sup>

T It is unclear whether political controversy was the sole or principal cause of the delay in issuing the opinion. Nor is it clear what prompted the Board to reject Chairman Gould's view that Hoffman was not an innocent employer whose backpay liability should be terminated. It is clear, however, that the years the case was pending at the Board were extremely contentious times, especially after Republicans gained the majority in the House of Representatives in 1994. Congressional subcommittees conducted unprecedented oversight hearings at which they interrogated Chairman Gould about particular Board decisions and policies with which they disagreed, and threatened to reduce the Board's appropriations.<sup>59</sup> Gould recalled that some Board members or staff feared that extending statutory rights to undocumented immigrants would be very controversial.<sup>60</sup>

T McCortney informed company owner Ron Hoffman of the costs and benefits of petitioning for review of the Board decision. Although advised that the costs would be high and the chance of winning uncertain, Hoffman wanted to fight on. When Regional Attorney Tovar insisted that if Hoffman refused to pay the award the Region would seek enforcement in the Ninth Circuit, McCortney decided to act. He knew that the law was not favorable in the Ninth Circuit and that the Act allows a "person aggrieved" by a board order to seek judicial review in

FNS <sup>56</sup> Telephone Interview with Ryan McCortney, January 16, 2004.

FNS <sup>57</sup> Telephone Interview with William B. Gould, IV, March 3, 2004.

FNS <sup>58</sup> One amicus brief to the Supreme Court opened with a reminder that "Hoffman does not contest that one of the illegally laid-off workers had indicated on his employment application that he was not authorized to work in the United States." Brief *Amici Curiae* of Employers and Employer Organizations, at 7. But the reviewing courts were necessarily bound by the factual finding that Hoffman was unaware of Castro's status.

FNS <sup>59</sup> These events are recounted in detail by Chairman Gould in his book on his tenure at the Board, William B. Gould, IV, *Labored Relations* (2000).

FNS <sup>60</sup> Telephone Interviews with William B. Gould, IV, January 21, 2004 and March 3, 2004.

370 THE STORY OF *HOFFMAN PLASTIC COMPOUNDS, INC. v. NLRB*

T the circuit court of appeals where the dispute arose or in the D.C. Circuit. He filed a petition for review in the D.C. Circuit that same day, in order to beat the NLRB to the courthouse.

T McCortney's guess that the D.C. Circuit would be a hospitable venue turned out to be wrong. The AFL-CIO filed a forceful amicus brief in support of the Board and Marsha Berzon, then one of the nation's leading labor and employment attorneys and soon to be confirmed by the Senate as a member of the U.S. Court of Appeals for the Ninth Circuit, participated in oral argument on behalf of *amici*. Berzon was a skilled and experienced appellate advocate, and as one member of the panel later recalled, she did a superb job presenting the case for enforcement.<sup>61</sup>

T The D.C. Circuit panel, in a majority opinion by Judge David Tatel, noted a number of points that had been largely overlooked by others.<sup>62</sup> The fifteen-page opinion canvassed the history and structure of IRCA and the various relevant NLRB doctrines on remedies. Judge Tatel observed that at the time Castro applied for a job, IRCA did not prohibit using another's birth certificate or documents to obtain employment. (IRCA was amended in 1990 to prohibit the use of another's documents.) Thus, in the majority's view, the issue was not a comparative judgment of Castro's misconduct in securing the job versus Hoffman's misconduct in firing him. Rather, it was whether Castro's immigration status rendered him ineligible for backpay. As to that, the majority concluded, Congress' intention was plain that there should be "expanded enforcement of existing labor standards and practices in order to deter the employment of unauthorized aliens and to remove the economic incentives for employers to exploit and use such aliens."<sup>63</sup> The majority also emphasized that IRCA "does not make it unlawful for an *alien* to work; it makes it unlawful for an *employer* to hire 'an alien knowing the alien is ... unauthorized.' Having now discovered Castro's unauthorized status, Hoffman can no longer employ him lawfully. But at the time

FNS <sup>61</sup> Telephone Interview with the Honorable David S. Tatel, June 8, 2004. Berzon's San Francisco firm, Altshuler, Berzon, Nussbaum, Berzon & Rubin, had particular expertise in these issues. Another member of the firm, Michael Rubin, had successfully litigated several of the leading post-*Sure-Tan* cases, including Patel v. Quality Inn South, 846 F.2d 700 (11th Cir. 1988) (undocumented worker is employee for purposes of Fair Labor Standards Act and may sue for unpaid wages and liquidated damages) and *Local 512, Warehouse and Office Workers' Union v. NLRB* (Felbro), 795 F.2d 705 (9th Cir. 1986) (wrongfully discharged undocumented worker who remains in country eligible for backpay). Earlier the same year Berzon argued *Hoffman*, the firm had also unsuccessfully petitioned for certiorari in *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998) (*en banc*) (per curiam) (temporarily unauthorized worker refused reinstatement after resignation cannot state claim under Title VII, implying undocumented workers not covered by Title VII).

FNS <sup>62</sup> *Hoffman Plastic Compounds, Inc. v. NLRB*, 208 F.3d 229 (D.C. Cir. 2000).

FNS <sup>63</sup> Id. at 240 (quoting Pub.L. No. 99-603 § 111(d), 100 Stat. 3359 (1986)).

CATHERINE L. FISK & MICHAEL J. WISHNIE

371

T Hoffman hired Castro, it complied with IRCA, and from that date until it learned he is unauthorized, nothing prohibited his continued employment.” The Board’s limitation of the backpay award to the period of Castro’s lawful availability for employment complied with IRCA and was consistent with both labor and immigration policy.<sup>64</sup>

T The majority opinion also dealt with the sentence in *Sure-Tan* stating that “in computing backpay, the employees must be deemed ‘unavailable’ for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States.” In the majority’s view, that sentence was *dicta*, because the *Sure-Tan* employees were not physically present in the United States at the time; the sentence was designed to respond to the Board’s lump-sum award of six months’ backpay for deported workers, which was not tailored to their actual circumstances. Judge Tatel also read the *Sure-Tan* sentence in context as indicating approval of the Seventh Circuit’s having limited its backpay award so as to avoid creating an incentive for the employees to reenter the country unlawfully to claim backpay.

T Judge David Sentelle dissented. In his view, the case was quite simple. Since Hoffman could not lawfully employ Castro, the company was immune from ordinary backpay liability for wrongful discharge. Were it not for the Supreme Court’s decision in *Sure-Tan*, which granted undocumented workers statutory rights, Judge Sentelle “would hold that by no theory of law or equity could the federal government compel an employer to employ an illegal alien to do nothing and pay him for doing nothing when it could not lawfully employ him to work and pay him for working.”<sup>65</sup> Judge Sentelle’s opinion set forth his view that the *Sure-Tan* sentence regarding employees “deemed ‘unavailable’ for work . . . during any period when they were not lawfully entitled to be present and employed in the United States” definitively foreclosed Castro’s claim.<sup>66</sup>

T McCortney and his client then had another choice to make. A petition for rehearing en banc would be a long shot—the D.C. Circuit grants rehearing en banc in only a handful of cases each year. But McCortney had heard that dissenting Judge Sentelle was a friend and hunting companion of Justice Antonin Scalia and, thus, was an influential voice within the court of appeals. So Hoffman gave the go-ahead.<sup>67</sup>

FNS <sup>64</sup> Id. at 243 (quoting 8 U.S.C. § 1324a(a)(1)(A) (1986)).

FNS <sup>65</sup> Id. at 253.

FNS <sup>66</sup> Id. at 254 (quoting *Sure-Tan*, 467 U.S. at 903).

FNS <sup>67</sup> Telephone Interview with Ryan McCortney, January 16, 2004.

372 THE STORY OF *HOFFMAN PLASTIC COMPOUNDS, INC. v. NLRB*

T The D.C. Circuit agreed to re-hear the case en banc, a strong sign that a majority of the ten active judges considered the panel decision to have been wrongly decided.<sup>68</sup> James Coppess of the AFL-CIO Office of General Counsel, an advocate widely respected by the members of the D.C. Circuit, participated in argument on behalf of the *amici*.<sup>69</sup>

T To the surprise of prognosticators, the *en banc* court denied Hoffman's petition for review and enforced the Board's award, in a 5-4 decision which saw two prominent conservative judges join three of the court's more progressive members in the majority.<sup>70</sup> The majority opinion, again written by Tatel, largely repeated the analysis of the panel opinion, and the dissents by Sentelle and Ginsburg largely repeated Sentelle's earlier argument that the *Sure-Tan* footnote controlled.

TCBI ***The Supreme Court Decision***

TCCS SUPREME COURT PROCEEDINGS

T Hoffman filed a petition for certiorari in the Supreme Court in the spring of 2001. McCortney thought it was another long shot. His brief argued that the D.C. Circuit's decision was in conflict with *Sure-Tan* and that the Supreme Court's intervention was necessary to resolve a "severe" circuit split.<sup>71</sup> In opposition, the Board argued that the D.C. Circuit opinion was fully consistent with *Sure-Tan*, that no circuit split existed since the Board's decision in *A.P.R.A. Fuel Oil Buyers Group* had addressed the divergent approaches of the Seventh and Ninth Circuits, and that in any event this case was a poor vehicle to resolve any uncertainties about the best interpretation of *Sure-Tan*. Foreshadowing a note of defensiveness that would later reappear in the government's brief on the merits, the Board repeatedly stressed that this case, in which the employer was unaware of Castro's status at the time of hire, differed from the knowing employer in *A.P.R.A.* and most other such cases, and was therefore "atypical" of the remedial settings in which the

FNS <sup>68</sup> 2000 WL 985015, 164 L.R.R.M. (BNA) 2814 (D.C.Cir.2000). Of the ten judges who voted on the petition for rehearing, only nine took part in the argument and decision. Judge Silberman assumed senior status between the time of the *en banc* argument and the date of the *en banc* decision, and accordingly participated in the decision, but Judge Merrick Garland took no part in the argument or decision. 237 F.3d 639, 640 n.\* (D.C. Cir. 2001) (*en banc*).

FNS <sup>69</sup> Telephone Interview with the Honorable David S. Tatel, June 8, 2004. Marsha Berzon had been sworn in as a member of the Ninth Circuit months before the *en banc* argument.

FNS <sup>70</sup> *Hoffman Plastic Compounds, Inc. v. NLRB*, 237 F.3d 639 (D.C. Cir. 2001).

FNS <sup>71</sup> The petition for certiorari failed to note the Fourth Circuit's decision in Egbuna but did contend a split existed between the Seventh and the D.C., Second, and Ninth Circuits. Petition for Certiorari, U.S. No. 00-1595, 2001 WL 34091948 (filed Apr. 16, 2001).

CATHERINE L. FISK & MICHAEL J. WISHNIE

373

T Board had ordered backpay to undocumented immigrants.<sup>72</sup> As in Hoff-  
man's petition, the Board's opposition contained only passing reference  
to immigration law other than IRCA.

T And then came the attacks of September 11, 2001. McCortney  
thought it made all the difference. Although a "cert memo" analyzing  
whether the Court should grant the writ of certiorari would have been  
produced over the summer by a law clerk in one of the eight chambers  
participating in the Justices' cert pool (which shared the task of analyz-  
ing all cases filed), recommending a disposition of the petition, and a  
justice would have nominated the petition for discussion well before  
September 11, the attacks and their aftermath may have influenced the  
Court's consideration in conference. McCortney recalled that the Court  
granted the cert petition two weeks to the day after September 11.

T In preparing his brief on the merits and for oral argument, McCort-  
ney thought a lot about whether and how to raise the link between lax  
immigration enforcement and terrorism. He ultimately decided he did  
not need to. One day when he had called the Court to ask a question  
about the briefing schedule, the clerk's office inexplicably did not answer  
the phone even though it was during business hours. He learned when  
the clerk returned his call the following Monday that the Court had been  
evacuated because a letter containing anthrax had been mailed to the  
Court. (No evidence was ever made public indicating that an immigrant  
was responsible for the anthrax, but the popular perception at the time  
was that there may have been a connection to foreign terrorists.) The  
clerk explained that he was working out of his van, which was parked on  
the street near the Court building. McCortney figured he did not need to  
mention the security issues posed by illegal immigration—the justices  
had had personal experience with the threat of terrorism. The most  
McCortney thought he needed to do at argument was to mention  
categories of visas that would allow people to be in the U.S. but not to  
work, and thus would render even legal visitors ineligible for backpay.  
The example he chose was student visas, because people had told him  
that they associated the reference to student visas with the men who  
flew the planes into the World Trade Center.<sup>73</sup>

T The NLRB's brief on the merits also avoided direct reference to the  
events of September 11, but it continued in some ways the cautious  
approach of the opposition to certiorari. Paul Wolfson, Assistant to the  
Solicitor General, who argued the case for the Board in the Supreme  
Court, later recalled that the INS had some discomfort with the position  
of the Board. He said, however, that the INS accepted the proposition  
that border enforcement alone could not stop undocumented immigrants

FNS <sup>72</sup> Brief for the NLRB in Opposition, 2001 WL 34090274 (June 16, 2001), at \*23.

FNS <sup>73</sup> Telephone Interview with Ryan McCortney, January 16, 2004.

374 THE STORY OF *HOFFMAN PLASTIC COMPOUNDS, INC. v. NLRB*

T from entering the country in search of work and it endorsed further efforts to reduce the employment magnet. Unlike review of other agency actions, however, where the Solicitor General’s office might sometimes facilitate internal discussions with the challenged agency that could lead to slightly different agency decisions—and a more legally defensible position—the Solicitor General’s office must defend the decisions of the Board as they are issued. The reason is that the NLRB, unlike other agencies, renders decisions in an adjudicative process that, like a judicial proceeding, is confidential until the decision is made; there is no opportunity for involvement of lawyers from the Department of Justice or the Solicitor General’s Office to craft decisions with likely Supreme Court litigation in mind. This left Wolfson unsure that *Hoffman* was winnable. He was concerned that the Court would treat the case as obviously controlled by *Sure-Tan* and dismiss the Board’s opinion as practically frivolous, resting on a factual distinction of no legal moment—the continued physical presence of the worker after discharge. In its merits brief, the Board thus spent nearly the first half of its argument presenting a detailed discussion of the *Sure-Tan* case. Only later did the Board address the remedial purposes of the NLRA, the goals of IRCA, and the ways in which the backpay award to Castro was consistent with both. Mitigation was treated in a paragraph, on the penultimate page of argument.<sup>74</sup>

T Meanwhile, soon after the Supreme Court granted certiorari, attorneys for the AFL–CIO, civil rights groups, and others began working to coordinate the preparation of *amicus* briefs. It was quickly agreed that the AFL–CIO and its outside counsel would approach the case from a labor law perspective, including a close analysis of the *Sure-Tan* case and an emphasis on the tradition of deference to the Board’s broad remedial authority. The ACLU would analyze the case from an immigration law perspective, including an exhaustive examination of the legislative origins of IRCA, to argue that Congress did not intend IRCA to alter the outcome in *Sure-Tan*, nor to limit labor law remedies. The ACLU would argue that IRCA made only more evident Congress’ intent that undocumented workers be eligible for backpay. Several civil rights advocacy organizations would organize a “Brandeis brief” collecting stories of exploitation of immigrants in the workplace. Finally, the attorneys

FNS <sup>74</sup> Brief for the NLRB, No. 00–1595; Telephone Interview with Paul R.Q. Wolfson, March 1, 2004; Telephone Interview with Bo Cooper, INS General Counsel in 2001–03, July 23, 2004. Notably, neither the Board nor Hoffman nor any of the amici engaged Board precedent addressing the appropriate remedy for wrongful discharge where there is a legal impediment to reinstatement other than immigration status, such as wrongful discharge of underage workers or unlicensed drivers, neither of whom can be re-employed lawfully. See, e.g., *NLRB v. Future Ambulette, Inc.*, 903 F.2d 140 (2d Cir. 1990) (crafting remedy of backpay and conditional reinstatement for wrongfully discharged driver with suspended license).



CATHERINE L. FISK & MICHAEL J. WISHNIE

375

T agreed that two less common briefs would be useful, one by state attorneys general emphasizing that, whatever the outcome in *Hoffman*, state labor, employment, workers' compensation, tort, contract, and insurance law must be left undisturbed. Last, if possible, would be a brief on behalf of mainstream employers frustrated by unfair competition from outlaw shops that violated labor and immigration laws. All five briefs, including the states'<sup>75</sup> and employer association briefs,<sup>76</sup> were eventually filed.

T Tellingly, the U.S. Chamber of Commerce declined to file a brief on either side, which supporters of the Board considered a victory.<sup>77</sup> If McCortney was dismayed by the fact that employer organizations either came in on the other side or stayed out of the case entirely, he did not admit it. He dismissed as "nonsense" the argument that giving backpay would give unethical employers a competitive advantage. When told that his position gained no support from employer or business organizations, Ron Hoffman just said "basically, to hell with them."<sup>78</sup> Nor, despite the

FNS <sup>75</sup> The state attorneys general *amicus* was drafted by labor attorneys in the office of Elliott Spitzer, Attorney General of New York, see 2001 WL 1636790, and other states were recruited to sign on. The New York Attorney General's Office recognized that a substantial number of their labor cases involved immigrant workers, and that an adverse Supreme Court ruling might threaten to undermine not only state labor law regimes but unemployment insurance, workers' compensation, tort, and other laws as well. The eventual signatories to the *amicus* included the Attorneys General from three of the states with the highest population of undocumented immigrants (California, New York, and Arizona). Despite last-minute efforts in the week before briefs were due, supported by attorneys working through state labor federations, bar associations, and personal contacts, failed to persuade the Attorneys General of Florida, Illinois, and Texas declined to sign on. Telephone Interview with M. Patricia Smith, Assistant Attorney General in Charge of Labor Bureau, Office of the Attorney General of the State of New York, July 21, 2004. [authority?]

FNS <sup>76</sup> While notable for their endorsement of a Board decision favoring an employee, the employer associations applied a traditional economic analysis in arguing that a rule exempting employers of undocumented immigrants from ordinary backpay liability for wrongful discharge was "bad for business" and would allow outlaw shops to compete unfairly with mainstream businesses that honored labor and immigration laws. 2001 WL 1631729. One author of this chapter, Michael Wishnie, was counsel of record for the employer association *amicus*.

FNS <sup>77</sup> Although the September 11 attacks temporarily derailed broad-ranging U.S.-Mexico talks that had been underway all that year, important employer sectors such as the hotel industry and agribusiness continued to hope for an expanded guestworker program and other legislation to increase the number of available immigrant workers. The employers, sensitive to criticism that guestworker programs had historically sanctioned widespread labor exploitation, may not have wished to be seen endorsing an employer's efforts to avoid sanction for the retaliatory discharge of an immigrant involved in a union organizing campaign.[authority?]

FNS <sup>78</sup> Telephone Interview with Ryan McCortney, January 16, 2004.

376 THE STORY OF *HOFFMAN PLASTIC COMPOUNDS, INC. v. NLRB*

T immigration law features of the case, did any representative of the  
immigration bar file briefs.

T As oral argument approached, observers considered Justice Kennedy the likely decisive vote. Chief Justice Rehnquist had dissented from the *Sure-Tan* holding that undocumented workers were even statutory “employees” under the NLRA, and together with Justices Scalia and Thomas seemed certain to reject the analysis of the Board and D.C. Circuit. Justice O’Connor, as the author of *Sure-Tan*, was assumed to be hostile to backpay for immigrants and might perceive the Board’s decision as an unprincipled effort to limit *Sure-Tan* to its facts. On the other side, Justice Stevens had dissented in *Sure-Tan*, and Justices Ginsburg, Souter, and Breyer had displayed both a willingness to defer to reasonable Board decisions and a sensitivity for immigrants and working people. That left Justice Kennedy who, while a member of the Ninth Circuit, had joined an opinion holding that the NLRA applied to undocumented immigrants, penning a short concurrence that declared, “If the NLRA were inapplicable to workers who are illegal aliens, we would leave helpless the very persons who most need protection from exploitative employer practices. . . .”<sup>79</sup> Although considered generally conservative, Kennedy had at times cast important votes in favor of civil rights and immigrant rights, and he had also supplied a fifth vote to affirm the Board in at least one case in which the Justices might have come out differently were they judging the matter in the first instance.<sup>80</sup> Labor and immigration advocates hoped Kennedy’s sympathy for the situation of exploited immigrant workers might combine with an understanding of the concerns of law-abiding small businesses about unfair competition to yield a fifth vote.

T It was Ryan McCortney’s first Supreme Court argument. He had been involved in the case since he was a junior associate, and by the time he stood before the Justices he was a partner. A more senior lawyer had argued both times in the D.C. Circuit, but Ryan had told him, at a time when it was just talk, that if the case went to the Supreme Court, he wanted to argue it. So McCortney got his chance. It was a big day in his life—he said everyone expects to be really nervous, but that the morning of the argument he woke “as calm as I’ve ever been in my life.” McCortney invited Wendy Delmendo, a former Sheppard Mullin associate who, while a stay-at-home mother, had drafted the briefs for McCort-

FNS <sup>79</sup> *NLRB v. Apollo Tire Co.*, 604 F.2d 1180, 1184 (9th Cir. 1979) (Kennedy, J., concurring).

FNS <sup>80</sup> See Romer v. Evans, 517 U.S. 620 (1996) (invalidating anti-gay state initiative); INS v. St. Cyr, 533 U.S. 289 (2001) (interpreting immigration statutes as preserving judicial review of certain removal decisions and not applying retroactively); *Holly Farms Corp. v. NLRB*, 517 U.S. 392 (1996) (upholding as reasonable Board determination that chicken catchers are NLRA “employees,” not exempt agricultural workers).

CATHERINE L. FISK & MICHAEL J. WISHNIE

377

T ney, to come to the argument. Going into the argument, McCortney  
T believed the key votes were those of Justices O'Connor and Kennedy.

As counsel for petitioner, McCortney spoke first. When, at the beginning of the argument, Kennedy asked him a friendly question—“And is it correct that when *Sure-Tan* was argued, IRCA . . . was being considered by Congress and the Government in its argument told us that if IRCA had been passed, back pay would not be available?”—McCortney figured he had Kennedy and needed only O'Connor's vote to win.<sup>81</sup> McCortney's theory was that he had to distinguish his client—who did not know he had hired an undocumented worker—from employers who did know. He had decided to label his client as the “innocent employer” to distinguish him from “the unscrupulous employer.” The problem was that the NLRB's rule, which terminated backpay liability on the date the employer learned the employee was undocumented, might actually treat the employer who knew it hired undocumented workers more favorably than one who did not. As one justice remarked, “It seems to me that's absolutely upside down.” McCortney was forced to admit, “that's the problem with the rule, is that it in some ways rewards the unscrupulous employer in *Sure-Tan* and penalizes the innocent employer, as in *Hoffman*.” He continued, “If the unscrupulous employer knowingly hires an illegal alien, then whenever some kind of union organizing drive comes along and say gee, we can get rid of them, and we know they're illegal, and we're going to terminate them, then they can report them to the INS right from the outset . . . get him deported, and cut off back pay.” That prompted the following interchange:

T11 JUSTICE BREYER: Take an employer who, you know, all he does,  
he says, I've checked their cards, I've checked their cards, the cards  
say they're here legally, and he runs some God-awful sweat shop.  
Now, your theory, there is no remedy under any law against that  
employer but for a prospective remedy, and so everyone gets one bite  
at that apple.

T11 JUSTICE SCALIA: Well, he has to pay for the sweat, though,  
doesn't he?

T11 MR. McCORTNEY: Absolutely.

T11 JUSTICE BREYER: And it's pretty low cost, because he's violating  
every labor law under the sun.

T Wolfson approached the oral argument with different concerns. A skillful and experienced Supreme Court advocate, Wolfson had clerked for Justice Byron White in 1989–90 and spent nearly the entire Clinton Administration in the Solicitor General's Office, handling a number of ERISA, labor, and employment law matters. But Wolfson was apprehen-

FNS <sup>81</sup> The transcript of oral argument is available at 2002 WL 77224.

378 THE STORY OF *HOFFMAN PLASTIC COMPOUNDS, INC. v. NLRB*

T sive that the Court would “tear my head off in this case,” because the justices might conclude that the Board had impermissibly ignored *Sure-Tan*. The key vote of Justice Kennedy seemed to Wolfson “almost impossible” to secure. Wolfson also recognized that a hostile opinion reversing the D.C. Circuit could sweep more broadly than necessary, endangering cases involving knowing employers, state law regimes, and perhaps the Board’s remedial authority generally. Wolfson also knew that when his colleague Edwin Kneedler had argued *Sure-Tan* before the Supreme Court, Kneedler had seemed to concede that, were Congress to prohibit the employment of undocumented workers, those workers would become ineligible for backpay (Wolfson later did not recall any discussion in the Solicitor General’s Office of the possibility that Kneedler, who had argued many recent immigration cases before the Court, would take on *Hoffman*).<sup>82</sup>

T Despite these concerns, there were some signs during McCortney’s argument that not all was lost for Castro and the Board. Justices Scalia and Kennedy had both commented that the Court’s *Sure-Tan* opinion did not decide the issues in *Hoffman*— remarks that signaled a majority of the Court might agree with the D.C. Circuit and Board on this crucial threshold point. Yet Wolfson was challenged the moment he rose to speak, unable even to complete the traditional opening, “May it please the Court,” before Justice Scalia interrupted. “What was the position of the Immigration and Naturalization Service— . . . in this matter when it was told that it—that you’re going to argue that courts should pay illegal aliens money that it was unlawful for them to earn? What did the INS say to that?” Wolfson replied, “The INS has agreed with it and accepts it . . .” Scalia retorted, “well, I have no—it explains why we have a massive problem of illegal immigration, if that’s how the INS feels about this.”<sup>83</sup> Scalia then pushed Wolfson on whether undocumented immigrants should ever be eligible for backpay because they are unable lawfully to mitigate: “If he’s smart he’d say, how can I mitigate, it’s unlawful for me to get another job . . . I can just sit home and eat chocolates and get my back pay.”

FNS <sup>82</sup> *Sure-Tan, Inc. v. NLRB*, Transcript of Oral Argument, 1983 Trans Lexis 5 at 47–48 (government statement that if Congress barred employment of undocumented immigrants, the “employment relationship would then become illegal, and for the Board to order the reinstatement of the employee to an illegal relationship and to pay him inconsistent with such a statute would clearly be improper”); Telephone Interview with Paul R.Q. Wolfson, March 1, 2004.

FNS <sup>83</sup> Wolfson recalled that Solicitor General Theodore Olson was upset by Scalia’s question, because the Solicitor’s office represents both the INS and the NLRB. Wolfson himself thought the inquiry an improper intrusion into the internal deliberations of the Executive Branch. Telephone Interview with Paul R.Q. Wolfson, March 1, 2004.

CATHERINE L. FISK & MICHAEL J. WISHNIE

379

T More devastating than Scalia's barbs, however, was the moment mid-way through Wolfson's argument when Justice Kennedy leaned forward to ask if it would be lawful if a union "knowingly uses an alien for organizing activity." Wolfson answered that under *Sure-Tan* and Board precedent, undocumented immigrants are included in a bargaining unit, but Kennedy pressed the unexpected, and unmistakably hostile, point. "And that doesn't induce illegal immigration? . . . Here what you're saying is that a union can, I suppose even knowingly, use illegal aliens on the workforce to organize the employer . . . That seems to me completely missing from . . . any equitable calculus in your brief. I'm quite puzzled by it." Kennedy's aversion to the very idea of undocumented immigrants participating in a union was an ominous portent and strongly suggested that the Board would lose.

T McCortney had expected his "innocent employer" strategy to be successful, but only in the middle of the government's presentation, during Justice Kennedy's and then Justice O'Connor's questioning of Wolfson, did he feel it had truly delivered the case. Justice O'Connor asked Wolfson, "What [the Board's rule is] doing, though, really is kind of odd, because the result is that back pay awards to illegal workers are likely to be greater than to legal ones under this Board's policy, and that's so odd, and it gives the illegal alien an incentive to try to phony up more documents and to extend for the longest possible time the charade that the worker is here lawfully, and that's surely strongly against the policies of the immigration act at the very least." At this question, McCortney suspected he had the fifth vote he needed.

T Overall, Wolfson had wanted to present the case as a *labor* case in which deference to the Board was appropriate, but much of the argument treated it as an *immigration* case arising under IRCA. "I could hear the INS attorneys shifting nervously behind me," Wolfson remembers, during questioning about the Board's authority and expertise in considering IRCA when fashioning a remedial order. The justices' focus on IRCA also served to highlight Castro's wrongdoing in tendering false documents; had the argument centered more on the NLRA, Wolfson would have had more opportunities to discuss Hoffman's own misconduct in discharging Castro for his union activities. In a final reminder that behind the Court's theoretical discussion of national immigration and labor policies exist the lives and experiences of real people, the day after argument Wolfson received a call from the Office of the President of Mexico, offering to assist in locating the man still referred to as Jose Castro.

T Many observers of the litigation had predicted before argument that Hoffman would prevail, and the oral presentations seemed to confirm their prescience. Accordingly, the very afternoon of the argument, a small group of labor and immigration advocates met with staff to the

380 THE STORY OF *HOFFMAN PLASTIC COMPOUNDS, INC. v. NLRB*

T Senate Labor Committee and Senate Immigration Subcommittee to begin developing a legislative strategy in the event the Court overturned the Board’s order.

TCCS THE SUPREME COURT DECISION

T The Supreme Court reversed the D.C. Circuit, 5–4. Chief Justice Rehnquist wrote the majority opinion, which was joined by Justices Scalia, Thomas, O’Connor, and Kennedy. Justice Breyer dissented, joined by Justices Stevens, Souter, and Ginsburg.<sup>84</sup> This was the same line-up that had decided many other politically controversial decisions of the Rehnquist Court, including civil rights, voting rights, and federalism issues and the election-determining *Bush v. Gore*.<sup>85</sup>

T Chief Justice Rehnquist’s opinion began by analogizing employees who worked without immigration authorization to employees who are ineligible for reinstatement or backpay because they have “committed serious criminal acts”such as trespass or violence against the employer’s property. The Court then noted that in *Sure-Tan* it had held that the Board lacked authority to order reinstatement to employees who had departed to Mexico, even though the employer had violated §§ 8(a)(1) and 8(a)(3) by reporting the employees to the INS in retaliation for union activity. Next, the Court distinguished its prior decision in *ABF Freight System, Inc. v. NLRB*, which had held that the Board was not obligated to deny backpay to an employee who gave false testimony in a compliance proceeding.<sup>86</sup> The Court said that perjury, “though serious, was not at all analogous to misconduct that renders an underlying employment relationship illegal.”

T Then the Court came to the heart of its reasoning—whether a backpay award would undermine “a federal statute or policy outside the Board’s competence to administer,” namely, the immigration laws. The Court explained that IRCA prohibits employers from hiring undocumented workers, and obligates employers to discharge them upon discovery of the undocumented status. The Court also noted that the Immigration and Nationality Act prohibits non-citizens from using false documents. Repeatedly characterizing Castro’s behavior as “criminal”—despite Castro’s acknowledgment on his initial employment application that he was unauthorized to work in the United States and the absence of any criminal charge or conviction—the Court went on to explain that awarding backpay “condones and encourages future violations” of immigration law because the eligibility for backpay turns both on remaining

FNS <sup>84</sup> *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

FNS <sup>85</sup> 531 U.S. 98 (2000).

FNS <sup>86</sup> 510 U.S. 317 (1994).

CATHERINE L. FISK & MICHAEL J. WISHNIE

381

T (presumably illegally) in the United States and mitigating damages by finding other work (also presumably illegally). Hoffman’s own illegal conduct in firing Castro for his union activities was almost absent from the majority opinion. To the question whether denial of backpay would encourage or reward employers who hire unauthorized workers by allowing them to violate labor law with impunity, Rehnquist responded curtly that the cease and desist order and notice posting requirement are “sufficient to effectuate national labor policy.” The majority expressly declined to decide whether awarding backpay to Castro would be impermissibly punitive, inasmuch as undocumented workers “have no entitlement to work in the United States at all,” and, therefore, arguably might not be entitled to be paid anything. Notably, Chief Justice Rehnquist’s opinion did not attempt to reargue that undocumented workers are not statutory “employees” under the NLRA, the point on which he and Justice Powell had dissented in *Sure-Tan*.

T In dissent, Justice Breyer began by noting that all agencies of the United States responsible for enforcing immigration and labor policy had concluded that backpay was consistent with immigration policy and, indeed, “helps to deter unlawful activity that *both* labor laws *and* immigration laws seek to prevent.” Justice Breyer continued: “Without the possibility of the deterrence that backpay provides,” employers might conclude that they could violate the labor laws with impunity. Next, examining the text and history of the INA, Breyer noted that IRCA does not state how violation of its provisions should affect enforcement of other laws, but that the policy underlying IRCA—“to diminish the attractive force of employment, which like a ‘magnet’ pulls illegal immigrants toward the United States”—is undermined by denial of backpay, which reduces the cost of labor law violations for employers and thus “increases the employer’s incentive to find and to hire illegal-alien employees.”

T Justice Breyer also challenged the majority’s analogy to cases in which backpay was denied because of an employee’s serious criminal acts. In those cases, Breyer observed, reinstatement and backpay were denied because the employee *responded* to the employer’s anti-union conduct with illegal conduct, and it was the employee’s illegal conduct that both prompted and justified the employer in firing the employee. Here, in contrast, the employer’s anti-union conduct was the firing, and it was neither motivated by nor justified by the employee’s own conduct. After all, according to the uncontested factual finding, Hoffman had no idea that Castro was undocumented. Finally, Justice Breyer dismissed the majority’s objection that a backpay award would represent “unlawfully earned wages” that could be obtained only through “criminal fraud.” The same award “requires an employer who has violated the labor laws to make a meaningful monetary payment” for work that the

382 THE STORY OF *HOFFMAN PLASTIC COMPOUNDS, INC. v. NLRB*

T employer believed the employee could lawfully have earned for work that he would have performed absent the employer's illegal conduct.

T Ultimately, the Court confronted a choice. It could wholly exempt a law-breaking employer from all monetary sanction, as Hoffman urged, because the illegally discharged employee happened also to be an unauthorized immigrant. Or the Court could defer to the Board's conclusion and enforce a compromise remedy that awarded Castro less than the traditional make-whole relief of full backpay *and* reinstatement, but more than nothing. At a broader level, the Court faced a choice between reading the labor and immigration laws as contradictory or, as the legislative history of IRCA seemed to indicate, as part of a comprehensive congressional scheme to protect wage levels in the U.S. while diminishing the incentive for outlaw employers to prefer unauthorized immigrants to legal workers. In the majority opinion's only reference to the legislative history of IRCA, a footnote, the opinion dismissed the legislative history as "a single Committee Report from one House of a politically divided Congress, which is a rather slender reed" on which to rely. The majority went on to assert that the legislative history showed only that Congress endorsed the *Sure-Tan* holding that undocumented aliens are employees, and said nothing about the Board's authority to award backpay. The majority rejected the possibility that, because Castro had in fact sought and obtained work after Hoffman illegally fired him, the precise operation of the duty to mitigate could be postponed to a future case. Instead, the majority chose a different path, convinced that the NLRA's compensatory and deterrence goals were either fully accomplished through a cease-and-desist order, or could not be reconciled with IRCA, or, more likely, that the NLRA's purposes were simply less important than those of the immigration law's document fraud provisions.

T The Supreme Court handed down its opinion in *Hoffman* in March 2002, only two months after the argument. The rapid ruling caught advocates for both sides by surprise. McCortney and his client were delighted; labor and immigrant defense advocates were quick to condemn the decision and vowed to seek a legislative fix. McCortney heard about it on the radio on his way into work and by the time he spoke to his client, Ron Hoffman said: "There are five TV camera trucks in my parking lot. What should I do?" Hoffman insisted the case was less a matter of principle than of money. Indeed, he ultimately paid as much in legal fees (\$45,000) as he would have paid in back wages had he simply followed the Board's initial order to offer reinstatement to Jose Castro.<sup>87</sup> By March 2002, if the backpay award going back to 1989 were upheld, the accumulated pay plus interest would have been a considerable sum.

FNS <sup>87</sup> Steve Toloken, *Supreme Court Hears Hoffman*, *Plastics News* 3 (Jan. 21, 2002)



CATHERINE L. FISK & MICHAEL J. WISHNIE

383

T Hoffman had told the press after the case was argued that it was unfair that he should be forced to pay backpay to *any* worker whom he fired, regardless of immigration status. “I don’t think it’s right to pay backpay for anyone who doesn’t earn it—whether they are here legally or illegally.”<sup>88</sup> Both he and McCortney were upset that the long delays in the appellate process (the Supreme Court decided the case thirteen years after Castro had been fired) meant that the accumulated interest on the backpay award was substantial, and that the number of years for which Castro might have been eligible for backpay vastly exceeded the number of months that Castro had worked for Hoffman.

T To organizers and workers watching the case, the thirteen-year delay sent an equally troubling message. A wait of more than a decade from termination to final adjudication, even if backpay relief were available, is enough to dissuade many workers from bothering to pursue relief from the Board. Union organizers working in Los Angeles today agree. Lawyers organizing the predominantly Latino, and heavily undocumented, low-wage workforce in Southern California believe that the NLRB will do nothing to help protect workers who seek to join unions. They long ago concluded that the Board’s processes are worse than useless for winning representation, and recognize that organizing campaigns are won based solely on the union’s support among workers and the community, not based on legal protections for union elections. They regard *Hoffman Plastic* as just another nail in the coffin of labor law. As one SEIU organizer said, “the law was bad before, but it’s ridiculous now. But the strength of the union doesn’t come from the law. . . . It comes from the power of the members.”<sup>89</sup> An SEIU lawyer did not think that undocumented workers were deterred from joining a union by weak NLRA protections.<sup>90</sup>

T Wolfson was naturally disappointed by the result but also relieved that the Court had found the case relatively difficult and had split 5–4. He was also consoled that Chief Justice Rehnquist’s opinion had not been disdainful of the Board. From the perspective of the Solicitor General’s Office, which represents the Board before the Court every Term, preserving the justices’ respect for the NLRB is an important goal. *Hoffman Plastic* was an important case, but it was only one of many the Board must defend before the Court. Wolfson felt he had

FNS <sup>88</sup> Thomas Maier, *Pitting Labor Against INS Laws*, Newsday (Feb. 19, 2002).

FNS <sup>89</sup> Interview with SEIU organizer Leticia Salcedo, September 24, 2003. On the attitudes of Los Angeles union organizers toward the challenges of organizing immigrant workers, see Ruth Milkman, ed., *Organizing Immigrants: The Challenge for Unions in Contemporary California* (2000).

FNS <sup>90</sup> Interview with Monica Guizar, lawyer representing SEIU Local 1877 in Los Angeles, September 26, 2003.

384 THE STORY OF *HOFFMAN PLASTIC COMPOUNDS, INC. v. NLRB*

T protected the Board's institutional reputation and its claim to deference in future cases.

T Whatever the case meant to others, it seemed to have done little for Jose Castro. At the time of the compliance hearing in June 1993, Castro was living and working in Texas. By the time of the Supreme Court argument, according to an NLRB spokesperson, he was living in Mexico.<sup>91</sup> The case did trouble Dionisio Gonzalez, the organizer who first tried to help the Hoffman employees. When interviewed about the decision in April 2002, he was working as an organizer for the United Steelworkers. He said: "It makes it real difficult to convince someone to sign a union card. . . . At Hoffman I told them they were protected under the law. I guess I was wrong."<sup>92</sup>

TCBI  
*The Immediate Impact and Continuing  
Importance of Hoffman Plastic*

T Not surprisingly, the initial reaction to the decision by labor and immigrant rights advocates was extremely critical. Reflecting the lack of a uniform employer view on the case while it was being litigated, employer responses to the decision were mixed.<sup>93</sup> One scholar labeled *Hoffman* as a revival of the infamous Bracero Program, a discredited form of guestworker program that brought 4.6 million Mexicans to the United States for agricultural work between 1946 and 1962 but did so under circumstances that ensured they worked for low wages in poor conditions.<sup>94</sup> Others expressed dismay that the decision had encouraged employers to violate labor laws with impunity.<sup>95</sup> While some of these concerns may be overstated, some employers did seek to take immediate advantage. In New York, a lawyer for an employer who had violated minimum wage laws threatened a group of protesters outside his client's store, citing *Hoffman* and claiming the Supreme Court had ruled "illegal

FNS <sup>91</sup> Steve Toloken, *Supreme Court Hears Hoffman*, *Plastics News* 3 (Jan. 21, 2002).

FNS <sup>92</sup> Nancy Cleeland, *Employers Test Ruling on Immigrants Labor; Some Firms are Trying to Use Supreme Court Decision as Basis for Avoiding Claims Over Workplace Violations*, *L.A. Times* (Apr. 22, 2002) at C1.

FNS <sup>93</sup> See, e.g., Scott Hauge, *Letter, Court hurts those who play by rules*, *S.F. Chronicle* (Apr. 4, 2002) ("small business community is outraged" by Hoffman decision, which is "slap in the face to employers that play by the rules" and unfair "to the employer who is trying to play it straight").

FNS <sup>94</sup> Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, the New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA *L. Rev.* 1, 2-4 (2003).

FNS <sup>95</sup> Rebecca Smith & Maria Blanco, *Used and Abused: The Treatment of Undocumented Victims of Labor Law Violations Since Hoffman Plastic Compounds v. NLRB*, 8 *Bender's Immigration Bulletin* 890 (May 15, 2003).

T immigrants do not have the same rights as U.S. citizens.”<sup>96</sup> Immigrants, perhaps cowed by the reduced protection against retaliation, reported fewer labor violations to the New York Attorney General’s Office after the Court’s decision.<sup>97</sup>

T The *Hoffman* decision had a number of immediate legal effects. At the Supreme Court, the lawyers and the justices seemed concerned about the implications of the ruling for remedies under labor and employment laws other than the NLRA. McCortney had argued that a ruling for Hoffman would affect only backpay for work not performed. Thus, he attempted to draw a line between laws like the Fair Labor Standards Act that require payment of wages for work performed—to which undocumented immigrants would be entitled—and laws like the NLRA and Title VII that provide prospective remedies, such as backpay, for work not performed. Wolfson pointed out in his argument that most states have held that undocumented workers are entitled to workers’ compensation benefits even though the benefits compensate in part for wages that were not earned.

T The first wave of legal developments after *Hoffman* occurred in executive branch agencies and concerned just this question of remedies. Within months, federal and state agencies began to rescind old regulatory materials and issue new guidance. In general, federal agencies assumed *Hoffman* barred backpay and reinstatement under other federal laws, but did not preclude other statutory remedies. The EEOC promptly rescinded its prior directive that undocumented workers are eligible for backpay under Title VII and other federal anti-discrimination statutes, but reaffirmed that undocumented immigrants are statutory “employees” and remain eligible for compensatory and punitive damages.<sup>98</sup> The U.S. Department of Labor acted similarly, declaring that undocumented workers were still covered “employees” under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act, and that such workers remained eligible for minimum wage or overtime compensation for work already performed.<sup>99</sup> And the Board itself, in its first post-*Hoffman* decision to touch on these issues, agreed that undocumented workers were eligible for damages for work already performed,

FNS <sup>96</sup> Ironically, the attorney for the workers, Ben Sachs, had been the principal author of the ACLU’s *amicus* brief in *Hoffman Plastic*, and he was well-positioned to advise his clients on the actual holding of the case.

FNS <sup>97</sup> Telephone interview with M. Patricia Smith, July 21, 2004.

FNS <sup>98</sup> Nancy Montwieler, *EEOC: EEOC Limits Undocumented Workers’ Relief Based on Recent Supreme Court Decision*, 126 Daily Lab. Rep. (BNA) at A-2 (July 1, 2002).

FNS <sup>99</sup> U.S. Dep’t of Labor, *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* (Aug. 19, 2002).

386 THE STORY OF *HOFFMAN PLASTIC COMPOUNDS, INC. v. NLRB*

T where the employer unlawfully reduced employee wages in retaliation for protected activity.<sup>100</sup>

T Only one agency explicitly grappled with the case of the “knowing” employer, a distinction that had been crucial to McCortney in crafting his arguments and a case that Justice Breyer in dissent had maintained was not before the Court. Unfortunately for workers, in July 2002 the NLRB General Counsel rejected the arguments of the AFL–CIO and others and concluded that all employers, innocent or knowing, were exempt from backpay liability for the wrongful discharge of undocumented workers.<sup>101</sup> The General Counsel sets enforcement policy for the NLRB, and thus his determination that employers who deliberately hire undocumented workers are exempt from backpay liability was a blow for those in the NLRB’s regional offices and in the labor movement who had hoped that the NLRB would take a more limited view of *Hoffman*.

T Some state agencies, including in California and Washington, took a different view, however, concluding that nothing in *Hoffman* preempted state laws allowing even backpay, the very remedy at issue in *Hoffman*, to undocumented workers. The Attorney General of New York went no further than the U.S. Department of Labor, agreeing that undocumented workers remained eligible for minimum wage and overtime damages for work already performed, but declining to express a view on backpay, punitive damages, or other state law remedies.<sup>102</sup>

T The implications of *Hoffman* have only just begun to be tested in litigation. To date, every federal court to consider the issue has endorsed the view, shared by all agencies, that immigration status is no bar to recovery of damages for work already performed.<sup>103</sup> As to other remedies, workers have succeeded in the earliest cases in pressing points rejected

FNS <sup>100</sup> Tuv Taam Corp., 340 NLRB No. 86, at 4 & n. 4, 2003 WL 22295361 (2003).

FNS <sup>101</sup> Memorandum GC 02–06, Procedures and Remedies for Discriminatees Who May be Undocumented Aliens after *Hoffman Plastic Compounds, Inc.* (July 19, 2002), available at <[www.nlr.gov/gcmemo/gc02-06.html](http://www.nlr.gov/gcmemo/gc02-06.html)>.

FNS <sup>102</sup> See Cal. Dep’t of Indus. Relations, *All California Workers Are Entitled to Workplace Protection* (after *Hoffman* decision, announcing labor agency will seek backpay “without regard to the worker’s immigration status”); *Statement of Gary Moore, Wash. State Dep’t of Labor and Indus.* (May 21, 2002) (stating that *Hoffman* will not affect availability of remedies under Washington state labor laws); 2003 N.Y. Op. Atty. Gen. No. F3 (*Hoffman* does not bar undocumented worker recovery under state wage and hour law for work already performed).

FNS <sup>103</sup> See, e.g., Liū v. Donna Karan Int’l, Inc., 207 F.Supp.2d 191, 192 (S.D.N.Y. 2002) (immigration status irrelevant to FLSA claims for time actually worked); Topo v. Dhir, 210 F.R.D. 76, 78 (S.D.N.Y. 2002) (same); Flores v. Amigon, 233 F.Supp.2d 462, 463–65 (E.D.N.Y. 2002) (same); Flores v. Albertsons, Inc., No. CV0100515AHM(SHX), 2002 WL 1163623, at \*5 (C.D. Cal.2002) (same); Cortez v. Medina’s Landscaping, Inc., No. 00 C 6320, 2002 WL 31175471 (N.D. Ill. Sept. 30, 2002) (same); see also Martinez v. Mecca Farms, Inc., 213 F.R.D. 601, 604–05 (S.D. Fla. 2002) (explaining that, under AWPA, farm

CATHERINE L. FISK & MICHAEL J. WISHNIE

387

T by the federal agencies. For instance, the only court since *Hoffman* to publish an opinion in a case involving a “knowing” employer determined that a “knowing” employer was not immune from post-discharge liability.<sup>104</sup> And the first federal court of appeals to examine a post-*Hoffman* question rejected the EEOC’s assumption that *Hoffman* even applies in Title VII actions. It said: “the overriding national policy against discrimination would seem likely to outweigh any bar against the payment of back wages to unlawful immigrants in Title VII cases. Thus, we seriously doubt that *Hoffman* applies in such actions.”<sup>105</sup> State courts have also generally held since *Hoffman* that the decision does not preclude undocumented immigrants from recovering for lost wages under tort law<sup>106</sup> or in workers’ compensation cases.<sup>107</sup>

T Courts have also generally barred discovery of immigration status in labor and employment litigation, concluding that compelled disclosure of a worker’s status is irrelevant where remedies are available regardless of status and would have an obvious *in terrorem* effect on the willingness of immigrant workers to vindicate labor rights.<sup>108</sup> The NLRB too has

FNS workers eligible for compensation for work already performed, regardless of immigration status, even after *Hoffman*).

FNS <sup>104</sup> Singh v. Jutla, 214 F.Supp.2d 1056, 1061 (N.D. Cal. 2002). The Singh opinion was authored by Judge Charles Breyer, brother of Justice Stephen Breyer.

FNS <sup>105</sup> Rivera v. Nibco, 364 F.3d 1057, 1069 (9th Cir. 2004).

FNS <sup>106</sup> *See, e.g.*, Tyson Foods, Inc. v. Guzman, 116 S.W.3d 233, 242–44 (Tex. App. 2003) (undocumented worker may seek damages for lost wages in negligence action for injuries suffered in forklift collision); Cano v. Mallory Mgmt., 760 N.Y.S.2d 816 (Sup. Ct. Richmond Co. 2003) (same, for injuries caused by electric meter explosion during course of employment); *see also* Madeira v. Affordable Housing Foundation, Inc., 315 F.Supp.2d 504, 506–07 (S.D.N.Y. 2004) (same, for injured construction worker seeking damages under state law).

FNS <sup>107</sup> Rajeh v. Steel City Corp., 2004 Ohio 3211, 2004 WL 1379829 (Ohio App. 7 Dist. June 15, 2004) (undocumented immigrant under order of deportation eligible for Ohio workers’ compensation benefits); Correa v. Waymouth Farms, Inc., 664 N.W.2d 324 (Minn. 2003) (undocumented worker eligible for benefits under Minnesota workers’ compensation law); Safeharbor Employer Services I, Inc. v. Velazquez, 860 So.2d 984 (Fla. Ct. App. 2003) (same); Cherokee Industries, Inc. v. Alvarez, 84 P.3d 798, 801 (Ok. Civ. App. 2003) (same); Wet Walls, Inc. v. Ledezma, 598 S.E.2d 60 (Ga. App. 2004) (same); *see also* Medellin v. Cashman, 2003 WL 231001186 (Mass. Dept. Ind. Acc. Dec. 23, 2003) (same). *But see* Reinforced Earth Co. v. Workers’ Comp. Appeal Bd. (Astudillo), 810 A.2d 99, 108–09 & n.12 (Pa. 2002) (undocumented worker is statutory employee and eligible for medical compensation, but wage-loss benefits may be suspended due to immigration status); Sanchez v. Eagle Alloy Inc., 658 N.W.2d 510, 514–16 (Mich. Ct. App. 2003) (undocumented worker who tenders false documents ineligible for workers’ compensation pursuant to state law “commission of crime” exception to coverage).

FNS <sup>108</sup> Liu v. Donna Karan Int’l Inc., 207 F.Supp.2d 191, 192 (S.D.N.Y. 2002) (barring discovery of immigration status in FLSA litigation); Topo v. Dhir, 210 F.R.D. 76, 78 (S.D.N.Y. 2002) (same, in litigation of FLSA and Alien Tort Claims Act cases).

388 THE STORY OF *HOFFMAN PLASTIC COMPOUNDS, INC. v. NLRB*

T concluded that discovery of immigration status is not relevant at the merits stage of an unfair labor practice proceeding, and further, that at the compliance (remedy) proceeding, it is the employer's burden to establish an employee's lack of work authorization to toll the backpay period.<sup>109</sup> Importantly, the Board has already rejected an employer's tender of a Social Security Administration "no-match" letter as sufficient to carry this burden.<sup>110</sup>

T Labor and immigration advocates have pursued legislation to address the consequences of *Hoffman*. California enacted a law directing that state labor and civil rights remedies, "except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status."<sup>111</sup> In 2004, Sen. Ted Kennedy and others introduced major immigration reform legislation that included a "*Hoffman* fix."<sup>112</sup> It is notable, however, that the *Hoffman* fix was incorporated in a lengthy immigration bill providing for an expanded guestworker program and earned legalization—that is, a bill unlikely to be acted on for several years, as wider debates about comprehensive immigration reform unfold. The *Hoffman* fix provision was not, for instance, attached to a "must-pass" bill essential to the AFL–CIO's legislative agenda, suggesting that while the measure has the support of the labor movement, it is not today among its highest priorities.

T Finally, labor advocates have sought to attack *Hoffman* in international settings. In October 2002, the AFL–CIO and Confederation of Mexican Workers filed a complaint with the International Labor Organization, alleging that the decision impermissibly infringed on workers' rights to organize, to bargain collectively, and to freedom of association. After reviewing the U.S. government's response, the ILO concluded that "the remedial measures left to the NLRB in cases of illegal dismissals of undocumented workers are inadequate to ensure effective protection against acts of anti-union discrimination" under international law.<sup>113</sup>

FNS <sup>109</sup> Tuv Taam Corp., 340 NLRB No. 86, 2003 WL 22295361 (2003).

FNS <sup>110</sup> "No-match" letters are correspondence from the Social Security Administration to employers "identifying discrepancies between SSA records" and employer payroll tax filings, which are frequently used by employers as grounds to conclude particular employees are undocumented. The NLRB rejected an SSA no-match letter as not being "legally cognizable evidence regarding the immigration status" of listed employees. Id. at 5 & n. 7.

FNS <sup>111</sup> Cal. Lab. Code § 1171.5(a) (West 2003); Cal. Civ. Code § 3339(a) (West 2004); Cal. Govt. Code § 7285(a) (West 2004). All three provisions were amended by enactment of Cal. Senate Bill 1818, c. 1071.

FNS <sup>112</sup> Safe, Orderly, Legal Visas and Enforcement (SOLVE) Act of 2004, S. 2381 (introduced May 2004), H.R. 4262 (introduced May 2004), § 321 (backpay or other monetary relief for labor or employment violation not to be denied because of employer or employee INA violation).

FNS <sup>113</sup> See Complaints Against the United States by AFL–CIO and Confederation of Mexican Workers, Case No. 2227, ¶ 610 (2003).

CATHERINE L. FISK & MICHAEL J. WISHNIE

389

T Advocates also raised objections to the *Hoffman* opinion at the Inter-American Court of Human Rights, where in May 2002 the Government of Mexico had requested an Advisory Opinion whether the *Hoffman* decision was consistent with international human rights law. In 2003, the Inter-American Court advised that under international law, immigrant workers, regardless of their status, were entitled to the same basic labor protections as citizens—including backpay.<sup>114</sup> To date, however, condemnations of U.S. labor policy in international tribunals have produced little change in the U.S.

T It is perhaps hardest to measure the impact of *Hoffman* on actual labor organizing campaigns. Pragmatic labor organizers and employers know that even for citizen workers, the Board can rarely provide prompt or meaningful redress in the event of a legal violation. The loss of eligibility for backpay, a partial and delayed remedy at best, may not affect the decision of many undocumented workers whether to participate in a union campaign. The *Hoffman* decision “hinders workers from coming forward, but the real problem is employer sanctions” and the inability to secure reinstatement, observed one long-time labor organizer who, as an undocumented restaurant worker himself, once received an NLRB backpay award in the pre-IRCA era.<sup>115</sup> Even before *Hoffman*, unauthorized workers faced the risk of job loss and deportation, without possibility of reinstatement.<sup>116</sup> Yet, although undocumented workers were entitled to full NLRA remedies in the mid-1980’s, the situation of immigrant workers was not a priority for the mainstream labor movement. Following *Hoffman*, however, the leadership of organized labor, especially those have embraced the cause of undocumented workers, have no choice but to address the reality of non-citizens in the workplace. Labor now must confront the fact that there are now two sets of rules for workers, one that provides full remedies and full deterrence to protect citizens and legal immigrants, and one that provides few remedies and no meaningful protection for undocumented, low-wage workers.

TCBI  
T ***Conclusion***

*Hoffman* did not break new doctrinal or theoretical ground. Nor is it likely significantly to affect labor or immigration jurisprudence generally. Rather than harmonizing the two statutory regimes, the majority concluded that immigration policies, as divined by five justices, trump labor policies. In many ways the opinion appears anachronistic, out of step with a trend toward deeper integration of regional, if not global,

FNS <sup>114</sup> Advisory Opinion No. 18, Inter-American Court of Human Rights (Sept. 2003).

FNS <sup>115</sup> Telephone Interview with Wing Lam, Executive Director, Chinese Staff & Workers Association, July 22, 2004.

FNS <sup>116</sup> Telephone Interview with Muzaffar Chishti, June 3, 2004.

390 THE STORY OF *HOFFMAN PLASTIC COMPOUNDS, INC. v. NLRB*

T labor markets. It is also out of step with emerging norms of international labor law and human rights, as reflected in the critical appraisals issued by the ILO and Inter-American Court.

T Nor is the opinion certain to endure. With the U.S. Chamber of Commerce and the AFL-CIO now united in opposition to IRCA's employer sanctions provisions, there is a real prospect that the prohibition on employment of unauthorized immigrants may be lifted before long, perhaps as part of another grand bargain on comprehensive immigration reform. Beyond repeal of employer sanctions, the interest of the business community in expanding guestworker programs, and its growing recognition of the inefficiencies of maintaining a vast transnational underground economy, together with the AFL-CIO's commitment to the cause of undocumented workers, have increased the prospects for broader reforms affecting immigrant workers. Behind the current policy discussions, too, looms the interest of both political parties in cultivating support among Latino voters. And there are national security considerations now as well, which favor creating a path to lawful status that will encourage undocumented immigrants to come forward, "instead of the current situation in which millions of people are unknown, unknown to the law."<sup>117</sup>

T But whatever the prospects for eventual reform, in the meantime *Hoffman* seems likely to embolden unscrupulous employers who would hire and exploit unauthorized immigrants, resulting in more unfair competition for businesses that play by the rules, lower terms and conditions of employment for citizens and legal immigrants, and an intensification of the "magnet" effect against which Congress legislated in 1986. For the *Hoffman* majority, Chief Justice Rehnquist wrote reassuringly that immunity from backpay liability "does not mean the employer gets off scot-free,"<sup>118</sup> because employers of undocumented workers remain subject to cease-and-desist orders and notice-posting requirements. To millions of workers in this country like Jose Castro, who labor under a different set of workplace rules, those words are of little comfort.

FNS <sup>117</sup> President George W. Bush, New Temporary Worker Program: Remarks on Immigration Policy (Jan. 7, 2004) (transcript available at <<http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html>>).

FNS <sup>118</sup> 535 U.S. at 152.