

Workplace Violence and Harassment of Low-Wage Workers*

Elizabeth Kristen, Blanca Banuelos and Daniela Urban†

Low-wage workers face harassment and violence in the workplace. These vulnerable workers then face tremendous obstacles in seeking justice. In this article, attorneys from the Legal Aid Society - Employment Law Center and California Rural Legal Assistance discuss patterns they see in low-wage worker harassment and violence cases. Citing to real worker experiences, this article addresses industry-based challenges for restaurant, agricultural, homecare, and domestic workers, as well as specialized concerns for LGBT and undocumented workers. This article discusses both the barriers low-wage workers often face in deciding to take legal action and the challenges they confront when they do seek justice. Finally, this article proposes strategies for legal advocates in helping combat violence and harassment in the workplace.

INTRODUCTION.....	170
I. LEGAL BASIS FOR CLAIMS OF VIOLENCE AND HARASSMENT IN THE WORKPLACE	171
A. Legal Basis for Harassment Claims	172
B. Legal Basis for Tort Claims	173
II. PATTERNS IN CASES OF HARASSMENT OF AND VIOLENCE AGAINST LOW-WAGE WORKERS	173
A. Industry-Specific Examples	173
1. Restaurant Industry	173

* This Essay is based on a presentation given at the Thelton E. Henderson Center for Social Justice's fall 2013 symposium, "Working for Change: Low-Wage Earners at the Tipping Point." Established in 1999, the Center produces and fosters creative scholarship that examines the law through a lens of social justice, and works in partnership with communities to provide education to the general public.

† Elizabeth Kristen is the Director of the Gender Equity & LGBT Rights Program and a Senior Staff Attorney at the Legal Aid Society-Employment Law Center. Blanca Banuelos is the Regional Director of Advocacy and a Staff Attorney at California Rural Legal Assistance, Inc. Daniela Urban is Special Counsel at the Legal Aid Society-Employment Law Center and Executive Director of the Center for Workers' Rights.

2. Agriculture Industry	175
3. Homecare and Domestic Industry	177
B. Harassment of the LGBT Community	178
C. Undocumented Workers	179
III. BARRIERS FOR LOW-WAGE WORKERS IN REMEDYING	
WORKPLACE HARASSMENT	179
A. Geographic Barriers	180
B. Cultural and Language Barriers	181
1. Stigma toward Victims of Domestic Violence.....	181
2. Language Barriers	182
C. Financial Barriers.....	182
D. Difficulties of Litigation	185
E. Immigration Status Barriers.....	186
1. Fear of Retaliation.....	186
2. Fear of Deportation	188
3. Limited Litigation Remedies	189
F. Length of Administrative Proceedings and Litigation	191
G. Inefficacy of Do-It-Yourself Remedies	193
1. Internal Investigations.....	193
2. DFEH Complaint Process	195
IV. STRATEGIES FOR LOW-WAGE WORKER ADVOCATES	196
A. Outreach and Education.....	197
B. Representation	198
C. Undocumented Clients.....	199
D. Protecting Victims and Monitoring Workplace Harassment and Violence	201
V. OPPORTUNITIES FOR EFFECTING PROGRESS	202
CONCLUSION	203

INTRODUCTION

Low-wage workers experience unlawful harassment and violence in the workplace at alarming rates. However, most of these workers remain silent and never pursue justice against transgressor employers or perpetrators.¹ Although between 50 and 80% of women experience sexual

1. Economists estimate that 800 workplace safety violations occur for every one complaint filed with federal authorities in the agricultural and factory industries. See David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL'Y J. 59, 78-79 (2005) (introducing data that 700 to 800 wage-and-hour violations under the Fair Labor Standards Act occur for every one violation reported to the Wage and Hour Division of the U.S. Department of Labor).

harassment at work, only 25% of harassed women tell anyone and only 5% complain formally.² The severity of the harassment and violence varies from case to case and from industry to industry, yet the barriers that these workers face in asserting their rights are remarkably similar.

The Legal Aid Society-Employment Law Center (LAS-ELC) and California Rural Legal Assistance, Inc. (CRLA) represent low-wage workers in a variety of workplace harassment cases. Clients face harassment based on sex, gender, gender identity, sexual orientation, national origin, accent, language, disability, race, and other bases. Cases involving workers who are raped, sexually assaulted, or sexually harassed at work are particularly difficult because of the profound emotional distress and stigma borne by the victims.

The brave workers who do come forward must overcome many obstacles to seek justice. In this Essay, we rely on our experiences representing low-wage workers and several studies about low-wage workers to evidence certain patterns, barriers, and strategies to redress workplace harassment.³ First, we discuss several common patterns that we have seen among groups of workers. For example, workers in the restaurant industry and lesbian, gay, bisexual, and transgender (LGBT) workers experience high rates of sexual harassment and face unique workplace conditions. Second, we discuss the most significant barriers that low-wage workers face in seeking justice. Low-wage workers often cannot complain about workplace violations due to geography, culture and language, personal finances, and slow or burdensome administrative and court remedies. Third, we discuss strategies that we have used to enforce workplace rights for low-wage workers and introduce potential solutions that could enable low-wage workers to seek justice. This Essay seeks to identify problems that low-wage workers face and ways that nonprofits, government agencies, private attorneys, and other actors in California can help vindicate important workplace rights. All people deserve a workplace free of harassment and discrimination regardless of immigration and financial barriers. This Essay, and organizations like LAS-ELC and CRLA, diligently seek to pursue that goal.

I. LEGAL BASIS FOR CLAIMS OF VIOLENCE AND HARASSMENT IN THE WORKPLACE

Both federal and state laws prohibit workplace harassment. Workers who have been harassed at work may bring not only civil rights claims, but also tort claims such as assault and battery.

2. Deborah L. Rhode, *Sexual Harassment*, 65 S. CAL. L. REV. 1459, 1461 (1992) (citing studies by researchers at the United States Merit Systems Protection Board).

3. All client names have been changed to preserve confidentiality.

A. Legal Basis for Harassment Claims

Workplace harassment is prohibited under both Title VII of the Civil Rights Act of 1964⁴ and the California Fair Employment and Housing Act (FEHA).⁵ While Title VII prohibits harassment based on sex, race, national origin, color, and religion,⁶ the FEHA provides broader protections.⁷ Currently, the FEHA prohibits harassment based on “race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status.”⁸

Sexual harassment includes “verbal, physical, and visual harassment, as well as unwanted sexual advances.”⁹ Verbal harassment may include epithets, derogatory comments, or slurs on the basis of sex.¹⁰ Physical harassment may include assault, impeding or blocking movement, or any physical interference with normal work or movement, when directed at a person on the basis of sex.¹¹ Visual harassment includes derogatory posters, cartoons or drawings on the basis of sex.¹²

Workers who seek justice after experiencing unlawful harassment under Title VII and FEHA first must file complaints with the administering agencies, the California Department of Fair Employment and Housing (DFEH) and/or the U.S. Equal Employment Opportunity Commission (EEOC).¹³ The DFEH and the EEOC may investigate charges and seek remedies on behalf of the workers.¹⁴ However, workers who plan to initiate litigation can request an immediate “Right to Sue” letter from the DFEH

4. 42 U.S.C. § 2000e-2(a)(1) (2012); 29 C.F.R. § 1604.11 (2012).

5. CAL. GOV'T CODE § 12940(j)(1) (2014). California Courts often look to federal decisions interpreting and applying Title VII when interpreting and applying FEHA, as the anti-discriminatory objectives and the overriding public policy purposes of both statutes are identical. *See, e.g.*, *Fisher v. San Pedro Peninsula Hosp.*, 262 Cal. Rptr. 842, 850 (Cal. Ct. App. 1989).

6. 42 U.S.C. § 2000e-2(a); 29 C.F.R. § 1604.11; *see also* EEOC, *Harassment*, <http://www.eeoc.gov/laws/types/harassment.cfm> (last visited Nov. 3, 2014) (“Harassment is unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age ([forty] or older), disability or genetic information.”).

7. CAL. GOV'T CODE § 12940(j)(1).

8. *Id.*

9. CAL. CODE REGS., tit. 2, § 11034(f)(1) (2013).

10. CAL. CODE REGS., tit. 2, § 11019 (b)(1)(A) (2013).

11. CAL. CODE REGS., tit. 2, § 11019 (b)(1)(B).

12. CAL. CODE REGS., tit. 2, § 11019 (b)(1)(C).

13. *Shikles v. Sprint/United Mgmt. Co.*, 426 F.3d 1304, 1317 (10th Cir. 2005) (“It is well-established that Title VII requires a plaintiff to exhaust his or her administrative remedies before filing suit.”).

14. CAL. GOV'T CODE § 12960 (2012); 29 C.F.R. § 1601.15 (2012).

and EEOC in order to immediately file their claims in court without having to wait for the administrative process to occur.¹⁵

B. Legal Basis for Tort Claims

Under California law, workers may bring claims against individual harassers for torts including but not limited to assault, battery, false imprisonment, or infliction of emotional distress.¹⁶ In cases involving sexual assault, claims for assault and battery are most typical. Under some circumstances, workers also may hold their employer liable for torts committed against them at work.¹⁷ There is no administrative resolution for tort claims; plaintiffs must litigate tort claims to pursue available remedies.¹⁸

II. PATTERNS IN CASES OF HARASSMENT OF AND VIOLENCE AGAINST LOW-WAGE WORKERS

A. Industry-Specific Examples

Harassment and violence in the workplace can occur with any type of employer or employee; however, certain low-wage workers are particularly vulnerable to abuse. Economists David Weil and Amanda Pyle found that “workers that feel vulnerable to exploitation are less likely to use their rights—these include immigrant workers, those with less education or fewer skills, and those in smaller workplaces or in sectors prone to a high degree of informal work arrangements.”¹⁹ Common patterns exist across and within these groups of workers. In this Essay, we focus on the restaurant, agricultural, and homecare and domestic industries.

1. Restaurant Industry

Workers in the restaurant industry are particularly likely to experience sexual harassment and sexual violence. A recent study by the Restaurant Opportunities Centers United (ROC-United) found that women working in the restaurant industry report having faced sexual harassment at a disproportionately high rate: though restaurant workers make up only 7% of women in the workforce, restaurant workers accounted for 37% of the

15. CAL. GOV'T CODE § 12965(b) (2012); 29 C.F.R. § 1601.28 (2012).

16. *Rojo v. Kliger*, 801 P.2d 373, 375 (Cal. 1990).

17. David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 Cornell L. Rev. 66, 82-90 (1995).

18. *Rojo*, 801 P.2d at 375.

19. Weil & Pyles, *supra* note 1, at 91.

sexual harassment complaints brought by women to the EEOC.²⁰ In a survey of restaurant workers, ROC-United found that “[t]wo-thirds of women workers and over half of men workers had experienced some form of sexual harassment from management; nearly 80% of women and 70% of men experienced some form of sexual harassment from co-workers; and nearly 80% of women and 55% of men experienced some form of sexual harassment from customers.”²¹ Of these surveyed workers, ROC-United found that 66% of women experienced sexual harassment from management on at least a monthly basis.²²

LAS-ELC’s and CRLA’s cases mirror the trends reported by ROC-United. In a recent case handled by LAS-ELC, several restaurant employees were subjected to frequent, unwelcome sexual remarks from the restaurant manager, who demanded sex, threatened workers, and inappropriately touched workers during and after work. The same manager brutally sexually assaulted one of the employees, Ana, numerous times throughout the approximately three-and-a-half years she worked at the restaurant. In another LAS-ELC case, a restaurant manager in a major California city sexually harassed each of his female employees. He groped, hugged, and kissed them at work and frequently texted one employee, Emilia, about his love for her.

Because restaurants are often small businesses, few employees possess authority to respond to complaints of sexual harassment. In many cases, the harassers are the managers, as in Ana and Emilia’s cases. For Ana, there were no other employees with management authority to report her manager’s conduct. Even though a male coworker witnessed Ana being assaulted on three separate occasions and confronted the manager/perpetrator, the manager said that he was not afraid of treating women the way he did because they “were not going to do anything about it.” As small businesses, restaurants often fail to post information about employees’ right to be free of harassment and also fail to implement formal policies or procedures for employees to report the harassment. Emilia did not know how to report the harassment; she eventually informed the restaurant’s owners of the harassment after she quit.

Even for larger restaurant companies with more formal procedures, complaints of sexual harassment often are not taken seriously. In an LAS-ELC case involving a large restaurant with an established human resources

20. THE RESTAURANT OPPORTUNITIES CTRS. UNITED, *TIPPED OVER THE EDGE: GENDER INEQUITY IN THE RESTAURANT INDUSTRY* 1, 3 (2012), available at http://rocunited.org/wp-content/uploads/2012/02/ROC_GenderInequity_F1-1.pdf.

21. THE RESTAURANT OPPORTUNITIES CTRS. UNITED, *THE GLASS FLOOR: SEXUAL HARASSMENT IN THE RESTAURANT INDUSTRY* 13 (2014), available at <http://rocunited.org/new-report-the-glass-floor-sexual-harassment-in-the-restaurant-industry/>.

22. *Id.*

department, one worker, Betty, was subjected to daily sexual harassment by at least two of her male coworkers. The coworkers made frequent unwelcome sexual comments and looked down her shirt at her breasts. One of the male coworkers grabbed Betty's genitalia and hit her forcefully on the buttocks.

Although Betty complained to the restaurant group's human resources department, the company failed to properly investigate, remedy, and monitor the situation. The first time Betty's coworker hit her on the buttocks, she complained to human resources. The perpetrator was sent home for half of a workday and human resources informed Betty that the situation had been addressed. When Betty complained the second time, the human resources manager stated that management was unaware that sexual harassment continued after the first complaint. Because the human resources department did not effectively redress or investigate the first incident, the harassment continued. Moreover, because the restaurant management did not monitor the conduct of the employees accused of sexual harassment, the human resources department treated reoccurring complaints of unwelcome conduct like petty coworker arguments rather than serious, degrading acts of sexual violence. A manager in the restaurant admonished Betty and other coworkers for complaining about sexual harassment because he felt that "employees were just complaining back and forth about each other" and he could not sort out responsibility. For management, it was easy to deny knowledge of the sexual harassment, since they avoided any investigation that would reveal illegal conduct. Management's behavior dissuaded workers from complaining. Ultimately, when the company did examine Betty's working conditions, her male coworkers admitted much of the conduct that she alleged. As Betty's experience illustrates, even in larger restaurant companies, redress of sexual harassment is limited.

2. *Agriculture Industry*

Farm workers are especially vulnerable to sexual abuse. A recent documentary by the Public Broadcasting Station (PBS), *Rape in the Fields*, revealed that farmworker rape is a pervasive and pressing issue that often goes unreported and unpunished.²³ A report by Human Rights Watch (HRW) documented the sexual violence and harassment that farmworkers in the United States face.²⁴ Nearly every farmworker interviewed by HRW

23. *Frontline: Rape in the Fields* (PBS television broadcast June 25, 2013), available at <http://www.pbs.org/wgbh/pages/frontline/rape-in-the-fields/>.

24. HUM. RIGHTS WATCH, *CULTIVATING FEAR: THE VULNERABILITY OF IMMIGRANT FARMWORKERS IN THE US TO SEXUAL VIOLENCE AND SEXUAL HARASSMENT* (May 2012), available at http://www.hrw.org/sites/default/files/reports/us0512ForUpload_1.pdf.

experienced or witnessed workplace sexual harassment, and approximately 80% of those interviewed in California's Central Valley personally experienced sexual harassment.²⁵ California has the largest population of farmworkers in the country and many face sexual abuse.²⁶

Female and immigrant farmworkers are especially vulnerable to harassment. Many immigrant women work alone in fields or receive rides from male supervisors to and from the worksite, leaving them more open to attack. Most farmworkers are immigrants; the National Agricultural Workers Survey found that 72% of farmworkers are foreign born and about 50% of farmworkers are undocumented.²⁷ Farmworkers are geographically, culturally, and linguistically isolated and often cannot or do not know how to seek legal or counseling services to enforce their rights. Fewer than 30% of farmworkers speak English "well" and many indigenous workers do not speak Spanish and cannot report the harassment.²⁸

LAS-ELC and CRLA jointly represented Cristina, a farm worker in rural California. Because Cristina did not have a way of getting to and from work, she accepted a ride from her male supervisor, arriving at the fields before other crew members. This situation left Cristina alone with the supervisor and vulnerable to his aggressive advances. On a daily basis the supervisor told Cristina that she had a beautiful voice, body, and lips; he grabbed her face and forcibly kissed her. The supervisor told Cristina that he wanted to engage in sexual intercourse with her and offered her money in exchange for sex. He threatened to fire her if she did not have sex with him, but she refused and said that she only wanted to work. He continued to threaten her and told her that she would eventually be his. Cristina asked other employees if they could give her a ride to work, but no one could.

One day after they arrived to the fields, the supervisor pulled off Cristina's pants and underwear and raped her. When other workers began to arrive at the field, the supervisor stopped, but threatened Cristina with termination and a call to immigration authorities if she told anyone about the sexual assault. After the assault, Cristina continued to reject the manager's sexual advances, and she was fired because he told the human resources office she was not a good worker.

In a similar case, CRLA represented a rural farmworker, Julia. Julia was the only female worker in a crew of ten workers. On her first day of work, Julia's male supervisor began making inappropriate comments to her, including asking whether he could go with her to the bathroom. These comments continued on a daily basis. Julia's supervisor even asked her to

25. *Id.* at 23.

26. *Id.* at 11, 23.

27. *Id.* at 15.

28. *Id.* at 16, 38.

accompany him to a nearby trailer to have sexual intercourse and asked her whether she was having sex with others. When Julia instructed him to leave her alone and told him that she was married, he responded that he was jealous. On her final day of work, her supervisor threatened that he could rape and kill her so that she could not complain about him. Similarly, CRLA represented another worker in rural California who was raped by her employer on her first day of work.

3. *Homecare and Domestic Industry*

Homecare and domestic workers also are especially vulnerable to workplace harassment because they work alone and in intimate environments. Domestic workers perform their jobs in private homes and remain invisible to outside organizations, attorneys, and consumers. Many domestic workers are immigrants who may be unfamiliar with the language and culture in the United States.²⁹ Nearly all domestic workers work alone, and many feel isolated and lonely.³⁰ Because domestic work takes place in the household and is often populated by immigrant women, the industry is a part of the unregulated “underground economy.”³¹ As a result, domestic workers are exposed to harassment and abuse.³²

The case of one LAS-ELC client and homecare worker, Sandra, is particularly evocative of the abuse domestic workers face. Like many domestic workers, Sandra lived at her employer’s home. Because she depended on the employer for housing, Sandra was especially at risk for abuse by her employer. Sandra’s employer groped her, made unwelcome sexual comments, and forced her to watch pornography. Sandra suffered from anxiety as a result of the harassment; she lost a significant amount of weight and became worried about her health. Because she had lived with her employer, the abuse forced her to sleep in her car and on the street for several days. Sandra’s story shows how the harms of sexual harassment can compound for a domestic worker living in her employer’s home.

An HRW study found that, internationally, domestic workers regularly face battery and assault, limited freedom of movement, wage-and-hour violations, unhealthy and unsafe working conditions, and psychological

29. Linda Burnham & Nik Theodore, NAT’L DOMESTIC WORKERS ALLIANCE, HOME ECONOMICS: THE INVISIBLE AND UNREGULATED WORLD OF DOMESTIC WORK 11 (2012), available at <http://www.domesticworkers.org/sites/default/files/HomeEconomicsEnglish.pdf> (citing the U.S. Census Bureau’s American Community Survey’s 2005-2009 five-year sample’s estimate that 46% of domestic workers are foreign-born).

30. Diana Vellos, *Immigrant Latina Domestic Workers and Sexual Harassment*, 5 AM. U. J. GENDER & L. 407, 423 (1997) (describing isolation experienced by undocumented domestic workers).

31. *Id.* at 413.

32. *Id.* at 424-25. (“Domestics working in private homes do not have other people to validate or strengthen their stories, and are isolated from other individuals who would be willing and able to attest to their exploitation.”).

abuse.³³ Two female domestic workers interviewed by HRW reported never leaving their employer's house because of employer imposed rules prohibiting communication outside the home.³⁴ One domestic worker HRW interviewed, Anita, was groped by her employer on three occasions, but did not quit her job because she did not know her rights and needed the job for income.³⁵ Another worker, Fariba, was physically assaulted by her employer at work and faced psychological abuse through demeaning comments, restrictions on her ability to leave the home alone, and inadequate food provisions, but continued to work because she had no opportunity to report the abuse.³⁶ Other domestic workers feel threatened by their employers' "constant flirting" in the employers' own homes.³⁷ Many domestic workers are unaware of their rights and are particularly vulnerable to harassment because no coworkers are present to witness the harassment or share information about resources to combat harassment.³⁸

B. Harassment of the LGBT Community

Members of the LGBT community frequently experience sexual harassment in the workplace. Up to 41% of LGBT workers surveyed reported that they were verbally or physically abused in the workplace.³⁹ Nearly 90% of transgender workers surveyed reported experiencing workplace harassment, including verbal harassment, lack of access to appropriate restrooms, improper use of name and preferred pronoun, and persistent questions about surgery.⁴⁰

LAS-ELC represented a transgender female restaurant worker, Diane, who endured verbal and physical sexual harassment from several managers at work. One manager grabbed her buttocks on an almost daily basis and

33. HUM. RIGHTS WATCH, *SWEPT UNDER THE RUG: ABUSE AGAINST DOMESTIC WORKERS AROUND THE WORLD* (2006), available at <http://www.hrw.org/sites/default/files/reports/wrd0706webwcover.pdf>.

34. *Id.* at 75.

35. HUM. RIGHTS WATCH, *HIDDEN IN THE HOME: ABUSE OF DOMESTIC WORKERS WITH SPECIAL VISAS IN THE UNITED STATES* 9 (2001), available at <http://www.hrw.org/reports/2001/usadom/usadom0501.pdf>.

36. *Id.* at 10-11. Fariba was ultimately removed from the home by police and advocates after telling a local produce vendor about the abuse and providing him with her address. *Id.* at 11.

37. Vellos, *supra* note 30, at 421.

38. HUM. RIGHTS WATCH, *HIDDEN IN THE HOME*, *supra* note 35, at 1-2.

39. M.V. Lee Badgett et al., THE WILLIAMS INSTITUTE, *BIAS IN THE WORKPLACE: CONSISTENT EVIDENCE OF SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION* 5 (2007), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Sears-Lau-Ho-Bias-in-the-Workplace-Jun-2007.pdf>.

40. Jaime M. Grant et al., NAT'L CTR. FOR TRANSGENDER EQUALITY AND NAT'L GAY & LESBIAN TASK FORCE, *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY* 3, 7 (2011), available at http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf.

made unwelcome inquiries about intimate sexual matters, including asking Diane how she had sex and wondering “what it would feel like to have sex with [her].” Diane repeatedly told the manager that this physical contact and questioning was unwelcome and inappropriate. She was ultimately terminated by her manager/harasser after complaining to human resources about the conduct.

The situation faced by a gay farmworker in Northern California is similarly illustrative of the harassment LGBT workers face in the workplace. CRLA learned of this worker’s situation through his coworkers. The farmworker endured homophobic comments on a daily basis from his coworkers. This farmworker became depressed, was fearful at the workplace, and attempted to isolate himself from his coworkers. This worker attempted to ignore the comments by listening to his radio using earphones. Like many farmworkers, and much like domestic workers, this worker lived in employer-provided housing. One day, after many hours of work, his employer’s son showed up to the farmworker’s home, banged on the door, and attempted to knock it down while uttering homophobic slurs such as “fuckin’ faggot.” After successfully getting into the worker’s home, the employer’s son physically attacked the worker. Other workers called the police, but no charges were pressed. Although CRLA learned of his story through other workers, the barriers to justice for this worker were too great and he chose not to pursue a remedy.

C. Undocumented Workers

Undocumented workers face additional complications to remedying workplace harassment and violence. The National Domestic Workers Alliance found that “[u]ndocumented workers . . . have almost no standing to negotiate for better wages or working conditions, and live in fear that their irregular status will be exposed.”⁴¹ In addition, many undocumented workers work on farms, in homes, or in restaurants that lack formal human resources department, and undocumented workers are often unfamiliar with local law, language, and culture. In Part IV.E, we discuss three particular vulnerabilities that undocumented workers face: retaliation, deportation, and limited remedies.

III. BARRIERS FOR LOW-WAGE WORKERS IN REMEDYING WORKPLACE HARASSMENT

Unfortunately, low-wage workers face a wide-range of overlapping barriers when seeking justice for workplace harassment. Although workers who are harassed in the workplace know the injustice of the situations they

41. Burnham & Theodore, *supra* note 29, at 20.

face and want to better these poor conditions for themselves and others, they may not know where to turn for help. Low-wage workers have little information about their legal rights and where to seek justice. A survey conducted by the Brennan Center for Justice found that only 18% of low-wage workers surveyed could even identify the minimum wage let alone other important workplace rights.⁴² One Justice, a California nonprofit focused on access to legal services, reports that “over [eight] million low-income Californians face legal barriers to life necessities.”⁴³ Workers lack information about what their rights are and where to enforce these rights.

Even if a worker is able to find assistance, logistical problems often prevent workers from pursuing meaningful remedies for harassment and workplace violence. Many low-wage workers are not located geographically near legal services, cannot communicate with service providers due to language and cultural barriers, lack financial support to seek justice, and are frustrated by the lengthy and ineffective process of administrative and litigation remedies. Undocumented workers confront additional challenges in seeking justice. Despite workplace laws’ explicit protections against retaliation, undocumented and other low-wage workers fear and often actually face retaliation when they report violations.⁴⁴

A. Geographic Barriers

Workers in rural communities have a more difficult time seeking justice in cases of workplace violence and harassment, in part because they are more geographically removed from the locations where they can receive assistance. For example, the EEOC only has three offices in Northern California, all of which are located in urban areas. Out of around 100 nonprofit legal organizations in California, only twenty-seven serve rural areas.⁴⁵ Even local courthouses are often too remote for rural workers to

42. BRENNAN CTR. FOR JUSTICE, DO NEW YORKERS KNOW THE MINIMUM WAGE? RESULTS FROM A SPOT SURVEY OF EMPLOYERS AND WORKERS IN NEW YORK CITY (2006), available at http://www.brennancenter.org/sites/default/files/legacy/d/download_file_34916.pdf; see also Stephen A. Wandner & Andrew Stettner, *Why Are Many Jobless Workers Not Applying for Benefits?*, 123 MONTHLY LAB. REV. 21, 21-22 (2000), available at <http://www.bls.gov/opub/mlr/2000/06/art2full.pdf> (finding “millions of [eligible] unemployed workers know about the [unemployment insurance] program but . . . do not apply for benefits because they think they are ineligible”).

43. *The Need: Millions of Californians Desperately Need Legal Assistance*, ONE JUSTICE, <http://www.one-justice.org/TheNeed> (last visited Nov. 3, 2014).

44. Weil & Pyles, *supra* note 1, at 83-84 & n.19 (introducing studies by HRW and other scholars indicating that workers, particularly those who are undocumented, widely believe that they will be fired if they exercise their workplace rights); see also HUM. RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS’ FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 42 (2000) (discussing many undocumented workers’ fear of exercising their rights under the National Labor Relations Act for fear of their employers challenging their immigration statuses).

45. *Rural Justice*, ONE JUSTICE, <http://www.one-justice.org/ruraljusticeinitiative> (last visited Nov. 3, 2014).

access in order to pursue remedies. Additionally, few worker centers are located in rural communities.⁴⁶ As a result of these geographic barriers to resolution, a low-wage rural worker may suffer through years of workplace violence and harassment without pursuing a legal remedy.

Agricultural workers are especially geographically isolated. In addition to having a rural workplace, some farmworkers live in employer-provided housing.⁴⁷ This creates the impression that shelter for oneself and one's family is contingent upon complicity with working conditions. As such, complaining imperils laborers' work lives and home lives. Worksites are remote and perpetrators can easily harass workers without being heard or seen, as Cristina's case described in Part II.A.2 demonstrates. It is difficult for legal services to conduct outreach for farmworkers who are isolated and living in employer housing. Because an agricultural workforce tends to be small and transient, even when information about legal rights and remedies does reach the rural community, any institutional knowledge about legal rights or remedies among the workers is quickly lost at the end of the season.

B. Cultural and Language Barriers

Low-wage workers also face cultural and language barriers to pursuing justice for workplace harassment. Victims fear that if they report the violence—particularly sexual assault—they will be humiliated in their community. Especially in small or close-knit communities, this humiliation can impact spouses, children, and friends. This fear is compounded when victims also suffer from domestic violence at home.

1. Stigma toward Victims of Domestic Violence

Many women suffer from compound and cyclical problems of sexual violence at work and at home. One LAS-ELC client, Rosa, was a victim of both domestic violence at home and sexual harassment at work. When she reported the workplace sexual harassment to her boss, he complained that she “always had problems at work, always had problems at home.” Many victims of domestic violence are chastised for bringing their “personal problems” to work. Victims of domestic violence need the economic security wages provide in order to leave abusive relationships.⁴⁸ Studies

46. Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law: A Contextual Analysis*, 30 BERKELEY J. EMP. & LAB. L. 232, 240 n.12 (2009).

47. Don Villarejo, *California's Hired Farm Workers Move to the Cities: The Outsourcing of Responsibility for Farm Labor Housing*, 1 (Jan. 24, 2014), available at http://www.crla.org/sites/all/files/u6/2014/rju0214/VillarejoFrmLbrHsngHlth_CRLA_012414.pdf.

48. See MARY KAY INC., *THE 2012 TRUTH ABOUT ABUSE SURVEY REPORT 3* (2012), available at <http://content2.marykayintouch.com/Public/MKACF/Documents/2012survey.pdf> (reporting that 74% of

show that women in poverty are less likely to leave an abusive relationship and more likely to return to one when they do leave.⁴⁹ Reporting sexual harassment at work may threaten these wages and push victims to stay longer in a violent relationship. Consequently, if a woman is already in a violent relationship and experiences abuse in the workplace, she likely will lack the spousal support to report her workplace conditions.

2. *Language Barriers*

Language barriers also create significant problems in remedying violence and harassment in the workplace. Interpreters help bridge the language divide, but interpreters alone are not sufficient to make pursuing legal remedies for workplace violence and harassment feasible and desirable for many low-wage workers. It is difficult enough for a victim to describe the harassment or violence he or she experienced, and having to communicate that experience through an interpreter only makes that communication process more difficult. Although the interpretation may be accurate, the delivery of the message may not have the same impact on the audience. For example, in one CRLA case, after a long trial of a worker who had been sexually assaulted by her supervisor, the jury found in favor of the employer. One of the reasons that the jury provided for finding in favor of the employer was because listening to testimony of the worker through an interpreter was “strange” and because the interpreter was a male, and the worker a female, the jury also had a difficult time understanding the worker’s situation. Moreover, the limited availability of interpreters can be especially challenging when the worker speaks an indigenous language or a language not prevalent in the geographic location. In some cases, the only available interpreter may be a member of the worker’s community, and the worker may be concerned about confidentiality. If a low-wage worker cannot communicate the harassment he or she experienced, there is no hope that the worker will find justice.

C. *Financial Barriers*

Low-wage workers also face a number of financial barriers to remedying violence or harassment in the workplace. The simple fact that low-wage workers live in poverty provides its own barrier to seeking

domestic violence victims stayed in an abusive relationship longer because of “economic uncertainties”).

49. ACLU WOMEN’S RIGHTS PROJECT, DOMESTIC VIOLENCE AND HOMELESSNESS (2006), available at <https://www.aclu.org/sites/default/files/pdfs/dvhomelessness032106.pdf>; Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay*, 28-OCT COLO. LAW 19, 20 (1999) (citing a comprehensive Texas study finding that 85% of the victims calling hotlines, emergency rooms, and shelters had left their abusers a minimum of five times previously, with the number one reason cited for returning to the batterer being financial despair).

remedies for violence or harassment in the workplace.⁵⁰ Low-wage workers are likely to have experienced wage theft in addition to the harassment. In one case described in Part II.A.1, Ana and the other women working at the restaurant had substantial wage-and-hour claims on top of the sexual harassment. Ana is not alone: in just one year, claims by low-wage workers who were denied the minimum wage or who were subject to violations of other wage protections increased by 73%.⁵¹

Due to their limited financial resources, low-wage workers cannot finance their own litigation. It is even difficult for low-wage workers to take time off from work to pursue litigation by meeting with a lawyer, having his or her deposition taken, or testifying at trial.⁵² Many low-wage workers have no access to paid time off, and the financial loss of one day's wages can significantly impact the ability to provide the most essential household expenses.

Additionally, the relatively small amount of damages won through the administrative process or litigation may also serve as a financial barrier to low-wage workers. One of the remedies for harassment is the recovery of wages lost as a result of the unlawful conduct.⁵³ Consequently, when the worker's pay rate is low, the total amount recovered will likely also be low. Many private plaintiff-side attorneys work on a contingency fee, which is calculated based on the percentage of the monetary award. Because the fee recoverable for collecting a small damages award also will be small, these attorneys may lack the financial motive for taking on individual low-wage worker cases. Some plaintiff-side firms take on large class actions for low-wage workers but are unable to represent individual low-wage workers.⁵⁴ Unfortunately for low-wage victims of harassment and violence at work, it is much more difficult to bring a class action for sexual harassment cases

50. See Betsy Gwin, *Lessons for Anti-Poverty Advocates from the Workplace Flexibility Movement: Improving Flexibility in Low-Wage Work and Access to Work Supports*, 18 GEO. J. ON POVERTY L. & POL'Y 265, 265 (2011) ("At home, workers are struggling to feed themselves and their families, pay their rent, care for their children and elderly family members, and keep themselves and their families healthy.").

51. Nantiya Ruan, *Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers*, 63 VAND. L. REV. 727, 728 (2010) (citing JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUS. OF THE U.S. COURTS: 2007 ANNUAL REPORT OF THE DIR. 150 tbl.C-2A (2007), available at <http://www.uscourts.gov/judbus2007/contents.html>) (reporting a 73% increase in Fair Labor Standards Act claims from 2006-2007)).

52. See Gwin, *supra* note 50, at 265 (citing "the lack of flexibility in their workplaces" as a primary reason for low-wage worker poverty).

53. 42 U.S.C. § 2000e-5(g)(1); see *Peralta Cmty. Coll. Dist. v. Fair Emp't & Hous. Comm'n*, 801 P.2d 357, 361 (Cal. 1990).

54. E. Tammy Kim, *Lawyers As Resource Allies in Workers' Struggles for Social Change*, 13 N.Y. CITY L. REV. 213, 223 (2009) (explaining that "because federal wage-and-hour litigation can be costly and time-consuming, it is more efficient to do multiple-plaintiff cases" and that the attorneys' fees provisions of federal and state wage-and-hour laws make group cases with greater potential damages more attractive to plaintiff-side firms).

because the legal inquiry is individualized and depends on the experience of each victim.⁵⁵ Moreover, because positions in agriculture are seasonal, any damages awarded as a remedy for workplace violence or harassment will be relatively low, and wronged workers will have difficulty obtaining legal representation.

The financial viability of the defendant can also prevent the injured worker's recovery. Small companies may be unable to withstand the financial burden of defending a harassment suit and will declare bankruptcy before victims are properly compensated. In Ana's case, despite the severity of the conduct experienced and the wage-and-hour claims discovered, LAS-ELC struggled with whether litigation would actually bring justice for the workers, since the company was likely to be insolvent. In another case on behalf of a client named Lisa, LAS-ELC litigated and won but was unable to recover when Lisa's employers declared bankruptcy. Lisa worked at a franchise of a major restaurant chain owned by her parents-in-law who also domestically abused her. Lisa won a large claim for unpaid wages but has not been fully repaid because her abusers were insolvent.

Lisa and Ana's stories are all too common. The Wage Justice Center, a Los Angeles nonprofit that frequently wins cases for low-wage workers denied their wages, has faced numerous instances of employers absconding responsibility by changing their name or declaring bankruptcy.⁵⁶ Further, in the agricultural industry, the farm labor contractor system is dominant. Growers use farm labor contractors to shield themselves financially.⁵⁷ If the worker can only pursue remedies from the farm labor contractor, it is likely the contractor will have insufficient funds to compensate the worker.

In addition, low-wage workers' frequent lack of health care and other benefits impacts the ability to remedy cases of violence and harassment in two ways.⁵⁸ First, after experiencing a violent incident, workers often do not receive medical or psychiatric attention. Doctors can help document the worker's injuries, which can later be used as evidence in the case. Medical

55. The legal inquiry may be very individualized because it hinges, in part, on whether the conduct was unwelcome both to a reasonable person and to the specific plaintiff. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993). There has been at least one Rule 23 sexual harassment class action, *Jenson*, and some pattern-and-practice EEOC cases. See *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997); *EEOC v. Mitsubishi Motor Mfg. of Am., Inc.*, 990 F. Supp. 1059 (C.D. Ill. 1998).

56. *Our Work*, THE WAGE JUSTICE CENTER, http://wagejustice.org/?page_id=42 (last visited Nov. 3, 2014).

57. HUM. RIGHTS WATCH, *Cultivating Fear*, *supra* note 24, at 20.

58. See Sharon M. Dietrich, *When Working Isn't Enough: Low-Wage Workers Struggle to Survive*, 6 U. PA. J. LAB. & EMP. L. 613, 620 (2004) (citing GREGORY ACS ET AL., THE URBAN INSTITUTE, PLAYING BY THE RULES BUT LOSING THE GAME: AMERICA'S WORKING POOR (2000) (noting that only 54.3% of working poor families have employer-provided health insurance, compared to 88.6% of non-poor workers)).

professionals also help refer victims to social and legal resources. For example, one farmworker interviewed by HRW only sought legal relief for the severe sexual assault she suffered at work at the advice of her healthcare provider.⁵⁹ Second, long-term mental and physical injuries can persist even after the violence has ceased, which may limit the victim's ability or desire to pursue justice. Post-traumatic stress disorder (PTSD) is not uncommon among victims of workplace violence. Without medical care, these injuries may go untreated, and those afflicted with PTSD may not want to re-live the trauma through litigation.⁶⁰

D. Difficulties of Litigation

Pursuing litigation is an emotionally difficult and time-consuming process. Plaintiffs in employment cases often have their medical, psychiatric, and employment records subpoenaed. While there are strategies to protect a worker's privacy, litigation is often invasive. When a worker also has been a victim of rape or sexual assault, she may be especially reluctant to come forward. He or she may wish to keep his or her name confidential. Recently, LAS-ELC filed a federal district court sexual harassment action on behalf of the client, a domestic violence victim, as a "Doe" plaintiff. She was being sexually harassed at work by her abusive ex-partner who also worked with her. However, the defendant opposed the Doe motion and the court found the case could not proceed pseudonymously. As a result, the worker was forced to go forward using her name and the case settled soon thereafter. In other cases, LAS-ELC has successfully protected the client's identity.

During litigation, employers take advantage of the vulnerabilities of victims of sexual harassment. Consequently, litigation can be especially difficult for rape victims, who may be asked detailed questions over and over again. This is likely to be more difficult at the deposition process or while testifying during trial, where they may be re-victimized. Employers commonly use this so-called "nuts and sluts" defense to avoid liability for sexual harassment. Under this tactic, employers dissuade workers from filing sexual harassment complaints by subjecting sexual harassment victims to intense scrutiny of their sexual histories and past psychological trauma.⁶¹ One author defined "nuts and sluts" as "the defense tactic of

59. HUM. RIGHTS WATCH, *Cultivating Fear*, *supra* note 24, at 41.

60. See Jennifer L. Vinciguerra, *The Present State of Sexual Harassment Law: Perpetuating Post Traumatic Stress Disorder in Sexually Harassed Women*, 42 CLEV. ST. L. REV. 301, 303 (1994) ("Post Traumatic Stress Disorder is a common result in women who have suffered sexual harassment in the workplace.").

61. See, e.g., Rebecca Korzec, *Viewing North Country: Sexual Harassment Goes to the Movies*, 36 U. BALT. L. REV. 303, 313 (2007) (noting that in *Jenson*, the only sexual harassment Rule 23 class action, "defendants' lawyers were 'going full guns with the tried-and-true nuts-and-sluts defense'").

portraying women who bring harassment . . . claims as too unstable to be believed or too promiscuous to be harassed.”⁶²

E. Immigration Status Barriers

The many low-wage workers who are immigrants face additional barriers to justice as a result of their immigration status. It is particularly difficult for undocumented workers to seek justice as a result of retaliation, deportation, and limited remedies.

1. Fear of Retaliation

Despite the fact that antidiscrimination laws such as Title VII and California’s FEHA prohibit retaliation, undocumented workers fear that if they complain about workplace violence, their employers will retaliate against them. Retaliation is a concern for all of our low-wage clients but is felt acutely by undocumented workers because employers threaten their very presence in this country. Commonly, undocumented workers fear being fired in retaliation for complaining about workplace violence because it is exceedingly difficult for them to find steady work.⁶³ Consequently, undocumented workers are less likely to take action that may jeopardize their employment. Some employers of undocumented workers even threaten to report the immigration status of a complaining employee’s family members because employers often employ several members of the same family. Undocumented farmworkers who have reported sexual harassment or filed lawsuits to seek justice report being “blackballed” or denied employment at other farms.⁶⁴

It is often difficult to find witnesses for workplace harassment cases because many coworkers of undocumented workers are also undocumented and unwilling to come forward for fear of retaliation. Although a threat or report regarding a worker’s immigration status is unlawful retaliation when it is made in response to a worker’s participation in a proceeding under anti-

(quoting CLARA BINGHAM & LAURA LEEDY GANSLER, CLASS ACTION: THE STORY OF LOIS JENSON AND THE LANDMARK CASE THAT CHANGED SEXUAL HARASSMENT LAW 286 (2002)); Hillary Jo Baker, *No Good Deed Goes Unpunished: Protecting Gender Discrimination Named Plaintiffs from Employer Attacks*, 20 HASTINGS WOMEN’S L.J. 83, 95-99 (2009) (describing the “nuts and sluts” strategy); Christine Sgarlata Chung, *From Lily Bart to the Boom-Boom Room: How Wall Street’s Social and Cultural Response to Women Has Shaped Securities Regulation*, 33 HARV. J.L. & GENDER 175, 232 n.363 (2010).

62. Chung, *supra* note 61, at 232 n.363.

63. Although statistics about undocumented workers are difficult to gather, data suggests that many work in temporary positions in agriculture, construction, domestic service, and restaurants. See Jeffrey S. Pasell & D’Vera Cohn, PEW RESEARCH HISPANIC TRENDS PROJECT, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES, Appendix B (2009), available at <http://www.pewhispanic.org/2009/04/14/appendix-b-additional-tables/>.

64. HUM. RIGHTS WATCH, *Cultivating Fear*, *supra* note 24, at 5.

discrimination laws or other labor and employment laws, the fear of retaliation is not unfounded.⁶⁵

A number of workers have sought assistance from LAS-ELC after experiencing retaliation for reporting workplace violence or harassment. LAS-ELC spoke to a factory worker, Cary, who reported severe and widespread sexual assault and health and safety violations. Cary had been groped on four occasions by a coworker and reported that other immigrant women had been raped, assaulted, and verbally abused. Cary reported this harassment to her supervisor. Instead of ameliorating the abuse, Cary's employer instead transferred and ultimately terminated her in retaliation for her complaints. Although Cary held a U visa, a special immigration status for crime victims and domestic violence survivors, she explained that many of her undocumented coworkers feared reporting the harassment for fear of retaliation. Similarly, in Cristina's case, she was fired after she filed a claim with the EEOC. This retaliation was exactly what she had feared and one of the reasons she had endured the sexual violence until that point.

Preventing retaliation is extremely challenging. An employer who allows workplace violence or sexual harassment is likely to violate anti-retaliation laws as well. Retaliation can take the form of any action that deters an employee from engaging in protected activity.⁶⁶ To prove retaliation, an employee must show that an action might have "dissuaded a reasonable worker from making or supporting a charge of discrimination."⁶⁷ In *University of Texas Southwestern Medical Center v. Nassar*, the Supreme Court clarified that in order to prove a case for retaliation a plaintiff must show "but for" causation, a more strict evidentiary standard than required for proving the underlying harassing conduct.⁶⁸ For plaintiffs, who are not privy to their employer's decision-making process, it is difficult to establish that the employer would not have made the same decision absent the exercise of rights.

65. William R. Tamayo et al., *The Effects of Immigration Status On Employment Litigation*, Presentation at the Nat'l Employment Lawyers Association Convention, 11 (June 21, 2012), available at <https://www.nela.org/NELA/index.cfm?showfullpage=1&event=showAppPage&pg=semwebCatalog&panel=showSWOD&seminarid=4174>; see, e.g., Centeno-Bernuy v. Perry, 302 F. Supp. 2d 128, 136 (W.D.N.Y. 2003) ("reporting plaintiffs to the INS and making baseless allegations to the government that plaintiffs are terrorists, constitute an adverse employment action" actionable under the anti-retaliation provisions of the FLSA); Singh v. Jutla, 214 F. Supp. 2d 1056, 1057 (N.D. Cal. 2002) (employer reported employee to immigration authorities after employee settled claim for non-payment of wages); Contreras v. Corinthian Vigor Ins. Brokerage, 103 F. Supp. 2d 1180, 1186 (N.D. Cal. 2000) (employer reported employee to immigration authorities after pre-hearing conference regarding employee's wages).

66. 42 U.S.C. § 2000e-3; *Burlington N. Santa Fe Ry. Co. v. White*, 548 U.S. 53, 65-66, 68 (2006).

67. *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 68.

68. 133 S. Ct. 2517, 2534 (2013).

Although retaliation is against the law under Title VII and California state law, it is difficult to enforce until an employee has already been retaliated against. For low-wage workers, in practicality, workers should prepare for the possibility that the accused employer will retaliate, by terminating the worker or by taking other adverse actions, even though illegal, since the remedy for the worker is equally burdensome as the initial complaint of harassment.

2. *Fear of Deportation*

In addition to experiencing a general fear of retaliation for exercising workplace rights, undocumented workers also worry that the perpetrators or their employers will retaliate against them by having them deported. As explained above, perpetrators of violence in the workplace routinely threaten their victims that they will call immigration authorities in order to prevent them from reporting the conduct. LAS-ELC has had several cases where an employer or the employer's attorney has informed Immigration and Customs Enforcement (ICE) of the plaintiff's immigration status. One of CRLA's clients was picked up by ICE after a deposition and was back in his home country that evening. Ana and Cristina were both threatened with deportation in order to prevent the reporting of their sexual assaults. These victims took their employers' threats seriously and waited for considerable periods of time before deciding to report the conduct.

Some laws can help prevent retaliation in the form of deportation. First, an undocumented employee who suffered workplace violence may be eligible for a U or T visa.⁶⁹ U visas "encourage non-citizen crime victims to report crimes and to cooperate with law enforcement agencies."⁷⁰ To obtain a U visa, a law enforcement agency, such as the local police department, must certify that the immigrant would be helpful in the investigation of a crime.⁷¹ T visas provide similar protection for victims of human trafficking.⁷²

Second, in an attempt to limit employer threats of immigration-related retaliation, the California Legislature passed Senate Bill (SB) 666, effective January 1, 2014, which establishes, among other things, that an employer may lose its business or professional license for retaliating or taking an adverse action against an employee, former employee, or applicant on the

69. 8 U.S.C. § 1101(a)(15)(U)-(T) (2012); *see also* U.S. DEP'T OF HOMELAND SEC., U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT 13, *available at* http://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf.

70. Elizabeth M. McCormick, *Rethinking Indirect Victim Eligibility for U Non-Immigrant Visas to Better Protect Immigrant Families and Communities*, 22 STAN. L. & POL'Y REV. 587, 588 (2011).

71. *Id.*

72. *Id.*

basis of their citizenship and immigration status.⁷³ Under this statute, a transgressor employer may be subject to a civil penalty of up to \$10,000 per violation.⁷⁴ In addition, the Legislature passed and the governor signed Assembly Bill (AB) 263, which prohibits employers from demanding new immigration documents, implementing e-verify, or threatening to call immigration authorities after workers have exercised protected labor rights.⁷⁵

As worker advocates, it is important to inform clients of the risks to immigration status in pursuing a case against an employer, so that the worker can make an informed decision about seeking justice. There are tremendous opportunities and risks when an undocumented worker pursues a workplace claim.

3. *Limited Litigation Remedies*

For the most part, undocumented workers enjoy the same employment rights and protections as workers with legal status. Through SB 1818 in 2002, the California Legislature established that “[a]ll protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state.”⁷⁶ Furthermore, the California Labor Code clearly establishes that “in proceedings or discovery undertaken to enforce . . . state laws no inquiry shall be permitted into a person’s immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law.”⁷⁷ California law provides strong protections for immigrant workers, but issues related to immigration status do arise during the course of litigation and in the calculation of remedies.

Generally, undocumented workers who are victims of workplace harassment and violence are entitled to the same remedies as any other workers under federal and state employment statutes.⁷⁸ However, one

73. S.B. 666, 2012-2013 Leg., Reg. Sess. (Cal. 2013) (codified as CAL. BUS. & PROF. CODE § 494.6 & 6103.7 (2014), amending CAL. LAB. CODE § 98.6 & 1102.5 (2014), and adding to CAL. LABOR CODE § 244 (2014)).

74. CAL. LAB. CODE § 98.6(b)(3).

75. A.B. 263, 2012-2013 Leg., Reg. Sess. (Cal. 2013) (codified as CAL. LABOR CODE §§ 1019, 1024.6, 1102.5, & 1103 (2014), and amending Cal. LABOR CODE §§ 98.6, 98.7 (2014)).

76. S.B. 1818, 2001-2002 Leg., Reg. Sess. (Cal. 2002) (codified as CAL. CIV. CODE § 3339(a) (2012)).

77. CAL. LAB. CODE § 1171.5(b) (2003).

78. Della Barnett, California Rural Legal Assistance Foundation, Representing Undocumented Plaintiffs, 3-4, 6-9 (2014) (unpublished manuscript) (on file with authors).

possible exception to this maxim is reinstatement and backpay. Some courts have applied *Hoffman Plastic Compounds, Inc. v. NLRB*,⁷⁹ a National Labor Relations Act case that prohibited an award of backpay to undocumented workers, in cases brought under Title VII.⁸⁰ However, the Ninth Circuit has questioned whether the Supreme Court's decision in *Hoffman Plastic* extends to Title VII.⁸¹ In *Salas v. Sierra Chemical Co.*, a case recently decided in the California Supreme Court and litigated by LAS-ELC, the court held that federal immigration law prohibiting the use of another's identification does not preempt California Labor Code Section 1171.5.⁸² The court held that an undocumented worker, even one using false identification, can seek an award of compensatory damages, including backpay, for workplace discrimination.⁸³

Even though the California Labor Code establishes that "immigration status is irrelevant to . . . enforce state laws," employers will attempt to question immigrant plaintiffs during discovery regarding immigration status.⁸⁴ Attorneys representing any plaintiffs, especially undocumented workers, should be familiar with *Rivera v. NIBCO, Inc.*,⁸⁵ and subsequent cases limiting discovery of immigration status, to protect clients from irrelevant questioning.⁸⁶ It is best practice to not allow any inquiry regarding the plaintiff's immigration status, regardless of the client's work authorization. Another tactic to protect a plaintiff from questions regarding immigration status is to not seek reinstatement or a backpay remedy at all. For a plaintiff who "is not seeking backpay for work not already performed or reinstatement, immigration status is clearly not relevant."⁸⁷

As the Ninth Circuit discussed in *Rivera*, protecting employees from revealing immigration status is important to encourage workers to assert important workplace rights.⁸⁸ However, because the legal protections for undocumented workers are not always understood by attorneys and are still being debated and changed, some undocumented workers will not pursue

79. 535 U.S. 137 (2002).

80. Tamayo et al., *supra* note 65, at 6-7; *see, e.g.*, Escobar v. Spartan Sec. Serv., 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003). *But see* Rivera v. NIBCO, Inc., 364 F.3d 1057, 1066-70 (9th Cir. 2004) (holding that *Hoffman Plastics* does not apply to Title VII cases).

81. *Rivera*, 364 F.3d at 1066-70.

82. 327 P.3d 797, 806 (Cal. 2014).

83. *Id.* at 807.

84. CAL. LAB. CODE § 1171.5(b) (2009).

85. *Rivera*, 364 F.3d at 1071.

86. *See, e.g.*, Farmer Brothers Coffee v. Workers' Comp. Appeals Bd., 35 Cal. Rptr. 3d 23 (Cal. Ct. App. 2005); Reyes v. Van Elk, Ltd., 56 Cal. Rptr. 3d 68, 78 (Cal. Ct. App. 2007); Incalza v. Fendi N. Am., Inc., 479 F.3d 1005, 1010 (9th Cir. 2007).

87. Tamayo et al., *supra* note 65, at 21 (internal citations omitted).

88. *Rivera*, 364 F.3d at 1064.

their claims because of their fear or misunderstandings of the protections that the law affords.

F. Length of Administrative Proceedings and Litigation

Pursuing remedies in cases of workplace violence and harassment is not a speedy process. If a low-wage worker is able to overcome all of the barriers to seeking justice discussed above, as the process of pursuing a remedy drags on, the worker may abandon his or her claim because the lengthy process can be too grueling to warrant continued action.

A major factor in the delay of justice for low-wage workers is the slow-moving administrative process. Higher-paid workers often are able to find private attorneys, who, in order to comply with the administrative exhaustion requirement under Title VII and FEHA, request an immediate right-to-sue letter from either the EEOC or the corollary state agency, which in California is the Department of Fair Employment and Housing (DFEH). For low-wage workers, the administrative process might be the only available process to address their claims. It is free and does not require counsel. Studies have shown that private attorneys tend to obtain significantly higher settlements and judgments than the DFEH, creating two antidiscrimination systems that are “separate and unequal.”⁸⁹

LAS-ELC often assists workers with filing administrative claims. However, administrative investigations can take an unreasonable amount of time. While a DFEH investigation must be completed within one year, given recent procedural changes and budgetary constraints, appropriate staffing may not be available to keep up with and thoroughly review the volume of complaints. This combination of time, budgetary, and staffing constraints may result in a rush to conclude the matter as the one-year deadline approaches.

The EEOC can take years to complete an investigation. In Ana’s case, the EEOC did not find cause in the case until three years after she filed her charge. Meanwhile, her rapist continued to work for the employer. During that time, Ana had no legal protections to seek new employment, as the EEOC failed to provide her with a U visa certification for five years, despite her request and qualification for the certification.⁹⁰

If a low-wage worker is able to pursue remedies through litigation after exhausting the administrative remedies, the process may also last several years. Recent cutbacks in court funding in California have exacerbated the

89. Gary Blasi & Joseph W. Doherty, UCLA LAW-RAND CENTER FOR LAW & PUBLIC POLICY, CALIFORNIA EMPLOYMENT DISCRIMINATION LAW AND ITS ENFORCEMENT: THE FAIR EMPLOYMENT AND HOUSING ACT AT 50, at 62 (2010), available at http://www.dfeh.ca.gov/res/docs/Renaissance/FEHA%20at%2050%20-%20UCLA%20-%20RAND%20Report_FINAL.pdf.

90. See *infra* notes 125-130 for more information about U Visas.

delay in justice for low-wage workers who seek remedies through litigation.⁹¹

The delay in the adjudication of a victim's claims has serious consequences. First, complainants may give up on seeking justice. Sometimes they give up because the processes are too burdensome for the limited available remedies. One gay male victim of harassment LAS-ELC represented declined to continue pursuing his harassment claim because the employer had very limited resources and the invasion of his privacy during litigation was too burdensome. Sometimes low-wage workers have no choice but to drop their claims and move on with their lives. If a worker has been fired or quit due to the harassment or violence in the workplace, the resulting loss of income may force him or her to move, sometimes even leaving the United States, in order to seek other means of financial support. This relocation can make it difficult for a complainant to continue to pursue his or her claims. Additionally, any witnesses to the events may have been lost in the delay. Particularly in agricultural work, where workers move season to season, one's coworkers one day may be states away a year later. Even when workers stay in the same location, other difficulties arise because of the slow-paced administrative process. Their memories may fade, and employers may go out of business or declare bankruptcy as the administrative investigation takes place.⁹²

Statute of limitations issues also complicate low-wage workers' pursuit of remedies for workplace violence or harassment. Victims of sexual harassment in the workplace must exhaust their administrative remedies for claims under Title VII and FEHA.⁹³ However, the tort claims based on the same conduct have a short, two-year statute of limitations.⁹⁴ Therefore, while the EEOC or the DFEH conducts their investigation over a number of years, the victim's ability to pursue tort claims in court can expire.⁹⁵

91. Maura Dolan, *Cutbacks in California Court System Produce Long Lines, Short Tempers*, L.A. TIMES, May 10, 2014, <http://www.latimes.com/local/la-me-court-cuts-20140511-story.html#page=1>.

92. Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 418 (1995) (noting that, for many state agencies and the EEOC, "sluggish processing destroys any real possibility of [anti-discrimination] enforcement. By the time the agency investigates the claim, the employer who is responsible for the violation may be out of business; evidence may have been lost; and memories may have faded.")

93. *Shikles v. Sprint/United Mgmt. Co.*, 426 F.3d 1304, 1317 (10th Cir. 2005); CAL. GOV'T CODE § 12960 (2006).

94. CAL. CIV. PROC. CODE § 335.1 (2003).

95. Claimants who want to file tort claims and who are nearing the two-year statute of limitations can request an immediate right to sue letter and file in court. CAL. GOV'T CODE § 12965(b) (2012); 29 C.F.R. § 1601.28 (2012).

G. Inefficacy of Do-It-Yourself Remedies

Theoretically, workers can remedy complaints of sexual harassment through internal, company sexual harassment investigations and through the DFEH or EEOC complaint processes. In actuality, however, neither of these processes typically produces successful results for workers.

1. Internal Investigations

California law requires employers to remedy complaints of sexual harassment.⁹⁶ In fact, the FEHA establishes a separate cause of action against employers who “fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.”⁹⁷ When an employer is made aware of the harassing acts of its employee, has the opportunity to investigate, and continues to retain the employee, such retention constitutes ratification of the employee conduct.⁹⁸ In fact, where an employer knew of an employee’s poor conduct and failed to redress the wrong, keeping the wrongdoer employed may make the employer liable for punitive damages.⁹⁹

Despite these requirements, employer investigations of sexual harassment regularly fail to provide relief to the victim.¹⁰⁰ This failure to investigate was evident in Betty’s case. She reported incidents of sexual harassment to managers and human resources representatives, but at no time did the employer take effective remedial measures. Despite having

96. Although federal law does not contain a separate cause of action for failing to remedy sexual harassment, employers should investigate and remedy claims of harassment to avoid liability. *Yamaguchi v. U.S. Dept. of Air Force*, 109 F.3d 1475, 1483 (9th Cir. 1997) (“An employer is liable for a co-worker’s sexual harassment only if, after the employer learns of the alleged conduct, he fails to take adequate remedial measures.”); *Ellison v. Brady*, 924 F.2d 872, 881-82 (9th Cir. 1991) (“Employers send the wrong message to potential harassers when they do not discipline employees for sexual harassment [and] . . . have a duty to ‘express[] strong disapproval’ of sexual harassment, and to ‘develop[] appropriate sanctions.’”) (quoting 29 C.F.R. § 1604.11(f) (2014)); *see also Fuller v. City of Oakland*, 47 F.3d 1522, 1529 (9th Cir. 1995). Failing to “take even the mildest form of disciplinary action” renders the employer’s remedial action insufficient to shield the employer from liability under Title VII. *Ellison*, 924 F.2d at 882. The adequacy of the employer’s response depends on the seriousness of the sexual harassment. *Id.*

97. CAL. GOV’T CODE § 12940(k) (2014); *Northrop Grumman Corp. v. Workers’ Comp. Appeals Bd.*, 127 Cal. Rptr. 2d 285, 295-96 (Cal. Ct. App. 2002); *Del Mar Avionics, F.E.H.C. Dec. 85-19, *23* (Fair Emp’t & Hous. Comm’n Nov. 4 1985) (precedential decision).

98. *Sandoval v. S. Cal. Enters., Inc.*, 219 P.2d 928, 935-36 (Cal. Ct. App. 1950).

99. *McChristian v. Popkin*, 171 P.2d 85, 90 (Cal. Ct. App. 1946).

100. The Ninth Circuit Court of Appeals has held that the “fact of the investigation alone is not enough” and that “[a]n investigation that is rigged to reach a pre-determined conclusion or otherwise conducted in bad faith will not satisfy the employer’s remedial obligation.” *Swenson v. Potter*, 271 F.3d 1184, 1193 (9th Cir. 2001) (internal quotation marks omitted); *see also Christine Masters, Something for Everyone: How to Address the Interests of the Employer, the Complainant and the Accused in an Investigation of Sexual Harassment Allegations*, Presentation at the California Employment Lawyers Association Annual Conference (Sep. 24 & 25, 1998).

issued final warnings to both of Betty's harassers because of her complaints regarding their ongoing sexual harassment, the company failed to follow through and terminate either man when his behavior continued. Instead, the company promoted one of the perpetrators.

Moreover, most federal courts have determined that "as long as an employer has a sexual harassment policy and a grievance procedure, it has met its obligation to prevent harassment (regardless of whether the policy and procedure have been effective at that or any other workplace)."¹⁰¹ Equal Rights Advocates calls this type of compliance with sexual harassment laws "File Cabinet Compliance," and argue that the law should encourage employers to take steps to address the actual causes of such harassment.¹⁰²

Internal company dynamics also impact the objectiveness of an internal investigation. When it is a supervisor's word against a low-wage worker's, the company is much more likely to believe the supervisor.¹⁰³ It is a common employer strategy to keep the harassers on staff pending the investigation, arguing that there is no evidence of harassment and, as such, the harasser may continue to work for the employer. Additionally, victims of sexual harassment may find their work performance impacted by the consequences of sexual harassment.¹⁰⁴ In Christina's case, once she complained of harassment, the supervisor/harasser told her that her work was "too slow," even though the pace of her work had not changed. This result may be especially likely if the employee is forced to interact with the harassing supervisor.¹⁰⁵ If a victim's work performance suffers because of the harassment's psychological and physical impacts, an employer may be

101. EQUAL RIGHTS ADVOCATES, MOVING WOMEN FORWARD: ON THE 50TH ANNIVERSARY OF TITLE VII OF THE CIVIL RIGHTS ACT A THREE-PART SERIES: PART ONE: SEXUAL HARASSMENT STILL EXACTING A HEFTY TOLL 9 (2014), available at <http://www.equalrights.org/wp-content/uploads/2014/10/Women-Forward-Sexual-Harassment-.pdf>.

102. *Id.* Equal Rights Advocates suggest employers keep records of harassment complaints, implement post-complaint procedures, periodically assess and revise anti-harassment policies and procedures, and evaluate supervisors' compliance with the policies and procedures. *Id.*

103. See Carla Marinucci, *Despair Drove Her to Come Forward*, S.F. EXAMINER, Jan. 10, 1993, at A11 (detailing the story of a Mexican immigrant woman who mused that "[i]f you're a peasant girl, and it's your word against [a doctor's], you don't have a chance.>").

104. One study of the effects of workplace sexual harassment found "evidence that sexual harassment, even at relatively low frequencies, exerts a significant negative impact on women's psychological well-being and, particularly, job attitudes and work behaviors." Louise F. Fitzgerald et al., *Job-Related and Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence From Two Organizations*, 82 J. APPLIED PSYCHOL. 401, 412 (1997).

105. *Id.* at 413 ("Most respondents indicated that they coped with their experience by trying to avoid the person who bothered them; however, at the same time, most noted that the nature of their work role required ongoing interaction with this person. This has important implications for day-to-day organizational functioning; if women who experience sexual harassment are required to interact with the offender to carry out their work, not only are the chances for further incidents increased, but their avoidance strategies are likely to have a negative impact on their (and the organization's) functioning.")

less likely to believe the worker's claims of sexual harassment, especially if he or she has a difficult employment history. Further compounding these issues, language barriers can make it difficult for the worker to communicate his or her complaint to his or her employer.¹⁰⁶

2. DFEH Complaint Process

The DFEH complaint process is, sadly, also fraught with difficulties.¹⁰⁷ In December 2013, the California Senate Office of Oversight and Outcomes issued its scathing report on the effectiveness of the DFEH, titled "Department of Fair Employment and Housing: Underfunding and Misguided Policies Compromise Civil Rights Mission."¹⁰⁸ The report highlighted several specific procedural issues with the administration of DFEH that limit the ability of low-wage workers to remedy claims of harassment in the workplace.¹⁰⁹ The report explained that when a new online system of filing and tracking DFEH complaints went into effect, it significantly increased investigator caseload.¹¹⁰ This report stated that the result was a lack of thorough investigations.¹¹¹

106. Note that employers may have a limited defense in sexual harassment complaints if an employee unreasonably fails to utilize employer complaint procedures. Under Title VII, in the absence of a tangible employment action (such as a termination), an employer can assert a defense to liability for supervisor sexual harassment if the employer proves (1) that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (2) "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *see also* *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). In California, employers have a limited defense to damages (not liability) if "the employee more likely than not could have prevented [damages] with reasonable effort and without undue risk, expense, or humiliation, by taking advantage of the employer's internal complaint procedures appropriately designed to prevent and eliminate sexual harassment." *State Dep't of Health Servs. v. Superior Court (McGinnis)*, 79 P.3d 556, 565 (Cal. 2003). Under *McGinnis*, the employer has the burden of establishing all of the following elements: "(1) the employer took reasonable steps to prevent and correct workplace sexual harassment; (2) the employee unreasonably failed to use the preventive and corrective measures that the employer provided; and (3) reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered." *Id.*

107. *See* Blasi & Doherty, *supra* note 89, at 62 ("We found sufficient reasons to be concerned that our antidiscrimination system may itself discriminate, perhaps against people in the very groups that it was designed to protect.")

108. Press Release, Cal. Senate Office of Oversight & Outcomes, *Underfunded Civil Rights Agency Fails to Enforce Discrimination Law, Bows to Secret Policy on Public Workers* (December 18, 2013), available at <http://sooo.senate.ca.gov/sites/sooo.senate.ca.gov/files/DFEH%20report%20press%20release.doc-FINAL.pdf>.

109. DOROTHY KORBER & JOHN ADKISSON, CAL. SENATE OFFICE OF OVERSIGHT & OUTCOMES, DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING: UNDERFUNDING AND MISGUIDED POLICIES COMPROMISE CIVIL RIGHTS MISSION 7-8 (2013), available at <http://sooo.senate.ca.gov/sites/sooo.senate.ca.gov/files/fair%20employment%20and%20housing%20final.pdf>.

110. *Id.* at 44.

111. *Id.* at 43-44.

Furthermore, the DFEH's online system required, until recently, that complainants draft their own complaints online.¹¹² Previously, low-wage workers could call, meet in person with the DFEH to explain the claim of discrimination, or submit a written pre-complaint questionnaire and the DFEH would prepare the charge. This process gave the DFEH the opportunity to screen out claims that were outside the jurisdiction of the department, such as wage-and-hour disputes, so that an investigator did not spend time on unnecessary cases. Low-wage workers often do not have the writing skill necessary to craft accurate and concise charges that properly explain the basis of the discriminatory allegations. Consequently, investigators were spending time clarifying the basic language of the charges before they could actually take any real steps toward investigating the underlying legal claims. The DFEH has now changed its charge-filing process again. However, the new system can result in filing delays as it can take weeks for investigators to process the charges.

There are many technical issues with the DFEH online complaint process, but certainly the issue posing the greatest barrier to low-wage workers has been the requirement that complaints must ordinarily be filed online and in English.¹¹³ Additionally, in order to complete the complaint, a charging party would have to have an email address. Non-English speakers and those without computer access had to endeavor to reach the DFEH by phone for assistance in filing their complaints. The Senate Report found that the online filing requirement and the full-scale elimination of in-person filings is "detrimental to many with low education levels and those with inadequate English skills."¹¹⁴

Moreover, the DFEH investigation process does not involve face-to-face interviews, thereby removing the human element of the harassment charges.¹¹⁵ Without this direct interaction with low-wage workers, investigators are more likely to believe an employer who often has better communication abilities and retains counsel, than a low-wage worker seeking to pursue justice on his or her own. Although workers are still required to exhaust the administrative process and file charges with the DFEH and the EEOC, they are unlikely to have their claims properly investigated and adjudicated.

IV. STRATEGIES FOR LOW-WAGE WORKER ADVOCATES

Because of the barriers low-wage workers face when attempting to remedy cases of workplace harassment and violence, legal aid organizations

112. *Id.* at 45.

113. *Id.*

114. *Id.* at 43.

115. *Id.* at 5.

like LAS-ELC and CRLA have adopted various strategies to identify and remedy cases of workplace harassment and violence.

A. Outreach and Education

Nonprofit organizations focus more heavily on community outreach and education than do private counsel. Because of the geographic and cultural barriers discussed above, low-wage workers often work in isolated communities without community resources to remedy cases of discrimination. Consequently, outreach efforts must target even the most remote workplace locations. CRLA has over twenty offices spread out through rural California. Since 1993, CRLA has also operated the Indigenous Farmworker Project, which provides information on workers' rights to indigenous communities. CRLA also runs "Proyecto Poderoso" (Project Powerful), which focuses on LGBT rights. Through Proyecto Poderoso, CRLA is dedicated to improving LGBT rights in rural California by improving access to justice and expanding civic engagement opportunities for LGBT communities. CRLA's innovative approach addresses the intersection of race, ethnicity, and poverty within the advancement of rural LGBT rights. Proyecto Poderoso works with families, students, school districts, District Attorney's offices, housing authorities, and local nonprofit organizations to achieve its goals.

In addition, CRLA runs the Farmworker Sexual Violence Technical Assistance Project, which provides one-on-one legal consultations to farmworkers and strategies for victims of sexual violence. The Project takes a holistic approach to representation of farmworkers and understands the workers' cultural sensitivities. The project also addresses the safety of workers living in labor camps.

LAS-ELC operates Project SURVIVE, which works to ensure that people who experience domestic violence or sexual assault can keep their jobs while seeking safety, medical, or legal help. Project SURVIVE has a helpline where workers can have their questions answered regarding their workplace rights. LAS-ELC also provides representation to Project SURVIVE callers when possible.

CRLA and LAS-ELC frequently present to community groups of low-wage workers about employment rights, including those involving workplace violence and harassment. The outreach presentations vary in how they are handled. Most recently, CRLA has begun conducting workplace violence presentations where the audience is presented with different scenarios involving workplace violence and are allowed to discuss in a group different options in resolving the scenarios.

B. Representation

In order to overcome some of the barriers within the administrative process and litigation that low-wage workers face, legal aid organizations and some private attorneys have begun to represent workers in pre-litigation and administrative processes. If LAS-ELC is contacted by a worker who has experienced sexual harassment in the workplace and is still employed, LAS-ELC initially will often seek to work with the employer, providing information about its legal obligations to investigate and remedy the harassment. If the company fails to properly investigate and remedy the harassment, LAS-ELC typically will help the worker file his or her complaint with the proper administrative agency.

Representing low-wage workers in the administrative processes is often frustrating for both the representative and the claimant. LAS-ELC and CRLA must spend time speaking with administrative agencies and confirming that the investigators have a proper understanding of the legal issues and the facts of the case. While there is no easy solution for navigating the administrative agencies, LAS-ELC and CRLA have attempted to develop strong relationships with agency heads, in order to seek assistance when consultants fail to properly investigate a case. Additionally, LAS-ELC and CRLA often send multiple, non-required explanations of case facts and legal analysis, to assist the consultants in properly identifying the violations of law.

Advocates for low-wage workers can also take advantage of mediation options at both the DFEH and the EEOC to reach a resolution in discrimination cases. Because of the expense of litigation, sometimes the administrative mediation process can help resolve claims more quickly and inexpensively.¹¹⁶ However, just as often, employers are not willing to mediate these disputes.¹¹⁷ We can only speculate that employers are not willing to mediate because the additional time and money expended on cases through litigation may be a barrier for workers to continue forward with the case, thus preventing a judgment against the employer.

As discussed above, it can be difficult for low-wage workers to find counsel to represent them in litigating their harassment cases. Legal aid organizations often co-counsel with other organizations and/or private attorneys to provide representation to as many victims as possible. For example, in Cristina's case, CRLA co-counseled with LAS-ELC to pool the

116. Carrie A. Bond, *Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace* 65 FORDHAM L. REV. 2489, 2518 (1997) ("Timely mediation can save over 80% of the court and counsel costs of litigation. Mediation is the least expensive and the least disruptive dispute resolution method available.") (internal citations omitted).

117. See, e.g., Martin Miller, *What's New at the EEOC*, 22 TENN. EMP. L. LETTER 2 (2007) ("The EEOC reported that 80[%] of employees who file charges with the agency are willing to mediate, while only 28[%] of employers are willing to mediate.").

resources necessary to investigate and litigate her case. Private attorneys, both on the defense side and the plaintiff side, may be willing to co-counsel cases dealing with workplace violence, especially where it is clear that their representation serves a social justice interest. Unfortunately, defense attorneys often are unwilling to litigate plaintiff-side employment issues, due either to a conflict of interest with a client, or the anticipated negative reaction of clients or future clients, who may resent a pro-worker victory given their typical role in employment litigation as defendant-employer.¹¹⁸

Another area where special strategies and preparation are required when representing low-wage workers is depositions of individuals with limited-English proficiency. Working with interpreters takes patience and practice. Additionally, “many interpreters are simply not qualified to interpret in a deposition setting.”¹¹⁹ Whenever possible, LAS-ELC uses a time-tested interpreter or brings along its own interpreter to check the accuracy of the interpreter present. If needed, attorneys should object to the interpretation and in some cases, stop the deposition, until an appropriate interpreter is provided.

C. Undocumented Clients

Employee advocates should aggressively use litigation protections for their undocumented clients. Attorneys can seek a protective order to limit the scope of discovery if the employer seeks irrelevant immigration-related information.¹²⁰ If during the course of a deposition an attorney asks for immigration-related information, plaintiff’s counsel can stop the deposition to contact the judge in order to seek a protective order.¹²¹ Especially if a judge is not available, plaintiff’s counsel can also instruct the client not to answer and state the objections on the record and defendant’s counsel can file a motion to compel. If the plaintiff’s employer has retaliated by informing ICE of the worker’s immigration status, plaintiff’s counsel should intervene to seek assistance of an immigration attorney with experience in detention and removal proceedings.¹²² In a recent immigration case, the judge granted a motion to suppress evidence and

118. See Esther F. Lardent, *Positional Conflicts in the Pro Bono Context: Ethical Considerations and Market Forces*, 67 *FORDHAM L. REV.* 2279 (1999).

119. Elizabeth Kristen, A.B.A. Sec. of Lab. & Emp’t L., Ethics and Professional Responsibility Committee, Panel Paper, *How to Professionally and Ethically Deal with “Rambo” like Tactics in Discovery, Opposing Rambo Discovery Tactics*, 6 (March 25, 2011), available at http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/ethics/60_kristen_authcheckdam.pdf.

120. *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064 (9th Cir. 2004); Tamayo, *supra* note 65, at 24.

121. *FED. R. CIV. P.* 30.

122. Tamayo, *supra* note 65, at 31.

ended removal proceedings when it came to light that the immigration raid was a result of the employer's retaliatory conduct.¹²³

If an attorney suspects in any way that the employer or the perpetrator might contact immigration authorities to report the victim, special logistical precautions should be taken whenever the plaintiff is scheduled to appear at a given location. Because immigration authorities have appeared at plaintiffs' depositions, some representatives now carefully check deposition locations prior to the arrival of the undocumented client. Moreover, travelling to and from depositions with the client may protect the client from ICE. The same precautions should be taken with any undocumented witnesses that may be assisting with the case.

Attorneys can also help secure legal immigration status for victims of workplace harassment and violence. A T visa can be issued to victims of human trafficking when the recipient individual is assisting in the investigation or prosecution of the perpetrator of the trafficking.¹²⁴ A U visa can be issued to an undocumented worker if he or she "has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity" or "has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official."¹²⁵ Crimes that qualify as "criminal activity" under the U visa statute include rape, torture, trafficking, domestic violence, sexual assault, abusive sexual contact, stalking, false imprisonment, felonious assault, witness tampering and obstruction of justice.¹²⁶ U visa holders can be granted work authorization and may apply for Legal Permanent Residence after three years.¹²⁷ Although these visas are available, it can be difficult to get law enforcement agencies to request that the visa be issued.¹²⁸ Attorneys should also be prepared to work with certifying agencies about what their role is in the U visa process—which is to certify that the worker is a victim of a qualifying crime and that he or she cooperated with law enforcement—not to determine whether the person is eligible for or "deserving" of a U visa.¹²⁹

123. *In re Herrera-Priego*, U.S. D.O.J. E.O.I.R. July 10, 2003 (Lamb, Immigration J.), available at <http://www.lexisnexis.com/practiceareas/immigration/pdfs/web428.pdf>.

124. 8 U.S.C. §1101(a)(15)(T) (2014).

125. 8 U.S.C. §1101(a)(15)(U) (2014).

126. *Id.*

127. *Id.*

128. Dina Francesca Haynes, *Good Intentions Are Not Enough: Four Recommendations for Implementing the Trafficking Victims Protection Act*, 6 U. ST. THOMAS L.J. 77, 85 (2008) (observing that in 2007, only 729 individuals received T visas, although the Department of Justice estimated that 50,000 people were trafficked that year, and concluding that this disparity "tend[s] to suggest that more victims exist and could be found if law enforcement listened with an open mind when victims or their advocates approach law enforcement").

129. LAS-ELC and CRLA have seen that some law enforcement agents are hesitant about providing U visa certification, since they may think workplace violations are less "deserving" than other forms of violence.

Unfortunately, there is no requirement that a certifying agency must issue a certification; the certification remains discretionary.¹³⁰ Despite the fact that Ana endured crimes that qualified her for a U visa and she complied with the investigation, the EEOC took five years to issue a U visa certification.

D. Protecting Victims and Monitoring Workplace Harassment and Violence

In seeking to prevent new cases of harassment and in settling current cases, attorneys can require that employers provide training to other employees and supervisors regarding harassment. Under California law, large employers are required to conduct sexual harassment trainings for supervisory employees, but often fail to provide accurate information.¹³¹ Advocacy groups can support employers by providing trainings that come from a pro-worker, pro-victim standpoint.

Additionally, to protect against the stigma that victims face, attorneys can file complaints using a pseudonym, like Jane Doe. In the Ninth Circuit, parties may proceed using pseudonyms in “the ‘unusual case’ when nondisclosure of the party’s identity ‘is necessary . . . to protect a person from harassment, injury, ridicule or personal embarrassment.’”¹³² Under the Ninth Circuit test, many cases of worker harassment and violence would qualify to proceed anonymously.¹³³

130. DEP’T OF FAIR EMP’T & HOUS., ENFORCEMENT DIVISION DIRECTIVE NO. 317 (2014), available at <http://www.dfeh.ca.gov/res/docs/publications/directives/DFEH-Directive317.pdf>; EUNICE HYUNHYE CHO, NAT’L EMP’T L. PROJECT, U VISAS FOR VICTIMS OF CRIME IN THE WORKPLACE: A PRACTICE MANUAL 3 (2014), available at <http://www.nelp.org/page/-/Justice/2014/U-Visas-for-Victims-of-Workplace-Crime-Practice-Manual-NELP.pdf?nocdn=1>.

131. CAL. GOV’T CODE § 12950.1 (2013) (“The training and education required by this section shall include information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment and the remedies available to victims of sexual harassment in employment. The training and education shall also include practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation, and shall be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation.”)

132. *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1067-68 (9th Cir. 2000) (quoting *United States v. Doe*, 655 F.2d 920, 922 n.1 (9th Cir.1981)).

133. *See Doe*, 655 F.2d at 922 (“Where it is necessary, however, to protect a person from harassment, injury, ridicule or personal embarrassment, courts have permitted the use of pseudonyms.”); Benjamin P. Edwards, *When Fear Rules in Law’s Place: Pseudonymous Litigation As A Response to Systematic Intimidation*, 20 VA. J. SOC. POL’Y & L. 437, 446 (2013) (“[C]ourts have protected plaintiff privacy when so-called matters of ‘utmost intimacy’ will be discussed. Though the term lacks a precise definition, it encompasses a wide variety of private matters. Courts have protected the identities of rape survivors, homosexual plaintiffs, transgender plaintiffs, plaintiffs with stigmatizing diseases, and plaintiffs with mental illnesses on grounds of utmost intimacy.”); *see also* Jayne S. Ressler, *Privacy, Plaintiffs, and Pseudonyms: The Anonymous Doe Plaintiff in the Information Age*, 53 U. KAN. L. REV. 195, 242 (2004). For relevant decisions beyond the Ninth Circuit, *see* Nancy L. Abell et al., *Circuit By Circuit Review Of Selected Sexual Harassment Issues*, 2 A.L.I.-A.B.A. CURRENT DEVS. IN EMP. L. 609 (Aug. 1995).

To achieve long-lasting and broad-based protections for low-wage workers, attorneys can advocate for legislative changes that further support workers who report harassment and violence in the workplace. In 2013, worker advocates in California had a variety of successes in enacting pro-worker legislation, including SB 666, which strengthens the retaliation laws for immigration-related threats, and SB 263, which prohibits employers from demanding new immigration documents, implementing e-verify, or threatening to call immigration authorities after workers have exercised protected labor rights. Moreover, SB 400 was enacted which provides additional workplace protections for survivors of domestic violence, sexual assault and stalking.

V. OPPORTUNITIES FOR EFFECTING PROGRESS

There is no easy solution to stopping workplace violence and harassment. However, there are ways that worker advocates can move forward and attempt to help victims who are faced with violent situations.

Although the process of raising awareness about sexual assault and other violent acts in the workplace has begun, advocates still have a long way to go. Low-wage workers and their advocates can find support by raising awareness not only in agricultural communities, but also throughout the state and the country. Allies in the health and human services field, immigration groups, and religious organizations can help raise awareness to a wide audience.

Awareness-raising campaigns will help victims come forward, and will also help focus advocacy efforts on harassment prevention. The more educated the workforce is, the less likely it is that a perpetrator will think that he or she can get away with workplace violence and harassment without detection.

Awareness campaigns will need to cross cultural barriers and be provided in many different languages.¹³⁴ Moreover, administrative agencies need to increase access for non-English speakers. Worker advocates and legislators should also push for administrative agencies to more frequently and quickly issue U and T visas to qualified workers.

There is some debate among worker advocates as to whether efforts should be focused on improving the investigative process of government agencies or whether resources should be redirected to litigation and private enforcement by nonprofits and private attorneys. Although requiring administrative exhaustion through the DFEH or the EEOC allows the

134. Immigration experiences vary based not only on country of origin, but on race, ethnicity, and skin color. See MOVEMENT ADVANCED PROJECT ET AL., A BROKEN BARGAIN FOR LGBT WORKERS OF COLOR 37 (2013), available at <http://www.lgbtmap.org/file/a-broken-bargain-for-lgbt-workers-of-color.pdf>.

government to track the number and the type of discrimination claims being reported, it does little to show the merits of such complaints. As a result, if resources currently being expended on DFEH investigations were redirected to advocacy nonprofits, perhaps low-wage workers would find justice on a more regular basis and without such substantial delays.

Some advocates propose a victims' compensation fund to both financially support the cost of seeking justice and to ensure that financial compensation is available to victims even when the perpetrator does not have sufficient resources for recompense. This fund could be supported with government fees collected through the issuance of business licenses. Alternatively, the state or federal government could require that employers carry harassment and violence-in-the-workplace insurance, which would cover claims brought by their employees.

Finally, there are many steps that supportive employers may take to protect themselves while protecting their employees. In order to overcome barriers to employment for undocumented workers and people of color, employers should consider eliminating or reducing criminal background checks, endorsing internal non-discrimination policies (including for LGBT workers), championing diversity in the workplace, and targeting social and media outlets catering to marginalized communities when recruiting new hires.¹³⁵

CONCLUSION

Low-wage workers who face workplace violence and harassment confront many barriers to obtaining justice. They have experienced in the workplace conditions that no one should have to endure and many do so alone and without justice. But these brave workers who do come forward inspire us every day to continue to fight to make the system easier to access and more just in resolution. The more attention we bring to the stories of Ana, Christina, Rosa and others who have fought back against their perpetrators, the greater hope we have to enlist additional help to represent these workers and prevent future violence and harassment in the workplace.

135. *Id.* at 39-40. For more information on reducing criminal background checks, see NAT'L EMP'T L. PROJECT, BAN THE BOX (2014), available at <http://www.nelp.org/page/-/SCLP/Ban-the-Box.Current.pdf?nocdn=1>. For more information on internal non-discrimination policies, see HUM. RIGHTS CAMPAIGN, WORKPLACE DISCRIMINATION LAWS AND POLICIES, <http://www.hrc.org/resources/entry/Workplace-Discrimination-Policies-Laws-and-Legislation> (last visited Nov. 3, 2014).

DAVID E. FELLER MEMORIAL LABOR LAW LECTURE

April 9, 2014

A New Labor Movement for a New Working Class: Unions, Worker Centers, and Immigrants

Kent Wong[†]

My beginnings with the labor movement were right here at UC Berkeley. I worked as a student boycott organizer for the United Farm Workers of America (UFW) under the leadership of Cesar Chavez. A movie on the life of Cesar Chavez was recently released that is both inspiring and powerful.¹ Although there are some historic inaccuracies, including insufficient recognition of the Filipino farmworkers, overall the movie is a celebration of the farmworker movement and immigrant worker organizing in California.

Many of the organizing strategies pioneered by the UFW are still relevant today: their embrace of the philosophy of nonviolence; labor, community, and student partnerships; and alignment with progressive

[†] Kent Wong is director of the UCLA Center for Labor Research and Education, where he teaches labor studies and Asian American studies. Kent regularly addresses labor, community, civil rights, university, and student conferences throughout the country. He writes extensively on labor issues and has published books on the labor movement, immigrant worker organizing, popular education, and the Dream Act movement. Kent Wong attended UC Berkeley as an undergraduate and graduated from the People's College of Law. Wong was the first staff attorney for the Asian Pacific American Legal Center of Southern California (now Asian Americans Advancing Justice). He later served as staff attorney for SEIU in Los Angeles. Wong was the founding president of the Asian Pacific American Labor Alliance, the first national labor organization for Asian American workers within the AFL-CIO. He was also the founding president of the United Association for Labor Education, an organization representing union and university-based labor educators. He is currently a vice president with the American Federation of Teachers. This piece was prepared as an annual lecture in honor of David E. Feller and has been slightly edited for publication.

1. CESAR CHAVEZ (Pantelion Films & Participant Media 2014).

religious leaders to bring a moral dimension to the crusade. The UFW forged a vision of social justice unionism that extended beyond just fighting for better wages to fighting for a cause, for human dignity and justice. The UFW was able to reach out and recruit thousands of students all over the country who saw this campaign as a calling and were recruited to work for five dollars a week to become boycott organizers.

I have had the privilege of working with many labor leaders who got their start with the United Farm Workers of America. I wrote a book² about my good friend Miguel Contreras, who was the former leader of the Los Angeles County Federation of Labor. Miguel came from a family of farmworkers in the Central Valley of California. They lived in Dinuba, California, and at the age of nineteen, he and his family were summoned by a foreman in front of their modest house. The foreman fired Miguel and his whole family, and explained, “You are good workers, but we can’t have any more ‘Chavistas’ here.”

Miguel was recruited by Dolores Huerta to join the grape boycott, and he was sent to Toronto, Canada, paid five dollars a week, and provided free room and board at a Jesuit center. At the time that he signed up to go to Toronto, he did not realize he was going to another country. He had never been outside of California, he had never been on a plane, and yet he accepted the challenge. For two years, he built a boycott movement in Toronto, aligned labor and community organizations, and generated international support for the boycott. I was in Toronto last year to meet with the Central Labor Council, and they still remember Miguel. They recall the time that he spent in Toronto organizing the grape boycott and convincing labor unions, religious leaders, community organizations, and student groups to support the campaign.

My work with the United Farm Workers encouraged me to pursue a career as a labor attorney. I became a staff attorney for the Service Employees International Union (SEIU) back in the late 1980s, a time of tremendous transformation in the labor movement in Los Angeles. Our union had launched the “Justice for Janitors” campaign and a homecare organizing drive.³ There were many people in our union who were convinced that these campaigns were doomed to failure. How are we going to organize janitors? The workers were undocumented, worked in small teams at night with five, ten, fifteen workers per shift, and the turnover was high. The dominant view embraced by the majority of unions in the country was that immigrant workers could not be organized. Most unions

2. KENT WONG & MICHAEL VIOLA, *MIGUEL CONTRERAS: LEGACY OF A LABOR LEADER* (2009).

3. SERVICE EMPLOYEES INTERNATIONAL UNION, *JUSTICE FOR JANITORS, A Look Back and a Look Forward: 24 Years of Organizing Janitors*, <http://www.seiu.org/a/justice-for-janitors/justice-for-janitors-20-years-of-organizing.php> (last visited January 14, 2015).

believed that because of their immigration status, their fear of deportation, and their lack of knowledge about labor rights, immigrant workers would not join unions. But the janitors proved them wrong.

On June 15, 1990, during a peaceful rally of janitors in Century City, Los Angeles, the Los Angeles Police Department brutally beat and arrested the janitors.⁴ Dozens were sent to the hospital, and one woman suffered a miscarriage as a result of the beating at the hands of the police.⁵ This violent incident occurred before the union had won a single contract and before the union had been recognized. The organizers worried that the workers would be intimidated but in fact, the opposite occurred. This unprovoked attack only strengthened the janitors' resolve to fight back.

In many ways, June 15, 1990 was a turning point in the campaign that successfully reorganized the janitorial industry in Los Angeles. Not only did union density grow by leaps and bounds but more importantly, it demonstrated the power of immigrant worker organizing. The campaign proved that when unions develop creative organizing strategies backed by resources, immigrant workers could be organized.

Another breakthrough campaign was won in 1999 by the Los Angeles homecare workers. Again, many in our own union thought this campaign was a waste of time. There were tens of thousands of low-wage women workers, women of color and immigrants, each working in separate homes scattered throughout Los Angeles County. How could the union possibly organize them?

The organizing method utilized was a grassroots, community-based approach. Organizers went door to door to identify the homecare workers in their neighborhoods and organized small house meetings of three to five homecare workers. Long before formal union recognition, the campaign operated as if they were a union, including political mobilization actions. In 1999 after over a decade-long fight led by low-wage women of color, 74,000 homecare workers were successfully organized—the single largest union victory in the country in decades.⁶ Today, there are 250,000 homecare workers who are covered by union contracts in the state of California.⁷

4. Roger Waldinger, et al., *Helots No More: A Case Study of the Justice for Janitors Campaign in Los Angeles*, in *ORGANIZING TO WIN* 102 (Kate Bronfenbrenner et al., eds., 1998).

5. *Id.*

6. Peggie R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 N.C. L. REV. 45, 73-74.

7. Jon Ortiz, *California Unions Have Big Stake in Supreme Court Dues Ruling*, THE STATE WORKER, THE SACRAMENTO BEE (Jun. 30, 2014, 8:00 PM), <http://www.sacbee.com/news/politics-government/the-state-worker/article2602613.html>; Kate Thomas, *Judge Orders State to Halt Wage Cut for California Home Care Workers*, SEIU BLOG (Jun. 25, 2009, 10:03 PM), <http://www.seiu.org/2009/06/judge-orders-state-to-halt-wage-cut-for-california-home-care-workers.php>.

These campaigns reflect the potential of future organizing, and especially immigrant worker organizing, within the country. For more than twenty years, I've been the director of the UCLA Labor Center. Much of our work has been focused on reaching out to low-wage workers, to workers of color, and to immigrant workers, and finding creative ways to forge new alliances, new coalitions, and new opportunities to envision a new labor movement for the new working class.

The American labor movement is in deep crisis. Union density is down from a high of about 35% in the 1950s to a low of 11.3% today, with only 6.7% unionization in the private sector.⁸ There have been concerted, organized, fierce attacks on unions throughout the United States. In Wisconsin, the governor rolled back fifty years of collective bargaining rights for public sector workers.⁹ Michigan has enacted "right-to-work" legislation.¹⁰ After an intense multi-year campaign in Tennessee, the union election at a major auto factory ended in defeat.¹¹

There have been fundamental changes in the US workforce. There are more part-time, temporary, and contingent workers than ever before.¹² The workforce is much more transitional. It is very unusual for workers to stay on the same job for twenty or thirty years, as we saw in generations past. There has been a massive shift from an industrial economy to an information and service-based economy. This is bad news for unions because historically it has been the industrial sectors that have had the strongest union presence, in industries such as auto, steel, rubber, aerospace and shipbuilding. The parts of the economy that are growing—high-tech, finance, the service sector, and fast food—have historically been nonunion jobs. The workforce is also changing to include more women, more people of color, and more immigrant workers.¹³

8. News Release, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *Union Members 2013*, USDL-14-0095 (Jan. 24, 2014), available at <http://www.bls.gov/news.release/pdf/union2.pdf>; Steven Greenhouse, *Union Membership in U.S. Fell to a 70-Year Low Last Year*, N.Y. Times, January 21, 2011, <http://www.nytimes.com/2011/01/22/business/22union.html> (noting that the unionization rate peaked in the 1950s at 35%).

9. Paul M. Secunda, *The Wisconsin Public-Sector Labor Dispute of 2011*, 27 ABA J. LAB. & EMP. L. 293, 293-94 (2012); Jason Stein et al., *Walker Signs Budget Bill, Legal Challenges Mount*, JOURNAL SENTINEL (Mar. 11, 2011), <http://www.jsonline.com/news/statepolitics/117798133.html>.

10. Elizabeth Hartfield, *Michigan Governor Signs Right to Work Bill Into Law*, ABC NEWS (Dec. 11, 2012), <http://abcnews.go.com/Politics/michigan-governor-signs-work-bill-law/story?id=17934332>.

11. Lydia DePillis, *Auto Union Loses Historic Election at Volkswagen Plant in Tennessee*, WONKBLOG, WASHINGTON POST (February 14, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/02/14/united-auto-workers-lose-historic-election-at-chattanooga-volkswagen-plant/>.

12. See U.S. GOV'T ACCOUNTABILITY OFFICE, EMPLOYMENT ARRANGEMENTS: IMPROVED OUTREACH COULD HELP ENSURE PROPER WORKER CLASSIFICATION 11 (2006), available at <http://www.gao.gov/assets/260/250806.pdf>.

13. See U.S. DEP'T OF LABOR, FUTUREWORK: TRENDS AND CHALLENGES FOR WORK IN THE 21ST CENTURY – EXECUTIVE SUMMARY 2, 11-12 (1999), available at <http://www.dol.gov/dol/aboutdol/history/herman/reports/futurework/execsum.pdf>.

The decline of the American labor movement is not a concern for union members alone; it is a concern for all workers. The decline in union density has resulted in growing economic inequality and growing corporate power, especially in politics. The recent Supreme Court decision in the *Citizens United* case¹⁴ has dealt a huge blow to campaign finance reform and subverted democratic principles. The result has been a massive infusion of independently financed corporate campaigns into the electoral process.

The challenge of building a new labor movement for a new working class is compelling, immediate, and addresses the very survival of the labor movement. The work of the Los Angeles labor movement represents hope for the future. Los Angeles unions have embraced immigrant workers, developed labor-community alliances, and organized beyond the bread-and-butter issues at the workplace to a broader vision of social justice that reaches all workers regardless of whether they are in a union or not.

Miguel Contreras played an historic role in changing the direction of the American labor movement, but it was not without a fight. Many union leaders resisted the idea that a farmworker, a person of color, could be the leader of the second largest labor council in the country. I remember working with Miguel when the national AFL-CIO convention came to Los Angeles in 1999. Miguel was the head of the Los Angeles labor movement,¹⁵ and he wanted to use the convention to make a statement, to showcase the organizing work of the Los Angeles labor movement, and to challenge the national leadership of the labor movement to embrace a change agenda.

Miguel led five hundred recently organized workers in Los Angeles, including janitorial, homecare, hotel, factory, and construction workers, on a march through the convention floor.¹⁶ The five hundred immigrant workers, women workers, and workers of color, carrying colorful banners and posters, marching, and chanting, were a sharp contrast to the predominantly older, male, white convention delegates.

At the same AFL-CIO convention, Miguel helped to orchestrate a debate on the AFL-CIO's national immigration policy. The hotel worker, service employee, and farmworker unions led the demand for the AFL-CIO to reverse its anti-immigrant policies and to embrace immigrant workers. This debate resulted in a major change of immigration policy within the AFL-CIO. The following year, the AFL-CIO announced a new policy

14. *Citizens United v. Federal Election Comm'n*, 588 U.S. 310 (2010).

15. At the time, Contreras headed the Los Angeles County Federation of Labor. Victor Narro, *AFL-CIO Convention: 'A Historic Opening in the Labor Movement,'* AFL-CIO 2013 CONVENTION (Oct. 18, 2013) <http://www.aflcio.org/About/Exec-Council/Conventions/2013/AFL-CIO-Now-Convention-2013/%28post%29/99661>.

16. *Id.*

supporting legalization and a pathway to citizenship for millions of undocumented workers in the country.

In 2000, Miguel Contreras organized a town hall meeting to celebrate the AFL-CIO's change in policy.¹⁷ The event was held at the downtown Los Angeles Memorial Sports Arena, with a sixteen-thousand-person capacity. Twenty thousand people attended, including thousands of workers who could not get inside the overcrowded stadium and instead staged a spontaneous march in solidarity around the arena. Immigrant workers were ecstatic that the American labor movement was siding with them, supporting their right to live and work in this country. This policy change was a major turning point for the American labor movement and their attitude toward immigrant workers.

In 2006, there were massive May Day demonstrations all over the United States. This was the largest May Day demonstration in US history, even bigger than in the 1930s during the height of the Great Depression.¹⁸ In Los Angeles, there were two separate May Day marches, each with a half-million people. The afternoon march began from MacArthur Park, and a sea of humanity filled the four-and-a-half-mile route along Wilshire Boulevard. María Elena Durazo, the leader of the Los Angeles County Federation of Labor, emceed the rally at the end of the march.

May Day 2006 was a reflection of the incredible energy and power of the immigrant worker movement in this country. The irony, however, is that the largest International Workers Day demonstration in US history was not led by the US labor movement but by immigrant workers themselves. In May Day demonstrations throughout the country, many unions were missing in action, a sign that some union leaders had not embraced the call to organize immigrant workers.

Los Angeles is at the cutting edge in immigrant worker organizing. Some of the most dynamic union organizing campaigns in the country are being led by immigrant workers in Los Angeles. And the organizing extends beyond the traditional boundaries of the formal US union structure to include a dynamic worker center movement. Last year, the UCLA Labor Center offered a six-month community scholars' class to conduct research on the growing role and impact of worker centers.

The worker center movement engages many workers who are explicitly excluded from coverage under the National Labor Relations Act (NLRA), including domestic workers, agricultural workers, workers in the informal sector, and workers who are wrongfully classified as independent

17. *Id.*

18. Democracy Now!, *Over 1.5 Million March for Immigrant Rights in One of Largest Days of Protest in U.S. History*, DEMOCRACY NOW! (May 2, 2006), available at http://www.democracynow.org/2006/5/2/over_1_5_million_march_for.

contractors.¹⁹ When Congress enacted the NLRA, there was a deliberate decision to exclude protection for certain groups of workers, especially workers of color and women, including African American agricultural workers from the South, Latino farmworkers from the Southwest, and domestic workers throughout the country.²⁰ Other workers have been miscategorized as independent contractors, including domestic workers, cabdrivers, truck drivers, and some service and construction workers.

The worker center movement grew in large part because of the need for workers to join together to fight for fair wages and working conditions, for immigrant rights, and for mutual aid and support. These worker centers in many ways mirror the early origins of the American labor movement, where workers came together for mutual benefit within certain trades and crafts and in specific communities.

For example, the National Day Laborer Organizing Network (NDLON) has done extraordinary work in building day labor centers in cities across the country to fight for the rights of day laborers, advocate for immigrant rights, and stop deportations.²¹ Day laborers have been on the forefront of many civil and human rights campaigns in the country. The Restaurant Opportunities Center United (ROC-UNITED), which has chapters across the country, has been a powerful advocate for the rights of restaurant and food workers.²² ROC-UNITED has worked to expose sweatshop conditions in the industry and to draw stronger links with workers throughout the food production chain. The National Taxi Worker Alliance has partnered with the labor movement to organize unions and establish independent worker centers to support cabdrivers.²³ In Los Angeles, the Pilipino Workers Center (PWC) worked with a statewide coalition to win landmark legislation around the Domestic Workers Bill of Rights in the state of California.²⁴ The Koreatown Immigrant Workers Advocates (KIWA) are forging alliances between Korean and Latino immigrant workers in Los Angeles.²⁵

The UCLA Labor Center is particularly proud of our work to support the car wash workers of Los Angeles. There are ten thousand car wash workers in the Los Angeles area. The car wash industry has been notorious

19. See 25 U.S.C. § 152(3) (2012).

20. Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 96-97 (2011).

21. NATIONAL DAY LABORER ORGANIZING NETWORK, <http://www.ndlon.org/en/> (last visited Jan. 15, 2014).

22. RESTAURANT OPPORTUNITIES CENTER UNITED, <http://rocunited.org/> (last visited Jan. 15, 2015).

23. NATIONAL TAXI WORKERS ALLIANCE, <https://nytwa.org/> (last visited Jan. 15, 2015).

24. PILIPINO WORKERS CENTER, <http://pwsc.org/> (last visited Jan. 15, 2015).

25. KOREATOWN IMMIGRANT WORKERS ALLIANCE, kiwa.org (last visited Jan. 15, 2015).

for horrendous workplace abuse: wage theft, blatant violations of the minimum wage, denial of breaks, and abysmal health and safety conditions with injuries from toxic chemicals and unsafe heavy machinery. Students enrolled in classes taught by the UCLA Labor Center conducted path-breaking research and prepared reports that were instrumental in advancing state legislation to strengthen regulation of the car wash industry.²⁶ This research was also crucial in the launch of an organizing campaign by the AFL-CIO and the United Steel Workers of America. Former UCLA students have been hired as key organizers for this campaign.

In the last two years, twenty-six car washes have been successfully unionized in Los Angeles County,²⁷ the first unions in the car wash industry in the country. Now there are car wash organizing campaigns in Chicago and New York. The car wash campaign has had a major impact in the immigrant community and in promoting a collective identity for car wash workers. In union gatherings throughout Los Angeles, when the car wash workers are introduced, people stand up and cheer. The car wash workers are now part of the movement for rights, respect, and dignity.

Last year in September 2013, Los Angeles hosted the AFL-CIO national convention for the first time since 1999 when the debate on immigration was launched. In 1999, the National Day Labor Organizing Network organized a solidarity contingent to support the AFL-CIO convention in Los Angeles. When they arrived with their banners and their signs, a group of convention delegates surrounded them and physically pushed them out of the convention hall, chanting, “scab, scab, scab.” At that time, it was not uncommon for union leaders to call immigration authorities to report day laborers seeking work on the street corner.

The AFL-CIO convention in 2013 was a completely different environment. The AFL-CIO gave a human rights award to the International Domestic Workers Alliance worker center. Groups of domestic workers from many parts of the developing world and the United States, mostly women of color, marched onto the convention floor singing. The *Jornaleros del Norte*, the band from the National Day Labor Organizing network, performed. Bhairavi Desai, the executive director of the National Taxi Workers Alliance, an independent worker center, was elected to the AFL-CIO executive council. She is the only Asian on the executive council and its first representative of a worker center.

26. See, e.g., Matt Parker, *Wage, Labor, and Safety Conditions in the California Carwash Industry* (2006) (unpublished paper, UCLA Department of Urban Planning, on file with UCLA Labor Center).

27. Interview with Justin McBride, Campaign Director, CLEAN Carwash Campaign, in L.A., Cal. (Feb. 26, 2015).

Tefere Gebre, an immigrant from Ethiopia, was elected as the executive vice president.²⁸ He is the first immigrant to be a top officer at the AFL-CIO.²⁹ Gebre was formerly the leader of the Orange County Labor Federation where he transformed the labor movement in one of the most conservative parts of California and built powerful labor-community alliances.³⁰ He expanded the vision of the Orange County Labor Federation to include worker centers and the community. The UCLA Labor Center is working together with the Orange County Labor Federation to build a new labor and community center at UC Irvine to provide research and educational support to growing labor-community alliances in Orange County.

The change in the AFL-CIO convention from 1999 to 2013 was extraordinary. The leaders of the American labor movement now embrace labor-community alliances, partnerships between unions and worker centers, the fight for immigrant rights and a path to citizenship for eleven million undocumented immigrants, and an end to the deportations. In many ways, this change has grown out of crisis. The labor movement needs to stop focusing the vast majority of its resources on a shrinking segment of the US workforce and instead represent the interests of the new US working class. This should be a time for experimentation, new ideas, and new campaigns that will be marked by both success and failure. New approaches sometimes don't work. But risk-taking and experimentation is necessary to transform and change the American labor movement.

This brings me full circle to my own beginnings in the labor movement with the United Farm Workers of America. The UFW experienced both success and failure but ultimately pioneered immigrant worker organizing and many innovative ideas that are now embraced by the mainstream American labor movement. In the words of the United Farm Workers of America, *Sí Se Puede!*

28. Dave Jamieson, *At AFL-CIO, An Immigrant's Rise to Vice President Reflects New Opportunities, New Strategies*, HUFFPOST POLITICS (November 11, 2013, 1:33 pm EST), http://www.huffingtonpost.com/2013/11/11/teferre-gebre-afl-cio_n_4254990.html.

29. *Id.*

30. *Id.*

