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# Mistakes in the Making: The Failure of U.S. Immigration Reform to Protect the Labor Rights of Undocumented Workers

by Lilah S. Rosenblum

IN RECENT YEARS IMMIGRATION REFORM has been a key political issue in the United States. Both the American public and policymakers have recognized that the U.S. immigration system has failed and that there is an urgent need for comprehensive reform.<sup>1</sup> In the past year in particular there has been extensive legislative debate on this issue.<sup>2</sup> For example, the U.S. House of Representatives passed an immigration reform bill in December 2005 that focused on border security and increased enforcement of immigration laws. At the time of this writing, the Senate is debating its own version of an immigration reform bill that combines increased enforcement with a guest worker program. Because of the divisiveness and complexity of the debate in the Senate and the stark differences between the House and Senate versions, it is unlikely the bill will be passed into law this year.<sup>3</sup>

Although there is clearly a need for comprehensive immigration reform, neither the House nor Senate proposals effectively addresses the failure of current U.S. law to protect the labor rights of undocumented workers in the United States. This article begins by describing the current state of U.S. law vis-à-vis the labor rights of undocumented workers and the ways in which it violates international human rights norms and undermines the enforcement of domestic law. It then examines current legislative proposals and outlines how they fail to bring the United States into compliance with international law and fall short of securing effective domestic policy. Finally, this article concludes by proposing steps the U.S. Congress could take to better protect the labor rights of undocumented workers.

## CURRENT STATE OF U.S. LAW REGARDING THE LABOR RIGHTS OF UNDOCUMENTED WORKERS

IN MARCH 2002 THE U.S. Supreme Court decided *Hoffman Plastics v. National Labor Relations Board*<sup>4</sup> and held that undocumented workers are not entitled to the same remedies as documented workers for violations of the National Labor Relations Act (NLRA), which protects a worker's right to organize, join, or form a labor union, engage in concerted activities, and bargain collectively.<sup>5</sup> The Court found that undocumented workers are not entitled to backpay<sup>6</sup> when their rights are violated under the NLRA because they are not legally available to work due to their unlawful presence in the United States. To be eligible for backpay, which is calculated from the date of an illegal firing until the date of a court judgment, an individual must be available to work during that time. Backpay is one of two substantive remedies available to individuals under the NLRA.<sup>7</sup> The other substantive NLRA remedy, reinstatement, is also unavailable to undocumented workers for similar reasons.<sup>8</sup> By foreclosing any substantive remedy under the NLRA, the Court effectively removed the rights protected by the Act for undocumented workers. Although various U.S. govern-

ment bodies have claimed that undocumented workers continue to be covered by the NLRA despite the *Hoffman* ruling,<sup>9</sup> such claims ring hollow considering there are no effective mechanisms to enforce these rights.

Although the *Hoffman* decision was limited to the availability of backpay for undocumented workers in the NLRA context, many employers have sought to expand *Hoffman* by claiming that they are not liable to undocumented employees under other workplace laws,



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A flag-clad protester at an April 10, 2006 immigration protest in Washington, D.C.

such as anti-discrimination, wage and hour, and workers' compensation statutes.<sup>10</sup> Many courts have rejected such claims, especially where payment is sought for work already performed or where compensatory or punitive damages are available.<sup>11</sup> Some courts, however, have expanded *Hoffman's* scope to other employment laws.<sup>12</sup> In employment statutes with backpay and reinstatement remedies, including Title VII of the Civil Rights Act of 1964 and the Family and Medical Leave Act, courts may be more likely to apply *Hoffman* and deny such remedies to undocumented workers.<sup>13</sup> Other courts have avoided the application of *Hoffman* altogether by granting protective orders to plaintiffs to shield their immigration status from discovery during litigation.<sup>14</sup> If a plaintiff's immigration status is unknown, *Hoffman* cannot preclude recovery of backpay.<sup>15</sup> Still other courts have granted a protective order solely for the liability portion of the case and allowed for disclosure of immigration status during the remedies stage, which often results in

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a finding of liability but provides no substantive remedy. In cases where courts have not protected the immigration status of plaintiffs at all, the employment claims have often failed.<sup>16</sup> Ultimately, U.S. courts are split on the scope of *Hoffman*, which has resulted in the limitation or denial of recovery for undocumented workers when their labor rights are violated. Until there is definitive clarification by the federal government on this issue, undocumented workers will remain susceptible to workplace abuses.

#### CURRENT U.S. LAW VIOLATES INTERNATIONAL HUMAN RIGHTS LAW

IN *HOFFMAN*, THE SUPREME COURT denied undocumented workers equal protection of U.S. labor law by precluding any substantive remedy to enforce their labor rights. Although the United States is not required to admit migrants into the country and is under no obligation to offer employment to those who enter illegally, it is required under international law to treat all workers the same once they are employed in the United States.<sup>17</sup>

As a signatory to various human rights conventions and by operation of customary international law the United States is legally obligated to uphold a variety of international norms, including equal protection and non-discrimination.<sup>18</sup> Article 26 of the

protection, are *jus cogens* norms, i.e., principles of international law so fundamental that no state may opt out by way of treaty or passage of domestic law.<sup>21</sup> Article 2 of the Universal Declaration provides, “*Everyone* is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, *national* or social *origin*, property, birth or *other status*” (emphasis added).<sup>22</sup> Article 7 provides, “All are equal before the law and are entitled without discrimination to equal protection of the law.”<sup>23</sup>

In addition, the United States has legal obligations under the American Declaration of the Rights and Duties of Man (American Declaration) by virtue of its membership in the Organization of American States (OAS). For OAS Member States that have not ratified the American Convention on Human Rights, such as the United States, the Inter-American Court has found that the American Declaration serves as a source of international obligations related to the OAS Charter, which was ratified by the U.S. in 1951.<sup>24</sup> Article II of the American Declaration requires equal protection of the law and provides that “[a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or *any other factor*” (emphasis added).<sup>25</sup>

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“The Inter-American Court found in OC-18 that a state must take affirmative steps to ensure that private employers do not discriminate against undocumented workers in the application of workplace statutes. Not only is the U.S. government failing to take affirmative steps to ensure equal protection of labor and employment statutes, but it has, through its highest court, planted the seed for such disparate treatment.”

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International Covenant on Civil and Political Rights (ICCPR), which the U.S. government ratified in 1992, provides:

*All persons* are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, *national or social origin*, property, birth, or *other status* (emphasis added).<sup>19</sup>

Despite U.S. declarations that the ICCPR is not “self-executing,”<sup>20</sup> it is nevertheless binding.

Further, the Inter-American Court on Human Rights (Inter-American Court) has held that Articles 2 and 7 of the Universal Declaration on Human Rights (Universal Declaration), which embody the international norms of non-discrimination and equal

The plain language of each of these international instruments provides for equal protection and non-discrimination for “all” persons, including undocumented immigrants. There is no qualifying language in these documents that excludes persons due to their immigration status. Article 26 of the ICCPR and Article 2 of the Universal Declaration enumerate “national origin”<sup>26</sup> and “other status” as classes entitled to equal protection, and the American Declaration enumerates “any other factor” as protected by Article II. Undocumented workers are entitled to equal protection because of their non-U.S. national origin and their immigration status.

The Inter-American Court articulated the applicability of the international human rights principles of equal protection and non-discrimination vis-à-vis undocumented workers in an advisory opinion issued in September 2003. In response to a request by the Mexican government, the Inter-American Court specifically addressed the legal status and rights of undocumented migrant workers in Advisory Opinion OC-18. The Inter-American Court found that the “migratory status of a person can never be a justifi-

cation for depriving him of the enjoyment and exercise of his human rights, including those related to employment.”<sup>27</sup> It noted that states must provide equal protection of labor laws to undocumented and documented workers alike and must take affirmative steps to ensure that private employers do not discriminate against undocumented workers in the application of workplace protections to comply with human rights law. Although the United States is not bound by OC-18 because it is an advisory opinion and because the United States does not recognize the jurisdiction of the Inter-American Court, OC-18 provides important guidance on the international obligations of states with regard to the treatment of undocumented migrant workers within their borders.

In addition to OC-18, other non-binding sources of international law<sup>28</sup> specifically address the labor rights of migrant workers, such as International Labour Organization (ILO) Convention



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Marchers protesting for immigration reform in Washington, D.C.

No. 97, the Convention Concerning Migration for Employment; ILO Convention No. 143, the Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers; the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; and provisions of the American Convention on Human Rights and the International Covenant on Economic, Social and Cultural Rights, among others. These international instruments can also serve as useful guidance for the United States' international obligations with respect to the treatment of undocumented workers.<sup>29</sup>

Since the *Hoffman* decision, the United States has disregarded the principles set forth in OC-18 and has contravened international conventions and customary international law by continuing to deny undocumented workers equal protection of U.S. labor law due to their immigration status. It has also ignored non-binding treaties that reflect international human rights norms. The Inter-American Court found in OC-18 that a state must take affirmative steps to ensure that private employers do not discriminate against undocumented workers in the application of workplace statutes. Not only is the U.S. government failing to take affirmative steps to ensure equal protection of labor and employment statutes, but it has, through its highest court, planted the seed for such disparate treatment.

## CURRENT U.S. LAW UNDERMINES ENFORCEMENT OF U.S. IMMIGRATION AND LABOR LAWS

THE *HOFFMAN* DECISION and the lower court cases that have expanded its scope undermine the enforcement of U.S. immigration and labor laws. In *Hoffman* the majority reasoned that awarding backpay to undocumented immigrants for work not performed would undermine the policy objectives underlying the Immigration Reform and Control Act, which sought to reduce illegal migration by prohibiting the employment of undocumented immigrants. The Court found that awarding backpay to undocumented workers for labor law violations would reward illegal activity and encourage future illegal migration, thereby thwarting immigration enforcement. Such reasoning is flawed, however, because it does not take into account the macroeconomic implications of denying undocumented workers backpay. By failing to provide equal remedies to undocumented workers, these workers are more easily exploited and become cheaper to employ, which in turn creates an incentive for employers to recruit and hire undocumented workers.

In terms of U.S. labor law enforcement, *Hoffman* and subsequent lower court cases impede effective enforcement of a range of workplace statutes and lower overall labor standards. Despite numerous government agencies' policy guidelines and decisions reiterating that undocumented workers continue to be protected by employment statutes,<sup>30</sup> many employers feel emboldened to violate the rights of undocumented workers because there is little economic deterrent to discourage them from doing so. *Hoffman* has thus effectively created two classes of workers: documented workers who are entitled to the full protection of U.S. labor laws and undocumented workers who are no longer fully protected.

Because undocumented workers do not have full protection of the law and because they are in a particularly vulnerable position in relation to their employers due to their irregular immigration status, they are often willing to work for less pay and in less desirable working conditions. The availability of workers who will expect and demand less from their employers allows employers in turn to lower workplace labor standards for all employees. The resultant depression of wages, deterioration of work conditions, and obstacles to labor organizing harm both U.S. and foreign workers.

## CURRENT LEGISLATIVE PROPOSALS REGARDING IMMIGRATION REFORM

### PROPOSAL BY THE U.S. HOUSE OF REPRESENTATIVES: H.R. 4437

On December 16, 2005, the U.S. House of Representatives passed the Border Protection, Antiterrorism, and Illegal Immigration Control Act by a vote of 239-to-182. This bill focuses exclusively on immigration enforcement and border security and does not include any comprehensive immigration measures. Some of the most draconian provisions of this bill would make unlawful presence in the United States a federal crime, make unlawful entry into the country an aggravated felony, impose mandatory minimum sentences for immigration violations, give state and local law enforcement the authority to enforce federal immigration laws, require mandatory detention of all unlawful entrants apprehended at the border or at ports of entry, expand expedited removal, criminalize any individual or organization that provides social services

to undocumented immigrants, restrict judicial review of immigration decisions, and build a fence along the U.S.-Mexican border. The bill contains no provision that would improve the labor rights of undocumented workers, but rather seeks to criminalize and deport the estimated 12 million undocumented individuals who currently reside in the United States, as well as those who migrate in the future. On a practical level, mass deportations, criminal prosecutions, and detentions of millions of immigrants is not a feasible or desirable solution to the U.S. immigration problem.

Under such a statutory scheme, labor rights violations against undocumented workers would likely increase for two reasons. First, undocumented workers would become even more fearful of deportation and detention and would not report workplace abuses. Self-reporting, which is the principal mechanism for enforcing the majority of employment statutes, would be impeded if this proposal became law. Second, unscrupulous employers would likely seize on this heightened fear and become even more emboldened to violate workplace statutes and retaliate against employees who attempt to exercise their rights. The House's legislative proposal ignores the labor rights of undocumented workers and therefore perpetuates the incentives for employers to continue violating immigration and labor laws. It also threatens to force undocumented workers deeper into the shadows and makes it even less likely that they will report labor law violations. Ignoring the rights of undocumented workers feeds the demand for such workers, which spurs illegal immigration into the United States and undermines the enforcement of immigration laws. Any sensible immigration proposal cannot ignore other equally important domestic laws, such as U.S. labor laws, and must also take into account international human rights obligations.

### U.S. SENATE PROPOSAL

On March 27, 2006, the Senate Judiciary Committee voted 12-to-6 in favor of immigration reform legislation that combines enforcement and border security with a guest worker program. At the time of writing, this bill was being debated on the Senate floor and will be debated further in a House-Senate conference if the Senate passes the bill. Because the House and Senate versions of the bill are drastically different and therefore difficult to reconcile, it is unlikely that final immigration reform legislation will be passed into law this year.

The Senate Judiciary Committee's version incorporates some of the enforcement and border security measures included in the House bill but does not contain the most draconian and extreme measures included in the House bill. The guest worker program proposed by the Committee would allow undocumented individuals currently residing in the United States to remain in the country for up to six years if they pay a penalty, pay all back taxes, pass criminal background checks, understand or are studying English and U.S. civics and history, and are employed. After six years these workers would be required to return to their countries of origin unless they were in the process of establishing permanent residence. These immigrants would be eligible to apply for legal permanent residence (LPR) if they worked continuously for the six-year period, paid additional fines and fees, and met the other requirements of the bill. These immigrants would have to wait, however, until LPR applications already in the backlog were processed before they could establish legal permanent residence and would then have to wait an additional five years before they could apply for U.S. citizenship.

There would also be an earned legalization program for undocumented farmworkers. To be eligible, farmworkers would have to demonstrate that they had worked in agriculture for 150 days in the past two years. Eligible farmworkers would earn a "blue card" or temporary residence status and could then work toward a "green card" or legal permanent residence after working in agriculture for 150 days per year for three years or 100 days per year for five years. Farmworkers would also have to pay fines, fees, and any back taxes and pass criminal checks.

The Senate Judiciary Committee proposal would also allow up to 400,000 workers residing outside of the United States to obtain guest worker visas each year. These new guest workers would be allowed to fill low-skilled jobs in the United States if they demonstrated that they have secured such employment; paid fees; and met security, medical, and other conditions. After one year of work, they could apply for LPR status with employer sponsorship or they could apply on their own after four years. To adjust their status to lawful permanent residence they would be required to meet English language and U.S. civics learning standards.

The guest worker program includes workers' protections for visa holders. First, there is a visa portability feature that allows workers to maintain their visa status without being tied to a particular employer. Workers, however, would lose their visa status if they were unemployed for a period of 60 days or more. The visa portability feature is meant to protect foreign workers from abuse and exploitation by individual employers who might otherwise use immigration status as a means of controlling or coercing employees. Second, because guest workers could self-petition for LPR status after four years, they would not necessarily be beholden to their employers who would otherwise serve as their sponsors.<sup>31</sup> Third, the guest worker program would require that employers provide the same wages, benefits, rights, and working conditions as those granted to similarly employed U.S. workers. It would establish an administrative complaint mechanism to address violations of these requirements and increase funding for Department of Labor investigation and enforcement of these laws.

Although the Senate guest worker program provides labor protections to visa holders, it fails to acknowledge that undocumented workers will continue to reside in the United States after implementation of the program. Many currently undocumented individuals may not qualify for the guest worker visa or may not be able to afford the cost of obtaining a visa, which includes fines, fees, and back taxes. Because the presence of undocumented workers in the United States will likely continue in spite of the proposal, immigration reform legislation must protect the labor rights of undocumented workers as well. Otherwise the cycle of exploitation and false incentives that currently exists will continue to compromise the labor rights of undocumented workers, lower overall labor standards in the United States, and encourage future illegal migration. Any final immigration reform legislation must provide the full protection of U.S. labor laws to all workers within the United States, including undocumented workers, to avoid these counterproductive outcomes.

### RECOMMENDATIONS

THE MOST EFFECTIVE WAY to ensure that undocumented workers receive full protection of U.S. labor laws would be to include provisions in the immigration reform bill that directly address the *Hoffman* dilemma. Although the worker protection language in the Senate's version of the bill requires equal protection of all labor

laws for guest workers, it does not address the rights of undocumented workers. Language similar to the Senate's guest worker provision requiring equal treatment in wages, benefits, rights, and working conditions should be broadened to apply to all workers regardless of immigration status.

In the alternative, federal legislation should mirror state legislation passed by California in response to *Hoffman*.<sup>32</sup> Federal legislation should similarly state, "All protections, rights, and remedies available under federal law and relevant international obligations, except any reinstatement remedy prohibited by immigration law, are available to all individuals regardless of immigration status who are, or who have been, employed in this country." Such language would protect the labor rights of undocumented workers by ensuring that they have equal access to remedies under the law.

Federal legislation should also codify the current practice of issuing protective orders to protect the immigration status of complainants in labor law proceedings. Similar to California's bill, federal immigration legislation should state, "For purposes of enforcing federal labor and employment laws, a person's immigration status is irrelevant to the issue of liability, and in proceedings or dis-

covery undertaken to enforce those 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." Such language would allow undocumented workers to assert their workplace rights without fear of retaliation and deportation because their immigration status would be confidential in the adjudication of their employment law claims.

Including such language in an immigration reform bill would protect the labor rights of the millions of undocumented workers living and working in the United States. It would bring the United States into compliance with international human rights law, which requires equal protection of all workers regardless of immigration status. It would also improve labor conditions for all workers in the United States and remove the false incentives that currently exist for U.S. employers to violate domestic immigration and labor laws. Any legislative reform that fails to include such protective language for undocumented workers will perpetuate a failed U.S. immigration system, retard labor standards in the United States, and continue to violate international human rights law. *HRB*

## ENDNOTES: Mistakes in the Making

<sup>1</sup> According to a recent Pew Hispanic Center report, there are an estimated 12 million undocumented individuals residing in the United States, with approximately 500,000 new unauthorized migrants arriving each year. Pew Hispanic Center, "The Size and Characteristics of the Unauthorized Migrant Population in the U.S.," <http://pewhispanic.org/reports/report.php?ReportID=61> (Mar. 7, 2006).

<sup>2</sup> Although this article focuses on current U.S. law and attempts by policymakers to change the U.S. immigration system, it should be noted that the American public has played a key role in shaping the debate as well. In the weeks preceding and during the Senate's debate on immigration reform, immigrants, community-based organizations, churches, labor unions, and legal and social service organizations organized mass mobilizations across the country and high school students staged walkouts in favor of rational and humane immigration reform. These actions were covered extensively in the U.S. media.

<sup>3</sup> Even if immigration reform legislation is not passed into law this year, the various viewpoints represented in the congressional debate this year will likely re-emerge next year as Congress returns to this issue.

<sup>4</sup> *Hoffman Plastic Compounds v. NLRB*, 535 U.S.137 (2002).

<sup>5</sup> The National Labor Relations Act, 29 U.S.C. § 157 (2006), ensures employees rights to "self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and the right to refrain from any or all such activities."

<sup>6</sup> Backpay is pay for work that would have been performed if not for the illegal firing.

<sup>7</sup> The other remedies provided under the NLRA are a cease and desist order and a required workplace posting detailing the violation of the law.

<sup>8</sup> *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), made reinstatement of undocumented workers contingent upon lawful reentry into the United States. The remaining remedies available to undocumented workers under the NLRA are an order against the offending employer to cease and desist from violating the NLRA and an order requiring the employer to post a notice in the workplace regarding the violation. Neither of these remedies is likely to provide any benefit to an undocumented employee fired in retaliation for exercising his or her rights under the NLRA.

<sup>9</sup> A National Labor Relations Board (NLRB) Memorandum found that "all statutory employees, including undocumented workers, enjoy protections from unfair labor practices and the right to vote in NLRB elections without regard to their immigration status." NLRB Office of the General Counsel, Memorandum GC 02-06 (July 2002); *Hoffman*, 535 U.S.137, held that even without the remedies of reinstatement and backpay undocumented workers

are still covered under the NLRA.

<sup>10</sup> In *Galaviz-Zamora, et al. v. Brady Farms, Inc.*, 230 F.R.D. 499 (W.D. Mich. 2005), the defendants opposed the issuance of a protective order and argued that under *Hoffman* the plaintiffs' immigration status was relevant to the issues of damages and standing to sue, as well as class certification and credibility. In *Singh v. Jutla, et al.*, 214 F. Supp. 2d 1056 (N.D. Cal. 2002), the defendants sought a motion to dismiss a wage and hour claim and argued that *Hoffman* barred plaintiffs' claim.

<sup>11</sup> *Galaviz-Zamora, et al. v. Brady Farms, Inc.*, 230 F.R.D. 499 (W.D. Mich. 2005), found that immigration status was irrelevant to claims under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act and noted that "the damage and prejudice which would result to Plaintiffs' if discovery into their immigration status is permitted far outweighs whatever minimal legitimate value such material holds for defendants." *Flores v. Amigon*, 233 F. Supp. 2d 462, 463 (E.D.N.Y. 2002), found that *Hoffman* does not apply to circumstances where the plaintiffs have already performed the work for which unpaid wages are being sought. *Flores et al. v. Albertsons, Inc. et al*, 2002 U.S. Dist. LEXIS 6171 (C.D. Cal. 2002), held that *Hoffman* does not affect the right of undocumented workers to be paid for work actually performed and therefore the plaintiffs' immigration status was irrelevant in a Fair Labor Standards Act claim.

<sup>12</sup> *Sanchez v. Eagle Alloy Inc.*, 254 Mich. App. 651 (Mich. Ct. App. 2003), found that undocumented workers are covered by Michigan's workers' compensation law and are entitled to full medical benefits if injured on the job but that their right to wage-loss benefits ends at the time that the employer "discovers" they are unauthorized to work. *Rosa v. Partners in Progress, Inc.*, 152 N.H. 6 (N.H. 2005), held that an undocumented worker asserting a tort claim for a workplace injury could only recover lost wages at the wage level of his country of origin unless he could prove his employer knew about his irregular immigration status at the time of hiring.

<sup>13</sup> *Crespo v. Evergo Corp.*, 366 N.J. Super. 391 (App. Div. 2004), held that an undocumented worker suing for employment discrimination could not recover either economic or non-economic damages absent egregious circumstances such as sexual harassment. *Renteria, et al. v. Italia Foods, Inc., et al.*, 2003 U.S. Dist. LEXIS 14698 (N.D. Ill., Aug. 21, 2003), granted compensatory damages for a retaliatory discharge but denied backpay and front pay because "unlike the remedy of backpay or front pay, the remedy of compensatory damages does not assume the undocumented worker's continued (and illegal) employment by the employer." *Molina v. J.F.K. Tailor Corp. and Koo Kim*, 2004 U.S. Dist. LEXIS 7872 (S.D.N.Y. Apr. 30, 2004), however, found that *Hoffman* did not foreclose a grant of backpay for sexual harassment when the plaintiff's immigration status was not identified on the record.

<sup>14</sup> *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064 (9th Cir. 2004), upheld a pro-