

Justices Let Stand Ruling That Illegal Aliens Have Standing to Sue for Violations of FLSA

By Laura D. Francis

March 10 — The U.S. Supreme Court March 10 declined to review a federal appeals court decision that found undocumented workers have standing to sue and may recover wages owed under the Fair Labor Standards Act (*Jerusalem Cafe, LLC v. Lucas, U.S.*, No. 13-682, cert. denied 3/10/14).

The justices left intact a July 2013 decision by the U.S. Court of Appeals for the Eighth Circuit affirming an approximately \$284,000 jury verdict to six undocumented workers under the FLSA (721 F.3d 927, 20 WH Cases2d 1764, 2013 BL 199821 (2013)) (145 DLR AA-1, 7/29/13).

The appeals court determined that the FLSA's broad definitions of "employee" and "employer" include immigrants who are unauthorized to work and those who employ them.

The FLSA's text and legislative history indicate that the act's definition of employee covers the broadest possible range of workers, the court held.

Question of Whether Hoffman Applies

Petitioning for Supreme Court review, Kansas City, Mo.-based Jerusalem Cafe LLC and owners Farid Azzeh and Adel Alazzeh argued that the Eighth Circuit's decision directly contradicts both the language of the Immigration Reform and Control Act—enacted subsequent to the FLSA—and the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 169 LRRM 2769 (2002).

Although Hoffman involved undocumented workers' ability to recover under the National Labor Relations Act, the result is the same under the FLSA, the petitioners said—IRCA precludes the employment of undocumented immigrants, and so such workers lack standing to pursue wages they weren't lawfully entitled to in the first place.

But the respondents—six undocumented Jerusalem Cafe workers from Guatemala—argued in their brief opposing Supreme Court review that Hoffman was distinguishable because it involved an undocumented immigrant's attempt to recover pay for work he hadn't performed, but that would have been paid had he not been fired in violation of the NLRA.

The case didn't address undocumented immigrants' standing to sue for wages for work already performed, the respondents argued.

Instead, the respondents said, "[e]very federal court to have addressed the issue raised here has reached the same conclusion: Undocumented workers are entitled to proper compensation under the FLSA for work already performed."

Jury Awarded Damages to Workers

According to the petitioners' brief, the U.S. District Court for the Western District of Missouri initially granted the workers a motion in limine under which their immigration status wouldn't be mentioned, but that order was dissolved after one of the plaintiffs mentioned they were all "illegals," and Azzeh sought to testify that he had no payroll records because of the workers' undocumented status.

Despite the workers remaining open about their immigration status, a jury found in their favor in November 2011 and awarded them actual damages, liquidated damages for willful FLSA violations, legal fees and expenses.

Seeking judgment as a matter of law, the defendants argued that the workers lacked prudential standing to pursue their claims under the FLSA because IRCA precluded them from working in the first place, citing Hoffman. The district court denied the motion, and the defendants appealed to the Eighth Circuit. The Eighth Circuit affirmed, finding that, despite prohibiting the employment of undocumented immigrants, IRCA requires employers to abide by other federal labor and employment laws such as the FLSA.

The appeals court distinguished Hoffman as applying only to undocumented immigrants' ability to recover back pay for work not performed, whereas the FLSA lawsuit pertained to payment for work actually performed.

“Far from concluding the NLRA did not protect unauthorized aliens for work actually performed, the Hoffman court—after considering Congress's intervening enactment of the IRCA—reaffirmed its earlier holding in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883[, 116 LRRM 2857] (1984), that the NLRA applies to the actual employment of unauthorized aliens,” the Eighth Circuit said.

Petitioners: Hoffman Precludes Any Pay

This reading of Hoffman was incorrect, the petitioners argued. Rather, they said, the Hoffman court considered whether the undocumented worker in that case was entitled to any wages in light of IRCA's prohibition on employment of undocumented immigrants, and determined that it was “simply impermissible.”

Sure-Tan, the petitioners argued, “applied a straightforward framework to determine whether unauthorized aliens qualified for wage-paying protections of federal employment laws: if federal law did not prohibit their employment, they could qualify. Conversely, if federal law did prohibit their employment, as the IRCA does today, they could not qualify.”

IRCA directly answered Sure-Tan by prohibiting the employment of undocumented immigrants, the petitioners said.

Hoffman recognized this development, and said “to allow ‘an undocumented alien who has never been legally authorized to work in the United States’ to claim ‘wages that could not lawfully have been earned’ would ‘trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations.’” the petitioners argued.

Reasoning Applies to Other Federal Laws

The petitioners added that this reasoning isn't limited to the NLRA. For example, the Fourth Circuit in *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184, 77 FEP Cases 777 (4th Cir. 1988), said IRCA's prohibition on the employment of undocumented immigrants strips such workers of standing to pursue claims under Title VII of the 1964 Civil Rights Act.

Undocumented workers cannot come within the “zone of interests” Congress sought to protect under the FLSA because IRCA “absolutely prohibits such employment or the payment of such wages in the first place,” the petitioners argued. Furthermore, they said, it is “common” for later acts of Congress to remove the ability of some classes of litigants to sue under earlier enactments.

In addition, the petitioners argued that Hoffman wasn't, as the Eighth Circuit held, limited to undocumented immigrants' standing to pursue claims for work not performed. Rather, the decision precludes back pay for wages that couldn't have been earned lawfully in the first place.

“As to unauthorized aliens, the IRCA prohibits those wages from being paid in the first place. It matters not whether the claim for wages was brought under the NLRA, FLSA, Title VII, or any other federal employment statute,” the petitioners said.

DOL's Reasoning Flawed

Finally, the petitioners argued that the Eighth Circuit wrongfully relied on the Department of Labor's opinion that undocumented workers can recover under the FLSA, because it was based on the same reasoning the DOL put forth in arguing in Hoffman that undocumented workers can recover under the NLRA.

The DOL argued that undocumented workers must be able to recover under the FLSA in order to prevent employers from gaining an economic advantage by employing such workers, a position the Supreme Court rejected.

“And rightly so,” the petitioners said, because “ultimately the position makes no sense.”

Requiring the payment of minimum wage and overtime pay under the FLSA wouldn't do anything to make employment of undocumented workers more costly because “the unlawful ‘employers’ still would be paying less than for a lawful worker, as the illicit payments would be unrecorded and in cash, there would be no recordkeeping or tax-planning costs, and the ‘employers’ neither would withhold nor pay a share of FICA, Medicare, or state or federal income or unemployment taxes,” the petitioners said.

“Hiring and paying unauthorized aliens—now with judicial sanction of the otherwise black market—still would be far more lucrative than hiring a lawful worker. And, at the same time, it would necessitate the unpalatable result of the federal courts permitting (and enforcing) judicially that which Congress expressly has prohibited,” the petitioners argued.

Jonathan Sternberg of Kansas City, Mo., was counsel of record for the petitioners.

Respondents: Hoffman Distinguishable

“Contrary to the plain language of the FLSA and without citing a single case that supports their position, Defendants pound the table with the notion that this Court's decision in Hoffman supports their argument that undocumented immigrants are not protected by the FLSA,” the workers argued in their brief opposing Supreme Court review. “Defendants' argument rests on a misreading of Hoffman.”

The respondent workers said Hoffman left intact Sure-Tan's holding that undocumented immigrants are “employees” under the NLRA, but held that such workers aren't entitled to back pay for work they might have earned had they not been unlawfully fired.

“Here, in contrast, the plaintiffs were deprived of fair wages for work already completed,” they said.

As the Eleventh Circuit recently held in *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 20 WH Cases2d 564, 2013 BL 59594 (11th Cir. 2013) (46 DLR AA-1, 3/8/13), awarding back pay for work already performed by undocumented immigrants wouldn't create additional violations of immigration laws, the respondents said. Rather, the immigration violation already has occurred, and the back pay award doesn't condone or continue that violation—it merely ensures that an employer doesn't gain an advantage from the violation by failing to adhere to labor standards, they argued.

Every other federal court that has addressed the issue, as well as the DOL, has reached the same conclusion, the respondents said.

Egbuna Also Addressed Work Not Performed

In addition, they said Egbuna was distinguishable because it “has virtually nothing to do with the issue here.”

That case, the respondents said, involved an employee whose work authorization expired during his employment, and who applied again for a job after quitting. The employer initially offered him a position but rescinded it two days later, and the employee claimed that the rescission was unlawful retaliation for having testified in a co-worker's sexual harassment lawsuit.

The Fourth Circuit determined that, because IRCA establishes that undocumented workers can't be hired, the employee wasn't qualified for the job for which he applied, and thus couldn't make out a prima facie case under Title VII, the respondents said.

Like the employee in *Hoffman*, the employee in *Egbuna* sought compensatory damages for pay he would have earned had he been hired—not for work already performed, the respondents said.

FLSA, IRCA Complementary

Furthermore, the respondents argued, IRCA doesn't prohibit the payment of wages to undocumented immigrants. The statute addresses the employment relationship itself, and the FLSA complements IRCA by addressing wages for work performed by employees, undocumented or not, they said.

This reading of the two statutes makes sense, the respondents said, because “[i]f employers are required to pay undocumented workers according to the standards of the FLSA, rather than being permitted to pay whatever lower wages they wish to pay, and if those standards are enforced, the incentive to hire such workers is minimized.”

Not requiring such pay “would be to perpetuate a secondary labor market that undercuts wages and job opportunities for workers who must be paid minimum wage and overtime,” they said.

The respondents also argued that the petitioners aren't actually making a standing argument, but rather are making a “post-trial attempt to raise a new affirmative defense.” By not raising this nonjurisdictional defense until after trial, it was waived, they claimed.

Mark V. Dugan of Dugan Schlozman LLC in Overland Park, Kan., was counsel of record for the respondents.