FROM HOFFMAN PLASTIC TO THE AFTER-ACQUIRED EVIDENCE DOCTRINE: PROTECTING UNDOCUMENTED WORKERS’ RIGHTS UNDER FEDERAL ANTI-DISCRIMINATION STATUTES

KIREN DOSANJH ZUCKER*

I. INTRODUCTION

Despite the federal prohibition on their employment, approximately six million of the estimated seven million “unauthorized immigrants” are in the working labor force, typically earning low wages in undesirable jobs. While being offered coverage under statutory labor and employment rights, these “undocumented workers” are relegated to the shadow of workplace protections. The threat of employers’ retaliation looms large for undocumented workers: Adverse employment action, made more likely by the federal mandate to discharge workers who are “discovered” to be undocumented, could be coupled with reports to federal immigration authorities leading to possible deportation and criminal prosecution. Although its own exposure to liability for hiring the undocumented worker should cause a defendant employer to resist its retaliatory urge to report the claimant, the prevalence of undocumented workers in spite of the hiring prohibitions found in the Immigration Reform and Control Act (IRCA) appears to

* Kiren Dosanjh Zucker received her B.A. in political science magna cum laude from Syracuse University and her J.D. from the University of Michigan Law School. She is an assistant professor in the College of Business and Economics at California State University Northridge and a member of the State Bar of California.


3. See Rivera v. NIBCO, Inc., 364 F.3d 1057, 1064 (9th Cir. 2004) (“Many of these [undocumented] workers are willing to work for substandard wages in our economy’s most undesirable jobs.”); see also Elizabeth M. Dunne, Student Author, The Embarrassing Secret of Immigration Policy: Understanding Why Congress Should Enact an Enforcement Statute for Undocumented Workers, 49 Emory L.J. 623, 636 (2000) (discussing incentives for hiring undocumented workers—their willingness to work hard at undesirable jobs for less pay and their reluctance to complain regarding workplace conditions and other labor violations).


5. See Immigration Reform & Control Act 8 U.S.C. § 1324(a)(2) (compelling employers who unknowingly hire undocumented workers to discharge them once their status is discovered).

6. Rivera, 364 F.3d at 1064. The threat of retaliation facing undocumented workers is much greater than that confronting documented workers. The employer “will likely report them to the [Immigration and Naturalization Service] INS and they will be subjected to deportation proceedings or criminal prosecution.” Id; see Lori A. Nessel, Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform, 36 Harv. Civ. Rights-Civ. Libs. L. Rev. 345, 405 (2001) (suggesting the INS refuses to act upon information provided by employers about their own workers’ undocumented status due to the probability that the employer is attempting to undermine efforts to enforce labor or employment laws, while recognizing that this approach would still leave the undocumented workers vulnerable to, among other things, threats of deportation).

counterbalance this concurrent threat in the employer’s favor.

The undocumented worker who steps out from the shadow of protection to seek remedy for violation of their workplace rights will find that immigration policy limits the scope of their protections, as seen in Hoffman Plastic Compounds Inc. v. National Labor Relations Board. In addressing claims brought by undocumented workers under federal anti-discrimination statutes in the wake of Hoffman Plastic, the federal courts have generally limited that ruling’s reach to the narrow issue it addressed. The threat of retaliatory discharge remains, however, as employers use the discovery process in employment discrimination claims to “ascertain” the workers’ immigration status, asserting relevance not only under Hoffman Plastic but potentially under the after-acquired evidence doctrine as well.

After reviewing Hoffman Plastic and the judicial, legislative, and regulatory responses to it, this article turns to the after-acquired evidence doctrine and its potential impact on undocumented workers’ wrongful termination claims brought under federal anti-discrimination statutes, with particular emphasis on potential litigation strategies of both employer and undocumented worker such as those revealed in recent federal cases such as Rivera v. NIBCO.

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8. Sure-Tan Inc., 467 U.S. at 893. In this decision, which preceded the enactment of the Immigration Reform and Control Act (IRCA), the U.S. Supreme Court determined that while there was no conflict between the Immigration and Nationality Act (INA) and the NLRA, the backpay awards were improper given the workers’ inability to work legally in the U.S. during the relevant time period. The enactment of IRCA was later found not to affect Sure-Tan. See A.P.R.A. Fuel Oil Buyers Group, 134 F.3d 50, 55 (2d Cir. 1997).


10. 364 F.3d at 1057.