Representing Immigrant Workers in Sexual Harassment Cases

Developments and Challenges in Representing Undocumented Female Farm Workers in Sexual Harassment Cases

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We can all celebrate the fact that we have made substantial progress towards achieving gender equality in the U.S. during the last 100 years. However, we shouldn’t celebrate much, or for long, because eliminating gender inequality and its ugly first cousin, sexual harassment, remains a work in progress with major challenges ahead. No area better illustrates those challenges than the sexual mistreatment of undocumented immigrant women in the workplace. And many of the most egregious cases of sexual harassment involve undocumented female farm workers.

An article in Ms. Magazine in the summer of 2005 painted an agonizing portrait of the problem. The article centered on Olivia Tamayo, a California farm worker repeatedly raped by her supervisor as a condition of continued employment while working for a major agricultural enterprise in Fresno, California. "I endured it all without knowing that I could ask for help," she explained. "I didn’t even know there were laws or anything that

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1 Some of the ideas presented in this paper were first articulated by the author in a chapter in a recent book concerning representation of employees in sexual harassment cases. See David L. Kern, La Frontera Verde: The Green Frontier of Sexual Harassment Law in REPRESENTING EMPLOYEES IN SEXUAL HARASSMENT CASES, Aspatore Books (2012).

2 This paper does not attempt to comprehensively address all of the workplace rights and remedies of undocumented workers. For a truly excellent treatise that does, see: Workplace Rights and Remedies for Undocumented Workers: A Legal Treatise, Haeyoung Yoon, Tsedeye Gebreselassie, and Rebecca Smith (National Employment Law Project, January 2013).


4 Id.
would protect me. He took advantage because he knew I wasn’t going to say anything. It was a trauma that followed me everywhere.\textsuperscript{5}

When Ms. Tamayo did report the sexual assaults, her employer, Harris Farms, did not believe her and refused to help. “They knew he was an abuser, but they covered for him,” Tamayo told Ms. “I didn’t want anything more than to be protected. Honestly, I really thought the company was going to help me. When they didn’t, I felt betrayed.”\textsuperscript{6}

Fortunately, Ms. Tamayo found the help she needed from EEOC and the lawsuit filed on her behalf produced a jury verdict of nearly $1 million dollars in her favor\textsuperscript{7} which was upheld on appeal.\textsuperscript{8} When the farm worker community learned of the verdict,\textsuperscript{9} more cases of sexual harassment of female farm workers came in to EEOC’s offices. In Salinas, California, farm workers referred to one company’s field as the field de calzon, or “field of panties,” because it was common for supervisors to rape female laborers there. Similarly, female farm workers in Florida called the fields they worked in “The Green Motel.” And in Iowa, a group of immigrant women laboring in an egg-packing plant told their lawyer, “We thought it was normal in the United States that in order to keep your job, you had to have sex.”\textsuperscript{10}

The reported incidents of sexual harassment and rape of female farm workers are dramatic, but the true scope of the problem is far greater than the reported cases. Much sexual harassment and rape goes unreported by the undocumented who stand to lose their jobs and face detention and deportation by coming forward. As reported in 2005:

Every year an estimated 500,000 women\textsuperscript{11} toil in US fields, picking crops or packing fruits and vegetables. Many are subjected to sexual harassment or assault, usually from male supervisors who control whether they get or keep

\textsuperscript{5} Id.
\textsuperscript{6} Id.
\textsuperscript{7} Ms. Tamayo’s circumstances clearly met the prima facie elements of a sexual harassment claim. See, e.g., Bonds v. Leavitt, 629 F.3d 369, 385 (4th Cir. 2011) (listing the elements as follows: “a plaintiff must show that the offending conduct (1) was unwelcome, (2) was because of her sex, (3) was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment and (4) was imputable to her employer. . . . Such proof depends upon the totality of the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”).
\textsuperscript{9} The trial attorney for Ms. Tamayo, Linda Ordonio-Dixon, explained it this way: “I think the word is out in the fields that there is liability, and there is an agency that is going to push the issue. The real change out there will be employers saying, ‘Holy crap, this happened to Harris Farms; we better change what’s going on now.’” “The Green Motel”, p. 4.
\textsuperscript{10} Id., p. 2
\textsuperscript{11} In fact, this estimated number is probably low by more than 50 percent. Census data from 2008 put the number of undocumented female farm workers in the US at more than 1 million. See infra footnotes 31 thru 36 and accompanying text. That number has certainly increased in the last five years.
their jobs. While no reports show the extent of this exploitation – which ranges from rude comments and propositions, to groping and rape – those in close touch with farm workers say the problem is ubiquitous and may affect thousands of women.\(^{12}\)

**Power Imbalances at the Root of the Problem**

Although sexual harassment and assaults occur in all industries, female farm workers are “ten times more vulnerable than others,” to suffer such abuses.\(^{13}\) This is precisely because the balance of power between female farm workers and their male supervisors is so heavily askew, especially when the workers are undocumented immigrants.

Most female farm workers are non-English speaking immigrants, more than half of them are undocumented, and only a very small percentage are unionized.\(^{14}\) Many justifiably fear that if they complain about sexual harassment, they will lose their jobs and possibly even be deported.\(^{15}\) Women at the lowest end of the pay scale\(^ {16}\) with very few, if any, alternative employment opportunities, and who face possible deportation if they complain, confront a terrible dilemma when victimized by sexual harassment in the workplace. As Monica Ramirez, Director of Esperanza, (a Florida-based legal organization that works with female farm workers) says: “All these women want to do is make a living and provide for their family. They shouldn’t have to trade their dignity for the opportunity to have a better life.”\(^ {17}\) Yet, for too many of them, the only viable decision they can make is to remain silent and endure the harassment, or worse.

Such was the case for Maria Reyes who was repeatedly sexually harassed by her direct supervisor (including unwelcome sexual touching and a quid pro quo offer of higher pay for sexual favors) when she worked the grape orchards of California’s Salinas Valley. She did not complain because she was unaware of her legal rights.\(^ {18}\) Likewise, Maria Trevino-Sauceda, who had her breasts and buttocks fondled by supervisors when she worked as a farm worker, also did not know about her legal protections.\(^ {19}\) Hundreds, if not thousands, of female farm workers are suffering in silence as Reyes and Trevino-Sauceda did. What can be done to help them? The EEOC and organizations like Esperanza have led the way in answering that question.

\(^{13}\) Id., p. 2, quoting William R. Tamayo (Regional Attorney, EEOC San Francisco Regional Office).
\(^{14}\) Id., p. 2
\(^{15}\) Undocumented workers can, of course, be deported under the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in 8 U.S.C. § 1324a (1988)). The argument has even been advanced (and thankfully rejected) that undocumented workers should have no protections under Title VII since they are not legally employed in the first instance given that IRCA makes it illegal to hire them. See EEOC v. Tortilleria La Mejor, 758 F. Supp. 585 (E.D. Cal. 1991)(holding that undocumented workers are protected by Title VII). See also Katherine Bishop, “Judge Upholds Job Rights of Undocumented Aliens,” NY Times, Mar. 6, 1991, at A22.
\(^{16}\) According to the National Agricultural Worker’s Survey, nearly 60% of farm workers earn less than $12,500 and nearly 40% earn under $10,000 annually. http://www.doleta.gov/agworker/report9/toc.cfm.
\(^{17}\) “The Green Motel”, p. 2
\(^{18}\) Id., p. 3
\(^{19}\) Id., p. 3
EEOC’s Successes and Challenges –

In 1999, the EEOC achieved a $2 million settlement in California for a class of female farm workers who had been sexually harassed.20 The lead plaintiff, a single mother from El Salvador, alleged quid pro quo sexual harassment and retaliation for her termination after complaining about being forced to have sex as a condition for getting work during two harvest seasons.21 Publicity from the settlement resulted in EEOC receiving hundreds more sexual harassment and discrimination complaints from California farm workers which, in turn, resulted in more large settlements and verdicts for these victims.22 These successes then spread to other EEOC regions which also began reaching six- and seven-figure settlements for immigrant workers.23 The results achieved by EEOC are very impressive, doubly so when one considers that EEOC’s funding and staffing have not kept pace with steady increases in EEOC responsibilities over the last twenty years.

The Equal Employment Opportunity Act of 1972 dramatically increased EEOC responsibilities by lowering Title VII’s coverage threshold from twenty-five to fifteen employees and providing EEOC with authority to litigate in federal court. Subsequently, the Department of Labor transferred to EEOC the enforcement authority for the Equal Pay Act of 1963 (EPA) and the Age Discrimination in Employment Act of 1967 (ADEA). Around the same time, the former Civil Service Commission transferred to EEOC the responsibility for employment practices of the federal government. The scope of EEOC responsibility increased again when the Americans with Disabilities Act of 1990 (ADA)

21 Mr. Tamayo described Ms. Alfaro’s story as “consistent with the stories we heard from farm worker advocates about the commonly occurring sexual assaults of farm workers by male supervisors and co-workers.” 44 U.S.F.L Rev. 253, 261 (2009).
and Civil Rights Act of 1991 (CRA 1991) became law. ADA made EEOC responsible for a new realm of discrimination (disability) and CRA 1991 expanded EEOC jurisdiction to extraterritorial employees, and staff of local, state, and federal public officials.

Throughout this period of great expansion in EEOC responsibilities and workload, its funding and staffing levels did not grow correspondingly. In fact, throughout the 1990s and into the early 2000s, as EEOC responsibilities steadily increased, Congress consistently provided less funding to EEOC than the President requested resulting in EEOC staffing levels remaining at a constant or decreasing level. The following graphs24 illustrate these funding and staffing disparities:

![EEOC Funding History 1994-2001](image)

![EEOC Staffing History 1994-2000](image)

These unfortunate trends have continued at EEOC. From 2005 to 2010, for example, while EEOC Charge receipts rose from about 75,000 to almost 100,000, EEOC lost 25

24 These graphs are reproduced from “Funding Federal Civil Rights Enforcement: 2000 and Beyond,” Chapter 2, US EEOC, [http://www.usccr.gov/pubs/crfund01/ch2.htm](http://www.usccr.gov/pubs/crfund01/ch2.htm). See Table 2.1 and Figure 2.1 (EEOC Funding History 1994-2001) and Table 2.2 and Figure 2.2 (EEOC Staffing History 1994-2000) therein.
percent of its investigators and 30 percent of its overall staffing resulting in a large backlog of EEOC Charges. EEOC’s Fiscal Year 2012 Budget Justification report explained:

An increasing number of job seekers and workers across the country have turned to the EEOC for assistance with discrimination complaints in the first decade of the 21st century, yet funding and staffing declined significantly during much of that period. Between 2000 and 2008, the EEOC’s staffing level dropped by nearly 30 percent. At the same time, as its jurisdiction expanded, the number of discrimination charges filed with the EEOC reached historic levels, peaking between 2008 and 2010. The convergence of these factors yielded a growing backlog of unresolved discrimination charges.

EEOC suffered yet another funding setback recently when the Senate Appropriations Committee decreased the agency’s funding for fiscal year 2012 by $7.3 million from the prior fiscal year prompting EEOC Chair Jacqueline Berrien to warn EEOC staff of “serious consequences... on [the EEOC’s] staff and the mission of the agency.” Meanwhile, the serious sexual harassment problems faced by undocumented female farm workers are not going away. In fact, it is a virtual certainty that EEOC’s admirable efforts have barely scratched the surface of addressing the problem of sexual harassment of female farm workers.

It would certainly help if EEOC and its allied organizations had greater funding to prosecute sexual harassment cases on behalf of female farm workers, especially in key states such as California, Texas, Florida, New York, New Jersey and Georgia. However, until that happens, the scope of the problem is only getting bigger with time.

According to the Census Bureau, approximately 8.3 million undocumented workers were in the U.S. in March 2008 representing about 5 percent of the entire workforce

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28 Id.
30 Nearly two-thirds of the undocumented farm workers in the U.S. labor in these states. See note 32, infra.
of the country.\textsuperscript{32} About 76 percent of these undocumented workers were Hispanic.\textsuperscript{33} Half of them had less than a high school education.\textsuperscript{34} And 25 percent (more than two million undocumented workers) labored as farm workers.\textsuperscript{35} About half of these farm workers were (and still are) women. Thus, in 2008, there were approximately 1 million undocumented female farm workers in the United States, the vast majority of them Hispanic, lacking formal education, and very vulnerable to sexual harassment. Those numbers have increased with the passage of time and by March 2010 there were an estimated 11.2 million undocumented immigrants living in the U.S. representing about 5.2 percent of the U.S. labor force.\textsuperscript{36} Given these numbers, it is very clear that EEOC, with its limited resources, cannot adequately address the problem of sexual harassment of female farm workers by itself.\textsuperscript{37} Thus, we must look beyond EEOC for other avenues to help remedy these injustices.\textsuperscript{38}

Among possible solutions that could help combat sexual harassment of undocumented immigrants:

- Legislative repeal or modification of \textit{Hoffman Plastics};
- Use of state workers compensation laws;
- Use of state tort laws; and,
- Greater involvement by private attorneys.

\textbf{Legislative Repeal or Modification of \textit{Hoffman Plastics} –}

At the heart of many problems in seeking justice for undocumented workers is the Supreme Court’s \textit{Hoffman Plastics} decision.\textsuperscript{39} In \textit{Hoffman Plastics}, the Court ruled 5-4 along ideological lines that an undocumented worker laid off for aiding a union organizing drive was not entitled to a backpay award under Section 8(a)(3) of the NLRA.

\begin{itemize}
  \item [32] These 8.3 million workers were dispersed primarily over ten states with California (nearly 2 million undocumented workers), Texas (nearly 1 million), Florida (750,000), New York (650,000), New Jersey (425,000) and Georgia (325,000) accounting for nearly 5.2 million (about 63%) of them. \textit{Id.}, Table 2.
  \item [33] \textit{Id.}
  \item [34] \textit{Id.}, Other Major Findings: “Adult unauthorized immigrants are disproportionately likely to be poorly educated. Among unauthorized immigrants ages 25-64, 47 percent have less than a high school education. By contrast, only 8 percent of US born residents ages twenty-five to sixty-four have not graduated from high school.”
  \item [35] \textit{Id.}, Table 5.
  \item [37] \textit{Id.} \texttt{http://www.eeoc.gov/eeoc/plan/2013budget.cfm}. In fact, only about 20 percent of EEOC funding goes to support litigation efforts, and sexual harassment cases are only a portion of EEOC’s litigation work. EEOC also litigates discrimination arising under ADEA, EPA, ADA, other Title VII (race, color, religion and national origin), and most recently the Genetic Information Nondiscrimination Act of 2008 (GINA). \textit{Id.}
  \item [38] It is worth noting that
  \item [39] In \textit{Hoffman Plastic Compounds, Inc. v. National Labor Relations Board}, 535 U.S. 137 (2002), the Court denied a back pay award to an undocumented worker laid off for assisting a union organizing drive. The National Labor Relations Board (NLRB) had found the layoff violated Section 8(a)(3) of the National Labor Relations Act (NLRA) which prohibits retaliation against workers who engage in concerted activities. The Court ruled along ideological lines in a 5-4 decision that because Castro had entered the US illegally in violation of IRCA he was not entitled to backpay under NLRA’s protections.
\end{itemize}
The NLRB found that the worker was terminated from employment by Hoffman Plastics for aiding the union and awarded him backpay under the protections of Section 8(a)(3). However, the Court ruled that the undocumented worker could not receive backpay under the NLRA’s protections because he had entered the U.S. illegally in violation of IRCA.\textsuperscript{40}

Although the case involved the narrow issue of a backpay award for an undocumented factory worker, it did not involve insignificant sums. In fact, the backpay awarded to the undocumented worker by the NLRB in 1998 was nearly $67,000 plus interest, a small fortune for a factory worker.\textsuperscript{41} 326 NLRB 1060, 1062 (1998). Over the dissent of four of its members (Breyer, Stevens, Souter, and Ginsburg), the Supreme Court took this backpay award away. In the dissent Justice Breyer argued that the Court should have given deference to the government’s position that the Board’s backpay remedy for was “entirely consistent with IRCA” even though the worker was undocumented.\textsuperscript{42}

Applying the result in \textit{Hoffman Plastics} to the efforts of a union to prevent or remedy sexual harassment of undocumented female farm workers yields some very bad results. One of the reasons female farm workers are so vulnerable to sexual harassment is that so few of them have a union to call upon for help.\textsuperscript{43} However, Hoffman undercuts not only the effectiveness of unions in the workplace, but also the effectiveness of concerted activity by employees in mutual aid and protection of each other.\textsuperscript{44} In the context of farm worker sexual harassment cases, \textit{Hoffman Plastics} acts as a deterrent for victims of sexual harassment to come forward and report the abuse they have suffered. This could and should be changed legislatively by Congress.\textsuperscript{45}

\textsuperscript{40} Id. The case involved the narrow issue of backpay because the NLRB had previously ruled in favor of Castro and three co-workers and ordered that Hoffman: (1) cease and desist from further violations of the NLRA, (2) post a detailed notice to its employees regarding the remedial order, and (3) offer reinstatement and backpay to the four affected employees. 306 NLRB 100, 107-108 (1992). Hoffman complied with the Board’s order, but during the hearing concerning the amount of backpay it emerged that Castro was in the country illegally. 535 U.S. 137, 138.

\textsuperscript{41} 326 NLRB 1060, 1062 (1998). The backpay award was calculated for the three and a half years from Castro’s termination to the date that Hoffman first became aware of Castro’s undocumented status. Id. at 1061.


\textsuperscript{43} See note 14, supra, and accompanying text.

\textsuperscript{44} The NLRA protects both unionized and non-unionized employees who engage in concerted activities on behalf of other employees. \textit{See}, e.g., \textit{Every Woman’s Place}, 282 NLRB 413 (1986), \textit{enforced} 833 F.2d 1012 (6th Cir. 1987); \textit{NLRB v. Mike Yurosek & Son}, 310 NLRB 831 (1993) \textit{enforced} 53 F.3d 261 (9th Cir. 1995). \textit{See also} \url{http://www.nlrb.gov/rights-we-protect/employee-rights}.

\textsuperscript{45} For example, Congress could create a legislative exception to \textit{Hoffman Plastics} applicable to especially egregious harassment. The Arbitration Fairness Act of 2011 (“AFA”) introduced in Congress by Senator Al Franken is analogous to this. Senator Franken proposed AFA to counteract the efforts of an employer to force a female employee to arbitrate sexual harassment and workplace rape allegations. \textit{See} \url{http://en.wikipedia.org/wiki/Jamie_Leigh_Jones}. Under the proposed legislation, companies could not mandatorily require employees to arbitrate their disputes. \textit{See} Tsotakos, Alexis, “Protecting the Rabbits from the Panel of Foxes: The Case Against Mandatory Arbitration Clauses in Non-Union Employment Contracts” (2009). \url{http://digitalcommons.wcl.american.edu/stu_upperlevel_papers/31/}.
Use of State Workers' Compensation Laws –

Sexual harassment cases involve conduct that in some circumstances could be actionable under state workers' compensation laws. A few state courts have limited the rights of undocumented workers to recover under state workers' compensation statutes\(^46\), and one state court has banned recovery altogether.\(^47\) However, the vast majority of state courts have found that undocumented workers are covered by such laws. States so finding include: Arizona, California, Colorado, Connecticut, the District of Columbia, Florida, Georgia, Illinois, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania South Carolina, Tennessee, Texas, and Virginia.\(^48\) State courts have routinely held that state statutes broadly covering employees include coverage for undocumented workers.\(^49\) Similarly, courts

\(^{46}\) Sanchez v. Eagle Alloy, 658 N.W.2d 510, 521 (Mich. Ct. App. 2003) (applying a specific state law to suspend wage loss compensation for undocumented worker from date employer learned that worker lacked authorization to be employed); The Reinforced Earth Company v. Worker's Compensation Appeal Board (Astudillo) 810 A.2d at 1040-41 (Pa. 2002) (holding that undocumented immigrants are entitled to medical benefits but comp benefits for undocumented workers may be suspended without a showing of job availability by the employer).

\(^{47}\) The Wyoming Supreme Court, held that undocumented workers are excluded from workers' compensation because of a state statute's express language excluding certain aliens. Felix v. State ex rel., Wyo. Workers' Safety & Comp. Div., 986 P.2d 161, 164 (Wyo. 1999).


have found coverage when statutes specifically include “aliens” and fail to distinguish between documented and undocumented workers. And even more specific statutory language which includes “aliens, whether lawfully or unlawfully employed,” also has been held to include undocumented immigrant laborers.

More importantly, since Hoffman, only two state courts (Michigan and Pennsylvania) have placed limitations based on immigration status on the availability of workers' comp benefits for injured workers. See Sanchez v. Eagle Alloy, 658 N.W.2d 510 (Ct. Apps. Mich. 2003); The Reinforced Earth Company v. Worker's Compensation Appeal Board (Astudillo) 810 A.2d 99 (Pa. 2002). All others have held that unauthorized workers remain entitled to workers' compensation benefits after Hoffman. See, e.g., Continental PET Technologies, Inc. v. Palacios, 269 Ga.App. 561, 604 S.E.2d 627 (2004); Cherokee Industries, 84 P.3d at 801; Lang, 918 P.2d 404; Econ. Packing Co., 901 N.E.2d at 921; Visoso, 778 N.W.2d at 512; Correa, 664 N.W.2d at 328; Del Taco, 79 Cal. App. at 1441; Curiel, 655 S.E.2d at 485; Earth First Grading, 606 S.E.2d at 335; Champion Auto Body, 950 P.2d at 673.

Thus, in most jurisdictions, state worker’s compensation laws might be used, with the right facts, as an alternative basis for recovery in a sexual harassment case brought by an undocumented worker.

Use of State Tort Laws –

Based on the current development of the law in this area, use of state tort laws by an undocumented worker to seek recovery for sexual harassment is likely to be more effective in some jurisdictions than others. This is primarily because the tort damages recoverable by undocumented workers will be limited in some jurisdictions by the application of Hoffman and IRCA.

A minority of state courts have held that tort damages sought by undocumented workers are recoverable in their entirety, because Hoffman “only applies to an undocumented alien worker's remedy for an employer's violation of the NLRA and does not apply to common-law personal injury damages.” See, e.g., Tyson Foods, Inc. v. Guzman, 116 S.W.3d 233, 244 (Tex. App. 2003), citing Wal-Mart Stores, Inc. v. Cordova, 856 S.W.2d 768,779 (Tex. App. 1993); see also Contreras v. KV Trucking, Inc., No. 4:04-CV-398, 2007 WL 2777518 (E.D. Tex. Sept. 21, 2007) (denying motion to exclude damages for lost earnings capacity because of plaintiffs’ undocumented status). In Vargas v. Kiewit Louisiana Co., Civ. No. H-09-2521, 2012 WL 2952171 (S.D. Tex. July 18, 2012), a

“employee” as “any person engaged in the employment of any person, firm, limited liability company, or corporation covered by the terms of the Workers’ Compensation Act”).

50 See, e.g., Bollinger Shipyards, Inc. v. Director, Office of Worker’s Compensation Programs, 604 F.3d 864, 874 (5th Cir. 2010); Econ. Packing Co., 901 N.E.2d at 920 (“the plain meaning of ‘aliens,’ therefore, includes not only foreign-born citizens that can legally work in the United States, but also those that cannot”); Rajeh, 813 N.E.2d at 701; Correa, 664 N.W.2d at 329-30; Sanchez, 658 N.W.2d at 515-16; Gene’s Harvesting v. Rodriguez, 421 So. 2d 701 (Fla. Dist. Ct. App. 1982).

federal district court in Texas held in a wrongful death action brought by the survivors of an undocumented construction worker that an award of future lost earnings would not contravene IRCA. The court dismissed the defendant’s argument to the contrary and found that “immigrants will not be motivated to violate IRCA in order to obtain additional U.S. wages after suffering fatal injuries.” Id. at * 5.

Similarly, a Massachusetts court held that an injured worker’s immigration status was irrelevant to earning capacity and found that “[i]f employers know that they will be potentially less financially responsible for a workplace injury as long as the injured party is an illegal immigrant they will be more inclined to hire illegal immigrants for dangerous positions.” Pontes v. New England Power Company, No. 0300160A, 2004 WL 2075458, at *3 (Mass.Super. Aug 17, 2004). The same argument could certainly be advanced if tort theories for egregious sexual harassment were asserted by an undocumented worker.

Contrary to the case law in Texas and Massachusetts, Defendants have successfully used Hoffman in some jurisdictions to limit damages recoverable by undocumented workers in state tort actions. For example, courts have barred claims for future lost earnings in tort actions based on the theory that an award of lost wages to an undocumented worker would violate IRCA and Hoffman. Courts so finding have considered issues such as: a) whether the worker violated IRCA by submitting false work authorization; b) whether future lost earnings should be based on what the worker would have earned in their country of origin; and c) whether the worker is likely to return to their home country.52

To summarize, immigration status is irrelevant to the issue of liability in a state tort action, but is relevant to the damages obtainable in some jurisdictions based on the theory that plaintiffs who are undocumented are barred by Hoffman and IRCA from seeking future lost earnings that they could not lawfully earn in the United States. Many courts that have analyzed these issues have considered whether such damages are limited by what plaintiffs would earn in their home countries. Thus, state tort laws could be used, with the right facts, as an alternative basis for recovery in a sexual harassment case brought by an undocumented immigrant. The trade off is that in many jurisdictions

52 See, e.g., Veliz v. Rental Serv. Corp. USA, Inc., 313 F.Supp. 2d 1317 (M.D. Fla. 2003)(barring lost wages claim of undocumented worker who used false documents to obtain employment because “permitting an award predicated on wages that could not lawfully have been earned, and on a job obtained by utilizing fraudulent documents runs ‘contrary to both the letter and spirit of the IRCA, whose salutory purpose it would simultaneously undermine.’”) 313 F.Supp. 2d at 1337, citing Majlinger v. Cassino Contracting Corp., 766 N.Y.S.2d 332, 334 (N.Y.Sup.Ct. 2003). The court also analogized the lost wages sought by the plaintiff to the backpay in Hoffman on the theory that both constituted an award for work never to be performed. Id. at 1337. See also Hernandez-Cortez v. Hernandez, No. Civ. A. 01-1241, 2003 WL 22519678 (D. Kan. Nov. 4 2003)(finding that undocumented workers were not entitled to recover for lost income resulting from personal injuries because their undocumented status precluded recovery for such damages based on projected earnings in the U.S.). Notably, these courts only barred recovery for lost income based on projected U.S. earnings; they did not consider whether plaintiffs could recover the future lost wages they would have earned in their home countries.
some of the damages would be limited by the application of Hoffman and IRCA. The law in this area is still developing in many jurisdictions.

The Need for Greater Involvement by the Private Bar –

Another important part of the solution is greater involvement by the private bar in litigating sexual harassment cases on behalf of female farm workers. In addition to litigating worthwhile cases on a private basis attorneys in private practice can get involved in these cases by working in concert with legal aid organizations and public service civil rights law firms that represent farm workers.

A good example of how this can work is the Legal Assistance Foundation of Metropolitan Chicago (“LAF”). LAF has statewide outreach to migrant farm workers and a good working relationship with the EEOC. As it states on the LAF website:

LAF has a long history of utilizing the talent and good will of the private bar to help meet the need for civil legal services to Chicago’s poor. Attorneys who volunteer with LAF receive the training and support necessary to provide high quality services to our clients and are covered by our malpractice insurance. To meet the many diverse needs of our clients, LAF currently supports a variety of pro bono initiatives [including] LAF’s Pro Bono Panel [which] includes hundreds of the area’s most dedicated attorneys. Volunteers from all aspects of Chicago’s legal community participate; from large corporate law firms, government offices, small and medium sized firms to in-house counsels and solo practitioners. [And] LAF’s EEOC Mediation Project [which] pairs experienced employment discrimination attorneys with clients seeking representation in EEOC mediations. Clients in the project are low-income individuals who have accused their employer, or former employer, of some form of discrimination.

Similar opportunities for participation in such litigation exist with non-profit civil rights law firms like Texas RioGrande Legal Aid, Inc. (“TRLA”). TRLA has a farmworker litigation section “to protect the rights of, and ensure legal access for migrant farm workers both in cases relating to employment and in non-agricultural employment matters that impact the farm worker community.” TRLA, along with its Southern Migrant Legal Services office in Nashville, Tennessee, represents migrant and seasonal farm workers throughout Texas, Kentucky, Tennessee, Alabama, Mississippi, Louisiana and Arkansas. TRLA has an extensive Private Attorney Involvement (PAI) program and encourages private attorneys to get involved in its cases.

53 As noted, the EEOC even with the help of dedicated grassroots civil rights organizations like The Esperanza Project, lacks adequate funding and staff resources to litigate every meritorious immigrant worker sexual harassment case. See notes 24 thru 28 and accompanying text, supra. Thus, a tremendous need exists for greater involvement by the private bar.


55 Id.

Beyond these kinds of pro bono and PAI opportunities, private attorneys also should be alert for opportunities to take on these cases on a private, for-profit basis. The conventional wisdom used to be that these kinds of cases are not economically feasible for private firms to take on as profitable ventures. However, the EEOC’s sterling results detailed above demonstrate to the contrary. In fact, the EEOC has recovered many millions of dollars for farm workers and other immigrants victimized by sexual harassment.  

Beyond the possible rewards, why should private attorneys get involved in these cases? To begin with, with the exception for Native Americans, all of us are either immigrants or the descendants of immigrants. And many of us are the descendants of the working poor who immigrated to this country and were welcomed with open arms and given an opportunity for success. 58 We have an obligation to our forebears, to ourselves, and to the continuation of the American Dream to pass that good fortune along to others. As one EEOC attorney who has overseen the litigation of many farm worker sexual harassment cases eloquently explained:

Because of [immigrant workers’] vulnerability, there is always a strong temptation for employers to use and abuse them, and to retaliate and intimidate them when they assert their rights under law. ... All of our actions as advocates determine whether immigrant children will be fed, whether the rent will be paid, whether there will be clothes for the young ones, whether the rapes will stop in the fields, and whether workers can fight for their rights without fear of deportation. The legal arguments have real faces and lives behind them. The stakes are very high. ... Our task as civil rights-minded lawyers will be to meet the various challenges associated with helping our underrepresented immigrant community while always ensuring that our values of equality and fairness are present in our work. Deep down inside, we all believe profoundly in the American dream and in Dr. Martin Luther King’s dream ... that workers do not have to experience the nightmares of family separation, poverty, harassment, exploitation, and discrimination. 59

57 See notes 22 and 23, supra, and accompanying text.
58 “Give me your tired, your poor / Your huddled masses yearning to breathe free / The wretched refuse of your teeming shore / Send these, the homeless, tempest-tossed to me / I lift my lamp beside the golden door”, Emma Lazarus (words engraved on the base of the Statue of Liberty National Monument in New York Harbor).
59 William R. Tamayo, 44 U.S.F.L. Rev. 253, 271 (2009). Citing Rivera v. NIBCO, Inc., 364 F.3d 1057, 1072 (9th Cir. 2004). ("Regrettably, many employers turn a blind eye to immigration status during the hiring process; their aim is to assemble a workforce that is both cheap to employ and that minimizes their risk of being reported for violations of statutory rights. Therefore, employers have a perverse incentive to ignore immigration laws at the time of hiring but insist upon their enforcement when their employees complain.")