

Undocumented Immigrants and Discrimination

By Robert LeRoux Hernandez

Two cases reported last summer address the thorny issue of what rights, if any, undocumented workers have to hold their employers legally accountable for discrimination, including sexual harassment. Often victims of the most egregious exploitation, the out-law status of "illegals" has naturally caused them to avoid courts and state agencies upholding anti-discrimination laws. A California state court case holds that undocumented status will not prevent recovery under anti-discrimination laws, while a Fourth Circuit decision denied redress on the basis of undocumented status. Reading the cases together suggests that the nature of the alleged discrimination and the remedy sought may have a profound effect on the success of cases brought on behalf of undocumented immigrants.

In *Murillo v. Rite Stuff Foods, Inc.*, 65 Cal.App.4th 833, 77 Cal.Rptr.2d 12, reported in July by the California Court of Appeals from the Second Appellate District, Division One¹, an undocumented worker complained that her immediate supervisor had touched her inappropriately and made crude sexual propositions and lewd remarks to her. He had physically isolated her from other employees to facilitate his harassment and had insulted her in front of co-workers. The employee had complained about this conduct to the plant manager, who did nothing to investigate or remediate. Instead, the employer suspended the employee and eventually terminated her employment. The employee sued under California law for wrongful termination, breach of contract and the contractual covenant of good faith and fair dealing, general negligence, negligent supervision and retention of an employee, invasion of privacy, assault, battery, false imprisonment, and the intentional and negligent infliction of emotional distress.

The employer moved for summary judgment on all of the employee's claims, asserting that the claims were barred by

the doctrine of after-acquired evidence and relying on the employee's admission at deposition that she was an undocumented alien, who had, on the suggestion of her supervisor, purchased false documents which she used to secure the employment. The employee thereupon dismissed those causes of action and claims relating to her discharge, and defended against summary judgment on the basis of her own deposition and evidence that the employer's general manager knew its workers were undocumented but took no action to terminate them. The trial court granted summary judgment to the employer, and the appeal court reversed.

The appeal court reasoned that although the employee's misrepresentations as to her documented status "went to the heart of the employment relationship and related directly to her wrongful discharge and contractual claims" and were therefore barred by the unclean hands doctrine, "there is no sound reason why either the after-acquired-evidence doctrine or the unclean hands doctrine should bar plaintiff's discrimination or tort claims." Relying in part on the reasoning of *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), and its recognition of the broad remedial purpose of eradicating discrimination in the workplace, the appeal court concluded that although the after-acquired evidence of the employee's undocumented status might bar some remedies such as reinstatement and future pay, she had a right to recover for injuries suffered during the term of her employment. Such a result would further the purposes of both the anti-discrimination laws (in holding an employer liable for all discrimination, regardless of immigration status) and immigration laws (in depriving the employer of an incentive to hire undocumented aliens who would not be afforded the protections of anti-discrimination laws).

Undocumented status served as a bar, however, to the employee in *Egbuna v.*

Time-Life Libraries, Inc., 153 F.3d. 184 (4th Cir. (Va.) 1998),² who claimed he had suffered retaliation for having testified on behalf of a co-employee in a Title VII case. Egbuna had left the employer and thereafter applied for re-employment. Although initially rehired, the offer was rescinded two days later. The employer sought and obtained summary judgment on the ground that the employee's undocumented status rendered him unqualified for the job in which he sought re-employment. The Fourth Circuit, in an August 1998 decision, agreed.

The Fourth Circuit found that because the Immigration Reform and Control Act of 1986 (IRCA) made it unequivocally illegal to hire an undocumented alien, indeed criminalizing such a hiring, the employee could not circumvent the law by obtaining equitable relief through Title VII. In a strong dissent Judge Ervin, joined by three others, found no incompatibility between serving the purposes of the IRCA and enforcing Title VII, urging that *McKennon* required a focus on discriminatory animus of the employer, such that the employee's immigration status affected remedy only.

It is not apparent that the employee in *Egbuna* was seeking other than equitable relief. Accordingly it is not apparent that the majority would have reached an identical result if Egbuna, like Murillo, had merely sought damages for sexual harassment suffered during the term of employment. In such a case, the anomaly of forcing an employer to violate criminal statutes would simply not have arisen, giving greater force to the rationale of the dissent that the purposes of the IRCA would be better served by enforcing anti-discrimination laws on behalf of undocumented workers.

These decisions are significant in their analysis of the interplay of immigration and anti-discrimination laws and the

Continued on page 6

public policy considerations applicable to their harmonious interpretations. An undocumented alien falling victim to discrimination or sexual harassment should avoid seeking equitable relief or bringing causes of action sounding in contract; despite the potentially severe limitations in redress suggested by the *Egbuna* court, such a worker may nevertheless be able to recover tort-types of damages.

¹ The *Murillo* decision can be downloaded at: <http://www.courtinfo.ca.gov/cgi-bin/opinions.cgi> (time-limited), or may be obtained directly from the author by e-mailing rhem@civiljustice.com.

² The *Egbuna* decision can be downloaded at <http://www.law.emory.edu/4circuit/aug98/952547.p.html>.

Attorneys' Fees in Employment Rights Cases

By M. Malissa Burnette

Many employment rights statutes include fee-shifting provisions that permit the prevailing party to seek court-awarded attorney's fees and costs. The principles governing the award of attorneys fees have been developed primarily in connection with Section 1983 litigation and are applicable to employment rights cases. "In any action or proceeding to enforce a provision of section...1983...of this title,...the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. Section 1983(b) (Supp. IV 1992).

The legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 specifies that attorneys' fees are an integral part of the remedies necessary to obtain compliance with the civil rights laws. Congress enacted the provision for counsel fees "not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by...discrimination to seek judicial relief..." *Lea v. Cone Mills Corp.*, 438 F.2d 86, 88 (4th Cir. 1971) (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 804 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971). ("attorneys' fees are to be imposed not only to penalize defendants for pursuing frivolous arguments, but to encourage individuals to vindicate the strongly expressed congressional policy" against discrimination.)

"To be a prevailing party in a legal action, a party must obtain relief in the action on the merits of his claim...and not from some other process." *Statewide Reapportionment Advisory Comm. v. Beasley*, 99 F.3d 134, 137 (4th Cir. 1996) (Niemeyer, concurring), cert. denied, 117 S. Ct. 1427 (1997). To acquire prevailing party status, plaintiffs must "succeed on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing the suit." *Arvinger v. Mayor of Baltimore*, 31 F.3d 196, 200 (4th Cir. 1994). "In short, a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 111-112 (1992). If an enforceable judgment is rendered for the plaintiff, the plaintiff is a prevailing party. *Lytle v. Commissioners of Election*, 541 F.2d 421, 425 (4th Cir. 1976), cert. denied, 438 U.S. 904 (1978) (citing, 6 J. MOORE, FEDERAL PRACTICE SECTION



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