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## A Wink and a Nod: The *Hoffman* Case and Its Effects on Freedom of Association for Undocumented Workers

by Jill Borak\*

On March 27, 2002, the United States Supreme Court held that undocumented immigrants improperly discharged by U.S. employers for union organizing activities are not entitled to back pay. The case, *Hoffman Plastic Compounds, Inc. v. NLRB* (*Hoffman*), has generated widespread concern—both domestically and internationally—among workers and advocates who worry that *Hoffman* represents a substantial reduction in labor rights for workers. Advocates fear the decision creates a chilling effect on reports of employer abuse by undocumented workers in the United States and curbs freedom of association for all U.S. workers. Beyond U.S. borders, the decision violates international human rights norms; the United States, by denying employment protections to undocumented workers, discriminates against them based on their immigration status.

### Workers' Rights within the Human Rights Framework

The right of workers to form a union is protected as an aspect of the freedom of association contained in a number of international human rights instruments. While contemporary slavery and abusive child labor are examples of severe violations of the rights of workers that shock the conscience, the human rights of workers are also threatened when employers seek to quash union-organizing activities through tactics such as intimidating or discharging union supporters. The United Nations Universal Declaration of Human Rights of 1948 (UDHR), in Article 23(1) and (4) respectively, proclaims that “everyone has the right to work,” and “everyone has the right to form and to join trade unions for the protection of his interests.” Fifty years after the adoption of the UDHR, the International Labor Organization (ILO) noted the relationship between the protection of workers' rights and the full achievement of human potential in its Declaration of Fundamental Rights and Principles at Work of 1998. To that end, this Declaration set forth four core workers' rights principles, the first of which is freedom of association (the right to organize and join trade unions) and the effective recognition of the right to collective bargaining (the right of workers to seek improvements in their working conditions as a group rather than individually). Other principles of this Declaration include the elimination of forced labor, child labor, and employment discrimination.

### The National Labor Relations Act

Administered by the National Labor Relations Board (NLRB), the National Labor Relations Act (NLRA) regulates the labor-management relationship for many employees and companies in the United States and provides most private sector employees the right to organize, bargain collectively, and engage in peaceful strikes and picketing. The NLRA also prohibits unfair labor practices, which may result from either employer or employee action, such as employer discrimination against employees for union organizing activities and employee secondary boycotts. One of the NLRB's main functions is to review allegations of unfair labor practices and institute remedial measures available under the NLRA. These remedial measures include posting notices of unfair labor practices at worksites, obtaining employer commitments not to violate the NLRA in the future, reinstating

unlawfully discharged employees, and distributing back pay to such employees. No private rights of action are permitted under the NLRA, and no fines or other penalties are levied against employers committing unfair labor practices.

Back pay, under the NLRA, is monetary compensation, including interest, for the wages not earned by a worker because of the employer's unfair labor practice violation. In most cases, reinstatement with back pay is the remedy for employee complaints of being discharged for pro-union activities. If the worker takes another job between the date of the unlawful discharge and the NLRB's decision, the earned wages are deducted from the amount the violating employer must pay. This limit to the back pay remedy illustrates that the purpose of the NLRA is not to punish employers, but to restore employees to their status before the unfair labor practice occurred. The NLRB awards back pay to approximately 20,000 workers each year.

### Shortcomings of the NLRA

Critics of the NLRA remark on the inadequacy of the remedial system. Many employers consider remedies like back pay for workers to be routine business costs that are worth the expense to suppress union activities. Orders to post written notices of violations and “cease and desist” orders are likewise not taken seriously by employers, because they carry no economic consequences. Furthermore, supervisors and managers, independent contractors, employees of certain small businesses, domestic service workers, agricultural workers, and public-sector employees are exempt from protection under the NLRA. Although other federal, state, or local statutes may cover these workers, the U.S. government estimates that as many as one-quarter of U.S. workers—32 million individuals—lack collective bargaining rights under any federal or state statute.

The Supreme Court's recent decision in *Hoffman* may significantly limit undocumented workers' rights under an already insufficient NLRA. The Court's decision may also lead to a reduction of undocumented workers' rights under other labor laws, through a broad application of *Hoffman* by the courts or through a chilling effect directly caused by the case. In a broader sense, the decision calls into question the commitment of the United States to promoting freedom of association and preventing employment discrimination.

### *Hoffman Plastic Compounds, Inc. v. NLRB*

In January 1992, the NLRB found that Hoffman Plastic Compounds, Inc. illegally discharged several employees, including an undocumented worker from Mexico, because the employees were union supporters. In its decision, the NLRB reasoned that the most effective way to further U.S. immigration policies would be to provide the protections and remedies of the NLRA to undocumented workers whose employers commit unfair labor practices.

The Supreme Court's decision in *Hoffman* reversed the NLRB, 5-4, reasoning that the NLRB decision undermined federal statutes and policies outside the scope of the NLRA. The Court found the NLRB's prescribed remedy inconsistent

The *Hoffman Case*, continued from previous page

with the Immigration Reform and Control Act (IRCA), which prohibits employees from submitting fraudulent identification documents to secure work and prohibits employers from knowingly hiring undocumented workers. Although the Court affirmed its earlier rulings in *Sure-Tan v. NLRB* and other related cases, reaffirming that undocumented workers are employees covered under the NLRA, the Court stated that allowing undocumented workers to receive back pay would encourage workers' evasion of immigration authorities, condone prior violations of the immigration laws, and encourage future violations. The Court disagreed with the NLRB's contention that by limiting the undocumented worker's back pay award to the time when the company became aware of his status, the NLRB accommodated the IRCA. Instead, the Court found that the NLRB's position focused on employer misconduct while discounting the misconduct of employees. Moreover, the Court reasoned that the orders to "cease and desist" and to post a notice to its employees were sufficient sanctions against the company.

### The Dissent

The dissenting members of the Court maintained that the back pay award would not undermine U.S. immigration policy. Reports from all the relevant government agencies—including the U.S. Department of Justice, the agency then responsible for enforcement of the immigration laws—supported this point. The minority disagreed that orders to post notices and to cease and desist were sufficient sanctions against employers. Back pay, the minority noted, serves not only as compensation to employees, but also as a deterrent to employers who commit unfair labor practices. With back pay, employers lose money after violating the law; with notices, however, employers lose nothing.

As expressed in the dissenting opinion, the Court's decision may encourage employers to hire workers that are potentially undocumented "with a wink and a nod." The dissent predicted *Hoffman* will create a preference among employers for hiring undocumented workers, because employers may hire undocumented workers confident that the workers will not qualify for remedies under U.S. law. Indeed, undocumented workers are often less likely to complain about unfair wages and working conditions and to defend their rights due to their immigration status and related fear of deportation.

In a final irony, the *Hoffman* decision may secure an effect opposite to that intended by the Court, making both labor and immigration policy vulnerable. The employer preference for undocumented workers will likely increase the number of undocumented immigrants seeking to enter the United States. Therefore, far from upholding U.S. immigration policy, as hoped by the majority, the *Hoffman* decision may actually undermine it.

### Effects of the Hoffman Decision on the Rights of Workers

Issues immediately raised by the *Hoffman* decision include the relevance of immigration status in cases where workers allege their employers have committed labor violations, and the applicability of the decision to other labor laws. Since the Supreme Court's decision is predicated on a worker's immigration status, employers have begun to argue that evidence of workers' undocumented status is relevant to their cases. Advocates report a sharp rise in the number of cases where employers request that courts order an inquiry into the immigration status of the employees; most courts, however, have refused to compel workers to disclose their immigration sta-



Credit: National Employment Law Project

Protesters demanding economic justice for workers.

tus. Similarly, after the *Hoffman* decision, immigrants' and workers' rights advocates reported an increase in employers who argue that undocumented workers simply have no labor rights. Some federal agencies, such as the Department of Labor and the Equal Employment Opportunity Commission, have attempted to limit *Hoffman*'s impact by stating that the decision does not necessarily apply to laws other than the NLRA.

### Action in International Forums in Response to the Hoffman Decision

The impact of the *Hoffman* decision is not limited to the rights of individual undocumented workers. The decision also affects immigrant workers, and more broadly all U.S. workers. Therefore, the Mexican government, the AFL-CIO, and other groups have recently attempted to use international pressure to limit *Hoffman*'s impact on workers' rights.

### Request for an Advisory Opinion from the Inter-American Court of Human Rights

On May 10, 2002, in response to discriminatory laws and precedents such as the *Hoffman* decision, the government of Mexico submitted a request for an advisory opinion from the Inter-American Court of Human Rights (Inter-American Court). In the request, the Mexican government noted that the protection of immigrant workers' rights is a matter of particular interest because many Mexican nationals migrate outside of Mexico. They then become targets for exploitation because of their vulnerability due to their immigration status. Specifically, the Mexican government requested that the Inter-American Court give its opinion as to whether a state may limit workers' rights based on immigration status, or if such a practice violates the principles of non-discrimination and equality before the law. The Mexican government observed that undocumented workers are subject to hostile treatment and are considered inferior in relation to others under the laws of some states. In the government's view, when any state

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The *Hoffman* Case, continued from previous page

authorizes different treatment of work-related rights solely on the basis of the immigration status of a worker, such action is discriminatory.

The American Convention on Human Rights (American Convention), Article 64(1), authorizes the Inter-American Court to issue advisory opinions interpreting treaties concerning the protection of human rights in the American States. The purpose of an advisory opinion is not to compel states to change their laws, but to determine the scope of the obligations of member states of the Organization of American States (OAS) under international law. The opinion also seeks to assist states in complying with and applying human rights treaties without bringing a complaint against any state. The government of Mexico asked the Inter-American Court to consider concrete rather than theoretical situations in which states may take actions that might limit the rights of immigrant workers.

A concrete example of United States treatment of undocumented workers was offered by a group of U.S. labor, civil rights, and immigrants' rights organizations that submitted an amicus brief to the Inter-American Court in January 2003, supporting the Mexican government's request. The brief, pointing to the *Hoffman* decision and relevant U.S. labor laws, supports the position that the United States denies basic protections to workers based on their immigration status, and that U.S. labor laws violate international norms of non-discrimination and freedom of association. The brief discusses provisions of several laws explicitly excluding undocumented workers from the scope of their protection. For example, temporary non-immigrant agricultural workers are exempted from the Migrant and Seasonal Agricultural Worker Protection Act, the primary U.S. labor law for the protection of agricultural workers. Undocumented workers are excluded from the Unfair Immigration-Related Employment Practices Act, which protects workers against employment discrimination based on citizenship and national origin. These and other laws, the groups argue, clearly demonstrate the discriminatory nature of U.S. law concerning undocumented workers. Such discrimination violates fundamental international norms of non-discrimination.

Unauthorized Labor Force by Industry, 2001 (in thousands)		
Industry Group	Total Unauthorized	U.S. Labor Force
Construction	620	9,670
Manufacturing	1,190	20,830
Durable	580	12,670
Non-durable	610	8,150
Wholesale and Retail Trades	1,410	29,850
Restaurants	700	7,720
Others	720	22,130
Services	1,320	41,960
Business	390	2,350
Private Household	250	1,050
Other	690	38,570
Other Industries*	350	37,990
<b>Total Workers</b>	<b>5,300</b>	<b>143,640</b>

\* Other industries include transportation, communication; finance, insurance and real estate; mining and public administration.

This information was published in a March 21, 2002 report by the Pew Hispanic Center entitled, "How Many Undocumented: The Numbers behind the U.S.-Mexico Migration Talks," by B. Lindsay Lowell and Robert Suro.

Although the organizations acknowledge that international law recognizes the right of states to control the flow of immigration across their borders, international law prohibits many forms of discrimination against immigrants regardless of their immigration status. Once an immigrant is present in a country's territory and secures employment, the organizations contend, the state is not free to deny the immigrant's fundamental workplace protections, even if the worker is undocumented. In short, the organizations take the opposite view of the U.S. Supreme Court's reasoning in *Hoffman* that immigration policy must prevail over protection of the rights of workers. The organizations rely on provisions of the American Declaration of the Rights and Duties of Man (the American Declaration); the American Convention; the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social, and Cultural Rights (ICESCR); the UDHR; and the ILO Convention Concerning Discrimination in Employment. Each of these international instruments expressly prohibits discrimination on the basis of national or social origin or other status.

The organizations also argue that U.S. law violates international norms by failing to protect undocumented workers' freedom of association. They cite several instruments applicable to the United States that protect rights inherent in the right to freedom of association, including the rights to organize a union, bargain collectively, and strike. The instruments include the American Declaration, the American Convention, the OAS Charter, the ICCPR, the ILO convention on the Freedom of Association and Protection of the Right to Organize, and the ILO Convention regarding the Right to Organize and Collective Bargaining. The ILO conventions do not recognize any exception to the freedom of association. The American Convention, ICCPR, and ICESCR recognize only narrow exceptions to the freedom of association for purposes of national security, public safety, health or morals, the rights of others, and public order. The organizations concede that the public order exception could be implicated by the *Hoffman* decision, but argue that denial of freedom of association to workers is not a necessary or proportional response to the goal of immigration control.

Any advisory opinion issued by the Inter-American Court will not legally bind the United States. The Inter-American Court has no jurisdiction over the United States, but the organizations nonetheless hope that the request for an advisory opinion provides an opportunity to clarify the obligations of members of the inter-American system to protect undocumented workers. The organizations note that undocumented workers are uniquely vulnerable to human rights abuses, and point to the need for strong regional standards for the protection of undocumented workers' rights.

#### ***Complaint to the ILO Committee on Freedom of Association***

In November 2002, the AFL-CIO filed a complaint with the ILO's Committee on Freedom of Association (CFA), claiming the *Hoffman* decision violates key international labor conventions. The CFA receives complaints concerning violations of freedom of association directly from workers' and employers' organizations. Although ILO conventions codify the basic rights associated with the freedom of association, a state need not have ratified the conventions for a complaint to be filed. The authority for the examination of complaints comes from the ILO Constitution, agreed to by all member states of the ILO. Therefore, although the United States has

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The *Hoffman* Case, continued from previous page

not ratified key conventions such as the ILO Convention on the Freedom of Association and Protection of the Right to Organize, or the ILO Convention on the Right to Organize and Collective Bargaining, complaints may still be heard against the United States before the CFA.

The AFL-CIO, a federation of 66 national and international unions representing approximately 13 million workers in the United States, alleged that the *Hoffman* decision violated the ILO Convention on the Freedom of Association and Protection of the Right to Organize, by creating a distinction based on immigration status. The complaint further maintained that *Hoffman* violates the requirement of the ILO Convention on the Right to Organize and Collective Bargaining for adequate protection against acts of anti-union discrimination. Finally, *Hoffman* is alleged to violate the ILO Declaration of Fundamental Principles and Rights at Work by denying the freedom of association to undocumented workers.

The complaint illustrates that the rights of all workers are diminished by the *Hoffman* decision. Union organizers will not be able to reassure undocumented workers that they will be protected if fired for pro-union activities. Since most undocumented workers are employed alongside documented workers and U.S. citizens, the AFL-CIO predicts union organizational efforts will result in employee fear and division. Such a climate will adversely affect all workers.

The AFL-CIO's complaint is not likely to result in a direct change to the *Hoffman* decision. Although the United States has accepted jurisdiction and review by the CFA of complaints filed against it under these conventions, the ILO has no enforcement powers. In past complaints before the ILO the United States took no action to implement the organization's recommendations. If the CFA makes an ultimate finding that the United States has encountered problems in guaranteeing freedom of association, the implementation of such a decision will follow guidelines established for all ILO member states: the CFA will simply ask the government to report to it on the status of the problem.

### Conclusion

The General Accounting Office, the independent investigatory office of the U.S. Congress, recently concluded that *Hoffman* goes beyond merely limiting undocumented workers' available remedies, to effectively diminish their collective bargaining rights. Advocates have further argued that the decision promotes employment discrimination against immigrant workers and diminishes the freedom of association enjoyed by all workers in the United States. Despite the reluctance of federal agencies and many courts to expand *Hoffman*'s reach beyond the NLRA, nothing exists to prevent a broad application of the case or to remedy the decision of the U.S. Supreme Court. Due to the anti-immigrant climate that currently prevails in the United States, it is unlikely that federal legislators will propose legislation to assist undocumented workers. The onus falls on advocates at state and local levels to promote workers' rights, and on international human rights forums to continue to exert pressure on the U.S. government to balance its immigration policy with the rights of workers. ☉

*\*Jill Borak is a J.D. candidate at the Washington College of Law and a staff writer for the Human Rights Brief.*



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