



Office of
Legal Counsel

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

FAX TRANSMITTAL COVER SHEET

DATE: January 6, 2000

PLEASE DELIVER TO:

NAME: Irene Bueno

AGENCY/OFFICE DEPT.:

FAX NUMBER: 456-5581

TELEPHONE NUMBER:

THIS MESSAGE IS BEING SENT BY:

NAME: BENITA LUCY FOR ELLEN VARGYAS

TELEPHONE NUMBER: 202/663-4637

THIS MESSAGE HAS 6 **PAGES PLUS THIS COVER SHEET.**

THIS FAX NUMBER IS 202/663-4639.

REMARKS:

The case & consent decree are now being filed. Please call if I can be of further assistance.

Ellen

**IF YOU HAVE ANY PROBLEMS RECEIVING THIS TELECOPY MESSAGE,
PLEASE CALL THE FOLLOWING NUMBER IMMEDIATELY, 202/663-4637.
THANK YOU.**

U.S. Equal Employment Opportunity Commission

NEWS

FOR IMMEDIATE RELEASE
Thursday, January 6, 2000

CONTACT: *For EEOC*
Chester V. Bailey
(414) 297-1265
Jean Kamp
(414) 297-1860
TTY: (414) 297-1115
Lloyd Zimmerman
(612) 335-4046
TTY: (612) 335-4045

For Holiday Inn
J. Michael Colloton
(612) 347-0259

EEOC SETTLES NATIONAL ORIGIN LAWSUIT AGAINST HOLIDAY INN ON BEHALF OF AGGRIEVED IMMIGRANT WORKERS

MINNEAPOLIS – The U.S. Equal Employment Opportunity Commission (EEOC) today announced a \$72,000 settlement of a lawsuit alleging national origin discrimination and retaliation against the Holiday Inn Express Hotel and Suites on behalf of nine Mexican workers in its housekeeping department.

In addition to monetary benefits, the consent decree provides for a federal court injunction against the Holiday Inn prohibiting retaliation and discrimination, as well as training and reporting to the EEOC for one year.

"Subjecting immigrant workers to unfair treatment simply because of their national origin is unacceptable," said Chester V. Bailey, Director of EEOC's Milwaukee District Office. "The Commission will act to prevent and eradicate such discriminatory conduct and hold employers responsible for appropriate remedies when they violate the civil rights laws."

The EEOC's suit alleged that Holiday Inn discriminated against nine employees of Mexican national origin in violation of Title VII of the Civil Rights Act of 1964 by denying them lunch and rest breaks, imposing more rigorous monitoring and productivity schedules, and denying promised pay raises at the end of their 90-day probationary period. Moreover, the suit charged that Holiday Inn retaliated against Amado Flores and other Mexican workers by advising the Immigration and Naturalization Service (INS) of their undocumented status after the employees sought redress for the discrimination.

(more)

HOLIDAY INN SETTLEMENT – Page 2

Noting that the EEOC recently issued guidance on remedies for undocumented workers under agency-enforced laws, Jean P. Kamp, Acting Regional Attorney for the Milwaukee Office, said: "This settlement reinforces the Commission's position that the anti-discrimination laws protect all employees, regardless of their immigration status. Retaliating against unauthorized workers because they complained about workplace bias is unlawful. Such unscrupulous behavior by employers will not be tolerated."

A spokesperson for the Holiday Inn Express denied the alleged violations of law and asserted that the employees were not treated any differently. The employer stated that its decision to settle was "a business decision that it was more economical to settle these unsubstantiated claims than to spend the next year and one-half to two years defending against them."

EEOC Senior Trial Attorney Lloyd Zimmerman stated: "This case demonstrates that the EEOC will move quickly and aggressively to protect the rights of vulnerable immigrant workers who are singled out for discrimination. We worked in close partnership with the Minneapolis Civil Rights Department (MCRD) as well as with the National Labor Relations Board (NLRB), which investigated charges of unfair labor practices. This close collaboration enabled EEOC, MCRD and the NLRB to expedite the investigation of our respective claims, resolving them in less than two months. The end result is a settlement that is fair and reasonable." EEOC and the NLRB also coordinated with the Office of Special Counsel in the U.S. Department of Justice in its investigation of possible violations of the Immigration Reform and Control Act.

In addition to enforcing Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex or national origin, the EEOC enforces the Age Discrimination in Employment Act; the Equal Pay Act; Title I of the Americans with Disabilities Act, which prohibits employment discrimination against people with disabilities in the private sector and state and local governments; prohibitions against discrimination affecting individuals with disabilities in the federal government; and sections of the Civil Rights Act of 1991.

Further information about the Commission, including the text of the guidance on remedies for undocumented workers, is available on the agency's web site at www.eeoc.gov.

Holiday Inn Express Hotel and Suites is located at 225 Eleventh Street in Minneapolis.

#

January 6, 2000

HIGHLIGHTS CONCERNING EEOC v. HOLIDAY INN EXPRESS HOTEL

General Background

- The complaint in this case alleges that nine immigrant workers were subjected to national origin discrimination and retaliation by Holiday Inn Express Hotel and Suites ("Holiday Inn Express").
- Holiday Inn Express is a franchisee of Holiday Inn located in Minneapolis, Minnesota, which functions as a limited service hotel.
- During EEOC's two month investigation, Holiday Inn Express agreed to resolve these charges through a one-year consent decree providing:
 - payment of \$72,000 to be shared equally by the nine aggrieved workers (\$8,000 each);
 - agreement not to discriminate or retaliate in the future, and agreement to communicate this policy to all managers and supervisors and provide appropriate follow-up training; and
 - agreement to maintain and provide EEOC access to employee records concerning rates of pay, overtime, and job assignments, etc. along with each individual's national origin, so EEOC can ensure there is no national origin discrimination in the terms and conditions of employment.
- The Consent Decree was filed in the United States District Court for the District of Minnesota, simultaneously with the complaint, on Thursday, January 6, 2000.
- This is EEOC's first lawsuit involving undocumented workers since EEOC issued its recent enforcement guidance on remedies for undocumented workers under federal civil rights laws.

Background on Claim of National Origin Discrimination

- EEOC complaint alleges that nine undocumented workers from Mexico received disparate treatment based on their national origin, including denial of lunch and rest breaks, denial of promised pay raises and more rigorous work assignments as compared to their non-Mexican co-workers.
- When the Mexican workers, with the assistance of a union organizer, complained to Respondent's management about the disparate treatment, Respondent ignored their objections.

Background on Claim of Retaliation

- The union subsequently won an election and scheduled a negotiating session to address the disparate treatment of the Mexican workers.
- On the eve of the first scheduled negotiating session, Respondent notified the Immigration and Naturalization Service (INS) that there were undocumented workers on the premises, and had the workers arrested.
- One of the nine Mexican workers then filed a charge of discrimination and retaliation with EEOC.

Coordination with State and Federal Agencies

- EEOC coordinated the investigation and resolution of this charge with other State and Federal agencies:
 - EEOC's investigation was conducted with the cooperation of the Minnesota Department of Civil Rights (MDCR), including participation of MDCR investigators with EEOC investigators in interviewing witnesses.
 - The National Labor Relations Board (NLRB) recently found merit to charges of unfair labor practices, and is in the process of resolving those charges through a settlement agreement with Holiday Inn Express.
 - EEOC and NLRB shared information during the course of their complementary investigations. Both agencies played different, although related, roles in this case.
 - EEOC's role ensured broader monetary relief, including compensatory damages/injunctive relief under Title VII, for the affected individuals and served to vindicate the public interest in remedying the national origin and retaliation violations that we allege occurred here.
 - The monetary relief obtained by NLRB is limited to lost backpay.
 - The Office of Special Counsel (OSC) in the Department of Justice has investigated a claim that the hotel violated the Immigration Reform and Control Act (IRCA), and EEOC believes that OSC is in the process of settling that claim with the hotel.
 - Finally, the aggrieved workers are negotiating with INS to allow voluntary departures in lieu of deportation. Voluntary departures would permit the workers to apply for reentry into the United States in the future.

**Information on EEOC Enforcement Guidance on Remedies Available to
Undocumented Workers Under Federal Employment Discrimination Laws**

- This guidance explains the availability of remedies under Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Equal Pay Act where an employer has unlawfully discriminated against undocumented workers.
- The guidance makes clear that federal employment discrimination laws protect all employees in this country who work for an employer with 15 or more employees, including those who are not authorized to work.
- The guidance also makes clear that unauthorized workers are protected by the retaliation principles of the federal anti-discrimination laws.

January 3, 2000

NOTE TO OFFICE OF RECORDS MANAGEMENT:

Attached is the original November 5, 1999 letter from Representative Mark Foley and 19 others urging the President to review and reverse the recent decision of the EEOC to extend anti-discrimination rights to illegal immigrants (Tracking Worksheet number 403389).

I do not believe a response is necessary because I have been informed that the EEOC staff has followed up with Representative Foley and the other interested members of Congress on their concerns with this decision.

Please contact me if you have any questions. Thank you.

Irene B. Bueno DPC
456-655b

Enclosure

cc: Cathy Mays

2403389

**INTERIM
WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET**

INCOMING CORRESPONDENCE

DATE OF LETTER: 11/5/99

NAME/ADDRESS OF CORRESPONDENT:

The Honorable Mark Foley
U.S. House of Representatives

SUBJECT:

Urges the President to review and reverse the recent decision of the Equal Employment Opportunity Commission to extend anti-discrimination rights to illegal immigrants

ROUTED TO:

LaStein - Org - 99/11/15

CB

A

99/11/22

CJ

✓ DPC - Bruce Reed - Action - 99/12/03

DATE: 11/15/99

COMMENTS: *cc. Broderick Johnson, Irene Bueno, Brooke Livingston, 1240/FL, Rebecca Hunter, Labor, IWS*
letter also signed by 19 additional signees
sp 403383

ACTION CODES:

A Appropriate Action
C Comment/Recommendations
D Draft Response
F Furnish Fact Sheet to be used as enclosure
I Info. Copy Only /No Action Necessary
R Direct Reply w/Copy
S For Signature
X Interim Reply

DISPOSITION CODES:

A Answered
C Completed
B Non-Special Referral
S Suspended

THE WHITE HOUSE
WASHINGTON
November 22, 1999

MEMORANDUM FOR BRUCE REED
DOMESTIC POLICY COUNCIL

FROM: CHARLES M. BRAIN
LEGISLATIVE AFFAIRS

SUBJECT: PRESIDENTIAL CORRESPONDENCE

Enclosed please find a copy of a letter that was sent to the President from Rep. Mark Foley (R-FL) and nineteen other Members of Congress.

I do not believe this letter requires a Presidential response at this time. Please review the attached letter and respond directly to the Member(s) of Congress. Please forward a copy of the response to the Office of Records Management, Room 74 Old Executive Office Building.

Thank you very much for your assistance in this matter. If you have any questions, please feel free to call Courtney Crouch, Office of Legislative Affairs, at 456-7500.

Enclosure

Congress of the United States

Washington, DC 20515

November 5, 1999



403389

The Honorable William Jefferson Clinton
The President of the United States of America
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear President Clinton:

We are writing to urge you to review and reverse the recent decision of the Equal Employment Opportunity Commission (EEOC) to extend anti-discrimination rights to illegal immigrants.

The EEOC's decision flies in the face of everything we as a country are trying to do to discourage illegal immigration. In states like Florida, Texas and California, fighting the steady tide of illegal immigrants is a daily challenge of legislators and law enforcement authorities. We cannot afford to have our own federal government encouraging, either directly or indirectly, individuals to break the law. By recognizing illegal immigrants in the work place, the Administration has not only given a backhanded endorsement to breaking the law, it has lost focus on the true problem -- employers who are committing a crime by hiring illegal aliens in the first place.

While we are strong supporters of equal rights for all individuals, we realize there are laws directly prohibiting the hiring of illegal immigrants.

For the EEOC to be establishing "protections" for illegal workers that not only give them the right to sue employers, but to have their jobs -- to which they were hired illegally -- reinstated, is patently absurd. If the Administration is worried about unscrupulous employers mistreating illegal workers, it should go after those employers who are already breaking the law -- not extending rights and protections that legitimately should be enjoyed by legal workers.

Again, we urge you to ensure that the EEOC rescind their decision.

Respectfully,

William Funder

Cass Ballenger

John T. Dabbs

Van Hillman

Paul Hillman

Ray Hunt

Roy Tucker

^{Smith}
Robert 2. Elving

Barbara Culver

^{Young}
W. Young

Bob Ney

Robert Jones

B. Schaffer John Linder

THE WHITE HOUSE

WASHINGTON

November 22, 1999

Dear Representative Foley:

Thank you for your letter to the President concerning the recent decision by the Equal Employment Opportunity Commission (EEOC) which extends anti-discrimination rights to illegal immigrants.

I have shared your concerns with the President and his advisors, and you will receive a response in the near future. In the meantime, if I can be of assistance to you, please do not hesitate to contact me.

Best wishes.

Sincerely,



Charles M. Brain
Deputy Assistant to the President
and Deputy Director for Legislative
Affairs

The Honorable Mark Foley
House of Representatives
Washington, D.C. 20515

Slam at INS



EEOC fax

U. S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
OFFICE OF COMMUNICATIONS AND LEGISLATIVE AFFAIRS
1801 L STREET, N.W.
WASHINGTON, D. C. 20507
FAX: (202) 663-4912

DATE: 12/6/99 TIME: 5:35p
TO: Irene Bueno
FAX NUMBER: 456-5581
SENDER: Pat Crawford
SENDER'S TELEPHONE NUMBER: (202) ~~663-4912~~ 663 4012
DOCUMENT:
NUMBER OF PAGES TRANSMITTED (INCLUDING COVER): 10

SPECIAL INSTRUCTIONS:

As we discussed earlier.

Pat

PLEASE TELEPHONE SENDER IF YOU DO NOT RECEIVE ALL DOCUMENTS.

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DETERMINED TO BE AN
ADMINISTRATIVE MARKING
INITIALS: DMS DATE: 12/16/09

December 9, 1999

The Honorable Peter Hoekstra
Chairman
Subcommittee on Oversight and Investigations
Committee on Education and the Workforce
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Hoekstra:

new P
I am pleased to ~~make~~ ^{reply} to your letter of November 18, 1999 regarding the Equal Employment Opportunity Commission's (EEOC) recently issued *Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Law*. Indeed, I welcome this opportunity to clarify the intent and purpose of the guidance, as well as to correct many of the misinterpretations that have been made since issuance of the guidance. ~~As you know,~~ [✓] The Commission has an important role in interpreting the laws within its jurisdiction. EEOC has a long history of issuing sub-regulatory guidance, such as the Notice at issue, to help both employers and employees better understand their rights and obligations under the law. These guidances must be approved by the full Commission after a thorough review process. In this case, we also coordinated our review with the Immigration and Naturalization Service (INS), and were pleased to secure their support of this guidance. ~~that was not the case~~ [✓]

Consistent with governing Supreme Court precedent, the Commission has taken the position for many years that the laws it enforces protect all workers in the United States, regardless of their immigration status. The issues raised by this guidance, and the questions raised by your letter, address the remedies that are available for violations of the laws. In fashioning this guidance, the Commission relied extensively on a series of cases addressing remedies that are available to unauthorized workers for violations of the labor laws as well as the civil rights laws. We also relied on the position taken by the National Labor Relations Board (NLRB) with regard to remedies that are available for violations of the National Labor Relations Act (NLRA). We understand, of course, that the legal authority is not uniform with regard to the questions under discussion. Indeed, we have been careful to acknowledge the different points of view in the guidance itself. We do believe, however, that our position is consistent with the weight of legal authority and is supported by the important policy considerations of protecting workers' rights while at the same time respecting our nation's immigration laws.

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Let me now answer your specific questions:

Question 1: In light of the Supreme Court's warning in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) that any remedies available to undocumented workers under the National Labor Relations Act (and similarly, Title VII) must be tailored to avoid any conflict with the immigration laws:

- a. Please list any and all events, policy shifts, legal decisions, or political influences within the last year (and limited to the last year) that prompted the EEOC to issue Notice 915.002 at this time.
- b. Please inform this Committee who made the decision to go forward with the release of Notice 915.002 before first approaching the Committees of jurisdiction of the United States House of Representatives to discuss the recent events and significant policy shifts that necessitated release of Notice 915.002.
- c. Within the current Administration, was the option of working with the Congress to craft a solution that would clarify this area, rather than potentially add to an existing policy conflict discussed?

EEOC Response Question 1

EEOC carefully structured its policy guidance to conform to the Supreme Court's admonition in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), that the National Labor Relations Act (and by implication for our purposes here, the civil rights laws) should be interpreted to avoid a conflict with the immigration laws. We believe that the Commission's guidance has achieved that goal and has avoided any conflict between the discrimination laws and the immigration laws, as evidenced by INS' support of our guidance.

In *Sure-Tan*, the Supreme Court first concluded that the NLRB properly construed the NLRA to prohibit discrimination against unauthorized workers. *Id.* at 893-94. The Commission's long-standing position that the discrimination laws within its jurisdiction protect all workers in the United States regardless of their immigration status is thus entirely consistent with *Sure-Tan*.

The Court then turned to the question of the appropriate remedies for the unauthorized workers whose rights were violated. In the Commission's view, as well as that of three circuit courts of appeals, (*see NLRB v. A.P.R.A.*, 134 F.3d 50 (2nd Cir. 1997); *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988); *Local 512 v. NLRB*, 795 F.2d 705 (9th Cir. 1986)), the *Sure-Tan* holding regarding the availability of remedies must be viewed in light of the facts of the case. In *Sure-Tan*, after the union prevailed in a Board election, the company sent a letter to INS requesting that the agency check into the status of a number of its employees who had voted for the union. INS agents visited the employer's premises on February 18, 1977. On that same day: (1) the INS agents discovered that five employees were living and working illegally in the

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U.S. and (2) the employees executed INS forms acknowledging their illegal presence in the country and accepting INS's grant of voluntary departure as a substitute for deportation, and boarded a bus for Mexico. *Id.* at 887. Since the employees *were working for the employer up to the very day they left the country*, they incurred no wage loss at any time that they were available for work in the U.S.

Thus, when the Court held that "the implementation of the Board's traditional remedies at the compliance proceedings must be conditioned upon the employees' legal readmittance to the United States," *Id.* at 902-03, it did so on the factual record that the employees were not in the United States. The same analysis applies to the Court's conclusion that "in computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States." *Id.* Since the employees would only be entitled to backpay for periods when they were not paid, and since they were out of the country -- and could not legally return -- for that entire period, any grant of back pay would pose a conflict with the immigration laws by encouraging their illegal return to the United States.

The Commission faithfully adopted these limitations in its guidance as it concluded that unauthorized workers are not entitled to back pay for the period of time that they are outside of the United States and cannot legally return. As such, it avoided exactly the conflict that the *Sure-Tan* Court was concerned about.

- a. You have asked only for specified events which occurred in the past year which "prompted the EEOC to issue Notice 915.002 at this time." In fact, no "events, policy shifts, legal decisions, or political influences" occurred in the past year which prompted EEOC to issue the guidance at this time. Rather, the principal events which prompted EEOC to revisit this issue were the NLRB's and Second Circuit's decisions in *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.* Both of these decisions were issued more than a year ago. The only legal development of relevance during the past year was the issuance of the NLRB General Counsel's Memorandum on Undocumented Aliens on December 4, 1998. That memorandum was fully consistent with prior positions taken by the Board and did not constitute a "shift." See also answer to question # 6.
- b. Sub-regulatory policy interpretations, including the Notice at issue, must be approved by vote of the Commission after a thorough internal review. As I am sure you can understand, the Commission's deliberative decision-making process, with an emphasis on achieving consensus within the Commission, where possible, can be a lengthy and sometimes ponderous process. The Commission, functioning as a body, thus made the decision to approve this policy. We would note that the Notice was approved unanimously by the bi-partisan membership of the Commission.

✓ Need a sentence^{on} Why didn't you consult w/ Congress?

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- c. The EEOC is an independent executive agency with jurisdiction over the enforcement of enumerated laws prohibiting discrimination in employment. There were no discussions within the Administration regarding the option of working with Congress on this issue because, consistent with the discussion in the guidance and this letter, this Administration does not believe that there is a policy conflict.

Question 2: The Seventh Circuit Court of Appeals in the case of *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115 (7th Cir. 1992) holds that undocumented aliens cannot receive back pay for any time that they were working in the United States. The Seventh Circuit court bases its holding on *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 903 (1984) wherein the Supreme Court held that undocumented aliens were not entitled to the NLRA's remedy of back pay "during any time they were not lawfully entitled to be present and employed in the United States."

On the basis of Notice 915.002, obviously, the EEOC believes that the Seventh Circuit's interpretation of *Sure-Tan* is far too narrow. In contrast, the *Del Rey Tortilleria* court offers as one reason for this interpretation the dissenting opinion of Justice Brennan in *Sure-Tan*.¹ The court points out that the *Sure-Tan* majority responded to Justice Brennan's dissenting views, *Id.* At 905, n. 13, but failed to criticize what would seem to be, consistent with EEOC's logic, a very broad, unjustified and totally wrong reading of the case of Justice Brennan. How does the EEOC reconcile its reading of *Sure Tan* in light of the Brennan dissent?

EEOC Response Question 2

The Commission's conclusion that *Sure-Tan* does not bar awards of monetary remedies to undocumented workers who have remained in the country is consistent with the rulings of the majority of the courts to have considered the question. *NLRB v. A.P.R.A.*, 134 F.3d 50 (2nd Cir. 1997); *Local 512 v. NLRB*, 795 F.2d 705 (9th Cir. 1986). See also *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988)(expressing no opinion on the Ninth Circuit's interpretation of *Sure-Tan*, but noting that "the [*Sure-Tan*] Court was faced with the question of whether deported employees could recover for the loss of their jobs" and holding that *Sure-Tan* is inapplicable to an action under the FLSA to recover wages for work already performed.) Only the 7th Circuit, in

¹ In *Sure-Tan*, 467 at 912, Justice Brennan wrote: "Once employers, such as petitioners realize that they may violate the NLRA with respect to their undocumented employees without fear of having to recompense those workers for lost back pay, their incentive to hire such illegal aliens will not decline, it will increase."

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Del Rey Tortilleria, Inc. v. NLRB, 976 F. 2d 1115 (7th Cir. 1992), has resolved the question differently.²

The Commission believes that Justice Brennan's dissent in *Sure-Tan* does not affect its conclusion, and sees no significance in the *Sure-Tan* majority's failure to criticize his opinion. Justice Brennan was not arguing that workers who remained in the country should be eligible for back pay but, rather, that discriminatees who had left the country should be eligible for back pay. That was the context in which he stated that failing to impose monetary penalties would increase, not decrease, the incentive of employers such as *Sure-Tan, Inc.* to hire illegal aliens. Concluding that *Sure-Tan* denied back pay to those who had left the country is, of course, an entirely accurate reading of the decision and is in no way contrary to the Second and Ninth Circuits' conclusions that *Sure-Tan* permits back pay awards to those who remained in the country. Understood in that way, his statement would provide no occasion for the majority to comment. In any event, it is difficult to draw inferences of any sort from a majority's failure to comment on any particular point in a dissent.

Question 3: Second Circuit Judge Jacobs, in the case of *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 61-62 (2nd Cir. 1997), in dissent writes:

"It is indisputable that under IRCA the employment of an undocumented alien is now illegal. It closely follows that an undocumented alien is not available for employment, and therefore is not eligible for any award of back pay in any period during which that alien lacks work authorization...The majority's approach subverts and contradicts the immigration laws by compensating...for prolonged illegal residence in this country. Thus may have become entitled to years of salary (depending on how the NLRB computes the award), but would qualify for nothing (under the rule of *Sure-Tan*) if they had respected the United States immigration law by returning to their countries. Considering that NLRB proceedings can span a whole decade, this is no small inducement

²The Fourth Circuit, in *Egbuna v. Time Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998), *cert. denied*, 119 S.Ct.1034 (1999), did not reach the issue of remedies to undocumented workers who were discriminated against after hire. It ruled only that undocumented *applicants* had no cause of action because, as undocumented workers, they were not qualified to be hired. The Commission disagrees with *Egbuna* for the reasons set forth in the Guidance and by Judge Ervin's dissent. The case did not address remedies as is the case here.

The employee bears the burden of proving that discrimination was the reason for the adverse employment action. In the context of hire or discharge, this will be a heavy burden for an undocumented worker if the employer has no history of knowingly employing such workers. Thus, those most likely to be subject to monetary penalties are employers who, like those in *A.P.R.A.* and *Sure-Tan*, knowingly employ undocumented workers and those who exploit workers during their employment.

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to prolong illegal presence in the country. The poor fit between labor laws and the immigration laws (as the majority construes them) is further illustrated by an employers obligation to mitigate damages, a duty recognized by the Supreme Court in *Sure-Tan*, 467 U.S. 901, 104 S. Ct. at 2813-14, but that cannot be performed by an undocumented alien without causing further violation of the immigration laws, 134 F.3d at 62.

Please address Judge Jacob's point about the conflict of labor law and immigration law in terms of the duty to mitigate damages.

EEOC Response Question 3

The Commission believes that the *A.P.R.A.* panel majority sets forth the appropriate interpretation of *Sure-Tan* and disagrees with the policy argument that a monetary award "contradicts" the immigration laws by compensating for prolonged illegal residence. The Commission believes that undocumented persons come to this country to gain the protection of the labor laws; they come for jobs, under any conditions, and providing disincentives to hire them is the most effective deterrent to illegal entry. Again, INS is in agreement with this assertion. See, e.g., *Patel*, 846 F.2d at 704. In short, for the reasons set forth in the Guidance and in this letter, the Commission has concluded that the back pay policy complements the immigration laws. INS + the
~~INS + the~~
✓

Moreover, the Supreme Court's reference to the duty to mitigate was made in passing and was unrelated to the workers' undocumented status. Instead, in criticizing the "obviously conjectural" back pay award made by the lower court, the Supreme Court simply observed that a remedy "must be sufficiently tailored to expunge only the actual, and not merely speculative, consequences of an unfair labor practice. . . . To this end, we have . . . required that the Board give due consideration to the employee's responsibility to mitigate damages in fashioning a back pay award (citation omitted). Likewise, the Board's own long-standing practice has been to deduct from the backpay award any wages earned in the interim in another job." 467 U.S. at 900. Accordingly, we do not believe that the general duty to mitigate damages cited by the Court, causes any conflict between the labor and immigration laws. ✓

Question 4: Under Section 2000e-5(f)(1) of Title VII,³ if the EEOC dismisses a charge, or does not bring an enforcement action or enter into a conciliation agreement within 180 days after a charge is filed, it shall notify the complainant, who then has 90 days to sue. Section 2000e-5(b), however, requires that the EEOC investigate all administrative charges. The D.C. Circuit Court of Appeals, in the case of *Martini v. Federal National Mortgage Association*, 178 F.3d 1336 (D.C. Cir. 1999), ruled that the EEOC's duty to investigate is mandatory and unqualified, therefore

³ 42 U.S.C.A. 2000E-5(F)(1).

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impeding the issuance of a "right to sue" letter prior to the statutory 180-day period for EEOC investigation.

- a. During EEOC's investigation, the Immigration and Naturalization Service (INS) will be pursuing its own legal process. Please explain in detail the formal plans to coordinate these two separate government pursuits.
- b. Since it is apparent that the INS will be pursuing legal processes at the same time that the EEOC is investigating a claim of discrimination, please provide a list of all meetings between EEOC and INS that preceded the release of Notice 915.002 with the minutes of each such meeting. If no minutes were kept, please summarize the proceedings of each such meeting.
- c. In addition, please provide any and all documents that were prepared before or after such meetings that touch upon potential conflicts between the statutory missions of the INS and EEOC. For each meeting that occurred between EEOC and INS, please provide, in addition to other requested documents, proposed agendas, attendance lists, invitation letters or meeting notices, E-mail communications, and all preparatory memoranda.

EEOC Response Question 4

EEOC, of course, complies with all statutory mandates regarding the investigation of charges. Insofar as you are concerned about demands on EEOC's charge processing capacity, I am extremely pleased to report that we have made extraordinary progress in reducing the backlog. As of the end of FY 1999, EEOC's charge inventory consisted of 40,234 cases. This is down from a high of approximately 111,000 charges in 1995. In addition, we have succeeded in reducing charge processing times while at the same time significantly enhancing benefits to persons who seek our assistance.

- a. EEOC and INS have distinct enforcement responsibilities and processes. EEOC investigates charges of discrimination while INS enforces the immigration laws. Because these enforcement processes neither converge nor conflict, the agencies will proceed with their separate enforcement processes accordingly.
- b. There were no meetings between EEOC and INS regarding the guidance. However, there were several telephone calls between EEOC and INS agency staff. During the course of these conversations, INS expressed the view that the EEOC's policy interests were consistent with the statutory mission of the INS and the enforcement of the immigration laws. In fact, an article in an October 26, 1999, Chicago Tribune article entitled *EEOC Seeks to Protect Undocumented: Policy Change Aims to Prevent Abuses* quotes Brian Perryman, the Chicago-based district director for the U.S. Immigration and Naturalization Service as saying he backed "any effort to protect workers while maintaining compliance with

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DRAFT

immigration laws." He further stated that his agency places a priority on investigating "employers who exploit illegal aliens in the workforce." Additionally, Don Mueller, a spokesperson for the INS, said, in an October 27, 1999, Arizona Republic article entitled *Rights of Illegal Immigrants Protected in Workplace*, the agency supports the policy. Moreover, Mr. Mueller said "for us, anything that's going to protect workers' rights we're going to support; our public enemy are the smugglers and employers who exploit these people."

- c. As stated in response to subsection b, there were no meetings and no documents were generated that "touch upon potential conflicts between the statutory missions of the INS and the EEOC" other than the discussion in the guidance, itself. Furthermore, as explained in this letter and in the guidance, neither INS nor EEOC believes that there is a policy conflict between the enforcement of the immigration and civil rights laws.

Question 5: Please provide all documents prepared by EEOC which assess the effect of Notice 915.002 on the EEOC's caseload of charges. If no such documents exist, please provide estimates of the number of charges that EEOC expects to receive as a result of the changes appearing in Notice 915.002.

EEOC Response Question 5

EEOC has not prepared any documents to assess the effect of the Notice on EEOC's caseload of charges. The Commission has consistently taken the position that the federal employment discrimination laws protect all workers regardless of their immigration status. See EEOC Compl.Man. (BNA) section 622.7(a) (Oct. 1981). See also *Espinoza v. Farah Manufacturing Company*, 414 U.S. 86, 95 (1973) ("aliens are protected from discrimination under" Title VII). Moreover, EEOC has neither the authority nor expertise to determine an individual's immigration status in connection with its enforcement program. As a result, EEOC does not track the immigration status of charging parties and has no information regarding the number of charges which may have been filed by unauthorized workers. Based on highly anecdotal information regarding charges which may involve claims of unauthorized workers, we believe that the impact of this Notice on EEOC's caseload will be insignificant.

Question 6: I assume that EEOC's Office of Legal Counsel and other offices within the agency prepared and/or received a number of memoranda, letters, E-mails and other communications relating to the preparation of Notice 915.002 or issues relating thereto. These documents will be very helpful to Congress in evaluating the options now pending before it to address policy in this area. Accordingly, and based upon the assumption that the number of documents to be submitted is not that extensive, please forward all such aforementioned documents, from any source, for a two-year period preceding release of Notice 915.002 in addition to those documents already requested.

~~CONFIDENTIAL~~ DRAFT

EEOC Response Question 6

Question # 6 seeks several governmental documents regarding the Commission's policymaking process. The documents you seek were all prepared prior to the adoption of the policy and were part of the deliberative process used by the Commission and its staff to analyze, and make recommendations on, the issues to be addressed in the policy document. As such, the documents are protected from disclosure by the government's deliberative process privilege and we respectfully assert such privilege. The privilege applies to documents prepared prior to an agency's decision, Jordan v. Dep't of Justice, 591 F.2d 753,774 (D.C. Cir. 1978)(en banc), and for the purpose of assisting the agency's decisionmakers. Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

Downside to
providing?

EEOC has received communications from non-governmental sources regarding the issues raised in this Notice. Copies of written communications are attached hereto. In addition, EEOC staff spoke with other organizations regarding this rulemaking, including the Equal Employment Advisory Council and the Society for Human Resources Management. We requested information from the National Federation of Independent Businesses but did not receive a reply.

In closing, let me note the Commission's belief that this guidance supports the goal of making America's workplaces free from any form of discrimination. Any time an employer is able to breach civil rights requirements for a group of workers such as undocumented workers, without the deterrence of economic or legal penalties discrimination is free to flourish. EEOC's mission does not tolerate such blatant abuse and, in conformity with federal employment discrimination and immigration laws, will fully pursue all remedies available under the law without apology.

Please feel free to call on me if I can be of further assistance to you. Or, your staff may contact Bill White of my staff at 663- 4900.

Sincerely,

Ida L. Castro
Chairwoman

enclosures

cc. The Honorable Tim Roemer
Ranking Minority Member

The Honorable Doris Meissner
Immigration and Naturalization Service



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

FAX TRANSMITTAL COVER SHEET

DATE: November 29, 1999

TIME: _____

DELIVER TO: Irene Buero

AGENCY/OFFICE/DEPT: _____

FAX#: 456-5581

TELEPHONE#: _____

SENT BY: Ellen Vargas

TELEPHONE#: 663-4637

SENT FROM FAX#: 663-7176

COVER SHEET PLUS 4 **PAGES**

SUBJECT/REMARKS:

CALL 202/663- 4637 IF THERE IS A PROBLEM WITH THIS TRANSMISSION.

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(TTY) (202) 225-3372

MINORITY (200) 225-3728

(TTY) (202) 225-3116

**SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
COMMITTEE ON EDUCATION AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
2181 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-8100**

November 18, 1999

The Honorable Ida Castro
Chairwoman
Equal Employment Opportunity Commission
1801 L Street, N.W.
Washington, D.C. 20507

Dear Chairwoman Castro:

I am writing with regard to the Equal Employment Opportunity Commission's (EEOC) recently released "Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Law (Notice 915.002)." Numerous legal questions have spawned since the passage of the Immigration Reform and Control Act of 1986 (IRCA) over the application of certain statutory protections under the jurisdiction of this Committee to foreign nationals residing illegally in the United States. This and other Committees of the Congress are therefore keenly interested in any policy interpretations that are proffered in this area by agencies, such as the EEOC, under their statutory mandates. Accordingly, pursuant to Rules X and XI of the Rules of the House of Representatives, and consistent with the responsibilities of the Subcommittee on Oversight and Investigations, please provide answers to the following questions and produce the following requested documents:

- (1. In light of the Supreme Court's warning in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), that any remedies available to undocumented workers under the National Labor Relations Act (and similarly, Title VII) must be tailored to avoid any conflict with the immigration laws:
 - (a) Please list any and all events, policy shifts, legal decisions, or political influences within the last year (and limited to the last year) that prompted the EEOC to issue Notice 915.002 at this time.
 - (b) Please inform this Committee who made the decision to go forward with the release of Notice 915.002 before first approaching the Committees of jurisdiction of the United States House of Representatives to discuss the recent events and significant policy shifts that necessitated release of Notice 915.002.

- (c) Within the current Administration, was the option of working with the Congress to craft a solution that would clarify this area, rather than potentially add to an existing policy conflict discussed?
2. The Seventh Circuit Court of Appeals in the case of *Del Rey Tortilleria, Inc. v. NLRB*, 976 F. 2d 1115 (7th Cir. 1992) holds that undocumented aliens cannot receive back pay for any time that they were working in the United States. The Seventh Circuit court bases its holding on *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 903 (1984) wherein the Supreme Court held that undocumented aliens were not entitled to the NLRA's remedy of back pay "during any time they were not lawfully entitled to be present and employed in the United States."

On the basis of Notice 915.002, obviously, the EEOC believes that the Seventh Circuit's interpretation of *Sure-Tan* is far too narrow. In contrast, the *Del Rey Tortilleria* court offers as one reason for this interpretation the dissenting opinion of Justice Brennan in *Sure-Tan*.¹ The court points out that the *Sure-Tan* majority responded to Justice Brennan's dissenting views, *Id.* at 905, n. 13, but failed to criticize what would seem to be, consistent with EEOC's logic, a very broad, unjustified and totally wrong reading of the case by Justice Brennan. How does the EEOC reconcile its reading of *Sure Tan* in light of the Brennan dissent?

3. Second Circuit Judge Jacobs, in the case of *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F. 3d 50, 61-62 (2nd Cir. 1997), in dissent writes:

"It is indisputable that under IRCA the employment of an undocumented alien is now illegal. It closely follows that an undocumented alien is not available for employment, and therefore is not eligible for any award of back pay in any period during which that alien lacks work authorization... The majority's approach subverts and contradicts the immigration laws by compensating ...for prolonged illegal residence in this country. Thus they may have become entitled to years of salary (depending on how the NLRB computes the award), but would qualify for nothing (under the rule of *Sure-Tan*) if they had respected the United States immigration law by returning to their countries. Considering that NLRB proceedings can span a whole decade, this is no small inducement to prolong illegal presence in the country. The poor fit between labor laws and the immigration laws (as the majority construes them) is further illustrated by an employers obligation to mitigate damages, a duty recognized by the Supreme Court in *Sure-Tan*, 467 U.S. 901, 104 S. Ct. at 2813-14, but that cannot be performed by an undocumented alien without causing further violation of the immigration laws, 134 F. 3d at 62.

¹ In *Sure-Tan*, 467 at 912, Justice Brennan wrote: "Once employers, such as petitioners realize that they may violate the NLRA with respect to their undocumented employees without fear of having to recompense those workers for lost back pay, their incentive to hire such illegal aliens will not decline, it will increase."

Please address Judge Jacob's point about the conflict of labor law and immigration law in terms of the duty to mitigate damages.

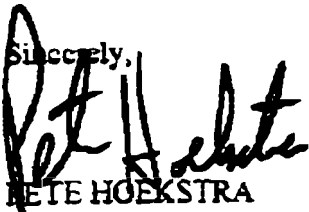
4. Under Section 2000e-5(f)(1) of Title VII,² if the EEOC dismisses a charge, or does not bring an enforcement action or enter into a conciliation agreement within 180 days after a charge is filed, it shall notify the complainant, who then has 90 days to sue. Section 2000e-5(b), however, requires that the EEOC investigate all administrative charges. The D.C. Circuit Court of Appeals, in the case of *Martini v. Federal National Mortgage Association*, 178 F. 3d 1336 (D.C. Cir. 1999), ruled that the EEOC's duty to investigate is mandatory and unqualified, therefore impeding the issuance of a "right to sue" letter prior to the statutory 180-day period for EEOC investigation.
 - (a) During EEOC's investigation, the Immigration and Naturalization Service (INS) will be pursuing its own legal process. Please explain in detail the formal plans to coordinate these two separate government pursuits.
 - (b) Since it is apparent that the INS will be pursuing legal process at the same time that the EEOC is investigating a claim of discrimination, please provide a list of all meetings between EEOC and INS that preceded the release of Notice 915.002 with the minutes of each such meeting. If no minutes were kept, please summarize the proceedings of each such meeting.
 - (c) In addition, please provide any and all documents that were prepared before or after such meetings that touch upon potential conflicts between the statutory missions of the INS and EEOC. For each meeting that occurred between EEOC and INS, please provide, in addition to other requested documents, proposed agendas, attendance lists, invitation letters or meeting notices, E-mail communications, and all preparatory memoranda.
- (5) Please provide all documents prepared by EEOC which assess the effect of Notice 915.002 on the EEOC's caseload of charges. If no such documents exist, please provide estimates of the number of charges that EEOC expects to receive as a result of the changes appearing in Notice 915.002.
- (6) I assume that EEOC's Office of Legal Counsel and other offices within the agency prepared and/or received a number of memoranda, letters, E-mails and other communications relating to the preparation of Notice 915.002 or issues relating thereto. These documents will be very helpful to Congress in evaluating the options now pending before it to address policy in this area. Accordingly, and based upon the assumption that the number of documents to be submitted is not that extensive, please forward all such aforementioned documents, from any source, for a two-year period preceding release of Notice 915.002 in addition to those documents already requested.

² 42 U.S.C.A. 2000e-5(f)(1).

In closing, I want to note that I have repeatedly urged this Administration to use the enforcement power at its disposal to assist undocumented aliens who may be exploited by employers within the United States. I have been greatly disappointed in the seeming lack of interest of this Administration in this area. This preexisting disappointment makes it all the more perplexing that this Administration, through the EEOC, would venture into a policy area clearly as legally questionable as the remedies available to undocumented alien workers under Title VII while demonstrating a lack luster performance in enforcing laws designed to prevent the smuggling of aliens into this nation where they can be thrown into sweatshops in the garment industry, be forsaken in the fields picking crops while housed in sub-human conditions, or abused in houses of prostitution virtually right under the noses of legal authority. Accordingly, I am not questioning the wisdom of this Administration's desire to do something to address the exploitation of undocumented workers. What I am seriously questioning is using this nation's scarce enforcement resources to cure a problem that is the least troublesome threat for most undocumented aliens now in the United States, relatively speaking. Let me make it clear -- arguing that the remedies available under Title VII will complement efforts to help exploited undocumented workers is like putting a band-aid on a festering and infected wound. In ignoring the fundamental policy conflicts inherent in the interplay between labor law and immigration law, this Administration once again seems to be pandering to interest groups while ignoring those most truly in need of our focused attention and aggressive assistance.

Please communicate with Steve Seitle at (202) 225-1860 if you have any questions about this request for information and documents. Please provide these documents no later than close of business December 9, 1999. In advance, thank you for your assistance.

Sincerely,


PETE HOEKSTRA
Chairman

cc. Hon. Tim Roemer
Ranking Minority Member

Commissioner Doris Meissner
Immigration and Naturalization Service

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November 3, 1999 Wednesday, CHICAGO SPORTS FINAL EDITION

SECTION: COMMENTARY; Pg. 28; ZONE: N; Voice of the people (letter.)

LENGTH: 748 words

HEADLINE: PROTECTING WORKERS FROM DISCRIMINATION

BYLINE: Ida L. Castro, Chairwoman, U.S. Equal Employment Opportunity Commission.

DATELINE: WASHINGTON

BODY:

As chairwoman of the U.S. Equal Employment Opportunity Commission, I want to set the record straight regarding your Oct. 27 editorial "This EEOC policy goes out of bounds" and other statements and press accounts highlighting the agency's recently issued enforcement guidance, "Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws." I want to ensure that all parties, including the media, have information to correctly convey what the enforcement guidance does, and does not do, with respect to the effect of anti-discrimination laws on undocumented workers.

Let me first make it clear the commission could not, would not and did not state in its enforcement guidance that individuals working in this country illegally must be given their jobs back if they have been the victims of discrimination. Unless an individual has satisfied the Immigration and Naturalization Service requirements for legal authorization to work, reinstatement would not be among the remedial options open to that person.

Your readers also might find it important to know that EEOC's guidance reinforces the long-established protections that have always been available to all workers, regardless of status in the United States, since passage of Title VII of the Civil Rights Act of 1964, which created the EEOC. As such this guidance does not represent, as some have suggested, a new concept or expansion of the nation's federal employment discrimination laws to unauthorized workers for the first time. The American ideal of a discrimination-free workplace for all workers was as alive and well then as I hope it still is today, and this guidance simply underscores that national commitment.

Full application of the nation's anti-discrimination and immigration laws, and the monetary consequences of violating those laws, is the deterrent

determined to be the most effective by Congress and the courts in promoting compliance with the laws and upholding our societal values. In fact both Congress and the Supreme Court have long placed a great deal of importance on deterrence as a key element in civil rights enforcement. To suggest that increased liability to employers who violate the law will pose no deterrent to their illegal practices simply defies experience and common sense. Whether in a criminal or civil setting, our legal construct calls for punishing the wrongdoer--not only to "right a wrong," but also to send a strong, unequivocal message to all that such behavior brings with it serious repercussions. EEOC's enforcement guidance fortifies that message.

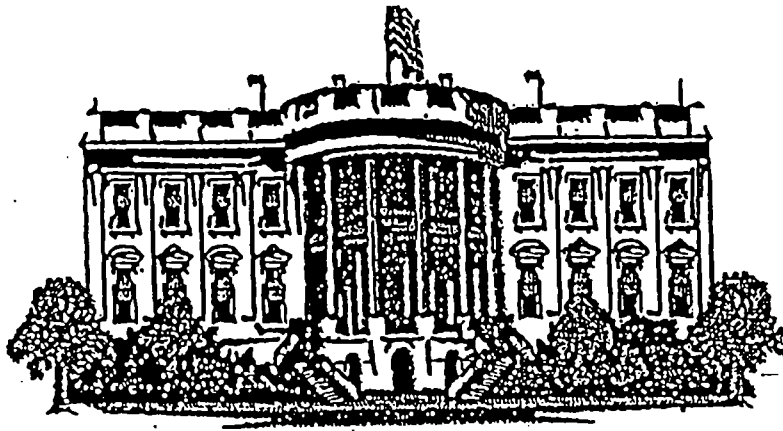
Rather than undermining established immigration policies and laws, this guidance assists their implementation. That is why, when consulted, the INS, whose job it is to police immigration, found our guidance to be consistent with the overall goals of the Immigration Reform and Control Act. Moreover this guidance tracks judicial affirmation of the National Labor Relations Board's ruling that unauthorized workers are eligible for back pay for periods that they were working for an employer but were discriminatory underpaid. Because Title VII's back pay provision is modeled on the National Labor Relations Act, the EEOC concluded that the same authority should apply.

No, this guidance is not about immigrant children and families too afraid of deportation to do what they can to ensure their safety and welfare. But, again, it is about deterring employers from making the lives of a most vulnerable community even more unbearable. Effective enforcement of anti-discrimination laws at the workplace in fact protects children and families from the horrors of working conditions that violate the fundamental right to be free from discriminatory actions. Clearly, these actions threaten the physical and mental well-being of hard-working individuals and indirectly reward those who assault these families daily. This is unacceptable on any front. In accordance with that position, the EEOC feels strongly that failure to penalize discriminating employers will undermine that objective.

Any time an employer is able to breach civil rights requirements for a group of workers such as undocumented workers, without the deterrence of economic or legal penalties, discrimination is free to flourish. The EEOC will not tolerate such blatant abuse and, in conformity with federal employment discrimination and immigration laws, will fully pursue all remedies available under the law without apology.

LANGUAGE: ENGLISH

LOAD-DATE: November 3, 1999



THE WHITE HOUSE

Domestic Policy Council

DATE: 11/16/97

FACSIMILE FOR: Pat Crawford

PHONE: () -

FAX: (163 -7201

FACSIMILE FROM: IRENE B. BUENO

PHONE: (202)456 - 6558

FAX: (202)456 7028 or 5581

NUMBER OF PAGES (INCLUDING COVER): 3

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COMMENTS: Foley letter



Irene Bueno <irene_bueno@hotmail.com>

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Record Type: Record

To: Irene Bueno/OPD/EOP

cc:

Subject: Fwd: Labor rights for Illegal Immigrants

>From: Fyoungberg@aol.com

>To: Fyoungberg@aol.com

>Subject: Labor rights for Illegal Immigrants

>Date: Fri, 29 Oct 1999 07:25:17 EDT

>

> SEARCH THE SITE

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> October 28, 1999

>

>

> U.S. to Expand Labor Rights to Cover Illegal Immigrants

>

> By STEVEN GREENHOUSE

>

>

>

> The Equal Employment Opportunity Commission has announced that it will
>extend broad anti-discrimination rights to illegal immigrants for the first
>time, a policy that some critics said could be hard to enforce and others
>contended would encourage illegal immigration.

>

> The Equal Employment Opportunity Commission announced this week that it
>would for the first time extend broad anti-discrimination rights to workers
>who are illegal immigrants, a policy that some lawyers said might be hard
>to
>enforce because immigrants might fear deportation if they assert these
>rights.

>

> The E.E.O.C. said Tuesday that illegal immigrants who are dismissed or
>discriminated against because of their race, sex, age or religion should
>enjoy the same remedies as legal workers -- back pay, punitive damages and
>even reinstatement, but reinstatement coming only if they have first
>obtained
>legal work papers.

>

> The new policy faces several enforcement problems, among them that
>illegal

>aliens might be too scared to file discrimination complaints with the
>E.E.O.C. and are likely to have difficulty obtaining official work
>documents.
>
> The E.E.O.C. said it issued the new policy because it wanted to ensure
>that
>employers who knowingly hire illegal aliens were not free to discriminate
>against them without facing any penalties.
>
> But critics of the Clinton administration's immigration policies attacked
>the decision, insisting that extending remedies like reinstatement and back
>pay to illegal immigrants would only encourage more such immigrants to
>enter
>the United States.
>
> "This whole policy is creating an atmosphere hostile to removing illegal
>immigrants from the labor force," said Daniel Stein, executive director of
>the Federation for American Immigration Reform, a Washington-based group
>pushing for stricter limits on immigration. "The E.E.O.C. is putting itself
>in the position of a mother superior seeking to gather and protect the
>undocumented flock."
>
> E.E.O.C. Chairwoman Ida Castro asserted that without the policy announced
>Tuesday, unscrupulous employers would feel encouraged to hire illegal
>aliens
>with an eye to exploiting them. She said the policy would discourage such
>discrimination and exploitation by guaranteeing illegal aliens the same
>anti-discrimination protections as U.S. citizens and resident aliens.
>
> Ms. Castro said, "If you let employers just breach civil rights
>requirements
>for a group of workers such as undocumented workers, then you're indirectly
>supporting the hiring of this group and the violation of our laws."
>
> Several critics suggested that the Clinton administration pushed the
>E.E.O.C. to embrace this new policy as a way to win support for Vice
>President Al Gore's presidential campaign among three important Democratic
>constituencies: labor unions, minorities and immigrants.
>
> The A.F.L.-C.I.O., which endorsed Gore two weeks ago, has pushed hard for
>the E.E.O.C. to adopt this policy, arguing that failure to enforce
>discrimination laws for illegal aliens encouraged employers to hire them
>and
>undercut workplace conditions for all workers.
>
> Administration and E.E.O.C. officials said politics had nothing to do
>with
>the new E.E.O.C. policy.
>
> A.F.L.-C.I.O. general counsel John Hiatt said the labor federation has
>long
>pushed for this policy partly because of concerns that failing to crack
>down
>on discrimination against illegal workers can create an atmosphere that

>allows discrimination of documented workers.

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> "They are a very welcome set of guidelines," Hiatt said. "The

>exploitation

>of undocumented workers lowers wages, benefits and conditions for

>documented

>workers.

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> The new policy continues a trend in which the federal government has

>extended more and more protections to illegal immigrants. They are covered

>by

>minimum-wage and occupational-safety laws. And The National Labor Relations

>Board has ruled that employers who knowingly hire illegal aliens are

>prohibited from dismissing them if they support unionization.

>

> Attracted in part by contingency fees and attorneys fees, some lawyers

>have

>moved aggressively to file suits charging that employers have violated

>minimum wage laws for undocumented workers. Some business organizations

>voiced fears that lawyers might seek to do the same in filing

>discrimination

>claims on behalf of illegal aliens.

>

> One fear that some business executives expressed is that if they hire

>illegal aliens without knowing of their undocumented status and later

>dismiss

>those workers upon learning of that status, the angered workers might file

>discrimination suits, charging that they were fired because of their race

>or

>sex.

>

> E.E.O.C. officials said they adopted the new policy after encountering

>what

>they said were horrific examples of discrimination against illegal

>immigrants.

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> These officials described one illegal immigrant who was dismissed after
 >refusing to provide sexual favors to her boss. E.E.O.C. officials also
 >described a group of Vietnamese workers who were illegally segregated from
 >other workers on a fishing vessel. These officials also described instances
 >in which managers retaliated against illegal aliens by dismissing them
 >after
 >they sought to report racial discrimination or sexual harassment.
 >
 > "Unauthorized workers are especially vulnerable to abuse and
 >exploitation,"
 >Ms. Castro said. "It is imperative for employers to fully understand that
 >discrimination against this class of employees will not be tolerated."
 >
 >
 >
 > Seeking to avoid a clash with the nation's immigration laws, the E.E.O.C.
 >said it would push for reinstatement for illegal aliens who had been
 >discriminated against only when those aliens have first obtained papers
 >authorizing them to work in the United States. But the E.E.O.C. said it
 >would
 >recommend back pay whether or not the immigrants had working papers.
 >
 > E.E.O.C. officials said the new policy would help not just illegal
 >aliens,
 >but also their co-workers.
 >
 > "If employers were not held responsible for discriminating against
 >unauthorized workers, it would create an incentive for unscrupulous
 >employers
 >to employ and exploit these workers," the commission said. "It would also
 >harm authorized workers who might be denied these jobs or be subjected to a
 >workplace which tolerated discrimination."
 >
 > Illegal immigration has been a controversial issue in recent decades, as
 >many Americans insist that illegal aliens are an unwanted public charge,
 >while others say they are hard workers who contribute to the economy.
 >
 > Frank Sharry, the executive director of the National Immigration Forum, a
 >Washington-based group that promotes immigrants' rights, praised the
 >E.E.O.C., saying, "This new policy says that if you're working, we're not
 >going to be complicit in giving employers an open door to using your illegal
 >status to hit workers over the head with discriminations."
 >
 > But Sharry acknowledged that many illegal aliens might be too timid to
 >file
 >discrimination charges.
 >
 > Sharry said the new policy was bound to stir controversy because it pits
 >two
 >fundamental concerns against each other: the desire to limit illegal
 >immigrations and the desire to combat discrimination on the basis of race,
 >sex, age or religion.
 >
 > "There's a mismatch between the debate and the reality," he said. "Lots

>of
>workers who some people say are criminals because they entered illegally
>are
>actually hard-working, tax-paying immigrants who are working hard to make a
>better lives for themselves."
>
> In 1994, in one of the strongest backlashes against illegal immigration,
>Californians passed a proposition that barred state money for education,
>health care or other services for illegal aliens. A U.S. District Court in
>Los Angeles has partially enjoined enforcement of the proposition.
>
> John Findley, a lawyer with the Pacific Legal Foundation, one of the
>initiative's main sponsors, criticized the E.E.O.C.'s new policy.
>
> "To me it should be a nonstarter because an illegal alien by definition
>is
>in the country unlawfully," he said. 'That individual has no right to the
>job
>in question. To force an employer to rehire an individual with back pay and
>subject the employers to sanctions seems to me ridiculous."
>
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>

THE WHITE HOUSE**OFFICE OF LEGISLATIVE AFFAIRS****FAX COVER SHEET**

NOTE: THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS
CONFIDENTIAL AND INTENDED FOR THE RECIPIENT ONLY.

DATE: 11/16/99

TO: IRENE BUENO

FAX: 6-5581

FROM: ✓ COURTNEY CROUCH DEVAN PATEL

456-7500 (TEL)

456-6221 (FAX)

RE: FOLEY LETTER!

PAGE 1 OF 4

If there are any problems with this transmission, please
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403389

**INTERIM
WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET**

INCOMING CORRESPONDENCE**DATE OF LETTER:** 11/5/99**NAME/ADDRESS OF CORRESPONDENT:**

The Honorable Mark Foley
U.S. House of Representatives

SUBJECT:

Urges the President to review and reverse the recent decision of the Equal Employment Opportunity Commission to extend anti-discrimination rights to illegal immigrants

ROUTED TO:

LaStein - Org - 99/11/15

DATE: 11/15/99**COMMENTS:**

1240/FL

letter also signed by 19 additional signees
sp 403383

ACTION CODES:

A	Appropriate Action
C	Comment/Rcommendations
D	Draft Response
F	Furnish Fact Sheet to be used as enclosure
I	Info. Copy Only /No Action Necessary
R	Direct Reply w/Copy
S	For Signature
X	Interim Reply

DISPOSITION CODES:

A	Answered
C	Completed
B	Non-Special Referral
S	Suspended

Congress of the United States

Washington, DC 20515

November 5, 1999



403389

The Honorable William Jefferson Clinton
The President of the United States of America
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear President Clinton:

We are writing to urge you to review and reverse the recent decision of the Equal Employment Opportunity Commission (EEOC) to extend anti-discrimination rights to illegal immigrants.

The EEOC's decision flies in the face of everything we as a country are trying to do to discourage illegal immigration. In states like Florida, Texas and California, fighting the steady tide of illegal immigrants is a daily challenge of legislators and law enforcement authorities. We cannot afford to have our own federal government encouraging, either directly or indirectly, individuals to break the law. By recognizing illegal immigrants in the work place, the Administration has not only given a backhanded endorsement to breaking the law, it has lost focus on the true problem -- employers who are committing a crime by hiring illegal aliens in the first place.

While we are strong supporters of equal rights for all individuals, we realize there are laws directly prohibiting the hiring of illegal immigrants.

For the EEOC to be establishing "protections" for illegal workers that not only give them the right to sue employers, but to have their jobs -- to which they were hired illegally -- reinstated, is patently absurd. If the Administration is worried about unscrupulous employers mistreating illegal workers, it should go after those employers who are already breaking the law -- not extending rights and protections that legitimately should be enjoyed by legal workers.

Again, we urge you to ensure that the EEOC rescind their decision.

Respectfully,

Tilken Foulke

Cass Bollinger

John T. Dettl

Van Hillman

Paul Hillman

Ray Hunt

Roy Tucker

^{Ehrlich}
Robert 2. Eling

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U. S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
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*Copies also faxed to Martha Foley
and Lisa Macerovic (LRD)*



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Cox News Service
November 5, 1999

SECTION: Washington - general news

LENGTH: 224 words

HEADLINE: CONGRESSMEN WANT REVERSAL OF RIGHTS FOR ILLEGAL IMMIGRANTS
BY SUE SCHULTZ

DATELINE: Washington

BODY:

In a letter to President Clinton, 18 Republican congressmen Friday called for the reversal of a decision that would give certain legal rights to illegal immigrants. Rep. Mark Foley of Florida, the primary author of the letter, has also introduced legislation that would ban the policy established by Equal Employment Opportunity Commission last week.

"The EEOC's decision flies in the face of everything we as a country are trying to do to discourage illegal immigration," Foley said. "In states like Florida, Texas, and California, fighting the steady tide of illegal immigrants is a daily challenge of legislators and law enforcement authorities."

Under the EEOC decision, illegal immigrants would be able to get back pay from employers and sue for punitive damages and reinstatement to their jobs.

"If the administration is worried about unscrupulous employers mistreating illegal workers, it should go after those employers who are already breaking the law, not extending rights and protections that legitimately should be enjoyed by legal workers," Foley said in the letter.

Foley's letter was signed by 17 other Republicans, including Reps. Tillie Fowler, Fla., Lamar Smith, Texas, Sam Johnson, Texas, Nathan Deal, Ga., Jack Kingston, -Ga., Paul Gillmor, Ohio, Robert Ney, Ohio, and Cass Ballenger, N.C.

ENDIT

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I

106TH CONGRESS
1ST SESSION

H. R. 3170

To amend title VII of the Civil Rights Act of 1964, and the Age Discrimination in Employment Act of 1967, and the Americans with Disabilities Act of 1990 to exclude individuals who are employed, and unlawfully present, in the United States.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 28, 1999

Mr. FOLEY introduced the following bill; which was referred to the Committee on Education and the Workforce

A BILL

To amend title VII of the Civil Rights Act of 1964, and the Age Discrimination in Employment Act of 1967, and the Americans with Disabilities Act of 1990 to exclude individuals who are employed, and unlawfully present, in the United States.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. AMENDMENT TO THE CIVIL RIGHTS ACT OF**
4 **1964.**

5 Section 701(f) of the Civil Rights Act of 1964 (42
6 U.S.C. 2000e(f)) is amended by adding at the end the fol-
7 lowing:

1 "With respect to employment in the United States, such
2 term excludes an individual who is unlawfully present in
3 the United States."

4 **SEC. 2. AMENDMENT TO THE AGE DISCRIMINATION ACT OF**
5 **1967.**

6 Section 11(f) of the Age Discrimination Act of 1967
7 (29 U.S.C. 630(f)) is amended by adding at the end the
8 following:

9 "The term 'employee' excludes any individual who is un-
10 lawfully present in the United States and employed by an
11 employer in a workplace in the United States."

12 **SEC. 3. AMENDMENT TO THE AMERICANS WITH DISABIL-**
13 **ITIES ACT OF 1990.**

14 Section 101(4) of the Americans with Disabilities Act
15 of 1990 (42 U.S.C. 12111(4)) is amended by adding at
16 the end the following:

17 "With respect to employment in the United States,
such term excludes an individual who is unlawfully

U.S. Equal Employment Opportunity Commission**NEWS**

FOR IMMEDIATE RELEASE
Tuesday, October 26, 1999

CONTACT: Reginald Welch
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**EEOC ISSUES GUIDANCE ON REMEDIES FOR UNDOCUMENTED WORKERS
UNDER LAWS PROHIBITING EMPLOYMENT DISCRIMINATION**

WASHINGTON – The U.S. Equal Employment Opportunity Commission (EEOC) today issued an enforcement guidance modifying its position on remedies available to unauthorized workers under federal employment discrimination laws. The guidance addresses recent legal developments and explains the basic remedies available to this class of workers under EEOC-enforced laws.

"This guidance makes clear that the anti-discrimination laws under the Commission's jurisdiction protect all employees across the country, regardless of their work status," said EEOC Chairwoman Ida L. Castro. "Unauthorized workers are especially vulnerable to abuse and exploitation. It is imperative for employers to fully understand that discrimination against this class of employees will not be tolerated and that they will be responsible for appropriate remedies if they violate the civil rights laws."

Chairwoman Castro further explained that the new guidance is fully consistent with the nation's immigration laws, principally the Immigration Reform and Control Act (IRCA). "If employers were not held responsible for discrimination against unauthorized workers, it would create an incentive for unscrupulous employers to engage in unlawful workplace conduct," said Ms. Castro. "This would directly undermine the enforcement of the immigration laws by encouraging the employment of unauthorized workers. It would also harm *authorized* workers who might be denied jobs or be subjected to a work environment which tolerated discrimination."

The new guidance addresses the availability of remedies under the following statutes, where an employer has unlawfully discriminated against undocumented workers: Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Equal Pay Act.

- more -

Unauthorized Workers Guidance - Page 2

The guidance explains that undocumented workers are entitled to the same remedies as any other workers – back pay, reinstatement if the employee was unlawfully terminated, hiring if the employee was denied a job due to discrimination, other appropriate injunctive relief, damages and attorneys' fees – except in the very narrow situations where an award would directly conflict with the immigration laws. The guidance also emphasizes that unauthorized workers are fully protected by the retaliation principles of the federal anti-discrimination laws.

The new guidance replaces EEOC's *Policy Guidance: Effect of the Immigration Reform and Control Act on the Remedies Available to Undocumented Aliens Under Title VII* (N-915.040) issued on April 26, 1989. The Commission re-evaluated its position on back pay in light of important legal developments since 1989 regarding the availability of back pay to undocumented workers under the closely related National Labor Relations Act. In addition, the Commission addressed other changes in the law since 1989, principally the creation of a damages remedy under Title VII and the Americans with Disabilities Act.

The guidance will be available on EEOC's web site (www.eeoc.gov) shortly after release of the document. It can also be obtained by calling or writing to EEOC's Office of Communications and Legislative Affairs, 1801 L Street, NW, Washington, D.C. 20507.

The EEOC enforces Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, or national origin; the Age Discrimination in Employment Act, which protects workers 40 and older; the Equal Pay Act; the Americans with Disabilities Act, which prohibits discrimination against qualified individuals with disabilities in the private sector and state and local governments; prohibitions against discrimination affecting persons with disabilities in the federal government; and sections of the Civil Rights Act of 1991.

#



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

October 29, 1999

Office of
the Chairwoman

Dear Editors:

As Chairwoman of the U. S. Equal Employment Opportunity Commission (EEOC), I want to set the record straight regarding your editorial of October 27 (*This EEOC Policy Goes Out of Bounds*) and other statements and press accounts highlighting the agency's recently issued enforcement guidance, *Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws*. I want to ensure that all parties, including the media, have information to correctly convey what the enforcement guidance does, and does not do, with respect to the effect of anti-discrimination laws on undocumented workers.

Let me first make it clear that the Commission could not, would not, and did not state in its enforcement guidance that individuals working in this country illegally must be given their jobs back if they have been the victims of discrimination. Unless an individual has satisfied the Immigration and Naturalization Service (INS) requirements for legal authorization to work, reinstatement would not be among the remedial options open to that person.

Your readers also might find it important to know that EEOC's guidance reinforces the long established protections that have always been available to all workers, regardless of status in the United States, since passage of Title VII of the Civil Rights Act of 1964, which created the EEOC. As such, this guidance does not represent, as some have suggested, a new concept or expansion of the nation's federal employment discrimination laws to unauthorized workers for the first time. The American ideal of a discrimination-free workplace for all workers was as alive and well then as I hope it still is today, and this guidance simply underscores that national commitment.

Full application of the nation's anti-discrimination and immigration laws, and the monetary consequences of violating those laws, is the deterrent determined to be the most effective by Congress and the courts in promoting compliance with the laws and upholding our societal values. In fact, both Congress and the Supreme Court have long placed a great deal of importance on deterrence as a key element in civil rights enforcement. To suggest that increased liability to employers who violate the law will pose no deterrent to their illegal practices simply defies experience and common sense. Whether in a criminal or civil setting, our legal construct calls for punishing the wrong-doer. Not only to "right a wrong," but also to send a strong,

unequivocal message to all that such behavior brings with it serious repercussions. EEOC's enforcement guidance fortifies that message.

Rather than undermining established immigration policies and laws, this guidance assists their implementation. That is why, when consulted, the INS, whose job it is to police immigration, found our guidance to be consistent with the overall goals of the Immigration Reform and Control Act. Moreover, this guidance tracks judicial affirmation of the National Labor Relations Board's ruling that unauthorized workers are eligible for back pay for periods that they were working for an employer but were discriminatorily underpaid. Since Title VII's back pay provision is modeled on the National Labor Relations Act, the EEOC concluded that the same authority should apply.

No, this guidance is not about immigrant children and families too afraid of deportation to do what they can to ensure their safety and welfare. But, again, it is about deterring employers from making the lives of a most vulnerable community even more unbearable. Effective enforcement of anti-discrimination laws at the workplace in fact protects children and families from the horrors of working conditions that violate the fundamental right to be free from discriminatory actions. Clearly, these actions threaten the physical and mental well-being of hard working individuals and indirectly reward those who assault these families daily. This is unacceptable on any front. In accordance with that position, the EEOC feels strongly that failure to penalize discriminating employers will undermine that objective.

This enforcement guidance supports the goal of making America's workplaces free from any form of discrimination. The EEOC, as a bipartisan, independent Commission, has the responsibility to enforce anti-discrimination laws without bias or preference. Any time an employer is able to breach civil rights requirements for a group of workers such as undocumented workers, without the deterrence of economic or legal penalties, discrimination is free to flourish. The EEOC will not tolerate such blatant abuse and, in conformity with federal employment discrimination and immigration laws, will fully pursue all remedies available under the law without apology.

Sincerely,



Ida L. Castro

Chairwoman

U.S. Equal Employment Opportunity Commission

The U.S. Equal Employment Opportunity Commission

The EEOC is responsible for eliminating discrimination at the workplace. The nation's federal employment discrimination laws ensure that anyone working in this country be treated fairly and justly under the laws, and be afforded appropriate protection and redress should an employer violate these laws. The laws enforced by the EEOC serve to deter unlawful discrimination by employers.

Questions & Answers

Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws

This guidance explains the availability of remedies under Title VII, the Age Discrimination in Employment Act, the Americans With Disabilities Act and the Equal Pay Act where an employer has unlawfully discriminated against undocumented workers. The guidance supersedes "Policy Guidance: Effect of the Immigration Reform and Control Act on the Remedies Available to Undocumented Aliens Under Title VII," N-915.040 (April 26, 1989).

Q: Are undocumented workers protected under the federal anti-discrimination laws?

A: Yes. The federal employment discrimination laws protect all employees in this country who work for an employer with 15 or more employees, including those who are not authorized to work.

Q: Doesn't this create a conflict with the immigration laws which prohibit employers from employing unauthorized workers?

A: No. In fact, enforcing the civil rights laws on behalf of all workers supports the enforcement of the immigration laws, principally the Immigration Reform and Control Act (IRCA). If employers were not held responsible for discriminating against unauthorized workers, it would create an incentive for unscrupulous employers to employ and exploit these workers. This would directly undermine the enforcement of the immigration laws by encouraging the employment of unauthorized workers. It would also harm authorized workers who might be denied these jobs or be subjected to a workplace which tolerated discrimination.

Q: What remedies are available under the laws enforced by the Commission for workers who are authorized to work?

A: The basic remedies available under these laws are reinstatement if the employee was unlawfully terminated, instatement if the employee was discriminatorily denied a job, back pay, other appropriate injunctive relief, damages, and attorneys' fees.

Q: Are undocumented workers entitled to the same remedies available to all other workers for violations of the laws enforced by the Commission?

A: Generally, yes, but not if the award would conflict with the requirements of immigration laws. For instance, in the case of an undocumented worker, s/he cannot be reinstated unless s/he produces the work documents required by immigration law.

Q: What general limitations on remedies apply to unauthorized workers?

A: Generally, applicable limitations on the availability of certain remedies apply equally to unauthorized workers as all other workers. In "mixed motive" cases, if an employer can show it would have taken the same action against the worker even absent the discrimination, the employer is not required to reinstate the employee or pay back pay or damages. In "after-acquired evidence" cases, if, after the employer takes a discriminatory action against an employee, the employer learns that the employee has engaged in wrongdoing for which the employer would have taken the same action, remedies may be limited. In both mixed motive and after-acquired evidence cases, however, the employer remains fully liable for the wrongdoing. However, unless an individual who has been discriminated against has satisfied Immigration and Naturalization Service requirements for legal authorization to work, reinstatement would not be among the remedies available.

Q: Are there additional limitations on relief for unauthorized workers?

A: The following limitations apply:

- If an employer knows that a worker who was hired after November 6, 1986 is unauthorized, reinstatement of that worker can be conditioned on the worker being able to satisfy IRCA's verification requirements within a reasonable period of time.
 - This condition does not apply to workers who were employed by the employer on or before November 6, 1986, because IRCA does not require employers to seek work authorization documents from those workers.
- Workers are eligible for back pay to the same extent as any other worker, except that back pay is cut off if the worker has left the country and is not legally eligible to return.

Q: Are unauthorized workers protected by the retaliation principles of the federal antidiscrimination laws?

A: Yes. Such workers are particularly vulnerable to threats to report them to the INS or other forms of retaliation and EEOC takes the concern of retaliation very seriously.

- It is unlawful to threaten to report, or to report a worker to INS because a worker opposed unlawful discrimination or participated in a proceeding under the anti-discrimination laws.
- Where the employer appears to have acquired information about a worker's unauthorized

status after that worker complained of discrimination, the Commission will investigate whether the information was acquired through a retaliatory investigation.

If an unauthorized worker is retaliated against, that worker is entitled to damages without regard to his or her work status.

Q: Why did the Commission change its position from the 1989 Policy Guidance?

A: In 1989, the Commission concluded that, because IRCA prohibited employers from employing undocumented workers hired after November 6, 1986, such workers were not entitled to reinstatement or to back pay for the period when they had not worked because of a discriminatory failure to hire or termination. Such workers were, however, entitled to back pay for any periods in which they were working for the employer but were discriminatorily underpaid.

Legal developments since 1989 persuaded the Commission that its position regarding back pay was no longer correct. In addition, the Commission determined that it was important to address other important legal developments regarding remedies. In particular:

- The Second Circuit Court of Appeals affirmed a decision of the National Labor Relations Board (NLRB v. A.P.R.A. Fuel Oil Group) that unauthorized workers are eligible for back pay under the National Labor Relations Act (NLRA) and that back pay should only be cut off after the worker leaves the country and is not eligible to return. The court also stressed that imposing monetary penalties on employers who violated the law best served the goals of the NLRA and was fully consistent with the goals of the immigration laws. The Commission concluded that because Title VII's back pay provision was modeled on the NLRA, the same analysis should apply.
- Congress enacted the Civil Rights Act of 1991, which
 - provided that Title VII is violated when a prohibited factor motivated the employer's action, even if other, lawful factors - such as unauthorized immigration status - also motivated the action; and
 - provided for compensatory and punitive damages under Title VII and the ADA based on Congress' finding that damages are necessary to both compensate victims of discrimination and to deter future violations.
- The Supreme Court's decision in *McKennon v. Nashville Banner Publishing Co.* made clear that an employer is responsible for its discriminatory actions -- even if, after the action, the employer discovers information that would have justified the action on other, nondiscriminatory grounds. Under *McKennon*, an employer's discovery that a worker is undocumented will not protect it from liability for a discriminatory action it previously took with regard to that worker.

This page was last modified on October 26, 1999.

The U.S. Equal Employment Opportunity Commission

FOR IMMEDIATE RELEASE
Tuesday, October 26, 1999

CONTACT: Reginald Welch
David Grinberg
(202) 663-4900
TTY: (202) 663-4494

EEOC ISSUES GUIDANCE ON REMEDIES FOR UNDOCUMENTED WORKERS UNDER LAWS PROHIBITING EMPLOYMENT DISCRIMINATION

WASHINGTON - The U.S. Equal Employment Opportunity Commission (EEOC) today issued an enforcement guidance modifying its position on remedies available to unauthorized workers under federal employment discrimination laws. The guidance addresses recent legal developments and explains the basic remedies available to this class of workers under EEOC-enforced laws.

"This guidance makes clear that the anti-discrimination laws under the Commission's jurisdiction protect all employees across the country, regardless of their work status," said EEOC Chairwoman Ida L. Castro. "Unauthorized workers are especially vulnerable to abuse and exploitation. It is imperative for employers to fully understand that discrimination against this class of employees will not be tolerated and that they will be responsible for appropriate remedies if they violate the civil rights laws."

Chairwoman Castro further explained that the new guidance is fully consistent with the nation's immigration laws, principally the Immigration Reform and Control Act (IRCA). "If employers were not held responsible for discrimination against unauthorized workers, it would create an incentive for unscrupulous employers to engage in unlawful workplace conduct," said Ms. Castro. "This would directly undermine the enforcement of the immigration laws by encouraging the employment of unauthorized workers. It would also harm authorized workers who might be denied jobs or be subjected to a work environment which tolerated discrimination."

The new guidance addresses the availability of remedies under the following statutes, where an employer has unlawfully discriminated against undocumented workers: Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Equal Pay Act.

The guidance explains that undocumented workers are entitled to the same remedies as any other workers back pay, reinstatement if the employee was unlawfully terminated, hiring if the employee was denied a job due to discrimination, other appropriate injunctive relief, damages and attorneys' fees except in the very narrow situations where an award would directly conflict with the immigration laws. The guidance also emphasizes that unauthorized workers are fully protected by the retaliation principles of the federal anti-discrimination laws.

The new guidance replaces EEOC's Policy Guidance: Effect of the Immigration Reform and Control Act on the Remedies Available to Undocumented Aliens Under Title VII (N-915.040) issued on April 26, 1989. The Commission re-evaluated its position on back pay in light of important legal developments since 1989 regarding the availability of back pay to undocumented workers under the closely related National Labor Relations Act. In addition, the Commission addressed other changes in the law since 1989, principally the creation of a damages remedy under Title VII and the Americans with Disabilities Act.

The guidance will be available on EEOC's web site (www.eeoc.gov) shortly after release of the

document. It can also be obtained by calling or writing to EEOC's Office of Communications and Legislative Affairs, 1801 L Street, NW, Washington, D.C. 20507.

The EEOC enforces Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, or national origin; the Age Discrimination in Employment Act, which protects workers 40 and older; the Equal Pay Act; the Americans with Disabilities Act, which prohibits discrimination against qualified individuals with disabilities in the private sector and state and local governments; prohibitions against discrimination affecting persons with disabilities in the federal government; and sections of the Civil Rights Act of 1991.

This page was last modified on October 26, 1999.



[Return to Home Page](#)

The U.S. Equal Employment Opportunity Commission

		Number
EEOC	NOTICE	915.002
		Date

1. SUBJECT: Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws.

2. PURPOSE: The purpose of this Enforcement Guidance is to set forth the Equal Employment Opportunity Commission's (EEOC) position regarding remedies available to unauthorized workers in charges filed under federal employment discrimination statutes. This Enforcement Guidance rescinds and supersedes the "Policy Guidance: Effect of the Immigration Reform and Control Act of 1986 (IRCA) on the Remedies Available to Undocumented Aliens Under Title VII," N-915.040 (April 26, 1989).

3. EFFECTIVE DATE: Upon issuance.

4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, section a (5), this Notice will remain in effect until rescinded or superseded.

5. ORIGINATOR: Coordination and Guidance Services, Office of Legal Counsel.

6. INSTRUCTIONS: This supersedes the "Policy Guidance: Effect of the Immigration Reform and Control Act of 1986 (IRCA) on the Remedies Available to Undocumented Aliens Under Title VII," N-915.040 (April 26, 1989). Discard the 1989 document and file this as Appendix B of Section 622, Volume II of the Compliance Manual.

7. SUBJECT MATTER: Remedies available to unauthorized workers in employment discrimination cases.

10-26-99
Date

/s/
Ida L. Castro
Chairwoman

INTRODUCTION

This Enforcement Guidance addresses the availability of remedies in cases where an employer⁽¹⁾ is found to have discriminated against unauthorized workers⁽²⁾ in violation of Title VII of the Civil Rights of 1964, the Americans with Disabilities Act (ADA), section 501 of the Rehabilitation Act, the Age Discrimination in Employment Act (ADEA), and the Equal Pay Act (EPA). Based on important legal developments, the Commission is replacing its April 26, 1989, guidance on Title VII remedies for undocumented workers. The Commission now concludes that unauthorized workers who are subjected to unlawful employment discrimination are entitled to the same relief as other victims of discrimination, subject to certain narrow exceptions which are discussed below. The pertinent legal developments

include recent cases concerning remedies for unauthorized workers under the National Labor Relations Act, changes in the law regarding after-acquired evidence and mixed motive cases, and the addition of damages to the range of available remedies.

First, the National Labor Relations Board (NLRB) and the Second Circuit recently concluded that unauthorized workers are eligible for back pay under the National Labor Relations Act (NLRA). *A.P.R.A. Fuel Oil Buyers Group*, 320 N.L.R.B. 408, 151 L.R.R.M. 1209 (1995), *aff'd*, *NLRB v. A.P.R.A. Fuel Oil Group*, 134 F.3d 50 (2d Cir. 1997). The *A.P.R.A.* rationale, discussed in more detail below, applies equally to the federal employment discrimination statutes.⁽³⁾

Second, in the context of an after-acquired evidence case, the Supreme Court held that employee wrongdoing does not shield a discriminating employer from liability under the civil rights laws.⁽⁴⁾ Similarly, Congress amended Title VII to provide that employers are liable when discrimination is part of the reason for an adverse employment action, even if it can show it would have taken the same action absent the discrimination.⁽⁵⁾ Both changes recognize that deterrence is a central goal of the federal employment discrimination laws and that failure to penalize discriminating employers will undermine that goal.

Third, Congress has added compensatory and punitive damages to the range of available remedies under Title VII and the ADA. It did so because it had concluded that existing remedies were ineffective and that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace."⁽⁶⁾ Inasmuch as undocumented workers are particularly vulnerable to employer abuse, awarding monetary remedies irrespective of a worker's unauthorized status promotes the goal of deterring unlawful discrimination without undermining the purposes of the immigration laws.

Finally, the ADA had not been enacted when the 1989 document was issued. This guidance highlights the fact that the principles governing remedies for unauthorized workers apply to all of the federal anti-discrimination statutes enforced by the EEOC, including the Rehabilitation Act and the ADA, as well as Title VII, the EPA, and the ADEA.

DISCUSSION

I. Requirements of Immigration Law

Prior to 1986, the immigration laws did not prohibit employers from employing unauthorized workers, although such workers were subject to deportation. In enacting the Immigration Reform and Control Act of 1986 (IRCA), however, Congress made it unlawful for employers to knowingly employ individuals who are not legally authorized to be employed in the United States and who were hired after November 6, 1986.⁽⁷⁾

To address concerns that the employer sanction provisions would cause discrimination against some national origin groups, IRCA prohibits employers that have from four to fourteen employees, and are therefore not covered by Title VII, from discriminating on the basis of national origin against U.S. citizens and nationals and non-citizens with work authorization.⁽⁸⁾ It also prohibits citizenship status discrimination and discriminatory documentary practices by all employers who have four or more employees.⁽⁹⁾ IRCA's nondiscrimination requirements are enforced by the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC), Civil Rights Division, at the U.S. Department of Justice.⁽¹⁰⁾

II. Coverage of Unauthorized Workers Under Federal Discrimination Laws

The federal discrimination laws protect all employees in the United States, regardless of their citizenship or work eligibility. Employers may no more discriminate against unauthorized workers than they may discriminate against any other employees.⁽¹¹⁾ EEOC will therefore assure that in its enforcement of the laws, unauthorized workers are protected to the same degree as all other workers.

Recognizing that federal labor laws make no distinction based on alienage, courts have similarly generally held that all workers are protected by those laws, regardless of citizenship or work eligibility.⁽¹²⁾

In the leading case of *Sure-Tan v. NLRB*, 467 U.S. 883 (1984), the Supreme Court addressed the coverage of undocumented workers in the context of the NLRA and explained that affording those workers the protection of American labor laws promotes the purposes of both the labor and immigration laws.

The employer in *Sure-Tan* retaliatorily reported five employees to the Immigration and Naturalization Service (INS) because the employees had exercised NLRA-protected rights. The employer had been aware that the workers were undocumented and had not reported them to the INS until they participated in union activities. It was therefore clear that retaliation was the reason that he had reported them. The Court concluded that applying the labor law to undocumented workers served the purposes of immigration laws:

[a] primary purpose in restricting immigration is to preserve jobs for American workers Application of the NLRA helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment. If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened. In turn, if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws.

467 U.S. at 893-94. This principle applies equally to the discrimination laws within the Commission's jurisdiction.

Moreover, the EEOC agrees with the NLRB and those courts that have concluded that the *Sure-Tan* decision is unaffected by the subsequent enactment of IRCA. *A.P.R.A.*, 151 L.R.R.M. at 1215 ("[C]ongress . . . [in enacting IRCA] expressly approved the view of the Supreme Court in *Sure-Tan* that undocumented workers are entitled to established labor protections."), *aff'd*, *NLRB v. A.P.R.A. Fuel Oil Buyers Group*, 134 F.3d 50, 55 (2d Cir. 1997) (NLRA).⁽¹³⁾ Failure to protect those workers would undermine enforcement of not only the anti-discrimination laws, but also the immigration laws. Without such coverage, employers have an incentive to hire workers who cannot effectively protest unlawfully discriminatory treatment. As the Eleventh Circuit observed, in the context of the FLSA, "coverage of undocumented workers has a[n] effect similar to that of IRCA], in that it offsets what is perhaps the most attractive feature of such workers - their willingness to work [in substandard conditions. Without that offset] . . . employers would have an incentive to hire them."⁽¹⁴⁾

III. Remedies Available to Unauthorized Workers Who Are Victims of Unlawful Discrimination

A. Purposes of Remedies Provisions of Federal Employment Discrimination and Immigration Laws

The remedies provisions of the federal anti-discrimination laws are intended both to deter employment discrimination and to restore the injured employee to the position s/he would have been in absent the discrimination. Some remedies, such as requiring the employer to stop the discriminatory activities,

adopt corrective measures, post notices, or expand recruitment, serve primarily to prevent future discrimination. Other remedies, such as instatement, reinstatement, or promotion, serve primarily to make the victim whole.

Monetary remedies serve both purposes: they deter future discrimination⁽¹⁵⁾ and make the victim whole. Back pay is so central to the remedial scheme that the Supreme Court has ruled that, where liability is found, back pay is a presumptive remedy and "should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."⁽¹⁶⁾

Compensatory and punitive damages also serve make-whole and deterrence purposes.⁽¹⁷⁾ Moreover, because a private suit serves important public purposes, the litigant will not be denied relief even if s/he has engaged in wrongdoing.⁽¹⁸⁾

The provisions of the Immigration and Nationality Act (INA) serve a different purpose - the deterrence of illegal immigration. The INS apprehends and removes those who have violated applicable immigration laws and imposes sanctions on employers who knowingly employ unauthorized workers hired after November 6, 1986. The purposes and remedial schemes of immigration and discrimination laws are not at odds with each other. Thus, where an unauthorized worker is found to have been a victim of employment discrimination, remedy awards can and should fulfill the goals of the employment discrimination statutes without undermining the purposes of the immigration laws.

B. Availability of Remedies for Unauthorized Workers

1. Injunctive Relief to Prevent Future Discrimination

Remedies that serve only to prevent future discrimination are unaffected by the immigration laws and remain available to redress violations of the employment discrimination laws without regard to an employee's work status. Such injunctive relief may include, for example, orders to post notices that the employer has been found to have discriminated, orders to stop the discriminatory practices, orders to purge personnel records of information regarding discriminatory actions, and orders to adopt some specific corrective action, such as implementing new hiring procedures, keeping data on all disciplinary actions, or providing training.

2. Instatement or Reinstatement

Under federal employment discrimination laws, victims of discriminatory refusal to hire or discriminatory termination are presumptively entitled to instatement or reinstatement.⁽¹⁹⁾ The Commission concludes that the same presumption applies to unauthorized workers who were hired on or before November 6, 1986 because IRCA does not prohibit employers from continuing to employ workers hired on or before that date.⁽²⁰⁾ This presumption also applies to workers hired after November 6, 1986 unless the employer knows that the worker is unauthorized, in which case the worker's eligibility for reinstatement depends on being able to satisfy IRCA's verification requirements within a reasonable time.⁽²¹⁾

The *Sure-Tan* Court held that unauthorized workers are protected by the NLRA and remanded the case to the Board to determine what remedies were appropriate in light of the fact that the workers had left the country and it was not clear whether they had returned.⁽²²⁾ The Court placed only one constraint on the remedies the Board could order; namely, any offer of reinstatement was to be conditioned on the workers' lawful reentry. The Court imposed that restriction to avoid encouraging illegal reentry and thereby undermining the purpose of the immigration law.⁽²³⁾ In so doing, the Court made clear that the workers' original illegal entry did not preclude reinstatement or back pay.

At the time *Sure-Tan* was decided, employers were not prohibited from employing unauthorized

workers. In *A.P.R.A.*, the Second Circuit considered whether, by enacting IRCA to make employing unauthorized workers illegal, Congress altered the *Sure-Tan* rule that unauthorized workers were entitled to relief.

As in *Sure-Tan*, the *A.P.R.A.* employer knowingly employed unauthorized workers and retaliated against them for participating in union activity. In *A.P.R.A.*, however, the workers had remained in the United States until the time of the decision. The Board concluded that "if full remedies are not granted, the illegitimate economic advantage to unscrupulous employers that knowingly employ undocumented workers has [a] . . . corrosive effect on congressional policies respecting the workplace . . ."(24) To avoid a conflict with IRCA's prohibition against employing unauthorized workers, the Board ordered that the offer of reinstatement be conditioned on the workers' ability, within a reasonable period of time, to satisfy IRCA's normal verification of work eligibility requirements. In affirming the Board's order of conditional reinstatement, the Second Circuit explained that the Board "quite clearly tailor[ed] the remedy for the violation of the NLRA to the restrictions of" IRCA.(25) In addition, the court observed that the Board's remedy, "felicitously keeps the Board out of the process of determining an employee's immigration status, leaving compliance with IRCA to the private parties to whom the law applies.... the Board is not charged with the enforcement of the complex U.S. immigration laws."(26)

Like the Board, the EEOC is not charged with the enforcement of IRCA and should not participate in "the process of determining an employee's immigration status." Therefore, EEOC will neither collect nor evaluate evidence regarding a worker's status.

3. Back Pay and Damages

Unauthorized workers are entitled to back pay and appropriate damages on the same basis as other workers, unless the award would conflict with the purposes of the immigration laws. In the great majority of instances, monetary awards do not conflict with the purposes of immigration laws, but enhance them. Without monetary awards, including damages, employers who are unscrupulous may consider penalties under immigration law to be offset by the savings of employing unauthorized workers, thus defeating the objectives of immigration, civil rights, and labor laws and allowing employers to profit from their own wrongdoing.(27)

There are no limitations on damages for unauthorized workers, beyond those which would apply in any other case. However, there is a narrow limitation on the availability of back pay. To fulfill the requirements of the immigration laws, the *Sure-Tan* Court ruled that "in computing back pay, the employees must be deemed unavailable for work (and the accrual of back pay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States."(28) The Commission construes this language to limit back pay relief only where, as in *Sure-Tan*, the worker is unavailable for work by virtue of being out of the country.(29)

The Commission adopts this interpretation for several reasons. The Supreme Court, in *Sure-Tan*, did not hold that the employees' original unlawful entry precluded awards of reinstatement or back pay. Its reversal of the appellate court's award of six months back pay was, instead, because it regarded as unduly speculative the appellate court's surmise that, absent the unlawful retaliation, the workers would have worked for another six months.(30) In addition, " *Sure-Tan* gave no indication that it was overruling a significant line of [NLRB] precedent that disregards a discriminatee's *legal status*, as opposed to *availability for work*, in determining his or her eligibility for back pay."(31)

The Commission concludes that IRCA does not preclude awarding back pay and damages to unauthorized workers because, as the Second Circuit has observed,

[while] IRCA established sanctions for employers who knowingly hire or continue to employ illegal aliens, . . . and also introduced procedures to assure that undocumented workers are not able to gain employment in the United States, . . . IRCA does not materially change the policy considerations underlying the previous decisions The primary

purpose of IRCA was to make it more difficult to employ undocumented workers and to punish the employers who offer jobs to these workers Congress sought to reduce the availability of jobs for undocumented workers without adversely affecting working conditions within those jobs.

A.P.R.A., 134 F.3d at 55.⁽³²⁾

Significantly, the conclusion that employers must make monetary awards to victims of discrimination despite lack of work authorization comports with the rules governing cases in which the employer is guilty of discrimination but the employee is also guilty of wrongful acts that would have motivated the employer to terminate the employment relationship. The governing principle is that, because monetary remedies serve not only remedial but also deterrence purposes, employee wrongdoing does not bar relief.⁽³³⁾

In short, employers who discriminate against unauthorized workers are liable for monetary relief, including compensatory, punitive, or liquidated damages, to the same extent as for authorized workers. An employer is not liable for back pay accruing during any period during which the worker is unavailable for work because s/he is out of the country.⁽³⁴⁾ In addition, back pay will stop accruing if the worker is reinstated, or, within a reasonable period of time after being offered reinstatement or reinstatement,⁽³⁵⁾ the worker cannot show work eligibility.

4. Remedies for Discrimination in the Terms and Conditions of Employment or For Failure to Promote

The undocumented status of workers is never a justification for subjecting them to discriminatory terms or conditions of employment or for failing to promote them. Thus, for example, workers who have been discriminatorily undercompensated or harassed while working are entitled to all appropriate relief, including full back pay, for the period worked, even if they have subsequently left the country. They were clearly "available" for work for periods during which they were actually working.

5. Remedies in Cases of Retaliation

Unauthorized workers are particularly vulnerable to threats to report them to INS. If such a threat or report is made because a worker opposed unlawful discrimination or participated in a proceeding under the anti-discrimination laws, it constitutes unlawful retaliation. In every case in which the employer asserts that the worker is unauthorized and appears to have acquired that information after that worker complained of discrimination, EEOC will determine whether the information was acquired through a retaliatory investigation.⁽³⁶⁾ If the investigation was retaliatory, the employer is liable for monetary damages for retaliation without regard to the worker's actual work status as well as for appropriate equitable relief.

6. Attorneys' Fees and Costs

Attorneys' fees and costs are available to unauthorized workers on the same terms as to other workers who are prevailing parties under laws enforced by the Commission.⁽³⁷⁾ Attorneys' fees and costs are available in mixed motives cases, even though reinstatement, back pay, and damages are not.⁽³⁸⁾

C. Limitations on Remedies: Mixed Motive and After-Acquired Evidence Analysis

As in any discrimination case, an employer may be able to limit the remedies available for its discriminatory acts if it can prove that it acted from mixed motives, *i.e.*, that it would have taken the same action even absent the discrimination,⁽³⁹⁾ or that, after the discriminatory act, it acquired evidence

that would have caused it to take the same adverse action.⁽⁴⁰⁾ A worker's unauthorized status can be a legitimate reason that may form the basis for a mixed motive or after-acquired evidence defense and thereby limit the available remedies.

In mixed motive cases, the employer can be liable for attorneys' fees and injunctive relief, but the complaining party is not entitled to reinstatement, back pay, or any damages.⁽⁴¹⁾ In after-acquired evidence cases, if the employer can show that it would not have employed the person after learning of his or her unauthorized status, the worker would not typically be entitled to reinstatement and the period during which back pay accrues would be cut off as of the date that the employer discovered the unauthorized status.⁽⁴²⁾ Punitive damages and damages for emotional harm would be unaffected by the after-acquired evidence.⁽⁴³⁾

1. To simplify the discussion, the term "employer" in this document includes not only covered employers but also labor organizations and employment agencies. The principles in the guidance also apply to federal employers.

2. For purposes of this document, the term "undocumented or unauthorized worker" means, with respect to employment at a particular time, one who is not a citizen or national of the United States and is neither (1) lawfully admitted for permanent residence in the United States, nor (2) authorized by law to work. *See* Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a (h)(3); *see also* 8 C.F.R. § 274a.1.

3. The interpretation of the back pay provision of the NLRA is relevant to Title VII since Title VII's "back pay provision was expressly modeled on the back pay provision of the National Labor Relations Act." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975). The conclusion in the 1989 document, that unauthorized workers who had been discriminatorily terminated or not hired were not entitled to back pay, accorded with the position of the NLRB at that time.

4. *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995).

5. Section 703(m) of Title VII, 42 U.S.C. § 2000e-2(m).

6. 42 U.S.C. § 1981a, note. *See also* H.Rep. No. 40(I), 102d Cong., 1st Sess. 69, *reprinted in* 1991 U.S.C.C.A.N. 549, 607 ("Making employers liable for all losses - economic and otherwise - which are incurred as a consequence of prohibited discrimination, . . . will serve as a necessary deterrent to future acts of discrimination, both for those held liable for damages as well as the employer community as a whole. . . . Back pay as the exclusive monetary remedy under Title VII has not served as an effective deterrent, and, when back pay is not available . . ., there is simply no deterrent.").

7. 8 U.S.C. § 1324a. Criminal penalties can be imposed in cases involving a pattern or practice of knowingly employing unauthorized workers. *Id.* Congress further amended the Immigration and Nationality Act in 1990, imposing civil penalties on individuals who provide fraudulent immigration documents. 8 U.S.C. § 1324c (1994).

8. 8 U.S.C. § 1324b(a)(1).

9. 8 U.S.C. § 1324b(a)(1)(B) and § 1324b(a)(6). IRCA's protection against citizenship discrimination applies only to U.S. citizens or nationals, permanent residents, refugees, asylees, and temporary residents. Permanent residents, however, must apply for naturalization within six months of eligibility to remain within the protected class. 8 U.S.C. § 1324b(a)(3). U.S. citizens, nationals, and all individuals with work authorization are also protected by IRCA's prohibition against unfair documentary practices, such as discriminatorily requesting more or different documents than required by 8 U.S.C. § 1324a, or refusing to honor documents that appear genuine. 8 U.S.C. § 1324b(a)(6).

IRCA's nondiscrimination provisions are not directly germane to the remedies issues discussed in this guidance. The references to IRCA in this guidance relate only to the employer sanction provisions.

10. Charges raising issues under those provisions should be referred to OSC as provided in the Memorandum of Understanding (MOU) between OSC and EEOC. 63 Fed. Reg. 5518 (Feb. 3, 1998).

11. See *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973) (Title VII protects non-citizens against race, color, sex, religious, and national origin discrimination); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1517 (9th Cir. 1989) (plaintiffs were subject to Title VII's protections notwithstanding their status as undocumented workers); *Rios v. Enterprise Ass'n Steamfitters Local Union 638 of U. A.*, 860 F.2d 1168, 1173 (2d Cir. 1988) (same). But see *Egbuna v. Time Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998), cert. denied, 119 S.Ct. 1034 (1999), in which the court took the contrary view: that an applicant who is unauthorized has no cause of action under Title VII for an allegedly discriminatory refusal to hire. For the reasons discussed in this guidance, the Commission disagrees with the Fourth Circuit.

12. While this conclusion is based in part on the fact that the labor laws protect "any individual," the same rationale applies to the Equal Pay Act, which, although part of the Fair Labor Standards Act (FLSA), refers to "employees" rather than to "any individual." Like Title VII, the FLSA contains no exemption for unauthorized workers. *Patel v. Quality Inn South*, 846 F.2d 700, 704 (11th Cir. 1988) "[N]othing in IRCA or its legislative history suggests that Congress intended to limit the rights of undocumented . . . [workers] under the FLSA . . .", cert. denied, 489 U.S. 1011 (1989).

13. See also *EEOC v. Switching Systems Div. of Rockwell Int'l Corp.*, 783 F. Supp. 369, 374 (N.D. Ill. 1992) ("Title VII's protections extend to workers who may be in this country either legally or illegally"; however, no Title VII violation because employer's policy discriminated, if at all, only on the basis of citizenship and not national origin) (post-IRCA); *EEOC v. Tortilleria "La Mejor"*, 758 F. Supp. 585, 591 (E.D. Cal. 1991) (same); and *Patel*, 846 F.2d at 704 (FLSA applies to undocumented workers post-IRCA). But see *Egbuna*, 153 F.3d 184 (because IRCA renders unauthorized workers unqualified to work, an unauthorized worker cannot challenge hiring discrimination). Cf. *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1517 n.11 (9th Cir. 1989) ("although we need not decide the issue in this case [which arose pre-IRCA], it may well be that [IRCA] changes the mix of policy considerations underlying the case law which supports our conclusion that undocumented employees may recover back pay in a Title VII action") (citation omitted).

14. *Patel*, 846 F.2d at 704. See also *A.P.R.A.*, 151 L.R.R.M. at 1215 ("Congress believed that providing . . . [unauthorized workers] the same protections . . . afforded to American employees was the most effective means of eliminating the economic incentives for employers to hire undocumented . . . [workers]"), *aff'd*, 134 F.3d at 56.

15.

If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a [monetary] award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.'

Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975) (citation omitted).

16. *Id.* at 421.

17. For detailed information on appropriate compensatory and punitive damage awards under Title VII and the ADA, see "Enforcement Guidance on Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991," EEOC Compliance Manual (BNA) N:6071, 6076 (July 14, 1992). Liquidated damages are available for violations of the Equal Pay Act and for willful violations of the ADEA and track the amount of the back pay award. See Section 7(b) of the ADEA, 29 U.S.C.

§ 626(b), and Section 16(b) of the FLSA, 29 U.S.C. § 216(b).

18. *McKennon*, 513 U.S. at 358, citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974).

19. See, e.g., *Roush v. KFC Nat'l Management Co.*, 10 F.3d 392, 398 (6th Cir. 1993), *cert. denied*, 513 U.S. 808 (1994) (ADEA); *Duke v. Uniroyal, Inc.*, 928 F.2d 1413, 1424 (4th Cir.), *cert. denied*, 502 U.S. 963 (1991) (ADEA); *Henry v. Lennox Indus., Inc.*, 768 F.2d 746, 752 (6th Cir. 1985) (Title VII). Of course, the presumption can be overcome. For example, the employer may be able to show that the employee would not have gotten the job even absent the discrimination.

20. INS regulations provide that such workers are "grandfathered" and not subject to IRCA's employment verification requirements. 8 C.F.R. § 274a.7(a). The regulations further provide that wrongful termination followed by reinstatement should not be considered a break in service sufficient to cost those workers their "grandfathered" status. 8 C.F.R. § 274a.2(b)(1)(viii)(5).

21. Except in this very narrow circumstance, employers may not request or reexamine I-9 documents of workers returning from a discriminatory discharge. 8 U.S.C. § 1324b(a)(6); 8 C.F.R. § 274a.2(b)(1)(viii).

22. *Sure-Tan*, 467 U.S. at 904-06. INS permitted the *Sure-Tan* plaintiffs to leave the country voluntarily in lieu of deportation, and they did so immediately.

23. *Id.*

24. *A.P.R.A.*, 151 L.R.R.M. at 1216.

25. *A.P.R.A.*, 134 F.3d 50, 57.

26. *Id.*

27. Granting unlawful workers full redress for violations . . . should act as a deterrent to such unprincipled and opportunistic employers, and level the competitive playing field between them and the vast majority of employers in the United States that recognize and respect the rights of their employees and that carefully follow the procedures that IRCA requires.

A.P.R.A., 151 L.R.R.M. at 1216, *aff'd*, 134 F.3d at 56. See also *Patel*, 846 F.2d at 704-05 (FLSA).

28. 467 U.S. at 903.

29. The Second and Ninth Circuits support this position. *A.P.R.A.*, 134 F.3d at 54 (post-IRCA); *Rios*, 860 F.2d 1168 (2d Cir. 1988) (pre-IRCA); *Local 512, Warehouse and Office Workers' Union v. NLRB*, 795 F.2d 705 (9th Cir. 1986) (pre-IRCA).

The Seventh Circuit took a contrary position in *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115 (7th Cir. 1992), holding that *Sure-Tan* prohibits awards of back pay to undocumented workers under the NLRA. However, in his dissent, Judge Cudahy noted that the Supreme Court's reference to employees being "lawfully entitled to be present and employed in the United States," was a quote from the decision that he wrote for the Circuit in *Sure-Tan*, and that he was referring to workers who were not in the country and could not legally return. *Id.* at 1123-24. Moreover, the Seventh Circuit explicitly declined to decide whether the same rule would apply to Title VII. *Id.* at 1122 n.7. That rule should not apply to Title VII, the ADA, or the ADEA because part of the court's rationale was that "the award provisions of the NLRA are remedial, not punitive, in nature." *Id.* at 1119. In contrast, Title VII, the ADA, and the ADEA provide for punitive damages (ADEA liquidated damages are punitive in nature), and back pay under those statutes serves not only a remedial, but also a deterrent function. See *Albemarle Paper Co. v. Moody*, 422 U.S. at 418-19, 421.

The Commission is persuaded that Judge Cudahy's dissent and the decisions of the Second and Ninth

Circuit are more soundly reasoned and more consistent with the language and purposes of the employment discrimination laws.

30. *Sure-Tan*, 467 U.S. at 900-01.

31. *See A.P.R.A.*, 134 F.3d at 54, citing *Local 512*, 795 F.2d 705, 717 (9th Cir. 1986) (emphasis added).

32. This conclusion is supported by IRCA's legislative history. The report of the House Education and Labor Committee on IRCA stated, *inter alia*, the following:

[t]he committee does not intend that any provision of this Act would limit the powers of State or Federal labor standards agencies such as the . . . Equal Employment Opportunity Commission . . . to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by these agencies. To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.

H.R. Rep. No. 99-682(II), 99th Cong., 2d Sess. 8-9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5757, 5758. *See also A.P.R.A.*, 134 F.3d at 56 n.3.

33. *McKennon*, 513 U.S. at 357.

34. Following the dictate of *Sure-Tan*, a monetary award should not induce illegal reentry. Thus, if the worker's location is known, the monetary award should be sent to him/her.

35. An offer of reinstatement must comport with the standards set forth in *EEOC v. Ford Motor Co.*, 458 U.S. 219 (1982).

36. *See EEOC Enforcement Guidance: After Acquired Evidence*, 8 FEP Manual 405:7331, 7335 (Dec. 14, 1995).

37. *See* Section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k); Section 16(b) of the FLSA (EPA), 29 U.S.C. § 216(b); Section 7(b) of the ADEA, 29 U.S.C. § 626(b); and Section 505 of the ADA, 42 U.S.C. § 12206.

38. *See* Sections 706(g)(2)(B)(i) and (ii) of Title VII, 42 U.S.C. §§ 2000e-5(g)(2)(B)(i),(ii).

39. *See* Section 703(m) of Title VII, 42 U.S.C. § 2000e-2(m) (liability is established when the complaining party proves that a prohibited factor motivated the adverse action, even though other factors also motivated the action).

40. *See McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 361-62 (1995) (the fact that the employer could have terminated the employee for misconduct is irrelevant to liability if the employer was not motivated by such misconduct; only the remedy is affected). *See also EEOC Enforcement Guidance: After-Acquired Evidence*, 8 FEP Manual 405:7331 (Dec. 14, 1995).

41. Section 706(g)(2)(B)(ii) of Title VII, 42 U.S.C. § 2000e-5(g)(2)(B)(ii).

42. *McKennon*, 513 U.S. at 360 (if employer can prove that it would have terminated the employee when it learned of specific misconduct, it need not reinstate her and the back pay period will end on the date that the employer discovered the evidence).

43. *See EEOC Enforcement Guidance: After-Acquired Evidence*, 8 FEP Manual 405:7331, 7333-37 (Dec. 14, 1995) (explaining effect of after-acquired evidence on back pay and damages).

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EEOC's rule aims to protect illegals

ASSOCIATED PRESS

The U.S. Equal Employment Opportunity Commission is expanding federal protections against workplace abuse and discrimination for undocumented workers.

"This guidance makes clear that the anti-discrimination laws under the commission's jurisdiction protect all employees across the country, regardless of their work status," said EEOC Chairman Ida L. Castro in an announcement of the new rule yesterday.

She added that unauthorized workers are "especially vulnerable to abuse and exploitation" and said it is important that employers know that discrimination "will not be tolerated."

In the past, the EEOC didn't exercise much authority on the question of workers who are in the United States illegally.

But with the new rule, the agency responsible for enforcement of Title VII of the 1964 Civil Rights Act that bars employment discrimination based on race, color, religion sex or national origin is seeking to extend workplace protections to all workers, whether in the country legally or not.

Under the rule, illegal workers could get back pay, be reinstated to

their jobs if they were unfairly fired and ask the courts to force the employers to pay damages and attorneys' fees if discrimination is proved.

Dan Stein, executive director of the Federation for American Immigration Reform, a District-based lobbying group, said the new regulation undermines efforts to curb illegal immigration.

"To give back pay to people who have no right to be here and no right to have a job makes no sense," he said. "It totally undermines the

principles of U.S. immigration law by throwing out illegal residents with one hand and encouraging their employment with the other."

Dianna Johnston, an EEOC lawyer, said the new regulation is supported by recent federal court decisions finding that undocumented workers share access to the essentially the same remedies as legal workers if discriminated against.

She said the regulation was coordinated with both the Justice Department and the Immigration and Naturalization Service.

U.S. to Expand Anti-Discrimination Rights to Cover Illegal Immigrants Working in This Country

By STEVEN GREENHOUSE

The Equal Employment Opportunity Commission has announced that it will extend broad anti-discrimination rights to illegal immigrants for the first time, a policy some critics said could be hard to enforce and others contended would encourage illegal immigration.

The commission said illegal immigrants who were fired or discriminated against because of their race, sex, age or religion should enjoy the same remedies as legal workers: back pay, punitive damages and even reinstatement, but reinstatement coming only if they have first obtained legal work papers.

The new policy faces several enforcement problems, among them that illegal immigrants might be too scared to file discrimination complaints with the E.E.O.C. and are likely to have a hard time obtaining official work documents.

The commission said it would not ask illegal immigrants who brought discrimination charges if they had work documents.

The commission said it issued the

new policy because it wanted to insure that employers who knowingly hired illegal immigrants were not free to discriminate against them without facing any penalties.

But critics of the Administration's immigration policies attacked the decision, insisting that extending remedies like reinstatement and back pay to illegal immigrants would only encourage more such people to enter the United States.

"This whole policy is creating an atmosphere hostile to removing illegal immigrants from the labor force," said Daniel Stein, executive director of the Federation for American Immigration Reform, a Washington group pushing for stricter limits on immigration.

Ida Castro, the commission's chairwoman, asserted that without the policy, which was announced on Tuesday, unscrupulous employers would feel encouraged to hire illegal aliens with an eye to exploiting them. The policy would discourage such discrimination and exploitation, Ms. Castro said.

"If you let employers just breach

civil rights requirements for a group of workers such as undocumented workers," she said, "then you're indirectly supporting the hiring of this group and the violation of our laws."

Several critics suggested that the Clinton Administration pushed the E.E.O.C. to embrace this new policy as a way to win support for Vice President Al Gore's campaign among three important Democratic constituencies: labor unions, minorities and immigrant groups.

The A.F.L.-C.I.O., which endorsed Mr. Gore two weeks ago, has pushed hard for this policy.

Administration and commission officials said politics had nothing to do with the new policy.

John Hiatt, the A.F.L.-C.I.O.'s general counsel, said the labor federation had long pushed for this policy partly because of concerns that failing to crack down on discrimination against illegal workers could create an atmosphere that allowed discrimination of documented workers.

The new policy continues a trend in which the Federal Government has extended more and more protec-

tions to illegal immigrants. They are covered by minimum wage laws and occupational safety laws. In the past five years, the National Labor Relations Board has ruled that employers who knowingly hire illegal immigrants are prohibited from firing them if they support unionization.

Attracted in part by contingency and other fees, some lawyers have aggressively moved to file suits charging that employers have violated minimum wage laws for illegal immigrant workers. Some business organizations voiced fears that lawyers might seek to do the same in filing discrimination claims.

E.E.O.C. officials said they adopted the new policy after encountering what they said were horrific examples of discrimination against illegal immigrants. These officials described one immigrant who was dismissed after refusing to provide sexual favors to her boss. Officials also described instances in which managers retaliated against illegal immigrants by firing them after they sought to report racial discrimination or sexual harassment.

Seeking to avoid a clash with the nation's immigration laws, the E.E.O.C. said it would push for reinstatement for illegal immigrants who had been discriminated against only when those people had first obtained papers authorizing them to work in the United States. But the commission said it would recommend back pay whether or not the immigrants had working papers.

Commission officials said the new policy would help not only illegal immigrants, but also their co-workers.

"If employers were not held responsible for discriminating against unauthorized workers, it would create an incentive for unscrupulous employers to employ and exploit these workers," the commission said. "It would also harm authorized workers who might be denied these jobs or be subjected to a workplace which tolerated discrimination."

Illegal immigration has been a controversial issue in recent decades, as many Americans insist that illegal immigrants are an unwanted public charge while others say they

are hard workers who contribute to the economy.

Frank Sharry, the executive director of the National Immigration Forum, a Washington group that promotes immigrants' rights, praised the E.E.O.C., saying, "This new policy says that if you're working, we're not going to be complicit in giving employers an open door to using your illegal status to hit workers over the head with discriminations."

Mr. Sharry said the new policy was bound to create controversy because it pitted two fundamental concerns: the desire to limit illegal immigration and the desire to combat discrimination on the basis of race, sex, age or religion.

Businesses can fire illegal immigrants because they do not have work papers, but one fear some business executives expressed is that if they hire illegal immigrants without knowing of their undocumented status and later dismiss those workers upon learning of that status, the angered workers might file discrimination suits, charging that they were fired because of their race or sex.