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Asian Law Journal

Symposium on Labor and Immigration

William Tamayo†

I am really happy to be sharing this panel with some very dedicated civil rights attorneys. I have worked with all of them on different cases over the last few years and have much respect for them. They reflect the fact that if you want to get involved in this area of immigrant rights, particularly in the labor context or civil rights context, you have to be extremely dedicated and a little crazy—a little on the wild edge. That's the way you survive in this area. And you have to be extremely creative and willing to push the envelope at any time.

When you represent immigrants, you represent a sector of society that oftentimes is non-white, non-citizen, and non-English speaking, that can't vote, that has little money, that has some of the worst jobs, is not organized, and on top of that, lives in fear of deportation. And if deported, faces extreme poverty, persecution, or both. And if that is not enough it is a sector of society that is blamed for everything: unemployment, drugs, terrorism, disease, and even traffic jams.

As advocates, you represent an extremely vulnerable sector that is not popular. People will wonder why are you with your great degree from Boalt law school representing "these illegal aliens" when you could have been working at "blah-blah-blah and blah" firm? Instead, you're working at the ACLU!

If you enter this area, you will be practicing civil rights and employment law during a period of enhanced international movement of capital, and a consequent global migration of labor. In the mid-1990s the World Bank issued a report saying that approximately 100 million people had left their homelands in search of a better life. The United Nations' High Commissioner for Refugees also released a report that said there were 44 to 50 million refugees worldwide—and this was in 1994. So they are going to be

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in the work force.

The top two sending countries of labor in the 1980s and early 1990s were Mexico, number one, and number two, the Philippines. Current estimates are that three quarters of a million people leave the Philippines every year to go to work, primarily Europe, Australia, the United States, and Canada. So, to a certain extent, from a civil rights perspective, if you want to succeed in this area, you have to approach your work with an internationalist perspective. If you put on your nativist, racial blinders, you will simply not be able to do an effective job of advocacy.

Fortunately, many of the U.S. labor and employment laws provide protections for all workers within the United States, within its borders or territories, and generally they make no distinctions based on immigration status. Thus, the topic of my talk today is: what is the effect of immigration status on employment litigation when you are trying to represent an immigrant worker?

I work at the EEOC, which is the federal agency that is charged with investigating discrimination charges and enforcing the civil rights laws. The territory I cover—Northern and Central California, Hawaii, the U.S. territories, and the Pacific—is a territory that is undergoing massive demographic changes and a lot of industrial changes. Asians and Latinos represent about 35 percent of the population. You would assume then that there would be a large number of immigrants, both documented and undocumented. And that the industries we have here have historically been dependent on immigrant labor. They include the garment, high-tech manufacturing, and service hotel industry, and agriculture. California's largest industry is agriculture, which employs close to a million workers. Not surprisingly, there are constant threats of deportation to workers if they assert their rights under the various civil rights or labor laws.

My role as the Regional Attorney is to decide which of the employers to sue. That is a fun job from a civil rights perspective. Earlier, somebody asked me to comment on my prior role, which most of the time—when I co-counseled with the panelists—was to sue the INS and to sue the federal government to make them do what we thought they should do. I was asked if there was any contradiction in the kind of work I am doing now, where I am “the federal government.” And I say, “no,” there is no inconsistency.

I illustrate this issue because a couple of months after I started the job at the EEOC, I was going to receive an award from the National Lawyers' Guild. At the NLG convention, as part of the National Immigration Project, I received an award for my work in immigrant rights' advocacy. During the reception I saw somebody who had done a lot of immigrant rights work too, and he came up to me and asked: “So how is it like working for the enemy?”

I got into a discussion with him because I think we have to approach these issues from two bases: one is from an international human rights per-

spective, and for all of you who say you are international human rights advocates, you know the goal of international human rights is very simple. It's to hold governments accountable, to make them do the right thing to protect people's rights. So I saw no inconsistency with being in an agency that has the duty to enforce people's rights.

Secondly, any student of the civil rights movement understands that throughout the history of the civil rights movement in the United States, it has always been a demand on the state, on government, to protect people's rights. And I know that even among those of us who have sued government, none of us will really disagree with this statement because all that we have been trying to do is make the government do what it is supposed to do in protecting people's rights.

So I consider my work at the EEOC basically as a continuation of the goal of protecting the civil rights of workers regardless of what their immigration status is. And frankly, under the laws we enforce, immigration status is irrelevant to determining liability and violations of the law.

Now, just to get into that whole area of immigration status as it affects employment litigation, I believe it is malpractice for any employment lawyer not to inquire about and know the immigration status of a client when asserting any rights or seeking relief. You would be surprised at how many employment lawyers never ask about immigration status and don't know what's going to happen in litigation. Once you get involved in litigation with immigrant workers, the worker's immigration status may limit the person's remedies. It may produce unwanted inquiries during discovery or at deposition. It may produce a chilling effect on that worker. And it may produce testimony for a felony conviction. So you need to be aware of all these factors if you are going to represent immigrant workers. You also cannot work under any stereotypes. For example, when the client speaks with a "TV network" accent you cannot assume he is a U.S. citizen or that she is blond so she must not be an immigrant and must be here legally. Never assume these kinds of things. I think you have a duty to inquire about the truth.

The other thing to note is that immigration status is not static. You could be legal today and undocumented tomorrow. You could be undocumented today and legal tomorrow. You could be a citizen today and denaturalized tomorrow. Immigration status is not a constant situation. You always have to check it; it always changes. The key case that started off this debate is the case of *Sure-Tan v. NLRB*, which is the 1984 Supreme Court decision which basically held that undocumented workers were protected under the National Labor Relations Act.¹ In that case, Latino workers were organizing for their labor rights and in the course of the organizing campaign, the employer called the INS basically, to say, come and raid the

1. *Sure Tan V. NLRB*, 467 U.S. 883 (1984).

shop to break the organizing.

The NLRB found that this was an unfair labor practice to call the INS to basically deter the workers from asserting their rights, and ultimately some of the workers were deported. The Supreme Court reaffirmed the concept: workers, regardless of their immigration status were protected under the National Labor Relations Act, and it was an unfair labor practice for the employer to call the INS. That is the key case from which all the other cases stem. But that was a 1984 case. In 1986, Congress passed the Immigration Reform and Control Act (IRCA), which made it unlawful for employers to hire undocumented workers.² IRCA also placed the burden on employers to check each worker's immigration status and to verify it before they hired somebody to work on the job.

Some courts have interpreted IRCA as undoing the labor rights of the undocumented. Fortunately, when Congress passed this law, they did say that IRCA was never intended to undercut any worker's rights. Workers should still be able to file a sexual harassment claim. They should still be able to organize a union. If Congress denied workers the right to organize or the right to complain about harassment, there would be every incentive for an employer to hire undocumented people, which would run contrary to the intent of Congress.

Several cases in the NLRB context have reaffirmed the idea that undocumented people are protected by Title VII. And many other cases have also held that it is an unfair labor practice for the INS to be called in during the midst of an organizing drive. And in the Fair Labor Standards Act context, most of the circuits which have addressed this issue—including the Eleventh Circuit in *Rajni Patel v. Quality Inn South*—have said that undocumented people are entitled to the full remedies of the Fair Labor Standards Act.³ Basically, you need to get paid for the work that you have done, regardless of your immigration status. The court rationalized that without the protections of labor law, an employer could hire someone and exploit the hell out of him or her but never have to pay the employee because the employee was undocumented. It would simply encourage the hiring of the undocumented.

At the EEOC, we enforce Title VII, which is the main employment discrimination law that says you cannot use race, color, sex, or national origin in employment decisions in the hiring, termination, or promotion contexts. The EEOC has basically taken the position that immigration status is irrelevant, and the courts have reaffirmed this position. We do not need that kind of information to be able to enforce the law.

There is a key case—*EEOC v. Tortilleria "La Mejor"*—in 1991 that I was able to work on as plaintiff-intervenor, and I actually wrote a brief in

2. 8 U.S.C. 1364.

3. 846 F.2d 700 (11th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989).

support of the position that undocumented workers are protected under Title VII.⁴ In that case, the employer had discriminated against our client based on pregnancy. She asserted her rights under Title VII, and the employer argued that (1) she couldn't state a claim; and (2) she was undocumented and therefore should not be protected, because allowing her to pursue this right and her further stay would merely encourage her undocumented status in the United States.

Fortunately, the Eastern District of California issued a decision that said immigration status was not relevant for Title VII proceedings and that these undocumented workers were clearly protected.

However, an open issue remains: What happens when people are recently hired? Under IRCA, if someone has been working since before November 6, 1986, they can be "grandfathered in." It's not so much that they are protected under the law, but the employer faces no liability for keeping them on the job. But more and more cases are coming out now where workers haven't been working for their employers since November 6, 1986. We will be looking at what the employer was doing in making a certain decision.

A key case was issued a couple of years ago called *Apra Fuel Oil Buyers Group*.⁵ This case addressed the question of what happens when the employer knows that people are here illegally, hires them, and then in the midst of their assertion of labor rights, terminates them. Can the NLRB order the employer to take back these workers who are undocumented and give them back pay? The countervailing argument is that this would give undocumented employees too many remedies. But the other consideration is that the employer gets away with everything and doesn't have to pay any sort of penalty or pay back pay to these workers.

In order to resolve this question, the NLRB has devised an interesting remedy. They said that in case like this, with these facts, where the employer knew all the time that the employees were undocumented, the employer has to pay the price. The Board fashioned a remedy that provided these workers with back pay and reinstatement. But because the employees were undocumented, the NLRB gave these employees a reasonable opportunity to get their immigration papers together. Up until the time that the employees can either not get their papers together, or can get their papers together, the employer has to give them back-pay. It was a very good decision.

I will wrap up with two more issues. One issue arises when an employer terminates a worker for a reason unrelated to immigration status and then later finds out that the worker is undocumented during the course of

4. 758 F.Supp. 585 (E.Dist. Ca. 1991).

5. NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc., 134 F.3d 50 (2d Cir. 1997), *remedial order aff'd without opinion*, A.P.R.A. Fuel Oil Buyers Group, Inc. v. NLRB, 159 F.3d 1345 (2d. Cir. 1998).

various labor proceedings. The employer asserts to the court that they can't take this person back anyway because of the worker's undocumented status.

This information is known as "after-acquired evidence." Courts have found that employers can make this argument because they should have fired the worker anyway because he or she was undocumented. However, in *McKennon v. Nashville Publishing Co.*, the Supreme Court indicated that the key inquiry was the employer's original motive for terminating the worker.⁶ In *McKennon*, which was an age discrimination case, the plaintiff was not fired because of her immigration status or for doing something wrong. The court found that she was fired for age discrimination. Although the employer later discovered that she had been stealing documents, they found that out much later on.

This reasoning can be applied by analogy to the immigration context: If an employer fired someone for discriminatory reasons and then finds later on that this person is undocumented, that matter is simply irrelevant to a finding of liability. But it does go to the issue of damages. Hence, in "after-acquired" cases perhaps a person cannot get reinstatement or back pay. However, he or she might be able to get compensatory damages for emotional distress, and there may be punitive damages ordered against the employer.

Another critical issue we should look at is retaliation. If a worker comes to us and has filed a charge of employment discrimination, we notify the employer that a charge has been filed and give them an initial response. In the context of trying to work something out with their workers, the employer will ask the employees about their immigration status, whether they are authorized to work in the United States, and so forth. We might consider this to be retaliation, because it's intended as a threat to the worker to discourage him or her from pursuing the charge. This inquiry by the employer raises an issue that is simply irrelevant to whether or not there was a finding of discrimination to begin with. Hence, it may constitute retaliation.

In the geographic area covered by the San Francisco district of the EEOC, one of the interesting issues that we're looking at is sexual harassment in the agricultural industry, where there is a large number of immigrant workers, including some with unclear immigration status. They have alerted the EEOC that if there is anything we should address in agriculture, it should be sexual harassment. But they know that sometimes coming to a federal agency is a scary thing. We try to convey that we don't care what their immigration status is. What we want to ensure is that they are protected and that no other women are going to be harassed like this. So the point we stress is that we don't ask immigration status questions in deter-

6. 513 U.S. 352 (1995).

mining liability.

However, I would also say that in preparation for litigation, as I mentioned earlier, a lawyer has a duty to inquire about immigration status because it may alter the kinds of remedies sought. For example, in a sexual harassment case, if your client is undocumented, you may not want to ask for back pay or reinstatement, because asking for these remedies opens a Pandora's box about work authorization, length of stay in the United States, and so forth. Rather, for sexual harassment cases, a claim solely for compensatory damages and punitive damages is warranted. In most of these cases, back pay is minimal anyway. The real message to get to the employers is that they have to be punished and that they have to pay for the suffering caused by the harassment.

This whole area of law is very interesting, very challenging, and very relevant to the kinds of industries we have here in California and certainly to those cases we have in Saipan. For those of you who want to get into this area, volunteer at different places. We take clerks at the EEOC, and I'm sure you would get a great experience working with the ACLU and with labor firms in this area. When I interview people for jobs with the EEOC, sometimes I ask them—particularly when I know they haven't worked in their whole life—have you ever worked? I hear, uh, no. I ask them, how would you interview an undocumented woman from Guatemala who has faced sexual harassment? How would you conduct that interview? And that is a very real expectation on my part. You should know how to do that or at least be willing to learn. So my point is to get a resume, get an experience that's relevant to the job that you are going to be applying for. In this area of immigrant rights advocacy, there are plenty of opportunities and certainly a lot of ways to learn. All of today's panel members have been doing this kind of work. We welcome those who are interested in this topic, and we are enthused to see so many people here today. I think if we did this panel maybe twenty years ago, we would not have had an audience this big. I think the growing interest shows that we are doing the right thing and that people are committed to this area.

Thank you very much.

