Mezonos Maven Bakery, Inc. *and* Puerto Rican Legal Defense and Education Fund. Case 29–CA–25476

August 9, 2011

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE AND HAYES

In *Hoffman Plastic Compounds,*[1] the Supreme Court held that the Board lacked "remedial discretion" to award backpay to an undocumented worker who, in contravention of the Immigration Reform and Control Act (IRCA),[2] had presented fraudulent work-authorization documents to obtain employment. In this compliance-stage proceeding, we are presented with the question of whether the Court's decision in *Hoffman* also forecloses us from awarding backpay to undocumented workers where the employer, not the employees, violated IRCA. For the reasons set forth below, we conclude that it does.[3]

A. Factual and Procedural Background

The discriminatees[4] worked for the Respondent for periods ranging from 5 months to 8 years. They never presented work-authorization documents, and the Respondent did not ask for documentation when it hired them.

On February 12, 2003, the Respondent discharged the discriminatees after they concertedly complained about the treatment they were receiving from a supervisor. Unfair labor practice charges were filed, the parties settled, and the Board issued an unpublished Decision and Order pursuant to a formal settlement stipulation. The Board ordered the Respondent, among other things, to offer the discriminatees reinstatement and to make them whole for lost wages and benefits. The Order also provided, however, that at compliance, the Respondent could seek to establish that the discriminatees are not entitled to offers of reinstatement and could dispute the amount of backpay due, "if any." On March 15, 2005, the Board's consent Order was enforced by the United States Court of Appeals for the Second Circuit.

Thereafter, the General Counsel issued a compliance specification. The Respondent answered, stating in relevant part that, pursuant to the Court's decision in *Hoffman*, supra, it could not offer the discriminatees reinstatement or pay them backpay because they were not legally authorized to work or be present in the United States.[5]

In *Hoffman*, undocumented worker Jose Castro admitted at compliance that he had presented fraudulent documents to his prospective employer. The Board found that Hoffman did not know that Castro was unauthorized and would not have hired him had it known. The Board awarded Castro backpay, ending the backpay period (under the after-acquired evidence rule) as of the date Hoffman learned that Castro had presented fraudulent documents.[6] The D.C. Circuit enforced the Board's order.[7] The Supreme Court granted certiorari and reversed, holding that an award of backpay "to an undocumented alien who has never been legally authorized to work in the United States" is "foreclosed by federal immigration policy, as expressed by Congress in [IRCA]."[8] In its opinion, the Court referred to the fact that Castro had broken the law by presenting fraudulent work-authorization documents.[9] But as discussed more

[1] *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

[2] IRCA makes it unlawful for an employer to hire or continue to employ an "unauthorized alien," knowing that he or she is unauthorized, 8 U.S.C. §§ 1324a(a)(1)(A), (2), or to hire any person without verifying his or her authorization to work in the United States, id. § 1324a(a)(1)(B)(i), and for an individual knowingly to present fraudulent documents to an employer to obtain or continue employment, id. § 1324c(a)(2). IRCA was enacted in 1986, but the latter provision outlawing the knowing presentation of fraudulent documents was added in 1990.

[3] On November 1, 2006, Administrative Law Judge Steven Davis issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief. The General Counsel and Charging Party each filed a brief in support of the judge's supplemental decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the judge's supplemental decision in light of the exceptions and briefs and has decided to reverse the judge's supplemental decision and dismiss the compliance specification.

Chairman Liebman and Member Pearce join this opinion, but write separately to explain their views. (Member Becker is recused and did not participate in the consideration of this case.)

[4] Jose Antonio Quintuna Bermeo, Antonio Gonzalez, Luis Marcelo Gonzalez Hurtado, Francisco Javier Joya, Christian Palma, Miguel Quintuna, and Jose Armando Sax-Gutierrez.

[5] At the compliance hearing, the Respondent attempted to question the discriminatees about their work-authorization status. The discriminatees refused to answer, on Fifth Amendment grounds. The judge adjourned the hearing and filed with the Board a recommendation that the discriminatees be ordered to testify on this issue. While the recommendation was pending, the General Counsel agreed to proceed on the assumption that the discriminatees are undocumented. The judge thereafter withdrew his recommendation.

[6] *Hoffman Plastic Compounds*, 326 NLRB 1060 (1998).

[7] *Hoffman Plastic Compounds, Inc. v. NLRB*, 237 F.3d 639 (D.C. Cir. 2001) (en banc).

[8] *Hoffman*, supra, 535 U.S. at 140.

[9] E.g., id. at 143 ("Since the Board's inception, we have consistently set aside awards of reinstatement or backpay to employees found guilty of serious illegal conduct in connection with their employment."); id. at

fully below, the Court also used language—including that just quoted—that on its face would foreclose backpay for all undocumented workers, regardless of the alien-or-employer identity of the IRCA violator.

Joined by three other justices, Justice Breyer dissented, arguing (among other things) that the majority's decision undermined IRCA itself by creating a "perverse economic incentive" for employers "to find and to hire illegal-alien employees," an incentive that "would be obvious and serious" if the Board were "forbidden to assess backpay against a *knowing* employer—a circumstance not before us today."[10]

On November 1, 2006, the judge issued his decision in this case, concluding, among other things, that the discriminatees are entitled to backpay notwithstanding their undocumented status. The judge distinguished *Hoffman* based on the fact that the employee in that case violated IRCA by proffering fraudulent work-authorization documents to obtain employment, whereas in this case the discriminatees did not tender fraudulent documents and the Respondent violated IRCA by hiring them knowing they were undocumented. The Respondent excepts, contending that because the discriminatees are unauthorized to work in the United States, backpay is foreclosed by the Court's decision in *Hoffman*. We agree.

B. Analysis

For the reasons that follow, we conclude that the Court's decision in *Hoffman* broadly precludes backpay awards to undocumented workers regardless of whether it is they or their employer who has violated IRCA.[11]

The Court's stated holding, and other language probative of the Court's intent, support a broad construction.[12] In the opening paragraph of its decision, the Court announces its holding as follows:

> The National Labor Relations Board (Board) awarded backpay to an undocumented alien who has never been legally authorized to work in the United States. We hold that such relief is foreclosed by federal immigration policy, as expressed by Congress in [IRCA].[13]

The holding is categorically worded: backpay may not be awarded to undocumented aliens. It suggests no distinction based on the identity of the IRCA violator.

That the Court intends its holding to be "IRCA violator–neutral" is confirmed and amplified by the following key passage setting forth the policy rationale upon which the Court's holding is based:

> Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without *some party* directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA's enforcement mechanism, *or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations*. The Board asks that we overlook this fact and allow it to award backpay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud. We find, however, that *awarding backpay to illegal aliens runs counter to policies underlying IRCA*, policies the Board has no authority to enforce or administer. Therefore, as we have consistently held in like circumstances, the award lies beyond the bounds of the Board's remedial discretion.[14]

The Court's rationale can be restated as follows. Under IRCA, an employment relationship between an employer and an undocumented worker cannot be formed without one or the other "contravening explicit congressional policies."[15] Regardless of which party violates the law, the result is an unlawful employment relationship. The Board, as a Federal agency, may not order a remedy

148-149 ("The Board asks that we . . . allow it to award backpay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud.").

[10] Id. at 155–156.

[11] Although General Counsel Meisburg, who issued the complaint in this case, apparently believed otherwise, his predecessor, General Counsel Rosenfeld, had earlier concluded that the Court's decision in *Hoffman* was IRCA violator–neutral. See GC Memorandum 02-06, "Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens after *Hoffman Plastic Compounds, Inc.*" (July 19, 2002) ("[T]he clear thrust of the majority opinion precludes backpay for all unlawfully discharged undocumented workers regardless of the circumstance of their hire.").

The Board has consistently stated the Court's holding in *Hoffman* in similarly broad terms. See *Case Farms of North Carolina*, 353 NLRB 257, 263 (2008) ("In [*Hoffman*], the Supreme Court held that [IRCA] precluded the Board from awarding backpay to any discriminatee who is not lawfully entitled to be present and employed in the United States.") (internal quotations omitted); *Domsey Trading Corp.*, 353 NLRB 86, 86 fn. 5 (2008) ("In [*Hoffman*], . . . the Court held that the Board may not award backpay to undocumented workers."), incorporated by reference in 355 NLRB No. 89 (2010). The Second Circuit recently stated likewise. *NLRB v. Domsey Trading Corp.*, 636 F.3d 33, 38 (2d Cir. 2011) ("After *Hoffman*, it is now clear that undocumented immigrants are ineligible for backpay under the NLRA . . . .").

[12] See *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1291 (D.C. Cir. 1998) (en banc) ("The Court's every word and sentence cannot be read in a vacuum; its pronouncements must be read in light of the holding of the case and[,] to the degree possible, so as to be consistent with the Court's apparent intentions and with other language in the same opinion.").

[13] *Hoffman Plastic Compounds*, supra, 535 U.S. at 140.

[14] Id. at 148-149 (emphasis added).

[15] Id. at 148.

that "trenches upon a federal statute or policy" outside of its portfolio.[16] If an employer ends an unlawful employment relationship in a way that violates the Act, a backpay remedy would trench upon "policies underlying IRCA" by legitimizing that relationship: an award would replace lost wages that "could not lawfully have been earned" in the first place.[17] Such a remedy is beyond the limits of the Board's remedial discretion.[18]

In finding that the discriminatees in this case are entitled to backpay despite their undocumented status, the judge distinguished *Hoffman* based on the fact that the employee in that case violated IRCA by proffering fraudulent work-authorization documents, whereas in this case the Respondent is the IRCA violator. We do not think *Hoffman* can be persuasively distinguished on that basis.

It is true that the Court refers to Castro having "obtained" his job "in the first instance by a criminal fraud," i.e., by presenting fraudulent work-authorization documents. However, the Court also uses language that strongly implies backpay is precluded for all undocumented workers, regardless of the circumstances of their hire. In the words of the Court, for an undocumented worker to obtain employment in the United States, "some party"—alien or employer—must contravene IRCA. Either way, a backpay award "lies beyond the bounds of the Board's remedial discretion" because "awarding backpay to illegal aliens runs counter to policies underlying IRCA, policies the Board has no authority to enforce or administer." This language, together with the wording of the Court's holding, evinces an intention to preclude backpay for undocumented workers regardless of the identity of the IRCA violator.

The General Counsel and the Charging Party emphasize other language they contend supports an intent to limit *Hoffman*'s holding to IRCA-violating undocumented discriminatees, such as Castro. They point out that in rejecting the Board's claim that a backpay award to Castro reasonably accommodates IRCA, the Court said that "what sinks" the claim "is that Congress has expressly made it criminally punishable for an alien to obtain employment with false documents. . . . Far from 'accommodating' IRCA, the Board's position, recognizing employer misconduct but discounting the misconduct of illegal alien employees, subverts it."[19] As selectively quoted, this language links the Court's refusal to defer to the Board's remedial discretion to the fact that Castro "obtain[ed] employment with false documents"—"misconduct" that the Board "discount[ed]" even as it recognized Hoffman's misconduct in violating the Act. And that, in turn, suggests that it remains an open issue under *Hoffman* whether a backpay award to an IRCA-compliant alien against an IRCA-violating employer (as here) might reasonably accommodate immigration law and warrant judicial deference.[20] This argument, although plausible, fails to come to grips with three points.

First, when the Court criticizes the Board for "discounting the misconduct of illegal alien employees," that misconduct includes "remain[ing] in the United States illegally" (a violation of the law independent of IRCA)[21] and "continu[ing] to work illegally."[22] The Court's clear point is that undocumented immigrants working in the United States are party to an employment relationship the Court deems criminal.[23] The unlawful character of that relationship does not depend on whether it is the employee or the employer who has violated IRCA.[24] Either

[16] Id. at 147.

[17] Id. at 149.

[18] In addition to this core rationale, the Court identifies three further policy reasons in support of its holding:

> We therefore conclude that allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. *It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations.* However broad the Board's discretion to fashion remedies when dealing only with the NLRA, it is not so unbounded as to authorize this sort of an award.

Id. at 151–152 (emphasis added). These three policy reasons apply with equal force regardless of whether the IRCA violator is the employee, as in *Hoffman*, or the employer, as here.

[19] Id. at 149–150.

[20] Indeed, the Charging Party argues that in *Hoffman* "the Court did not defer to the Board's choice of remedy only because it found that the Board failed to consider the conflict between two federal statutes (the NLRA and the IRCA) that was created by an award of backpay to an employee who provided false documents to an IRCA-compliant employer. . . . In the present case, . . . an award of backpay creates no conflict between the NLRA and the IRCA."

[21] See 8 U.S.C. § 1182(a)(6)(A)(i) ("An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible."); id. § 1227(a)(1)(B) ("Any alien who is present in the United States in violation of this chapter or any other law of the United States . . . is deportable.").

[22] "[W]hat sinks both of the Board's claims, is that Congress has expressly made it criminally punishable for an alien to obtain employment with false documents. There is no reason to think that Congress nonetheless intended to permit backpay where but for an employer's unfair labor practices, an alien-employee would have remained in the United States illegally, and continued to work illegally, all the while successfully evading apprehension by immigration authorities." *Hoffman*, supra, 535 U.S. at 149.

[23] See *Hoffman*, supra, 535 U.S. at 146 (characterizing the proffer of fraudulent documents as "misconduct that renders an underlying employment relationship illegal under explicit provisions of federal law"); 151 fn. 5 (stating that IRCA "expressly criminalizes the only employment relationship at issue in this case").

[24] Id. at 148–149 ("[I]t is impossible for an undocumented alien to obtain employment in the United States without some party directly

way, the Court strongly implies, "[t]here is no reason to think that Congress … intended to permit backpay."

Second, when the Court emphasizes Castro's misconduct to rebut the Board's arguments, it is pointing out that immigration law has been violated—but it does not suggest that backpay would have been available had Hoffman (but not Castro) violated IRCA. On the contrary, as stated above, the Court categorically states that "awarding backpay to illegal aliens runs counter to policies underlying IRCA" because "it is impossible for an undocumented alien to obtain employment in the United States without *some party* directly contravening explicit congressional policies." Again, the Court makes clear that what matters is that IRCA has been violated, not which party to the employment relationship committed the violation.

Finally, Justice Breyer's dissenting observation that the Court did not have before it an IRCA-violating employer strengthens the case for taking the Court's violator-neutral holding at face value. Reminded by the dissent of the possibility of distinguishing between IRCA-violating-alien and IRCA-violating-employer cases, the Court declined the invitation to limit its holding to the former and, to the contrary, repeatedly selected language that ignored the distinction.[25]

C. Conclusion

In sum, and despite several passages that might suggest otherwise, we are persuaded that the Court's opinion in *Hoffman* forecloses backpay awards for undocumented workers regardless of the circumstances of their hire. The Court worded its holding in IRCA violator–neutral terms, it invoked IRCA violator–neutral policy grounds, and it otherwise made clear that which party violated IRCA was immaterial to its holding. The clear implication of the Court's decision is that awarding backpay to undocumented workers lies beyond the scope of our remedial authority, regardless of whether the employee or employer violated IRCA.

In reaching this conclusion, we are mindful of the various policy arguments advanced by the judge, the General Counsel, and the Charging Party in support of awarding backpay in cases where, as here, the employer has violated IRCA by knowingly hiring undocumented workers. Regardless of the merits of those arguments, we are not at liberty to disregard the Court's decision in *Hoffman*.[26]

ORDER

The compliance specification is dismissed.

Dated, Washington, D.C. August 9, 2011

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN LIEBMAN and MEMBER PEARCE, concurring.

In its decision enforcing an earlier Board order, the Second Circuit aptly framed the issue that this case, too,

contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification . . . or the employer knowingly hires the undocumented alien. . . .").

[25] While much of the Court's discussion in *Hoffman* sweeps beyond the specific facts in that case, that fact does not make it less authoritative. As the Court itself recently stated, "[a] holding . . . can extend through its logic beyond the specific facts of the particular case." *Los Angeles County v. Humphries*, --- U.S. ---, 131 S. Ct. 447, 453 (2010). See also *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996) ("We adhere . . . not to mere obiter dicta, but rather to the well-established rationale upon which the Court based the results of its earlier decision. When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.").

[26] As they explain in their concurring opinion, Chairman Liebman and Member Pearce believe that the policy arguments for awarding backpay to undocumented workers are compelling. They conclude, however, that *Hoffman* forecloses that remedy.

Member Hayes joins his colleagues in concluding that the Supreme Court's decision in *Hoffman* mandates that the Board may not award backpay to illegal alien employees. He does not, however, join in their highly unusual critique of that decision. In his view, once the Court has expressly ruled against the Board's interpretation of its remedial authority, as it did in *Hoffman*, it is the Board's role to enforce this controlling precedent in adjudicatory proceedings without critical comment. It is the role of Congress to determine whether to alter the law in response to the Court's decision. Further, Member Hayes does not join his colleagues in suggesting what new remedies might permissibly be imposed by the Board in a future case that would not contravene the holding of *Hoffman.* In this respect, the *Hoffman* majority specifically stated:

> Lack of authority to award backpay does not mean that the employer gets off scot-free. The Board here has already imposed other significant sanctions against Hoffman—sanctions Hoffman does not challenge. These include orders that Hoffman cease and desist its violations of the NLRA, and that it conspicuously post a notice to employees setting forth their rights under the NLRA and detailing its prior unfair labor practices . . . . *We have deemed such "traditional remedies" sufficient to effectuate national labor policy regardless of whether the "spur and catalyst" of backpay accompanies them*.

535 U.S. at 152 (emphasis added).

presents. "In the simplest terms," the court said, "this appeal raises the question whether an employer who knowingly hires undocumented aliens can use the immigration laws as a shield to avoid liability for [its] later retaliatory discharge of the employees" in violation of the National Labor Relations Act (NLRA).[1] So also here: the Respondent, plainly indifferent to its legal duties under either the Immigration Reform and Control Act (IRCA) or the NLRA, has invoked immigration law as a shield to escape liability for violating labor law. If the issue were an open one, we would not hesitate to reject the Respondent's backpay defense. Unfortunately, we are compelled to conclude that the Supreme Court's decision in *Hoffman Plastic Compounds*[2] categorically precludes the Board from awarding backpay to undocumented workers.[3] It is a conclusion we reach most reluctantly. The arguments in favor of extending that remedy to undocumented workers—particularly where, as here, the discriminatees never proffered fraudulent documents, and the Respondent hired and continued to employ them in knowing violation of IRCA—are compelling. They have been stated repeatedly.[4] We review them here.[5]

A.

Our first duty, as members of the Federal agency entrusted with administering the National Labor Relations Act, is to enforce the rights that statute confers. No violation of those rights is graver than the one the Respondent committed—discharging employees because they exercised their right, under Section 7 of the Act, to concertedly protest the terms and conditions of their employment. To enforce that right in the face of such a flagrant violation requires credible remedies. Some have questioned whether the remedies at our disposal are up to the task under the best of circumstances.[6] But absent a more efficacious remedy, we agree with Justice Breyer that imposing backpay liability on the Respondent is necessary (although not, in our view, sufficient) to "make[ ] clear that violating the labor laws will not pay."[7] Under *Hoffman*, however, we may not furnish even this rudimentary remedy. As a result—in addition to the obvious failure to make employee-victims whole—the Act's enforcement is undermined, employees are chilled in the exercise of their Section 7 rights, the work force is fragmented, and a vital check on workplace abuses is removed.

1. *Precluding backpay undermines enforcement of the Act.* Although the primary purpose of a backpay award is to make employee-victims of unfair labor practices whole,[8] the backpay remedy also serves a deterrent function by discouraging employers from violating the Act. To absolve the Respondent of backpay liability for unlawfully discharging its undocumented employees removes a deterrent that might restrain other unprincipled employers from doing likewise. As Justice Breyer observed, "in the absence of the backpay weapon, employers could conclude that they can violate the labor laws at least once with impunity."[9] The foreseeable result will be widespread retaliation against undocumented workers brave (or foolish) enough to assert their rights under the Act—and, increasingly, employee silence born of intimidation.

2. *Precluding backpay chills the exercise of Section 7 rights.* Provided it is severe enough, one labor-law violation is all it really takes. The coercive message—assert your rights, and you will be discharged (and, perhaps, detained and deported)—will have been sent, and it will not be forgotten.[10] Thus, it makes little difference that

[1] *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 52 (2d Cir. 1997).

[2] *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

[3] In so concluding, we have borne in mind that a reviewing court would owe no deference to our interpretation of *Hoffman*. See, e.g., *New York New York, LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002) ("We are not obligated to defer to an agency's interpretation of Supreme Court precedent under *Chevron* or any other principle.") (internal quotations omitted).

[4] See, e.g., *Hoffman Plastic Compounds*, supra, 535 U.S. at 153–161 (Breyer, J., dissenting); *Local 512, Warehouse and Office Workers' Union v. NLRB*, 795 F.2d 705 (9th Cir. 1986) (*Felbro*); *A.P.R.A. Fuel Oil Buyers Group*, 320 NLRB 408 (1995).

[5] In reviewing these arguments, we do not dispute that *Hoffman* is controlling authority. We observe, however, that the decision entails certain undesirable consequences as a matter of federal labor and immigration policy, which are the subject of wide and vigorous public debate. We believe it is appropriate for the Board, within the limits of its authority, to acknowledge and seek to address the consequences of the Supreme Court's decision.

[6] See, e.g., Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 Colum. L. Rev. 1527, 1554 (2002) ("The weakness of the Act's remedies in the face of employer resistance has proven to be the Achilles' heel of employee rights. . . . [E]mployees' section 7 rights are notoriously underenforced."); Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 Harv. L. Rev. 1769, 1788–1789 (1983) ("[T]he traditional remedies for discriminatory discharge—backpay and reinstatement—simply are not effective deterrents to employers who are tempted to trample upon their employees' rights."). Chairman Liebman has previously drawn attention to the weakness of the Act's backpay remedy. *St. George Warehouse*, 351 NLRB 961, 971 (2007) (then-Member Liebman, dissenting).

[7] *Hoffman Plastic Compounds*, supra, 535 U.S. at 154 (Breyer, J., dissenting).

[8] See *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969).

[9] *Hoffman*, supra, 535 U.S. at 154 (Breyer, J., dissenting).

[10] As the Board has observed, loss of employment is the "capital punishment" of the workplace. A discharge demonstrates most sharply an employer's power over employees. Thus, discharging employees for asserting their rights under the Act is particularly likely to have a

the offending employer will be ordered to cease and desist, and that a cease-and-desist order will set the stage for contempt penalties should the employer reoffend. For the employer to do so, employees would have to reassert their Section 7 rights. That is highly unlikely. Employees will recall, or will have learned from the lore of the shop, what happened the last time someone dared do so. They will be unaware, probably, of the availability of contempt proceedings were there to be a next time. And even if they are aware, they also would be aware that they face a double risk in taking concerted action—not just as employees asserting their Section 7 rights against a known violator of those rights, but as undocumented immigrants at risk of deportation. Thus, we agree with the Ninth Circuit's observation that the risk of contempt penalties is "slight" because contempt proceedings "would require a further complaint from an undocumented employee who knew that filing a charge would immediately place his or her immigration status in jeopardy."[11]

It may be countered that fear of detection is a two-way street. That is, an employer knowingly in violation of IRCA may hesitate to raise work-authorization status as a backpay defense, since in doing so it blows the whistle on itself as an IRCA violator. Undocumented employees, realizing as much, may feel emboldened to risk asserting their Section 7 rights. Perhaps, but we doubt it. Employees will also understand that their employer already may have realized, or may be anticipating, savings that offset the risk of IRCA penalties. They will recognize that even if their employer incurs those penalties, it will escape backpay liability, and most likely it will have enjoyed labor-cost savings as a result of employing undocumented workers.[12] Realizing as much, employees may reasonably conclude that their employer may be perfectly willing to blow that whistle, and remain chilled from exercising their Section 7 rights.

But the chilling effect does not stop there. Authorized workers—citizens of the United States and legally resident aliens—likewise will be chilled when they see their employer retaliating with impunity against their coworkers. Such employees will not necessarily know that those coworkers are undocumented. They will not necessarily grasp that they themselves are differently situated remedially and thus better protected in the exercise of their Section 7 rights. But they will, necessarily, grasp the import of what they witness: coworkers discharged for engaging in protected activities, with the only visible consequence a notice posted on a bulletin board. Indeed, authorized workers may well be chilled even if they know that discharged coworkers are undocumented. Unless they are versed in labor law, they may not connect the lack of effective remedy to the discriminatees' immigration status. They may simply conclude that there *is* no effective remedy under the Act for what their employer did. In sum, one purpose of a backpay order is to make all employees at a jobsite, regardless of whether they themselves were the target of unfair labor practices, "more confident in the exercise of their statutory rights."[13] One result of precluding backpay for undocumented workers will be to make authorized workers *less* confident in asserting those rights.[14]

3. Precluding backpay fragments the work force and upsets the balance of power between employers and employees. Protecting collective action is the bedrock policy on which the Act rests. This is clear from the words of Section 7,[15] as well as the Supreme Court's decision upholding the constitutionality of the Act:

> Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; . . . that union was essential to give laborers opportunity to deal on an equality with their employer.[16]

Citing that seminal decision, the Court has observed that "exclud[ing]" undocumented aliens "from protections against employer intimidation" would create "a

lasting coercive impact on the workforce. E.g., *Michael's Painting, Inc.*, 337 NLRB 860, 868 (2002), enfd. mem. 85 Fed. Appx. 614 (9th Cir. 2004).

[11] See *Felbro*, supra, 795 F.2d at 718–719. In finding that an order to cease and desist and post a remedial notice is "sufficient to effectuate national labor policy," the Supreme Court relied on the threat of subsequent contempt sanctions. *Hoffman*, supra, 535 U.S. at 152. Because employers of undocumented workers have so little reason to fear the prospect of those sanctions, we respectfully disagree with the Court's view that cease-and-desist and notice-posting remedies suffice.

[12] See *A.P.R.A. Fuel*, supra, 320 NLRB at 415 (stating that "employers . . . may consider the penalties of IRCA a reasonable expense more than offset by the savings of employing undocumented workers or the perceived benefits of union avoidance").

[13] V*irginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 541 (1943).

[14] See *A.P.R.A. Fuel*, supra, 134 F.3d at 58 ("[T]he lack of a backpay remedy would make undocumented workers an easy target for employers resisting union organization, and, thus, frustrate the rights of authorized U.S. workers under the NLRA. An employer could intimidate United States citizens and other lawful residents by targeting undocumented workers for antiunion discharges.").

[15] All of the rights created by Sec. 7 involve collective action—the right to organize; to form, join, or assist labor organizations; to bargain collectively; to engage in concerted activities for mutual aid and protection.

[16] *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (citing *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921)).

subclass of workers without a comparable stake in the collective goals of their legally resident coworkers, thereby eroding the unity of all the employees and impeding effective collective bargaining."[17] The Court's observations in this regard were in support of its conclusion that undocumented aliens are "employees" within the scope of Section 2(3). In our view, however, to deny undocumented workers a backpay remedy is to exclude them from "protections against employer intimidation" nearly as effectively as would denying them 2(3) status altogether, with the same erosion of employee unity.[18] That exclusion from the Act's protection of collective action creates a powerful disincentive for undocumented employees to make common cause with their authorized coworkers.

The resulting fragmentation of the work force along immigration lines harms all employees by impairing their ability to engage in collective action.[19] Authorized workers, forced to organize without the mutual aid of their undocumented coworkers, are denied the full freedoms of association and self-organization that the Act was intended to foster.[20] The real-world consequence of denying an effective remedy under the Act to undocumented workers is that *all* workers suffer a diminution of their rights to pursue collective bargaining and to engage in other activities for mutual aid and protection.[21]

4. *Precluding backpay removes a vital check on workplace abuses*. The very employers most likely to be emboldened by a backpay-free prospect to retaliate against undocumented workers for concertedly protesting their terms and conditions of employment are the ones most likely to impose the worst terms and conditions. It is no secret that many undocumented workers suffer unconscionable abuse at the hands of their employers. They are often victims of wage theft, minimum wage and overtime violations, health and safety violations, and even physical abuse.[22] By chilling protest, precluding backpay for undocumented workers reduces the likelihood that such abuses will be confronted by concerted employee action. The foreseeable result is a workplace culture in which, as the Board observed in *A.P.R.A. Fuel*, the exploitation of such workers "can occur in secret and with relative impunity."[23]

B.

We recognize, as the Board has before, that we must "consider with care [c]ongressional mandates in other areas of public policy."[24] Under *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942), we are required to undertake a "careful accommodation" of the NLRA and IRCA.[25] But we adhere to the view that holding wrong-

[17] *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984) (citing *Jones & Laughlin Steel*, supra, 301 U.S. at 33).

[18] See id. at 911 (Brennan, J., dissenting) (criticizing "the disturbing anomaly" created by the Court's holding, on one hand, that undocumented aliens are Sec. 2(3) employees entitled to the Act's protection, and on the other that "these same alien employees are effectively deprived of any remedy").

[19] As the Court has observed, "collective action would be a mockery if representation were made futile by interference with freedom of choice." *Jones & Laughlin Steel,* supra, 301 U.S. at 34.

[20] Sec. 1 of the Act provides, inter alia:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce . . . .
>
> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by . . . restoring equality of bargaining power between employers and employees.
>
> . . . .
>
> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

[21] Id.

[22] *A.P.R.A. Fuel*, supra, 320 NLRB at 413–414 ("Both houses of Congress explicitly noted that . . . alien workers, out of desperation, will work in substandard conditions and for starvation wages.") (citing IRCA's legislative history). See also, e.g., Rebecca Smith & Catherine Ruckelshaus, *Solutions, Not Scapegoats: Abating Sweatshop Conditions for All Low-Wage Workers as a Centerpiece of Immigration Reform*, 10 N.Y.U. J. Legis. & Pub. Pol'y 555 (2006–2007) (concluding that immigrant workers "work exceedingly hard, often in situations of wage exploitation, discrimination, and exposure to life-threatening dangers on the job," and that undocumented immigrant workers "can face especially staggering obstacles to obtaining even the basic necessities for survival, leaving them vulnerable to exploitation by unscrupulous employers"); Annette Bernhardt, Siobhan McGrath, & James DeFilippis, *The State of Worker Protections in the United States: Unregulated Work in New York City*, 4/1/08 Int'l Lab. Rev. 135 (April 1, 2008) (examining the "prevalence and types" of noncompliance with labor law in New York City, and finding that "immigrants constitute the largest group of workers found in unregulated jobs," that "undocumented immigrants and recent arrivals run the greatest risk of being subjected to workplace violations," and that these violations include wage and hour violations, health and safety violations, denial of access to workers' compensation, misclassification, and even human trafficking and forced labor).

[23] *A.P.R.A. Fuel*, supra, 320 NLRB at 414.

[24] Id. at 410.

[25] *Southern Steamship*, supra, 316 U.S. at 47. *Southern Steamship* does not require that the NLRA yield automatically to other Federal statutes. One commentator has observed, however, that when the NLRA and some other Federal statute potentially come into conflict, Federal labor policy consistently loses out. Christopher David Ruiz

doing employers liable for backpay to undocumented discriminatees not only does not conflict with IRCA's purposes, it supports them.[26] As Justice Breyer pointed out in his *Hoffman* dissent, Congress enacted IRCA "to diminish the attractive force of employment, which like 'a magnet' pulls illegal immigrants toward the United States."[27] That magnet has a supply-side "push" and a demand-side "pull." The availability of backpay awards would not increase the push on the supply side. As Justice Breyer commonsensically observed, aliens cross the border to find work, not to gain the protection of the NLRA.[28] But the foreseeable result of precluding backpay will be to increase the pull on the demand side. That pull is strong as it is. Undocumented workers are attractive to certain unprincipled employers because their precarious immigration status renders them vulnerable to exploitation.[29] Typically, they will work long hours, accept low wages, and tolerate unsafe conditions.[30] Now that they also come with a cost-free discharge guarantee—even where, as here, the employer is a knowing IRCA violator—the demand-side pull will be all the greater, directly contrary to Congress's purpose in enacting IRCA.[31]

Of course, the most direct way to counteract the demand-side pull is through vigorous enforcement of IRCA itself. But it is or should be apparent that the double risk of IRCA penalties *and* NLRA backpay awards would reinforce deterrence, whereas precluding backpay awards would undermine the deterrent effect of IRCA penalties by creating offsetting savings. Employers who knowingly employ undocumented workers are aware that they risk IRCA penalties. On the other hand, such employers enjoy labor-cost savings. Giving them immunity from backpay liability can only tilt the cost-benefit calculus in the direction of encouraging employers to run that risk. Thus, as the Board concluded in *A.P.R.A. Fuel*, awarding backpay to undocumented workers not only accommodates IRCA's central purpose, it furthers that purpose.[32]

C.

By reducing illegal immigration, Congress sought through IRCA to protect the interests of U.S. citizens and authorized-alien workers.[33] As stated above, undocumented immigrants, fearing detection and deportation, will work long hours, accept low wages, and tolerate substandard conditions. Thus, they possess a competitive edge in the labor market—particularly in the market for unskilled labor—over U.S. citizens and other authorized workers unwilling to submit to such exploitation.[34] Also, undocumented immigrants' availability in a labor market tends to depress wages and working conditions for others in the same market.[35] By deterring employers from hiring undocumented immigrants, IRCA seeks to

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Cameron, *Borderline Decisions: Hoffman Plastic Compounds, The New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA L. Rev. 1, 6 (2003) ("In selected cases, the Court has set up an apparent conflict between the NLRA and some other federal legislative scheme, then resolved that conflict by effectively abrogating federal labor policy in favor of federal 'other' policy.").

[26] See *A.P.R.A. Fuel*, supra, 320 NLRB at 415: "[W]e conclude that the most effective way for the Board to accommodate—and indeed to further—the immigration policies IRCA embodies is, to the extent possible, to provide the protections and remedies of the NLRA to undocumented workers in the same manner as to other employees. To do otherwise would increase the incentives for some unscrupulous employers to play the provisions of the NLRA and IRCA against each other to defeat the fundamental objectives of each. . . ."

The Board and some courts have previously found that IRCA's legislative history demonstrated Congress's intent that IRCA not be construed to limit the Board's remedial powers. See id. at 414; *Hoffman Plastic Compounds, Inc. v. NLRB*, 237 F.3d 639, 646 (D.C. Cir. 2001) (stating that IRCA's legislative history "shows that Congress did not intend the statute to limit the NLRA even indirectly"); *A.P.R.A. Fuel*, supra, 134 F.3d at 55 ("IRCA's legislative history . . . demonstrates the intention to preserve the NLRA's protection of and remedies for undocumented workers."). We recognize, however, that the Supreme Court has rejected this view. See *Hoffman Plastic Compounds*, supra, 535 U.S. at 149 fn. 4 (dismissing IRCA's legislative history as "a single Committee Report from one House of a politically divided Congress" and a "slender reed," and stating that other courts have read the Report as merely endorsing the holding of *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), that undocumented aliens are "employees" under Sec. 2(3) of the Act).

[27] *Hoffman Plastic Compounds*, supra, 535 U.S. at 155 (citing H.R. Rep. No. 99-682, at 45 (1986), reprinted in 1986 U.S.C.C.A.N. 5649).

[28] Id.

[29] See, e.g., Ames Alexander, *Raeford Managers to Fight Charges*, Charlotte Observer, July 31, 2009 (reporting that current and former supervisors at a Greenville, South Carolina chicken processing plant said that the plant "preferred undocumented workers because they were less likely to question working conditions for fear of being deported or fired").

[30] See supra fns. 22, 29.

[31] Conversely, "[i]f 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." *Sure-Tan*, supra, 467 U.S. at 893.

[32] 320 NLRB at 415 ("[T]he most effective way for the Board to accommodate—and indeed to further—the immigration policies IRCA embodies is, to the extent possible, to provide the protections and remedies of the NLRA to undocumented workers in the same manner as to other employees.").

[33] H.R. Rep. No. 99-682, at 47 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5651.

[34] *A.P.R.A. Fuel*, 320 NLRB at 413–414.

[35] "'[A]cceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens.'" *Sure-Tan*, supra, 467 U.S. at 892 (quoting *De Canas v. Bica*, 424 U.S. 351, 356-357 (1976)). Or, as Judge Cudahy more colloquially expressed it, undocumented aliens' "willingness to work for less means that American workers too must settle for less, or risk settling for unemployment." *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1125 (7th Cir. 1992) (Cudahy, J., dissenting).

counteract these forces. To the extent that precluding backpay awards encourages employers to hire undocumented immigrants, it is at cross-purposes with IRCA and injures the welfare of citizen and authorized-alien workers.[36]

D.

The policy considerations outlined above also may be looked at from the viewpoint of law-abiding employers who must compete with IRCA violators. By adhering to wage and hour laws and complying with workplace safety standards, such employers typically shoulder higher labor costs than do those who employ unauthorized aliens. In principle at least, IRCA seeks to level the playing field by imposing costs on IRCA-violating employers in the form of civil penalties and criminal fines. Shielding IRCA violators from backpay liability tilts the field the other way. As a matter of policy, and of simple fairness, government should not contribute, however unintentionally, to helping law-breaking employers undercut their law-abiding competitors. Awarding backpay to undocumented workers helps ensure that IRCA-compliant employers "do not suffer a competitive disadvantage for their obedience to the law."[37]

Conclusion

Although we are persuaded that an award of backpay to undocumented workers is beyond the scope of the Board's authority under the Court's *Hoffman* decision, we also remain convinced that the result in this case—an order relieving the employer of economic responsibility for its unlawful conduct—can serve only to frustrate the policies of both the Act and our nation's immigration laws. In denying backpay to the undocumented workers in this case, therefore, we do not definitively shut the door on other monetary remedies, which have not been tested here. It is arguable, for example, that a remedy that requires payment by the employer of backpay equivalent to what it would have owed to an undocumented discriminatee would not only be consistent with *Hoffman,* but would advance Federal labor and immigration policy objectives. Such backpay could be paid, for example, into a fund to make whole discriminatees whose backpay the Board had been unable to collect.

Because of the procedural posture of this case, we do not examine such a remedy here.[38] However, we would be willing to consider in a future case any remedy within our statutory powers that would prevent an employer that discriminates against undocumented workers because of their protected activity from being unjustly enriched by its unlawful conduct.

Dated, Washington, D.C. August 9, 2011

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

NATIONAL LABOR RELATIONS BOARD

Emily De Sa, Esq., for the General Counsel.

Lloyd Somer, Esq., of New York, New York, for the Respondent.

Washington Square Legal Services, Inc., Mayra Peters-Quintero, Esq., Tsedeye Gebreselassie, David Peterson, Hannah Roman, and *Heding Yang, Law Students, New York, New York,* and *Marielena Hincapie, Esq., National Immigration Law Center,* of Los Angeles, California, for the Charging Party.

SUPPLEMENTAL DECISION

STEVEN DAVIS, Administrative Law Judge. The general question presented is whether undocumented workers who are not legally authorized to work or be present in the United States but are nevertheless covered and protected by the National Labor Relations Act (Act) are entitled to a backpay remedy.

The specific issue to be decided is whether undocumented workers who have not engaged in fraud or criminal activity in violation of the Immigration and Reform Act of 1986 (IRCA) in obtaining or continuing their employment are entitled to backpay where their employer, in violation of that statute, hired and retained them knowing that they were undocumented.

Procedural Background

Based upon a charge filed on March 5, 2003 by the Puerto Rican Legal Defense and Education Fund (Charging Party), a complaint was issued on April 23, 2003 alleging that Mezonos Maven Bakery, Inc. (Respondent) discharged certain employees on February 12, 2003 because they concertedly complained to it concerning their supervisor's behavior toward them.

Thereafter, on February 2, 2005, based upon a Settlement Stipulation executed by all parties, the Board issued its Decision and Order [unpublished] directing the Respondent to cease and desist from discharging employees because they complained to it about working conditions or because they otherwise attempted to improve their working conditions. The Respondent was ordered to offer unconditional reinstatement to Jose Antonio Quintuna Bermeo, Antonio Gonzalez, Luis

[36] These injuries are in addition to those inflicted on authorized workers in the exercise of their rights under Sec. 7. See above, A.2, A.3.

[37] A.P.R.A. Fuel, supra, 134 F.3d at 57.

[38] See, e.g., *Scepter Ingot Castings, Inc.*, 341 NLRB 997 (2004) (holding that the Board lacks jurisdiction to modify court-enforced orders), enfd. sub nom. *Scepter, Inc. v. NLRB*, 448 F.3d 388 (D.C. Cir. 2006).

Marcelo Gonzalez Hurtado, Francisco Javier Joya, Christian Palma, Miguel Quintuna, and Jose Armando Sax-Gutierrez "except that Respondent may avail itself of a compliance proceeding and therein attempt to establish that one or more of the alleged discriminatees is not entitled to an unconditional offer of reinstatement." The Respondent was also directed to make the employees whole for any lost wages and other benefits "except that if the amounts, if any, due to the employees are not agreed to, a compliance proceeding will be commenced to litigate the amount of back pay due, if any, to said employees."[1]

The Respondent's counsel stated here that the language concerning the availability of a compliance proceeding was included in the Stipulation pursuant to his intention to raise a defense that the employees were not entitled to reinstatement or backpay pursuant to the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

On March 15, 2005, the United States Court of Appeals for the Second Circuit entered its judgment enforcing the Board's Order. On July 28, 2005, the Regional Director issued a Compliance Specification (Specification) setting forth the backpay owed for the seven employees, and further asserting that backpay for six of the employees continues to run in the absence of a valid offer of reinstatement. Backpay was tolled for the seventh employee, Miguel Quintuna, who had already been reinstated.

The Respondent's answer to the Specification states that it could not make a valid offer of reinstatement to the employees or pay them backpay because it believed that they were not legally authorized to work in the United States pursuant to *Hoffman*, but even if it was required to do so, it offered them reinstatement in 2003, asking them at that time for proper documentation, but none presented the required documents. The Respondent therefore concluded that they were not legally authorized to work in the United States and refused to reinstate them.

Prior to the opening of the hearing, the Charging Party filed a Motion in Limine in which it asked that I exclude all inquiries into the employees' documented status. The Respondent filed an Opposition, and I issued an Order denying the Motion.

A hearing was held before me on January 31, February 1 and 2, 2006 in Brooklyn, New York. During the hearing, the Respondent sought to examine the employees about their documented status. Counsel for the Charging Party objected on the ground of their Fifth Amendment privilege against self incrimination. I adjourned the hearing and, pursuant to Section 102.31(c) of the Board's Rules and Regulations, filed with the Board a Recommendation that it issue an order requiring the employees to testify concerning these matters.

While the Recommendation was pending before the Board, counsel for the General Counsel moved to amend the Specification or her theory thereof to eliminate the issue of whether the discriminatees were documented. She stated that for the purposes of this proceeding she "will proceed on the assumption that the discriminatees are undocumented. We have decided not to contest the issue of [the discriminatees' documented] status in this proceeding for the purposes of expediting this matter." Counsel for the General Counsel also moved that I withdraw my Recommendation to the Board. Counsel for the Charging Party responded that it took no position on the motions. Counsel for the Respondent objected to the motions. I granted the motions and withdrew my Recommendation to the Board.

The hearing was resumed and closed on August 8, 2006. On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

I. FINDINGS OF FACT

A. The Respondent's Failure to Request Documentation during the Employees' Employment

Shaye Lieberman functions as the Respondent's president, running the operation and handling employee-related issues. His wife owns the business, and Alex Izhak, the Respondent's manager and admitted supervisor, reports to Mr. Lieberman.

Of the approximately 20 production workers employed by the Respondent, the seven employees involved here were employed the longest—including Joya and Miguel Quintuna for eight years and Jose Bermeo for five years. The seven employees made bread in the Respondent's wholesale bakery. They worked 65 to 75 hours in a six-day work week. None received pay at a higher rate for working more than 40 hours per week. They were discharged on February 12, 2003.

Lieberman testified that he knew that the Respondent is legally required to verify that its workers are lawfully entitled to work in the United States by examining evidence of identify and employment eligibility and completing INS Form I-9 which must be completed and signed by the employee and the employer within three days of the employee's hire. He stated that, consistent with such understanding, when the seven employees were hired he asked each for documentation which would support the completion of the I-9 form. They did not provide such documentation at their hire. He stated that he asked them for such documentation three or four times thereafter during the course of their employ. Each time they said that they would produce the papers but did not. He conceded that none presented any fraudulent documents concerning their immigration status.[3]

Lieberman stated that although none presented any of the required documents, he permitted them to work. Lieberman did not terminate them after three days of work, he did not receive a receipt for the application of such documents from any of the employees, and they were not discharged after 90 days of work for not presenting the actual documents, as required by IRCA.

[1] According to the General Counsel, three other employees named in the Order, Angel Bermeo, Marcos Bermeo, and Blanca Uruchina have elected not to participate in this proceeding.

[2] The General Counsel's unopposed motion to correct the transcript is hereby granted as set forth in GC Exh. 14.

[3] Lieberman also hired another employee, Marco Bermeo, without receiving documentation of his immigration status. Lieberman later sponsored him for a visa. Thereafter, Bermeo was discharged with the seven employees and was an alleged discriminatee but elected not to participate in this matter. Lieberman subsequently rehired Bermeo but did not ask for or receive documentation of his immigration status because of his sponsorship filing.

In contrast, the Respondent's other approximately 11 workers presented the documents required by the I-9 form at the time of their hire.

Contradicting Lieberman's testimony, the seven employees testified consistently that when they were hired they were not asked to produce such documents as a social security card, birth certificate, passport, driver's license or any other documents, and none presented any of the above documents on his own to the Respondent. However, four employees, Jose Antonio Quintuna Bermeo, Antonio Gonzalez, Luis Marcelo Gonzalez Hurtado, and Francisco Javier Joya were asked for certain documentation during their employment, as will be discussed below. The other three workers were not asked for documentation during their hire. None were asked to sign any paperwork either at hire or during their employment.

I cannot credit Lieberman's testimony that at the time of the hire of the seven employees he requested valid documentation to support their documented status. Thus, the seven employees each credibly testified that none was asked for such documentation by Lieberman or anyone else at the time of their hire. In addition, the four employees who were asked for documentation during their employment presented papers which should not have been accepted but were, such as passports and a photo identification card from countries other than the United States. Moreover, regardless of whether the employees were asked for documentation and did not produce it, the Respondent violated IRCA by hiring them and continuing to employ them without receiving the proper documentation.

B. The Requests for and Offers of Reinstatement

1. The facts

The Specification alleges that the backpay period for Jose Antonio Quintuna Bermeo, Antonio Gonzalez, Luis Marcelo Gonzalez Hurtado, Francisco Javier Joya, Christian Palma, and Jose Armando Sax-Gutierrez, begins on February 12, 2003, the date of their discharge, and continues to run in the absence of a valid offer of reinstatement. The Specification also asserts that the backpay period for Miguel Quintuna begins on February 12, 2003 and terminates on March 5, 2003, the date he was reinstated by the Respondent. The General Counsel argues that no valid offer of reinstatement has been made to any of the employees.

The Respondent's answer states that it could not make a valid offer of reinstatement to the employees because it believed that they were not legally authorized to work in the United States. The answer further states that even if the Respondent was required to make an offer of reinstatement, it did so in 2003 when it told them that they would be reinstated upon their presentation of proper documentation establishing their identification and eligibility to work in the United States. However, none presented proper documentation and it therefore concluded that they were not legally authorized to work in the United States and refused to reinstate them.

The issues therefore are whether the Respondent was required to make offers of reinstatement to the employees and if so, whether it has made valid offers.

One or two weeks following their discharge on February 12, 2003, the employees visited the Respondent in two consecutive weeks in order to obtain their pay for the period that they worked until their discharge. They received their pay without incident, but they did not request, and were not offered reinstatement at those times.

None of the employees received any letters from the Respondent offering them reinstatement. In March, 2003, an appointment was made with the Respondent by counsel for the Charging Party or by a workers group, either Asociacion Tepeyac De New York or the Latin American Workers Project, for the men to return to the plant and meet with the Respondent in order to attempt to obtain reinstatement. The workers returned to the plant twice for that purpose.

Regarding the first meeting, Lieberman testified that he received a letter from Asociacion Tepeyac pursuant to which he agreed to meet only with Jared, a representative of one of the workers' groups. After making this appointment but prior to the arrival of the workers, the charge in the underlying case was filed on March 5 and Lieberman was served with a copy of the charge. When the seven employees arrived with Jared, Lieberman refused to meet with the workers as a group. Lieberman stated that although he was interested in having the men return to work, he refused to speak to them at that time, did not offer them reinstatement, and admittedly sent the workers away, telling them to contact him and that he would meet with them individually. He did not ask them for any contact information which would enable him to contact them later.[4]

Lieberman's testimony is somewhat different than that of the employees. They stated that when they arrived with Jared at the shop in March, 2003, manager Izhak said that he did not wish to speak to Jared, but would speak to the workers. The employees insisted that Jared be present as he was needed to translate what was being said. Izhak refused to speak to the men with Jared and they left.

About one week later, pursuant to an appointment with the Respondent, the men returned with Oscar and Javier from the above worker organizations. Izhak asked them to go to the office one at a time.

Lieberman testified that at the meetings with the seven employees he offered to reinstate each of them if they produced proper documentation as to their immigration status. He stated that the seven employees "triggered" a wage and hour investigation undertaken by the New York State Attorney General in which their wages and hours were subject to examination. That investigation began in 2003 at about the same time as the instant Board case. Lieberman conceded that the employees here caused him "a lot of trouble." However, he denied asking the seven employees for immigration documentation in retaliation for the filing of the charge with the Board.

Each of the seven employees testified that at their meetings, Lieberman had no forms with him for them to fill out, they were not asked to sign anything, and he took no notes. Each employee's version of his meeting with Lieberman is set forth below.

[4] In this connection, the employees did not give their home address or phone number, if they had one, to the Respondent during their employ, and they were not asked to supply that information.

Jose Antonio Quintuna Bermeo

Jose Antonio Quintuna Bermeo stated that about three years after his hire in April, 1998, manager Izhak asked him for identification. Bermeo gave him a copy of his passport which was issued by a country other than the United States. Izhak said that that was enough.

At the March, 2003 interview, Lieberman asked Bermeo what he was doing there. Bermeo asked to be reinstated. Lieberman told him that he must bring a "social security, I don't care whether it's real or fake," and that he could return to work if he presented that document. Lieberman did not state a deadline within which it had to be submitted. Bermeo asked Lieberman why he was asking for that document now inasmuch as he did not request it when he began work. Lieberman answered that all the employees who work downstairs have social security numbers and "papers." Bermeo reminded him that he worked upstairs, and Lieberman replied that "positions are taken upstairs too." Lieberman then said that this is his country and his business and he could do as he pleased.

Thereafter, Bermeo did not present the requested documents. However, a few weeks later he returned to the plant with dischargee Antonio Gonzalez and met with Izhak. Gonzalez asked to be reinstated, and was told that all vacant positions had been filled. When Bermeo persisted, Izhak told him that he should bring a social security number, and he would be reinstated. Bermeo asked why he asked for such documents now and not when he was hired. Izhak then said that he should "drop the lawsuit and then my position will be there for me." (On March 5, 2003, a charge was filed alleging the unlawful discharge of the night shift employees). Bermeo protested that he knew nothing about a lawsuit. Izhak said that he would think about it and asked Bermeo to call him the next day.

The following day, Bermeo called and identified himself to the secretary who shortly thereafter informed him that Izhak was not present. Izhak did not return the call. Bermeo placed calls in the following two days but was told on each occasion that Izhak was not there. Bermeo did not present a social security card or number thereafter.

Antonio Gonzalez

Antonio Gonzalez stated that about two years after he was hired in February, 2000, manager Izhak told him to bring in "any type of identification ticket." Thereafter, Gonzalez showed Izhak his passport from another country. Izhak said that it was "enough."

At his interview with Lieberman in March, 2003, Gonzalez was asked if he wanted to return to work. Gonzalez said he did. Lieberman told him to return within two days with his social security number. Gonzalez replied "o.k. That was fine." Lieberman asked if he understood and Gonzalez said he did.

Gonzalez did not return with the number but about one month later he visited the shop with Jose Antonio Quintuna Bermeo, another dischargee. Bermeo asked Izhak if he could be reinstated and was told that he could not return because new employees had taken his job.

Gonzalez did not return to the plant and did not contact the Respondent thereafter because he believed that the Respondent did not act in good faith because (a) Lieberman spoke in an "upset" manner and did not say that he had a job for him even if he brought his social security card and (b) he was told by a friend who was a current employee that new employees had been hired and were performing the same work he had been doing.

Luis Marcelo Gonzalez Hurtado

Luis Marcelo Gonzalez Hurtado stated that eight days after he began work in March, 2002, Izhak asked him for an identification card, and also asked if he had a passport. Hurtado gave him his passport which was issued by a country other than the United States.

In March, 2003, Hurtado met with Lieberman accompanied by co-workers Palma and Jose Antonio Quintana Bermeo. Lieberman asked them what they wanted. They asked whether it was possible to obtain reinstatement. Lieberman replied that if they presented a social security card and an identification card they could return to work, but if they could not present those documents they could not be employed there. He did not set a deadline for the production of those documents. The men asked why he requested those papers, and Lieberman replied that it was a new rule or new law.

The workers then asked whether the employees currently employed had presented those documents. Lieberman said they had. The three men then requested that Lieberman prove that those then employed had produced their papers, asking to be shown their social security cards and identification cards. Lieberman then reacted in a "strange way" and told them to leave. Hurtado did not thereafter present the documents requested, nor did he return to the Respondent's premises or attempt to contact it.

Hurtado testified that following the meetings that day, he learned from the other six employees that all of them had been asked to present social security cards and identification cards.

Francisco Javier Joya

Francisco Javier Joya stated that about five years after his hire in 1995, Izhak asked him to present identification. Joya showed him a military photo identification card from a country other than the United States.

At his March, 2003 interview, Lieberman asked him what he wanted, and Joya responded that he wanted reinstatement. Lieberman told him to bring in a social security number and he would be reinstated the next day. Joya replied that he had been employed for seven years and "for the first time you are asking for a social security number." Lieberman repeated that if he brought a social security card he would be working tomorrow.[5] Joya replied "let's leave it at that," answering in that way because he believed that Lieberman's offer was not a "real" job offer since he had a sarcastic "facetious" grin as if he was making fun of him. Joya did not present a social security card or number thereafter.

Christian Palma

Palma, who was hired in June, 2002, was interviewed in March, 2003 by Lieberman. Palma was accompanied by co-

[5] Joya testified inconsistently that Lieberman did not say when he could return to work if he presented a social security card.

worker Javier Joya who translated.

Lieberman asked Palma if he brought "the papers." Palma asked "what papers?" Lieberman replied "social security, passport, license, identification from his country," adding "it didn't matter if it was false." Palma answered that he did not have those documents with him at that time, and Lieberman said that "there is nothing I can do." Palma never brought such documents to the Respondent. He did not contact the Respondent thereafter about obtaining reinstatement essentially because Lieberman did not say that he would be reinstated, and while he spoke to Palma he was smiling which Palma interpreted as an attempt to humiliate him.

Palma stated that although he went to this interview believing that he would be offered reinstatement, Lieberman did not make such an offer.

Miguel Quintuna

Quintuna began work in 1995. He was late arriving at work on February 12, 2003 and was not present when his co-workers were discharged. He was told by Izhak that his fellow employees were not needed and were fired. Quintuna's brother, Jose Antonio Quintuna Bermeo, was one of those fired. Izhak warned Quintuna that if he left he could not return. Nevertheless, Quintuna left the premises without working that night.

When Quintuna picked up his last paycheck in late February, he was asked by Izhak whether he wanted to return to work. Quintuna asked if there was any problem, and Izhak said there was none. Quintuna asked to think about it and the following day called Izhak and said that he would return to work. He was reinstated on March 5.[6] When he came back to work he was not asked for any documents such as a social security card, birth certificate or passport, and he did not present any such documents on his own.

About one month after his return to work, Lieberman approached Quintuna at his work station and asked him where his brother was. Quintuna said that he was at home. Lieberman then grasped Quintuna's shirt or lapels and shook them back and forth saying: "I don't want to see your brother because if he comes here he's going to cause trouble for me." Lieberman then lightly tapped Quintuna on both cheeks, saying "I do not want your brother anymore," or "tell your brother not to come again to the bakery."[7] Quintuna said that he would speak to his brother. Quintuna continued to work for the Respondent until about August, 2004.

The Charging Party argues that Lieberman's lack of good faith in asking the former employees for proof of documented status is shown by his reinstating Quintuna without asking for such proof. It asserts that the Respondent was thus motivated to reinstate him and not the other workers because Lieberman regarded his brother and the others as troublemakers. In this connection, both Quintuna and Marcos Bermeo who was also reinstated told Lieberman one day after the walkout that they did not want to leave work, but had been threatened to do so by other workers.[8] The implication is clear that the Respondent was not interested in reinstating troublemakers—those who asserted their rights under the Act.

Lieberman testified that he did not ask Quintuna for documentation upon his rehire because he "sponsored" him for a visa during his employ.[9] I was not cited to any authority holding that the Respondent is relieved of its obligation to verify the employee's documented status upon rehire because he is being sponsored for a visa.

Jose Armando Sax-Gutierrez

Sax-Gutierrez began work in September, 2002. He attempted to obtain reinstatement in February, 2003 before his co-workers returned to the plant for that purpose. Sax-Gutierrez went to the plant two weeks after his discharge and told Izhak that he needed his job back. Izhak replied that he would need identification, and asked that he call the next day. The following day Sax-Gutierrez called, identified himself and asked the secretary to speak to Izhak. She said that she would get Izhak, but five minutes later she told Sax-Gutierrez that Izhak did not know who he was.

At his interview with Lieberman in March, 2003, Sax-Gutierrez said that he needed his job. Lieberman replied that he needed a social security number, but did not say when it had to be supplied. Sax-Gutierrez did not answer, but left because he believed that Lieberman "ignored" him by not looking directly at him when he spoke to him. Sax-Gutierrez did not present a social security card or contact the Respondent thereafter because he believed that Lieberman was making fun of him by ignoring him, as Izhak had, as described above.

2. Analysis and discussion

The only alleged offers of reinstatement made by the Respondent occurred shortly after the discharges of the employees in February, 2003 at a time when it was not legally obligated to make such alleged offers. The Board's Order, issued two years later, in February, 2005, directed the Respondent to make offers of reinstatement. It did not make any such offers at that time, but relies on the meetings it had with employees two years earlier to support its belief that they were undocumented because they did not present any documentation after being asked to do so, and for that reason refused to reinstate them.[10]

I credit the testimony of the employees concerning their versions of the meetings with Lieberman. Most of the testimony was undenied. In addition, they testified consistently concerning what was asked of them.

Hoffman did not disturb the conditional reinstatement part of the order in *A.P.R.A. Fuel Oil Buyers Group*, 320 NLRB 408, 417 (1995), enfd. 134 F.3d 50, 56 (2d Cir. 1997) in which the

[6] The Respondent's answer admits the Specification's allegation that he was reinstated on March 5.

[7] Quintuna's pre-trial affidavit did not mention that he was struck by Lieberman, but it did state that Lieberman was "very upset." Quintuna did not protest his treatment and continued to work thereafter without seeking medical attention, filing a police report or bringing a lawsuit.

[8] Lieberman's affidavit. C.P. Exh. 2, par. 11.

[9] I sustained an objection to questions of Quintuna about the Respondent's alleged sponsorship based on his Fifth Amendment refusal to answer questions, Rule 102.31(c), but permitted the Respondent to make an offer of proof.

[10] The Respondent does not claim that it had no contact information for the dischargees. It could have communicated with their representatives as had been done 2 years earlier.

employer that hired employees knowing that they were undocumented was required to offer immediate and full reinstatement to the workers "provided that they complete, within a reasonable time, INS Form I-9, including the presentation of the appropriate documents in order to allow the employer to meet its obligations under IRCA."

It is first questionable whether the Respondent's alleged offers of reinstatement in March, 2003 afforded them the "reasonable time" under *A.P.R.A.* to produce valid immigration documents, particularly since the evidence does not permit a finding that it intended to keep its offer open for a "reasonable period of time" or that it so informed the dischargees. *County Window Cleaning Co*., 328 NLRB 190, 199–200 (1999). In this regard, Lieberman told Gonzalez to return within two days with his social security number. He told Joya to bring a social security card the next day, and when told by Palma that he had no papers with him, said that there was nothing he could do. The implication is that if Gonzalez, Joya and Palma did not present such documentation at that time they would not be reinstated. In this connection I am aware that Lieberman did not set a deadline with Bermeo, Hurtado and Sax-Gutierrez for the presentation of their documents.

The assumption applied in this case that the seven employees were undocumented at the time of the hearing does not answer the question concerning the Respondent's obligation, first to validly offer reinstatement and then to leave those offers open for a reasonable time within which they must present proof of documentation. Those obligations have not been met.

An employer's offer of reinstatement must be specific and unequivocal in order to toll backpay. *Midwestern Personnel Services*, 346 NLRB 624, 624 (2006); *A-1 Schmidlin Plumbing Co*., 313 NLRB 191, 192 (1993). An employer is relieved of its duty to reinstate only when a proper offer is made and unequivocally rejected by the employee. *L.A. Water Treatment*, 263 NLRB 244, 246 (1982). If an offer of reinstatement is not a bona fide offer, or one made in good faith, or "designed to prevent reinstatement" it will not toll backpay. *Murray Products,* 228 NLRB 268, 269 (1977). The employer bears the burden of proving that a reinstatement offer was valid. *Marlene Industries Corp*., 234 NLRB 285, 288 (1978). Any ambiguity in the explanation of the offer is construed against the employer. *A.P. Painting & Improvements, Inc.,* 339 NLRB 1206, 1208 (2003).

Counsel for the General Counsel argued at hearing that the offers of reinstatement were not valid for two reasons. First, although she concedes that an employer is required to demand proof of documented status in order to fulfill its obligation under IRCA, she argues that the Respondent did not make its request for documents for that reason. Rather, she argues that the demand was made for an illegitimate purpose—because the Respondent believed that the employees were undocumented it requested the documents knowing that they could not be produced, thereby ensuring that the employees could not be reinstated.

The General Counsel further argued that for an employer to legitimately make a demand for immigration documentation, the purpose of the request must be because it sought to comply with the requirements of IRCA—that it hire employees lawfully entitled to work in the United States. Here, however, by conditioning reinstatement upon providing proof of documented status, the Respondent's true motive was not to comply with the provisions of IRCA.

The General Counsel asserts that the Respondent's lack of good faith is demonstrated in its permitting employees Marco Bermeo and Miguel Quintuna to return to work without presenting any proof of their documented status. If the Respondent was sincere in its efforts to comply with IRCA it would have asked them to present proof of documentation prior to reinstating them. I agree with the General Counsel. Lieberman's argument that it did not do so because it "sponsored" them for a visa was not supported by any evidence that it was relieved of its obligation to demand documentation because it sponsored them. It should also be noted that the Respondent demonstrated no interest in complying with IRCA prior to the filing of the charge inasmuch as it did not discharge any of the employees when they failed to present documentation at their hire or during their employment.

The Respondent's lack of good faith is also demonstrated by Lieberman's telling Bermeo that he must present a "social security" which could be real or false, and his telling Palma that he should present certain documentation and he did not care if it was false.[11] It should also be noted that Lieberman asked Palma to present identification from a foreign country which is not among the documents listed on INS Form I-9 as an acceptable demonstration of identity or work eligibility. *Regal Recycling, Inc*., 329 NLRB 355, 356 (1999).

The Respondent's lack of good faith is further shown in Bermeo's testimony that the Lieberman claimed that he had filled all vacant positions and therefore none were available, and in Izhak's avoiding the calls of Bermeo and Sax-Gutierrez.

Bermeo also gave uncontradicted testimony that when he requested reinstatement, admitted supervisor Izhak told him that all positions had been filled and that if he wanted reinstatement he should "drop the lawsuit." An offer to reinstate an employee conditioned on his withdrawal of a charge is not valid and constitutes a refusal to reinstate. *Midwest Hanger Co.*, 221 NLRB 911, 914 (1975); *Amsterdam Wrecking & Salvage Co.,* 196 NLRB 113, 116 (1972). Such comments undermine and contradict the Respondent's claim that it would reinstate the employees if they presented proper documentation.

In addition, Lieberman's comment to Quintuna that he did not want his brother Jose Bermeo to return to work because he would cause "trouble" for the Respondent is further evidence that the Respondent had no intention of reinstating the dischargees. As set forth above, Quintuna and Marcos Bermeo, both of whom were reinstated, were identified by Lieberman as unwilling participants in the walkout.

I accordingly find and conclude that valid offers of reinstatement have not yet been made to the seven employees, and that backpay has not been tolled. The remainder of this Decision deals with whether the employees are entitled to backpay,

[11] In this connection I am aware that Hurtado testified that he was told that Lieberman asked all the employees to present a social security card and identification card, valid forms of identification, but I find for the reasons set forth above, that the offers of reinstatement were not valid.

and the calculations of the proper amount of backpay due them.

C. Undocumented Workers as Employees and the Backpay Remedy

The principal issue here involves the statutory rights of undocumented workers who are prohibited from entering the United States and working here but who are nevertheless employed by willing employers. Although undocumented workers are provided the same rights under the Act, the Respondent, relying on *Hoffman*, argues that the remedies available to them do not include backpay.

1. The State of the law prior to *Hoffman*

A brief history of the state of the law as it relates to the coverage by the Act of undocumented workers, and whether backpay is an appropriate remedy will help in the analysis of these issues.

It has consistently been held that undocumented workers are "employees" within the meaning of Section 2(3) of the Act and that they are entitled to its protections. *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 891 (1984); *Concrete Form Walls, Inc*., 346 NLRB 831, 833 (2006). In finding that undocumented workers are protected by the Act, the Supreme Court in *Sure-Tan* noted that the Immigration and Nationality Act (INA) did not make it unlawful for an employer to hire an undocumented worker and that the employment relationship between an employer and an undocumented worker was not illegal under the INA. The Court observed that the "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." It held that the "Board's enforcement of the NLRA as to undocumented aliens is therefore clearly reconcilable with and serves the purposes of the immigration laws . . . ." 467 U.S. at 894.

The Court stated that "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 this country in violation of the federal immigration laws." 467 U.S. at 893–894. The Court further noted that "if undocumented alien employees were excluded from participation in union activities and from protections against employer intimidation, there would be created a subclass of workers without a comparable stake in the collective goals of their legally resident co-workers, thereby eroding the unity of all the employees and impeding effective collective bargaining." 467 U.S at 892. In this respect, the Supreme Court recognized that "[a]cceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions." 467 U.S. at 892.

The Court noted that compliance proceedings must take into consideration "the objective of deterring unauthorized immigration that is embodied in the INA." 467 U.S. at 903. The Court held that in order to be eligible for backpay, employees must be available for work. It found that the Sure-Tan employees were not available for work "during any period when they were not lawfully entitled to be present and employed in the United States." Since the undocumented workers were deported after being reported to the INS, the Court considered them unavailable for work and rejected their backpay awards because they were based on a conjectural 6-month period that was beyond the statutory authority of the Board to make. The Court further held that any other award without the "lawfully present" requirement would provide workers with an incentive to re-enter the country illegally in violation of the INA.

Justice Brennan wrote for the dissent in arguing that "once employers, such as petitioners, realize that they may violate the NLRA with respect to their undocumented alien employees without fear of having to recompense those workers for lost backpay, their 'incentive to hire such illegal aliens' will not decline, it will increase. And the purposes of both the NLRA and the INA that are supposedly served by today's decision will unquestionably be undermined." 467 U.S. at 912.

The Court did not decide whether an undocumented worker who is not deported and remains in the United States after being terminated in violation of the Act is considered available for work and therefore entitled to backpay. In this respect, both the Second Circuit and the Ninth Circuit Courts of Appeals interpreted *Sure-Tan* as applying only to awards of backpay to undocumented workers who have left the country, and held that when those workers remain in the United States after their illegal termination, they are entitled to backpay. *A.P.R.A. Fuel Oil Buyers Group, Inc*., 134 F.3d 50, 56 (2d Cir. 2001); *Local 512, Warehouse & Office Workers' Union v. NLRB ("Felbro"),* 795 F.2d 705, 719–720 (9th Cir. 1986).

The *Felbro* court noted that it was "improbable" that providing backpay to undocumented workers who continued to work during the backpay period would encourage illegal entry or reentry to the United States. "Indeed, equalizing the backpay liability for unlawful acts against undocumented and American workers could deter employers from hiring undocumented workers and thus marginally reduce illegal entry to the United States." 795 F.2d at 720. It concluded that awarding backpay to undocumented workers "promotes the underlying aims of the NLRA and does not detract from the purposes of the INA." 795 F.2d at 722.

However, the Seventh Circuit Court of Appeals in *Del Ray Tortilleria, Inc. v. NLRB,* 976 F.2d 1115, 1119 (7th Cir. 1992) reached the opposite result, holding that inasmuch as undocumented workers had no right to be present in the United States and therefore had no right to employment, they suffered no harm in not being awarded backpay.

IRCA, enacted in 1986, for the first time made the employment of undocumented workers illegal. The statute '"forcefully' made combating the employment of illegal aliens central to 'the policy of immigration law.'" *Hoffman,* 535 U.S. at 149 (2002). It sought to accomplish that goal by deterring the employment of undocumented workers by imposing penalties on those who hire them.

Accordingly, IRCA placed the burden on employers to verify that their employees possessed certain qualifying documentation in order to be legally employed in the United States. IRCA

provides for sanctions against employers of undocumented workers as the "principal method of eliminating the job opportunities that entice unskilled, illegal immigrant labor to the United States." *A.P.R.A. Fuel Oil Buyers Group, Inc*., 134 F.3d 50, 56 (2d Cir. 2001).

IRCA sought to deny employment to those who are not lawfully present in the United States or who are not lawfully authorized to work in the United States. The statute made it unlawful for an employer to (a) knowingly hire an undocumented worker (b) fail to verify that a prospective employee possesses certain qualifying documents and (c) continue to employ someone having learned that he is unauthorized to work in the United States. If an applicant for employment cannot present the required documents, the applicant cannot be hired. An employer that violates IRCA is subject to fines and criminal prosecution. However, an employer presented with documentation which "reasonably appears on its face to be genuine" has established an affirmative defense that it has not violated IRCA with respect to such hiring.

Significantly, IRCA does not make it unlawful for an employee to obtain employment or work in the United States. The only employee conduct made unlawful by IRCA is that he or she cannot tender as proof of documented status fraudulent documents including those which are forged or counterfeit or documents of other persons. Accordingly, the seven employees here did not violate IRCA by working in the United States even if they were undocumented.

The legislative history notes that IRCA was "not intended to limit in any way the scope of the term 'employee' under the Act or the scope of the rights and protections stated in Sections 7 and 8 of that Act" and was "not intended to 'limit the powers' of the Board to remedy unfair practices committed against undocumented employees." *A.P.R.A*., 134 F. 3d at 56.[12]

In *A.P.R.A.,* the employer violated IRCA by hiring employees who it knew were undocumented and then violated the Act by firing them for their union activities. The Second Circuit Court of Appeals adopted the Board's reasoning that precluding a backpay remedy "would increase the incentives for employers to hire undocumented aliens . . . and would frustrate the objectives of IRCA and the NLRA by undermining the deterrent effect of the monetary penalties imposed by IRCA. Many employers . . . might well consider the fines to be a 'reasonable expense more than offset by the savings of employing undocumented workers or the perceived benefits of union avoidance.'" *A.P.R.A*., 134 F.3d at 57.

The *A.P.R.A*. court observed that "IRCA demonstrates a Congressional intent to punish the employers of illegal aliens, not to grant them any additional reward for their illegal actions." The Board's additional remedy of reinstatement was awarded to the employees "provided that they complete, within a reasonable time, INS Form I-9, including the presentation of the appropriate documents in order to allow the employer to meet its obligations under IRCA". Backpay was awarded from the dates of their discharges to the earliest of the following: their reinstatement by the employer, subject to compliance with the employer's normal obligations under IRCA, or their failure after a reasonable time to produce the documents enabling the employer to meet its obligations under IRCA to verify their eligibility for employment in the United States.

2. The effect of *Hoffman*

Thereafter, the Supreme Court decided *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149 (2002). In that case, employee Jose Castro fraudulently presented to his employer upon his hire the birth certificate of another person. The employer learned of his undocumented status for the first time at a Board compliance hearing following his unlawful discharge.

In denying a backpay remedy, the Court held that federal immigration policy as set forth in IRCA forecloses the Board from awarding backpay to an undocumented worker who has never been legally authorized to work in the United States. The Court held that the Board's backpay remedy conflicted with the policies of IRCA which was outside the Board's competence to administer.

The Respondent relies on *Hoffman* in arguing that no backpay is due to the seven discriminatees here because it believed that they were undocumented since they failed to present documentation upon being offered reinstatement in February, 2003. The Respondent attempts to successfully play both statutes against each other—discharging employees in violation of the Act and then arguing that no backpay is due because the dischargees are undocumented, a fact it was aware of for up to 8 years.

> Regrettably, many employers turn a blind eye to immigration status during the hiring process; their aim is to assemble a workforce that is both cheap to employ and that minimizes their risk of being reported for violations of statutory rights. Therefore, employers have a perverse incentive to ignore immigration laws at the time of hiring but insist upon their enforcement when their employees complain. *Rivera v. Nibco, Inc*., 364 F. 3d 1057, 1072 (9th Cir. 2004).

It is significant that the two essential facts in *Hoffman* (a) that Castro criminally violated IRCA by presenting fraudulent documents to his employer and (b) that employer Hoffman did not violate IRCA but hired Castro with no knowledge that he was undocumented are absent here. The reverse is true in this case. The seven employees did not present fraudulent documents to the Respondent and did not violate IRCA, but the Respondent violated IRCA by knowingly hiring them and continuing their employment without evidence that they were documented.

Therefore, the Court's express concern that awarding backpay would condone criminal conduct by an employee is not applicable here. Accordingly, the Court's emphasis that the employee was the wrongdoer while the employer was innocent of wrongdoing is not a factor here.

In contrast, in failing to verify its employees' documentation

[12] The Board has stated that "we recognize that threats involving immigration or deportation can be particularly coercive. Such threats place in jeopardy not only the employees' jobs and working conditions, but also their ability to remain in their homes in the United States." *North Hills Office Services*, 346 NLRB 1099, 1102 (2006), citing *Smithfield Packing Co*., 344 NLRB 1, 8 (2004).

and continuing to employ the seven discriminatees with knowledge of their undocumented status, the Respondent is the wrongdoer while the employees are innocent of violating IRCA. Thus, the Respondent should not be permitted to evade its liability for backpay. Just as the Court denied a remedy to the wrongdoing party, employee Castro who presented fraudulent immigration documents, here the Respondent is the sole wrongdoer since it violated IRCA in hiring the workers without obtaining proof of their documented status. Accordingly, the Respondent should not be rewarded for knowingly and intentionally violating IRCA and the Act.

Justice Breyer's dissent in *Hoffman* poses the question presented here:

> Were the Board forbidden to assess backpay against a *knowing* employer—a circumstance not before us today, this perverse economic incentive, which runs directly contrary to the immigrations statute's basic objective, would be obvious and serious. 535 U.S. at 155 (emphasis in original).

The majority opinion did not disavow or disapprove of Justice Breyer's hypothetical observation.

Where an employer knowingly violates IRCA a holding denying backpay provides the employer with an incentive to violate that statute. It would know that it could avoid a monetary award of backpay simply by hiring undocumented workers in violation of IRCA. The knowing employer cannot claim that it would not have hired the undocumented worker had it known of his undocumented status, or that it would have terminated him when it learned of his undocumented status. Accordingly, no conflict between the two statutes exists in this case since the Respondent knowingly violated IRCA and the employees did not.

Justice Breyer's concern is consistent with IRCA's express language which prohibits an employer from knowingly hiring an undocumented worker, failing to verify that he possesses qualifying documents, and continuing to employ him having learned that he is unauthorized to work in the United States. Thus, the main object of IRCA is to deter employers from knowingly hiring and continuing to employ such workers. A denial of backpay here would encourage employers to hire undocumented workers.

It is important to note that prior to *Hoffman*, the Board consistently held that IRCA did not preclude the award of backpay to employees whose employer hired them knowing that they were undocumented. *A.P.R.A.*, 320 NLRB 408 (1995), enf. 134 F.3d 50, 56 (2d Cir. 2001); *Met Food*, 337 NLRB 109 (2001); *Regal Recycling, Inc*., 329 NLRB 355 (1999); *County Window Cleaning Co.,* 328 NLRB 190, fn. 2 (1999), where the Board stated that "it is clear that undocumented aliens are employees under Sec. 2(3) of the Act and, thus, are entitled to the protections and remedies of the Act."

In his dissenting opinion in *Hoffman*, Justice Breyer stated that nothing in IRCA prohibits an award of backpay to undocumented workers. He noted that the purpose of backpay awards includes deterrence—discouraging employers from violating the Act, and that by denying a backpay award the wrongdoing employer benefits from his violation of both the Act and IRCA while the employee achieves no remedy. Such a result "increases the employer's incentive to find and to hire illegal-alien employees." 535 U.S. at 155.

Thus, according to Justice Breyer, *Hoffman* accomplishes what the *Sure-Tan* Court sought to avoid: employers benefiting by hiring undocumented workers thereby creating incentives for more workers to enter the country illegally, forming a subclass of workers with few remedies thereby weakening labor conditions and protections for all workers. 535 U.S. at 157.

Justice Breyer observed that according to the legislative history of IRCA, the "general purpose of [the statute] is to diminish the attractive force of employment, which like a 'magnet' pulls illegal immigrants toward the United States." *Hoffman*, 535 U.S. at 155, 156. The "willingness of many illegal immigrants to accept low wages and substandard conditions makes them attractive to some employers who are ready to 'exploit [them as a] source of labor' often to the detriment of United States workers whose wages are depressed or whose jobs are lost." *A.P.R.A. Fuel Oil Buyers Group, Inc*., 134 F.3d at 55–56 (2d Cir. 2001).

"A policy of *applying* the labor laws must encompass a policy of *enforcing* the labor laws effectively. Otherwise, 'we would leave helpless the very persons who most need protection from exploitative employer practices.'" *Hoffman*, dissenting opinion, 535 U.S. at 156. (emphasis in original) Justice Breyer also described backpay as the only tool in the Board's "remedial arsenal" which is meaningful, and that by prohibiting an award of backpay, employers could flout the labor laws "at least once with impunity." He further stated that "the backpay remedy is necessary; it helps make labor law enforcement credible; it makes clear that violating the labor laws will not pay." 535 U.S. at 154. Thus, although undocumented workers are protected by the Act they should not be disqualified from sharing in the same remedies as workers who are documented.

Accordingly, in enacting IRCA Congress believed that the continued enforcement of worker protection laws including the Act for documented and undocumented workers would remove the economic incentive for employers to hire undocumented workers. In the legislative history, set forth above, which stated that IRCA was "not intended to 'limit the powers' of the Board to remedy unfair practices committed against undocumented employees," it is clear that Congress sought to complement rather than replace the remedies provided by the Act with the sanctions provided by IRCA. Its intent in enacting IRCA was that such workers continue to be protected by the Act. Where employees are protected by the Act they must also benefit from its remedies, otherwise the Act's protection is a meaningless promise. A backpay remedy here is appropriate to make whole the employees who are innocent of any violations of IRCA.

It is clear that a backpay remedy here will effectuate the policies of the Act while at the same time be compatible with IRCA. Section 10(c) of the Act provides that the Board shall provide such remedies including "reinstatement of employees with or without backpay, as will effectuate the policies of this Act." The Supreme Court has recognized that Section 10(c) vests in the Board "the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review." *Sure-Tan, Inc. v. N.L.R.B.,* 467 U.S. 883, 898–899 (1984). "The power to com-

mand affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act. *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 236 (1938).

In *NLRB v. J.H. Rutter-Rex Mfg. Co*., 396 U.S. 258, 263 (1969), the Supreme Court stated:

> The legitimacy of back pay as a remedy for unlawful discharge . . . is beyond dispute, and the purpose of the remedy is clear. A back pay order is a reparation order designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice.

The purpose of a backpay remedy is remedial—an aid in repairing the harm to employees. The main purpose of awarding backpay is to make employees whole for losses caused by their employer's unfair labor practices. An award of backpay vindicates the policy of the Act and may deter similar illegal conduct of other employers in the future.

Monetary penalties are effective in deterring future conduct, and without them, employers have more, not less incentive to hire undocumented workers. Non-monetary remedies including a cease and desist order and the posting of a notice do not make the employee whole for his wrongful discharge. By denying a backpay remedy, an employer has an incentive to increase its employment of undocumented workers by removing any real remedy for violating the Act, thus undermining the purpose of the Act and the effectiveness of its monetary remedies.

A backpay award also serves to deter the commission of future unfair labor practices by preventing wrongdoers from benefiting from their unlawful conduct. *Rutter-Rex*, above, 396 U.S. at 265. An award of backpay "does not create an additional incentive for unscrupulous employers to employ illegal aliens . . . and helps to ensure that employers who comply with IRCA do not suffer a competitive disadvantage for their obedience to the law." *A.P.R.A.,* 134 F.3d at 57. On the other hand, in being awarded backpay, employees do not receive compensation for entering the United States without authorization. Rather, they are being made whole for the Respondent's unlawful act in discharging them. If a backpay remedy is equally applied to undocumented as well as documented workers, employers will have no incentive to hire undocumented workers because there will be no benefit to unlawfully firing an undocumented worker.

It would be anomalous to hold that undocumented workers are not entitled to backpay despite the well-settled principal that they are employees under the Act who are intended to be protected by it. A right is meaningless if it cannot be enforced. If they are covered by the Act such protection must be accompanied by a meaningful backpay remedy. Justice Breyer noted that denying undocumented workers backpay "undermines the public policies that underlie the Nation's labor laws." 535 U.S. at 160. A backpay award serves to fulfill the promise of the Act made more than seventy years ago that a remedy is available for employees covered and protected by it who are victims of discrimination while at the same time innocent of wrongdoing. The Board "honors our responsibility to protect the rights of those covered by the Act." *Oakwood Healthcare, Inc.,* 348 NLRB 686, 686 (2006).

An award of backpay which would serve to deter employers from knowingly hiring undocumented workers outweighs any unjust enrichment of the undocumented worker who remains in the United States illegally. In this regard, undocumented workers who have been unlawfully discharged from jobs in this country have already made the decision to unlawfully enter and remain here in order to work. It is too speculative to contend that people will enter the United States illegally only to obtain backpay in the event that they are illegally discharged.

The *Hoffman* majority noted that Castro could not mitigate damages as he is required to do by legally seeking interim employment following his discharge. However, as demonstrated in this hearing, the seven undocumented workers all obtained employment following their discharges. It is a fact that once in the United States, although here illegally, undocumented workers will find a way to work and will find employers willing, if not eager to employ them.

If a backpay remedy is denied, the seven employees would be held responsible for the Respondent's violation of IRCA. Denying an award of backpay would punish the employees, benefit the wrongdoer, condone the employment of undocumented workers and place the risk associated with such employment on the employees instead of the employer. However, by requiring the employer to pay backpay to undocumented workers, the employer will have no incentive to hire undocumented workers because there will be no benefit in violating the Act.[13]

Enforcement of the Act enhances the mission of IRCA. Imposing a backpay award on an employer which violates the Act serves the same purpose as fining an employer for employing an undocumented worker. Both sanctions discourage employers from hiring undocumented workers. Awarding backpay to such workers will not impinge upon the nation's immigration policy—it will enhance it. Such actions would help to deter the unlawful activity that both the Act and IRCA seek to prevent. Employers that knowingly violate both IRCA and the Act should have penalties imposed under both statutes. An award of backpay would create no conflict between the two statutes where, as here, the Respondent seeks to benefit from its violation of IRCA while at the same time the employees have not violated that statute.

I accordingly find and conclude that the seven employees are entitled to backpay.

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[13] "[E]very case citing *Hoffman* since it was rendered has either distinguished itself from it or has limited it greatly." *Cano v. Mallory Management*, 760 N.Y.S. 2d 816, 818 (N.Y.S.C. 2003); See also *Zavala v. Wal-Mart Stores,* 393 F.Supp. 2d 295, 321–324 (D.N.J. 2005); *Singh v. Jutla*, 214 F.Supp 2d 1056, 1061–1062 (N.D. CA 2002); *Zeng Liu v. Donna Karan Intl., Inc.*, 207 F.Supp 2d 191 (S.D.N.Y. 2002); *Balbuena v. IDR Realty LLC*, 6 N.Y. 3d 338, 350–360 (Ct. Appeals 2006).

D. Backpay Calculations

1. Gross backpay and backpay period

The Specification alleges and the Respondent admits that, except for its *Hoffman* defense, the gross backpay figures and the way in which they were calculated are accurate. The Respondent stipulated that for the seven employees it (a) maintained no payroll records during their employment which would show the days and hours they worked or their rates of pay (b) paid them in cash and no deductions were made on their behalf for federal, state or city taxes or for social security and (c) did not issue W-2 forms during their employment with it.

The reinstatement remedy established in *A.P.R.A.* relating to the unlawful discharge of undocumented employees knowingly hired by their employer in violation of IRCA was not disturbed by *Hoffman* and applies here. Backpay was awarded from the dates of their discharges to the earliest of the following: their reinstatement by the employer subject to compliance with the employer's normal obligations under IRCA, or their failure after a reasonable time to produce the documents enabling the employer to meet its obligations under IRCA to verify their eligibility for employment in the United States. As set forth above, I have found that no valid offers of reinstatement have been made to any of the seven employees. Accordingly, their backpay continues to run for all seven workers except Miguel Quintuna who has already been reinstated.

The Specification alleges that the backpay period for Jose Antonio Quintuna Bermeo, Antonio Gonzalez, Luis Marcelo Gonzalez Hurtado, Francisco Javier Joya, Christian Palma, and Jose Armando Sax-Gutierrez, begins on February 12, 2003, the date of their discharge by the Respondent, and continues to run in the absence of a valid offer of reinstatement. The Specification also asserts that the backpay period for Miguel Quintuna begins on February 12, 2003 and terminates on March 5, 2003, the date he was reinstated by the Respondent.

2. Interim employment

The Specification, which was issued on July 28, 2005, contains interim earnings figures only through the first quarter of 2005, ending on March 31, 2005. Evidence concerning interim employment and earnings from that date to the date of the hearing was testified to by the employees. I have revised and updated the interim earnings and backpay amounts through the fourth quarter of 2005 based on the employees' testimony in January and February, 2006, and I have set forth such revised backpay calculations in appendices at the end of this Decision. In some cases, the testimony of the employees differs from the Specification. I have attempted to reconcile the differences as discussed below.

Hurtado and Joya were paid by check by their interim employers, but did not retain copies of the checks or check stubs. The other five employees were paid in cash and received no written documentation such as pay receipts of their hours worked or earnings received from their interim employers. None of the seven employees provided written documentation of their interim earnings to the Regional Office, and none kept any written records of his search for interim employment.

Jose Antonio Quintuna Bermeo

Bermeo testified that following his discharge he found it difficult to search for work because he had to attend meetings with the Charging Party's attorneys in an effort to obtain reinstatement. He stated that he was so engaged about twice per week, with his first meeting one week after his discharge which consumed three to four hours. That day he did not search for interim employment.

Bermeo looked for work at about three bakeries and was told that no jobs were available because it was the slow season. He could not recall any of the names of the bakeries but gave the street names for two of the companies. He also stood at a location where contractors pick up day laborers but he was not selected for such work. During the period of time that he was not employed he paid his rent from his savings.

Bermeo became employed at Verrazano Tile in about April, 2003. He testified that his weekly starting salary was $410 with no overtime. Six months later, in October, 2003, his salary was increased to $520 at which time he received another $50 per week in overtime pay. Later he received a raise to $600 per week. Although he did not testify as to when he received that raise, the Specification states that it began in January, 2005 and I accept that date. He further testified that his wage was increased to $720 per week. He did not know when he received that raise but he said that it was in 2005, "a long time" before the February, 2006 hearing. Based on the facts concerning his history of wage raises, I find that he received the increase to $720 in July, 2005, six months after the January, 2005 raise.

Bermeo remained employed at Verrazano at the time of the hearing. He lives in Brooklyn and traveled to work in Staten Island by bus when he began work at Verrazano, but beginning in October, 2005 was driven to work by a co-worker.

The Specification states that Bermeo earned $420 per week plus $50 per month overtime while employed at Verrazano Tile. In January, 2004 his salary was increased to $520, and in June, 2004 he no longer received overtime pay. In January, 2005 his salary was increased to $600 per week.

There is thus a discrepancy concerning interim earnings between Bermeo's hearing testimony and the Specification. Although the Specification states that Gonzalez initially earned $420 per week and $50 per month overtime, he testified that his starting salary at Verrazano was $410 per week with no overtime. Using those figures, he thus testified to receiving less interim earnings than set forth in the Specification. However, inasmuch as the General Counsel has admitted a higher interim earnings figure as set forth in the Specification and has not amended that figure, and no notice has been given the Respondent that such a figure is incorrect, the Respondent had no opportunity to rebut the interim earnings as testified. *Laredo Packing Co.*, 264 NLRB 245, 248 (1982). Accordingly, I will retain the Specification's higher interim earnings figures of $4715 and $5610 and thus lower net backpay as set forth in the second and third quarters of 2003.

Bermeo testified that he began earning $520 per week plus $50 per week overtime in October, 2003 through December, 2003. (fourth quarter of 2003). This conflicts with the Specification's statement that he began earning $520 in January, 2004. I will rely on his hearing testimony as the most accurate ac-

count of his interim earnings where he testified to higher interim earnings than that set forth in the Specification. See *Local 294, Teamsters*, 208 NLRB 445, 449 (1974). This finding is supported by the fact that he kept no record of his interim earnings. Accordingly, I shall revise the Specification's calculations to state that he received higher interim earnings, as follows: For the fourth quarter of 2003 his interim earnings were $7410. ($520 x 13 weeks + $50 x 13 weeks).

According to his testimony, Bermeo continued to be paid $520 per week for the 2004 calendar year and $50 per week overtime only through June, 2004.[14] Accordingly his interim earnings continued to be $7410 per quarter through the second quarter of 2004. However, in the third and fourth quarters of 2004, his interim earnings were $6760 due to the loss of overtime pay. ($520 x 13 weeks).

According to Bermeo's testimony, he received a weekly wage of $600 in January, 2005, and later earned $720 per week. As set forth in the Specification, inasmuch as his interim earnings exceeded his gross backpay for the first quarter of 2005 at his wage of $600, he is not entitled to backpay from the first quarter of 2005 and thereafter.

I have reduced Bermeo's interim expenses in the fourth quarter of 2005 by $312 consistent with his testimony that he was driven to work by a co-worker and no longer used public transportation. He did not testify that he reimbursed the co-worker for his travel expenses. In any event, his interim earnings in that quarter exceeded his gross backpay even without the reduction so that he is entitled to no backpay for that quarter.

Antonio Gonzalez

Following his discharge, Gonzalez looked for work for two months before he became employed. His search was done by walking in Brooklyn two to three days per week for two to three hours each day. He did not look for work at the New York State Department of Labor, employment agencies, on the internet or in newspapers.

Gonzalez testified that he began work at All Type Auto Repair in about March, 2003. He worked 40 hours per week and his initial salary was $60 per day for five days' work, or a total of $300 per week. He was employed at All Type at the time of the hearing. In about September, 2004, Gonzalez received a raise of $5 per day, earning a total of $305 per week.

The Specification states that Gonzalez' initial salary was $250 per week and in late December, 2003 he received a raise to $275. On January 1, 2005, his weekly salary was increased to $300.

There is thus a discrepancy concerning interim earnings between Gonzalez' hearing testimony and the Specification. Although the Specification states that Gonzalez initially earned $250 per week and was ultimately raised to $300, he testified that his starting salary was $300 per week and he received a $5.00 raise in September, 2004. For the reasons set forth above, I rely on his hearing testimony as opposed to the Specification's statements. Accordingly, I will revise the computations consistent with his testimony to set forth that Gonzales' interim earnings were higher than set forth in the Specification. They consisted of $3900 per quarter ($300 per week x 13 weeks) from the second quarter of 2003 through the third quarter of 2004, and $3965 per quarter ($305 per week x 13 weeks) from the fourth quarter of 2004 through the fourth quarter of 2005.

Luis Marcelo Gonzalez Hurtado

Hurtado testified that he immediately searched for work by daily visiting employment agencies in Jackson Heights, Queens. He did not recall the names of those agencies. He first made such visits once per week. His first job following his discharge was at a restaurant where he worked for one week as a dishwasher in about May, 2003. He did not like that job and quit. He worked eight hours per day, six days per week, and earned $7.00 per hour. That position is not reported in the Specification and I shall accordingly increase his interim earnings for the second quarter of 2003 by $336.

Hurtado next worked in about June, 2003 at a demolition company in Queens whose name he does not recall. He testified that he earned $7.00 per hour and worked there 45 hours per week for 2 to 3 weeks.

The Specification states that Hurtado worked at the demolition company only 24 hours per week and earned $7.50 per hour. According to the Specification, he worked at that job for nine weeks, earning a total of $1620.00. At hearing, he explained the difference in his hours by stating that his working hours varied—some weeks he was employed 24 hours per week and other weeks 45 hours. Based on his testimony and the lack of documentary evidence, I find that he worked 24 hours per week for six weeks at $7.50 per hour and that he worked 45 hours per week for three weeks (consistent with his testimony) at a rate of $7.00 per hour.

Accordingly, the Specification will be revised to state that for the second quarter of 2003, Hurtado received higher interim earnings, earning a total of $2361.00. That figure is the sum of $1080 ($7.50 x 24 hours x 6 weeks) and $945 ($7.00 x 45 hours x 3 weeks) plus $336 for his one week's work as a dishwasher.

Hurtado testified that thereafter, he had two periods of employment with the same construction/demolition company in Queens. In his first period of employment, which was for the month of September, 2003, he worked six days per week earning $60 per day. In his next period of employment he worked for 10 hours per day for 3 days per week, earning $7.00 per hour. Earnings for both companies are accurately contained in the Specification.

Hurtado testified that he next became employed in a bakery where he was employed at the time of the hearing. When he began work in about April, 2004, he earned $360 for a six day week, but by the time of the hearing his salary was increased to $68 per day for a six day week. He did not know when his wage was increased, and indeed testified that he did not receive a raise in pay. However, it is likely, as he testified, that inasmuch as he worked there for ten months by the time of the hearing he did receive a raise to $68 per day. Accordingly, I shall revise the Specification to state that his interim earnings in the fourth quarter of 2004 were $5304, which is higher than that set forth. ($68 per day x 6 days x 13 weeks).

[14] In this respect, I accept the Stipulation's statement that he stopped receiving overtime pay in June, 2004. He did not testify differently.

Francisco Javier Joya

Joya first began looking for work about three or four weeks after his discharge, but explained that he did not look for work because he could not find a job. He searched for work in Brooklyn by applying in person at bakeries, but did not look for work elsewhere.

Joya eventually worked as a day laborer three or four days a week for three to four weeks earning $70 per day. He also worked in construction at Breant Company where he earned $8.00 per hour by check and worked 35 to 40 hours per week. He was employed there for about 1-1/2 months. He left because he did not like construction work.

In about May, 2003, Joya became employed by Panificio Bakery where he worked five to six days per week and was paid $90 per day. He worked there for three to four months. Panificio was sold to Reliable Bakery and he was transferred to that company. He began at a daily salary of $75 and worked seven days per week, then in mid April, 2004, he worked six days, and in early October, 2004, he resumed working seven days per week. In 2005 he received a raise to $80 per day.

Inasmuch as the 2005 pay raise is not reflected in the Specification, I shall revise it to state that in each quarter in 2005, Joya's interim earnings were $7280. ($80 x 7 days x 13 weeks).

Christian Palma

Palma testified that following his discharge on February 12, 2003, he immediately searched for work four to five days per week by looking in help-wanted ads in *El Diario*, a Hispanic language newspaper. He called certain advertisers including about four to five car washes and one company which cleaned offices. The ads for car washes resulted in four job interviews but by the time he was interviewed the company had already hired the one or two workers needed. His afternoons were spent doing personal errands. He also asked his friends if they knew whether any jobs were available.

Palma responded to an ad placed in *El Diario* by Car Spa and was hired in about April, 2003 where he continued to work at the time of the hearing. He is employed from 8 a.m. to 6 or 7 p.m. 6 days per week, or about 50 to 60 hours per week. Palma testified that his initial wage was $5.00 per hour and he received a 50 cent raise in June or July, 2003, after which his wage was reduced in August, 2004 for 2 months to $5.00 per hour, but later his wage was raised to $5.50. He received another 50 cent raise in about October, 2005. His wage from September, 2005 to the date of the hearing was thus $6.00 per hour.

The Specification states that Palma earned $5.50 per hour based on a 55 hour work-week plus $25 in tips six days per week. It further states that in March, 2004, his work-week was reduced to 45 hours and his tips reduced to $15 per day, but he continued to work six days per week. On May 10, 2004, his work-week was reduced to 37 hours, but his tips and days of work remained the same. In July, 2004, his salary was reduced to $5.00 per hour and his weekly hours of work were increased to 44-1/2, and his tips and days of work remained the same.

Thus Palma testified that he received a wage of $5 to $15 per day and $30 to $35 per week in tips, but the Specification is based on his earning a wage of $25 and $15 per day in tips, six days per week. I will not disturb the Specification's figures in this regard particularly since his testimony is self-contradictory. Thus, although the Specification states that his lowest daily tip total was $15 he testified that it was only $5.

Palma testified that from the second quarter of 2004 through the fourth quarter of 2005, his wage varied from $5.00 to $6.00 per hour. In August, 2004, he received $5.00 per hour for two months and then $5.50 from October, 2004 to October, 2005 when he received $6.

Thus, in the second quarter of 2004, according to his testimony, he earned $5.50 per hour. His interim earnings that quarter were $5102.50. ($5.50 x 55 hours x 13 weeks + $15 daily or $90 weekly tips x 13 weeks). I shall revise the Specification accordingly to set forth higher interim earnings.

In 2 months of the third quarter of 2004 his interim earnings, according to his testimony, was $2920. ($5.00 per hour x 55 hours x 8 weeks + $90 weekly tips x 8 weeks). In the third month, he earned $5.50 per hour for a total of $1570 for that month. The total interim earnings for the third quarter are thus $4490. I shall revise the Specification accordingly to set forth higher interim earnings.

From October, 2004 to October, 2005, according to his testimony, Palma earned $5.50 per hour. Accordingly, from the fourth quarter of 2004 to the third quarter of 2005, his quarterly interim earnings were $5102.50. ($5.50 x 55 hours x 13 weeks + $90 weekly tips x 13 weeks). I shall revise the Specification accordingly to set forth higher interim earnings.

Palma testified that he earned $6.00 per hour from October, 2005 to the date of the hearing. Accordingly, his interim earnings in the fourth quarter of 2005 were $5460. ($6.00 per hour x 55 hours x 13 weeks + $90 weekly tips x 13 weeks). I shall revise the Specification accordingly.

Miguel Quintuna

The Specification states that the backpay period begins on February 12, 2003 when Quintuna was discharged, and ends when he was reinstated on March 5, 2003. Accordingly, $1,320 in backpay is sought for that 2-week period which consists of $7.50 per hour for 40 hours per week plus 32 hours of overtime at time and one-half for 32 hours per week.

No evidence was presented that Quintuna searched for employment during that period and it is not alleged that Quintuna received any interim earnings. Although the Respondent suggested that Quintuna returned to work earlier than March 5, no evidence has been adduced to support that claim. The only evidence presented was that the Respondent made an offer of proof that it sponsored Quintuna for a visa during his employ. Such efforts included Quintuna retaining an attorney who contacted the Respondent, and Lieberman signed a sponsorship document for Quintuna.

Once the General Counsel has satisfied his burden to show the gross amount of backpay to which Quintuna is entitled, the Respondent has the burden to produce evidence that would mitigate its liability. It was thus the Respondent's burden to show that Quintuna unreasonably failed to mitigate damages. *Ferguson Electric Co*., 330 NLRB 514, 518 (2000). It has not done so. Accordingly, the net backpay is $1,320.00. ($7.50 x 40 hours x 2 weeks + $11.25 x 32 x 2 weeks).

Jose Armando Sax-Gutierrez

Sax-Gutierrez began his search for interim employment one week after his discharge, by visiting various companies in Brooklyn such as fruit stands and fish stores. He did not search for work in newspapers, on the internet or at employment agencies. He paid his rent with help from his family.

Although the Specification shows that he had no earnings for that period of time, he stated that he worked about three hours in 2 days in March, 2003 doing construction work. He earned $60 for 1/2 day's work, and I shall add $60 to his interim earnings for that quarter.

In April, 2003, Sax-Gutierrez searched for work five days per week for 1/2 day at a time by walking to prospective employers. He spent the other half of the day resting because he was tired from walking.

Sax-Gutierrez testified that he began work at Lekactov Bakery in early May, 2003 where he was employed 3 to 4 hours per day 2 to 3 days per week, earning $5.50 per hour. Then in June, 2003, he worked three hours per day three days per week. He first worked full time for Lekactov in September, 2003, and at times worked overtime, earning $6 per hour. In 2004, he worked 8 to 10 hours per day three to four days per week, or about 40 to 50 hours per week. He received a raise to $6.50 per hour in December, 2004. In 2005 he worked 11 to 12 hours per day or 60 to 65 hours per week for 5-1/2 days per week. In December, 2005 he received a raise to $7.50 per hour, earning $450 to $475 per week with overtime pay for work performed 11 to 12 hours per day, 5-1/2 days per week.

The Specification states that Sax-Gutierrez began work at Lekactov Bakery in early May, 2003, earning $5 per hour and working a 60 hour week. In early June, 2003, he received a raise to $6 per hour. One year later, in early June, 2004, his weekly hours of work decreased to 40. In early December, 2004, he received a wage increase to $6.50 per hour.

Sax-Gutierrez' testimony regarding his interim earnings at Lekactov from the start of his work there through the fourth quarter of 2004 is essentially the same as that set forth in the Specification. Accordingly, I will not disturb the Specification's statements concerning his interim earnings for that period of time.

However, he testified that in 2005 he worked 60 hours per week. Accordingly, I cannot accept the Specification's statement that in the first quarter of 2005 he worked only 40 hours per week. I therefore find that based on his testimony he worked 60 hours per week from the first quarter to the fourth quarter of 2005. Thus, from the first quarter of 2005 through the fourth quarter of 2005, his interim earnings were $5070 per quarter. ($6.50 x 60 hours x 13 weeks). I shall revise the Specification accordingly to set forth higher interim earnings.

3. Analysis and discussion

"The finding of an unfair labor practice and discriminatory discharge is presumptive proof that some back pay is owed by the employer." *NLRB v. Mastro Plastics Corp.,* 354 F.2d 170, 178 (2d Cir. 1965). The Respondent has the burden of adducing evidence that would mitigate its liability, including the burden of establishing the amount of any interim earnings that are to be deducted from the backpay amount due. *Ferguson Electric,* above.

"To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment. It is the respondent's burden to demonstrate affirmatively that the discriminatee failed to exercise reasonable diligence in searching for work. The discriminatee must put forth an honest, good-faith effort to find interim work; the law does not require that the search be successful." Doubts, uncertainties, or ambiguities are resolved against the wrongdoing respondent. *Millennium Maintenance & Electrical Contracting*, 344 NLRB 516, 517 (2005); *Glenn's Trucking Co.,* 344 NLRB 377, 377 (2005); *Cassis Management Corp.,* 336 NLRB 961, 968 (2001).

It is well settled that the reasonableness of a discriminatee's efforts to find a job and thereby mitigate loss of income resulting from an unlawful discharge need not comport with the highest standard of diligence. He need not exhaust all possible job leads. Rather, it is sufficient that the discriminatee make a good-faith effort. In determining the reasonableness of this effort, the discriminatee's skills, experience, qualifications, age, and labor conditions in the area are factors to be considered. The Respondent's obligation to satisfy its affirmative defense is to show a "clearly unjustifiable refusal to take desirable new employment." *Ferguson Electric,* above at 518.

None of the employees kept written records of their interim employment, and none provided written documentation to the Regional Office. Certain employees could not recall the names or addresses of the companies they visited in seeking work. However, the Board has held that employees are not automatically disqualified from backpay because of their poor record-keeping or uncertainty as to memory or exaggeration. *Cibao Meat Products*, 348 NLRB 47, 47 (2006), citing *Pat Izzi Trucking Co.*, 162 NLRB 242, 245 (1966), enfd. 395 F.2d 241 (1st Cir. 1968).

Applying the above principles, I find that each of the seven employees engaged in a reasonably diligent, good faith search for work. The evidence establishes that they made a good faith effort to find interim employment by visiting prospective employers, searching newspaper advertisements and asking friends for job leads. Their interest in working is amply illustrated by the fact that each found permanent employment within one or two months after their discharge at jobs at which they worked at the time of the hearing. Thus, they continued to work in those jobs for nearly 3 years.

Thus, despite the fact that Bermeo attended meetings with counsel immediately after his discharge, he did engage in a diligent search for work at bakeries and with contractors. He then became employed with Verrazano Tile in April, 2003 at which he was employed for nearly three years at the time of the hearing.

Similarly, Antonio Gonzalez sought work diligently in Brooklyn for two months before he became employed at All Type Auto in about March, 2003. He too remained employed by that company at the time of the hearing. Although he did not look for work at government or private agencies, on the internet or in newspapers, the Board has held that not reading or responding to newspaper advertisements does not establish a failure to search for work. *S.E. Nichols of Ohio*, 258 NLRB 1, 11 (1981). The question, ultimately, is whether he diligently

searched for work. I find that he did.

Hurtado visited employment agencies, worked as a dishwasher, found work with various construction/demolition companies, and then became employed at the bakery for which he worked at the time of the hearing.

Joya also looked diligently for work at bakeries, worked as a day laborer and then in construction, and finally at a bakery. Although he left a job in the construction field because he did not like such work, backpay is not tolled because he quit that employment. Inasmuch as construction work was not substantially equivalent to his job as a baker with the Respondent, Joya was not obligated to remain in such work. *Ryder System*, 302 NLRB 608, 609 (1991).

Palma searched for work each day by searching newspaper ads and calling advertisers and asking friends. He found permanent work in a car wash. As set forth above, the Respondent has not met its burden of proving that Miguel Quintuna did not engage in a diligent search for work. Sax-Gutierrez immediately inquired about work from stores in Brooklyn, worked in construction and found permanent work at a bakery in May, 2003 at which he was still employed at the time of the hearing.

The evidence convinces me that the Respondent has not affirmatively established that any of the discriminatees failed to make a reasonably diligent search for equivalent interim employment. Based on their diligent searches for work, their success in finding work, and the fact that they remained employed at such jobs for nearly three years at the time of the hearing, I find and conclude that the Respondent has not met its burden that any of them failed to make a diligent search for work.

Based upon the above, I issue the following recommended[15]

ORDER

The Respondent, Mezonos Maven Bakery, Inc., its officers, agents, successors, and assigns, shall make the employees named in the attached Appendix whole by paying to them the sums set forth in the column entitled Net Backpay for each of the employees, with interest on such amounts to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws.

Dated, Washington, D.C. November 1, 2006

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

APPENDIX 1

Jose Antonio Quintuna Bermeo

YEAR	QTR.	GROSS BACKPAY	INTERIM EARNINGS	INTERIM EXPENSES	NET INTERIM EARNINGS	NET BACKPAY
2003	1st	4,004.00			0.00	4,004.00
2003	2d	7,436.00	4,715.00	165.00	4,550.00	2,886.00
2003	3d	7,436.00	5,610.00	260.00	5,350.00	2,086.00
2003	4th	7,436.00	7,410.00	273.00	7,137.00	299.00
2004	1st	7,436.00	7,410.00	273.00	7,137.00	299.00
2004	2d	7,436.00	7,410.00	273.00	7,137.00	299.00
2004	3d	7,436.00	6,760.00	273.00	6,487.00	949.00
2004	4th	7,436.00	6,760.00	273.00	6,487.00	949.00
2005	1st	7,436.00	7,800.00	312.00	7,488.00	0.00
2005	2d	7,436.00	7,800.00	312.00	7,488.00	0.00
2005	3d	7,436.00	7,800.00	312.00	7,488.00	0.00
2005	4th	7,436.00	7,800.00	0.00	7,800.00	0.00
TOTAL		85,800.00	77,275.00	2,726.00	74,549.00	$11,771.00

APPENDIX 2

Antonio Gonzalez

YEAR	QTR.	GROSS BACKPAY	INTERIM EARNINGS	INTERIM EXPENSES	NET INTERIM EARNINGS	NET BACKPAY
2003	1st	3,123.75			0.00	3,123.75
2003	2d	5,801.25	3,900.00	165.00	3,735.00	2,066.25
2003	3d	5,801.25	3,900.00	260.00	3,640.00	2,161.25
2003	4th	5,801.25	3,900.00	273.00	3,627.00	2,174.25
2004	1st	5,801.25	3,900.00	273.00	3,627.00	2,174.25
2004	2d	5,801.25	3,900.00	273.00	3,627.00	2,174.25
2004	3d	5,801.25	3,900.00	273.00	3,627.00	2,174.25
2004	4th	5,801.25	3,965.00	273.00	3,692.00	2,109.25
2005	1st	5,801.25	3,965.00	312.00	3,653.00	2,148.25
2005	2d	5,801.25	3,965.00	312.00	3,653.00	2,148.25
2005	3d	5,801.25	3,965.00	312.00	3,653.00	2,148.25
2005	4th	5,801.25	3,965.00	312.00	3,653.00	2,148.25
TOTAL		66,937.50	43,225.00	3,038.00	40,187.00	$26,750.50

APPENDIX 3

Luis Marcelo Gonzalez Hurtado

YEAR	QTR.	GROSS BACKPAY	INTERIM EARNINGS	INTERIM EXPENSES	NET INTERIM EARNINGS	NET BACKPAY
2003	1st	2,793.88			0.00	2,793.88
2003	2d	5,188.63	2,361.00		2,361.00	2,827.63
2003	3d	5,188.63	4,680.00		4,680.00	508.63
2003	4th	5,188.63	2,310.00		2,310.00	2,878.63
2004	1st	5,188.63	2,310.00		2,310.00	2,878.63
2004	2d	5,188.63	3,240.00		3,240.00	1,948.63
2004	3d	5,188.63	4,680.00		4,680.00	508.63
2004	4th	5,188.63	5,304.00		5,304.00	0.00
2005	1st	5,188.63	5,304.00		5,304.00	0.00
2005	2d	5,188.63	5,304.00		5,304.00	0.00

2005	3d	5,188.63	5,304.00		5,304.00	0.00
2005	4th	5,188.63	5,304.00		5,304.00	0.00
TOTAL		59,868.81	46,101.00		46,101.00	$14,344.66

APPENDIX 4

Francisco Javier Joya

YEAR	QTR.	GROSS BACKPAY	INTERIM EARNINGS	INTERIM EXPENSES	NET INTERIM EARNINGS	NET BACKPAY
2003	1st	4,856.25	1,160.00	54.00	1,106.00	3,750.25
2003	2d	9,018.75	5,580.00	195.00	5,385.00	3,633.75
2003	3d	9,018.75	6,930.00	260.00	6,670.00	2,348.75
2003	4th	9,018.75	6,825.00	273.00	6,552.00	2,466.75
2004	1st	9,018.75	6,825.00	273.00	6,552.00	2,466.75
2004	2d	9,018.75	6,000.00	273.00	5,727.00	3,291.75
2004	3d	9,018.75	5,850.00	273.00	5,577.00	3,441.75
2004	4th	9,018.75	6,825.00	273.00	6,552.00	2,466.75
2005	1st	9,018.75	6,825.00	312.00	6,513.00	2,505.75
2005	2d	9,018.75	7,280.00	312.00	6,968.00	2,050.75
2005	3d	9,018.75	7,280.00	312.00	6,968.00	2,050.75
2005	4th	9,018.75	7,280.00	312.00	6,968.00	2,050.75
TOTAL		104,062.50	74,660.00	3,122.00	71,538.00	$32,524.50

APPENDIX 5

Christian Palma

YEAR	QTR.	GROSS BACKPAY	INTERIM EARNINGS	INTERIM EXPENSES	NET INTERIM EARNINGS	NET BACKPAY
2003	1st	2,793.88			0.00	2,793.88
2003	2d	5,188.63	940.00		940.00	4,248.63
2003	3d	5,188.63	5,882.50		5,882.50	0.00
2003	4th	5,188.63	5,882.50		5,882.50	0.00
2004	1st	5,188.63	5,307.50		5,307.50	0.00
2004	2d	5,188.63	5,102.50		5,102.50	86.13
2004	3d	5,188.63	4,490.00		4,490.00	698.63
2004	4th	5,188.63	5,102.50		5,102.50	86.13
2005	1st	5,188.63	5,102.50		5,102.50	86.13
2005	2d	5,188.63	5,102.50		5,102.50	86.13
2005	3d	5,188.63	5,102.50		5,102.50	86.13
2005	4th	5,188.63	5,460.00		5,460.00	0.00
TOTAL		59,868.81	53,475.00		53,475.00	$8,171.79

Appendix 6

Miguel Quintuna

YEAR	QTR.	GROSS BACKPAY	INTERIM EARNINGS	INTERIM EXPENSES	NET INTERIM EARNINGS	NET BACKPAY
2003	1st	1,320.00			0.00	1,320.00
TOTAL		1,320.00	0.00	0.00	0.00	$1,320.00

APPENDIX 7

Jose Armando Sax-Gutierrez

YEAR	QTR.	GROSS BACKPAY	INTERIM EARNINGS	INTERIM EXPENSES	NET INTERIM EARNINGS	NET BACKPAY
2003	1st	2,793.88	60.00		60.00	2,733.88
2003	2d	5,188.63	2,940.00		2,940.00	2,248.63
2003	3d	5,188.63	4,680.00		4,680.00	508.63
2003	4th	5,188.63	4,680.00		4,680.00	508.63
2004	1st	5,188.63	4,680.00		4,680.00	508.63
2004	2d	5,188.63	4,440.00		4,440.00	748.63
2004	3d	5,188.63	3,120.00		3,120.00	2,068.63
2004	4th	5,188.63	3,220.00		3,220.00	1,968.63
2005	1st	5,188.63	5,070.00		5,070.00	118.63
2005	2d	5,188.63	5,070.00		5,070.00	118.63
2005	3d	5,188.63	5,070.00		5,070.00	118.63
2005	4th	5,188.63	5,070.00		5,070.00	118.63
TOTAL		59,868.81	48,100.00		48.100.00	$11,768.81