

Can Injured, Undocumented Construction Workers Recover Lost Wages?



DAVID L. SCHER

STEPHEN J. MURPHY

BY DAVID L. SCHER
AND STEPHEN J. MURPHY

ON THE NATIONAL, state and local levels, issues surrounding the rights of undocumented workers are the subject of fierce debate and tend to evoke emotional and strongly held opinions on all sides. Access to health care for undocumented workers recently became one of the central concerns surrounding the pending health care bill. Many commentators believe that debates about those who enter the country illegally and their rights weighed heavily on the outcome of the last presidential election.

Like legislators and politicians, the courts in New York have recently grappled with this hot button issue in their decisions concerning the ability of undocumented construction workers to recover lost earnings resulting from injuries on the job. If a worker has obtained employment without documentation, a violation of the law, should he be able to recover wages lost after he is hurt on that job?

The New York Court of Appeals decision in *Balbuena v. IDR Realty LLC*¹ was a landmark one,

holding that undocumented construction workers may be entitled to recover lost earnings as a result of workplace injuries. In so ruling, the Court went to great lengths to distinguish the U.S. Supreme Court's decision in *Hoffman Plastic Compounds Inc. v. NLRB*.² In *Hoffman*, the Supreme Court held that an undocumented immigrant who has been fired in retaliation for exercising his right to engage in union organizing activity must nevertheless be denied the remedy of back pay.

The *Hoffman* majority reasoned that awarding back pay to vindicate the National Labor Relations Act (NLRA) would run afoul of conflicting provisions of the Immigration Reform and Control Act (IRCA),³ which forbids the hiring of undocumented workers. The New York Court of Appeals distinguished *Balbuena* from *Hoffman* by highlighting the fact that the plaintiff in *Hoffman* was not injured on the job, but rather seeking back pay for wrongful termination.

Further, the plaintiff in *Hoffman* had submitted false documentation to his employer in order to gain employment, while the *Balbuena* plaintiffs had not.

The *Balbuena* decision focused largely on conflict preemption issues, finally ruling that the federal IRCA and *Hoffman* ruling did not preempt New York state Labor Law §§240 and 241 and attendant lost earnings claims, through

which the New York legislature expressed a particularly strong interest in protecting injured construction workers and created stiff penalties for unsafe work sites.

The *Balbuena* Court also used the discretion of the jury to circumvent the apparent conflict, opining that the jury would be able to factor the worker's undocumented status into its ultimate decision regarding lost earnings. Noted the Court, the jury's role would involve determining the likelihood of whether the injured worker would have eventually taken steps to become documented and therefore earn in harmony with the terms of the IRCA.

The Question Left Open

The *Balbuena* decision was unquestionably a victory for undocumented workers disabled by workplace injuries, but it left open the question of whether an undocumented worker who obtained employment by presenting fraudulent documentation is entitled to recover lost wages. If anything, in distinguishing *Hoffman*, the *Balbuena* Court seemed to suggest that it would preclude such an injured worker from recovering wages.

While the Court of Appeals has not yet weighed in, the Appellate Division, Second Department did express its opinion on that very question in *Coque v. Wildflower Estates Developers Inc.*⁴ There, the court concluded, "where an employer violated the IRCA in hiring an employee, such as by failing to properly verify the employee's eligibility for work, the employee is not precluded, by virtue of his submission of a fraudulent documentation to the employer, from recovering damages for lost wages as a result of a workplace accident."

The *Coque* court expressly refused to condone employers who engage in "wink and a nod"⁵ hiring protocols with undocumented workers, where clearly fraudulent or inadequate documents are accepted by employers. Further troubling is the fact that those same employers are more than happy to employ undocumented workers, who are generally in no position to demand fair wages, benefits and working conditions.

DAVID L. SCHER is an associate and STEPHEN J. MURPHY is a partner with Block O'Toole & Murphy.

The employer in *Coque* had been given a fraudulent social security card by the plaintiff. The employer then filed the required I-9 form,⁶ listing the aforesaid social security number, but failing to indicate another valid form of identification that was received, as was required by the form. For its failure to verify the plaintiff's status with an additional form of identification in violation of the IRCA, the court justified its holding, reasoning that the employer had not fulfilled its duties with respect to verifying documentation. As such, held the court, the employer was not "induced" into employing the worker by the fraudulent documentation that was presented.

The Second Department does not stand alone. In December 2009, the First Department was faced with a lost earnings claim by an undocumented worker who had also admittedly provided a fraudulent social security card at the time of his employment, a card that the employer's chief operating officer claimed was relied upon by the company as accurate. See *Macedo v. J.D. Posillico Inc.*⁷

However, the employer in *Macedo* completely failed to file an I-9 form at the time of employment, and only did so months after the subject accident. The court held that the worker's lost earnings claim was not forfeited. Posited the court, the employer had failed to comply with its employment verification obligations in good faith, and therefore it could not be said that the employer was induced into employing the plaintiff based on the social security card.

Inducement has traditionally been an intensely factual question in the context of fraud, one typically left to the jury to determine the actual mens rea and/or reasonableness of the party claiming to have been induced. It appears that the First and Second departments, while using the language of fraudulent inducement, are actually drawing a brighter-line standard: An employer must comply with federal IRCA's provisions regarding new employee verification. A failure to comply with that law is essentially deemed to be a "bad faith" or "wink and a nod" hiring, and is punished by allowing the employee to recover lost earnings if he is ever disabled by a compensable work related injury, regardless of whether he presented fraudulent documentation when hired.

The principles established in *Balbuena* have even been applied to prevent certain defendants from inquiring about an injured construction worker's immigration status and tax filings in discovery. In a 2007 New York County Supreme Court case, *Gomez v. F&T Int'l (Flushing, NY)*,⁸ the plaintiffs were demolition workers injured when they fell off an elevated platform. At the time of their hiring, the plaintiffs' employer failed to obtain any documents to verify their identity or immigration status, in violation of the IRCA.

Defendants moved the court, seeking to compel a further deposition of the plaintiffs on the issue of their immigration status and history of tax filing. The court denied the motion, finding that the employer's violation of the IRCA rendered plaintiffs' immigration status irrelevant to the jury's consideration of their lost earnings claim.

The court's decision clearly was intended to punish the demolition company for its apparent practice of intentionally hiring undocumented workers, to whom it could provide lower wages and less safety protections. The court found the employer's sudden interest in the plaintiff's

immigration status in connection with defending the lawsuit to be distasteful, and expressed the opinion that the underlying motivation behind seeking the further deposition was actually to intimidate the workers.

Defendants argued, in part, that the plaintiffs' immigration status was relevant to their mitigation of future lost earnings defense, which essentially would ask the jury to find that the plaintiffs would not be able to gain future employment in this country, and thus should not be awarded money for future lost wages.

The court coldly rejected the argument, sarcastically noting, "[i]f defendants can somehow demonstrate that the demolition industry has all of a sudden agreed to abide by the IRCA such that [plaintiff] could not obtain demolition work

The 2006 New York Court of Appeals 'Balbuena' decision left open the question of whether an undocumented worker who obtained employment by presenting fraudulent documentation is entitled to recover lost wages.

without proper authorization, the court might reconsider its ruling. But, we all know better."⁹

It should be noted that the above decision appears to contradict Court of Appeals dicta in *Balbuena*, which found that a jury could and should consider an undocumented plaintiff's status in connection with his or her ability to gain future employment. That logic has been applied to allow similar discovery in other lower court decisions.¹⁰

Policy Concerns

There are strong policy concerns that run through the *Balbuena* decision and its progeny, but they are not all immediately apparent.

At first read, it may seem as if the *Balbuena* decision struck a blow against the IRCA, or at least its legislative intent, by in a sense "rewarding" workers who are undocumented. However, the Court was actually persuaded that limiting lost wage claims would increase employment levels of undocumented aliens by making it more financially attractive to hire them, which would actually thwart the very purpose of the IRCA.¹¹

From a safety perspective, the Court also feared

that "limiting a lost wages claim by an injured undocumented alien would lessen an employer's incentive to comply with the Labor Law and supply all of its workers the safe workplace that the Legislature demands."¹²

Of course, federal legislative changes could have a swift and dramatic impact on the current state of New York law as summarized in this article.

For example, while the IRCA does make it criminal for an employee to submit false or fraudulent documentation in order to satisfy verification requirements,¹³ it is not presently a crime to actually work in this country without proper documentation. If the act of working without documentation were to become illegal, however, a major underpinning of the *Balbuena* decision would be compromised.

The Court of Appeals expressly noted there that awarding lost earnings to undocumented workers avoided any conflict with the Supreme Court's decision in *Hoffman*, in part, because the specific act of working without documentation has not been criminalized.¹⁴ Were that to change, the Court would apparently revisit its analysis and, despite whatever policy concerns might remain, may hold such awards to be impermissible.

Ironically, if the *Balbuena* Court's logic is followed, stricter federal immigration laws could actually encourage further hiring of undocumented aliens, leading to less safe work environments and more injuries, because the subsequent injury claims would become far less valuable absent lost earnings components.

1. 6 N.Y.3d 338, 812 N.Y.S.2d 416 (2006).

2. 535 U.S. 137 (2002).

3. The IRCA, passed on Nov. 6, 1986, endeavored to control and deter illegal immigration into the United States. Among other things, the law requires all employers to verify the identity and work authorization status of their employees.

4. 58 A.D.3d 44, 867 N.Y.S.2d 158 (2nd Dept. 2008).

5. See *Coque*, 58 A.D.3d at 53, citing, *Hoffman*, 535 U.S. at 136 [Breyer, J., dissenting].

6. The I-9 Employment Verification Form must be completed at the time of a hiring and maintained by the employer until employment ceases. The form calls for the employee to certify his or her citizenship and/or immigration status, and for the employer to list what documents it reviewed in order to verify the employee's status. The form's instructions list what type of documents are sufficient for verifying citizenship and status. Failure to comply with the I-9 rules can lead to fines and loss of government contracts, among other things.

7. 68 A.D.3d 508, 2009 N.Y. Slip Op 09158 (1st Dept. 2009).

8. 16 Misc.3d 867, 842 N.Y.S.2d 298 (Sup. N.Y. County, 2007).

9. *Gomez*, 16 Misc.3d at 874.

10. See, e.g., *Barahona v. Trustees of Columbia University in the City of New York*, 11 Misc.3d 1035, 816 N.Y.S.2d 851 (Sup. Ct. Kings County, 2006).

11. See id.

12. *Balbuena*, 6 N.Y.3d 338 at 359.

13. See 8 U.S.C. §1324c [a]; 18 U.S.C. §1546[b].

14. *Balbuena*, 6 N.Y.3d 338 at 360.

Reprinted with permission from the February 22, 2010 edition of the NEW YORK LAW JOURNAL © 2010 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@alm.com. # 070-03-10-51

BOM

BLOCK
O'TOOLE
& MURPHY

ATTORNEYS AT LAW