

No. 81590-9

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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ALEX SALAS,

Petitioner,

v.

HI-TECH ERECTORS, a Washington Corporation,

Respondent.

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STATE OF WASHINGTON

BRIEF OF *AMICI CURIAE*

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**Table of Contents**

Table of Authorities ..... ii

Introduction..... 1

Statement Regarding Identity and Interest of *Amici* ..... 1

Statement of the Case..... 3

Argument ..... 4

*A. Public policy demands a rule that immigration status has no place in civil litigation.*..... 4

        1. Deterrence is needed most in hazardous industries where immigrants toil..... 4

        2. Introduction of immigration status chills immigrants from exercising their rights and invites abusive litigation tactics. .... 7

        3. Introduction of immigration status evidence prejudices juries... 9

*B. Washington State and national precedent support a rule that bars the introduction of immigration status evidence.*..... 11

*C. The Court of Appeal’s “Likelihood of Deportation Standard” is unmanageable and leads to racial profiling.*..... 16

        1. Immigration law is complex and ever-changing..... 16

        2. Allowing immigration status evidence leads to racial profiling and stereotyping..... 19

Conclusion ..... 20

## Table of Authorities

### Federal Cases

<i>Castro-O'Ryan v. U.S. Dep't of Immigration and Naturalization</i> 847 F.2d 1307 (9th Cir. 1988) .....	18
<i>Chellen v. John Pickle Co., Inc.</i> 434 F.Supp.2d 1069 (N.D.Okla. May 24, 2006).....	15
<i>De Canas v. Bica</i> 424 U.S. 351, 96 S.Ct. 933 (1976).....	12
<i>E.E.O.C. v. Bice of Chicago</i> 229 F.R.D. 581 (N.D.Ill. 2005).....	8
<i>E.E.O.C. v. First Wireless Group, Inc.</i> 225 F.R.D. 404 (E.D.N.Y.,2004).....	8
<i>E.E.O.C. v. The Restaurant Co.</i> 448 F. Supp. 2d 1085 (D. Minn. 2006).....	8
<i>Escobar v. Baker</i> 814 F.Supp. 1491 (W.D. Wash. 1993).....	13
<i>Flores v. Amigon d/b/a La Flor Bakery</i> 233 F. Supp.2d 462 n.2 (E.D.N.Y. 2002) .....	8, 15
<i>Galaviz-Zamora v. Brady Farms, Inc.</i> 230 F.R.D. 499 (W.D. Mich. 2005).....	8
<i>Hagl v. Jacob Stern &amp; Sons, Inc.</i> 396 F.Supp. 779 (E.D.Pa.1975) .....	11
<i>Hillsborough County v. Automated Medical Laboratories, Inc.</i> 471 U.S. 707, 105 S.Ct. 2371 (1985).....	12
<i>Hoffman Plastic Compounds, Inc. v. NLRB</i> 535 U.S. 137, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002).....	11, 16
<i>In re Reyes</i> 814 F.2d 168 (5th Cir. 1987) .....	11
<i>Liu v. Donna Karan International, Inc.</i> 207 F. Supp. 2d 191 (S.D.N.Y. 2002).....	8, 15
<i>Local 512, Warehouse and Office Workers' Union, AFL-CIO v. NLRB</i> (Felbro), 795 F.2d 705 (9th Cir. 1986) .....	6
<i>Lozano v. City of Hazleton</i> 239 F.R.D. 397 (M.D. Pa. 2006).....	8
<i>NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.</i> 134 F.3d 50 (1997).....	6
<i>Patel v. Quality Inn South</i> 846 F.2d 700 (11th Cir. 1988) .....	11
<i>Perez-Farias v. Global Horizons, Inc.</i> 2009 WL 1011180 (E.D.Wash.,2009) .....	20

<i>Rivera et. al. v. NIBCO, Inc.</i>	
364 F.3d 1057 (9th Cir. 2004) .....	8, 16
<i>Sandoval</i>	
2009 WL 2058145 .....	12
<i>Singh v. Jutla</i>	
214 F. Supp. 2d (N.D. Cal. 2002) .....	7
<i>Topo v. Dhir</i>	
210 F.R.D. 76 (S.D.N.Y. 2002) .....	8
<i>Torrez v. State Farm Mutual Automobile Ins. Co.</i>	
705 F.2d 1192 (10th Cir.1982) .....	11
<i>Zavala v. Wal-Mart Stores, Inc.</i>	
393 F. Supp. 2d 295(D.N.J. 2005) .....	15
<u>State Cases</u>	
<i>Bartlett v. Hantover</i> , 9 Wn.App. 616, 619-20, 513 P.2 844 (1973), <i>rev'd</i> <i>on other grounds</i> , 84 Wn.2d 426, 526 P.2d 1217 (1974) .....	4
<i>Bravo v. The Dolsen Cos.</i>	
125 Wash.2d 745, 888 P.2d 147 (1995).....	13
<i>Cagnoli v. Tandem Staffing and Specialty Risk Services</i> ,	
914 So.2d 950 (Fla. 2005).....	15
<i>Cherokee Industries, Inc., v. Alvarez</i>	
84 P3d 798 (Okla., 2003).....	15
<i>Correa v. Waymouth Farms, Inc.</i>	
664 N.W.2d 324 (MN, 2003).....	15
<i>Curiel v. Environmental Management Services</i>	
655 S.E.2d 482, (S.C., 2007) .....	15
<i>Design Kitchen &amp; Baths v. Lagos</i>	
882 A.2d 817 (Md. Ct. App. 2005).....	7, 15
<i>Drinkwitz v. Alliant Techsys., Inc.</i>	
140 Wash.2d 291, 996 P.2d 582 (2000).....	13
<i>Earth First Grading et al. v. Gutierrez</i>	
606 S.E.2d 332 (Ga. Apps. 2004) .....	15
<i>Farmers Bros. Coffee v. Worker's Comp. Appeals Bd.</i>	
133 Cal.App.4th 533 (Cal.App. 2 Dist. 2005) .....	15
<i>Ford v. Trendwest Resorts, Inc.</i>	
146 Wn.2d 146, 43 P.3d 1223 (2002).....	4
<i>Gates v. Rivers Construction</i>	
515 P. 2d 1020 (Alaska, 1975).....	11
<i>Hernandez v. Paicius</i>	
109 Cal. App.4th 452 .....	10

<i>Majlinger v. Cassino Contracting Corp.</i> 25 A.D.3d 14, 802 N.Y.S.2d 56 (2005), .....	14, 15, 18
<i>Montoya v. Gateway Insurance Co.</i> 401 A.2d 1102 (N.J. Apps 1979) .....	11
<i>Peterson v. Neme</i> 281 S.E. 2d 869 (Va. 1981).....	11
<i>Rajeh v. Steel City Corp</i> et. al., 813 NE2d 697 (Oh. Apps. 2004) .....	15
<i>Safeharbor Employer Services I Inc., v. Velazquez</i> 860 S.2d 984 (Fla. App. 2003).....	15
<i>Salas v. Hi-Tech Erectors</i> 143 Wn.App. 373 (2008) .....	10
<i>Tyson Foods, Inc. v. Guzman</i> 116 S.W.3d 233 (Tex.App., 2003).....	13, 14
<u>Federal Statutes</u>	
8 U.S.C. § 1101(a)(15)(U) .....	18
8 U.S.C. § 1184(p) .....	18
8 U.S.C. § 1229b(b)(1) .....	18
8 U.S.C. § 1231(b)(3) .....	18
8 U.S.C. §§ 1101(a)(15).....	17
8 U.S.C. §1229(a)(1)-(3).....	16
<u>State Statutes</u>	
RCW 49.32.020 .....	13
<u>Other Authorities</u>	
<i>Undocumented Immigrants and Their Personal Injury Actions: Keeping Immigration Policy Out of Lost Wage Awards and Enforcing the Compensatory and Deterrent Functions of Tort Law</i> 13 Roger Williams U. L. Rev. 530 (Spring 2008) .....	1

## **Introduction**

Immigrant workers perform the most dangerous jobs America has to offer. Accordingly, they suffer a disproportional percentage of on-the-job injuries and fatalities. Washington's tort system should not be designed to give a windfall to tortfeasors (along with a perverse incentive to ignore safety laws) by allowing evidence of an injured worker's immigration status to eliminate or reduce compensation awards.

Instead, a bright line rule must be established that promotes safe workplaces for our most vulnerable workers and continues this Court's leadership role protecting workers' rights. Sound public policy dictates the adoption of a standard that bars evidence of a parties' immigration status to limit the recovery of economic damages in personal injury cases.<sup>1</sup>

### **Statement Regarding Identity and Interest of Amici**

*Amicus* Centro de Ayuda Solidaria a los Amigos (CASA Latina) is a community-based organization that operates a day laborer dispatch center for Latino immigrants in Seattle. Last year, CASA Latina dispatched workers to 7,996 temporary jobs and helped 114 immigrant workers find permanent jobs. Workers are typically employed in non-union, manual

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<sup>1</sup> See, Wendy Andre, *Undocumented Immigrants and Their Personal Injury Actions: Keeping Immigration Policy Out of Lost Wage Awards and Enforcing the Compensatory and Deterrent Functions of Tort Law*, 13 Roger Williams U. L. Rev. 530 (Spring 2008) (in-depth review of intersection of tort law and immigration law and policy reasons supporting full compensation to all tort victims).

labor jobs; they frequently complain they face a significant threat of on-the-job injuries, and often fear pursuing legal claims due to their legal status. A decision by this Court that allows the use of a worker's immigration status in court proceedings will directly undermine CASA Latina's mission of securing safer workplaces for the workers it serves.

The National Employment Law Project (NELP) is a national non-profit legal organization with 40 years' experience advocating for employment and labor rights of low-wage and immigrant workers. NELP has litigated and participated as *amicus* in numerous cases addressing the rights of immigrant workers and how their immigration status affects their right to bring claims.

NELP works to ensure that all workers receive basic workplace protections guaranteed by our nation's labor laws. In NELP's experience, immigrant workers often forgo legitimate claims because they fear asserting their rights, which undermines workplace protections for all workers.

Since 1984, the Northwest Immigrants Rights Project (NWIRP) has promoted justice for low-income immigrants and refugees from more than 100 countries by pursuing and defending their legal status. NWIRP focuses on providing direct legal services, supported by education and public policy work. The standard created by the Division I Court of

Appeals subjects noncitizens to new forms of scrutiny regarding their current and future immigration status.

The Latina/o Bar Association of Washington (LBAW), in part, represents the concerns and goals of Latino people of Washington State. LBAW advocates for effective solutions to barriers within Washington's legal system that significantly impact the Latino community. Because Latinos work in the most hazardous industries in our State, it is important to ensure access to our courts to seek all available legal remedies to make victims whole and to provide incentives to ensure safe workplaces.

#### **Statement of the Case**

Petitioner Alex Salas was severely injured when he fell three stories from an unsafe scaffold ladder negligently installed by respondent Hi-Tech Erectors. The trial court denied Mr. Salas's motion *in limine* and allowed the jury to hear evidence of his immigration status in regard to his claim for future lost wages. The jury found Hi-Tech negligent, but awarded no damages. The Court of Appeals, Division One, upheld the trial court, ruling that immigration status is relevant to future lost wages claims only where there is evidence the plaintiff is unlikely to remain in the country throughout the period of claimed lost income. In doing so, the Court of Appeals rejected Washington State's long history of protecting the rights of all workers. This Court should reverse the Court of Appeals,

to promote compliance with safety laws in Washington's most hazardous industries, and to guarantee equal access to the courts to all state residents.

### Argument

#### **A. Public policy demands a rule that immigration status has no place in civil litigation.**

##### **1. Deterrence is needed most in hazardous industries where immigrants toil.**

The primary purposes of tort law are compensating injured parties and deterring wrongful conduct. *Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 154, 43 P.3d 1223, 1227 (2002)(citing *Restatement (Second) of Torts* §901). Compensation provides victims economic security and critical medical benefits. Compensation awarded by courts includes lost earnings capacity, defined as the impairment of one's ability to earn a living. *Bartlett v. Hantover*, 9 Wn.App. 616, 619-20, 513 P.2 844 (1973), *rev'd on other grounds*, 84 Wn.2d 426, 526 P.2d 1217 (1974). Compensation also serves the public by creating economic incentives to comply with safety laws. Providing all tort victims, including undocumented victims, with the full range of economic remedies<sup>2</sup> promotes these dual goals.

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<sup>2</sup> Courts retain equitable powers to refrain from ordering reinstatement in cases where verifiable records (e.g. Order of Removal from immigration court) indicate a party is not eligible for re-employment. Courts may condition reinstatement on the worker's ability to meet I-9 eligibility requirements.

The construction industry, where Mr. Salas worked, had the highest incident rate of non-fatal injuries in the state in 2006-2007.<sup>3</sup> A recent University of Washington study found that Seattle's immigrant day laborers are five times as likely to suffer job injuries as the average construction worker in the United States.<sup>4</sup>

Measurements of the overall danger in a particular occupation often rely on fatality rates, since these are more accurately measured than non-fatal injuries.<sup>5</sup> In 2007, Washington's construction industry had the second highest number of fatalities. Nationally, construction accounted for 21% of all fatal workplace injuries that same year.<sup>6</sup>

Nationally, between 1992 and 2007, work-related fatalities for immigrant workers rose by 59%, while they declined for other workers.<sup>7</sup>

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<sup>3</sup> See, Washington State Department of Labor and Industries (BLSI) data for 2007 Fatal Accidents (<http://www.lni.wa.gov/ClaimsIns/Files/DataStatistics/blsi/FATAL2007CFOIWA.pdf>) and Non-Fatal Accidents (<http://www.lni.wa.gov/ClaimsIns/Files/DataStatistics/blsi/NONFATAL2007WASummary.pdf>). (Appendix 1 and Appendix 2, attached for convenience).

<sup>4</sup> Seixas, Camp, Blecker, and Tseng, *Occupational Health and Safety Experience of Day Laborers in Seattle, WA*, American Journal of Industrial Medicine, 51:399-406, 405 (2008).

<sup>5</sup> Katherine Loh and Scott Richardson, *Foreign-born workers: trends in fatal occupational injuries, 1996-2001*, MONTHLY LABOR REVIEW 42, June 2004; MAJORITY STAFF REPORT BY THE COMMITTEE ON EDUCATION AND LABOR, HIDDEN TRAGEDY: UNDERREPORTING OF WORKPLACE INJURIES AND ILLNESSES, 110<sup>th</sup> Cong. 5-8 (2008)

<sup>6</sup> *Death on the Job*, p. 31 (from BLS data); see also, Catherine Singley, *Fractures in the Foundation: The Latino Worker's Experience in the Era of Declining Job Quality*, National Council of La Raza, Ch. 3, Table 3.1 (2009)(Over 40% of Latino on-the-job fatalities nationwide were in the construction industry). [http://www.nclr.org/section/fractures\\_in\\_the\\_foundation/](http://www.nclr.org/section/fractures_in_the_foundation/)

<sup>7</sup> *Death on the Job: The Toll of Neglect*, AFL-CIO (2009), p. 4, [http://www.aflcio.org/issues/safety/memorial/upload/doj\\_2009.pdf](http://www.aflcio.org/issues/safety/memorial/upload/doj_2009.pdf).

Although work-related deaths for Latino workers have dipped slightly over the last two years, Latinos still suffer the highest percentage of fatalities among minority workers.<sup>8</sup> Workers born in Mexico accounted for the largest portion (42 percent) of foreign-born workers who died at work in the United States in 2008.<sup>9</sup>

In this context, denying remedies to undocumented workers operates as a perverse incentive for non-compliant employers.<sup>10</sup> The Maryland Court of Appeals found that if immigration were discoverable in workers' compensation cases, workers would be at the mercy of "unscrupulous employers who could, and perhaps, would, take advantage of this class of persons and engage in unsafe [and exploitative] practices with no fear of

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<sup>8</sup> Bureau of Labor Statistics data shows total fatalities decreasing, but fatalities for Latinos increasing. *See*, <http://www.bls.gov/iif/oshwc/cfoi/cfch0007.pdf>, Appendix 3 and Appendix 4, attached for convenience.

<sup>9</sup> *Id.* BLS data, Appendix 5, attached for convenience.

<sup>10</sup> Courts and policymakers have commented on this phenomenon. When the Immigration Reform and Control Act was debated and passed in 1986, As Congressmen Dan Lundgren explained, some employers hire undocumented workers: "specifically so they can exploit them. . . . [This] is unfair to the competitors in those industries, other employers, who follow the law and are undercut in their competitiveness by the fact that those are breaking the law and taking advantage." *See* CONG. REC. H10595 (Oct. 15, 1986) (remarks of Rep. Lundgren, Ranking Member of the House Immigration Subcommittee of the House Judiciary Committee, made this comment immediately prior to the final vote on IRCA on October 15, 1986). In *Local 512, Warehouse and Office Workers' Union, AFL-CIO v. NLRB* (Felbro), 795 F.2d 705, 718-19 (9<sup>th</sup> Cir. 1986), where the court awarded backpay, (that is, pay for work that would have been performed had the worker not been fired), under the NLRB to undocumented workers, the court said that to deny this remedy would mean that "Unscrupulous employers would be encouraged to hire undocumented workers for the competitive advantage that an environment relatively free of labor safeguards may offer." Likewise, the Second Circuit expressed concern "that employers who comply with IRCA do not suffer a competitive disadvantage for their obedience to the law," *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 57 (1997).

retribution, secure in the knowledge that society would have to bear the cost[s of their conduct].” *Design Kitchen & Baths v. Lagos*, 882 A.2d 817, 826 (Md. Ct. App. 2005). See also, *Singh v. Jutla*, 214 F. Supp. 2d at 1062 (N.D. Cal. 2002) (“[E]very remedy denied to undocumented workers provides a marginal incentive for employers to hire those workers.”).

Because immigrants perform America’s most dangerous work, the civil justice system should fully compensate all injured victims. To do otherwise substantially negates the primary purposes of tort law and of workplace health and safety laws and rewards unscrupulous employers for disregarding safety laws.

**2. Introduction of immigration status chills immigrants from exercising their rights and invites abusive litigation tactics.**

Fear of exposure of immigration status in litigation deters immigrant workers from pursuing valid claims. A 2009 survey of low-wage workers, primarily immigrants, in three U.S. cities found that only 8% of those injured on the job had filed claims for workers’ compensation.<sup>11</sup> Fifty percent of those who told their employers about their injuries were reported to immigration authorities, fired, or instructed not to file claims.<sup>12</sup>

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<sup>11</sup> *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities*, Center for Urban Economic Development at UIC, National Employment Law Project, and UCLA Institute for Research on Labor and Employment, 2009, <http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1>

<sup>12</sup> *Id.*, at 25.

Recognizing this chilling effect and the low probative value of immigration status evidence, courts across the country<sup>13</sup> have entered protective orders keeping immigration status out of litigation:

Even documented workers may be chilled... fear[ing] that their immigration status would be changed, or that their status would reveal the immigration problems of their family or friends; similarly, new legal residents or citizens may feel intimidated by the prospect of having their immigration history examined in a public proceeding. Any of these individuals, failing to understand the relationship between their litigation and immigration status, might choose to forego civil rights litigation.

*Rivera et. al. v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004).<sup>14</sup>

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<sup>13</sup> See, e.g., *E.E.O.C. v. First Wireless Group, Inc.*, 225 F.R.D. 404, 406 (E.D.N.Y., 2004) (holding that the probative value of the information does not outweigh the severe prejudicial effect such information would have on the abilities of immigrant workers to pursue their claims and thus that it would “constitute an unacceptable burden to the public interest”); *E.E.O.C. v. Bice of Chicago*, 229 F.R.D. 581, 583 (N.D.Ill. 2005) (denying discovery as to immigration status “because questions about immigration status are oppressive, they constitute a substantial burden on the parties and the public interest and they would have a chilling effect on victims of discrimination from coming forward to assert discrimination claims”); *Flores v. Amigon d/b/a La Flor Bakery*, 233 F. Supp.2d 462, 465 n.2 (E.D.N.Y. 2002) (stating that discovery of immigration status would effectively eliminate the Fair Labor Standards Act as a means for protecting undocumented workers from exploitation and retaliation); *Liu v. Donna Karan International, Inc.*, 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002) (denying discovery of immigration status based on risk of intimidation and chilling effect); *Topo v. Dhir*, 210 F.R.D. 76, 79 (S.D.N.Y. 2002) (denying discovery of immigration status because of its in terrorem effect even though status could be “relevant to a collateral matter on cross examination”); *E.E.O.C. v. The Restaurant Co.*, 448 F. Supp. 2d 1085, 1086-88 (D. Minn. 2006) (holding immigration status not relevant where no claim was made for either back pay or front pay and not relevant prior to damages phase of proceeding); *Galaviz-Zamora v. Brady Farms, Inc.*, 230 F.R.D. 499, 501 (W.D. Mich. 2005) (holding that a plaintiff must “articulate specific facts showing clearly defined and serious injury resulting from the discovery sought” in order to obtain a protective order, and finding that possibility of discharge, prosecution, deportation, and withdrawal of claim meets this standard); *Lozano v. City of Hazleton*, 239 F.R.D. 397, 399-400 (M.D. Pa. 2006) (determining harm to plaintiffs of disclosure of immigration status outweighs benefit to defendants of that information).

<sup>14</sup> See also, *Flores v. Amigon d/b/a La Flor Bakery*, 233 F. Supp. 2d 462, 465 n.2 (E.D.N.Y. 2002) (“If forced to disclose their immigration status, most undocumented

Immigrants who have the courage to file valid claims often face aggressive attempts to bring immigration status into litigation. Combined, the attorneys and organizations signing this brief have decades of experience representing immigrant clients. In practice, *amici* have observed the following:

- Clients with compelling claims routinely forgo litigation when advised that immigration status may become an issue in the case, even though counsel promises to do everything possible to obtain protective orders;
- During discovery, defense counsel often focus very aggressively on immigration status to intimidate plaintiffs and key witnesses and to send a message to the immigrant community that litigation carries a heavy price;
- Clients are afraid to attend court proceedings due to stories of ICE arresting persons at the court house; and,
- Clients frequently report that employers and their agents have threatened to call immigration authorities if they complain about illegal working conditions.

Washington courts should protect vulnerable litigants and give full effect to safety laws enacted by the Legislature.

### **3. Introduction of immigration status evidence prejudices juries.**

As the Court of Appeals noted, “the issue of immigration status is divisive and prejudicial.” *Salas v. Hi-Tech Erectors*, 143 Wn.App. 373,

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aliens would withdraw their claims or refrain from bringing an action such as this in the first instance.”); *Sandoval v. Rizzuti Farms, Ltd.*, 2009 WL 2058145, 3 (E.D.Wash., 2009)(discovery of immigration status barred “in order to prevent manifest injustice and a chilling of Plaintiffs’ private right of action under the [Washington Little Norris LaGuardia] Act”).

383 (2008). The trial court's statement that "these are volatile times in terms of immigration, no doubt," may well be an understatement. *Id.*, at 377.

Unfortunately, fears that immigration status may invade the courtroom and overtake legitimate claims are not unfounded. In *Hernandez v. Paicius*, 109 Cal. App.4<sup>th</sup> 452, 457, 134 Cap Rptr.2d 756 (Ct. App. 4<sup>th</sup> Div.3 2003), a California trial judge court outlined the danger in stark terms:

There's a lot of jurors unfortunately, Mr. Henderson [plaintiff's counsel], as you may find out sadly at the end of this trial, [who] feel that anyone that comes into this fine country illegally, even for the motive of working, to come in illegally and then try to take advantage of our system for legal setup for legal resident, that we all pay money to support, pay their salaries, pay the buildings, yada, yada.

...It's too bad this poor gentleman hurt his foot, hand, whatever, but he came here to work illegally. So he's running the risk of getting injuries. He's running a risk of getting injured on any job if he is injured and outside the system. Tough. That's your problem.

This example vividly illustrates that immigration status is an explosive issue. Courts need to focus juries on issues of liability and damages and not allow them to be distracted by emotionally charged issues like immigration status.

**B. Washington State and national precedent support a rule that bars the introduction of immigration status evidence.**

For decades prior to 2002, both state and federal courts held that immigration status was irrelevant in tort litigation.<sup>15</sup> These holdings were briefly brought into question when the U.S. Supreme Court held that unauthorized workers are not entitled to back pay awards in NLRB administrative actions, even if they are illegally fired in retaliation for union activities. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002). After *Hoffman*, some advocates attempted to expand this narrow ruling to bar undocumented workers from all forms of recovery in employment litigation. That argument has been rejected in nearly every context in which it has arisen.

One primary reason to distinguish *Hoffman* where state claims are involved is the Supreme Court has confirmed that “[s]tates possess broad

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<sup>15</sup>*Torrez v. State Farm Mutual Automobile Ins. Co.*, 705 F.2d 1192, 1202-03 (10th Cir.1982) (illegality not a defense to wrongful death claim by estate of illegal alien killed in auto accident); *Hagl v. Jacob Stern & Sons, Inc.*, 396 F.Supp. 779, 783-84 (E.D.Pa.1975) (“every alien, whether in this country legally or not, has a right to sue those who physically injure him”); *Montoya v. Gateway Insurance Co.*, 401 A.2d 1102, 1106 (N.J. App. 1979) cert. denied 408 A.2d 796 (1979) (“There is no question but that an illegal alien is eligible under common law to sue in our courts for personal injury sustained and to recover as an element of his damage loss of earnings caused by the tortfeasor’s negligence.”); *Peterson v. Neme*, 281 S.E. 2d 869, 872 (Va. 1981) (immigration status evidence “irrelevant and immaterial” to undocumented alien’s right to recover lost wages in a negligence action); In other contexts, see, e.g., *Gates v. Rivers Construction*, 515 P. 2d 1020, 1022 (Alaska, 1975) (employment contract of undocumented Canadian upheld); *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988)(Fair Labor Standards Act); *In re Reyes*, 814 F.2d 168 (5th Cir. 1987)(immigration status irrelevant to pursue claims under FLSA and Agricultural Worker Protection Act).

authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety, and workmen's compensation laws are only a few examples." *De Canas v. Bica*, 424 U.S. 351, 356, 96 S.Ct. 933, 937 (1976). These have been, along with tort claims, "primarily, and historically, a matter of local concern." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 708, 105 S.Ct. 2371, 2372 (1985).

In Washington State, the agencies tasked with enforcing workplace rights have issued policies stating that they will continue to pursue claims and ensure all remedies are available to all workers regardless of their immigration status.<sup>16</sup> A recent federal district court decision ruled that *Hoffman* was "inapplicable" for Washington state law wrongful discharge claims even where the plaintiff sought backpay. *Sandoval*, 2009 WL 2058145 at 3. In *Sandoval*, farm workers filed a class action based, in

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<sup>16</sup> The Human Rights Commission and Department of Labor and Industries have made it clear that post-*Hoffman*, Washington employment laws should continue to be enforced and workers are entitled to compensation for lost wages, regardless of immigration status. The Washington State Human Rights Commission stated that it will continue to enforce laws against discrimination "without regard to the immigration status of the Complainant." (*Letter from Susan J. Jordan, Executive Director, State of Washington Human Rights Commission of 10/07/02*, Appendix 6). The Department of Labor and Industries has also committed to ensure that "all workers be paid at least the minimum wage and [be] provid[ed] with medical care and wage replacement when an injury or an occupational disease prevents them from doing their job...without regard to the worker's immigration status." (*Statement of Gary Moore, Director, State of Washington Department of Labor and Industries of 5/01/02*, Appendix 7).

part, on the Little-Norris LaGuardia Act, *RCW 49.32.020*, which protects non-unionized workers engaging in labor negotiations from employer interference. When the defendant sought discovery of the plaintiffs' immigration status, plaintiffs moved for a protective order and the trial court barred all immigration-related discovery. *Id.* at 3. In support of his conclusion, Judge Shea noted that:

Washington [has a] long history of providing comprehensive employment protections irrespective of immigration status. *See, e.g., Drinkwitz v. Alliant Techsys., Inc.*, 140 Wash.2d 291, 300, 996 P.2d 582 (2000) (identifying numerous examples of when Washington has exceeded federal employment protections including requiring eight-hour workdays and creating family-leave laws); *Bravo v. The Dolsen Cos.*, 125 Wash.2d 745, 753, 888 P.2d 147 (1995)(refusing to restrict the Act's protection only to unionized employees).

*Id.* at 2.<sup>17</sup>

Under Texas common law, immigration status is completely irrelevant in personal injury actions. In *Tyson Foods, Inc. v. Guzman*, 116 S.W.3d 233 (Tex.App., 2003), Tovar Guzman was severely injured when he was struck by a forklift while employed by a subcontractor in the poultry industry. *Id.* at 237. Mr. Guzman suffered spine damage and has a physical handicap that limits his future employment. *Id.* He filed a

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<sup>17</sup> *See also, Escobar v. Baker*, 814 F.Supp. 1491, 1498 (W.D. Wash. 1993)(finding immigration status irrelevant to claims brought under both the federal Agricultural Worker Protection Act and the Washington Farm Labor Contractor Act).

personal injury action in state court and was awarded a significant jury verdict that included \$210,000 for future lost earning capacity. *Id.*

On appeal, Tyson argued that the award of lost future wages should be struck as Mr. Guzman was not legally authorized to work. *Id.* at 244. Specifically, Tyson argued that the trial court should not have allowed plaintiff's expert witness to testify about Mr. Guzman's lost earning capacity in the United States. *Id.* After reviewing *Hoffman*, the Texas Court of Appeals upheld the entire lost earnings verdict. *Id.* at 242-244. The court ruled that *Hoffman* was limited to NLRA violations and "does not apply to common-law personal injury damages" actions. *Id.* at 244.

New York courts have also acknowledged deep concern that introduction of immigration status in litigation can undermine workers' rights and the purposes of the tort system:

Allowing the defendants to avoid any aspect of damages for which they would otherwise be responsible would facilitate exploitation of alien workers, and would unjustly enrich even scrupulous defendants.

*Majlinger v. Cassino Contracting Corp.*, 25 A.D.3d 14, 28-29, 802 N.Y.S.2d 56 (2005), *aff'd sub nom. Balbuena v. IDR Realty LLC*, 6 N.Y.3d 338, 845 N.E.2d 1246, 812 N.Y.S. 2d 416 (2006). The court went on to explain:

Only by equalizing defendants' potential liability for injuries to authorized and unauthorized workers can the objectives underlying

both federal immigration law and this state's tort law and workplace safety statutes be realized.

25 A.D. at 32.<sup>18</sup>

Courts have unanimously held that the broad sweep of the Fair Labor Standards Act covers lost wages for unauthorized workers.<sup>19</sup> Courts considering claims for workers' compensation have also held almost unanimously that injured workers should be entitled to full workers' compensation remedies regardless of their immigration status.<sup>20</sup>

Likewise, with respect to back pay awards under Title VII, the only court to decide an issue related to the relevance of immigration status cast doubt on whether *Hoffman* has any impact beyond the narrow issue of back pay under the NLRA. *Rivera et. al. v. NIBCO, Inc.*, 364 F.3d 1057, 1067-68

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<sup>18</sup> Despite recognizing the public policy reasons for equalizing liability, the *Majlinger* court, like the Appeals Court here, ruled that the correct standard is to allow the jury to consider whether an unauthorized worker is likely to remain in the country. *Majlinger*, 25 A.D.3d at 30.

<sup>19</sup> *Liu, et al. v. Donna Karan International, Inc.*, 207 F. Supp. 2d 191 (S.D.N.Y. 2002); *Flores v. Amigon d/b/a La Flor Bakery*, 233 F.Supp.2d 462 (E.D.N.Y. 2002); *Zavala v. Wal-Mart Stores, Inc.* 393 F. Supp. 2d 295, 325(D.N.J. 2005); *Chellen v. John Pickle Co., Inc.*, 434 F.Supp.2d 1069 (N.D.Okla. May 24, 2006).

<sup>20</sup> *Farmers Bros. Coffee v. Worker's Comp. Appeals Bd.*, 133 Cal.App.4th 533 (Cal.App. 2 Dist. 2005); *Cagnoli v. Tandem Staffing and Specialty Risk Services*, 914 So.2d 950 (Fla. 2005) reh. denied (Dec 14, 2004); *Safeharbor Employer Services I Inc., v. Velazquez*, 860 S.2d 984 (Fla. App. 2003) rev. denied by *Safeharbor Employer Services I Inc., v. Velazquez*, 873 So.2d 1224 (Fla. Apr. 22, 2004); *Earth First Grading et al. v. Gutierrez*, 606 S.E.2d 332 (Ga. Apps. 2004) cert. denied (Mar 28, 2005); *Design Kitchen and Baths, et.al. v. Lagos*, 882 A.2d 817 (Md. 2005) opinion after grant of cert. *Design Kitchen and Baths v. Lagos*, 388 Md. 718, 882 A.2d 817 (Md. Sep 12, 2005); *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324 (MN, 2003); *Rajeh v. Steel City Corp et. al.*, 813 NE2d 697 (Oh. Apps. 2004); *Cherokee Industries, Inc., v. Alvarez*, 84 P3d 798 (Okla., 2003) cert. denied Jan. 20, 2004; *Curiel v. Environmental Management Services*, 655 S.E.2d 482, (S.C., 2007) .

(9th Cir. 2004), *cert. denied*, *NIBCO, Inc. v. Rivera*, 544 U.S. 905 (2005), (Ninth Circuit upheld a protective order saying, “we seriously doubt” that *Hoffman Plastics* applied).

This Court should similarly reject the application of *Hoffman* and adopt a rule that bars immigration status as irrelevant and treats all tort litigants equally.

**C. The Court of Appeal’s “Likelihood of Deportation Standard” is unmanageable and leads to racial profiling.**

Because immigration law is so complex, the Court of Appeals standard would invite juries to engage in highly speculative and complicated factual scenarios. Moreover, the standard has the unintended effect of inviting litigants to engage in racial profiling.

**1. Immigration law is complex and ever-changing.**

Congress delegated to federal immigration agencies the “sole and exclusive” authority to determine admission or removal status in removal/deportation proceedings. *See* 8 U.S.C. §1229(a)(1)-(3). State courts have no authority to make immigration status determinations or adjudicate any pending or future applications under the Immigration and Nationality Act (INA). Even if trial courts attempt to limit immigration testimony to the issue of damages, delving into immigration-related evidence to determine the current status or future probable status will

inevitably embroil trial courts in time-consuming mini-trials that would distract the jury from the personal injury issues in the case.

The INA defines those who qualify for citizenship through birth or naturalization. The INA also defines myriad different classes of non-citizens who have either temporary or permanent lawful immigration status in the United States.<sup>21</sup> Many of these different classes are fluid, granted for certain time periods before an individual can either apply to renew their status or change their status to another category. In 2008, USCIS processed 647,000 applications from noncitizens who were seeking to adjust or change status to that of lawful permanent resident

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<sup>21</sup> The INA provides for non-citizens to hold any one of an array of different statuses. This non-exclusive list of provisions include: 8 U.S.C. §§ 1101(a)(15) (listing 22 separate categories of temporary or “nonimmigrant” visas, many with several different subcategories of visas); 1101(a)(15) (listing 13 separate categories of “special immigrant” visas, including many with subcategories); 1151 (establishing levels of permanent or “immigrant” visas based on family petitions and employment petitions); 1157 (refugees from outside the country); 1158 (asylees and applicants for political asylum from within the country); 1159 (adjustment to lawful permanent resident status for refugees or asylees); § 1160 (adjustment to lawful permanent residents status for Special Agricultural Workers); 1182(d)(3) & (5) (parole of otherwise inadmissible persons into the United States); 1184a (special provision for Philippine Traders); 1187 (Visa Waiver Program for temporary admission of nonimmigrants from certain countries); 1229b(b) (cancellation of removal and adjustment of status for certain nonpermanent residents—including undocumented persons and victims of domestic violence); 1231(b)(3) (restriction/withholding of removal); 1254a (temporary protected status for individuals from certain countries); 1255a (adjustment to lawful permanent resident status for certain entrants (old amnesty); 1259 (registration—for entrants prior to January 1, 1972); 1289 (codifying Jay Treaty Rights of Canadian Native Americans) 1255 (general adjustment to lawful permanent resident status provisions); 1257 (adjustment for prior diplomats and consulate workers under Section 13 of the 1957 Act).

from a temporary status or even from unauthorized presence.<sup>22</sup> Many of the applications for lawful permanent resident status require individuals to go through preliminary stages, some of which afford the individual employment authorization pending the adjudication of the application, and others which initially grant a temporary visa rather than a permanent visa. Moreover, many of these processes stretch out for a period of several years, with some family visa petitions that include waiting lists ranging from four to twenty-two years.<sup>23</sup>

In addition, certain immigrant visas provide status for individuals who have already been ordered removed or would otherwise be found inadmissible. *See, e.g.*, 8 U.S.C. § 1101(a)(15)(U) (establishing “U” visas for victims of certain enumerated crimes including peonage and involuntary servitude) and 8 U.S.C. § 1184(p) (providing waivers for grounds of inadmissibility for “U” visa applicants).<sup>24</sup>

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<sup>22</sup> 2008 Yearbook of Immigration Statistics, US Department of Homeland Security, Office of Immigration Statistics, p. 18. Another 466,000 obtained their permanent residence status from abroad. *Id.* at 19.

<sup>23</sup> *See* U.S. Department of State Visa Bulletin: [http://travel.state.gov/visa/frvi/bulletin/bulletin\\_1360.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html). Given the complex nature of immigration proceedings and the fact that processes may drag on for years, many individuals are not clearly able to identify their own immigration status. *See Castro-O’Ryan v. U.S. Dep’t of Immigration and Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1988) (“The maze of immigration statutes and amendments is notoriously complicated and has been described as second only to the Internal Revenue Code in complexity.”)

<sup>24</sup> Other individuals who do not have any current status but are *prima facie* eligible for applications like Restriction/Withholding of Removal under 8 U.S.C. § 1231(b)(3) and Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents under 8 U.S.C. § 1229b(b)(1) are not even eligible to apply until removal proceedings are initiated.

The record in this case reflects the inherent difficulties courts face when attempting to ascertain a non-citizen's status with any meaningful precision. Most notably, on cross-examination defense counsel elicited contradictory testimony that Mr. Salas had both a permanent residence card *and* was illegally present in the United States. RP 63 (5/22/06). This questioning demonstrates the reality that most attorneys, let alone juries, have little or no understanding of the basic concepts of immigration law. Even if Mr. Salas's current immigration status could be reliably determined at trial, this does not mean that his status could be predicted for any point in the future given the shifting sands of immigration law. The proposed standard opens up a minefield which trial courts are ill-equipped to negotiate and brings into play highly speculative evidence which is more likely to confuse and prejudice juries, rather than assist with rendering appropriate damage awards.

**2. Allowing immigration status evidence leads to racial profiling and stereotyping.**

Finally, allowing inquiry into immigration status encourages the racial and ethnic profiling of litigants. Only persons of color, or those with foreign-sounding names or accents, will be targeted for immigration-related questions. In another recent decision from the Eastern District of Washington, Chief Judge Whaley, wrote:

The Court is also concerned that immigration status is an issue in this case only as a result of an unspoken perception that persons with Hispanic last names are not eligible for work. The Court declines to perpetuate any stereotyping of the local Hispanic population by assuming that persons with Hispanic surnames who applied for work with Global are not eligible to work.

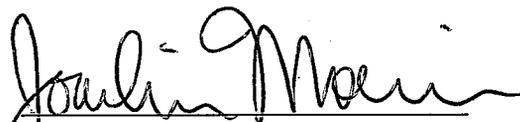
*Perez-Farias v. Global Horizons, Inc.*, 2009 WL 1011180, 18 -19

(E.D.Wash. 2009). The Appellate Court's standard, while well-intentioned, would prove unmanageable and promote undesirable results.

### Conclusion

Every day, immigrant workers labor in some of the most dangerous jobs in our country. Every day, some of them are injured or killed on the job. The courthouse doors must remain open to their claims for fair compensation for injuries. In order to ensure that tortfeasors are deterred and safe workplaces are a reality for all, we urge this Court to disallow the introduction of immigration status evidence in personal injury tort litigation.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of October, 2009.



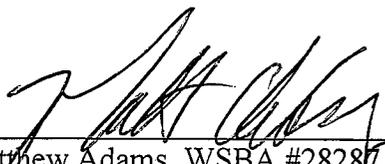
Joachim Morrison, WSBA #23094  
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Counsel for *Amicus* Centro de  
Ayuda Solidaria a los Amigos  
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Rebecca Smith, WSBA # 12834  
The National Employment Law Project  
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Maria Lorena González,  
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Counsel for *Amicus* Latina/o Bar  
Association of Washington



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Matthew Adams, WSBA #28287  
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Counsel for *Amicus* Northwest  
Immigrants Rights Project

**CERTIFICATE OF SERVICE**

I certify that I mailed, or caused to be mailed, a copy of the foregoing BRIEF OF AMICI CURIAE postage prepaid, via U.S. mail on the \_\_\_\_ day of October, 2009, to the following counsel of record at the following addresses:

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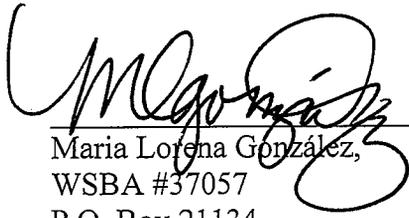
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Signed this \_\_\_\_ day of October, 2009.

---

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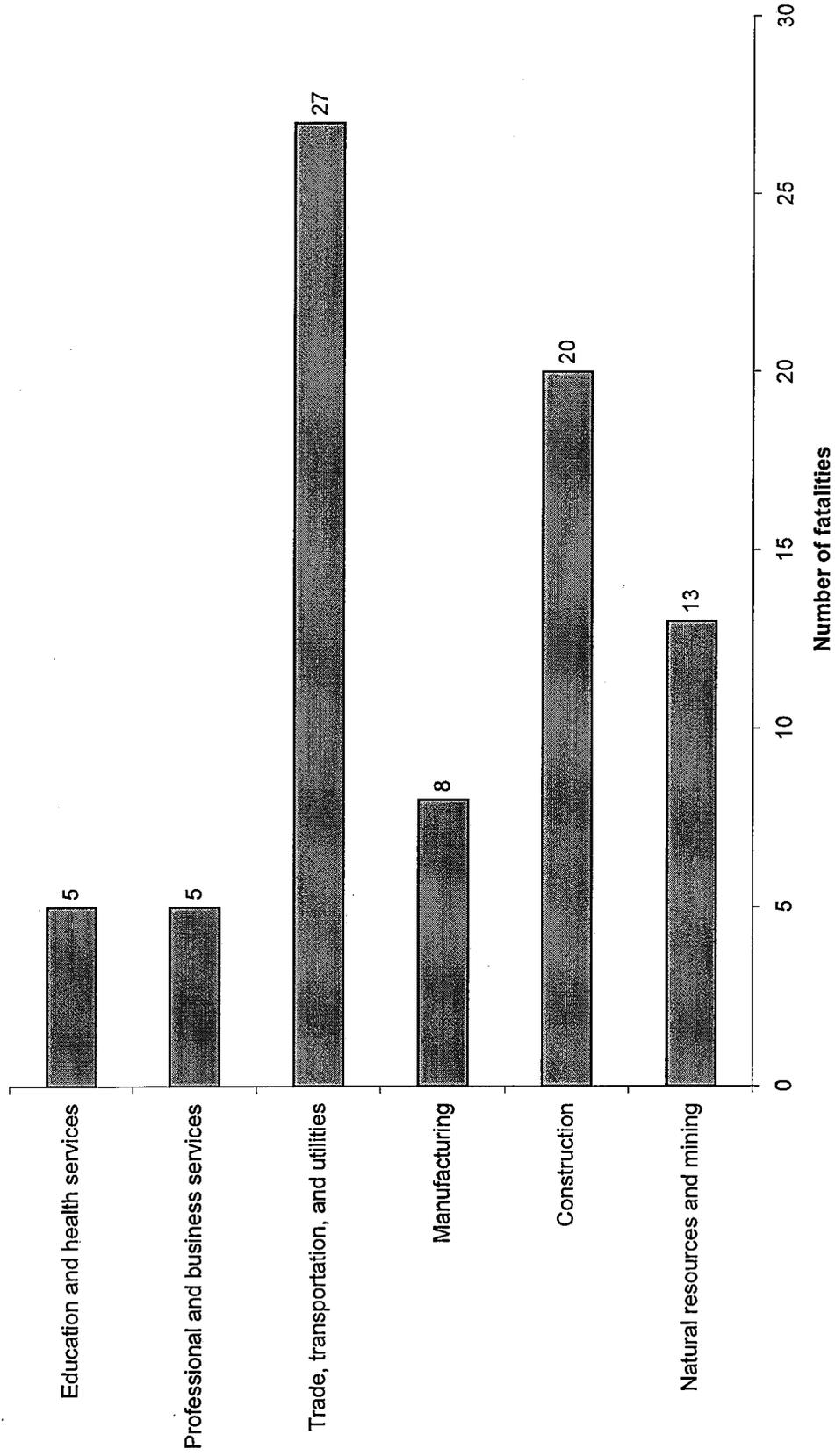
Maria Lorena González  
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Seattle, WA 98111

Signed this 16<sup>th</sup> day of October, 2009.

  
Joachim Morrison, WSBA #23094  
Counsel for *Amicus* Centro de Ayuda Solidaria a  
los Amigos (CASA) Latina

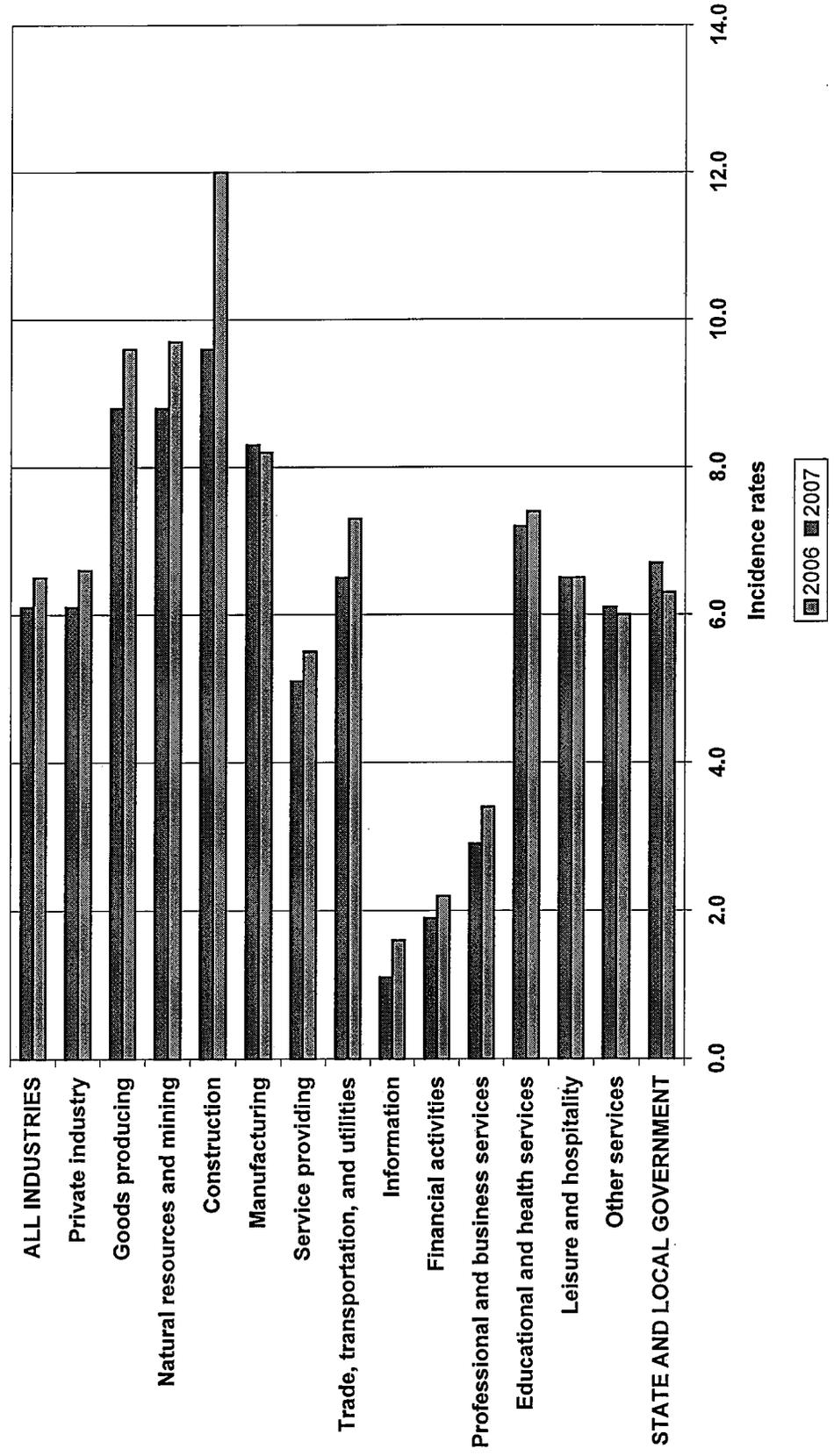
# **APPENDIX 1**

**Fatal work injuries in selected industries, 2007, Washington, all  
ownerships (88 Total fatalities)**



## **APPENDIX 2**

**Incidence rates per 100 full-time workers for total nonfatal occupational injuries and illnesses by major industry sector, Washington, 2006 & 2007**

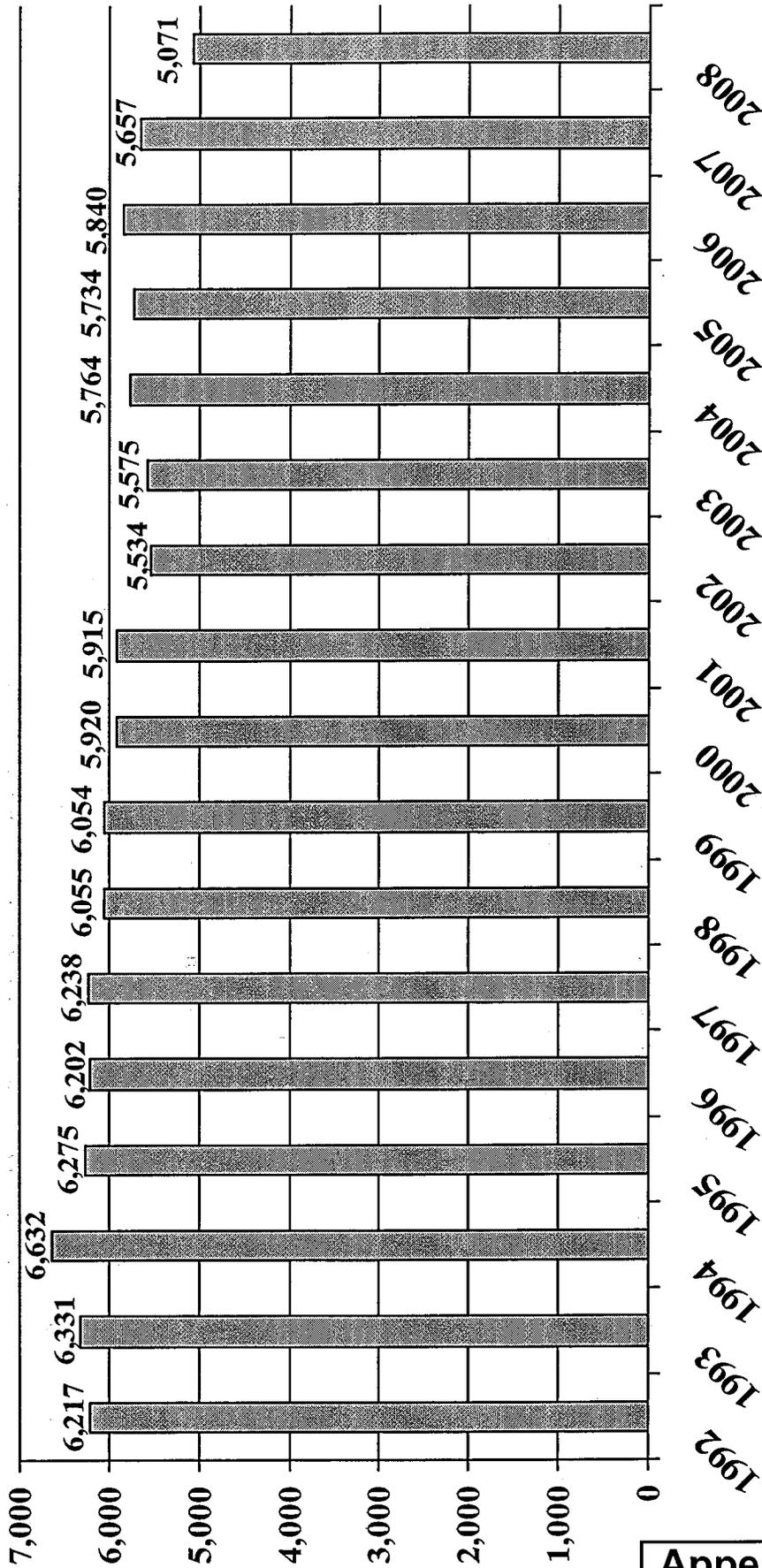


**Appendix 2**

SOURCE: Bureau of Labor Statistics, U.S. Department of Labor, Survey of Occupational Injuries and Illnesses in cooperation with participating State agencies.

## **APPENDIX 3**

# Number of fatal work injuries, 1992-2008\*



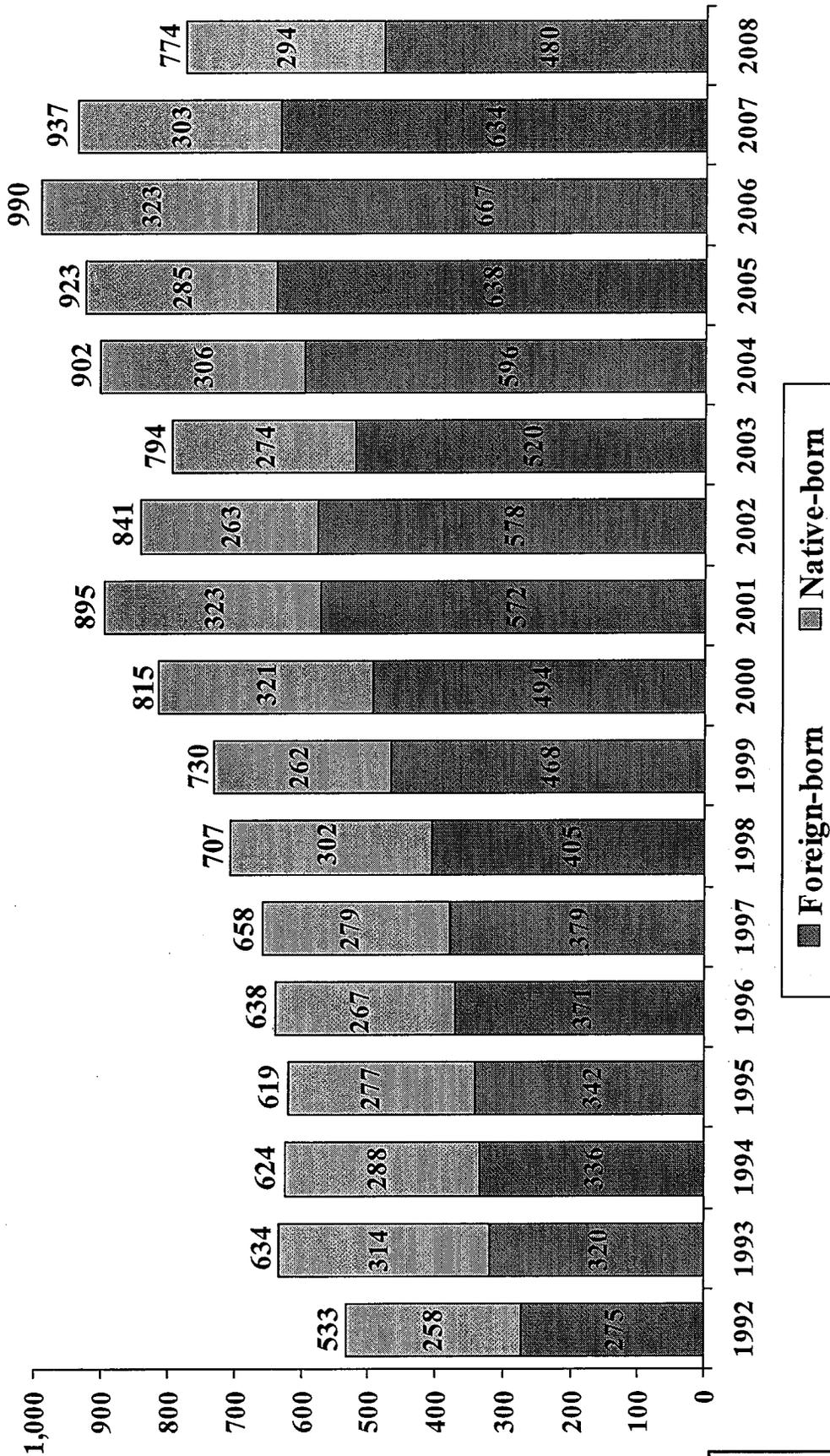
The 2008 preliminary count of 5,071 work-related fatalities represented a 10 percent decrease from the revised total of 5,657 fatal work injuries reported for 2007.

## Appendix 3

\*Data for 2008 are preliminary. Data for prior years are revised and final.  
 NOTE: Data from 2001 exclude fatalities resulting from the September 11 terrorist attacks.  
 SOURCE: U.S. Bureau of Labor Statistics, U.S. Department of Labor, 2009.

## **APPENDIX 4**

# Number of fatal work injuries involving Hispanic or Latino workers, 1992-2008\*



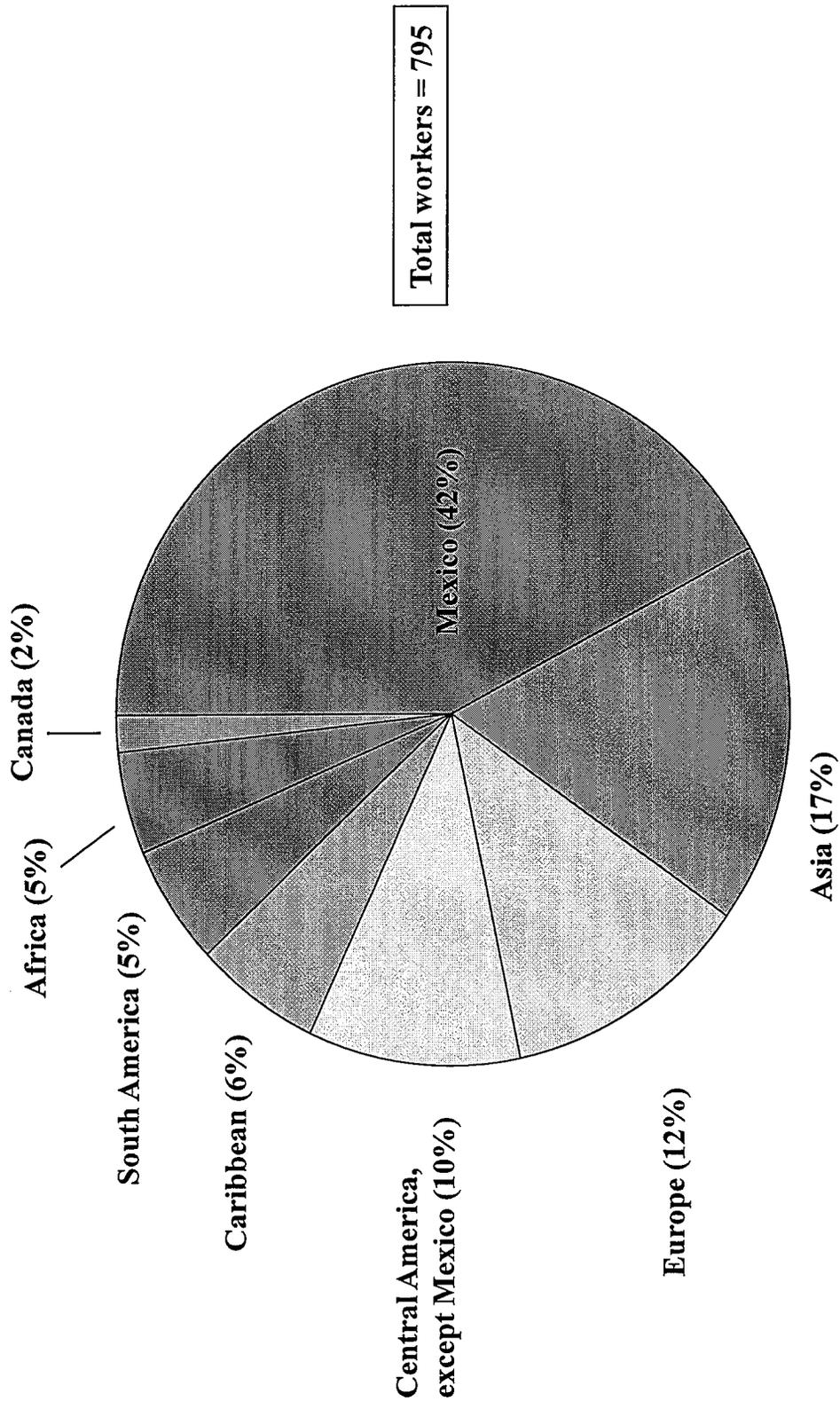
Fatal work injuries involving Hispanic or Latino workers continued to decrease in 2008 after reaching a series high in 2006. About three-fifths of fatally-injured Hispanic or Latino workers in 2008 were born outside of the United States.

\*Data for 2008 are preliminary. Data for prior years are revised and final.  
 NOTE: Data from 2001 exclude fatalities resulting from the September 11 terrorist attacks.  
 SOURCE: U.S. Bureau of Labor Statistics, U.S. Department of Labor, 2009.

## Appendix 4

## **APPENDIX 5**

# Fatal occupational injuries to foreign-born workers, by region of birth, 2008\*



Workers born in Mexico accounted for the largest portion (42 percent) of foreign-born workers who died at work in the United States in 2008.

## Appendix 5

\*Data for 2008 are preliminary.  
 NOTE: Percentages may not add to totals because of rounding.  
 SOURCE: U.S. Bureau of Labor Statistics, U.S. Department of Labor, 2009.

## **APPENDIX 6**



STATE OF WASHINGTON

## HUMAN RIGHTS COMMISSION

711 S. Capitol Way, Suite 402 • PO Box 42490 • Olympia, WA 98504-2490

(360) 753-6770 • Fax (360) 586-2282

<http://www.wa.gov/hrc>

October 7, 2002

Antonio Ginatta  
Executive Director  
WA ST Commission on Hispanic Affairs  
P.O. Box 40924  
Olympia, WA 98504-0924

RECEIVED  
NOV 13 2002  
Commission on Hispanic Affairs

Dear Tony:

I am responding to your letter of September 23, 2002 regarding the application of the U.S. Supreme Court's decision in Hoffman Plastics v. NLRB to the Washington State Law Against Discrimination (RCW 49.60). This is an opinion of the Executive Director of the Washington State Human Rights Commission (the Commission) as provided by WAC 162-04-070.

The Hoffman decision held that federal immigration policy foreclosed the NLRB from awarding back pay to an undocumented alien who had never been legally authorized to work in the United States. The court based its opinion on reconciling a conflict between federal immigration policy as expressed in the Immigration Reform and Control Act of 1986 and the National Labor Relations Act. The Commission does not view the Hoffman case as restricting its authority to seek back pay as a remedy for acts of discrimination in violation of state law.

RCW 49.60.250 clearly provides that remedies in an unfair practice case can include hiring or reinstating an employee, with or without back pay, or such other action as will effectuate the purposes of the chapter. The Law Against Discrimination is concerned with the elimination and prevention of discrimination on the basis of race, creed, color, national origin, familial status, sex, marital status, age and disability. It is the intent of the Commission to continue to seek awards of back pay in cases when merited, without regard to the immigration status of the Complainant.

I trust this opinion answer the concerns you raised. If you have questions or wish to discuss this matter further, you may call me at 360/753-2558.

Very truly yours,

A handwritten signature in cursive script that reads "Sue Jordan".

Susan (Sue) J. Jordan  
Executive Director

**Appendix 6**

## **APPENDIX 7**



STATE OF WASHINGTON  
DEPARTMENT OF LABOR AND INDUSTRIES  
PO Box 44000 • Olympia, Washington 98504-4000

December 4, 2002

Timothy D. Ford, Legal Counsel  
Building Industry Association of Washington  
P.O. Box 1909  
Olympia, Washington 98507

Dear Mr. Ford:

Thank you for your letter concerning undocumented workers. You asked for the department's current policy on awarding claims and benefits to them. You also asked what the department is doing to prevent undocumented workers from receiving benefits to which they are "not entitled."

Your letter suggests that an employer can hire an undocumented worker, benefit from that person's work, deduct money from that worker's paychecks to pay industrial insurance premiums, and then have the department deny essential medical and disability benefits under the Act when that worker is injured or killed in the course of their employment. The department respectfully disagrees.

Washington's Industrial Insurance Act is designed to provide benefits to workers injured in the course of their employment, without regard to fault. (RCW 51.04.010). The term "worker" refers to "every person in this state who is engaged in the employment of an employer under this title, whether by way of manual labor or otherwise in the course of his or her employment." (RCW 51.08.180). All employers and employees covered by the State Fund pay premiums based on the industry involved and the employer's accident experience. Undocumented workers pay into this system through payroll deduction at the same rate as naturalized citizens and properly documented workers.

Washington's Industrial Insurance Act must be "liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment. (RCW 51.12.010). The Washington State Supreme Court has repeatedly held that, when interpreting the Act, all doubts must be resolved in favor of the injured worker. [*Clauson v. Department of Labor & Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996); *Kilpatrick v. Department of Labor & Indus.*, 125 Wn.2d 222, 230, 883 P.2d 1370 (1994); *Dennis v. Department of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1993)]. It is within these principles that the department administers the Act.

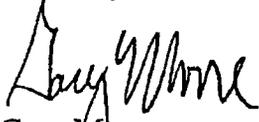
Timothy D. Ford  
December 4, 2002  
Page 2

The department does not discriminate against *any* industrially injured or ill workers. The department does not investigate the immigration status of workers in deciding whether to allow a claim, nor is there any law requiring such action. In carrying out its statutory obligations, the department provides the benefits set forth in Washington's Industrial Insurance Act to each and every worker injured in covered employment, regardless of the worker's race, ethnic background or citizenship.

You also suggest that, as a result of the department allowing claims of undocumented workers, builders pay increased premiums. Based on this assumption, you then inquire what the department's policy is for refunding these "increased premiums?" First, the department does not agree with your underlying premise. Second, even if it were correct, there is no legal authority that would permit such a refund.

Thank you for the opportunity to respond to your concerns.

Sincerely,



Gary Moore  
Director

## **APPENDIX 8**

**H**Only the Westlaw citation is currently available.

United States District Court,  
E.D. Washington.  
David SANDOVAL, Raul Coria, and all other similarly situated persons, Plaintiffs,  
v.  
RIZZUTI FARMS, LTD., and John R. Rizzuti and Jane Doe Rizzuti, a marital community, De-  
fendants.  
No. CV-07-3076-EFS.

July 15, 2009.

Candelaria Murillo, Tami L. Nida Arntzen, Columbia Legal Services, Kennewick, WA, Daniel G. Ford, Columbia Legal Services, Michael C. Subit, Sean M. Phelan, Frank Freed Subit & Thomas LLP, Seattle, WA, for Plaintiffs.

Ryan Mark Edgley, Edgley Law Office PS, Yakima, WA, for Defendants.

### ORDER GRANTING PLAINTIFFS' MOTION FOR RECONSIDERATION

EDWARD F. SHEA, District Judge.

\*1 In April 2009, the Court granted in part Plaintiffs' protective order request, finding that Plaintiffs' immigration information is not discoverable unless and until Plaintiffs' backpay claims survive summary judgment. (Ct.Rec.78.) Plaintiffs now ask the Court to reconsider its ruling because allowing Defendants to inquire into Plaintiffs' immigration status would be prejudicial and unduly burdensome. (Ct.Rec.83.) Although reconsideration is highly unusual, it is appropriate if the district court is presented with 1) newly-discovered evidence, 2) an intervening change in controlling law, or 3) evidence that its decision was manifestly unjust. Navajo Nation v. Norris, 331 F.3d 1041, 1046 (9th Cir.2003); 389 Orange St. Partners v. Arnold, 179 F.3d 656, 665 (9th Cir.1999). After review, the Court agrees with Plaintiffs-preventing manifest injustice necessitates barring discovery into Plaintiffs' immigration status. Plaintiffs' motion is therefore granted for the reasons set forth below.

#### I. Discussion

On August 31, 2007, Plaintiffs filed a class-action complaint alleging that Defendants violated

**Appendix 8**

several federal and state laws protecting basic worker rights. (Ct.Rec.1.) During discovery, Defendants sought to obtain information related to Plaintiffs' immigration status. Unwilling to provide this information, Plaintiffs filed a protective order request that was granted in part; namely, the Court prohibited discovery into Plaintiffs' immigration status unless and until Plaintiffs' backpay<sup>FN1</sup> claims survived summary judgment. Plaintiffs promptly moved for reconsideration.

FN1. "Backpay" is a type of damages award that an employee or ex-employee is entitled to when an employer unlawfully prevents that individual from working, inhibiting his ability to earn wages or benefits. Already earned wages that have not been collected are referred to as "uncompensated wages."

After reviewing Plaintiffs' reconsideration request, the Court directed the parties to file supplemental briefing on three (3) issues: 1) whether the Supreme Court's decision in Hoffman Plastic Compounds, Inc. v. National Labor Relations Board ("Hoffman"), 535 U.S. 137, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002), applies here; 2) whether Rivera v. NIBCO, Inc., 364 F.3d 1057 (9th Cir.2004), applies here; and 3) the relevance of the distinction between backpay and uncompensated wages. Each issue will be addressed in turn.

#### **A. Hoffman's Applicability**

Washington's Little-Norris LaGuardia Act (the Act), RCW 49.32.020, is a private right of action that protects non-unionized workers engaging in labor negotiations from employer interference. In 1995, the Washington Supreme Court expressly acknowledged that the Act is patterned after and contains language similar to the National Labor Relations Act (NLRA) and therefore concluded that federal authority is persuasive when interpreting the Act. Bravo v. The Dolsen Cos., 125 Wash.2d 745, 754-55, 888 P.2d 147 (1995). Because the Washington Supreme Court finds U.S. Supreme Court cases interpreting the NLRA relevant when analyzing the Act, so too does this Court.<sup>FN2</sup>

FN2. See Hemmings v. Tidyman's, Inc., 285 F.3d 1174, 1203 (9th Cir.2002) (finding that, when interpreting state law, federal courts are bound by pronouncements of the state's highest court).

In 2002, the U.S. Supreme Court considered a case arising under the NLRA and concluded that the worker at issue, an undocumented alien who had never been legally authorized to work in the United States, was not eligible for backpay because permitting such a claim ran contrary to the Immigration Control and Reform Act of 1986. Hoffman, 535 U.S. at 151. Defendants argue that Hoffman applies here and authorizes discovery into Plaintiffs' immigration status because Defendants need to confirm that Plaintiffs are lawfully entitled to their claimed backpay under the Act. (Ct.Rec.109.) Plaintiffs, however, distinguish Hoffman on the basis that it concerned a federal law (NLRA) with different enforcement mechanisms than the state law at issue here (the Act).

(Ct.Rec.102.)

\*2 After review, the Court finds that while the Act was modeled after the NLRA, making *Hoffman* informative, the Act is nevertheless distinguishable from the NLRA for three (3) reasons: first, the Act is not bound by the same constraints as the NLRA, *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985) (discussing a state's ability to use its police powers to protect workers); second, the Act is enforced via private causes of action whereas the NLRA is enforced primarily through the actions of the National Labor Relations Board (NLRB), compare *Krystad v. Alu*, 65 Wash.2d 827, 846, 400 P.2d 72 (1965), with *Hoffman*, 535 U.S. at 151; and third, the Act provides a broad range of remedies to deter employer misconduct, whereas the NLRB's discretion to provide a remedy is limited by other federal policies. The Court finds that these distinctions, coupled with the lack of any limitations based on immigration status or citizenship in the plain language of the Act, persuasive in determining that *Hoffman* is inapplicable here.

This ruling is consistent with Washington's long history of providing comprehensive employment protections irrespective of immigration status. See, e.g., *Drinkwitz v. Alliant Techsys., Inc.*, 140 Wash.2d 291, 300, 996 P.2d 582 (2000) (identifying numerous examples of when Washington has exceeded federal employment protections including requiring eight-hour workdays and creating family-leave laws); *Bravo*, 125 Wash.2d at 753, 888 P.2d 147 (refusing to restrict the Act's protection only to unionized employees).

#### **B. *Rivera v. NIBCO, Inc.* Dicta**

In *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir.2004), the Ninth Circuit addressed the issue of whether discovery into Plaintiffs' immigration status should be allowed in a Title VII employment discrimination case. The opinion, which included extensive dicta discussing *Hoffman's* applicability in a Title VII context, distinguished Title VII cases from *Hoffman's* NLRA posture and stated that discovery into immigration status should not be allowed in the early stages of discovery because it chills immigrant-employees' ability to pursue claims against employers for mistreatment. *Id.* at 1064. Plaintiffs argue that *Rivera's* Title VII dicta should control or at least inform the Court's analysis of the Act. The Court finds, however, that *Rivera's* Title VII holding is very narrow and the unnecessary dicta contained therein is inapplicable.

#### **C. Relevance of Immigration Status to Backpay Claims**

Plaintiffs assert that the distinction between backpay and uncompensated wages is irrelevant. (Ct.Rec.102.) Defendants contend that the distinction is absolutely relevant because lawful immigration status is a condition precedent to eligibility for a backpay award, while immigration status is irrelevant when a worker is pursuing claims for uncompensated wages.

The Court finds no practical distinction between backpay and uncompensated wages. Both depend on proof of hours that were worked or would have been worked but for the employer's violative conduct. The Act permits recovery of either or both without regard to immigration status. *See, e.g.*, Letter from Susan J. Jordan, Executive Director, State of Washington Human Rights Commission (Oct. 7, 2002) (on file with recipient) (stating, after the *Hoffman* decision, that the Human Rights Commission will continue to enforce laws against discrimination without regard to the immigration status of the complainant); Statement of Gary Moore, Director, State of Washington Department of Labor and Industries (May 21, 2002) (noting that all workers are entitled to basic employment benefits regardless of their immigration status).

### C. Reconsideration

\*3 In sum, the Court finds *Hoffman* inapplicable, *Rivera* unhelpful, and that no practical distinction exists for the purposes of the present issue between backpay and uncompensated wages. Accordingly, in order to prevent manifest injustice and a chilling of Plaintiffs' private right of action under the Act, discovery regarding immigration status is barred.

## II. Conclusion

Accordingly, **IT IS HEREBY ORDERED:** Plaintiffs' Motion for Reconsideration (Ct.Rec.82 ) is **GRANTED.** Discovery into Plaintiffs' immigration status is barred.

**IT IS SO ORDERED.** The District Court Executive is directed to enter this Order and to provide copies to counsel.

E.D.Wash., 2009.  
Sandoval v. Rizzuti Farms, Ltd.  
Slip Copy, 2009 WL 2058145 (E.D.Wash.)

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## **APPENDIX 9**

Slip Copy, 2009 WL 1011180 (E.D.Wash.)  
(Cite as: 2009 WL 1011180 (E.D.Wash.))

**H**Only the Westlaw citation is currently available.

United States District Court,  
E.D. Washington.

Jose Guadalupe PEREZ-FARIAS, Jose F. Sanchez, Ricardo Betancourt, and all other similarly situated  
persons, Plaintiffs,

v.

GLOBAL HORIZONS, INC., et al., Defendants.  
No. CV-05-3061-RHW.

April 15, 2009.

Lori A. Jordan Isley, Mirta Laura Contreras, Columbia Legal Services, Yakima, WA, Richard W. Kuhl-  
ing, Paine Hamblen Coffin Brooke & Miller, Spokane, WA, Gregory S. Johnson, Amy Louise Crewd-  
son, Amy Crewdson Law Office, Aberdeen, WA, Joachim Morrison, Columbia Legal Services, Wenat-  
chee, WA, for Plaintiffs.

Gary Edward Lofland, Lofland & Associates, Ryan Mark Edgley, Edgley Law Office PS, Brendan Vic-  
tor Monahan, Stokes Lawrence Velikanje Moore & Shore, Yakima, WA, Matthew S. Gibbs, Los An-  
geles, CA, for Defendants.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

ROBERT H. WHALEY, Chief Judge.

\*1 A bench trial on statutory damages was held in Yakima, Washington on March 3, 2009. Plaintiffs were represented by Lori Isley, Richard Kuhlning, and Joe Morrison. The Grower Defendants were represented by Ryan Edgely and Brendan Monahan. The Global Defendants were represented by Matthew Gibbs and local counsel Gary Lofland.<sup>FN1</sup>

FN1. At the beginning of the proceedings, the Court excused Mr. Lofland's presence at the bench trial.

#### PROCEDURAL BACKGROUND

Plaintiffs filed their class action in May, 2006. On July 28, 2006, Judge Leavitt certified the class and also bifurcated the trial, separating the liability and damages issues. Magistrate Judge Michael Leavitt died before ruling on the substantive motions on liability and damages. Judge Alan McDonald took over

Slip Copy, 2009 WL 1011180 (E.D.Wash.)  
(Cite as: 2009 WL 1011180 (E.D.Wash.))

the case.

On July 11, 2007, Judge McDonald granted Plaintiffs' Motion for Partial Summary Judgment, finding that Defendants violated the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA") and the Washington Farm Labor Contract Act ("FLCA"), and awarding statutory damages under FLCA. None of the Defendants had filed a responsive brief to Plaintiffs' Motion for Partial Summary Judgment. The brief available to Judge McDonald did not cite to relevant Ninth Circuit case law with respect to the awarding of statutory damages. Defendants filed Motions for Reconsideration of Judge McDonald's order alleging excusable neglect as grounds for failing to respond to the Partial Summary Judgment motions. Judge McDonald died before considering the Motions for Reconsideration. This Court ruled on these motions and has handled the case thereafter.

On August 10, 2007, this Court vacated the Judgment with respect to the amount of damages, based on its consideration of relevant Ninth Circuit case law that had not been cited to Judge McDonald (Ct.Rec.597). The Court did not vacate the portion of Judge McDonald's Order that found that Defendant Global committed the alleged violations of the FLCA and the AWPA. Instead, the Court vacated the award of statutory damages in the amount of \$500 per violation per person.

Judge McDonald did not rule on Plaintiffs' claims of racial discrimination and failure to provide work. These claims were tried to a jury in September, 2007. The jury found that Defendant Global Horizons and Defendant Mordechai Orian violated the Farm Labor Contractors Act by failing to employ, or discharging or laying off members of the subclasses, and discriminated against the subclasses because of their race (Ct.Rec.747). The jury awarded \$300,000 in punitive damages to the class and awarded the following damages to the representative Plaintiffs: Ricardo Betancourt: \$5099.50 for lost wages, \$2500.00 for emotional distress; Jose F. Sanchez: \$492.20 for lost wages, \$5,000.00 for emotional distress; Jose Guadalupe Perez-Farias; \$0.00 for lost wages, \$4,000.00 for emotional distress. Judgment was entered on October 23, 2007, consistent with the jury findings.

In March 27, 2009, the Court entered its Findings of Fact and Conclusions of Law on Plaintiffs' Claims Against Grower Defendants (Ct.Rec.863). The Court also addressed the Global Defendants' Post-Trial Motions. The Court upheld the jury verdict with respect to the discrimination claim against Global and Mordechai Orian. The Court held that the evidence was sufficient to uphold the FLCA claims asserted against Global, but found as a matter of law that Mordechai Orian could not be held individually liable for violations of the FLCA.

\*2 On May 23, 2008, the judgment was amended and the Denied Work Subclass definition used was:

U.S. Resident farm workers who claim they were offered employment by Global Horizons to work at Green Acre Farms, Inc. or Valley Fruit Orchards, LLC in 2004, but were not employed by Global Horizons in 2004.

(Ct.Rec.884).<sup>FN2</sup>

Slip Copy, 2009 WL 1011180 (E.D.Wash.)  
(Cite as: 2009 WL 1011180 (E.D.Wash.))

FN2. The judgment was amended to address the concern that the proposed amendment could be read broadly to include farm workers offered work by Global with other employers or in other states and during periods of time other than 2004. Although Global now maintains that the Court did not consider its objections to the proposed amendment, it is clear from the briefing that Global did not object to the amending of the judgment for this purpose. *See* Ct. Rec. 876.

### CLASS DEFINITION

On July 28, 2006, Judge Leavitt granted Plaintiffs' Motion for Class Certification (Ct.Rec.136). Judge Leavitt certified the Denied Work subclass using the following definition.

**U.S. Resident Workers:** All farm workers living in the United States (with the exception of guest workers) who applied, or who may apply in the future, at Global Horizons for agricultural employment in Washington State at Green Acres or Valley Farm.

**Denied Work Subclass:** All farm workers living in the United States (with the exception of guest workers) who applied, or who may apply in the future, at Global Horizons for agricultural employment in Washington State at Green Acres or Valley Farm.

As set forth above, a different Denied Work subclass definition was used at trial. For ease of use, the Court will refer to Judge Leavitt's definition as the Denied Work-Applied subclass and to the definition used at the jury trial as the Denied Work-Offered subclass. The subtle distinction between the two means that anyone who applied is a member of the Denied Work-Applied subclass, while only those Denied Work-Applied subclass members who were offered work are members of the Denied Work-Offered subclass.

In reviewing Plaintiffs' proposed class membership list and corresponding methodology for identifying class members, it appears that the distinction between the two class definitions affects nine potential class members. These nine people were listed on Global's Exhibit A, but were unable to provide any additional information that would indicate that they received a job offer. Plaintiffs ask the Court to presume that these persons were offered work based on the inconsistencies within Global's records.

Neither Defendant objected to the inclusion of these nine persons in the Denied Work-Offered subclass. Because of this, and because of the inconsistencies within Global records, the Court concludes that these nine members should be included in the Denied Work-Offered subclass.

### IDENTIFICATION OF CLASS MEMBERS

#### A. Denied Work Subclass

In support of Plaintiffs' Phase II Memorandum on Class Membership, Injunctive Relief & Damages,

Slip Copy, 2009 WL 1011180 (E.D.Wash.)  
(Cite as: 2009 WL 1011180 (E.D.Wash.))

Plaintiffs submitted Exhibit A, which was Plaintiffs' summarization of Global's Exhibit A. Plaintiffs' Exhibit A included 402 purported Denied Work Subclass members.

The Grower Defendants did not file any objection to Plaintiffs' Exhibit A. The Global Defendants objected to the admission of Plaintiffs' Exhibit A. In reply to the Global Defendants' objections, Plaintiffs clarified which exhibits they intended to seek admission. Plaintiffs indicated that they no longer intended to seek the admission of the summary charts and would use the summary Exhibits for demonstrative purposes only. Plaintiffs did submit Plaintiffs' Exhibit A-Amended. In reviewing the data, Plaintiffs were able to identify duplicates, as well as identify additional class members. Exhibit A-Amended lists 399 Denied Work Subclass members.

\*3 At the hearing, Global's only objections to Exhibit A-Amended related to the accuracy of some of the social security numbers. The Court finds Exhibit A-Amended reliable and adopts Plaintiffs' identification of class members contained in Plaintiffs' Exhibit A-Amended. In Plaintiffs' Amended Exhibit T, Plaintiffs indicate there are 397 members of the Denied Work subclass. This number does not include those subclass members who opted out of damages. The Court will award damages based on 397 Denied Work Subclass members.

#### **B. Green Acre Subclass**

In support of Plaintiffs' Phase II Memorandum on Class Membership, Injunctive Relief & Damages, Plaintiffs submitted Exhibit K, which is a summary that contains a list of purported Green Acre subclass members and the criteria used to determine class membership. Plaintiffs relied on Global's Exhibit B, Exhibit 50, wage and hour records, crew lists, and other miscellaneous documents to establish class membership.

The Defendants did not lodge specific objections to Plaintiffs' list. The Court concludes that the individuals listed in Plaintiffs' Exhibit K are presumptively members of the Green Acre Subclass. In Plaintiffs' Amended Exhibit T, Plaintiffs indicate there are 107 members of the Green Acre Subclass. The Court will award damages based on 107 members of the Green Acre Subclass.

#### **C. Valley Fruit Subclass**

In support of Plaintiffs' Phase II Memorandum on Class Membership, Injunctive Relief & Damages, Plaintiffs submitted Exhibit P, which is a summary that contains a list of purported Valley Fruit Subclass members and the criteria used to determine class membership. Plaintiffs relied on Global's Exhibit B, Exhibit 50, Trial Exhibit 38, wage and hour records, and timesheets to establish class membership.

The Defendants did not lodge specific objections to Plaintiffs' list. The Court concludes that the individuals listed in Plaintiffs' Exhibit P are presumptively members of the Green Acre Subclass. In Plaintiffs' Amended Exhibit T, Plaintiffs indicate there are 146 members of the Valley Fruit Subclass. The Court will award damages based on 146 members of the Valley Fruit Subclass.

Slip Copy, 2009 WL 1011180 (E.D.Wash.)  
(Cite as: 2009 WL 1011180 (E.D.Wash.))

### STATUTORY DAMAGES

In its Order Vacating Judgment, the Court concluded that under the clear language of Wash. Rev.Code § 19.30.170(2), the Court has discretion to decide whether to award damages, either actual or statutory, or other equitable relief, or to decide not to award damages even if a violation has occurred, and significantly, the Court has discretion to award statutory damages of less than \$500 per violation.

In determining the appropriate amount of statutory damages, the Court indicated that it would look to the Ninth Circuit case of *Six(6) Mexican Workers* for guidance.<sup>FN3</sup> *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir.1990). In that case, the Circuit instructed district courts to consider the following factors in determining whether a particular award serves the statute's deterrence and compensation objectives: (1) the amount of award to each plaintiff; (2) the total award; (3) the nature and persistence of the violations; (4) the extent of the defendant's culpability; (5) damage awards in similar cases; (6) the substantive or technical nature of the violations; and (7) the circumstances of each case. *Id.* at 1309.

FN3. The *Six (6) Mexican Workers* case addressed the federal Farm Labor Contractor Registration Act (FLCRA). Because § 19.30.170(2) has never been interpreted by an appellate court in the state of Washington, the parties agreed that it is proper for this Court to look to federal court decisions interpreting the analogous provision of AWP or FLCRA. See also *Escobar v. Baker*, 814 F.Supp. 1491 (W.D.Wash.1993).

\*4 FLCA and AWP are two statutes that attempt to address the same problem, namely the protection of farmers and farm workers against exploitation by farm labor contractors by requiring the disclosure of terms and conditions of employment and through registration of contractors and regulation of their activities. Wash. Rev.Code § 19.30 *et seq*; 7 U.S.C. § 2041. Although the authority applying the federal statutes is instructive, it is not binding on this Court. Notably, there are significant differences between FLCA and AWP. First, AWP requires that before awarding any damages, the Court must find that the defendant intentionally violated the provisions. 29 U.S.C. § 1854(c).<sup>FN4</sup> Second, AWP limits damages for multiple infractions of a single provision to only one violation for purposes of determining the amount of statutory damages. Finally, if a class action is pursued, damages are capped at \$500,000.<sup>FN5</sup>

FN4. U.S.C. § 1854(c) provides:

If the court finds that the respondent has intentionally violated any provision of this chapter or any regulation under this chapter, it may award damages up to and including an amount equal to the amount of actual damages, or statutory damages of up to \$500 per plaintiff per violation or other equitable relief, except that (A) multiple infractions of a single provision of this chapter or of regulations under this chapter shall constitute only one violation for purposes of determining the amount of statutory damages due a plaintiff; and (B) if such complaint is certified as a class action, the court shall award no more than the lesser of up to \$500 per plaintiff per

Slip Copy, 2009 WL 1011180 (E.D.Wash.)  
 (Cite as: 2009 WL 1011180 (E.D.Wash.))

violation, or up to \$500,000 or other equitable relief.

(2) In determining the amount of damages to be awarded under paragraph (1), the court is authorized to consider whether an attempt was made to resolve the issues in dispute before the resort to litigation.

FN5. Additionally, although other circuits have concluded that statutory damages under AWPAs are punitive in nature, the Ninth Circuit has specifically declined to permit the imposition of a “penalty disproportionate to the offense.” *Six Mexican Workers*, 904 F.2d 1301, 1309 (9th Cir.1990); *Alvarez v. Longboy*, 697 F.2d 1333, 1320 (9th Cir.1983). It is not clear whether the Washington legislature intended statutory damages under FLCRA to be punitive. Nevertheless, as discussed below, Plaintiffs’ interpretation of section 19.30.170(2) would necessarily result in a punitive award because the amount of damages would have no relationship to the harm caused by the wrongful conduct.

There is little Ninth Circuit precedent that has addressed the awarding of statutory damages under AWPAs or FLCRA. Notably, although one of the factors the Court should consider is whether the violation is technical or substantive in nature, no court has attempted to define or explain these terms.

Courts have recognized, however, that technical violations should result in less damages, whereas substantive violations have been awarded greater amounts. The Seventh Circuit, in *De La Fuente v. Stokely-Van Camp, Inc.*, concluded that the failure to post a written statement of the terms and conditions of employment, and the failure to give the workers clearance orders in Spanish were technical violations of FLCRA. 713 F.2d 225, 239-40 (7th Cir.1983). Recently, Judge Sharp of the District Court of Northern Indiana awarded a total of \$16,950 to four plaintiffs and two minor children. *See Martinez v. Mendoza*, 595 F.Supp.2d 923, 928 (N.D.Ind.2009). In that case, it appears that Judge Sharp awarded \$100 for each technical violation per plaintiff and \$500 per plaintiff for those violations that directly and adversely affected the plaintiffs. For instance, he awarded \$100 per plaintiff per violation of 29 U.S.C. § 1811(a) (failure to register); § 1821(b) (failure to provide written disclosures); § 1821(c) (failure to post in conspicuous place the rights and protections afforded workers under the AWPAs); § 1821(d) (failure to post requirements imposed upon housing providers); § 1821(e) (failure to provide records); § 1822(c) (violation of terms of working arrangement); § 1843 (failure to provide written statement regarding working conditions); § 1823(b)(1) (failure to post certificate). The court awarded \$500 per plaintiff per violation of 29 U.S.C. § 1821(d)(1) (failure to keep records); § 1821(d)(2) (failure to provide itemized written pay statements); § 1821(f) (knowingly provide false or misleading information); § 1821(a) (safety and health of housing); and § 1841(b) (vehicle / transportation safety).

Based on its review of the case law, the Court defines a technical violation as conduct that violates the plain language of the statute, but does not necessarily result in actual or specific harm to the worker. Substantive violations are conduct that violates the plain language of the statute and results in specific harm to the worker.

Slip Copy, 2009 WL 1011180 (E.D.Wash.)  
(Cite as: 2009 WL 1011180 (E.D.Wash.))

\*5 Plaintiffs initially argued to Judge McDonald that statutory damages under FLCA are mandatory, and courts must award \$500 per class member per violation. As noted, no brief in opposition was filed. Based on Plaintiffs' briefing, Judge McDonald awarded \$1,857,000.00 in statutory damages under FLCA. Plaintiffs now ask the Court to exercise its discretion and award statutory damages in the amount of \$500 per class member per violation for a total award of \$1,998,500.00. *See* Pl.Ex. T (Amended).

Plaintiffs' primary justification for the large award is its insistence that such an award is necessary to punish and deter future violations. At the hearing, the Court told the parties that an award of \$500 per class member per violation may violate due process. The Court recognizes that the state of Washington possesses discretion over the imposition of statutory damages; nevertheless, any damage award must meet both procedural and substantive constitutional requirements. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003). In the world of punitive damages, where the goals are punishment and deterrence, the award of damages should be reasonably predictable in its severity. *Exxon Shipping Co. v. Baker*, --- U.S. ---, ---, 128 S.Ct. 2605, 2627, 171 L.Ed.2d 570 (2008) (“The common sense of justice would surely bar penalties that reasonable people would think excessive for the harm caused in the circumstances.”); *State Farm*, 538 U.S. at 416 (reasoning that “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.”). Moreover, it is recognized that while punitive damages may serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding. *Id.* at 417.

Recently, the Ninth Circuit reviewed an award of punitive damages and made the following observations. *See* *Southern Union Company v. James M. Irvin*, 2009 WL 792475 (9th Cir. Mar.27, 2009). First, due process “prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.” *Id.* at \*2. Second, the objective of punitive damages is deterrence and punishment, without being unreasonable and disproportionate. *Id.* Finally, the Circuit noted that determining the constitutional limits with respect to punitive damages will vary from case to case. *Id.* at \*3. “Determining that limit is an art, not a science; no mathematical formula controls; no single asymptote defines the limit for all cases.” *Id.*

The Court believes it must consider these due process concerns when determining the appropriate amount of statutory damages under FLCA. In doing so, the Court will consider (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the statutory damages award; and (3) the difference between the statutory damages authorized by FLCA and the civil penalties authorized or imposed in comparable cases. *Id.*

\*6 The Court is also convinced that these same due process concerns reinforce the Court's interpretation that section 19.30.170(2) provides the Court with discretion to award no statutory damages, or to award less than \$500 in statutory damages for each violation that was found by Judge McDonald. For instance, Global put its address and phone number of the paycheck that was given to its employees, but did not place its name, address, and phone number on the detached pay stub. Plaintiffs are seeking over \$126,000.00 in statutory damages for Global's failure to put its name and address on the pay stub, even

Slip Copy, 2009 WL 1011180 (E.D.Wash.)  
(Cite as: 2009 WL 1011180 (E.D.Wash.))

when no class member complained or was prejudiced by this omission. Plaintiffs are seeking over \$225,000.00 in statutory damages for Global's failure to explicitly provide production standards that in all practicality would have been technically useless given that production standards change daily based on wide variety of factors that are unique to the orchard industry. These violations are technical violations and are in no way proportional to the harm that the Washington statute intended to prevent. To say that the Court has absolutely no discretion but to award such exorbitant amounts of statutory damages would violate all notions of fairness inherent in our judicial system.

This case was preceded by an investigation by the Washington Department of Labor that ultimately resulted in a Settlement Agreement between the state of Washington, the Global Defendants and the Grower Defendants. As part of the settlement process, Global admitted to violating Washington state and federal laws. (Ct.Rec.467-3, Ex. G). The state of Washington assessed \$10,250.00 in penalties and \$216,650.08 in wage assessments (Ct.Rec.1081-2).<sup>FN6</sup> Plaintiffs' complaint followed the State's investigation, alleging many of the same violations of state law. The Court finds it significant that the state of Washington has vindicated the public's interest in deterring the wrongful conduct that occurred in 2004. The investigation produced a significant record that was relied upon by Plaintiffs in developing their case.

FN6. On April 9, 2009, the Global Defendants requested the Court to take judicial notice of the June 3, 2005 letter from the Washington Department of Labor and Industries that was relied upon by Mr. Gibbs during his argument at the damages hearing (Ct.Rec.1081-1). Plaintiffs objected to Defendants' request for judicial notice (Ct.Rec.1082). Although Mr. Gibbs referred to this letter in his argument at the hearing, Plaintiffs did not object at that time. Therefore, any objection to the use of the letter is waived. Additionally, this letter was a culmination of an investigation conducted by the Department of Labor and Industries. Documents from this investigation were relied upon heavily by Plaintiffs in support of their summary judgment motions and at the trial on liability. Notably, this letter was included in Plaintiffs' Exhibits submitted to the Court in anticipation for the jury trial on liability. *See* Pl. Trial Ex. 10. Thus, it has been part of the Court's record since September, 2007. Moreover, in their opposition, Plaintiffs argue that the Court should limit judicial notice to the fact that penalties were assessed for violations. As set forth below, the Court is relying on the 2005 letter for that reason. Finally, Plaintiffs are not disputing its authenticity, accuracy, or relevance of the letter. For these reasons, the Court believes it is appropriate to take judicial notice of the 2005 letter.

The Court notes that with respect to the violation regarding the inadequate pay statements, the state of Washington assessed a \$1000.00 penalty, yet Plaintiffs are seeking \$500.00 for each member of the Green Acre and Valley Fruit subclass for a total of \$126,500.<sup>FN7</sup> Likewise, with respect to the violation regarding the unlawful deduction of Washington state income tax, the state of Washington assessed a \$1000 penalty. As set forth above, Plaintiffs are seeking \$500 for each member of the Green Acre and Valley Fruit subclass for a total of \$126,500. Thus, where the state of Washington concluded that \$2000.00 was an appropriate penalty for violations of FLCA, Plaintiffs are seeking over \$250,000.00 in statutory damages.

Slip Copy, 2009 WL 1011180 (E.D.Wash.)  
(Cite as: 2009 WL 1011180 (E.D.Wash.))

FN7. Wash. Rev.Code § 19.30.160 states:

(1) In addition to any criminal penalty imposed under RCW 19.30.150, the director may assess against any person who violates this chapter, or any rule adopted under this chapter, a civil penalty of not more than one thousand dollars for each violation.

Given that the statute permits the state to award damages for each violation, the potential penalty for this violation could have been in the hundreds of thousands. Likewise, the State found that Global unlawfully deducted Washington state income tax from 260 workers' pay. Thus, the State had the opportunity to assess \$1000 for each worker for a total of \$260,000.00, but chose to assess only \$1000 in penalties. Additionally, the State found that Global failed to pay full wages to four bus drivers. Rather than assess \$4000 in penalties, the State chose to assess \$1000 for this violation.

Moreover, awarding Plaintiffs \$1,998,500.00 in statutory damages as requested would not only punish the Grower Defendants, who are jointly and severally liable for the damages, but would ultimately harm Plaintiffs, whose welfare is linked to the region's fruit-growing industry. Salazar-Calderon v. Presidio Valley Farmers Ass'n, 765 F.2d 1334, 1347 (5th Cir.1985).

\*7 Finally, it is worth noting that the jury awarded two of the individually-named Plaintiffs actual damages with respect to the breach of contract claim. Thus, it was not impossible to try the actual damages portion of the proceedings. Plaintiffs deliberately chose not to seek actual damages in favor of the statutory damages, where the primary focus is not necessarily on compensating the individual class members, but rather to effectuate the purposes of the Act.

With these considerations in mind, the Court now addresses the question as to the appropriate amount of statutory damages that should be awarded to class members, based on the record before the Court.

#### **A. Judge McDonald's Order**

Judge McDonald found that the Global Defendants violated FLCA and awarded statutory damages of \$ 500 per plaintiff per violation. In doing so, Judge McDonald cited to Wash. Rev.Code § 19.30.170(1), (2), which states:

(1) After filing a notice of a claim with the director, in addition to any other penalty provided by law, any person aggrieved by a violation of this chapter or any rule adopted under this chapter may bring suit in any court of competent jurisdiction of the county in which the claim arose, or in which either the plaintiff or respondent resides, without regard to the amount in controversy and without regard to exhaustion of any alternative administrative remedies provided in this chapter. No such action may be commenced later than three years after the date of the violation giving rise to the right of action. In any such action the court may award to the prevailing party, in addition to costs and disbursements, rea-

Slip Copy, 2009 WL 1011180 (E.D.Wash.)  
(Cite as: 2009 WL 1011180 (E.D.Wash.))

sonable attorney fees at trial and appeal.

(2) In any action under subsection (1) of this section, if the court finds at the respondent has violated this chapter or any rule adopted under this chapter, it may award damages up to and including an amount equal to the amount of actual damages, or statutory damages of five hundred dollars per plaintiff per violation, whichever is greater, or other equitable relief.

Wash. Rev. Code § 19.30.170(1),(2).

Judge McDonald interpreted these provisions to support an automatic \$500.00 award for each violation, separate awards for multiple violations of a subsection, no cap for class action awards, and attorneys' fees and costs. Ct. Rec. 507 p. 29, n. 6.

As noted above, the Court reviewed the Ninth Circuit case law and concluded that rather than provide for mandatory damages, the statute permits the Court to exercise its discretion in awarding statutory damages. The Court concluded that a bench trial on the appropriate amount of damages would permit this Court to exercise its discretion in awarding the appropriate amount of damages.

The Court did not address whether it would reconsider the question as to whether Plaintiffs would have to show that the class members were aggrieved before they can obtain statutory damages. Clearly Judge McDonald found that the class members had demonstrated that they were aggrieved because, according to subsection (1), a person who was not aggrieved would not be entitled to statutory damages.

\*8 In their Motion for Reconsideration, the Grower Defendants argued that statutory damages were not mandatory, but did not specifically argue that the judgment should be vacated because the class members were not aggrieved. The Grower Defendants now argue that for some violations, however, statutory damages are not warranted because Plaintiffs cannot show that they were aggrieved.

Just as the Court accepts Judge McDonald's findings that violations occurred, the Court will accept Judge McDonald's conclusion that class members were aggrieved. Judge McDonald and the jury found that Plaintiffs had met their burden of showing class-wide damages. Plaintiffs are asking for liquidated statutory damages for class-wide claims. As such, the Court does not need to make specific factual calculations of actual injury. *See Six (6) Mexican Workers*, 904 F.2d at 1310; *see also Montelongo v. Meese*, 803 F.2d 1341, 1352 (5th Cir.1986) (rejecting argument that individual class members are not entitled to damages because they had either forgotten or never known the details of the job offers).

## **B. Evidence to be Considered**

The parties agreed that the available evidence for the damages phase consists of the evidence that was introduced at summary judgment and trial. The Global Defendants asserted that Plaintiffs should be required to present a separate evidentiary record for the damages phase because irrelevant and inadmissible evidence should not be considered by the Court and due process demands that Defendants be able to

Slip Copy, 2009 WL 1011180 (E.D.Wash.)  
(Cite as: 2009 WL 1011180 (E.D.Wash.))

specifically contest any and all of the evidence supporting Plaintiffs' alleged damages as well as class membership.

The Court disagrees. The Court sat through the jury trial. It can filter out the irrelevant and inadmissible evidence. Likewise, the complete summary judgment record is also before the Court. The Global Defendants' due process rights were waived when they failed to respond to Plaintiffs' summary judgment motions. Moreover, the Global Defendants fully participated in the jury trial, including challenging the admission of evidence based on relevancy and other grounds. Plaintiffs are not required to present to the Court a separate evidentiary record in support of their request for statutory damages.

### C. Analysis

The *Six (6) Mexican Workers* factors require the Court to consider the circumstances in each case. The circumstances in this case are unique. Here, the jury and the Court found that Global Horizons deliberately took steps to discourage local workers from obtaining work at Global Horizons. And in doing so, it violated various provisions of the Washington Farm Labor Contractors Act. But, it is clear that the underlying harm was the failure to hire the local workers in favor of hiring the H-2A workers. A corollary to that harm is the finding by Judge McDonald that Global committed a number of technical violations of FLCA.

The ten FLCA violations found by Judge McDonald can be divided into four separate categories: recruitment violations, working arrangement violations, failing to pay wages, and failing to pay adequate pay statements.

#### 1. Recruitment Violations

##### (a) Failure to Provide Required Disclosures

\*9 Judge McDonald found that Global failed to provide U.S. Resident Workers with the disclosures on the form required by the Washington Department of Labor and failed to provide the statement in Spanish.

Defendants argue that, notwithstanding the fact that the correct form was not used, Plaintiffs received all of the required information from the two-page summary that Worksource provided the applicant. Defendants allege that the summary contained information about the wages offered, the date, duration and description of the available employment.<sup>FN8</sup> Defendants assert that a WorkSource employee would explain to each applicant, in Spanish, information about the Clearance Order for which the person was applying.

<sup>FN8</sup>. This two-page summary was never introduced in the record.

The difficulty in assessing the harmed caused by the failure to use the required form is that the neither party provided Judge McDonald with the required form.<sup>FN9</sup> Moreover, there is nothing in the record to

Slip Copy, 2009 WL 1011180 (E.D.Wash.)  
 (Cite as: 2009 WL 1011180 (E.D.Wash.))

establish exactly what information contained in the Clearance Order was presented to the applicant. The Clearance Order and attachments constitute a 17-page technical document. Providing the Clearance Order is not the same as providing a document that clearly and simply states the rate of pay, whether bonuses will be provided, whether personal loans will be provided, whether transportation, housing, health and day care services will be provided, the employment conditions, whether any equipment or clothing is required for the job, the owner of the operations, the working conditions and whether there is an arrangement with a farm labor contractor. *See* Wash. Rev.Code § 19.30.110(7). Moreover, because this form was mandated by the State of Washington, farm laborers would be familiar with this form and the information contained on the form. Use of a consistent form would facilitate the worker's understanding of the job benefits and requirements. The Clearance Order was not an adequate substitute for the failure to use the required form. Moreover, the Court finds that throughout the recruitment process, Global deliberately tried to under-inform the prospective local workers in an attempt to discourage them from applying for work with Global.

FN9. At the bench trial, Plaintiffs introduced a copy of the required form. Additionally, the Court was able to locate an "Agreement-Farm Labor Contractor and Workers" from the Washington Department of Labor & Industries. *See* <http://www.lni.wa.gov/Forms/pdf/700046a0.pdf> (English) and <http://www.lni.wa.gov/Forms/pdf/700046z0.pdf> (Spanish) (last visited Feb. 26, 2009). It appears that this form was updated on March, 2008. This form is consistent with the requirements of Wash. Rev.Code § 19.30.110(7).

The state of Washington did not find a violation of Wash. Rev.Code § 19.30.110(7) and did not assess any penalties for the failure to provide the required form.

The Court concludes that although this is a technical violation, the failure to provide the information on the required form merits an award of \$100.00 per class member. The Court awards \$39,700.00 to the Denied Work subclass; \$10,700.00 to the Green Acre subclass; and \$14,600.00 to the Valley Fruit Subclass.

**(b) Providing False and Misleading Information about the Terms of Employment**

Judge McDonald found that Global failed to inform the applicants of the availability of the transportation benefits that were promised in the Clearance Orders and failed to inform the applicants that they would have to meet specific production standards. Judge McDonald found that Global imposed specific production standards on the workers and fired workers for failing to meet those standards.

\*10 Wash. Rev.Code § 19.30.120(2) provides:

No person acting as a farm labor contractor shall:

- (2) Make or cause to be made, to any person, any false, fraudulent, or misleading representation or publish or circulate or cause to be published or circulated any false, fraudulent, or misleading informa-

Slip Copy, 2009 WL 1011180 (E.D.Wash.)  
(Cite as: 2009 WL 1011180 (E.D.Wash.))

tion concerning the terms or conditions or existence of employment at any place or places, or by any person or persons, or of any individual or individuals.

**(i) Transportation Benefits**

Plaintiffs assert that rather than inform the applicants that they could obtain transportation to the work site, Global weeded out prospective employees who did not have their own transportation. Plaintiffs did not provide any specific instances of where a person was not offered a job because they did not have transportation, or any testimony that had they known about the transportation service as set forth in the Clearance Order, the employees would have utilized the service.<sup>FN10</sup> On the other hand, there was testimony that a worker tried to board a bus taking the Thai workers to the Green Acres Orchard but was told that the bus was only available for the Thai workers.

FN10. The nature of the transportation benefits provided in the Clearance Order consisted of transportation from the employer-provided housing to the fields.

Traditionally, agricultural workers are some of the lowest paid workers. The Court finds that if offered, many of the workers would have accepted transportation benefits. Moreover, the Court finds that the failure to inform the workers regarding the transportation benefits that were set forth in the Clearance Order was a deliberate attempt on the part of Global to misinform the local workers and discourage them from obtaining work at Global.

The state of Washington did not address this conduct and therefore did not assess a penalty for the failure to accurately inform the employees regarding transportation benefits.

**(ii) Production Standards**

Judge McDonald found that Defendants provided false and misleading information regarding the production standards. As explained in the hearing, however, the testimony presented at trial indicated that, in the context of orchards, production standards can change daily, depending on the weather, the time of year, the type of crop, the type of work, the size and age of the trees, etc. and that it would be nearly impossible to set forth the type of production standards in the Clearance Order that Plaintiffs argue should have been provided.

The state of Washington concluded that Global Horizons applied a productivity standard that was not contained in the January 20, 2005 H-2A application, but did not assess a penalty based on this conduct.

The Court does not believe a separate award of statutory damages for failing to provide production standards in the Clearance Order is necessary or warranted.

Nevertheless, the Court concludes Global's conduct in providing false and misleading information during the recruitment process regarding transportation benefits warrants an award of \$100.00 per class

Slip Copy, 2009 WL 1011180 (E.D.Wash.)  
(Cite as: 2009 WL 1011180 (E.D.Wash.))

member. The Court awards \$39,700.00 to the Denied Work subclass; \$10,700.00 to the Green Acre subclass; and \$14,600.00 to the Valley Fruit Subclass.

## **2. Working Arrangement Violations**

\*11 Judge McDonald found that Global violated Wash. Rev.Code § 19.30 .110(5), which provides:

Every person acting as a farm labor contractor shall:

5) Comply with the terms and provisions of all legal and valid agreements and contracts entered into between the contractor in the capacity of a farm labor contractor and third persons.

Judge McDonald found that this provision was violated in two ways: (1) by failing to provide written reprimands upon a second violation of a work rule; and (2) by employing H-2A workers without approval from the Department of Labor.

### **(a) Employing H-2A Workers**

The theory of the harm from employing H-2A workers without approval of the Department of Labor is the same as the failure to provide work. Presumably, if the H-2A workers were not used, local workers would have been provided the work. This will be addressed below. There is no private cause of action under the H-2A statutes and regulations. The Court declines to award separate statutory damages under FLCA for violations of the H-2A statutes and regulations, but will consider the fact that H-2A workers were hired in lieu of local workers when determining the appropriate amount of damages for the failure to employ and the discharging and laying off of workers.

The state of Washington assessed a \$1000 penalty for failing to notify the U.S. Department of Labor under H-2A requirements when Global moved workers from one location to another and did not house their workers in locations identified in their application. An additional \$1000 penalty was assessed for misrepresentations in documents provided to the Department of Labor & Industries of the number of workers that were to be brought to work in Washington.

### **(b) Failure to Provide Written Reprimands**

The evidence presented at trial was that persons were given verbal reprimands regarding discipline, but not written reprimands. Jose Cuevas and Ignacio Ramos both testified that they gave workers verbal reprimands but never provided written warnings as required by the Clearance Order.

The State of Washington did not address this conduct and therefore did not assess a penalty for the failure to provide written reprimands.

The Court concludes that \$10.00 per class member is an appropriate amount of statutory damages for

Slip Copy, 2009 WL 1011180 (E.D.Wash.)  
(Cite as: 2009 WL 1011180 (E.D.Wash.))

Global's failure to provide written reprimands as required by the Clearance Order. The Court awards \$1070.00 to the Green Acres subclass and \$1460.00 to the Valley Fruit subclass.

### **3. Failure to Pay Wages Due<sup>3</sup>**

#### **(a) Unlawful Deduction of State Income Tax**

At summary judgment, Global admitted that, for a limited time and due to clerical error, it deducted from the pay of certain Green Acre and Valley Fruit subclass members taxes that were not required by the state of Washington. The employees were reimbursed for the deductions in 2005. The total amount withheld were \$4,386.51. Judge McDonald found questions of fact with regard to whether the withholding of the wages was willful. No evidence was presented at trial to support a finding that the withholding of the Washington state tax was anything but a clerical error.

\*12 The state of Washington assessed a \$1000.00 penalty for the improper deductions for taxes not required by the State and ordered the reimbursement of the withheld amount.

Under Washington law, where a employee demonstrates that wages have been willfully withheld, damages are equal double the amount of wages that was withheld. The Court finds that this is an appropriate criteria from which to award statutory damages for the unlawful deduction of Washington state income tax. The Court awards \$8773.02 in statutory damages for this violation. This amount will be allocated to the 72 Green Acre subclass members and 49 Valley Fruit subclass members set forth in Plaintiff's Exhibit J.

#### **(b) Failure to Pay Piece Rate**

Judge McDonald also found that twenty-four workers at Valley Fruit were entitled to be paid the piece rate of \$19.00 per bin in the pear harvest in 2004 and that it was undisputed that the workers were not, in fact, paid a piece rate. Instead, workers were paid an hourly rate in which they earned almost \$70.00 per day, which computes to be more than they would have received at the approved piece rate. Plaintiffs did not present any evidence to Judge McDonald or during the trial that the workers' productivity would have increased significantly to earn more by piece rate than they actually received. These twenty-four workers picked pears for two days.

Even so, the failure to pay the bin rate represents willful conduct on the part of Global, which is evidence by the fact that Global initially filed an application for a Clearance Order that did not include a bin rate. The Department of Labor rejected the application for the Clearance Order, stating that Global needed to include a bin rate. Global eventually acquiesced and included a bin rate in a resubmitted application for a Clearance Order. Nevertheless, Global failed to notify the workers that a bin rate was included in the Clearance Order.

The Court awards \$100 to the twenty-four workers identified in Plaintiffs' Exhibit R.

Slip Copy, 2009 WL 1011180 (E.D.Wash.)  
(Cite as: 2009 WL 1011180 (E.D.Wash.))

#### **4. Failure to Provide Adequate Written Pay Statements**

##### **(a) Failure to Itemize Piece Rates Earned**

Judge McDonald found that Global failed to itemize the pieces picked on the pay statement when work was paid on a piece rate basis at Valley Fruit in 2004.

Pursuant to Wash. Rev. Code § 19.30.110(8):

Every person acting as a farm labor contractor shall:

(8) Furnish to the worker each time the worker receives a compensation payment from the farm labor contractor, a written statement itemizing the total payment and the amount and purpose of each deduction therefrom, hours worked, rate of pay, and pieces done if the work is done on a piece rate basis, and if the work is done under the Service Contract Act (41 U.S.C. Secs. 351 through 401) or related federal or state law, a written statement of any applicable prevailing wage.

This violation affected 99 Valley Fruit subclass workers who worked in the cherry harvest.

\*13 The evidence indicated that Mr. Verbrugge unilaterally offered the piece rate to the workers in the field, after which he contacted Global. Global's accounting system was not equipped to handle the piece rate and this was the reason why the piece rate was not included in the pay statements. There was no evidence that any of the workers complained to Global regarding the lack of piece rate. There was no evidence that Global failed to properly pay the workers for the piece units that were picked by the workers. At best, this was an oversight caused by the exigent circumstances of ripening fruit and the threat of losing labor to pick the fruit.

The Court awards \$10.00 to the 99 Valley Fruit subclass workers identified in Plaintiffs' Exhibit Q.

##### **(b) Failure to Provide Employers Name, Address and Telephone Number on Pay Statement**

In addressing statutory damages, Judge McDonald indicated that one of the violations was failing to provide adequate pay statements in violation of Wash. Admin. Code 296-131-015. In their briefing, Plaintiffs argued that Defendants were required to provide pay statements that identified the pay period and include the employer's name, address, and telephone number, pursuant to Wash. Admin. Code 296-131-015.

FLCA does not require the employer's name, address, and telephone number, rather this is required by the Washington regulations. As noted above, the state of Washington sought \$1000.00 in penalties for this violation. The Court concludes that this amount provides an appropriate gauge to access the need to deter and to adequately compensate Plaintiffs for this violation. Plaintiffs did not introduce any evidence

Slip Copy, 2009 WL 1011180 (E.D.Wash.)  
 (Cite as: 2009 WL 1011180 (E.D.Wash.))

that any class member was prejudiced by the failure to provide the information on the pay statement. It is undisputed that this information was provided on the pay check. There was no evidence presented that any of the class members complained to Global that its name and address were not provided on the pay statement, or demanded that this information be provided to the workers.

The state of Washington assessed a \$1000.00 for the failure to provide all information required on the statement of earnings to the workers. It found that Global failed to provide the its address, telephone number, beginning and ending dates of the pay period, and failed to include rate of pay for "other" hours.

The Court awards \$10.00 to each member of the Green Acres and Valley Fruit subclasses. The Court awards \$1070.00 to the Green Acres subclass and \$1460.00 to the Valley Fruit subclass.

### 5. Failure to Provide Work

The jury found that Defendants failed to employ the Denied Work Subclass and laid off or fired the members of the Green Acre and Valley Fruit Subclass in violation of the Clearance Order. Plaintiffs' theory was that Global Horizons deliberately took steps to discourage the local workers to work for Global Horizons because Global wanted to utilize Thai workers. The Court also accepted this theory at trial. Clearly, this was the most egregious violation.

\*14 The evidence at trial, however, was that the WorkSource accepted and referred more applicants than were available jobs. In reviewing the evidence presented at trial and found by Judge McDonald, the most H-2A workers that were employed at any given time was 172 Thai workers (Ct.Rec.507, p. 17). This represents the number of jobs that would have been available to the local workers if the Thai workers would not have been utilized. In determining the appropriate amount of statutory damages, the Court concludes that multiplying \$500.00 times this number is a good starting point for determining the amount of statutory damages to award the class members. This amount is \$86,000.00. If this amount is divided by the total number of class members (650), each class member would receive approximately \$132.00. The Court finds that an award of \$150.00 per class member is an appropriate amount to meet the goals of compensation and deterrence. The evidence is undisputed that not every person who applied for a job with Global would have been hired even if Global chose not to utilize the Thai workers. Even so, an award for \$150.00 for each Denied Work-Offered subclass member, and each Valley Fruit and Green Acres subclass member is appropriate. The Court awards \$59,550.00 to the Denied Work subclass, \$16,050.00 to the Green Acres subclass; and \$21,900.00 to the Valley Fruit subclass.

### D. Conclusion

The Court awards the following statutory damages:

Denied Work Subclass Violation	No. of Members	Individual Award	Total
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Slip Copy, 2009 WL 1011180 (E.D.Wash.)  
 (Cite as: 2009 WL 1011180 (E.D.Wash.))

Failure to Provide Required Disclosures	397	\$100	\$39,700
Providing False and Misleading Information: transportation benefits and production standards	397	\$100	\$39,700
Employing H-2A Workers	397	0	0
Failing to Employ	397	\$150	\$59,550
<b>Total</b>	<b>397</b>	<b>\$350</b>	<b>\$138,950</b>

<b>Green Acre Subclass Violation</b>	<b>No. of Members</b>	<b>Individual Award</b>	<b>Total</b>
Failure to Provide Required Disclosures	107	\$100	\$10,700
Providing False and Misleading Information: transportation benefits and production standards	107	\$100	\$10,700
Employing H-2A Workers	107	0	0
Laying Off in violation of Clearance Order	107	\$150	\$16,050
Failure to Provide Written Reprimands	107	\$10	\$1,070
Failure to Provide Adequate Pay Statements-name and address	107	\$10	\$1,070
Failure to Pay Wages Due-Deducting Washington State Tax	72	11	12

FN11. The Court is unable to determine the exact number of Green Acre Subclass members who were affected by this violation. The total amount of the damages award is \$8773.02, which will be divided between the two subclass members identified in Plaintiffs' Exhibit J.

FN12. See note 9.

Total		\$370	\$39,590
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<b>Valley Fruit Subclass Violation</b>	<b>No. of Members</b>	<b>Individual Award</b>	<b>Total</b>
Failure to Provide Required Disclosures	146	\$100	\$10,700
Providing False and Misleading Information: transporta-	146	\$100	\$10,700

Slip Copy, 2009 WL 1011180 (E.D.Wash.)  
 (Cite as: 2009 WL 1011180 (E.D.Wash.))

tion benefits and production standards

Employing H-2A Workers	146	0	0
Laying Off in violation of Clearance Order	146	\$150	\$21,900
Failure to Provide Written Reprimands	146	\$10	\$1,460
Failure to Provide Adequate Pay Statements-name and address	146	\$10	\$1,460
Failure to Provide Adequate Pay Statements-itemization	99	\$10	\$990
Failure to Pay Wages Due-Deducting Washington State Tax	49	13	14

FN13. The Court is unable to determine the exact number of Valley Fruit Subclass members who were affected by this violation. The total amount of the damages award is \$8773.02, which will be divided between the two subclass members identified in Plaintiffs' Exhibit J.

FN14. See note 13.

Failure to Pay Wages Due-Not paying Approved Bin Rate of \$19 in Pear Harvest	24	\$100	\$2,400
Total		\$480	\$49,610

\*15 The Court has considered the *Six Mexican Workers* factors as well as the unique circumstances of this case and determined that statutory damages in the amount set forth above represent an appropriate amount of damages to compensate Plaintiffs, deter Defendants, and encourage Plaintiffs to enforce their rights.

FLCA, which was modeled after FLCRA, was enacted to protect the migrant worker population. Indeed, previous cases documented the horrors that migrant workers experienced at the hand of unscrupulous farm labor contractors. See *Martinez v. Mendoza*, 595 F.Supp.2d 923 (N.D.Ind.2009) (plaintiffs traveled from Texas to Indiana on a bus that was not safe and in inadequate housing); *Velasquez v. Khan*, 2005 WL 1683768 (E.D.Cal.2005) (plaintiffs traveled from Arizona to California, housing that was provided was in grossly substandard conditions); *Castillo v. Case Farms of Ohio, Inc.*, 96 F.Supp.2d 578 (W.D.Tex.1999) (plaintiffs traveled from Texas to Ohio, terms and conditions of employment, transportation, and housing did not coincide with promises made to induce them to travel to Ohio).

Here, the class members in this case are not traditional migrant workers. Rather, the class is local workers who resided in the Yakima Valley area and were seeking work. Notably, there is nothing in the

Slip Copy, 2009 WL 1011180 (E.D.Wash.)  
(Cite as: 2009 WL 1011180 (E.D.Wash.))

record to suggest that the local workers had traveled to the region to obtain work, nor did they expect to receive housing or subsistence while employed with Global Horizon. These differences are important in determining the appropriate amount of statutory damages. The Court is also mindful that the jury awarded Plaintiffs punitive damages for failing to provide work or for firing, based on race. The conduct the jury considered in awarding the punitive damages is the same conduct that is at issue with respect to statutory damages.

The Court awards approximately \$235,000.00 in statutory damages. The Court finds that this amount is sufficient to deter future violations and encourage enforcement of the Act. The individual class members will be receiving \$350.00 or more in statutory damages. The Court finds this amount to be adequate to compensate the individual class members for any injury experienced as a result of Global's wrongful conduct.

### INDIVIDUAL LIABILITY FOR THE GROWER DEFENDANTS

Plaintiffs seek to hold Jim Morford and John Verbrugge personally liable for their companies' use of an unlicensed farm labor contractor. Previously, the Court concluded that Defendant Mordechai Orian could not be held individually liable for violations of FLCA (Ct.Rec.863). The Court concluded that in order to be held liable under FLCA, a person must act as a farm labor contractor and, because Plaintiffs did not argue that Orian personally acted as a farm labor contractor or that he personally needed to obtain a license under FLCA, he could not be held individually liable as a matter of law.

The analysis is somewhat different because the corporate Grower Defendants are jointly and severally liable as a result of the corporation's use of the services of an unlicensed farm labor contractor. The provision at issue is Wash. Rev.Code § 19.30.200, which provides, in part:

\*16 Any person who knowingly uses the services of an unlicensed farm labor contractor shall be personally, jointly, and severally liable with the person acting as a farm labor contractor to the same extent and in the same manner as provided in this chapter.

Plaintiffs argue that other state labor laws make officers liable with their corporations for violations of wage payment laws, and refer to Wash. Rev.Code § 49.52.020, which specifically states that “[a]ny employer or officer, vice principal or agent of any employer who [list of wrongful conduct] ... shall be guilty of a misdemeanor.” There, however, the plain language of the statute specifically provides liability on the part of an employer or officer. If anything, Plaintiffs' example supports the premise that liability under § 19.30.200 would not extend to the officers of a corporation who uses the services of an unlicensed farm labor contractor. If the Washington legislation intended to hold officers liable, it could have clearly written the statute in a manner similar to § 49.52.020. It did not. As such, the Court is left with the plain language of the statute, which requires the person to use the services of an unlicensed farm labor contractor. There is nothing in the record to suggest that Mr. Morford or Verbrugge personally used the services of an unlicensed farm labor contractor. The Court declines to impose joint and several liability on these Defendants.

Slip Copy, 2009 WL 1011180 (E.D.Wash.)  
(Cite as: 2009 WL 1011180 (E.D.Wash.))

### INJUNCTIVE RELIEF

Plaintiffs seek a permanent injunction against Global Horizon to prevent it from operating as a farm labor contractor in Washington until the company obtains valid federal and state contracting licenses. Plaintiffs request that any injunction remain in place until Global has paid in full all sums owing from this lawsuit and any other money judgments owed to farm workers they employed in Washington. Plaintiffs also seek a permanent injunction against the Grower Defendants to enjoin them from using the services of an unlicensed farm labor contractor.

Wash. Rev.Code 19.30.180 provides:

The director or any other person may bring suit in any court of competent jurisdiction to enjoin any person from using the services of an unlicensed farm labor contractor or to enjoin any person acting as a farm labor contractor in violation of this chapter, or any rule adopted under this chapter, from committing future violations. The court may award to the prevailing party costs and disbursements and a reasonable attorney fee.

Generally, when issuing an injunction, the Court is exercising its equitable powers. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006). In this case, however, the authority to issue the injunction is not necessarily a function of the Court's equitable powers, but is a statutorily-conferred power. Even so, the Court concludes that the proper test to apply is the traditional four-factor test recognized in eBay, Inc. *See id.* (applying test where party was seeking an injunction under the Patent Act). Therefore, in order to obtain a permanent injunction, Plaintiffs must demonstrate the following:

- \*17 (1) they have suffered an irreparable injury;
- (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury;
- (3) that, considering the balance of hardships between plaintiffs and defendants, a remedy in equity is warranted; and
- (4) that the public interest would not be dis-served by a permanent injunction.

*Id.* at 390; *see also* Geertson Seed Farms v. Johanns, 541 F.3d 938, 943 (9th Cir.2008).

An injunction is an extraordinary remedy. Weinberger v. Romero-Barcelo, 456 U.S. 305, 312, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982). “An injunction should issue only where the intervention of a court of equity ‘is essential in order effectually to protect property rights against injuries otherwise irremediable.’” *Id.* The relief granted must not be “more burdensome than necessary to redress the complaining parties.”

Slip Copy, 2009 WL 1011180 (E.D.Wash.)  
(Cite as: 2009 WL 1011180 (E.D.Wash.))

*Bresgal v. Brock*, 843 F.2d 1163, 1169 (9th Cir.1988). Moreover, under the teachings of *eBayInc.*, an injunction should not “automatically issue” when a FLCA violation is found. *See Geertson*, 541 F.3d at 944 (holding that traditional balancing test is appropriate and that an injunction is not automatic when a NEPA violation is found).

Plaintiffs seek an injunction against both the Global Defendants and the Grower Defendants. Plaintiffs have failed to show that the extraordinary relief of a permanent injunction is warranted in this matter.

### **(1) Irreparable Harm**

Plaintiffs argue that they will suffer irreparable harm because the Global Defendants are unlikely to pay for past violations, and future violations would require multiple lawsuits and leave Plaintiffs in an untenable position.

The test is whether the parties will suffer irreparable harm if the injunction is not granted. Here, the record does not support a finding that it is likely that Global will commit further violations. Global has admitted to committing violations under FLCA. And there is evidence in the record that Global took steps to remedy past violations. For instance, although it did operate as an unlicensed farm labor contractor for a period of time, it is undisputed that it eventually obtained the Washington state license.

Likewise, Plaintiffs argue that the harm suffered by them would have been prevented if the Grower Defendant had not contracted with Global. This may be true but it does not support a finding of irreparable harm if the injunction would not be granted.

The Court does not find that the record supports an inference that Global or the Grower Defendants are likely to violate the FLCA in the future.

### **(2) Adequate Remedy at Law**

The FLCA provides for actual and statutory damages for violations of FLCA. Plaintiffs have not demonstrated that these damages are inadequate.

### **(3) Balance of Hardships**

Plaintiffs urge the Court to find that Global is likely to violate the FLCA in the future, which presumably would tip the balance of hardship in favor of Plaintiffs. Likewise, the Grower Defendants' complicity in Global's unlawful objectives to replace local workers with H-2A workers tips the balance in Plaintiffs' favor.

\*18 Plaintiffs' arguments do not demonstrate that the balance of hardships tip in favor of Plaintiffs.

### **(4) Interest of the Public**

Slip Copy, 2009 WL 1011180 (E.D.Wash.)  
(Cite as: 2009 WL 1011180 (E.D.Wash.))

Plaintiffs argue that there is no public interest in allowing Global to operate as a farm labor contractor in the state of Washington unless farm workers have been made whole regarding past abuses. Plaintiffs have not provided any case law that would give the Court the authority to do what Plaintiffs are asking the Court to do.

The Court finds that Plaintiffs have not met their burden of showing that an injunction is necessary or appropriate in this case.

### PROOF OF IMMIGRATION STATUS

The question of whether the class members would have to prove immigration status in order to recover actual or statutory damages permeated throughout the proceedings. The Court declined to address the issue as it related to damages based on the summary judgment motion, but in a prior order indicated that proof of immigration status was going to be required for those persons who sought damages under the claims proven at trial. At the time of making that statement, the Court presumed that Plaintiffs would be seeking actual damages.

In response to the Court's statement, Plaintiffs filed a motion asking the Court to clarify its ruling (Ct.Rec.868). In ruling on Plaintiffs' motion, the Court concluded that the relationship between the claims decided on summary judgment and the claims decided by the jury needed to be analyzed in the context of Plaintiff's anticipated damage presentation for each claim for which liability had been established (Ct.Rec.883). Specifically, the Court stated, "whether and how much an illegal alien can recover for violations of FLCA will depend on the circumstances of the alien and the nature and scope of the violation."

Upon further reflection, the Court makes the following observations. The representative Plaintiffs have established that they were legally eligible to work. There is no evidence to the contrary in the record. Similarly, there is no evidence in the record that absent class members were not legally eligible to work, just as there is no evidence in the record that absent class members were not able to meet the physical requirements of the Clearance Order. Therefore, the Court finds that absent class members are eligible to work.

Moreover, denied work class members only have to show that they were offered employment to meet their eligibility for class membership. Global made offers prior to verifying immigration status. Global was required to do so to avoid possible exposure to charges of discrimination. Since Global was not required to verify authorization to work prior to the Denied Work subclass members actually starting work, the Court declines to impose verification requirements to recover statutory damages for FLCA violations. A class member would not have been required to show proof of authorization to work until they commenced work-an opportunity Global denied them by failing to provide work as promised.

\*19 The Court is also concerned that immigration status is an issue in this case only as a result of an un-

Slip Copy, 2009 WL 1011180 (E.D.Wash.)  
(Cite as: 2009 WL 1011180 (E.D.Wash.))

spoken perception that persons with Hispanic last names are not eligible for work. The Court declines to perpetuate any stereotyping of the local Hispanic population by assuming that persons with Hispanic surnames who applied for work with Global are not eligible to work.

Given that Plaintiffs are no longer seeking actual damages, the Court finds that the Denied Work subclass will not have to show proof of eligibility to work in order to recover statutory damages. The purpose of statutory damages is to compensate, deter and encourage persons to enforce their rights under the statute. Plaintiffs were aggrieved irrespective of their eligibility to work. As such, proof of eligibility to work is not necessary in order to receive statutory damages.

### **DISTRIBUTION OF PUNITIVE DAMAGES**

The jury awarded punitive damages to each of the three subclasses for violating 42 U.S.C. § 1981. For the reasons stated above, the Court concludes that members of the Denied Work subclass are entitled to share in the award of punitive damages without proving they were authorized to work.

Plaintiffs ask that the Court distribute the punitive damages on a pro-rata basis to all subclass members. Here, it would be difficult to determine the comparative value of an individual class member's lost opportunity and suffering relative to the other class members as a result of Global's discriminatory conduct. The Court adopts Plaintiffs' request to distribute the punitive damages award among subclass members on a pro rata basis.

### **PROPOSED COURSE OF ACTION**

In Court Record 901, the parties agreed that all class members will need to submit claim forms and agreed to a ninety-day period for class members to submit their claim forms. As set forth above, class members will not be required to verify his or her entitlement to any of the damages. Thus, there is no need to appoint a claims administrator. Instead, the Court finds that it is appropriate for Plaintiffs' counsel to administer the claims process. Plaintiffs are directed to submit a proposed plan regarding the claims process to the Court, consistent with this Order.

Accordingly, **IT IS HEREBY ORDERED:**

1. Plaintiffs' Motion in Support of Award of FLCA Statutory Damages (Ct.Rec.761) is **GRANTED**.
2. Plaintiffs' Motion to Admit Evidence; Motion to Quash Subpoenas (Ct.Rec.1029) is **GRANTED**, pursuant to the Court's oral ruling.
3. Plaintiffs' Motion to Expedite; Motion for Leave to File Excess Pages (Ct.Rec.1066) is **GRANTED**.
4. Within 10 days from the date of this Order, Plaintiffs are directed to submit a proposed plan regarding the claims process to the Court. Defendants can file a response according to the Local Rules.

Slip Copy, 2009 WL 1011180 (E.D.Wash.)  
(Cite as: 2009 WL 1011180 (E.D.Wash.))

5. A telephonic hearing on Plaintiffs' proposed plan is set for **May 21, 2009, at 9:30 a.m.** Counsel are directed to dial the Court conference line, (509) 458-6380, to participate in the hearing.

**\*20 IT IS SO ORDERED.** The District Court Executive is directed to enter this Order and to provide copies to counsel.

E.D.Wash.,2009.  
Perez-Farias v. Global Horizons, Inc  
Slip Copy, 2009 WL 1011180 (E.D.Wash.)

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