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Rivera v. NIBCO: A Tentative Limitation of the Supreme Court's Decision in *Hoffman Plastic Compounds, Inc. v. NLRB*

By Rebecca L. Ennis*

I. Introduction

In 2002, the United States Supreme Court handed down its decision in *Hoffman Plastic Compounds, Inc. v. NLRB.*[1] This landmark decision seemingly eliminated any chance illegal immigrant employees had to obtain awards of backpay after being discharged in violation of the National Labor Relations Act (NLRA). More importantly, however, the decision sent a message to the country that illegal entry into the United States was a violation that was to be taken more seriously by the courts than grossly unfair employment practices.

The Court of Appeals for the Ninth Circuit recently handed down a decision in *Rivera v. NIBCO, Inc.*[2] which could potentially alleviate the negative implications *Hoffman* had for illegal alien workers. *Rivera* gives new hope to illegal immigrants seeking backpay remedies, distinguishing itself from the Supreme Court's decision in *Hoffman.*[3] This Note seeks to examine the history behind *Hoffman* and the effect of *Rivera* upon that decision. Part II examines the cases that the Supreme Court primarily relied upon to support its *Hoffman* decision, while Part III briefly discusses the *Hoffman* decision itself. Parts IV and V examine the reactions of the academic community, federal agencies, and the courts to *Hoffman.* Part VI summarizes the most relevant parts of the *Rivera* decision and Part VII discusses some of its possible impacts.

II. Case History

In *Hoffman*, the Supreme Court relied primarily on three cases. The first of these was *NLRB v. Fansteel Metallurgical Corp.*[4] In *Fansteel*, the Court considered whether the National Labor Relations Board (NLRB) had the power to require an employer to reinstate employees and award them backpay following the employees' discharge as a result of unlawful conduct.[5] After the employer had continuously interfered with the efforts of its employees to organize themselves into a union, in violation of the NLRA, the employees staged a "sit-down strike" and took over several of the employer's buildings.[6] The employees refused to leave, even after they were discharged by their employer.[7] They remained until they were arrested by police after nine days of striking.[8] Soon thereafter, the NLRB ordered the employer to reinstate the employees

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[1] 535 U.S. 137 (2002).
[2] 364 F.3d 1057 (9th Cir. 2004).
[3] *See id.* at 1068.
[4] 306 U.S. 240 (1939).
[5] *Id.* at 247.
[6] *Id.* at 247-48.
[7] *Id.* at 249.
[8] *Id.*

who went on strike and award them backpay.[9] The Court overturned these orders, holding that when the employees participated in an "illegal seizure of the buildings in order to prevent their use by the employer . . . they took a position outside the protection of the [NLRA] and accepted the risk of the termination of their employment."[10]

The Court made a similar ruling three years later in *Southern Steamship Co. v. NLRB.*[11] The employer refused to participate with its employees' bargaining representative, leading the employees to strike onboard the petitioner's boat.[12] Several employees were fired as a result of their involvement in the strike.[13] The NLRB ordered the petitioner to reinstate the employees and issue them backpay.[14] The Court, however, held that the strike was a mutiny and violated sections of the criminal code.[15] Accordingly, the Court concluded that "despite the initial unfair labor practice which caused the strike, . . . the reinstatement provisions of the order exceeded the Board's authority to make such requirements 'as will effectuate the policies of the [NLRA].'"[16]

Finally, in *Sure-Tan, Inc. v. NLRB*,[17] the petitioner employed several illegal aliens, some of whom were active in a union.[18] As retaliation, the petitioner notified the Immigration and Naturalization Service (INS) about the illegal immigration status of some of its employees.[19] The employees were arrested and ordered to leave the country.[20] The NLRB found that the petitioner had violated the NLRA and ordered that the employees be reinstated with backpay.[21] On appeal, the Court held that undocumented aliens were protected as employees under the NLRA[22] and that the petitioner's actions in reporting the employees to the INS in retaliation for the union formation violated the NLRA.[23] Most importantly, however, the Court held that while the remedy imposed by the NLRB was appropriate, "in computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States."[24] Essentially, these three cases led to the general conclusion that backpay could not be awarded to those who break the law, including undocumented workers.

[9] *Id.* at 251.
[10] *Id.* at 256, 258.
[11] 316 U.S. 31 (1942).
[12] *Id.* at 32-33.
[13] *Id.* at 33.
[14] *Id.* at 33 (citing 23 N.L.R.B. 26 (1940)), 36.
[15] *Id.* at 39-41, 46.
[16] *Id.* at 48.
[17] 467 U.S. 883 (1984).
[18] *See id.* at 886.
[19] *Id.* at 886-87.
[20] *Id.* at 887.
[21] *Id.* at 888-89.
[22] *Id.* at 892.
[23] *Id.* at 895-96.
[24] *Id.* at 902-03.

III. The *Hoffman* Decision

In *Hoffman Plastic Compounds, Inc. v. NLRB*,[25] the petitioner-employer had laid off several workers who were supporting efforts to organize a union among the employees.[26] The NLRB subsequently ordered that the workers in question be reinstated with backpay.[27] At a compliance hearing to determine the appropriate amount of backpay owed to each employee, one of the employees admitted to being an illegal immigrant.[28] Despite this revelation, the NLRB upheld its determination that the employee was entitled to backpay.[29] In its examination of the caselaw, the Court concluded that "where the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield."[30] Here, the Board's remedy of awarding backpay to an illegal alien conflicted with the policy implications of the Immigration Reform and Control Act (IRCA),[31] which were "policies the Board ha[d] no authority to enforce or administer."[32] Since Congress made it a crime for an illegal alien to get a job under false pretenses, it naturally followed that Congress would not have intended for an illegal alien to receive backpay, even when his employer violated the NLRA.[33]

IV. Uneasiness After the *Hoffman* Decision

After the *Hoffman* decision was handed down, it became clear that the Supreme Court would extend undocumented workers few labor rights. As a result, a measure of uneasiness developed among those who championed labor rights. For instance, there was a concern that employers would be encouraged to hire undocumented workers.[34] One author surmised, "[a]n employer can use undocumented workers as cheap labor. If by chance such workers wanted to organize a union, the employer need not worry, it can fire all of the union supporters with little or no repercussions."[35] Indeed, it seemed logical after the *Hoffman* decision that "[t]he non-monetary remedies awarded by the Court [would] not deter an employer from firing an undocumented worker or from reporting the undocumented worker to the INS in retaliation for engaging in union activity."[36] Another author reasoned that the legislative intent of Congress in passing the IRCA was to "protect U.S. jobs for legal workers by making undocumented immigrants unattractive to employers through imposing economic sanctions on the employers

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[25] 535 U.S. 137 (2002).
[26] *Id.* at 140.
[27] *Id.* at 140-41.
[28] *Id.* at 141.
[29] *Id.* at 141-42.
[30] *Id.* at 147 (relying upon Southern Steamship Co. v. NLRB, 316 U.S. 31 (1912) and the line of cases which flowed from it).
[31] 8 U.S.C. § 1324a. *See Hoffman*, 535 U.S. at 147 (describing the IRCA as "a comprehensive scheme prohibiting the employment of illegal aliens in the United States.")
[32] *Hoffman*, 535 U.S. at 149.
[33] *Id.*
[34] Gabriela Robin, Current Development, Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*: A Step Backwards for All Workers in the United States*, 9 NEW ENG. J. INT'L & COMP. L. 679, 690 (2003).
[35] *Id.* at 691.
[36] Sara R. Bollerup, Comment, *America's Scapegoats: The Undocumented Worker and* Hoffman Plastic Compounds, Inc. v. National Labor Relations Board, 38 NEW ENG. L. REV. 1009, 1035 (2004).

who hire them."[37] Theoretically, denying backpay awards actually undermines the goals of the IRCA, since monetary remedies would discourage employers from hiring illegal aliens.[38] In addition, some scholars concluded that "the majority's decision [in Hoffman] also set[] the flawed policy of favoring unscrupulous employers over employers who abide by labor and immigration laws by not hiring illegal workers and by treating workers lawfully."[39]

Questions arose about how the *Hoffman* decision would affect the role of the NLRB. "One possibility is that the Board can become so strict in its interpretation of the laws that it could become a one-sided administrative board. Another possibility is that people will find ways to side-step the administrative power of the Board."[40]

Yet another legitimate concern was the effect *Hoffman* would have on labor violations unrelated to union membership.[41] It seemed possible that employers could even defend themselves against employment discrimination claims by simply showing that the claimant is an undocumented worker.[42] This kind of defense would clearly have a chilling effect on those workers wanting to bring forward claims of unfair treatment—it seemed as though the Court had mandated that every time an employee brought an action for wrongful termination, employment discrimination, or the like, an investigation into the immigration status of that employee would become necessary.[43] Perhaps even more significantly, the *Hoffman* decision profoundly changed the role of the courts in society. "Courts have traditionally been the source of protection for those too marginalized to represent themselves in the political process, but the decision in *Hoffman* clearly indicates that future protection of undocumented workers is not likely to originate from the judiciary."[44]

Significantly, the executive agencies and organizations responsible for labor policy have not been particularly accepting of *Hoffman.* For instance, the Equal Employment Opportunity Commission (EEOC) stated that while it would follow the Court's decision in *Hoffman*, it would not investigate the immigration status of those bringing claims before it.[45] In similar fashion, the NLRB put forth a policy that it would continue with a presumption that anyone bringing a claim

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[37] Elizabeth R. Baldwin, Note, *Damage Control: Staking Claim to Employment Law Remedies for Undocumented Immigrant Workers After* Hoffman Plastic Compounds, Inc. v. NLRB, 27 SEATTLE U. L. REV. 233, 266 (2003).
[38] Bollerup, *supra* note 36, at 1035 (quoting *Hoffman*, 535 U.S. at 153-54 (Breyer, J., dissenting)).
[39] Bollerup, *supra* note 36, at 1038.
[40] Stephen M. Hernandez, Note, *Attempting to Find Some Common Ground for Illegal Aliens, and the Board's Ability to Award Back Pay:* Hoffman Plastic Compounds, Inc. v. NLRB, 23 J. NAT'L ASS'N ADMIN. L. JUDGES 177, 205 (2003).
[41] Katherine E. Seitz, *Enter at Your Own Risk: The Impact of* Hoffman Plastic Compounds v. National Labor Relations Board *on the Undocumented Worker*, 82 N.C. L. REV. 366, 408 (2003) (quoting Press Release, Kilpatrick Stockton, LLP, *Supreme Court Strikes Down NLRB's Back Pay Award to Illegal Aliens* (April 2002) *at* http://www.kilpatrick.com/publications/legalalerts_detail.aspx?ID=1053 (on file with the North Carolina Law Review)).
[42] *See id.*; Baldwin, *supra* note 37, at 267.
[43] Baldwin, *supra* note 37, at 267.
[44] Seitz, *supra* note 41, at 409.
[45] Beth L. Throne, Note, Hoffman Plastic Compounds, Inc. v. NLRB: *Empowering the Unscrupulous Employer and Stigmatizing the Undocumented Worker*, 17 TEMP. INT'L & COMP. L.J. 595, 606 (2003) (citing EEOC, Notice No. 915.002, Recision of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws (June 27, 2002), http://www.eeoc.gov/docs/undoc-rescind.html (last modified June 28, 2002)).

under the NLRA is a lawful worker.[46] Additionally, these agencies refused to expand the application of *Hoffman* beyond limiting awards of backpay to undocumented workers.[47] The NLRB, EEOC, and the Department of Labor emphasized that undocumented workers are still covered by federal employment statutes and that other remedies are available to them.[48]

V. Limited Judiciary Application of *Hoffman*

A line of cases decided after *Hoffman* resisted the anti-labor implications of the Supreme Court's opinion.[49] For instance, in *Flores v. Albertsons, Inc.*,[50] the defendant-employer, in an action under the Fair Labor Standards Act (FLSA),[51] wanted documents regarding the immigration status of the plaintiff-employees, arguing that the information might limit the liability of the employer for backpay.[52] Even in light of *Hoffman*, the district court rejected the defendant's claim.[53] The court distinguished between the factual scenario in *Hoffman*, and the factual scenario of the case before it. "Here, unlike in *Hoffman*, the class members have not been terminated and do not seek back pay for work 'not performed.' Rather, Plaintiffs . . . merely seek to recover the unpaid wages . . . to which they are entitled under the FLSA."[54] Furthermore, the court found that there was an *in terrorem* effect in making the plaintiffs produce immigration documents.[55] "It is entirely likely that any undocumented class member forced to produce documents related to his or her immigration status will withdraw from the suit rather than produce such documents and face termination and/or potential deportation."[56]

Similarly, in *Martinez v. Mecca Farms, Inc.*,[57] the defendant argued that the plaintiffs, who were undocumented aliens bringing an action under the Migrant and Seasonal Agricultural Worker Protection Act,[58] did not have standing to sue and could not receive compensation for work already performed.[59] The court disagreed and noted that since "the Plaintiffs are bringing suit to challenge the compensation for work *already performed*, Defendant's standing challenge fails."[60]

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[46] *Id.* (citing NLRB, Office of General Counsel, Memorandum 02-06, Procedures and Remedies for Discriminatees Who May be Undocumented Aliens after *Hoffman Plastic Compounds, Inc.* (July 19, 2002), http://www.nlrb.gov/gcmemo/gc02-06.html).
[47] *Id.* at 609.
[48] *Id.*
[49] For a more thorough discussion of the judicial opinions mentioned in this section, as well as other applicable cases, see Baldwin, *supra* note 37, at 254-63 and Bollerup, *supra* note 36, at 1031-35.
[50] No. CV 01-00515 AHM, 2002 U.S. Dist. LEXIS 6171 (C.D. Cal. Apr. 9, 2002).
[51] 29 U.S.C. §§ 201 et seq. (1938).
[52] *Flores*, 2002 U.S. Dist. LEXIS 6171, at *6.
[53] *Id.* at *18-21. *See also* Cortez v. Medina's Landscaping, No. 00 C 6320, 2002 U.S. Dist. LEXIS 18831 (N.D. Ill. Sept. 30, 2002) (denying defendant's motion to compel citizenship information because illegal aliens are not barred from recovering unpaid wages); Zeng Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191 (S.D.N.Y. 2002) (noting the difference between awards of backpay for work not performed and awards of unpaid wages under the FLSA).
[54] Flores, 2002 U.S. Dist. LEXIS 6171, at *18. Plaintiffs brought the suit alleging that they had not been paid the "overtime premiums and other wages to which they were entitled." *Id.* at *4.
[55] *Id.* at *20.
[56] *Id.*
[57] 213 F.R.D. 601 (S.D. Fla. 2002).
[58] Pub. L. No. 97-470, 96 Stat. 2583 (1983) (codified in scattered sections of 29 U.S.C.).
[59] *Martinez*, 213 F.R.D. at 604.
[60] *Id.* at 605.

Finally, in *Renteria v. Italia Foods, Inc.*,[61] a more limited, but still pro-labor, decision, the district court held that while backpay could not be awarded to undocumented aliens under the FLSA, compensatory damages were still applicable, pursuant to the *Hoffman* decision.[62] As the court distinguished, "[t]he remedy of compensatory damages, unlike those of back pay and front pay, does not assume the undocumented worker's continued (and illegal) employment by the employer."[63]

As these decisions were issued, it became increasingly clear that the district courts were unwilling to apply *Hoffman* broadly. Soon after, it became apparent that a higher and more influential court, the Court of Appeals for the Ninth Circuit, was similarly unwilling.

VI. *Rivera v. NIBCO*

Just two years after the Supreme Court issued its opinion in *Hoffman*, the Court of Appeals for the Ninth Circuit handed down its decision in *Rivera v. NIBCO, Inc.*[64] NIBCO employed many production workers who spoke limited English.[65] Though the employees performed satisfactorily, the company required them to take job skills tests in English.[66] Employees that did not do well on the tests were discharged.[67] The employees brought a suit in federal court, claiming that NIBCO discriminated against them based on national origin, in violation of Title VII.[68] Among other remedies, the plaintiffs sought reinstatement and backpay.[69] NIBCO brought a motion for interlocutory appeal in the case, after a protective order was issued that prevented discovery as to the immigration status of the plaintiffs during discovery.[70] While NIBCO's motion was pending in the district court, the Supreme Court's decision in *Hoffman* was issued.[71] NIBCO filed a motion to reconsider and the plaintiffs proposed to split the case into separate liability and damages phases.[72] They plaintiffs proposed that "[i]f [they] were able to prove NIBCO's liability for the alleged disparate impact violation, the court would then hold an *in camera* proceeding."[73] Each plaintiff would privately testify about his or her immigration status and the judge could determine who was entitled to backpay.[74] In response, the district court granted NIBCO's motion to certify the discovery ruling for interlocutory appeal, and the Court of Appeals for the Ninth Circuit granted the petition.[75]

In its decision, the court noted that when harm will result from public disclosure of information, the public and private interests must be weighed in deciding whether a protective

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[61] No. 02 C 495, 2003 U.S. Dist. LEXIS 14698 (N.D. Ill. Aug. 25, 2003).
[62] *Id.* at *18-20.
[63] *Id.* at *19.
[64] 364 F.3d 1057 (9th Cir. 2004).
[65] *Id.* at 1061.
[66] *Id.* The plaintiffs' job descriptions did not require English proficiency. *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.* at 1061-62.
[71] *Id.* at 1062.
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.* at 1063.

order is appropriate.[76] Here, the court found that "the protective order was justified because the substantial and particularized harm of the discovery . . . outweighed NIBCO's interests in obtaining the information at this early stage in the litigation."[77]

Specifically, the court said that requiring the plaintiffs to disclose their immigration status would "chill [their] willingness and ability" to bring a Title VII claim against NIBCO.[78] As the court noted, if it directed "district courts to grant discovery requests for information related to immigration status in every case involving national origin discrimination under Title VII, countless acts of illegal and reprehensible conduct would go unreported."[79] Since the effectiveness of Title VII depends on private individuals bringing actions, "the national effort to eradicate discrimination in the workplace would be hampered by the discovery practices NIBCO [sought] to validate here."[80]

The court essentially dismissed the objection that its decision conflicted with *Hoffman.*[81] According to the court, the policy of the NLRA was outweighed by the IRCA, and, therefore, the IRCA "[precluded] any backpay award to illegal immigrants under the NLRA."[82] The Ninth Circuit was unwilling to carry the *Hoffman* decision so far as to conclude that the IRCA also outweighed Title VII.[83] The court noted three differences between the NLRA and Title VII.[84] First, Title VII, as noted above,[85] depends on private individuals bringing enforcement actions, while the NLRA limits private actions.[86] Second, Title VII, more so than the NLRA, provides a broad range of remedies, including compensatory and punitive damages.[87] The "full complement of remedies accords with the long-standing notion that Title VII requires courts to remedy instances of discrimination by sending strong messages to would-be-discriminators."[88] Finally, while the *Hoffman* decision limited the NLRB's authority to award backpay under the NLRA, the "district court ha[d] the very authority to interpret both Title VII and IRCA that the NLRB lack[ed]."[89] The court remained convinced that the national interest in eradicating discrimination outweighed a prohibition on the award of backpay to illegal aliens in Title VII cases.[90]

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[76] *Id.* at 1063-64 (citing Phillips *ex rel.* Estates of Byrd v. General Motors Corp., 307 F.3d 1206, 1211 (9th Cir. 2002)).
[77] *Id.* at 1064.
[78] *Id.* (citing Rivera v. NIBCO, Inc., 204 F.R.D. 647, 651 (E.D. Cal. 2001)).
[79] *Id.* at 1065.
[80] *Id.* at 1065-66.
[81] *Id.* at 1067.
[82] *Id.* at 1066 (citing *Hoffman*, 535 U.S. at 148-52).
[83] *Id.* at 1068.
[84] *See id.* at 1067-68.
[85] *See supra* text accompanying note 80.
[86] *Id.* at 1067.
[87] *Id.* (citing 42 U.S.C. § 1981a).
[88] *Id.*
[89] *Id.* at 1068.
[90] *Id.* at 1069.

Retreating slightly, the *Rivera* court admitted that it did not have to decide whether the *Hoffman* decision was applicable.[91] The court emphasized the difference between the determination of whether NIBCO violated Title VII and the determination of the appropriate remedies for any violations, and noted that the information sought by NIBCO had no relation to whether or not it violated the statute.[92] Since other remedies besides backpay were available, NIBCO's liability had to be determined.[93]

In a separate concurring opinion, Judge Siler reemphasized that "[i]f the district court decides to bifurcate the trial on the issues of liability and damages, the documented status of the plaintiffs would not likely be relevant in the first part of the trial."[94] He concluded that it might be more efficient for summary judgment purposes to determine the immigration status of the plaintiffs right away, but noted that the appellate courts "are not here to rule on the efficiency of the district courts in moving cases through their dockets."[95] Significantly, Judge Siler also noted that since the present decision was only an interlocutory appeal, the court could potentially have the duty to directly resolve the issue of the applicability of *Hoffman* to Title VII claims on direct appeal later.[96]

VII. Impact of the *Rivera* Decision

The *Rivera* decision effectively eliminated a handful of the concerns in the Ninth Circuit that resulted from *Hoffman.* For instance, it is no longer a forgone conclusion that backpay cannot be awarded to illegal aliens for work not performed. The court in *Rivera* believed that the Court's decision in *Hoffman* was limited to those cases dealing with the NLRA and the NLRB. Claims under other statutes, such as Title VII, could effectively trump the policies of the IRCA in a way which the NLRA could not in *Hoffman.* While the court retreated slightly from the impact of its decision by refusing to explicitly declare *Hoffman* inapplicable, its opinion clearly favored the rights of illegal aliens to receive backpay.

Additionally, it no longer seems inherently necessary to investigate the immigration status of those workers claiming backpay under the various employment statutes. If immigration status is irrelevant to awards of backpay under Title VII, discovery into that status would be pointless. Also, after the *Rivera* decision, courts could still be said to be protectors of workers' rights. If there is no risk of investigation into immigration status, workers will no longer feel the chilling effect of *Hoffman* and can once again turn to the court for help in upholding their rights.

Finally, and most significantly, the risk of backpay awards under federal employment statutes should cause employers to be more cautious about how they treat their employees. At least in the Ninth Circuit, employers should now think twice before violating the rights of their illegal alien employees, for fear of having to pay monetary damages. The risk of monetary

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[91] *Id.* ("Regardless whether *Hoffman* applies in Title VII cases, it is clear that it does not *require* a district court to allow the discovery sought here.")
[92] *Id.* at 1069-70 (citing Hashimoto v. Dalton, 118 F.3d 671, 676 (9th Cir. 1997)).
[93] *Id.* at 1070.
[94] *Id.* at 1075.
[95] *Id.*
[96] *See id.*

remedies could even effectively reinforce the policies of the IRCA and lead employers to hire more legal workers, instead of illegal aliens.

VIII. Conclusion

Despite all of the potential positive impacts of the *Rivera* decision, only time will tell if the impacts take hold. The effects of *Rivera* are presently limited to the Ninth Circuit and may apply only to those claims brought under Title VII. Additionally, it is important to remember that the court in *Rivera* did not explicitly hold *Hoffman* to be inapplicable—it simply implied it.

It will take similar decisions concerning multiple statutes and circuits for the rights of undocumented workers to take hold. Most importantly, backpay claims depend upon the Supreme Court's willingness to leave these decisions undisturbed and limit its opinion in *Hoffman* to complaints brought pursuant to the NLRA. District court decisions handed down since *Hoffman* indicate that the Supreme Court's decision prohibiting backpay for illegal aliens does not apply to work already performed. Now, after *Rivera*, it is conceivable that undocumented workers can receive backpay even for work not performed.