

ARE UNDOCUMENTED ALIENS BARRED FROM COLLECTING LOST WAGES IN PERSONAL INJURY SUITS?

The answer to this question may not be so clear anymore. I currently represent the estate of an undocumented alien who died as a result of an automobile accident. During a mediation conference my adversary presented the mediator with a recent trial court decision that appeared to reverse decades of case law and New York State public policy permitting undocumented aliens to collect future lost wages in personal injury actions. That case was and is *Majlinger v. Cassino Construction Corp.*, 766 N.Y.S.2d 332 (Sup. Ct. Richmond County 2003).

In *Majlinger*, plaintiff was an undocumented alien who sustained injuries when he fell from scaffolding. *Id.* Plaintiff sued the contractor and site owner for negligence and violation of New York labor law §§200, 241 and 241(6). Defendants moved for summary judgment dismissing plaintiff's lost earnings claims. Justice Christopher J. Mega of the Supreme Court, Richmond County ruled, *inter alia*, that the "plaintiff should not be permitted to recover for lost wages given his inability to prove he is legally authorized to work in this country. It would be consistent to reserve lost wages awards to those workers who have demonstrated a right to be lawfully employed and reinstated in their jobs." *Id.* at 334. In its decision, the *Majlinger* court readily admitted that "New York law has, in the past, permitted the recovery of lost wages for undocumented illegal aliens" and that, in formulating its opinion, the court was "not unmindful of the contrary opinions expressed by other courts of original jurisdiction." *Id.* at 333, 334. So how did one single trial court decision upset the well-settled law of this State?

Justice Mega's holding relied primarily upon the recent United States Supreme Court ruling in *Hoffman v. NLRB*, 535 U.S. 137, 152 L. Ed. 2d 271, 122 S.Ct. 1275 (2002). In *Hoffman*, an employee, who was an illegal alien, sued his employer for violating the National Labor Relations Act ("NLRA") when he was terminated for participating in union activity. The NLRB awarded the employee back pay. However, the Supreme Court reversed this award finding that the employee violated the Immigration and Reform and Control Act of 1986 ("IRCA"). The employee obtained his job by presenting his friend's birth certificate to his employer and misled the employer to believe that the employee was a legal citizen born in Texas. The employee's actions were in clear violation of IRCA, which states that it is a crime for an illegal alien to present false documents to an employer to demonstrate employment eligibility. The *Hoffman* Court held "Congress has expressly made it criminally punishable for an alien to obtain employment with false documents ... Indeed, awarding back pay in a case like this not only trivializes the immigration laws, it also condones and

encourages future violations.” *See Id.* at 149-50. The *Hoffman* Court concluded that, while there was a violation by the employer under NLRA, the employee should not be allowed to recover damages for his crime when the employee so clearly violated IRCA. *See Id.* at 151-52. But does the *Hoffman* decision preclude recovery for lost earnings by undocumented aliens in New York State personal injury actions?

The *Majlinger* court held that it does. Therein Justice Mega held: “[b]y a parity of reasoning, for this court to sanction the recovery of lost wages by an undocumented alien for work not performed would run contrary to both the letter and spirit of the IRCA, whose salutary purpose it would simultaneously undermine. Manifestly, it is not within the power or competence of this court to encroach, even by indirection, upon the immigration policy of these United States. On constraint of *Hoffman*, it is therefore the determination of this court that plaintiff’s claim for lost wages must be dismissed.” 766 N.Y.S.2d at 334.

Many New York courts have staunchly disagreed with the application of *Hoffman* as suggested in *Majlinger*. Specifically, the United States District Courts, in both the Southern and Eastern Districts of New York, have limited the application of *Hoffman* to situations where the plaintiff is an illegal alien seeking back pay for work, which was not performed in cases involving the NLRA and IRCA. *See, Liu v. The Donna Karen Company*, 207 F. Supp. 2d. 191, (S.D.N.Y. 2002); *Flores v. Amigon*, 233 F. Supp. 2d. 462 (E.D.N.Y. 2002). In these cases, when the plaintiff asserted violation of the Fair Labor and Standards Act (“FLSA”), the court found that the *Hoffman* analysis did “not apply with the same force.” *Flores*, 233 F. Supp. 2d. at 464. In fact, the *Flores* Court questions whether the IRCA is really even applicable with the enforceability of the FLSA provisions. (“[I]t is arguable that enforcing the FLSA’s provisions requiring employers to pay proper wages to undocumented aliens when the work has been performed actually furthers the goal of the IRCA.”) *See, Id.*

Further, in the realm of tort law, trial courts are finding the *Hoffman* analysis is simply inappropriate. *See, Balbuena v. IDR Realty, LLC*, ___ N.Y.L.J. ___, May 28, 2003, (Sup. Ct. New York County, May 16, 2003); *Cano v. Mallory*, 195 Misc.2d 666, 667-68, 760 N.Y.S.2d 816 (Sup. Ct. Richmond County 2003). In *Cano*, plaintiff was an illegal alien who received third degree burns when an electric meter owned by Con Ed exploded. These injuries prevented plaintiff from going to work. Although Con Ed tried to dismiss plaintiff’s negligence complaint on the grounds that he was an illegal alien, the court found that “[i]t was contrary to public policy of New York State that a person who claims to be injured as a result of tortuous conduct may be barred from pursuing that claim in the courts of this State based upon the resident status of the claimant. Defendants can not negligently injure someone who is within the state legally or not, and then not be responsible to that injured person for the injuries

sustained.” *Id.* at 668. The *Cano* Court denied Con Ed’s motion for dismissal and allowed plaintiff’s case for lost wages and pain and suffering to go to the jury. *See Id.*

Similarly in *Ulloa v. Al’s All Tree Service, Inc.*, 768 N.Y.S.2d 556 (Dist. Ct. Nassau County 2003), the Court permitted plaintiff, who was an undocumented alien, to recover a claim for unpaid wages for actual work performed. The Court recognized, as did the Supreme Court in *Hoffman*, that “it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies.” *Id.* at 558, (quoting *Hoffman*, 535 U.S. at 148, 152 L. Ed. 2d at 282, 122 S. Ct. at 1283). Without evidence demonstrating that the plaintiff violated the IRCA, the Court refused to apply the *Hoffman* analysis. *See, Id.* at 558.

To date, the only New York case that applies the *Hoffman* analysis to personal injury actions is *Majlinger*. *Majlinger* is currently being appealed before the Appellate Division, Second Department. Accordingly, as of today, it is the law of both the First and Second Departments that undocumented aliens may recover future lost wages in personal injury actions. *See, Public Administrator of Bronx County v. Equitable Life Assurance Society*, 192 A.D.2d 325, 595 N.Y.S.2d 478 (1st Dept. 1993); *Collins v. New York City Health and Hospitals Corp.*, 201 A.D.2d 447, 607 N.Y.S.2d 387 (2nd Dept. 1994).

As a plaintiff’s attorney who often represents undocumented aliens who were severely injured or killed as a result of the negligence of another, it is comforting to learn that our local courts have disagreed with the stringent view expressed by the *Majlinger* Court. In “these United States” undocumented aliens often perform the jobs that many documented Americans are unable or unwilling to perform. A tortfeasor does not have the right injure another, without consequence, simply because the injured party happens to be undocumented or awaiting citizenship. Nevertheless, as a practical matter, it is important to note the impact such a decision, if affirmed, could have upon an undocumented alien’s recovery in personal injury actions.

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