


10-1-2005

## Cutting Undocumented Alien Employment Using the Spine of a Knife: How the Fourth Circuit Failed to Adequately Use Title VII to Strengthen IRCA in *Egbuna v. Time Life Libraries, Inc.*

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### Recommended Citation

Widdison, Jeffrey B. (2005) "Cutting Undocumented Alien Employment Using the Spine of a Knife: How the Fourth Circuit Failed to Adequately Use Title VII to Strengthen IRCA in *Egbuna v. Time Life Libraries, Inc.*," *North Carolina Central Law Review*: Vol. 28 : No. 1 , Article 6.

Available at: <https://archives.law.nccu.edu/ncclr/vol28/iss1/6>

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## CASENOTES

### **CUTTING UNDOCUMENTED ALIEN EMPLOYMENT USING THE SPINE OF A KNIFE: HOW THE FOURTH CIRCUIT FAILED TO ADEQUATELY USE TITLE VII TO STRENGTHEN IRCA IN *EGBUNA V. TIME LIFE LIBRARIES, INC.***

JEFFREY B. WIDDISON

#### I. INTRODUCTION

Through its decision in *Egbuna v. Time Life Libraries, Inc.*,<sup>1</sup> the Fourth Circuit was the first U.S. Court of Appeals to interpret how the enactment of the Immigration Reform and Control Act of 1986 (“IRCA”) affected millions<sup>2</sup> of undocumented aliens employed in the United States and their rights under Title VII of the Civil Rights Act of 1964 (“Title VII”). Carrying a strong dissent, the Fourth Circuit affirmed the lower court’s grant of summary judgment for the defendant Time Life Libraries, Inc. (“Time Life”). The court held that an undocumented alien had “no cause of action [under Title VII] because his undocumented status rendered him ineligible both for the remedies [sought] and for employment within the United States.” This holding was given although Time Life never provided evidence that its motivation behind its refusal to rehire a former undocumented alien employee was anything other than a retaliatory animus in violation of Title VII.<sup>3</sup>

The consequence of the *Egbuna* holding prohibits any undocumented alien employed in the U.S. from filing a Title VII claim within the jurisdiction of the Fourth Circuit against their employer’s violative acts. The protections that are lost by these employees are, *inter alia*, guarantees against employers’ discriminatory acts targeting race,

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1. *Egbuna v. Time Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998), *cert. denied*, 525 U.S. 1142 (1999).

2. There are reportedly over 5.3 million workers in the “unauthorized labor” force. See Dean E. Murphy, *A New Order: Imagining Life Without Illegal Immigrants*, N.Y. TIMES, Jan. 11, 2004, § 4, at 1.

3. *Egbuna*, 153 F.3d at 186.

color, sex, religion, and/or national origin, and claims for sexual harassment in the work place.<sup>4</sup>

This note begins by reviewing the Fourth Circuit's holding in *Egbuna*. It then offers five arguments why the holding in *Egbuna* is erroneous and should be overruled. First, permitting undocumented aliens to file Title VII claims maintains the integrity of Title VII while harmoniously furthering the purpose of IRCA. Second, before *Egbuna* was decided, there was a strong precedent which allowed undocumented aliens to enforce their rights under Title VII. Third, the Equal Employment Opportunity Commission's ("EEOC") policy has previously favored, and currently favors, Title VII rights for undocumented aliens. Fourth, a recent post-IRCA U.S. Supreme Court ruling<sup>5</sup> found that employers may not escape liability after violating similar federal labor laws when the victim is an undocumented alien. Fifth, other federal courts outside of the Fourth Circuit have not followed the *Egbuna* holding and have allowed undocumented aliens to maintain causes of action against their employer's Title VII violations.

## II. ANALYSIS BY THE FOURTH CIRCUIT

In July 1993, after his arrangements to return home to Nigeria were altered, Obiora E. Egbuna ("Mr. Egbuna") sought reemployment for the position with Time Life that he had voluntarily resigned from just three months earlier. Mr. Egbuna alleged Time Life extended an offer to him for reemployment upon a branch manager and former supervisor's recommendation because of his proven record, experience and immediacy of being a leader for Time Life. Even though Mr. Egbuna intended to accept reemployment, and regardless of his attractive qualities, Time Life allegedly reneged on its offer. Time Life contended that, due to IRCA's proscriptions against hiring undocumented aliens, it could not legally extend employment to Mr. Egbuna. Mr. Egbuna claimed Time Life's purported reason was pre-textual; he argued that Time Life's refusal to rehire him was in retaliation to his corroboration of a co-worker's sexual harassment charge against Time Life during Mr. Egbuna's original employment in violation of section 704(a) of Title VII of the Civil Rights Act of 1964.<sup>6</sup> Section 704(a) makes it

an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice

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4. See 42 U.S.C. § 2000e-2(a) (1991).

5. See *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137 (2002).

6. See 42 U.S.C. § 2000e-3 (1972).

by this title, or because he has . . . assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.<sup>7</sup>

Mr. Egbuna alleged Time Life knew upon originally hiring him in June 1989 that he had a temporary work visa on the verge of expiration and that Time Life permitted him to continue working until his voluntary resignation in 1993 despite being cognizant of his illegal status. He also alleged Time Life extended the offer for reemployment fully aware of his undocumented status. Mr. Egbuna pointed out that only upon filing a motion for summary judgment did Time Life bring up the matter of his illegal work status. Mr. Egbuna argued had it not been for his corroboration of a sexual harassment charge against Time Life, he would have either been reemployed by Time Life despite his illegal status or Time Life would have held the position open for four more months whereupon Mr. Egbuna would have established—and *did establish*—work authorization.<sup>8</sup>

The United States District Court for the Eastern District of Virginia sustained Time Life's motion for summary judgment. The court ruled Mr. Egbuna failed to make a *prima facie* case for retaliatory failure to hire under Title VII since he could not be "qualified" for the job as an undocumented alien.<sup>9</sup> Because the overwhelming precedent in previous Title VII cases for retaliation to hire did not require the applicant to establish he/she was "qualified" for the position, and because there still remained questions of fact as to whether Time Life's motivations to rescind the job offer were due to Mr. Egbuna's illegal status, Mr. Egbuna sought appellate review of the District Court's ruling.

In spite of the questionable lower court ruling, the U.S. Court of Appeals for the Fourth Circuit affirmed the summary judgment, albeit on different grounds.<sup>10</sup> The Fourth Circuit found Mr. Egbuna was ineligible to even file a Title VII action due to his undocumented status.<sup>11</sup> The Court explained that the Immigration Reform and Control Act of 1986 ("IRCA") "statutorily disqualifies any undocumented

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7. *Id.*

8. Mr. Egbuna was granted temporary work authorization in January 1994. *See Egbuna*, 153 F.3d. at 186 n.4.

9. *Id.* at 186.

10. The District Court granted Time Life's motion for summary judgment based on Mr. Egbuna's lack of evidence to support a *prima facie* disparate treatment claim pursuant to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824 (1973). In particular, the second element would require that Mr. Egbuna show that he was "qualified for a job for which the employer was seeking applicants." *See Egbuna*, 153 F.3d. at 186. However, the Court of Appeals affirmed the District Court's grant of summary judgment not based on an analysis of a *McDonnell Douglas*'s *prima facie* case but based solely on the reasoning that IRCA "statutorily disqualifies" any and all undocumented aliens from employment in the U.S. and thereby obliterates any rights unauthorized workers could have under federal employment laws such as Title VII. *Id.* at 188.

11. *Egbuna*, 153 F.3d at 188.

alien from being employed as a matter of law” and, in fact, makes it a criminal offense to employ any undocumented alien.<sup>12</sup> The Court reasoned that by allowing Mr. Egbuna to have a cause of action against Time Life for failing to hire him for a position he could not legally have counters the mandate of IRCA “that employers immediately discharge unauthorized aliens upon discovering their undocumented status.”<sup>13</sup> The Court also contemplated as a remedy for Time Life’s violation, Mr. Egbuna would be entitled to reinstatement, and “[t]o do so would sanction the formation of a statutorily declared illegal relationship.”<sup>14</sup> The Fourth Circuit also erased any doubt as to whether a previous U.S. Supreme Court holding that recognized undocumented aliens’ rights under federal labor laws<sup>15</sup> would support Mr. Egbuna’s case partly by noting it was decided “pre-IRCA.”<sup>16</sup>

### III. FIVE REASONS WHY THE *Egbuna* Decision Should Be Overruled

#### A. *Simultaneous Maximization of Title VII and IRCA*

The Fourth Circuit’s holding is based on two premises. First, the remedies allowed under Title VII are available “*only* upon a successful showing that the applicant was qualified for employment.”<sup>17</sup> The Court came to the logical conclusion that since the goal of equitable remedies under Title VII “is to make the complainant whole without imposing large monetary penalties upon the employer,”<sup>18</sup> and because “IRCA statutorily disqualifies any undocumented alien from being employed,” not a single undocumented alien would be “qualified for employment” and ultimately would be ineligible for the equitable remedies afforded under Title VII.<sup>19</sup> The Court’s holding carries the undertone that it flies in the face of judicial economy to permit such cases. Second, because Title VII offers protections to employees, and because IRCA makes it unlawful for an undocumented alien to be employed, giving merit to claims brought by undocumented alien employees would be to “sanction the formation of a statutorily declared illegal relationship.”<sup>20</sup> The two premises are addressed in order.

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12. *Id.* at 187.

13. *Id.* at 188.

14. *Id.* (alteration in original).

15. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984). See discussion *infra* Part II.A.

16. *Egbuna*, 153 F.3d. at 187.

17. *Id.* (emphasis added).

18. *Id.* at 186.

19. *Id.* at 187.

20. *Id.* at 188.

## 1. Title VII Remedies and Undocumented Alien Employees

Perhaps the most obvious argument to be made concerning the coverage of Title VII protections of undocumented alien employees is simply because there are no express terms in Title VII limiting claims to only “authorized” employees.<sup>21</sup> Section 701(f) of Title VII defines “employee” as “an individual employed by an employer.”<sup>22</sup> However, “[i]n almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions.”<sup>23</sup> It is therefore necessary to counter the Fourth Circuit’s opinion by a further elaboration of remedies under Title VII.

Essentially, there are three scenarios in which an undocumented alien plaintiff’s illegal employment status would be at issue in a Title VII case, each scenario having different remedies available to the plaintiff:

- (1) The first scenario is where the plaintiff establishes a Title VII violation by an employer, and the employer either succeeds or fails after producing evidence that the plaintiff’s illegal employment status was the legitimate, nondiscriminatory reason behind the action.<sup>24</sup> This will be termed a “single-motive” case.
- (2) The second scenario is where the plaintiff establishes a Title VII violation by an employer, but the employer produces evidence that in addition to an improper motive, the plaintiff’s illegal employment status was also a motivating factor.<sup>25</sup> This was potentially the scenario in *Egbuna*, and will be termed as a “mixed-motive” case.<sup>26</sup>
- (3) The third scenario is where the plaintiff’s illegal employment status was unknown to an employer at the time of the employer’s

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21. For the sake of being concise, this section is limited to a discussion of the appropriateness of individual disparate treatment discrimination suits by undocumented alien plaintiffs under Title VII. It does not focus on the justification of systemic disparate treatment discrimination claims or disparate impact discrimination claims by undocumented alien plaintiffs, although the arguments for these types of claims would be akin.

22. 42 U.S.C. § 2000e(f) (1991).

23. See *Northwest Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 97 (1981) (alteration in original).

24. See generally *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (introducing the constitution of a prima facie case for a Title VII disparate treatment claim).

25. See 42 U.S.C. § 2000e-2(m) (1991); see e.g., *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94-95 (2003) (discussing the amount and type of evidence necessary for a plaintiff alleging a Title VII violation to establish that an employer had an impermissible, discriminatory motive concurrent to a legitimate, nondiscriminatory motive in executing the adverse employment decision).

26. Because the Fourth Circuit affirmed the district court’s grant of defendant’s motion for summary judgment, there was no factual finding as to whether Time Life’s motivation was in retaliation to Mr. Egbuna’s participation in the sexual harassment investigation or in consideration of Mr. Egbuna’s illegal employment status or a combination of both.

adverse treatment, but discovered before the final judgment.<sup>27</sup> This will be termed as an “after-acquired evidence” case.

In a “single-motive” case as described in the first scenario, the conceivable relief available for any plaintiff includes backpay, front pay, monetary damages (compensatory and/or punitive), reinstatement, reinstatement, injunction, retroactive seniority, and attorney fees.<sup>28</sup> In *Egbuna*, the Court cites *Albemarle Paper Co. v. Moody*<sup>29</sup> to support its opinion that Title VII remedies are “equitable remedies” meant to “make the complainant whole.”<sup>30</sup> The Court axiomatically failed to give a comprehensive declaration of Title VII remedies by listing only some remedies and by restricting the goal of the remedies to that of “mak[ing] the complainant whole,” which failed to note the remedies’ intended deterrence effect.<sup>31</sup> The court in *Albemarle* noted the dual mission of remedies available under Title VII when it said the “central statutory purposes [of Title VII] of *eradicating discrimination throughout the economy and making persons whole* for injuries suffered through past discriminations” should not be “frustrated” when awarding remedies.<sup>32</sup> *Albemarle* made its stance on this issue clear when the court said the prospect of a monetary award “provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country’s history.”<sup>33</sup>

27. See generally *McKennon v. Nashville Banner Publ’g Co.*, 513 U.S. 352, 363 (1995) (determining that for a defendant to have the “after-acquired evidence” defense, the defendant must first “establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the [adverse employment treatment]”).

28. See generally 42 U.S.C. §§ 2000e-5(g), (k), 1981a(a)(1) (1991). Although some of the remedies available for a Title VII claim serve to “make the complainant whole,” there are remedies under Title VII that do not have that function. See, e.g., *Local 28, Sheet Metal Workers’ Int’l Ass’n v. EEOC*, 478 U.S. 421, 474 (1986) (holding that section 706(g) does not bar an award of affirmative relief under Title VII to remedy previous discrimination, and that the purpose of affirmative action is not to make the identified victims whole).

29. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

30. *Egbuna v. Time Life Libraries, Inc.*, 153 F.3d 184, 186 (4th Cir. 1998), cert. denied, 525 U.S. 1142 (1999).

31. *Id.* (alteration in original).

32. *Albemarle Paper Co.*, 422 U.S. at 421 (addressing under what circumstances back pay should be denied to a plaintiff with a meritorious case) (alteration in original) (emphasis added).

33. *Id.* at 417-18 (quoting *United States v. N.L. Industries, Inc.*, 479 F.2d 354, 379 (CA8 1973). See also *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63 (1980) (finding that “Congress has cast the Title VII plaintiff in the role of ‘a private attorney general,’ vindicating a policy ‘of the highest priority’”); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974) (“[T]he private right of action remains an essential means of obtaining judicial enforcement of Title VII . . . . In such cases, the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices.”).

Most noticeably absent from the Fourth Circuit's laundry list of remedies in a Title VII case is monetary remedies. Title VII separates remedies into equitable remedies, found in section 706(g), and monetary remedies found in section 1981a. Monetary remedies include the award of compensatory and punitive damages. Punitive damages, by definition, are meant to punish the defendant and are not meant to "make the complainant whole."<sup>34</sup> The Civil Rights Act of 1991 ("CRA") amended Title VII and enacted section 1981a(a)(1) that says:

In an action brought by a complaining party under [Title VII] against a respondent who engaged in unlawful intentional discrimination . . . the complaining party may recover compensatory and *punitive damages* as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.<sup>35</sup>

The CRA goes on to give the prerequisites to recover punitive damages in section 1981a(b)(1) saying, "[a] complaining party may recover punitive damages . . . if the complaining party demonstrates that the respondent engaged in a discriminatory practice . . . with malice or reckless indifference to the federally protected rights of an aggrieved individual."<sup>36</sup> Evidently, whether the employee was "qualified for employment" is not a prerequisite to be eligible for an award of punitive damages as codified in the CRA.

Nor is there a prerequisite that the plaintiff show he/she was "qualified for employment" to receive compensatory damages under the CRA. Section 1981a(b)(3) of the CRA lists possible injuries for which compensatory damages may be awarded under a Title VII claim, many of which have nothing to do with actual employment, i.e., "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. . . ."<sup>37</sup> In addition, Congress's act of limiting the maximum award for compensatory and punitive damages according to the number of employees the defendant employs pursuant to section 1981a(b)(3)<sup>38</sup> should subdue the Fourth Circuit's fear, as articulated in

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34. *Egbuna*, 153 F.3d at 186.

35. 42 U.S.C. § 1981a(a)(1) (1991) (alteration in original) (emphasis added).

36. *Id.*

37. *Id.* See also *Ruffin v. Great Dane Trailers*, 969 F.2d 989, 993 (9th Cir. 1992) (holding that a Title VII plaintiff may recover attorney's fees despite not recovering monetary damages when he has prevailed in his request for injunctive relief), *cert. denied*, 507 U.S. 910 (1993).

38. The CRA was enacted just short of two decades after the *Albemarle* decision. Prior to the CRA, equitable remedies were the only remedies available to a plaintiff, which explains why the court in *Albemarle* did not discuss compensatory or punitive damages at that time.



*Albemarle*, of “imposing large monetary penalties upon the employer”<sup>39</sup>

As for the equitable remedies available in a “single-motive” case, under section 706(g), the statute says that the court itself awards equitable relief (i.e., reinstatement, instatement, backpay, front pay) at its discretion.<sup>40</sup> Thus, Title VII does not mandate that an employer reemploy an undocumented alien who is successful under a Title VII action, or even that the employer must compensate them for conceivable salary losses due to the discriminatory behavior. The Fourth Circuit ignored this when it warned that Title VII remedies were in conflict with IRCA. The Fourth Circuit based its decision on this faulty logic and this is the flaw to its first premise.

In the second scenario, or “mixed-motive” case, the remedies are very limited under any circumstances. In a “mixed-motive” case, in which an individual proves a violation under [a mixed-motive theory] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court (i) may grant *declaratory relief, injunctive relief, and attorney’s fees* and costs demonstrated to be directly attributable only to the pursuit of a claim under [a mixed-motive theory]; and (ii) *shall not* award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment . . . .<sup>41</sup>

In this scenario, any successful plaintiff, without regard to legal employment status or other “qualifications,” may not be instated, reinstated, receive backpay or front pay, or compensatory or punitive damages. The court may only grant declaratory relief, injunctive relief, and attorney’s fees, and, most importantly, there is no conflict with IRCA under any of these remedies.<sup>42</sup>

In an “after-acquired evidence” case, as described in scenario three above, the U.S. Supreme Court has held a court should determine the appropriate remedy on a case-by-case basis, but should not reward reinstatement and front pay if the employer would have discharged an employee for permissible reasons.<sup>43</sup> The Court in *McKennon* said the employer, in order to invoke this defense, must demonstrate they would have discharged the employee solely on that ground if the employer was aware of the employee’s wrongdoing (or employee’s illegal work status in this case). As pointed out by the Fourth Circuit, IRCA

39. *Egbuna*, 153 F.3d at 186-87.

40. See 42 U.S.C. § 2000e-5(g)(1) (1991).

41. See *id.* §2000e-5(g)(2)(B) (alterations in original) (emphasis added).

42. *Id.*

43. *McKennon v. Nashville Banner Publ’g Co.*, 513 U.S. 352, 361 (1995). Although *McKennon* was an ADEA case, the Court has repeatedly noted the common substantive features and purpose shared by Title VII and the ADEA. See, e.g., *McKennon*, 513 U.S. at 357.

mandates “employers immediately discharge unauthorized aliens upon discovering their undocumented status.”<sup>44</sup> In other words, an employer who terminates an undocumented alien employee based on his/her illegal work status did so for “permissible reason” as required by the *McKennon* court.<sup>45</sup>

The Court in *McKennon* did not limit the award for an “after-acquired evidence” case in regards to compensatory and punitive damages. As discussed above, a court that awards undocumented aliens compensatory and punitive damages under Title VII does not contradict IRCA. In fact, the only remedies under any of the scenarios discussed in this section that conflict with the provisions found in IRCA are the equitable remedies that a court gives in its discretion. In conclusion of the analysis of the Fourth Circuit’s first premise, it was wrong for the court to say IRCA would be “nullified” if an undocumented alien employee received *any* remedy under Title VII.<sup>46</sup> Not unless the court itself did the nullifying.

## 2. Title VII and IRCA: A Two-Part Harmony

For its second premise, the Fourth Circuit refused to recognize Mr. Egbuna had any rights under Title VII in fear of “sanctioning” the formation of a relationship declared illegal under IRCA.<sup>47</sup> The overwhelming weight of authority prior to IRCA’s enactment held undocumented alien employees were protected by federal labor laws. IRCA itself is silent as to whether Congress intended to change this precedent. The Fourth Circuit, however, was not. Being the first U.S. Court of Appeals to interpret IRCA’s affect on this long-running precedent, the Fourth Circuit reasoned Title VII claims brought by undocumented aliens would “nullify IRCA.”<sup>48</sup> In analyzing this conclusion it is necessary to understand Congress’ intent behind enacting IRCA.<sup>49</sup>

A poll taken of all undocumented aliens in the United States questioning the purpose which motivated their immigration to this country

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44. *Egbuna*, 153 F.3d at 188.

45. *McKennon*, 513 U.S. at 361.

46. See also *Smith v. Sec’y of Navy*, 659 F.2d 1113, 1120 (D.C.Cir. 1981) (“The questions of statutory violation and appropriate statutory remedy are conceptually distinct. An illegal act of discrimination whether based on race or some other factor such as a motive of reprisal is a wrong in itself under Title VII, regardless of whether that wrong would warrant an award of” remedies.).

47. *Egbuna*, 153 F.3d at 188.

48. *Id.*

49. See *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 138, 147 (2002) (describing IRCA as a “comprehensive scheme prohibiting the employment of illegal aliens in the United States,” and “forcefully made combating the employment of illegal aliens central to the policy of immigration law”).

would disclose a myriad of reasons; but the most common reason may be “to find work.” Therefore, it would seem logical that our national legislative body targets the biggest “magnet” of illegal immigrants: willing employers. Congress enacted IRCA primarily “to reduce illegal immigration by eliminating employers’ economic incentive to hire [unauthorized] aliens.”<sup>50</sup> IRCA defines who is an unauthorized alien,<sup>51</sup> establishes an extensive employment verification system and puts the burden on the employers to verify the identity and eligibility of all new hires by examining specified documents before they begin work.<sup>52</sup> IRCA makes it unlawful both for an employer to hire an undocumented alien<sup>53</sup> and for an employee to counterfeit any of the required documents.<sup>54</sup>

At first glance, for Congress to forbid the employment of undocumented aliens and then to protect undocumented aliens who are so employed under federal labor laws seems intrinsically contrary. However, a closer look reveals the consistency and why federal labor laws go hand in hand with IRCA rather than “nullify” it. For example, one U.S. District Court noted that if the Fair Labor Standards Act (“FLSA”), which Congress designated in part to set minimum wages, did not cover undocumented aliens due to IRCA’s mission to reduce undocumented alien employees, employers would have an incentive to hire them: “Employers might find it economically advantageous to hire and underpay undocumented workers and run the risk of sanctions under IRCA.”<sup>55</sup> If undocumented aliens were unable to enforce federal labor laws against their employers, Congress would have shot itself in the foot by enacting IRCA since employers would have an even greater incentive than before to pursue illegal applicants. The same can be said about Title VII; an employer would have an incentive to hire employees who are less apt to sue him or her for discrimination in the workplace.

We are not completely without guidance as to what the legislative intent was upon the enactment of IRCA. In *Tortilleria “La Mejor”*, the court noted that the House Judiciary Report on IRCA stated:

It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair labor practices committed against undocu-

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50. See *EEOC v. Tortilleria “La Mejor”*, 758 F.Supp. 585, 591 (E.D.Cal. 1991).

51. See 8 U.S.C. § 1324a(h)(3) (2004).

52. See *id.* § 1324a(b).

53. See *id.* § 1324a(a).

54. See *id.* § 1324c(a).

55. See *Tortilleria “La Mejor”*, 758 F.Supp. at 591.

mented employees for exercising their rights before such agencies or for engaging in activities protected by existing law.<sup>56</sup>

The same court recognized a statement made in the House Education and Labor Committee Report:

In addition, the committee does not intend that any provision of this Act would limit the powers of . . . the Equal Employment Opportunity Commission . . . in conformity with existing law, to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by those agencies.<sup>57</sup>

It is not the attractiveness of our anti-discrimination employment policies that lure aliens to illegally cross our borders. Even without those policies, a high percentage of those who immigrate to the United States will still search for employment as long as there are employers who recognize the economic incentives and are willing to hire them. While the goal of IRCA is to remove incentives for hiring undocumented aliens, this purpose is best achieved through cooperation with other federal labor laws. The “nullification” of IRCA occurs not from allowing undocumented aliens from finding shelter under the federal labor laws, but from the judiciary branch’s failure to enforce the federal labor laws against perpetrating employers.

### 3. Reconciliation

It is imperative to recognize IRCA and Title VII each have its own purpose, and one is not a corollary of the other. An expectation that IRCA should function in lieu of Title VII, and vice versa, is preposterous. Rather, IRCA and Title VII act as two cooperating pieces of legislation. While IRCA seeks to limit who can become an employee, Title VII seeks to protect those who do become employees. Both pieces of legislation focus their provisions on regulating employer behavior and together can maximize each other’s effects. It is only by judicial fiat that these two legislative acts butt heads and condone illegal behavior.

#### B. *Pre-Egbuna Interpretation of Rights under Title VII*

Title VII came into existence with the enactment of the Civil Rights Act of 1964. Thirty-four years went by before the Fourth Circuit issued the *Egbuna* opinion announcing that undocumented alien employees do not have a right to file a Title VII claim. The creation of immigration laws is not a recent phenomenon, which begs the question: what was the precedent before the *Egbuna* decision? There can-

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56. *Id.* at 592.

57. *Id.* at 590-91.

not be a simple, one-sentence response because legislation regulating immigration has had somewhat of an evolution since 1964.<sup>58</sup> However, in order to avoid deviating from the topic, this section will analyze the courts' stance on the issue of whether undocumented alien employees have had equal protections under Title VII as compared to authorized employees divided into two eras: the "pre-IRCA/pre-Egbuna" era, and the "post-IRCA/pre-Egbuna" era.<sup>59</sup>

### 1. The "Pre-IRCA/Pre-Egbuna" Era

The Supreme Court had its first opportunity to address this issue in 1973 in the case of *Espinoza v. Farah Mfg. Co.*<sup>60</sup> In *Espinoza*, the Court held that "[a]liens are protected from illegal discrimination under [Title VII], but nothing in [Title VII] makes it illegal to discriminate on the basis of citizenship or alienage."<sup>61</sup> In other words, the prohibition against employment discrimination based on national origin in Title VII does not embrace alienage, but still covers undocumented alien employees in the United States to the same extent as authorized employees.<sup>62</sup> The Supreme Court came to this conclusion by pointing out that the definition of "employee" in section 703 extends to "any individual."<sup>63</sup> The Court also drew on "the negative inference from the exemption in section 702, which provides [Title VII] shall not apply to an employer with respect to the employment of aliens *outside* any State."<sup>64</sup> The Court even went as far to say if an employer were to hire aliens of Anglo-Saxon background but refuse to hire aliens of Mexican ancestry, they would be in violation of Title VII.<sup>65</sup>

Any assertion that the Supreme Court's interpretation in *Espinoza* of the definition of employee in section 703 of Title VII was mere dicta is dispelled by the Court's later ruling in the 1984 case of *Sure-Tan, Inc. v. NLRB*.<sup>66</sup> In *Sure-Tan*, the Court squarely held that the National Labor Relations Act's ("NLRA") definition of employee, which uses the same language as other federal labor laws, such as Title VII, includes undocumented aliens and, as such, are protected under

58. For a brief history and general overview of immigration law, see generally Stephen Yale-Loehr, *Overview of Immigration Law*, in BASIC IMMIGRATION LAW 2004, at 14-15 (New York Practice Skills Course Handbook Series PLI Order No. 2930, 2004).

59. What could be dubbed the "post-IRCA/post-Egbuna" era will generally be discussed in sections IV and V.

60. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973).

61. *Id.* at 95 (alterations in original).

62. *Id.*

63. *Id.*

64. *Id.* (emphasis added) (alteration in original) (quoting 42 U.S.C. § 2000e-1).

65. *Id.*

66. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).

the NLRA.<sup>67</sup> In its majority opinion, the Court in *Sure-Tan* emphasized the importance of maintaining this traditional definition of “employee”:

A primary purpose in restricting immigration is to preserve jobs for American workers. . . . Application of the NLRA helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment. If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened. In turn, if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws.<sup>68</sup>

Undisputedly, before the enactment of IRCA, the overwhelming precedent was that undocumented alien employees were considered “employees” as defined in federal labor laws such as Title VII. Hence, undocumented aliens were not impeded from filing Title VII claims against their employer’s illegal acts.

## 2. The “Post-IRCA/Pre-*Egbuna*” Era

In 1989, the United States Court of Appeals for the Ninth Circuit was one of the first federal courts to consider whether an undocumented alien could be an employee as defined by Title VII following the 1986 enactment of IRCA in *EEOC v. Hacienda Hotel*.<sup>69</sup> Although not directly addressing the effect IRCA had on an undocumented alien’s rights under Title VII, the court followed the “pre-IRCA/pre-*Egbuna*” era’s precedent and found Title VII’s definition of “employee” did indeed include undocumented aliens.<sup>70</sup>

It was not until *Tortilleria “La Mejor”* in 1991 that a federal court directly addressed IRCA’s effect on Title VII claims brought by undocumented aliens.<sup>71</sup> The United States District Court in the Eastern District of California used statutory interpretation, legislative history, and EEOC administrative interpretations to come to the conclusion that “Congress did not intend IRCA to amend or repeal any of the previously legislated protections of the federal labor and employment laws accorded to aliens, documented or undocumented, including the protections of Title VII.”<sup>72</sup> The court in *Tortilleria “La Mejor”* im-

67. *Id.* at 893.

68. *Id.* at 893-94.

69. *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989).

70. *Id.* at 1517.

71. *EEOC v. Tortilleria “La Mejor”*, 758 F.Supp. 585 (E.D.Cal. 1991).

72. *Id.* at 593-94.

plied Congress, in enacting IRCA, purposefully left out express language that would address how the new legislation limited undocumented aliens' rights under current federal labor laws.<sup>73</sup> The court in *Tortilleria "La Mejor"* also compared other courts' treatment of how IRCA affected other federal labor laws, e.g., FLSA and NLRA, with respect to protection of undocumented aliens, and commented on the importance the threat of these claims play with IRCA in mitigating the incentive of hiring undocumented aliens.<sup>74</sup>

During the "post-IRCA/pre-*Egbuna*" era, courts in all jurisdictions continued to hear undocumented aliens' claims brought under other federal labor laws. Indeed, the absence of any citation by the Fourth Circuit to case law or legislative history that favored its denial of undocumented-alien initiated Title VII claims in *Egbuna* is painfully noticeable.

### C. EEOC Policy

President Lyndon B. Johnson signed Title VII into law on July 2, 1964, just over eight months after President John F. Kennedy's assassination and eleven months from the date of Martin Luther King, Jr.'s "I have a Dream" speech. Congress created the Equal Employment Opportunities Commission ("EEOC") simultaneously as the enforcement agency of Title VII's proscriptions, although initially with relatively limited enforcement powers.

Modernly, when a private person desires to sue their employer for Title VII violations, the complainant must timely file a charge of discrimination with the EEOC whereupon the EEOC will investigate the case and either file a civil action itself or issue a "right-to-sue letter" to the complainant. The EEOC recently released a statement on June 27, 2002, which states: "When enforcing these laws, EEOC will not, on its own initiative, inquire into a worker's immigration status. Nor will EEOC consider an individual's immigration status when examining the underlying merits of a charge."<sup>75</sup>

In 1999, the EEOC issued a document entitled "Enforcement Guidance on Remedies Available to Undocumented Workers Under Fed-

73. *Id.* at 593.

74. *Id.* at 591. See also *EEOC v. Switching Systems Div. of Rockwell Int'l Corp.*, 783 F.Supp. 369, 374 (N.D. Ill. 1992) ("[P]laintiff plainly is correct that Title VII's protections extend to aliens who may be in this country either legally or illegally.").

75. Equal Employment Opportunity Commission, *Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws* (June 27, 2002), available at <http://www.eeoc.gov/policy/docs/undoc-rescind.html> (this was the EEOC's response to the decision in *Hoffman Plastic Compounds, Inc.*, see discussion *infra* Part IV).

eral Employment Discrimination Laws.”<sup>76</sup> The document has since been rescinded due to the EEOC’s need to reexamine its stance on what remedies it believes should be offered to undocumented alien employees under Title VII.<sup>77</sup> Nonetheless, in its rescission letter, the EEOC stated the reason for the rescission “in no way calls into question the settled principle that undocumented workers are covered by the federal employment discrimination statutes and that it is as illegal for employers to discriminate against them as it is to discriminate against individuals authorized to work.”<sup>78</sup> In the rescinded letter, which was issued after the *Egbuna* opinion, and likely still EEOC’s position, the EEOC stated:

Failure to protect those workers would undermine enforcement of not only the anti-discrimination laws, but also the immigration laws. Without such coverage, employers have an incentive to hire workers who cannot effectively protest unlawfully discriminatory treatment. As the Eleventh Circuit observed, in the context of the FLSA, “coverage of undocumented workers has a[n effect similar to that of IRCA ], in that it offsets what is perhaps the most attractive feature of such workers - their willingness to work [in substandard conditions. Without that offset,] employers would have an incentive to hire them.”<sup>79</sup>

Although the EEOC Enforcement *Guidelines* do not have the force and effect of law, courts often look to them for direction.<sup>80</sup> Notwithstanding the customary citations to EEOC policy that are endorsed by so many other courts in Title VII issues, the Fourth Circuit failed to acknowledge the existence of this executive agency in its majority opinion. In the rescinded Enforcement Guidance, the EEOC expressly disagreed with the Fourth Circuit’s holding in *Egbuna*.<sup>81</sup> Furthermore, because the EEOC is only reconsidering the *remedies* that should be offered to undocumented aliens under federal employment discrimination statutes and not undocumented aliens’ *rights*, the

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76. Equal Employment Opportunity Commission, Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws (Rescinded October 26, 1999), available at <http://www.eeoc.gov/policy/docs/undoc.html>.

77. See discussion *infra* Part IV.

78. Equal Employment Opportunity Commission, Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws (June 27, 2002), available at <http://www.eeoc.gov/policy/docs/undoc-rescind.html>.

79. Equal Employment Opportunity Commission, Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws (Rescinded October 26, 1999), available at <http://www.eeoc.gov/policy/docs/undoc.html> (quoting *Patel v. Quality Inn South*, 846 F.2d 700, 704 (11th Cir. 1988)) (alterations in original).

80. See generally *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 142, 97 S.Ct. 401, 411 (1976) (stating that the level of deference given to EEOC’s *Guidelines* “will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade”).

81. *Id.*



EEOC will most likely continue to have a policy opposing the Fourth Circuit's interpretation.

#### D. *The U.S Supreme Court's Stance*

So far, the Supreme Court has not addressed IRCA's effect on undocumented aliens' rights under Title VII. However, the Supreme Court has addressed the effects of this congressional act on another federal labor law, the National Labor Relations Act ("NLRA"). The NLRA prohibits, among other things, employer discrimination against employees who take part in union or collective activities.<sup>82</sup> The NLRA created the National Labor Relations Board ("NLRB") to enforce this right, and it has historically been the NLRB's position that undocumented aliens receive protections under the NLRA.

The Supreme Court's 2002 decision in *Hoffman Plastic Compounds, Inc. v. NLRB* addressed the remedies the NLRB could grant an undocumented alien with a meritorious case under the NLRA.<sup>83</sup> The employee in this case assisted in organizing a union campaign by distributing authorization cards to co-workers. Seven months later, this employee was discharged due to the employer's distaste for union supporters. The NLRB found this to be in violation of the NLRA and awarded remedies, including backpay. The employee's unauthorized work status was discovered later at a hearing before an Administrative Law Judge and the question of which remedies were appropriate to award to undocumented alien employees arose. The Supreme Court granted certiorari and found awarding backpay to illegal aliens runs counter to policies underlying IRCA.<sup>84</sup> However, the Supreme Court did not rule, as did the Fourth Circuit in *Egbuna*, that undocumented aliens should altogether be excluded from filing such claims. In fact, the Supreme Court went in the opposite direction by recognizing its previous decision in *Sure-Tan* and held the NLRA applied to undocumented workers. Ultimately, the Court respected the NLRB's decision that action should be taken against the employer who violated the NLRA, even though the employee was an undocumented alien.<sup>85</sup>

Federal court cases have often drawn comparisons to the rights of undocumented aliens under Title VII with their rights under the NLRA.<sup>86</sup> In a memorandum directed from the Office of the General Counsel, the NLRB emphasized *Hoffman's* reaffirmation of the

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82. See 29 U.S.C. § 158(a)(3) (1974).

83. *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137 (2002).

84. *Id.* at 148.

85. *Id.* at 143, 152.

86. See *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1998).

Court's prior holding in *Sure-Tan* and said: "it is unassailable that all statutory employees, including undocumented workers, enjoy protections from unfair labor practices and the right to vote in NLRB elections without regard to their immigration status."<sup>87</sup> In a similar fashion as the EEOC, the memorandum also said the NLRB's policy in investigating claims is that Regions "should object to questions concerning the discriminatee's immigration status at the merits stage."<sup>88</sup>

The Supreme Court had an opportunity in *Hoffman* to acknowledge the Fourth Circuit's reasoning in *Egbuna* as an accurate reading of IRCA and how it affects undocumented aliens' rights under similar federal labor laws. However, the Supreme Court refused to find protecting undocumented employees under these laws would "nullify IRCA."<sup>89</sup> Instead, the Court only interpreted IRCA as limiting undocumented aliens' redressability under the NLRA.<sup>90</sup> *Hoffman* gave us a periscope's view of how the U.S. Supreme Court will rule on other federal labor laws' protections of undocumented employees when the occasions arise.

#### E. *Egbuna*, Should Other Federal Courts Follow?

Over seven years have passed since the Fourth Circuit's holding in *Egbuna*. Since that time, other federal courts have had the opportunity to either extend the Fourth Circuit's holding to similar issues or go in the opposite direction. The following is a brief summary of some of those cases that are noteworthy.

##### 1. *Rivera v. NIBCO, Inc.*

If the Fourth Circuit has polarized itself to the northern most hemisphere on the issue of whether undocumented aliens are protected by federal labor statutes, the Ninth Circuit is located somewhere on the southern hemisphere. In a fairly recent decision, *Rivera v. NIBCO, Inc.*,<sup>91</sup> the Ninth Circuit decided a plaintiff's immigration status is non-discoverable in a Title VII claim.<sup>92</sup> The Ninth Circuit reasoned that to hold otherwise would cause a "chilling effect . . . upon [an undocu-

87. Arthur F. Rosenfield, *Procedures and Remedies for Discriminates Who May Be Undocumented Aliens after Hoffman Plastic Compounds, Inc.*, Office of the General Counsel, MEMORANDUM GC 02-06 (July 19, 2002), available at [http://www.nlrb.gov/nlrb/shared\\_files/gcmemo/gcmemo/gc02-06.asp#foot2](http://www.nlrb.gov/nlrb/shared_files/gcmemo/gcmemo/gc02-06.asp#foot2) (last visited Nov. 15, 2005).

88. *Id.*

89. See *Egbuna v. Time Life Libraries, Inc.*, 153 F.3d 184, 188 (4th Cir. 1998), cert. denied, 525 U.S. 1142 (1999).

90. *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 143, 152 (2002).

91. *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004), cert. denied, 125 S. Ct. 1603 (2005).

92. *Id.* at 1074.

mented alien's] ability to effectuate their rights" under Title VII.<sup>93</sup> The court also emphasized liability and remedies are two distinct questions, and that IRCA only affects an undocumented alien's Title VII claim on the latter:

[I]t is clear that a separation between liability and damages would be consistent with our prior case law and would satisfy the concern that causes of action under Title VII not be dismissed, or lost through intimidation, on account of the existence of particular remedies. The principal question to be decided in the action before us is whether NIBCO violated Title VII. It makes no difference to the resolution of that question whether some of the plaintiffs are ineligible for certain forms of statutory relief.<sup>94</sup>

In *Rivera*, twenty-three female immigrants filed a Title VII suit against their employer, NIBCO, alleging disparate impact discrimination based on NIBCO requiring its employees to take examinations given only in English that were meant to evaluate basic job skills. Not surprisingly, the twenty-three employees who are all parties to this action and all immigrants who are limited in English proficiency, performed poorly on the examinations despite their otherwise satisfactory tenures. Soon thereafter, each employee faced adverse employment consequences and, eventually, all were discharged. NIBCO sought to discover the employees' immigration status during the depositions, but the plaintiffs' attorney counseled them to not respond. Furthermore, the attorney successfully filed for and obtained from the district court a protective order against further questions pertaining to immigration status.

On interlocutory appeal, NIBCO argued to the Ninth Circuit that, due to the *Hoffman* decision that back pay was inappropriate under IRCA to award to undocumented alien plaintiffs in an NLRA case, it is necessary to know before a Title VII case begins whether the plaintiffs have a legal immigration status.<sup>95</sup> To this, the Court first pointed out that both parties to the action stipulated to the fact that Title VII proscriptions are applicable to undocumented alien employees and then said "the parties' stipulation is consistent with what we have long assumed to be the law of this circuit."<sup>96</sup> The Court then speculated whether the *Hoffman* decision would prevent a backpay award to an undocumented alien plaintiff in a Title VII claim, but said:

[E]ven if we were to conclude that *Hoffman* did preclude backpay awards to illegal immigrants under all federal statutes, it would not matter in this case. *Hoffman* does not make immigration status rele-

93. *Id.* at 1064 (alteration in original).

94. *Id.* at 1070 (alteration in original).

95. *Id.* at 1062.

96. *Id.* at 1064 n.4.

vant to the determination whether a defendant has committed national origin discrimination under Title VII. If the district court decides to bifurcate the proceeding, as the plaintiffs have requested, the availability of backpay remedies for certain plaintiffs will be determined, if at all, only after the liability phase. Similarly . . . IRCA. . . [does not require] the district court to allow NIBCO's requested discovery.<sup>97</sup>

The Ninth Circuit left no room to speculate whether it agreed with the Fourth Circuit's conclusion in *Egbuna* that undocumented aliens' Title VII actions would "nullify IRCA."<sup>98</sup> The Ninth Circuit recognized in *Rivera* the important deterrent effect such claims have. The Ninth Circuit also found that IRCA's purpose is threatened by the passivity of a court being loathe to enforce Title VII violations against employers who victimize their undocumented alien employees by means of otherwise illegal discrimination.<sup>99</sup>

## 2. *Chaudry v. Mobil Oil Corp.*

Approximately one year after the *Egbuna* decision, the Fourth Circuit reaffirmed its position in *Chaudry v. Mobil Oil Corp.*<sup>100</sup> stating "foreign nationals" (i.e., aliens) are "entitled to Title VII protection 'only upon a successful showing that the applicant was qualified for employment.'"<sup>101</sup> By using the term "qualified for employment", the Fourth Circuit meant a person who could be employed legally pursuant to IRCA.<sup>102</sup> In *Chaudry*, the plaintiff ("Chaudry") was a Canadian citizen who had been employed by Mobil Oil Corporation ("Mobil") for 18 years in its London, England and Doha, Qatar offices. Chaudry argued that Mobil violated Title VII and the ADEA when Mobil discharged him rather than transfer him to the United States to work. Chaudry alleged Mobil's failure to transfer him was in retaliation for discrimination complaints Chaudry previously made against Mobil. Chaudry acknowledged during oral argument he did not have the authorization necessary to legally work in the United States.<sup>103</sup>

The district court granted the defendant's motion to dismiss for failure to state a claim. On appeal, the Fourth Circuit reviewed the defendant's motion *de novo* and held that, in light of the earlier *Egbuna*

97. *Id.* at 1074-75 (alteration in original).

98. See *Egbuna v. Time Life Libraries, Inc.*, 153 F.3d 184, 188 (4th Cir. 1998), *cert. denied*, 525 U.S. 1142 (1999).

99. *Rivera*, 364 F.3d at 1069.

100. *Chaudry v. Mobil Oil Corp.*, 186 F.3d 502 (4th Cir. 1999).

101. *Id.* at 504 (quoting *Egbuna*, 153 F.3d at 187).

102. Interestingly, the majority opinion in *Chaudry* was written by the judge who wrote the dissent in *Egbuna*.

103. *Chaudry*, 186 F.3d at 504-05.

decision, "the district court correctly dismissed Chaudry's complaint because it failed to establish that he was qualified for employment."<sup>104</sup> The Fourth Circuit shows no signs of relenting on the issue of whether employers who hire undocumented aliens and subject them to discrimination, in clear violation of Title VII, may be brought to justice through the very legislation that was enacted to forbid that conduct.

### 3. *Escobar v. Spartan Security Service*

In *Escobar v. Spartan Security Service*,<sup>105</sup> Plaintiff Enrique Escobar ("Mr. Escobar") had been employed by Defendant Spartan Security Service ("Spartan") for approximately seven months, from January 2001 to July 2001. Mr. Escobar alleged Spartan's President sexually harassed and propositioned him and, after Mr. Escobar refused the advances, he was demoted and eventually discharged. Mr. Escobar was an undocumented alien at the time of his employment but had obtained a legal work status by August 2002, before he filed a Title VII action against Spartan in the United States District Court in the Southern District of Texas.

The court in *Escobar* distinguished this case from *Egbuna*. The court said Mr. Escobar was in a different position than Mr. Egbuna because, even though Mr. Escobar was an undocumented alien at the time of employment, he was authorized to work by the time of the hearing and so was eligible for reemployment, whereas Mr. Egbuna was not eligible for reemployment.<sup>106</sup> The court, citing *Hoffman*, refused Mr. Escobar an award of backpay, but did allow reinstatement and front pay.<sup>107</sup>

*Escobar* committed a fatal error in distinguishing itself from *Egbuna*. The truth is Mr. Egbuna *did* achieve an authorized work status prior to the court's decision.<sup>108</sup> However, even if Mr. Egbuna had not established authorized work status prior to the disposition of the case, it seems odd that the court in *Escobar* would find this case would not "nullify IRCA"<sup>109</sup> when in both cases the plaintiffs had the same illegal work status at the time the offense took place. As discussed earlier, whether a Title VII plaintiff is granted instatement or rein-

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104. *Id.* at 504. The Court also addressed Chaudry's other claim that Mobil violated the ADEA and held that "since the ADEA also requires that a plaintiff be qualified for employment, Chaudry is also ineligible for ADEA protection." *Id.* at 505. *See also* Reyes-Gaona v. NCGA, 250 F.3d 861, 866-67 (4th Cir. 2001) (holding that the ADEA does not cover foreign nationals who apply in foreign countries for jobs in the United States).

105. *Escobar v. Spartan Sec. Serv.*, 281 F.Supp.2d 895 (S.D. Tex. 2003).

106. *Id.* at 897.

107. *Id.*

108. *See Egbuna v. Time Life Libraries, Inc.*, 153 F.3d 184, 186 n.4 (4th Cir. 1998), *cert. denied*, 525 U.S. 1142 (1999).

109. *See id.* at 188

statement is in the court's discretion. What seems more logical, but less apparent, is the court in *Escobar* did not agree with the outcome of the holding in *Egbuna* on a rational basis and tried to use employment status as a pretext to hold differently.

#### 4. *Slaitane v. Sbarro, Inc.*

*Slaitane v. Sbarro, Inc.*<sup>110</sup>, a New York federal district court case, concerned Mr. Fall, a black, foreign national complainant. Mr. Fall alleged his employer discriminated against him based on his race after the employer placed him on administrative leave pending a renewal of his expired "work permit" while allowing other employees with similarly expired "work permits" to continue on the job. The court granted summary judgment for the defendant and dismissed the complainant's entire claim.<sup>111</sup> The court cited *Egbuna* to support its decision that Mr. Fall failed to establish the second element of a *prima facie* discrimination claim that he was "qualified" for the position."<sup>112</sup> However, the court left open the possibility that if the employer treated similarly situated foreign nationals more favorably, Mr. Fall would be able to prove that the employer used his work status as a pretext to the true prohibited discriminatory motive.<sup>113</sup> Notwithstanding, the court saw no other similarly situated employee in this case to offer Mr. Fall this opportunity.<sup>114</sup>

The *Slaitane* holding is not an exact adoption of the *Egbuna* holding. *Egbuna*'s holding denounced any and all rights undocumented aliens would have under Title VII because of the inconsistency with IRCA. *Slaitane*, on the other hand, merely states that an employee's illegal work status is a legitimate, non-discriminatory reason for which an employer may take adverse employment action; however, the complainant still has the opportunity to prove that the employer is using the work status as a pretext and, theoretically, may still win the case.<sup>115</sup> In other words, *Slaitane* did not shut the door on all undocumented aliens Title VII claims as did the *Egbuna* holding.

#### 5. Summary of *Egbuna*'s Persuasion Outside the Fourth Circuit

The federal courts outside the Fourth Circuit's jurisdiction have collectively refused to extend *Egbuna*'s holding. Although it appears the Fourth Circuit is firm in its conviction that it ruled correctly in

110. *Slaitane v. Sbarro, Inc.*, No. 03-Civ.5504, 2004 U.S. Dist. LEXIS 9839 (S.D.N.Y. June 2, 2004).

111. *See id.* at \*66.

112. *Id.* at \*63.

113. *See id.* at \*64.

114. *See id.*

115. *See id.*

*Egbuna*, the true test to the validity of its holding in *Egbuna* will come when *and if* the Supreme Court makes a ruling on the issue. If the Supreme Court does give itself that chance, the Court would probably pattern its logic on its holding in *Hoffman* and only limit *remedies* without proscribing *rights* of undocumented workers under Title VII.

#### IV. CONCLUSION

The holding in *Egbuna* has serious consequences. Not only was Mr. Egbuna a possible victim of a Title VII violation who was denied his day in court, but, also, the employer in *Egbuna* may have evaded the sanctions designated by Title VII as retribution for his/her impermissible actions. What may be worse, the Fourth Circuit's holding goes further than its toll on individual cases. Put into perspective there are two larger consequences. First, there are reportedly over 5.3 million workers in the "unauthorized labor force."<sup>116</sup> Even though section 701(f) of Title VII defines "employee" as "an individual employed by an employer,"<sup>117</sup> the potential of the decision in *Egbuna* would permit 5.3 million employees' employers to be exempt from Title VII's proscriptions. Secondly, and as an end result of the first consequence, employers have yet another incentive to hire illegal immigrants.

Considering that the judiciary substantially controls the remedies afforded to successful Title VII complainants and IRCA's main purpose is to deplete employers' illegal hiring practices,<sup>118</sup> recognizing undocumented aliens' Title VII claims does not "nullify IRCA" as asserted by the Fourth Circuit.<sup>119</sup> However, failing to enforce such Title VII claims unnecessarily goes against an overwhelming weight of historical authority, EEOC policy, recent Supreme Court reasoning, and other current federal courts' holdings. In the end, the Fourth Circuit is the one who has begun to blaze a trail that will eventually "nullify IRCA."<sup>120</sup>

116. Dean E. Murphy, *A New Order: Imagining Life Without Illegal Immigrants*, N.Y. TIMES, Jan. 11, 2004, § 4, at 1.

117. 42 U.S.C. § 2000e(f) (1991).

118. See *EEOC v. Tortilleria "La Mejor"*, 758 F.Supp. 585, 591 (E.D.Cal. 1991).

119. *Egbuna*, 153 F.3d at 188.

120. *Id.*