Supreme Court of New Jersey

DOCKET NO. 089632

SERGIO LOPEZ,

Plaintiff-Petitioner,

—against—

MARMIC LLC, and MIKE RUANE, individually,

Defendants-Respondents.

ON PETITION FOR CERTIFICATION FROM AN ORDER OF THE SUPERIOR COURT

APPELLATE DIVISION DOCKET NO. A-002391-22

SAT BELOW: HON. ROBERT HEYS GARDNER J.S.C.

REPLY IN FURTHER SUPPORT OF PETITION FOR CERTIFICATION

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PRELIMINARY STATEMENT

Plaintiff-Petitioner, Sergio Lopez ("Petitioner"), submits this Reply in Further Support of Petition for Certification to the Response to Petition for Certification ("Response") that Defendants-Respondents, Marmic LLC and Mike Ruane, individually (together as "Respondents"), filed on August 23, 2024, in response to Petitioner's Amended Petition for Certification ("the Petition"), filed on August 13, 2024.

The Petition demonstrated that the Appellate Division erred in reaching its decision on two critical legal issues of wide-spread importance that merit this Court's review, specifically: (1) in determining that Petitioner's immigration status was relevant to his right to be paid and to recover statutory wages for work that he already and actually performed for Respondents; and (2) in affirming the trial court's unprecedented recognition of a "barter arrangement" in lieu of employment and the requisite payment of wages when a worker is undocumented, which undermines the bedrock principles of New Jersey's wage and hour laws.

Respondents appear to argue in their Response that the Appellate Division: (1) did not err in determining that Petitioner's immigrations status was relevant and not unduly prejudicial because Petitioner only faced prejudice from the admission of evidence concerning his W-4 form during a bench trial; (2) did not err in determining that Petitioner's immigration status was relevant, and correctly affirmed

that because Petitioner was "an undocumented alien . . . there can be no employee-employer relationship," as per the Immigration Reform and Control Act ("IRCA") and the United States Supreme Court's decision in Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137, 150 (2002); and (3) correctly affirmed the existence of a "barter arrangement" because undocumented immigrants cannot enter into employee-employer relationships.

Respondents' arguments make clear why this Court's review is necessary. Indeed, this Court should review this case and pronounce a rule, one way or another, as to whether evidence of an employee's immigration status is relevant in a suit to recover unpaid statutory wages for work already and actually performed. Second, this Court should either embrace, or categorically reject, the Appellate Division's loophole around New Jersey's wage payment statutes, which found lawful a barter arrangement in lieu of employment, even when all the factors supporting an employment relationship otherwise exist, so that an employer can avoid paying wages for hours actually worked to an undocumented worker.

Because these issues are of paramount importance, and Respondents' Response only highlights the need for this Court's review, the Court should grant the Petition and rule on both.

ARGUMENT

I. This Court should grant the Petition to clarify whether a worker's immigration status, in any context, is relevant to unpaid wage claims for work actually and already performed.

Whether a court may consider a worker's immigration status in a suit for unpaid wages under the New Jersey Wage and Hour Law and the New Jersey Wage Payment Law is an issue of paramount importance to all workers and businesses in this state. See In re Raymour & Flanigan Furniture, 405 N.J. Super. 367, 376 (App. Div. 2009) ("Put simply, the nature of the statutory scheme is to protect employees from unfair wages and excessive hours.") (internal quotations and citation omitted). And the Petition demonstrates that an employee's immigration status is categorically irrelevant to his/her statutory right to recover unpaid wages for work already performed.

A. Evidence concerning Petitioner's social security number was a proxy for his immigration status, and was entirely irrelevant to his wage claims.

While Respondents do not directly address this critical issue, their Response calls attention to the Appellate Division's statement that "there was no cross-examination about plaintiff's immigration status," despite the trial record being replete with questioning concerning Petitioner's lack of a valid social security

number. App24-25.[1] As the Petition cites, several courts have widely recognized that evidence concerning the validity of an individual's social security number is indeed a proxy for immigration status, and is thus not relevant and/or is unduly prejudicial in cases seeking recovery of wages for work already performed, even for purposes of discovery, let alone as admissible evidence at trial. See e.g., Palma v. Roman, No. 3:16-CV-00457, 2017 WL 4158651, at *3 (W.D. Ky. Sept. 19, 2017) (granting plaintiffs' protective order barring inquiry into their social security numbers during discovery in a case involving state and federal wage claims because "[p]ermitting inquiry into information that may influence immigration status, such as social security numbers, presents a danger of intimidation that can inhibit plaintiffs in pursuing their rights."); Nieves v. OPA, Inc., 948 F. Supp. 2d 887, 897 (N.D. Ill. 2013) (barring defendants from seeking discovery related to plaintiffs' immigration status, including their tax returns, and ordering defendants to destroy copies of a deposition because defendants inquired into a plaintiff's immigration status by asking, *inter alia*, about his social security number); Montoya v. S.C.C.P. Painting Contractors, Inc., 530 F. Supp. 2d 746, 750 (D. Md. 2008) (denying defendants' motion to compel discovery of plaintiffs' social security numbers in a case claiming unpaid wages, stating that "several courts have determined that

[1] "App," as used herein, refers to the Appendix to the Petition, followed by the relevant page numbers.

requests that seek to discover the immigration status of plaintiffs are both irrelevant and prejudicial"); Rengifo v. Erevos Enterprises, Inc., No. 06-CV-4266, 2007 WL 894376, at *1-2 (S.D.N.Y. Mar. 20, 2007) (granting a protective order barring defendants from inquiring into plaintiff's social security number during both discovery and at trial, where plaintiff brought state and federal wage claims, because courts "have recognized the *in terrorem* effect of inquiring into a party's immigration status and authorization to work in this country when irrelevant to any material claim"); Galaviz-Zamora v. Brady Farms, Inc., 230 F.R.D. 499, 502-03 (W.D. Mich. 2005) (granting a protective order barring discovery of all documents and information likely to lead to discovery of plaintiffs' immigration statuses, including, but not limited to, social security cards and W-2 forms, reasoning that such information is not relevant and unduly prejudicial). Thus, the Appellate Division erred in affirming the trial court's overruling of Petitioner's objections to Respondents' questioning concerning the validity of his social security number, and compounded that error by making the distinction that those questions did not constitute cross-examination about Petitioner's immigration status.

B. Petitioner's immigration status was irrelevant to his wage claims because Petitioner only made claims for work already performed.

The Petition exhaustively detailed how courts have repeatedly held that the IRCA does not preclude state wage claims by undocumented workers for labor

already provided to an employer. Respondents provide no answer to that wall of authority. Instead, Respondents look to the Appellate Division's blatant misinterpretation of Hoffman, without identifying any legal authority in support of their argument. That is because none exists. Hoffman narrowly prohibited the recovery of backpay for an undocumented worker for time *after* his unlawful termination, meaning not for work that he actually performed, as opposed to the issue here, which is for work already performed. As set forth in the Petition, courts have near-uniformly declined to extend Hoffman, all holding that it is limited to precluding relief for work not yet performed, as opposed to work already performed. See Solis v. Cindy's Total Care, Inc., No. 10-CV-7242, 2011 WL 6013844, at *2 (S.D.N.Y. Dec. 2, 2011) (granting plaintiff's motion *in limine* to exclude evidence of immigration status in an FLSA case, stating that "[t]he facts of Hoffman materially differ from those here. Most centrally, in Hoffman, the backpay award that was overturned exclusively covered a post-termination time period."); Galdames v. N & D Inv. Corp., No. 08-CV-20472, 2008 WL 4372889, at *2 (S.D.Fl. Sept. 24, 2008) (in response to defendants' argument that Hoffman should preclude recovery of unpaid wages for work actually performed based on plaintiffs' undocumented status, noting that "Defendants' tortuous reading of Hoffman is both plainly wrong and controverts clear, binding precedent.") (internal citation omitted); Zavala v. Wal–Mart Stores, Inc., 393 F. Supp. 2d 295, 321 (D.N.J. 2005) (stating

that it cannot infer that Hoffman precludes plaintiffs relief under the FLSA because, "[i]n Hoffman, the plaintiffs sought recovery for the hours that they would have, but had not, worked . . . Here, Plaintiffs hope to recover . . . for work that they already have performed."); see also Galaviz-Zamora, 230 F.R.D. 499 at 502-03 ("[C]ourts have limited the application of Hoffman to cases where claims of backpay are made for work not performed.") (internal citations and quotations omitted).

C. The prejudice that Petitioner suffered as a result of the lower courts' admission of evidence concerning his immigration status creates a chilling effect that targets vulnerable undocumented workers.

The Appellate Division similarly erred in determining that no prejudice occurred due to the admission of evidence concerning Petitioner's immigration status because "a bench trial was conducted, and no jury was tainted." App25. However, the trial court's own language, affirmed by the Appellate Division, leaves no question that Petitioner's immigration status tainted the trial because it, *inter alia*, expressly faulted Petitioner for lying about his social security number on his W-4, and for not "fixing the problem." App14, 50-51. Such decisions cause the "chilling effect" that courts are so cautious to avoid and provide the exact rationale as to why this Court should determine whether an individual's immigration status is either relevant, or it is not, in such suits, rather than allow the identity of the factfinder to dictate the admissibility of otherwise prejudicial evidence under such sensitive circumstances. Indeed, any undocumented individuals who review this case would

have ample reason to fear New Jersey's judicial system considering that the Appellate Division stated that "there was no cross-examination about plaintiff's immigration status" in the same decision that it stated as "the trial judge correctly found, plaintiff is an undocumented alien," which certainly did not occur based on evidence put forth by Petitioner. App18, 24-25; see also App19 (holding that the trial judge properly concluded that Petitioner was not eligible to work for Respondents under the IRCA because he is undocumented, based on Respondents' cross-examination of him).[2]

Either way, this issue is of paramount importance and this Court should grant review to clear it up.

II. The Court should reject the Appellate Division's unprecedented "barter arrangement" exception to New Jersey's Wage Payment Statutes.

This Court should also grant review of the Petition because the issue of whether courts may read a "barter arrangement" exception in lieu of employment into New Jersey's statutory wage laws for undocumented workers is similarly of paramount importance to all workers and businesses in this state. As the Petition makes plain, on the merits, the Appellate Division grievously erred in determining

[2] The irony of the Appellate Division determining that the questioning about Petitioner's social security number does not concern his immigration status and is not prejudicial, while affirming that the trial judge properly concluded that he is an "undocumented alien" based on that very questioning, is palpable.

that Petitioner's undocumented status defeats any employment relationship in suits for unpaid wages for work actually performed. See App18. Indeed, Respondents make no attempt to defend the Appellate Division's determination that there was not a valid employer-employee relationship under the ABC and/or the economic realities tests. See Petition, at 14-17. That is because Respondents are aware that Petitioner was their employee, and their only argument has ever been to escape the law on the basis of his immigration status. Thus, this ruling requires this Court's review because it sends an alarming message to all undocumented workers that their claims for wages for work already performed are of no consequence, and an equally alarming message to employers about this novel and incredible incentive to seek out and exploit the labor of undocumented workers to whom, should the Appellate Division's ruling stand, the state's statutory wage laws will no longer apply.

Indeed, the Appellate Division identifies no limiting principle for the "barter arrangement" exception. The Court should grant review to reject even the slightest inference that New Jersey's judiciary would allow employers to disclaim wage obligations through creative "bartering," thereby defeating the very purpose of the New Jersey Wage and Hour Law ("NJWHL") and the New Jersey Wage Payment Law ("NJWPL") - - to prevent sub-market arrangements and exploitation of vulnerable groups of workers.

CONCLUSION

The scope and application of this State's wage laws is a quintessential matter of public importance. Granting the Petition would allow this Court to set precedent and state with certainty whether an individual's immigration status, in any context, is relevant in a suit to recover unpaid statutory wages for work already performed, and to dispense of the novel "barter arrangement" exception to New Jersey's wage laws, and bring the NJWHL and NJWPL into greater consistency with the similarly-analyzed protections afforded by the Fair Labor Standards Act. Thus, for the reasons set forth in the Petition, and herein, Petitioner asks this Court to grant his Petition, reverse the judgments, and effectuate these vital public policies at stake.

Dated: New York, New York
September 3, 2024

Respectfully submitted,

By: /s/ Anthony P. Consiglio
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Andrew C. Weiss, Esq.