



L E G A L

S E R V I C E S

I N C O R P O R A T E D

TESTIMONY

ON

**THE PROPOSED RESOLUTION CALLING FOR THE
PASSAGE OF THE POWER ACT**

PRESENTED BEFORE:

**THE NEW YORK CITY COUNCIL
COMMITTEE ON IMMIGRATION AND
COMMITTEE ON CIVIL SERVICE AND LABOR**

PRESENTED BY:

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SENIOR STAFF ATTORNEY
MFY LEGAL SERVICES, INC.**

FEBRUARY 28, 2013

MFY Legal Services, Inc. (MFY) submits this testimony to New York City Council Committees on Immigration and Civil Service and Labor to express our support for the passage of a City Council Resolution in favor of the Protect Our Workers from Exploitation and Retaliation Act (POWER Act).

MFY envisions a society in which no one is denied justice because he or she cannot afford an attorney. To make this vision a reality, for 50 years MFY has provided free legal assistance to residents of New York City on a wide range of civil legal issues, prioritizing services to vulnerable and under-served populations, while simultaneously working to end the root causes of inequities through impact litigation, law reform and policy advocacy. We provide advice and representation to more than 8,000 New Yorkers each year. MFY's Workplace Justice Project (WJP) advocates on behalf of low-income workers most vulnerable to exploitation. On their behalf, we regularly litigate claims for unlawful failure to pay wages and unlawful discrimination. We also provide advice, counsel, and representation to clients on a range of other employment problems. Because MFY does not receive federal Legal Services Corporation funding, it is one of the few resources for New York City's low-wage undocumented immigrants who need legal representation.

The POWER Act Will Mitigate the Effective Incentive to Violate the Employment Rights of Immigrants of the *Hoffman Plastic* Case by Providing Workers Whose Rights are Violated with Documented Status

MFY supports the passage of the POWER Act because it could make a huge difference to our clients, who often have been the victim of wage theft and discrimination, but have few protections against employers' retaliation.

Even though undocumented workers are protected by most labor and employment laws, including minimum wage, overtime, discrimination, and health and safety laws, these workers face significantly greater challenges than documented workers in enforcing their rights under the law. This disparity is due in part to the U.S. Supreme Court's 2002 decision in *Hoffman Plastic Compounds Inc. v. NLRB*, which held that the National Labor Relations Board could not award undocumented workers back pay as a remedy when an employer illegally fired the workers in retaliation for exercising their labor rights under the National Labor Relations Act.¹ The decision left undocumented workers without the ability to pursue the legal remedies normally available to workers whose rights had been violated, and effectively undercut the law's protection of all workers.

After *Hoffman*, employers urged courts to extend the decision's reasoning to limit undocumented workers' rights and remedies under other employment laws, and were successful in doing so in some cases. For example, the holding in *Hoffman* has been extended to limit undocumented workers' remedies in other contexts where the remedy could be classified as pay

¹ 535 U.S. 137 (2002).

for “work not performed,” such as in denying back pay to victims of workplace discrimination.² Indeed, in our experience, it is common for employers to threaten workers with reports to the immigration authorities in response to justified complaints about unlawful conditions. Ultimately, *Hoffman* provides an incentive to employers to hire undocumented workers in order to break the law with no consequences. The lack of effective protection against retaliation means that undocumented immigrant workers are justifiably afraid to come forward, since they are barred from being awarded back pay or being reinstated to their job if they are fired for asserting their rights. Seeing coworkers fired and not reinstated creates a chilling effect that impacts all workers.

Undocumented Workers Are Subjected to a Host of Abuses for Which They Have Little Recourse

MFY has seen first-hand the way abusive employers take advantage of our undocumented clients, by blatantly violating minimum wage and overtime laws and illegally discriminating against them, emboldened by the knowledge that many in our clients’ positions won’t assert their rights. Below are a few examples.

Ms. L, an undocumented client from Mexico, worked in a takeout and catering business on the Upper East Side for years, for an abusive boss who constantly made derogatory comments about her race and national origin. For example, her boss told her that she was a “dirty Mexican” and that Mexicans “only came to the United States to steal.” She was also sexually harassed by a kitchen supervisor in the same workplace, for example, when he exposed himself to her, and also made sexually explicit jokes and gestures. Even though she complained, the boss did nothing to stop the behavior. Ms. L and other workers were not paid minimum wage or overtime. The boss would keep Ms. L and other workers in line by threatening to call immigration if they complained about the bad treatment. When Ms. L once got sick and said she could not come into work for a couple of days, the boss fired her. Even if she were to prove to a court that she was discriminated against, Ms. L would not have the right to receive back pay.

Ms. M, an undocumented client from Honduras, has worked as a home attendant for several home health agencies in New York City. Although she regularly worked as a sleep-in home attendant for one of her former employers, providing 24-hour care to her elderly and disabled patients, she has never been paid overtime as required by law. After Ms. M became ill on the job and was hospitalized, her employer fired her. Even if she were to be able to prove to a court that she was fired in violation of disability discrimination laws, Ms. M would not have the right to receive back pay or to be reinstated to her job, leaving her with little remedy other than to seek repayment for the unpaid wages for her work.

² See Ruben J. Garcia, *Ten Years After Hoffman Plastic Compounds v. NLRB: The Power of a Labor Law Symbol*, 21 Cornell J.L. & Pub. Pol’y 599, 661 (2012) (listing cases).

Ms. D, an undocumented client from Mexico who has a young daughter, was the victim of rape, sexual assault, and constant sexual harassment by her employer, the owner of a number of laundromats in the Bronx. Ms. D stayed at the job for years, in part because of her employer's threats that he would report her to immigration authorities if she were to leave and go to the police. At first Ms. D felt that she had no choice and that she would do anything to support and protect her young daughter, including staying at the job. Eventually, however, Ms. D left the job and filed a police report; however, justice has moved slowly, and Ms. D still lives in fear that her former employer will take retribution against her. Unsurprisingly, that employer is also guilty of egregious wage theft, failing to pay her minimum wage or overtime.

As these clients' stories show, immigrant workers who, in theory, should be protected by the law in fact have fewer remedies available to them, and all too often are left with little recourse when their rights are violated. Out of the three examples, because of the severity of the crime and the fact that she reported it to the police, only Ms. D has a solid chance of obtaining a U-visa, which is a type of visa available to victims of certain "qualifying criminal activity" who cooperate with law enforcement, and which provides temporary legal status and legal work eligibility in the United States.³

Although Ms. L and Ms. M have also been victims of illegal wage theft and discrimination, under the current statutory regime they have fewer remedies available to them, and their choice to file a lawsuit against their former employers could result in retaliation against which they are insufficiently protected.

The POWER Act could make a huge difference to clients like Ms. L and Ms. M. It would provide temporary protection for immigrant victims of crime and employment retaliation, and it would expand protections more broadly than what is available now under a U-visa, because it would apply to civil workplace claims. Among other things, it would apply to a worker who filed or is likely to be helpful in the investigation of a "bona fide workplace claim" and "reasonably fears, has been threatened with, or has been the victim of . . . abuse of the immigration or other legal process by the employer in relation to acts underlying or related to the filing of the claim."⁴ Under this framework, workers who have been the victims of wage theft but whose employers' abuse fall short of "qualifying criminal activity" have less to fear even if they believe their employers will threaten them with reporting them to immigration authorities if they complain.

MFY applauds the City Council for its proposed resolution in support of the POWER Act, and joins the City Council in calling on Congress to pass it without further delay. Thank you for the opportunity to submit testimony on this pressing issue.

³ See generally, Department of Homeland Security, U Visa Law Enforcement Certification Resource Guide at 1-3, available at http://www.dhs.gov/xlibrary/assets/dhs_u_vis_a_certification_guide.pdf (last visited Feb. 26, 2013).

⁴ Protect Our Workers from Exploitation and Retaliation Act, H.R. 2169, 112th Cong. (1st Sess. 2011), text available at <http://www.govtrack.us/congress/bills/112/hr2169/text> (last visited Feb. 26, 2013).

For any questions about this testimony, please feel free to contact Anamaria Segura at (212) 417-3707 or asegura@mfy.org, or Maia Goodell, at (212) 417-3749 or mgoodell@mfy.org.