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Portable Justice and  
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# Portable Justice, Global Workers, and the United States

By Cathleen Caron



*Stay and starve or go home and starve. “Henry” was faced with a bleak choice. Injured on the job and owed weeks of wages, Henry did not know where to turn for help in his country of employment. Unable to pay his rent and food, he saw no choice but to return to his home country. Although happy to be reunited with his family, he is unable to work, and he worries about his family’s ability to survive.*

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Justice, unlike migrants, does not easily cross borders. What awaits migrants such as Henry who go home but still need treatment for their compensable injuries or payment of unpaid wages? Nothing. Migrant-sending countries do not have ways to ensure that migrant workers achieve redress for legal wrongs suffered in their country of employment.

As a result of globalization, unprecedented numbers of migrants cross international boundaries seeking employment.<sup>1</sup> In the world today approximately 86 million people are migrant laborers.<sup>2</sup> Due to their unfamiliarity with the local languages, laws, and available assistance, foreign migrant workers are frequently exploited in their countries of employment.

Migrants’ ability to vindicate rights violated in one state when they return home or move to a third state has not received adequate attention. Migration for work does not always result in permanent resettlement in the country of employment. In fact, the trend globally is for temporary foreign migration to meet domestic labor needs. By tying workers’ legal presence to the length of employment, the host country is assured that the workers must leave when the employment ends. Workers also leave for other reasons, such as deportation or to care for ill relatives. Some simply want to return to their families. There are no statistics about the rate of return of migrant workers, but return migration is not uncommon.<sup>3</sup>

<sup>1</sup>The international definition of a migrant worker is a person “engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.” International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families art. 2, para. 1, Dec. 18, 1990.

<sup>2</sup>International Labour Organisation, International Labour Conference, June 1–17, 2004, *Report VI: Towards a Fair Deal for Migrant Workers in the Global Economy 7*, available at [www.ilo.org/public/english/support/publ/books.htm](http://www.ilo.org/public/english/support/publ/books.htm).

<sup>3</sup>Secretary-General of the United Nations, *Report of the Secretary-General on International Migration and Development*, ¶ 247, delivered to the General Assembly, U.N. Doc. No. A/60/871 (May 18, 2006), available at [www.un.org/esa/population/hldmigration/Text/Report%20of%20the%20SG%28June%2006%29\\_English.pdf](http://www.un.org/esa/population/hldmigration/Text/Report%20of%20the%20SG%28June%2006%29_English.pdf).

Herein lies the problem. Whether or not they willingly return home, migrants are forced to abandon their legal claims because their access to justice in their country of employment is thwarted once they leave. Migrants' transnational access to justice, or "portable justice," is not assured.<sup>4</sup> If migrants are prevented from vindicating their legal rights, an underclass of laborers is created, and this is all too attractive to employers who seek to avoid complying with the law. As a result, labor and safety standards are lowered for all workers. This scenario is happening all over the world.

Businesses are global. Workers are global. Justice is not. The winners of this system are the cheating employers who, knowing that their mobile work force has limited ability to use the legal system to halt the exploitation, break the law. Until justice is portable, allowing workers full freedom of movement without relinquishing their rights, migrants will continue to bolster but not benefit from globalization.

### I. United States and the Denial of Portable Justice

The United States is the largest migrant-receiving country in the world.<sup>5</sup> According to the U.S. government,

approximately 10.5 million unauthorized residents lived in the country in 2005, the top four countries of origin being Mexico (5,970,000), El Salvador (470,000), Guatemala (370,000), and India (280,000).<sup>6</sup> Approximately seven million of them are employed without the proper work authorization.<sup>7</sup> Although how many unauthorized or "undocumented" workers return to their country of origin is unknown, a certain percentage of them do go back.<sup>8</sup>

Over one hundred thousand temporary guestworkers enter the United States each year on H-2 visas for contracts lasting less than one year.<sup>9</sup> The countries sending the most H-2 workers to the United States in 2005 were Mexico (90,466), Jamaica (11,943), Guatemala (3,760), and Canada (3,127).<sup>10</sup> Performing "unskilled" temporary labor, such as agriculture, forestry, and landscaping, these workers are legally obligated to return to their country of residence once they complete their contracts. Live-in domestic workers come by the thousands to the United States on temporary visas to work in the homes of diplomats (A-3 visas) and members of international organizations (G-5 visas) or to accompany U.S. citizens visiting or temporarily assigned to the United States but who otherwise reside abroad (B-1 visas).<sup>11</sup>

<sup>4</sup>The term "portable justice" was coined in my statement, *Global Workers Require Global Justice: The Portability of Justice Challenge for Migrants in the USA*, to the Committee on Migrant Workers Day of General Discussion 9 (Oct. 30, 2005), available at [www.globalworkers.org/publications.html](http://www.globalworkers.org/publications.html).

<sup>5</sup>GLOBAL COMMISSION ON INTERNATIONAL MIGRATION, *MIGRATION IN AN INTERCONNECTED WORLD: NEW DIRECTIONS FOR ACTION* 83 (2005), available at [www.gcim.org/en/finalreport.html](http://www.gcim.org/en/finalreport.html).

<sup>6</sup>MICHAEL HOEFER ET AL., OFFICE OF IMMIGRATION STATISTICS, DEPARTMENT OF HOMELAND SECURITY, *ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2005*, at 7, tbl. 3 (Aug. 2006), [www.uscis.gov/graphics/shared/statistics/publications/ILL\\_PE\\_2005.pdf](http://www.uscis.gov/graphics/shared/statistics/publications/ILL_PE_2005.pdf).

<sup>7</sup>John Fraser, *Preventing and Combating the Employment of Foreigners in an Irregular Situation in the United States*, in *COMBATING THE ILLEGAL EMPLOYMENT OF FOREIGN WORKERS* 101 (Org. for Econ. Co-Operation and Dev. ed., 2000) ("two-thirds of the illegal population is economically active").

<sup>8</sup>"Unauthorized worker" specifically refers to persons working without employment authorization. This does not necessarily mean that the person is unlawfully or illegally present in the United States. The term "undocumented worker" suggests unlawful presence and employment. Beth Lyon, *New International Human Rights Standards on Unauthorized Immigrant Worker Rights: Seizing an Opportunity to Pull Governments out of the Shadows*, in *HUMAN RIGHTS AND REFUGEES: INTERNALLY DISPLACED PERSONS AND MIGRANT WORKERS* 553 (Anne F. Bayefsky ed., 2006). See, e.g., BELINDA I. REYES ET AL., PUBLIC POLICY INSTITUTE OF CALIFORNIA, *HOLDING THE LINE? THE EFFECT OF RECENT BORDER BUILD-UP ON UNAUTHORIZED IMMIGRATION IX* (2002), [www.ppic.org/content/pubs/report/R\\_702BRR.pdf](http://www.ppic.org/content/pubs/report/R_702BRR.pdf). (According to the 2000 Mexican census, 7 percent of those who moved without authorization to the United States returned within six months, and 11 percent had returned within a year.)

<sup>9</sup>OFFICE OF IMMIGRATION STATISTICS, DEPARTMENT OF HOMELAND SECURITY, *YEARBOOK OF IMMIGRATION STATISTICS: 2005*, tbl. 33, [www.uscis.gov/graphics/shared/statistics/yearbook/YrBk05NI.htm](http://www.uscis.gov/graphics/shared/statistics/yearbook/YrBk05NI.htm) (last visited Oct. 20, 2006).

<sup>10</sup>*Id.*

<sup>11</sup>HUMAN RIGHTS WATCH, *HIDDEN IN THE HOME: ABUSE OF DOMESTIC WORKERS WITH SPECIAL VISAS IN THE UNITED STATES* 4 (June 2001), [www.hrw.org/reports/2001/usadom/](http://www.hrw.org/reports/2001/usadom/) (last visited Oct. 20, 2006).

Although exact numbers are unknown, every year some low-wage migrants, whether unauthorized, temporary H-2 guest workers, domestic servants, or even workers legally permitted to be in the United States, leave the country.

If these workers faced unjust treatment in their employment, they are jeopardizing the viability of their legal claims simply by leaving the United States. The core obstacle is that the U.S. legal system relies legally and practically on an available litigant.

### A. Legal Claims Jeopardized by Migrant Unavailability

Litigation is typically a protracted procedure. From the date the case is filed to the day of trial is usually more than one year. If appeals are involved, a case might continue for over a decade. Migrants' mobility and subsequent lack of availability greatly increase the chance that they will be dismissed from the action at some point during the litigation.

The following are real-life examples of the impact of migrants' mobility and an unaccommodating legal system on legal claims.

**Reduced Number of Plaintiffs.** Thousands of workers cleaned Wal-Mart stores nightly. They never received overtime and were locked in the stores at night. The court set a six-month deadline to find the approximately ten thousand workers eligible to "opt into" the wage suit. The attorneys, unable to travel to all fourteen countries from where the workers hailed and where most were expected to have returned, were able to locate approximately only two hundred in six months.<sup>12</sup>

**Lost Compensation for Unpaid Wages.** "Rosa" should have won \$3,000 as compensation for unpaid wages for her work at a vegetable packinghouse. But her mother was dying, and Rosa chose to return to her native Guatemala instead of waiting

two more days to sit for her scheduled deposition. Unable to arrange for the deposition to take place in Guatemala, her lawyers dropped her from the case; she never recouped the lost earnings.<sup>13</sup>

**Reduction in Settlement Payout Amount.** For years, the farm systematically paid its Mexican and Guatemalan migrant workers less than the minimum wage for picking vegetables. Four years after filing suit, the workers won the legal battle, but their attorneys could locate only 100 of the 2,000 affected workers. In the settlement, the farm, gambling that the attorneys would not be able to locate many of the workers, agreed to pay every claimant who came forward. The farm was right; it paid out approximately only \$100,000 instead of the nearly \$800,000 on the negotiating table.<sup>14</sup>

All of these workers were denied their rights because they did not remain in the jurisdiction.

### B. Employers Not Challenged by Most Migrant Workers While in the United States

Unlike in the examples above, most migrant workers do not assert their rights before they leave the jurisdiction where the attorneys are available to assist them. Lack of knowledge and fear of retaliation keep migrants from initiating a legal claim before they depart the United States.

Workers often do not know their legal rights or where to obtain assistance. The legality of an issue is not always intuitive. Only through worker education will most realize that they have actionable claims. For example, in Florida, the tomato industry pays by piece rate; a worker receives \$.40 per bucket of tomatoes picked. Workers know they have been wronged when they do not receive the \$.40 for each bucket. However, most do not know that the federal minimum

<sup>12</sup>Interview with James Lindsey, Plaintiff's Attorney (May, 2006) (regarding *Zavala v. Wal-Mart Stores*, No. 03-5309, Plaintiffs' Memorandum of Law in Response to Wal-Mart's Motion to Dismiss (D.N.J. filed March 20, 2006)).

<sup>13</sup>As lead counsel, I have knowledge regarding *Luz-Carranza v. Mecca Farms*, No. 01-9013-Civ (S.D. Fla. March 17, 2003) (order on joint motion for preliminary approval of settlement agreement); E-mail Exchange with Greg Schell, Managing Director, Migrant Farmworkers Justice Project (Nov. 6, 2006).

<sup>14</sup>*Supra* note 13.

wage is \$5.15 an hour and that the wages received at the end of the work week must equal \$5.15 multiplied by the total hours worked.<sup>15</sup> Myriad legal principles, such as the legal construct of compensable work time, constitute important, yet not necessarily obvious, protections.<sup>16</sup> Without the relevant knowledge, workers often unintentionally forgo their rights.

“Stefan” is a typical example. While laboring as landscaper in the United States, Stefan seriously injured his knee. Eventually, through workers’ compensation, his employer provided him the medical care he needed, including knee surgery. When his guest worker visa expired, Stefan returned to his native Guatemala as the law required. Unaware that he was still entitled to continuing medical care, Stefan did not continue to seek medical assistance because he could not afford it. Denied reemployment in the United States due to his injury, his knee worsens, and he now struggles to support his family.<sup>17</sup>

Even workers who are aware of their rights are often fearful to assert them while under the employer’s watch. Fears of retaliatory firing, harassment, or deportation are real concerns. Although legal protections are available for these scenarios, the scenarios are typically difficult to prevent and harder to prove after the fact. Once beyond the reach of the employer, workers may be in a better and more confident position to assert their rights. This was the situation for “Pablo.” Although he knew he was owed wages, Pablo did not know where to seek assistance in the United States and felt he had no choice but to go home to extricate himself from the exploitative situation.

Armed with a guest worker visa, Pablo had high hopes when he boarded the

plane to plant pine trees in the southern United States. Quickly, however, the promise of high wages—a dream in his native country—turned into a nightmare human trafficking situation. Upon arriving in the United States, he was driven far north and forced to work for paltry wages in a northeastern state at a different job for a different employer. The contractor confiscated Pablo’s passport. Pablo was warned not to leave the overcrowded apartment (where he had to sleep on the floor) because the urban streets were dangerous. After several weeks of working for well under the federal minimum wage and far less than what he had been promised, Pablo convinced the contractor to release him. Back at home, Pablo did not know where to turn to recover the weeks of wages still owed him and to liberate his colleagues who remained in the precarious situation.<sup>18</sup>

Only attorneys licensed to practice law in the state where an employment law violation occurred may file suit. That means that even though advocates in the countries of origin may have better access to the returned workers, they may not directly assist them. Moreover, most home-country advocates have little knowledge of substantive laws or litigation procedures in the United States and are, therefore, hard-pressed to give advice or to know where to refer the workers for assistance.<sup>19</sup>

Lack of education about their employment rights exacerbates the migrant workers’ problems. Not educated about their rights before they leave for employment in the United States, not likely to encounter outreach workers in the United States, and less likely to be debriefed when they return, their employers are virtually guaranteed a workforce that has little possibility of ever learning, or exercising its labor protections.

<sup>15</sup>29 U.S.C. § 206(a)(1) (2004).

<sup>16</sup>29 C.F.R. § 790.6(b) (2002).

<sup>17</sup>I have knowledge regarding developing litigation against large U.S. landscaping company.

<sup>18</sup>I have knowledge of case currently under criminal investigation.

<sup>19</sup>The term “advocate” in this article refers both to lawyers and others who promote legal rights.

### C. The Current Approach: Unilateral Advocacy

Without the benefit of organizations in the sending countries to assist them, dedicated advocates in the United States do their best to confront the obstacles that prevent their transnational clients from vindicating their rights.<sup>20</sup> The efforts, however, are time-consuming, costly, and unsustainable, curtailing the advocates' willingness and ability to pursue such claims.

When they have sufficient resources, U.S.-based advocates often travel to migrant worker home countries to conduct discovery or distribute settlements. For example, three legal services staff members went to rural Guatemala for one week to conduct dozens of interrogatories for laborers who had not been paid the minimum wage for planting pine trees.<sup>21</sup> These workers would have lost the opportunity to claim their unpaid wages but for the sheer chance that one of the attorneys had experience in Guatemala and was willing to head the delegation.<sup>22</sup> Other workers were not as fortunate. The similarly situated Honduran clients were excluded due to lack of resources and contacts to find them in Honduras.<sup>23</sup>

Although the efforts in Guatemala described above ensured that the workers' claims remained viable, the human and financial costs expended render effective and efficient representation of transnational clients untenable for most U.S. attorneys. These efforts benefited that one case at that one moment in time. Other advocates did not benefit from or build upon that experience.

More common is for cases to be withdrawn when migrants leave the country or to be simply not initiated at all. One legal services attorney described how her organization simply would not represent clients who failed to initiate a claim before leaving the country. The reason is simple: resource triage. With an overloaded case docket and few resources to spare, representing clients with even more complicated cases because they crossed a border is just not a practical choice.

The consequences, however, are devastating for those who want to go home. Because of their transnational status, workers are essentially punished, denied even the ability to try to defend themselves.

### D. Legal Barriers to Portable Justice

Legal barriers also prevent justice from being portable. Rendering workplace rights transnationally viable would make the justice system responsive to the reality of today's global and mobile workforce. In the United States both procedural and substantive laws prevent justice from being portable. They also keep the U.S. justice system from being a realistic source of protection for transnational migrant workers.

Procedural obstacles vary. One example is the requirement in some jurisdictions that litigants appear before the court at least once during the litigation.<sup>24</sup> For workers who have returned to their country of origin, this mandate can be prohibitive due to the cost of and eligibility requirements for obtaining a visa to travel to the United States. Some judg-

<sup>20</sup>In 2005 two U.S. organizations, Centro de los Derechos del Migrante ([www.cdmigrante.org](http://www.cdmigrante.org)) and Farm Labor Organizing Committee ([www.floc.com](http://www.floc.com)), opened offices in Mexico to educate workers migrating to the United States and to offer legal referrals. These organizations are important resources for Mexican migrants and for U.S. and Mexican advocates.

<sup>21</sup>Unless specifically noted to be federally funded legal services, the term "legal services" is used to encompass both Legal Services Corporation-funded programs and nonprofit organizations that provide legal representation to low-wage workers.

<sup>22</sup>I organized the delegation on behalf of the Migrant Farmworker Justice Project and the Virginia Justice Center in October 2000 to conduct discovery in *Gonzalez-Sanchez v. International Paper Company*. The case eventually resulted in *Gonzalez-Sanchez v. International Paper Company*, 346 F.3d 1017 (11th Cir. 2003).

<sup>23</sup>I have knowledge obtained through involvement in *Gonzalez-Sanchez v. International Paper Co.*

<sup>24</sup>See, e.g., M.D. Fla. Local R. 3.04(b) and N.D. Fla. Local R. 26.2(C)(2) (requiring nonresident plaintiffs to appear in the jurisdiction at least once for deposition).

es permit telephone or video depositions to substitute for in-person depositions.<sup>25</sup> This trend should be encouraged and formally adopted in administrative rules because it recognizes that not all litigants are readily available.

Not uncommonly, advocates offer depositions as evidence at trial, especially for clients who are no longer in the United States. In a recent case, one court, however, disallowed the use of a deposition at trial because the client had returned to Mexico on his own accord (the court ignored that the judge's veiled threats of deportation at trial prompted the client to leave) and made no good-faith effort to testify at trial.<sup>26</sup> Unless advocates have the foresight and resources to guide their clients to establish a good-faith effort to return to the United States, many migrants will lose out.

Substantive legal issues also prevent migrants from accessing justice in the United States. Congressional regulations prohibit federally funded legal services programs from representing foreign migrant workers who labor under an H-2B visa, the temporary guest worker program for nonagriculture work.<sup>27</sup> This regulation prevented each of the 122,316 H-2B guest workers in 2005 from accessing the most widely available legal services.<sup>28</sup>

Applicability of U.S. laws to foreign recruitment has been questioned, opening the door to denying important protections to migrants. Transnational workers, especially guest workers, are

often contracted before they enter the United States. The court in *Reyes-Gaona v. North Carolina Growers Association*, however, found no violation of the Age Discrimination in Employment Act when recruiters in Mexico refused to hire anyone over 40 years old.<sup>29</sup> By holding that the Act did not apply to foreign nationals applying for employment in the United States from foreign nations, the court questioned the applicability of basic employment protections to international recruitment, such as, in this case, the H-2A temporary agricultural guest worker program.

Foreign workers are also being denied workers' compensation protections because of their transnational status. Insurance companies not uncommonly deny medical care and benefits to workers who leave the United States after their injuries.<sup>30</sup> In two illustrative cases, insurance companies are denying continuing medical treatment for workers with open and uncontested claims. Stefan, the aforementioned injured worker, is one of these cases. Denied medical care because he was no longer in the United States, Stefan, ironically, would have probably had a better chance at continuing with his workers' compensation coverage had he overstayed his H-2B guest worker visa and remained unlawfully in the country. In a second case, a worker was denied continuing temporary total disability benefits solely because the insurance carrier refused to approve a Mexican-based doctor to continue the treatment.<sup>31</sup>

<sup>25</sup>See, e.g., *Gonzalez-Jimenez v. Gillam*, No. 4:04-CV-00506 (E.D. Ark. Jan. 28, 2005) (in my files).

<sup>26</sup>*Garcia-Martinez v. City and County of Denver*, 392 F.3d 1187, 1192-93 (10th Cir. 2004).

<sup>27</sup>45 C.F.R. § 1626.3 (2004). Only a handful of non-Legal Services Corporation worker rights projects represent H-2B workers (e.g., Southern Poverty Law Center, Migrant Farmworker Justice Project, Northwest Workers' Justice Project, Workers' Rights Law Center). These few organizations can assist only a small percentage of the H-2B workers.

<sup>28</sup>OFFICE OF IMMIGRATION STATISTICS, *supra* note 9. This prohibition was recently challenged as discriminatory under the North American Agreement on Labor Cooperation. Petition on Labor Law Matters Arising in the United States, Submitted to the National Administrative Office of Mexico Under the North American Agreement on Labor Cooperation (April 13, 2005), available at [www.dol.gov/lab/media/reports/nao/submissions/2005-01petition.htm](http://www.dol.gov/lab/media/reports/nao/submissions/2005-01petition.htm) (last visited Oct. 20, 2006) (alleging that through its restrictions on legal services to certain immigrants, the United States violated North American Agreement on Labor Cooperation Articles 4 and 5).

<sup>29</sup>*Reyes-Gaona v. North Carolina Growers Association*, 250 F.3d 861, 866-67 (4th Cir. 2001).

<sup>30</sup>See, e.g., Deposition of Tracey Edwards, Claims Representative, Unisource Administrators, in *Sain v. Unisource Administrators*, No. 596-77-8642, (Fla. Dep't of Lab. & Emp. Sec. Jan. 20, 2004) (in my files).

<sup>31</sup>*Id.*

## E. Additional Barriers for Unauthorized Migrants

Although most substantive employment protections extend to unauthorized migrants, these workers face additional and increasing substantive obstacles when fighting for workplace justice. For example, federally funded legal services may not represent unauthorized workers.<sup>32</sup> Some states have disallowed or reduced time-loss benefits in workers' compensation cases.<sup>33</sup> And the U.S. Supreme Court ruled that, under the National Labor Relations Act, unauthorized workers unlawfully terminated for union activities were no longer entitled to the remedy of back pay, or wages that would have been earned but for the unlawful firing.<sup>34</sup> Due to the discriminatory impact that ruling would have on the unauthorized Mexican workers in the United States, the Mexican government sought an advisory opinion from the Inter-American Human Rights Court. The latter held that international discrimination standards required nations to apply national labor and employment laws equally to unauthorized workers and domestic workers.<sup>35</sup> Despite the additional and discrete issue of unauthorized workers' inclusion under employment and labor laws, the portability-of-justice challenges are the same.

## II. A New Approach: Transnational Networks and Portable Justice

In order for advocates to represent migrant workers effectively and efficiently in the new global worker land-

scape, justice must be transnationalized both practically and legally.

### A. Global Workers Justice Alliance

In 2005 the Global Workers Justice Alliance was founded to combat migrant worker exploitation by promoting portable justice through a cross-border network of advocates and resources. From its headquarters in New York, Global Workers creates and supports a transnational advocate alliance so that workers have access to justice no matter where they go. The project's initial focus is Mexico, Guatemala, and El Salvador.<sup>36</sup>

Although only attorneys licensed to practice law in the United States may litigate migrants' U.S.-based claims, advocates in migrants' home countries can play an indispensable role in successful transnational litigation. Home-country advocates can identify cases since workers are much more likely to come forward with grievances once they have returned home. Local advocates can facilitate discovery, locate witnesses and beneficiaries of settlements, and, in cases that require plaintiffs to appear in court in person, assist migrants in obtaining visas.

Global Workers identifies the sending-country advocates willing to participate in the alliance and conducts basic training in the specified host-country's employment-related laws and basic civil procedure. Once certified, they have a dual role. First, they assist host-country attorneys whose clients have returned home. Second, the sending-country advocates identify new cases of returned

<sup>32</sup>45 C.F.R. § 1626.3 (2004).

<sup>33</sup>See *Sanchez v. Eagle Alloy Incorporated*, 658 N.W.2d 510, 516, 521 (Mich. Ct. App. 2003) (undocumented workers are covered by Michigan workers' compensation law and are entitled to full medical benefits if they are injured on the job, but their right to wage-loss benefits ends when the employer "discovers" they are unauthorized to work); *Reinforced Earth Company v. Workers' Compensation Appeal Board (Astudillo)*, 810 A.2d 99, 100, 108 (Pa. 2002) (although undocumented worker is entitled to medical benefits after experiencing a workplace injury, illegal immigration status might justify terminating workers' compensation benefits for temporary total disability); *Rosa v. Partners in Progress Incorporated*, 868 A.2d 994, 997, 1001 (N.H. 2005) (undocumented worker asserting tort claim for workplace injury could recover lost wages only at the wage level of his country of origin unless he could prove his employer knew about his irregular immigration status at the time of hiring).

<sup>34</sup>*Hoffman Plastic Compounds Incorporated v. National Labor Relations Board*, 535 U.S. 137, 151 (2002).

<sup>35</sup>Legal Status and Rights of Undocumented Migrants, Inter-American Court Of Human Rights (Ser. A), No. 18, Advisory Op. OC-18/03 (2003).

<sup>36</sup>Assisting U.S. advocates on cases in other countries is considered on a case-by-case basis.

workers and contact Global Workers. Referring cases to the appropriate advocates and monitoring the progress of the cases, Global Workers plays the intermediary role.

Until now, sending-country advocates have been an underutilized resource for the defense of migrant rights in the United States. Engaging sending-country advocates in the solution will not only enable United States attorneys to utilize their resources better and increase the potential number of global migrant worker clients they serve but also bring these advocates into the host nation's dialogue on migration—a voice that is now largely absent.

Since its initiation, Global Workers has assisted many returned migrants in accessing justice in the United States. Some highlights:

- Stefan, the injured worker, did not know that he was entitled to workers' compensation until a Global Workers advocate informed him of his rights. Through the advocate network, his case is now being pushed forward in the workers' compensation system in Maryland with the intention to establish the precedent that coverage does not stop at the border.<sup>37</sup>
- Pablo, the worker who ended up in a trafficking situation, also found assistance through the Global Workers network in Guatemala. Within days, Global Workers assembled a top-level legal team that liberated the remaining workers and is now working with law enforcement to hold the traffickers criminally liable. The wage claims are also being pursued.<sup>38</sup>

Global Workers is available to facilitate cases for any entity representing low-wage migrant workers in employment-

related claims. Already the organization has worked in the United States with law school legal clinics, private law firms, and legal services.<sup>39</sup>

Collaboration with Legal Services Corporation-funded entities can be especially fruitful. Federally funded legal services are prohibited from solicitation.<sup>40</sup> As noted, Global Workers routinely refers cases of workers who are seeking representation in the United States from the Global Workers certified sending-country advocates to advocates in the United States. Through the Global Workers referral mechanism, more workers could ultimately benefit from legal services.

Sending-country advocates also serve as a resource on migrants' rights both predeparture and after migrants have returned. Global Workers is collaborating with U.S. embassies and sending-country governments to ensure that workers have access to basic labor right materials.<sup>41</sup>

## **B. More Effective Advocacy Resulting from Transnational Collaboration**

Once advocates across borders are working together to represent transnational workers, not only will more workers benefit but also doors will open to more creative and perhaps more effective advocacy.

Some migrant injustices can be dealt with by advocates on both sides of the border. This will yield better outcomes for the workers. However, harassment or threats against litigants or their families in the home countries are not uncommon. Family members of pine-tree litigants in Guatemala faced this issue. While protective measures in the United States may halt some of the harassment,

<sup>37</sup>See *supra* note 17.

<sup>38</sup>See *supra* note 18.

<sup>39</sup>E.g., a law school clinic currently represents "Pablo." The case of "Stefan" has yet to be placed.

<sup>40</sup>45 C.F.R. § 1638 (2004).

<sup>41</sup>Several projects are under way. E.g., with El Salvador's Foreign Ministry, Global Workers is strategizing to educate and screen workers returning from the United States regarding outstanding labor problems. In Guatemala, Global Workers is discussing with the U.S. embassy the distribution of workers' rights pamphlets to guest workers.

a domestic response by sending-country advocates can offer another avenue of protection.

Support from home-country advocates may encourage more workers to stand up for their rights. For example, the involvement of the Guatemalan Human Rights Ombudsman's office was pivotal in emboldening workers who were fearful of the local recruiter to join a guest worker wage suit. Not only were the workers encouraged by the ombudsman's endorsement, but also they expressed a sense of security in knowing that the local officials could take measures to protect them from any retaliation.

Some issues require action by sending-country advocates. For example, in the Age Discrimination in Employment Act case above, once denied relief in U.S. courts, an age discrimination case under Mexican law could have been subsequently filed in the appropriate jurisdiction in Mexico to seek relief for the harmed workers.

In a transnational, collaborative fashion, other efforts will have a greater likelihood of success. In Mexico, Guatemala, and El Salvador, local labor codes require foreign companies recruiting their nationals to work abroad to pay all visa and transportation-related costs.<sup>42</sup> In all three countries these laws are being violated systematically. Attorneys in those three countries can challenge the unlawful practices, but they need the information that U.S. advocates can give about the U.S. companies violating the laws. U.S. advocates can apply political pressure on the U.S. embassies, which facilitate the guest worker program, to

encourage companies to comply with local labor laws. Pressure on both the sending country and U.S. governments is needed. That is best accomplished by advocates in both countries working together.

An interdependence among international advocates necessarily occurs when laborers migrate through multiple nations. Ultimately the workers are better served when multilateral advocacy approaches are utilized.

■ ■ ■

Transnational advocacy will make representation of clients who have left the host country feasible. By decreasing the human and financial costs expended in the current ad-hoc system of helping transnational workers, U.S. advocates will be able to achieve their objectives more efficiently. Advocates may become more willing to pursue these claims and thereby increase the number of workers who will ultimately benefit.

Until justice is truly portable, both legally and practically, migrant workers will continue to live and work in the shadows of globalization. In the end the greatest beneficiaries of the disempowered foreign workforce are the employers who, knowing that there is little to no consequence, disregard the domestic labor laws. Workers should not have to check their legal rights at the border. Global workers require global justice.

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<sup>42</sup>Federal Labor Law art. 28 (1970) (Mexico); Labor Code art. 33 (1947, amended 1992) (Guatemala); Law of Organization and Functions of the Work and Social Prevention Sector art. 74 (1996) (El Salvador).

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