

“BUT YOUR HONOR, HE’S AN ILLEGAL!”

—RULED INADMISSIBLE AND PREJUDICIAL*

**CAN THE UNDOCUMENTED WORKER’S ALIEN STATUS
BE INTRODUCED AT TRIAL?**

by

Benny Agosto, Jr.[†]

Professor Lupe Salinas[‡]

Eloisa Morales Arteaga[§]

*Actual quote from a recent case

The Immigration Debate

According to a recent report by the U.S. Department of Homeland Security, it was estimated that 8.5 million unauthorized immigrants were living in the United States in 2000.¹ This figure grew by approximately 250,000 persons each year.² As of 2009, the number of unauthorized immigrants living in the United States was approximately 11.8 million.³ Immigrants from Mexico account for about 6.7 million of the total unauthorized immigrants living in the United States.⁴ It is estimated that between 2000 and 2009, approximately 2 million people illegally entered the United States from Mexico.⁵ There are an additional 170,000 people legally entering this country from Mexico each year.⁶ These numbers are the spark that has produced a firestorm of controversy.

As the United States Supreme Court recently stated in the March 2010 decision of *Padilla v. Kentucky*, “[t]he landscape of federal immigration law has changed dramatically over the last 90 years....The Nation’s first 100 years was a period of unimpeded immigration.”⁷ The 2010 Census, which is currently underway, may indicate that the number of undocumented workers living in the United States will reach between 12 to 13 million.

Migrant workers, whether legal or illegal, play an important role in the United States’ economy. The average undocumented family pays more than \$4,200 in annual federal taxes while earning less than the average annual salary of \$36,700.⁸ Fifty to eighty-five percent of the country’s 1.6 million farm workers are undocumented.⁹ Immigrant workers play a critical service in keeping hotels operating affordably by taking jobs American-born workers do not want. Of the 12 million food service workers in the United States, 1.4 million are believed to be immigrants, with 500,000 of them from Mexico.¹⁰ Forty percent of the workers in the New York restaurant industry are undocumented.¹¹ Undocumented workers from Mexico tend to be young, predominately male, struggling with the English language, and employed in the construction, manufacturing and hospitality industries.¹² The reality of undocumented workers in America stands in stark contrast to the fears engendered by their presence.

[†] Benny Agosto, Jr. is a partner at Abraham, Watkins, Nichols, Sorrels, Agosto & Friend.

[‡] Professor Lupe Salinas is a Professor of Law at Texas Southern University Thurgood Marshall School of Law.

[§] Eloisa Morales Arteaga is a contract attorney for Benny Agosto, Jr. at Abraham, Watkins, Nichols, Sorrels, Agosto & Friend.

The fear associated with undocumented workers is not new. Courts throughout the Nation have examined, and attempted to insulate against, the prejudices that a plaintiff, who is an injured undocumented worker, encounters in trying to obtain a fair trial. The debate over illegal immigration, however, is currently at the forefront of the policy in the United States, and attorneys who represent injured undocumented workers must be acutely cognizant of the prejudices that the American people are exposed to during this debate.

Evidence of an Individual's Alien Status in the Courts

In the course of a hotly contested trial, lawyers often “pull off the gloves.” Professional and ethical conduct, however, requires that there be limitations on the extent to which counsel may go into prejudicial and inadmissible matters. Rule 403 of the Texas Rules of Evidence, as well as the Federal Rules of Evidence, require that the trial court balance the risk of unfair prejudice against the probative value of the evidence seeking to be admitted.¹³ Most courts across the country following Rule 403 have determined that the trial court is to admit relevant evidence unless the probative value of that extraneous evidence is substantially outweighed by the danger of unfair prejudice.

Evidence Used to Inflamm the Jury

“Cases ought to be tried in a court of justice upon the facts provided; and whether a party be a Jew or gentile, white or black, is a matter of indifference.”¹⁴ During the last 100 years, the Texas Appellate Courts have uniformly condemned arguments that invoke prejudice based on race, ethnicity, religion, or national origin. This condemnation extends to arguments that seek to highlight or give weight to a person's alien status. Although the manner in which the prejudicial appeal is presented has varied through the years and from case to case, the response thereto has remained relatively unchanged.

Recent Texas cases

TXI Transp. Co. v. Hughes - Texas Supreme Court

In the historic case of *TXI Transp. Co. v. Hughes*, decided in March 2010, Justice David Medina, writing for a unanimous Texas Supreme Court, held that the trial court erred in admitting evidence impugning defendant Ricardo Rodriguez's character on the basis of his immigration status.¹⁵ According to the Court, “[s]uch error was harmful, not only because its prejudice far outweighed any probative value, but also because it fostered the impression that Rodriguez's employer [TXI] should be held liable because it hired an illegal immigrant.”¹⁶

In *TXI*, Kimberly Hughes was driving with several members of her family when her vehicle collided with a TXI gravel truck driven by Ricardo Rodriguez. The collision killed everyone in Hughes' vehicle except for one passenger. Hughes' husband sued TXI and Rodriguez.

At trial, evidence of Rodriguez’s immigration status was admitted over TXI’s objections. Evidence was introduced regarding Rodriguez’s prior deportation, his use of a false Social Security number, and the fact that he lied to obtain a commercial driver’s license by using a false Social Security number, among other evidence. TXI complained that Rodriguez’s immigration status was not relevant to any issue in the case, and that evidence of his status was highly prejudicial. Hughes argued that evidence of Rodriguez’s immigration status was relevant to the issues of negligent hiring and negligent entrustment, and also as impeachment evidence.

Justice Medina analyzed whether evidence of Rodriguez’s immigration status was relevant to the issues of negligent hiring and negligent entrustment. The Court concluded that neither Rodriguez’s immigration status nor his use of a fake Social Security number to obtain a commercial driver’s license caused the collision.¹⁷ Thus, his immigration status was not relevant to either issue.

The Court then went on to analyze whether evidence of Rodriguez’s immigration status, offered for impeachment purposes as prior inconsistent statements, was admissible. Justice Medina concluded it was not, for at least two different reasons. The Court first pointed out that Rodriguez’s immigration status was a collateral matter—that is, it did not relate to any of the claims—thus, it was inadmissible impeachment evidence.¹⁸

Second, the immigration-related evidence was also inadmissible under Texas Rule of Evidence 608(b).¹⁹ This rule provides that specific instances of conduct of a witness for the purpose of attacking his or her credibility may not be proved by extrinsic evidence. As the Court noted, “[f]or over 150 years, ‘Texas Civil Courts have consistently rejected evidence of specific instances of conduct for impeachment purposes, no matter how probative of truthfulness.’”²⁰ Thus, evidence of Rodriguez’s immigration status and deportation was inadmissible.

The Court held that even if evidence of Rodriguez’s immigration status had some relevance, its probative value was outweighed by the risk of unfair prejudice. Therefore, the trial court erred in admitting evidence of Rodriguez’s immigration status and the error was harmful.²¹

As Justice Medina so eloquently wrote,

Such appeals to racial and ethnic prejudices, whether “explicit and brazen” or “veiled and subtle” cannot be tolerated because they undermine the very basis of our judicial process.²²

Republic Waste Services, Ltd. v. Martinez – Texas Court of Appeals for the First District

Following the Texas Supreme Court’s decision in *TXI*, the Court of Appeals for the First District of Texas, in a landmark case, affirmed a trial court’s ruling to exclude evidence of a decedent’s immigration status. In *Republic Waste Services, Ltd. v. Martinez*, Elida Martinez sued Republic, a non-subscriber to the Texas Workers’ Compensation Act, for the wrongful death of her common law husband, Oscar Gomez.²³ Gomez was an immigrant from El Salvador and was working for Republic Waste in Houston, Texas, when a co-worker ran over him with a garbage truck, killing him.

Before trial, Martinez filed a motion in limine, which the trial court granted, to exclude evidence of Gomez's illegal immigrant status, asserting that it was irrelevant and highly prejudicial. Republic relied on evidence of a federal immigration raid at its facilities just two weeks after Gomez's death, which resulted in 50 to 55 workers being detained. Republic asserted that Gomez likely would have been deported after the raid and argued that this evidence was probative of whether Gomez's future income would be earned in the United States, where he earned \$33,000 per year, or in El Salvador, where he had earned \$1,000 per year. The jury found for Martinez and awarded \$1,408,491, including \$1,275,000 in future pecuniary losses.

Republic appealed, arguing that the trial court erred in excluding evidence of Gomez's illegal immigrant status. The court of appeals noted that "the issue of immigration is a highly charged area of political debate" and then went on to state that "[t]he probative value of evidence showing only that the plaintiff is an illegal immigrant, who could possibly be deported, is slight because of the highly speculative nature of such evidence."²⁴ The only evidence presented by Republic of Gomez's possible deportation was the federal immigration raid at its facilities, which did not, "without engaging in speculation and conjecture, rise to the conclusion that Gomez would have been deported, even if he had been detained."²⁵ The court concluded that the probative value of Gomez's immigration status was slight and was outweighed by its prejudicial effect. Thus, the trial court did not abuse its discretion in excluding evidence of Gomez's immigration status and the judgment was affirmed.

Other States' Decisions on the Admissibility of Immigration Status

Courts outside of Texas have rendered opinions espousing the same concerns as Texas courts on the issues of introducing evidence of a person's status as an undocumented worker.

For example, one Florida Court of Appeals held that any probative value of immigration status was "thoroughly outweighed by unfair prejudice, confusion of the issues, and misleading of the jury."²⁶ The California Supreme Court held in a 1985 decision that immigration status, "even if marginally relevant...was highly prejudicial."²⁷

Similarly, the Delaware Supreme Court held in 1999, that even if immigration status is relevant to impeach a witness, the court must still determine if the probative value is outweighed by unfair prejudice.²⁸ A New York court excluded evidence of immigration status because any probative value the evidence might have was far outweighed by its prejudicial impact.²⁹ The Wisconsin Supreme Court, in a 1987 decision, affirmed the exclusion of undocumented status based on its prejudicial effect.³⁰

A California Court of Appeals held that prejudice from evidence of undocumented status is "manifest and substantial" and noted that "there is unequivocally an inherent bias among certain segments of society against illegal immigrants."³¹ One Virginia court stated that "the danger of a jury unfairly denying [Plaintiff] relief based on his status alone outweighed the probative value of the evidence that he acted dishonestly in the past."³²

Courts in other jurisdictions have similarly held that the use of a witness's immigration status to attack the witness's character is not admissible.

A New York court found that there was no authority to support the conclusion that evidence of undocumented status “impugns one’s credibility.”³³ Thus the evidence was not admissible for impeachment purposes. One Illinois court did not allow evidence of undocumented status to impeach a witness.³⁴

Likewise, a California Court of Appeals found immigration status inadmissible to attack a party’s credibility.³⁵ The Fourth Circuit held that an individual’s status as an alien, legal or otherwise, did not brand the individual a liar.³⁶

Recent Supreme Court of the State of Washington case—*Salas v. Hi-Tech Erectors*

In *Salas v. Hi-Tech Erectors*, decided in April 2010, by the Supreme Court of the State of Washington, Alex Salas was working at a construction site when he slipped from a ladder erected by Hi-Tech.³⁷ He fell more than 20 feet to the ground and was severely injured. He sued Hi-Tech for negligence. Salas sought to exclude evidence of his immigration status at the trial court. The trial court admitted evidence of his immigration status because Salas was seeking lost future income. The court determined that the evidence was probative of whether Salas’s future income would be in U.S. dollars or in his home country’s currency. The jury found that Hi-Tech was negligent but was not the proximate cause of Salas’ injuries. The Court of Appeals affirmed.³⁸

Justice Fairhurst, writing for the majority Supreme Court of the State of Washington, noted that there was no evidence of pending deportation proceedings.³⁹ In addition, Salas had been in the country since 1989, had lived without a visa since 1994, had purchased a home, and had children living in the United States. The only risk of Salas being deported was his immigration status. As the Court pointed out, “immigration status alone is not a reliable indicator of whether someone will be deported,” considering that even when an undocumented alien is apprehended, he or she must still go through removal proceedings, which may or may not result in deportation.⁴⁰ Based only on Salas’ immigration status, Salas’ risk of being deported was very low. Nonetheless, the Court concluded that, although Salas’ immigration status only minimally increased the likelihood that his labor market would be outside the United States, that was enough to make his immigration status relevant to the issue of lost wages.⁴¹

However, the Court then went on to analyze whether the low probative value of Salas’ immigration status was substantially outweighed by the risk of unfair prejudice. The Court pointed to California and Wisconsin cases where the courts found that evidence of immigration status was prejudicial. The Court held that with regard to lost future earnings, the low probative value of immigration status was greatly outweighed by the danger of unfair prejudice.⁴² The Court reversed and remanded, and held that the trial court abused its discretion in admitting evidence of Salas’ immigration status.

The argument in favor of excluding evidence of immigration status was best articulated by Justice Fairhurst, writing for the majority in *Salas*:

We recognize that immigration is a politically sensitive issue. Issues involving immigration can inspire passionate responses that carry a significant danger of interfering with the fact finder's duty to engage in reasoned deliberation. In light of the low probative value of immigration status with regard to lost future earnings, the risk of unfair prejudice brought about by the admission of a plaintiff's immigration status is too great. Consequently, we are convinced that the probative value of a plaintiff's undocumented status, by itself, is substantially outweighed by the danger of unfair prejudice.⁴³

Recent Fifth Circuit case—*Bollinger Shipyards, Inc. v. Rodriguez*

It is worth noting that, although not related to the issue of relevance or prejudice, the Fifth Circuit decided in April 2010, that the undocumented status of an injured longshoreman will not be a bar to the recovery of benefits under the Longshore and Harbor Workers' Compensation Act.

In *Bollinger Shipyards, Inc. v. Rodriguez*, the Fifth Circuit held that undocumented immigrants are eligible for benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA").⁴⁴ Jorge Rodriguez was working for Bollinger as a pipefitter when he fell while welding the wall of a ship. Due to the injury, he was only able to perform light duty work for about a month, and eventually had to stop working. He sought benefits under the LHWCA.⁴⁵

At the administrative trial, Bollinger's vocational rehabilitation expert testified that because of Rodriguez's status as "an undocumented immigrant," he "had suffered no loss of *legal* earning capacity, as he had no *legal* earning capacity prior to being injured."⁴⁶

The administrative law judge ("ALJ") held that undocumented immigrants are eligible for LHWCA benefits and ordered that Bollinger pay benefits from the date of the accident to the present, among other things. The Benefits Review Board ("BRB") affirmed the ALJ's order and also held that undocumented immigrants are entitled to benefits under the LHWCA. Bollinger petitioned for review of the BRB's decision.⁴⁷

Bollinger argued that undocumented immigrants are "per se ineligible to receive indemnity benefits under the LHWCA, as any such benefits 'would be based on illegally obtained wages.'"⁴⁸ Bollinger went so far as to compare Rodriguez to a drug dealer, a pirate, and a Mafioso in regards to "ill-gotten wages."⁴⁹

The LHWCA provides workers' compensation benefits to an "employee" if disability or death "results from an injury occurring upon the navigable waters of the United States..."⁵⁰ "Employee" is defined in the Act as "any person engaged in maritime employment..."⁵¹ Further, the Act also states that "compensation under [the LHWCA] to aliens not residents (or about to become nonresidents) of the United States or Canada shall be the same in amount as provided for residents..."⁵² As the Fifth Circuit pointed out, the Act makes no reference to "illegal" or "undocumented" nor does it exclude undocumented immigrants from the definition of "employee."

The Court reviewed its 1988 decision in *Hernandez v. M/V Rajaan*, where the Court affirmed a district court's award of lost future wages despite the Plaintiff's status as an undocumented immigrant.⁵³ According to the Court, *Hernandez* "stands for the proposition that undocumented immigrants are eligible to recover workers' compensation benefits under the LHWCA."⁵⁴

Bollinger further argued that the BRB's ruling undermines the Immigration Reform and Control Act of 1986 ("the IRCA"). The Court then reviewed the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*.⁵⁵ In *Hoffman*, the Court held that the IRCA precluded the National Labor Relations Board from awarding backpay to an undocumented immigrant under the National Labor Relations Act ("the NLRA"). The Court noted that 1) the employee qualified for the backpay award only by remaining in the United States illegally and 2) the employee could not mitigate damages, as required, without violating the IRCA.⁵⁶

The Fifth Circuit disagreed with Bollinger for three reasons. First, the LHWCA is a non-discretionary, statutory remedy, unlike discretionary backpay under the NLRA. Second, the LHWCA is an injured longshoreman's exclusive remedy and thus, is a substitute for tort claims. An undocumented immigrant would have the right to sue in tort. Therefore, "the remedy provided by the LHWCA is merely a substitute for the negligence claim that an employee could otherwise bring against his employer in tort."⁵⁷ Third, the plain language of the LHWCA provides for compensation to nonresident aliens and aliens who are about to become nonresidents. Also, unlike NLRA cases, an injured longshoreman does not have to mitigate damages under the LHWCA nor does the employee have to remain in the United States to qualify for benefits. Therefore, awarding benefits to an undocumented immigrant under the LHWCA does not undermine the IRCA.⁵⁸

After reviewing the statutory text of the LHWCA, previous Fifth Circuit decisions, and the Supreme Court's decision in *Hoffman*, the Fifth Circuit was "convinced that Rodriguez [was] eligible to receive benefits under the LHWCA" and therefore, denied Bollinger's petition for review in all respects.⁵⁹

Conclusion

The terms "illegal alien," "illegal immigrant," and "undocumented worker" now more than ever, create a great deal of fear and distress in our society. This fear will, undoubtedly, find its way into a courtroom, and prejudice an injured undocumented worker's right to a fair trial. As illustrated by the recent decisions of the Texas Supreme Court and the Supreme Court of the State of Washington and other cases cited therein, the courts throughout this nation, from East to West, recognize the prejudice that is engendered within the terms "illegal alien," "illegal immigrant," and "undocumented worker," and have tried to strike a balance between this prejudice and its possible relevance. Texas and Washington, however, have made their position clear—any relevance that the alien status of an injured worker may have in a particular case is likely outweighed by its prejudicial effect.

¹ Michael Hoeffler, Nancy Rytina & Bryan C. Baker, U.S. Dep't of Homeland Sec., Office of Immigration Statistics, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2009* (Jan. 2010).

2 *Id.*
3 *Id.*
4 *Id.*
5 *Id.*
6 Benny Agosto, Jr. & Jason B. Ostrom, *Can the Injured Migrant Worker's Alien Status be Introduced at Trial?*,
30 T. MARSHALL L. REV. 383, 384 (2005).
7 *Padilla v. Kentucky*, 599 U.S. ____ (2010).
8 Agosto & Ostrom, *supra* note 6, at 385.
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.*
13 TEX R. EVID. 403; FED. R. EVID. 403.
14 *Moss v. Sanger*, 75 Tex. 321, 12 S.W. 619 (Tex. 1889).
15 *TXI Transp. Co., et al. v. Hughes*, 2010 Tex. LEXIS 212, at *36.
16 *Id.*
17 *Id.* at *24.
18 *Id.* at *26.
19 *Id.* at *27.
20 *Id.*
21 *Id.* at *36.
22 *Id.*
23 *Republic Waste Services, Ltd. v. Martinez*, ____ S.W.3d ____ (Tex. App.—Houston [1st Dist.] 2011).
24 *Id.*
25 *Id.*
26 *Maldonado v. Allstate Ins. Co.*, 789 So.2d 464, 466, 470 (Fla. Ct. App. 2001).
27 *Clemente v. State*, 707 P.2d 818, 829 (Cal. 1985).
28 *Diaz v. State*, 743 A.2d 1166, 1184 (Del. 1999).
29 *Klapa v. O & Y Liberty Plaza Co.*, 645 N.Y.S.2d 281, 282 (N.Y. Supp. Ct. 1996).
30 *Gonzalez v. City of Franklin*, 403 N.W.2d 747, 759-60 (Wis. 1987).
31 *People v. Martin*, No. B164978, 2004 WL 859187, at *6 (Cal. Ct. App. Apr. 22, 2004).
32 *Romero v. Boyd Bros. Transp. Co.*, No. 93-0085-H, 1994 WL 287434, at *2 (W.D. Va. June 14, 1994).
33 *Mischalski v. Ford Motor Co.*, 935 F. Supp. 203, 208 (E.D.N.Y. 1996).
34 *First Am. Bank v. W. Dupage Landscaping, Inc.*, No. 00-C-4026, 2005 WL 2284265, at *1 (N.D. Ill. Sept. 19,
2005).
35 *Hernandez v. Paicius*, 134 Cal. Rptr. 2d 756, 761–62 (Cal. Ct. App. 2003).
36 *Figeroa v. I.N.S.*, 886 F.2d 76, 79 (4th Cir. 1989).
37 *Salas v. Hi-Tech Erectors*, 2010 Wash. LEXIS 341, at *1.
38 *Id.* at *3.
39 *Id.* at *5.
40 *Id.* at *5–7.
41 *Id.* at *7.
42 *Id.* at *11.
43 *Id.* at *10–11.
44 *Bollinger Shipyards, Inc. v. Rodriguez*, ____ F.3d ____ (5th Cir. 2010).
45 *Id.*
46 *Id.*
47 *Id.*
48 *Id.*
49 *Id.*
50 33 U.S.C. § 903.
51 33 U.S.C. § 902.
52 33 U.S.C. § 909.
53 *Hernandez v. M/V Rajaan*, 841 F.2d 582, *amended after rehearing*, 848 F.2d 498 (5th Cir. 1988).
54 *Bollinger Shipyards, Inc. v. Rodriguez*, ____ F.3d ____ (5th Cir. 2010).

⁵⁵ *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 138 (2002).

⁵⁶ *Id.*

⁵⁷ *Bollinger*, __F.3d at __.

⁵⁸ *Id.*

⁵⁹ *Id.*