LABOR LAW — UNDOCUMENTED IMMIGRANTS — SECOND CIRCUIT HOLDS UNDOCUMENTED WORKERS ARE CATEGORICALLY BARRED FROM BACKPAY UNDER THE NATIONAL LABOR RELATIONS ACT. — *Palma v. NLRB*, 723 F.3d 176 (2d Cir. 2013).

Undocumented immigrants are "employees" within the definition of the National Labor Relations Act[1] (NLRA).[2] In *Hoffman Plastic Compounds, Inc. v. NLRB*,[3] the Supreme Court limited the ability of the National Labor Relations Board (NLRB or Board) to order backpay for an undocumented immigrant who was unlawfully fired and who used false documents when hired, holding that such a remedy would conflict with the Immigration Reform and Control Act of 1986[4] (IRCA). Over the past eleven years, state courts and lower federal courts have grappled with the limits of *Hoffman*.[5] Recently, in *Palma v. NLRB*,[6] the Second Circuit held that *Hoffman* categorically bars the NLRB from awarding backpay to undocumented immigrants who have been unlawfully fired, even if they did not use fraudulent documents when initially hired.[7] This broad reading of *Hoffman* was not necessary and brings *Palma* into tension with the Second Circuit's reasoning in *Madeira v. Affordable Housing Foundation, Inc.*,[8] which embraced a distinction based on whether the employer or the employee violated IRCA.[9]

IRCA made it unlawful for an employer to hire an unauthorized[10] worker.[11] The Immigration Act of 1990[12] added a prohibition against unauthorized workers using false documents to gain employment.[13] Notably, it is not unlawful for undocumented immigrants to seek

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1 29 U.S.C. §§ 151–169 (2006).

2 Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891 (1984).

3 535 U.S. 137 (2002).

4 Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

5 *See* Mariel Martinez, Comment, *The* Hoffman *Aftermath: Analyzing the Plight of the Undocumented Worker Through a "Wider Lens*," 7 U. PA. J. LAB. & EMP. L. 661, 673–78 (2005).

6 723 F.3d 176 (2d Cir. 2013).

7 *See id.* at 183–85.

8 469 F.3d 219 (2d Cir. 2006).

9 *See id.* at 254.

10 This comment uses the term "unauthorized" to refer to work authorization, as defined in 8 U.S.C. § 1324a(h)(3) (2012), and the term "undocumented" to refer to whether a noncitizen is lawfully present in the United States. Lawfully present noncitizens may be unauthorized to work. *See* 8 C.F.R. § 274a.12 (2013).

11 8 U.S.C. § 1324a; *see also* Catherine L. Fisk & Michael J. Wishnie, Hoffman Plastic Compounds, Inc. v. NLRB*: The Rules of the Workplace for Undocumented Immigrants*, *in* IMMIGRATION STORIES 311 (David A. Martin & Peter H. Schuck eds., 2005). Prior to IRCA, federal law did not make it unlawful for an employer to hire an unauthorized worker or for an unauthorized worker to seek employment. *See* Arizona v. United States, 132 S. Ct. 2492, 2503–04 (2012).

12 Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.).

13 8 U.S.C. § 1324c.

work, only to present fraudulent documents.[14] Employers must verify an employee's work authorization by reviewing specified documents (for example, a social security card).[15]

Christian Palma and six others were employed by Mezonos Maven Bakery (Mezonos) in Brooklyn, New York.[16] In 2003, they brought a complaint to a manager about another supervisor.[17] In retaliation, Mezonos fired all seven, in violation of the NLRA.[18] The seven coworkers filed a claim with the NLRB.[19] In 2005, the parties agreed to a settlement stipulation overseen by the Board.[20] In compliance proceedings, Palma and his coclaimaints stipulated for the purposes of the NLRB proceedings that they were undocumented immigrants and not authorized to work in the United States.[21] Although the parties contested whether Mezonos had initially requested work authorization documents (as required by IRCA), they agreed that the seven claimants never presented any fraudulent documents to their employer.[22] However, Mezonos alleged that the workers, as undocumented immigrants, were prohibited from receiving backpay or being reinstated under *Hoffman*.[23]

Judge Davis, an Administrative Law Judge in the NLRB Division of Judges, held the original NLRB order to be valid, deciding that Mezonos had not yet offered reinstatement to the workers, and that Mezonos owed them full backpay.[24] Judge Davis first affirmed that

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[14] *Id.* § 1324c(a), (f). For a succinct summary of major immigration laws related to employment from 1965 through the present, see *Developments in the Law — Immigrant Rights and Immigration Enforcement*, 126 HARV. L. REV. 1565, 1609–15 (2013) [hereinafter *Developments in the Law*].

[15] *Developments in the Law*, *supra* note 14, at 1609–15; *see also* Dep't of Homeland Sec., U.S. Citizenship & Immigration Servs., Form I-9, Employment Eligibility Verification (revised Mar. 8, 2013), *available at* http://www.uscis.gov/files/form/i-9.pdf.

[16] Mezonos Maven Bakery, Inc., Case No. 29-CA-25476 (N.L.R.B. Div. of Judges Nov. 1, 2006), *reprinted in* 357 N.L.R.B. No. 47, at 9, 9–10 (N.L.R.B. Aug. 9, 2011). Mezonos had employed one of the plaintiffs for as long as eight years, and another for five years. *Id.*, *reprinted in* 357 N.L.R.B. No. 47, at 10.

[17] *Id.*, *reprinted in* 357 N.L.R.B. No. 47, at 9.

[18] *Id.* Section 7 of the NLRA protects workers who engage in "concerted activities" for "mutual aid or protection," which includes advocating for better working conditions, such as by lodging a complaint regarding a supervisor. 29 U.S.C. § 157 (2006). Section 8 of the NLRA makes it an "unfair labor practice," and therefore unlawful, for an employer to retaliate against an employee for exercising section 7 rights. *Id.* § 158.

[19] *See Mezonos Maven Bakery*, *reprinted in* 357 N.L.R.B. No. 47, at 9.

[20] *Id.* The NLRB enforced the settlement stipulation by issuing a decision and unpublished order in 2005 directing Mezonos to offer reinstatement to the claimants (conditional upon demonstrating their work eligibility under IRCA) and to provide backpay. *Id.*, *reprinted in* 357 N.L.R.B. No. 47, at 9–10. The Second Circuit entered judgment enforcing the NLRB's 2005 order, and the Director of the NLRB's regional office issued an order and compliance specification detailing the backpay due to each claimant. *Id.*

[21] *Id.*, *reprinted in* 357 N.L.R.B. No. 47, at 10.

[22] *Id.*

[23] *Id.*

[24] *Id.*, *reprinted in* 357 N.L.R.B. No. 47, at 14, 22–23.

the NLRA applies to undocumented immigrants.[25] He then found that Mezonos hired the seven workers knowing their undocumented status, in violation of IRCA.[26] Judge Davis then distinguished this case from *Hoffman* based on the employees' conduct: the employee in *Hoffman* presented fraudulent documents to an unknowing employer, whereas Palma and his coclaimants did not, and Mezonos knew they were unauthorized to work.[27] Judge Davis explained, "employers have a perverse incentive to ignore immigration laws at the time of hiring but insist upon their enforcement when their employees complain."[28] He concluded, "[Mezonos] should not be rewarded for knowingly and intentionally violating IRCA and the [NLRA]."[29]

The NLRB reversed Judge Davis's award of backpay and did not comment on the reinstatement order.[30] The Board held that *Hoffman* categorically bars the NLRB from awarding backpay to undocumented immigrants,[31] rejecting Judge Davis's distinction between this case and *Hoffman*.[32] Instead, the Board interpreted *Hoffman* to mean that because the entire employment relationship is unlawful, it is irrelevant whether the employee or the employer violated IRCA.[33] Chairman Liebman and Member Pearce also wrote separately to express their desire to award backpay for policy reasons and their frustration that they could not do so under *Hoffman*.[34]

On petition for review, the Second Circuit denied the petition in part and granted it in part, remanding certain issues.[35] Judge Kearse, writing for the panel, adopted the Board's interpretation of *Hoffman* as categorically prohibiting backpay to undocumented immigrants.[36] The Second Circuit emphasized *Hoffman*'s broad wording: "The [NLRB] awarded backpay to an undocumented alien . . . . We hold that such relief is foreclosed by federal immigration policy, as ex-

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[25] *Id.*, *reprinted in* 357 N.L.R.B. No. 47, at 15 (citing Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891 (1984)).

[26] *Id.*, *reprinted in* 357 N.L.R.B. No. 47, at 10–11, 14.

[27] *See id.*, *reprinted in* 357 N.L.R.B. No. 47, at 16–17.

[28] *Id.*, *reprinted in* 357 N.L.R.B. No. 47, at 16 (citing Rivera v. NIBCO, Inc., 364 F.3d 1057, 1072 (9th Cir. 2004)).

[29] *Id.*, *reprinted in* 357 N.L.R.B. No. 47, at 17.

[30] *See* Mezonos Maven Bakery, Inc., 357 N.L.R.B. No. 47, at 4.

[31] *Id.* at 2. The opinion was by Chairman Liebman and Members Pearce and Hayes.

[32] *Id.* at 3.

[33] *Id.* at 2–3.

[34] *Id.* at 4–9 (Chairman Liebman and Member Pearce, concurring). The Board subsequently rejected the claimants' motion for reconsideration. Mezonos Maven Bakery, Inc., Case No. 29-CA-25476-M, 2011 WL 5234029, at *2 (N.L.R.B. Nov. 3, 2011) (order denying motion for reconsideration).

[35] *See Palma*, 723 F.3d at 187. Only five of the original seven claimants were involved at this stage of the appeal. *Id.* at 176.

[36] *Id.* at 181. Judge Kearse was joined by Judge Lohier and District Judge Kaplan, sitting by designation.

pressed by Congress in [IRCA]."[37] Judge Kearse reiterated *Hoffman*'s analysis of the conflict between IRCA and the NLRA: the *Hoffman* Court built on a line of cases that had "established that where the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield."[38]

Although the Second Circuit noted that Palma and his coclaimants did not violate IRCA by tendering false documents, unlike the plaintiff in *Hoffman*, Judge Kearse concluded that *Hoffman*'s "discussion of the direct conflicts between IRCA and awards of backpay is equally applicable to aliens who did not gain their jobs through such fraud."[39] The Second Circuit briefly considered and rejected the argument that it had held otherwise in *Madeira*, a personal injury case related to workers' compensation in which the court upheld damages awarded to an undocumented employee.[40] Judge Kearse wrote that the court was "not persuaded" by *Madeira* because "IRCA's focus is on violations of the immigration laws, not on workplace safety."[41] The Second Circuit remanded for further consideration of the reinstatement remedy.[42]

Such a broad reading of *Hoffman* was unnecessary. Instead, the Second Circuit should have embraced Judge Davis's distinction between *Hoffman* and *Palma* based on the fault of the employee. Such an analysis would have been more consistent with the Second Circuit's reasoning in *Madeira*, which the *Palma* court disregarded too quickly. Moreover, the manner in which the *Madeira* court distinguished its remedy for workplace injury from the backpay remedy in *Hoffman* supports the idea that an employee's use of fraudulent documents is a necessary predicate for *Hoffman*'s applicability.

The Second Circuit could have reasonably interpreted *Hoffman* as being predicated on an IRCA violation by the employee.[43] The *Hoffman* Court used broad language to observe that "it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies."[44] Ei-

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[37] *Id.* (quoting Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 140 (2002)). For a summary of the interaction of labor law and immigration law prior to *Hoffman*, see Fisk & Wishnie, *supra* note 11, at 312–16.

[38] *Palma*, 723 F.3d at 182 (emphasis omitted) (quoting *Hoffman*, 535 U.S. at 147 (emphasis added)).

[39] *Id.* at 183.

[40] *Id.* at 184.

[41] *Id.*

[42] *Id.* at 187.

[43] *See* Christine N. Cimini, *Undocumented Workers and Concepts of Fault: Are Courts Engaged in Legitimate Decisionmaking?*, 65 VAND. L. REV. 389, 409–14 (2012) (noting that a number of courts analyze only employee misconduct). For context on how *Palma* and *Madeira* fit into the range of approaches other courts have taken, see *id.* at 408–23.

[44] Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 148 (2002).

ther the worker "tenders fraudulent identification," or "the employer knowingly hires" an unauthorized worker "in direct contradiction of its IRCA obligations."[45] Yet the Court then clarified which unlawful actions were salient in determining the limits of the NLRB's authority: backpay is impermissible because it would be an award "for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud."[46] After the Court spoke in broad terms about the unlawful nature of the entire relationship, the Court situated that relationship within the context of one party or the other violating IRCA, and then identified the employee's "criminal fraud" as a central reason for denying backpay. The *Hoffman* dissenters identified the importance of the employee's unlawful conduct to the majority's reasoning: "Were the [NLRB] forbidden to assess backpay against a knowing employer — a circumstance not before us today — this perverse economic incentive [to hire unauthorized workers] . . . would be obvious and serious."[47] *Palma* presents just such a case.

The precedent *Hoffman* relied on to determine the scope of the NLRB's authority further supports a reading predicated on the employee's fault. As Judge Kearse noted, *Hoffman* built on Supreme Court precedent establishing that the NLRB's authority is most limited when the Board is resolving claims that conflict with other "equally important Congressional objective[s]."[48] The *Hoffman* Court analyzed the conduct of the parties in the context of "serious criminal acts" — acts that brought enforcement of the NLRB's remedies into conflict with other statutes.[49] The *Hoffman* Court analogized to *Southern Steamship Co. v. NLRB*,[50] in which sailors who engaged in a strike were held to have committed mutiny, a serious criminal act.[51] The Court ruled the NLRB could not order their reinstatement because their mutiny was a significant violation of other laws — thus, the reinstatement order created a conflict between the NLRA and the mutiny statute.[52] While the broad language of *Hoffman*'s holding im-

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[45] *Id.*

[46] *Id.* at 149.

[47] *Id.* at 155–56 (Breyer, J., dissenting) (citation omitted). Justice Breyer was joined by Justices Stevens, Souter, and Ginsburg.

[48] *Palma*, 723 F.3d at 182 (quoting *Hoffman*, 535 U.S. at 145) (internal quotation marks omitted).

[49] *Hoffman*, 535 U.S. at 143.

[50] 316 U.S. 31 (1942); *see Hoffman*, 535 U.S. at 143–44. *Hoffman* also cited and quoted *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), in which the Court forbade reinstatement for employees who unlawfully occupied their employer's building, *id.* at 255, 257–58, as an example of employees who committed serious criminal acts that preclude the NLRB from ordering certain remedies. *Hoffman*, 535 U.S. at 143.

[51] *Southern S.S. Co.*, 316 U.S. at 47.

[52] *Id.* at 48.

plied that IRCA criminalized the entire employment relationship regardless of who violated IRCA, *Hoffman*'s reasoning and the precedent from which it draws support a narrower reading.[53]

The *Hoffman* Court's concern with deterrence also lends credence to this narrower reading. The Court there was concerned with deterring workers' unlawful presence in the country and unlawful use of false documents, as well as employers' unlawful conduct.[54] While the Court determined that the NLRB was wrong to weigh deterring NLRA violations over deterring IRCA violations, it provided no method of balancing the relative importance of deterring different types of IRCA violations: the employee's unlawful presence, his unlawful use of false documents, or the employer's knowing hiring of an unauthorized worker. But these deterrence goals may operate differently in a scenario like that in *Palma*. As Judge Davis noted, denying backpay when an employer violates both IRCA and the NLRA — and when the employees themselves do not violate either — "increases the employer's incentive to find and to hire" unauthorized employees.[55] This incentive undermines both IRCA and the NLRA. In such a scenario, awarding backpay may "reasonably help[] to deter unlawful activity that both labor laws and immigration laws seek to prevent."[56]

While lower federal courts and state courts have interpreted *Hoffman* in myriad ways, *Madeira* is the federal appellate court decision that most directly addressed the importance of whether an employee used false documents.[57] In *Madeira*, an undocumented employee was injured at work and, under New York's workers' compensation and

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[53] Judge Kearse also cited *NLRB v. Domsey Trading Corp.*, 636 F.3d 33 (2d Cir. 2011), as a reason the *Palma* court was compelled to interpret *Hoffman* as categorically precluding backpay. *Palma*, 723 F.3d at 184. However, although *Domsey* included dictum about *Hoffman*'s breadth, its holding was about evidence: the court held that, due to *Hoffman,* an employee's immigration status at the time of discharge was relevant, and therefore the defendant was entitled to elicit testimony about the plaintiff's immigration status. *Domsey*, 636 F.3d at 38.

[54] *See Hoffman*, 535 U.S. at 148–52.

[55] Mezonos Maven Bakery, Inc., Case No. 29-CA-25476 (N.L.R.B. Div. of Judges Nov. 1, 2006), *reprinted in* 357 N.L.R.B. No. 47, at 9, 17 (N.L.R.B. Aug. 9, 2011) (quoting *Hoffman*, 535 U.S. at 155 (Breyer, J., dissenting)) (internal quotation marks omitted).

[56] *Hoffman*, 535 U.S. at 153 (Breyer, J. dissenting) (emphasis omitted).

[57] *Cf.* Martinez, *supra* note 5, at 673–78 (noting that most cases have distinguished *Hoffman* for other reasons); Elizabeth R. Baldwin, Note, *Damage Control: Staking Claim to Employment Law Remedies for Undocumented Immigrant Workers After* Hoffman Plastic Compounds, Inc. v. NLRB, 27 SEATTLE U. L. REV. 233, 254–63 (2003) (describing courts that have distinguished *Hoffman* based on statute and remedy). In *Singh v. Jutla*, 214 F. Supp. 2d 1056 (N.D. Cal. 2002), one federal district court addressed the importance of employees' use of false documents. That case, arising under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2006 & Supp. V 2011), was the first post-*Hoffman* case in federal court considering the claim of an undocumented worker hired by a *knowing* employer. *See Singh*, 214 F. Supp. 2d at 1061; Fisk & Wishnie, *supra* note 11, at 334. The district court based its distinction in part on the fact that the defendants "were aware of [the plaintiff's] illegal status." *Singh*, 214 F. Supp. 2d at 1061.

construction site liability laws,[58] was awarded compensatory damages for lost earning capacity.[59] The Second Circuit held that IRCA, as interpreted by *Hoffman*, did not preempt the state law in part because "the employer rather than the worker . . . knowingly violated IRCA."[60]

The reasoning the Second Circuit embraced in *Madeira* is inconsistent with its reasoning in *Palma*. In *Madeira*, the court emphasized that the Supreme Court has "'never deferred' to the NLRB's 'remedial preferences[']" when they "potentially trench upon" other federal policies.[61] The Second Circuit understood that in *Hoffman* the NLRA and IRCA conflicted precisely due to the employee's misconduct, because "recognizing employer misconduct [under the NLRA] but discounting the misconduct of illegal alien employees [under IRCA], subverts" IRCA.[62] Consequently, in *Madeira*, the court held that IRCA and the New York law did not conflict because "[n]o comparable worker misconduct [was] evident."[63] In *Palma*, just as was noted in *Madeira*, "the facts simply do not present the same concern for subversion"[64] that was present in *Hoffman*.[65] Palma and his coclaimants did not present any fraudulent documents.[66] Thus, the encroachment on other "equally important Congressional objective[s]"[67] — which occurs when the employee commits a serious criminal act such that awarding him backpay under the NLRA would reward that act — was not a concern.

Moreover, the manner in which *Madeira* distinguished the remedy of payment for lost earning capacity from the remedy of backpay itself served to underscore the importance of the employee's nonuse of fraudulent documents. *Hoffman* emphasized that backpay was inappropriate because it required payment for work not completed, and

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[58] N.Y. LAB. LAW § 240(1) (McKinney 2013) (creating absolute liability for construction site owners for injuries occurring on site). The plaintiff's original claim in *Madeira* was for personal injury, similar to a workers' compensation claim. *See* Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219, 222 (2d Cir. 2006). "'[T]he fact that the employment was illegal' does not . . . absolve the employer of his duty to provide workers' compensation." *Id.* at 229 n.10 (quoting O'Rourke v. Long, 359 N.E.2d 1347, 1351 (N.Y. 1976)).

[59] *Madeira*, 469 F.3d at 224–26. The plaintiff was also awarded damages for pain and suffering and out-of-pocket expenses. *Id.* at 225.

[60] *Id.* at 223. The court identified two other reasons: First, the law dealt with workplace injury, which is never authorized under IRCA, unlike termination, which would be required by IRCA but was unlawful in *Hoffman* because it was retaliatory. *Id.* at 236. Second, the jury was instructed to adjust the plaintiff's award based on the likelihood he would be deported. *Id.* at 223.

[61] *Id.* at 235 (quoting *Hoffman*, 535 U.S. at 144).

[62] *Id.* (quoting *Hoffman*, 535 U.S. at 150) (alteration in original).

[63] *Id.* at 237; *see also id.* at 244.

[64] *Id.* at 237.

[65] *See id.*

[66] *Palma*, 723 F.3d at 180.

[67] *Hoffman*, 535 U.S. at 145 (quoting Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 903 (1984)) (internal quotation marks omitted).

which could only be performed if at least one party violates IRCA.[68] Given this aspect of the Court's reasoning, multiple lower federal courts have distinguished later cases from *Hoffman* based on the nature and purpose of the remedy in question.[69] *Madeira* interpreted *Hoffman* as not precluding payment for lost ability to earn wages[70] — although these wages, like backpay, could not have been earned without at least one party violating IRCA. The *Madeira* court explicitly recognized such payment as similar to backpay, and acknowledged the arguments as to why this remedy does not conflict with IRCA are "analogous" to arguments the Supreme Court rejected in *Hoffman*.[71] Yet the *Madeira* court reconciled this seeming conflict in two ways: First, the court noted that almost every court to consider the issue had found workers' compensation payments were not precluded by *Hoffman*.[72] Second, the court interpreted *Hoffman* as never "explicitly reject[ing] the general premise of the NLRB's . . . argument" about deterrence and incentives.[73] Instead, *Hoffman*, according to the *Madeira* court, "identified other factors" that "tipped the . . . balance" against the NLRB's power to award backpay.[74] The *Madeira* court emphasized that what tipped the balance in *Hoffman* was in large part that the employment "originated in a criminal IRCA violation by the employee,"[75] which the Supreme Court cited as "sink[ing]" that plaintiff's case.[76] In other words, although *Madeira* is distinct from both *Hoffman* and *Palma* based on the wrong and the remedy implicated, even *Madeira*'s reasoning in explaining that distinction underscores the central importance of whether the employee used fraudulent documents.

In *Palma* and *Madeira*, the Second Circuit embraced contradictory readings of whether *Hoffman* is predicated on the employee's misconduct. The *Palma* court should have embraced Judge Davis's distinction and found that *Hoffman* did not control because Palma and his coclaimants did not use fraudulent documents. This outcome would have been more consistent with the reasoning of *Madeira*, and with the deterrence goals embodied in *Hoffman*.

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[68] *See id.* at 149.

[69] *See, e.g.*, Lucas v. Jerusalem Cafe, LLC, 721 F.3d 927, 935 (8th Cir. 2013) (distinguishing backpay from unpaid wages); NLRB v. C & C Roofing Supply, Inc., 569 F.3d 1096, 1099 (9th Cir. 2009) (distinguishing backpay from liquidated damages).

[70] *See Madeira*, 469 F.3d at 242.

[71] *Id.* at 246.

[72] *Id.* at 244–46

[73] *Id.* at 246.

[74] *Id.*

[75] *Id.*

[76] *Id.* (alteration in original) (quoting Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 149 (2002)) (internal quotation marks omitted).