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OBIORA E. EGBUNA v. TIME-LIFE LIBRARIES, INCORPORATED 95 E3d 353 (4th Cir. 1996) United States Court of Appeals, Fourth Circuit

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OPINION VACATED AND REHEARING EN BANC GRANTED

The Fourth Circuit vacated its opinion in *Egbuna* and granted a rehearing before the full panel of judges.[1] The purpose behind examining the vacated Fourth Circuit opinion is to alert the reader to the forthcoming *en banc* opinion and the factors that the court is likely to consider for the resolution of this controversy. The vacated opinion is important because it enunciated rarely examined principles that will affect resident aliens who do not have green cards. In fact, the *en banc* court will find no case law beyond that noted in the vacated *Egbuna* opinion and in the discussion below. Only the District Court for the Eastern District of California[2] and the Eleventh Circuit[3] have approached the question of whether aliens can bring employment discrimination suits. The vacated Fourth Circuit opinion is the most recent in this short series of opinions on this subject matter, and it is likely to play a significant role in the ultimate *en banc* opinion.

I. FACTS

Obiora Egbuna, appellant, was employed by Time-Life Libraries (hereinafter "TLLI"), appellee, from June 1989 until April 1993. Egbuna was a Nigerian national who, when TLLI initially hired him, had authorization from the Immigration and Naturalization Service to work in the United States. During Egbuna's employment with TLLI, an employee whom Egbuna supervised, Harrison Jackson, reported to Egbuna that another employee had sexually harassed him. An internal investigation followed, and Egbuna corroborated some of Jackson's allegations. Egbuna resigned voluntarily from TLLI in April 1993, but then sought reemployment in June 1993.

Egbuna's authorization to work in the United States expired before his voluntary resignation from his prior employment with TLLI. TLLI offered to rehire Egbuna but ultimately withdrew the offer, stating that he had failed to follow company policy while reporting the sexual harassment complaints of Jackson. Egbuna sued TLLI, alleging that the company had not rehired him because of his participation in the enforcement proceedings involving Jackson's complaints, in violation of Title VII of the Civil Rights Act of 1988, 42 U.S.C. § 2000e-3(a) (1988).[4]

The United States District Court for the Eastern District of Virginia granted summary judgment for TLLI on the ground that Egbuna was an alien without work authorization.[5] In order to reach Egbuna's discrimination claim, the district court required Egbuna to prove that he was qualified for the position he sought with TLLI. Egbuna did not have employment authorization at the time of reapplication. Therefore, the court found that Egbuna was not qualified for the position with TLLI, and Egbuna appealed.[6] The case was one of first impression for the Fourth Circuit. The question before the court was whether an undocumented alien who was ineligible to work in the United States under the Immigration Reform and Control Act of 1986[7] could bring a Title VII action for refusal to hire.

II. HOLDING

The United States Court of Appeals for the Fourth Circuit held that status as an alien without authorization to work in the United States did not disqualify the appellant from establishing a prima facie case of discrimination by his employer under Title VII.[8] The court held, instead, that the parties should apply the proof scheme set forth in

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[1] *Egbuna v. Time-Life Libraries, Inc.*, 95 F.3d 353 (4th Cir. 1996). Arguments were heard on March 4, 1997, and a decision by the Fourth Circuit is pending

[2] *EEOC v. Tortilleria "La Mejor,"* 758 F. Supp. 585 (E.D. Cal. 1991).

[3] *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988).

[4] 42 U.S.C. § 2000e-3(a) makes it illegal for employers to discriminate because an applicant "has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

[5] *Egbuna*, 95 F.3d at 354.

[6] 95 F.3d at 354.

[7] The Immigration Reform and Control Act of 1986, 8 U.S.C.A. § 1324a(a)(1) (Supp. 1996), makes it unlawful to grant employment to an unauthorized alien.

[8] *Egbuna*, 95 F.3d at 357.

McDonnell Douglas Corp. v. Green[9] for proving employment discrimination. Because the court found that work eligibility was not part of a prima facie case of discrimination, the court reversed the district court's summary judgment and remanded the case to the district court.

III. ANALYSIS/ APPLICATION

The appeal involved two federal statutes, Title VII and the Immigration Reform and Control Act of 1986 (IRCA). IRCA makes knowingly employing an unauthorized alien illegal.[10] Egbuna, claiming retaliatory failure to employ, sued TLLI under Title VII, which prohibits discrimination against an employment applicant "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."[11]

A. THE PRIMA FACIE CASE

The Fourth Circuit held that the proof scheme articulated in *McDonnell Douglas Corp. v. Green* applies to retaliatory claims brought under 42 U.S.C. § 2000e-3, as well as to discriminatory claims.[12] Under *McDonnell Douglas* the employee must establish a prima facie case of retaliation by showing three elements: "1) the employee engaged in protected activity; 2) the employer took adverse employment action against the employee; and 3) a causal connection existed between the protected activity and the adverse action."[13] Once the employee has established a prima facie case, the employee has a presumption of retaliation. The employer may rebut that presumption by providing a nondiscriminatory reason for its adverse action.[14] The employer need not prove the absence of a retaliatory motive; it must, however, raise a genuine issue of fact as to whether retaliation occurred for the protected activity.[15] If the employer offers a legitimate, nondiscriminatory explanation, the burden of proof shifts back to the employee, who must show that the reason advanced by the employer is pretextual.[16]

In Egbuna, TLLI conceded that Egbuna participated in protected activity during his employment and that TLLI did not rehire Egbuna.[17] Therefore, Egbuna had established the first two requirements necessary for a prima facie case. TLLI asserted that, at the summary judgment stage, the only issue was "whether Egbuna, who could not have been hired by TLLI, [could] demonstrate a causal connection between the protected activity and TLLI's failure to employ him."[18] Egbuna argued that he satisfied the three elements necessary to establish a prima facie case by alleging that TLLI failed to rehire him solely because of his witness status.[19]

B. CASE PRECEDENT

The specific question before the Fourth Circuit was addressed by the United States District Court of California in the case of *EEOC v. Tortilleria "La Mejor."* [20] That court held that Title VII protects unauthorized aliens despite the IRCA provisions.[21]

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[9] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). A civil rights activist engaged in illegal activity against his employer in an effort to protest that his discharge as an employee and the general hiring practices of the firm were racially motivated. *Id.* at 794. The court held that in a Title VII trial, the complainant carries the initial burden of establishing a prima facie case of discrimination. *Id.* at 802. The court noted that because facts vary in Title VII cases, the prima facie proof required from each respondent would differ according to factual situations. *Id.*

[10] 8 U.S.C. § 1324a(a)(1) (Supp. 1996).

[11] 42 U.S.C. § 2000e (1964).

[12] *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985). *See also Williams v. Boorstin*, 663 F.2d 109, 116 (D.C. Cir. 1980); *Womack v. Munson*, 619 F.2d 1292, 1296 (8th Cir. 1980).

[13] *Ross*, 759 F.2d at 365. The *Ross* court determined that the employee must show that the adverse action was the "but-for" cause of the action being challenged in the retaliation context. *Id.* at 366. However, the *Egbuna* court noted that Title VII was amended by the Civil Rights Act of 1991 to provide that a statutory violation occurs if "race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (Supp. III 1991). This court explained that the Civil Rights Act does not address illegal employment practices specifically as defined by § 2000e-3(a), the statute under which Egbuna sought recovery. *Egbuna*, 95 F.3d at 355.

[14] *Ross*, 759 F.2d at 365.

[15] 759 F.2d at 365.

[16] *Id.*

[17] *Egbuna*, 95 F.3d at 355.

[18] 95 F.3d at 355.

[19] *Id.*

[20] *EEOC v. Tortilleria "La Mejor,"* 758 F. Supp. 585 (E.D. Cal. 1991).

[21] *Tortilleria*, 758 F. Supp. at 593-94.

In *Tortilleria*, an employee who was an undocumented alien filed a claim of sex discrimination under Title VII.[22] The California district court held that undocumented aliens were protected under Title VII and noted that the EEOC had always so construed the statute.[23] The court then examined whether the enactment of the IRCA[24] altered the scope of the projections of Title VII and concluded that "Congress did not intend that the IRCA amend or repeal any of the previously legislated projections of the federal labor and employment laws accorded to aliens, documented or undocumented, including the projections of Title VII."[25]

In *Patel v. Quality Inn South*,[26] the Eleventh Circuit considered the interplay of the IRCA and the Fair Labor Standards Act. Congress enacted the FLSA to eliminate substandard conditions in the work place.[27] The court held that in regard to undocumented aliens, the IRCA did not affect the FLSA's application; its construction was based, in part, on the principle that courts disfavor "amendments by implication."[28] Only when the intent of Congress to amend or repeal is clear will courts conclude that a previous act is implicitly repealed or amended by a later one.[29] The *Patel* court concluded that nothing in the IRCA or the IRCA's legislative history suggested that Congress intended the FLSA to limit the rights of undocumented aliens and that the coverage of undocumented aliens under the FLSA was fully consistent with the IRCA.[30] The court found that a policy conflict did not arise from the simultaneous application of both the FLSA and the IRCA:

> Congress enacted the IRCA to reduce illegal immigration by eliminating employers' economic incentive to hire undocumented aliens. To achieve this objective the IRCA imposes an escalating series of sanctions on employers who hire such workers. See 8 U.S.C. § 1324a.[31] The FLSA's coverage of undocumented workers has a similar effect in that it offsets what is perhaps the most attractive feature of such workers—their willingness to work for less than the minimum wage. If the FLSA did not cover undocumented aliens, employers would have an incentive to hire them. Employers might find it economically advantageous to hire and underpay undocumented workers and run the risk of sanctions under the IRCA.[32]

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[22] 758 F. Supp. at 586.

[23] *Id.* at 589. The court noted that if Congress' intent is clear, the court must give effect to the expressed intent of Congress. However, if the plain meaning of Title VII is unclear, the court may look at the EEOC's interpretation of it. *Id.* The EEOC's Compliance Manual states: "[T]he acceptance or rejection of a Title VII charge should not hinge upon the potential charging party's status as a documented or undocumented alien. It is the Commission's position that the term 'any individual' in § 703 of the Act includes any person, whether documented or not, within the jurisdictional boundaries of any 'State.'" EEOC Compliance Manual (CCH), 3806 at 3810-11 (1982). Since the enactment of the IRCA, the EEOC has reaffirmed its position on the matter. EEOC Compliance Manual (CCH), 3820 at 3813 (1987). Although the EEOC's interpretation of Title VII's scope is not controlling, it is entitled to "great deference." *Tortilleria*, 758 F. Supp. at 589. The California district court concluded that the plain meaning of Title VII supported the moving parties and that the EEOC's consistent position reinforced this conclusion. 758 F. Supp. at 589.

[24] Before the IRCA was enacted, the Supreme Court acknowledged that aliens were protected against discrimination under Title VII. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973). The Supreme Court had also held that undocumented aliens were considered "employees" under the National Labor Relations Act, meaning any workers not specifically exempted from the act. Because undocumented aliens are not expressly exempted, they plainly fall within the broad definition of "employee." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891-92 (1984).

[25] *Tortilleria*, 758 F. Supp. at 594.

[26] *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988).

[27] 29 U.S.C. § 202 (1938). The FLSA requires covered employers to pay a statutorily prescribed minimum wage to their employees, 29 U.S.C. § 202, and prohibits employers from requiring their employees to work in excess of forty hours per week without compensating them at one and one half times their regular hourly rate. 29 U.S.C. § 207(a)(1). Congress defined the term "employee" in order to determine whom the act would cover. "Employee" was defined to include "any individual employed by an employer." 29 U.S.C. § 203(e)(1). Congress listed specific exceptions to this expansive definition. This framework strongly implies that Congress intended that the all-encompassing definition would include all employees not specifically excepted. *Patel*, 846 F.2d at 702.

[28] *Patel*, 846 F.2d at 704.

[29] 846 F.2d at 704.

[30] *Id.*

[31] 8 U.S.C.A. § 1324(a)(2) states, "[i]t is unlawful for a person or other entity, after hiring an alien for employment. . ., to continue to employ the alien in the United States knowing the alien is an unauthorized alien with respect to such employment."

[32] *Patel*, 846 F.2d at 704.

The court recognized that the FLSA's coverage of undocumented aliens helps discourage illegal immigration by reducing the incentive for employers to hire such workers; thus, its objectives were consistent with the IRCA's objectives. The court therefore concluded that undocumented aliens would continue to be "employees" covered by the FLSA.[33]

C. THE ISSUE ON APPEAL

Before the United States Court of Appeals for the Fourth Circuit, TLLI argued that Egbuna lacked work authorization, which rendered him not qualified to work, and thus Egbuna did not have the ability to make a prima facie case of retaliatory failure to employ.[34] Based on this belief, TLLI failed to advance any reply to Egbuna's Title VII claim, arguing that it did not need to advance a motive, as the second stage of the *McDonnell Douglas* framework requires. Egbuna argued that the court should not allow TLLI to hide its unlawful conduct behind an immigration law that TLLI "knowingly violated" for forty months.[35]

The EEOC, as *amicus curiae*, joined Egbuna in arguing that the trial court erred in including work authorization in the prima facie stage. The EEOC argued that ineligibility for employment under the IRCA may be "a legitimate, non-discriminatory reason for an employment decision" but that it could not be a basis for excluding a person from Title VII projections.[36] Ineligibility would be relevant "only if the employer relied on that reason when making its decision."[37] Therefore, the EEOC argued, work authorization should be considered at the second stage, and not at the prima facie case stage, if the employer advanced that as the nondiscriminatory reason for its decision.[38] Under this scheme, the plaintiff could then attempt to show that the explanation asserted by the employer was pretextual and that the employer's motivation was actually discriminatory.[39]

Egbuna and the EEOC argued that, the court should have permitted TLLI to offer Egbuna's status as an undocumented alien as the non-discriminatory reason for TLLI's action at the second stage in the *McDonnell Douglas* framework.[40] Egbuna asserted that he could have then demonstrated that TLLI's motivation was pretextual. Egbuna would have shown that his extended employment relationship with TLLI, most of which was in violation of the IRCA, together with the high recommendation from TLLI's branch manager for Egbuna's reemployment, were sufficient to put in issue both whether TLLI would have reemployed Egbuna in violation of immigration law and whether TLLI would have been likely to reserve the position for the appellant pending his receipt of employment authorization.[41]

D. THE COURT'S DETERMINATION

The court of appeals held that the district court's decision endorsed a proof scheme that protected employers from their acts of discrimination on the basis of reasons on which they did not legitimately rely.[42] TLLI did not claim that it failed to rehire Egbuna because he was ineligible to work.[43] Rather, it asserted that Egbuna's status precluded it from Title VII coverage. Inotherwords, TLLI was shielded from Egbuna's Title VII claim because he was undocumented.[44] Furthermore, the court of appeals found that the district court's decision which afforded this protection was directly contrary to the Supreme Court decision of *McKennon v. Nashville Banner Publishing Co.*[45] In *McKennon*, the Court held that when an employer fires an employee for an illegal reason, evidence of a legitimate reason for the termination acquired after the employee has been fired does not protect the employer from liability under the violated statute.[46] The Court noted that a

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[33] 846 F.2d at 705.

[34] *Egbuna*, 95 F.3d at 356. The court noted that this case was unusual because Egbuna alleged that the failure to hire by TLLI was retaliatory. In most cases, a past relationship does not exist between the person who is not hired and the employer, so the failure to hire is alleged to be discriminatory, not retaliatory. 95 F.3d at 355.

[35] *Id.* at 356.

[36] *Id.*

[37] *Id.* at 357.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *McKennon v. Nashville Banner Publishing*, 513 U.S. 352, 115 S. Ct. 879 (1995).

[46] *McKennon*, 115 S. Ct. at 881. A discharged employee sued her employer under the Age Discrimination in Employment Act of 1967. 29 U.S.C. § 621 et seq. (1988 ed. and Supp. V). The Court held that the ADEA was part of the wider statutory scheme of Title VII created to protect employees nationwide. 115 S. Ct. at 884. The Court stated that the ADEA and Title VII shared a common purpose: to eliminate discrimination in the workplace. *Id.* The Court further stated that the object of the ADEA and of Title VII was both deterrence and compensation for injuries resulting from the prohibited discrimination. *Id.*

litigant in a Title VII action, in addition to redressing a private injury, also vindicates the congressional policy against practices of employment discrimination.[47] The Court stated that the policy would not have been vindicated "if after-acquired evidence of wrongdoing that would have resulted in termination operates, in every instance, to bar all relief for an earlier violation of the Act."[48]

In *Egbuna*, the court of appeals held that it would not be appropriate to follow the district court ruling and allow TLLI to escape liability for a possible violation of Title VII on the basis of Egbuna's status as an undocumented alien.[49] The court concluded that the parties should, instead, proceed through the *McDonnell Douglas* framework: "TLLI may assert Egbuna's lack of work authorization as a legitimate non-discriminatory basis for its decision, and Egbuna may attempt to show that the asserted basis is pretextual."[50] The court stated the policy underlying its reasoning as follows:

> We believe that the legislative effort to fight employment discrimination by protecting those who make or support allegations of improper conduct is best served by holding that a Title VII claimant need not show work authorization as part of the prima facie case. This conclusion does no damage to the distinct legislative decision to proscribe the hiring of undocumented workers under the IRCA. As the Eleventh Circuit noted, uniform application of this nation's labor laws removes a possible economic incentive to hiring illegal workers.[51]

The *Egbuna* holding preserves an applicant's ineligibility to work as a relevant consideration. The employer may assert lack of work authorization as the legitimate, nondiscriminatory basis for its decision. Should a Title VII violation be established, ineligibility to work may ultimately pertain to the question of possible remedies.[52]

IV. JUDGE RUSSELL'S DISSENT

Judge Russell criticized the majority's decision that the parties should proceed under the *McDonnell Douglas* framework.[53] Judge Russell emphasized that under the *McDonnell Douglas* framework, an employer cannot be ordered to employ an individual unless the employee is qualified for the position sought.[54] An alien must have the "the requisite employment authorization"[55] to be qualified; here, Egbuna "is an alien without a green card."[56] Therefore, Egbuna could not qualify for employment by Time-Life Libraries, Inc. Judge Russell was not persuaded that mere alien status is a sufficient reason for holding the immigration laws subject to Title VII.[57] Thus, Judge Russell would allow employers to escape all liability for Title VII violations simply because of an employee's undocumented status.

V. CONCLUSION

A rehearing en banc was granted for *Egbuna*. Nonetheless, the Fourth Circuit finding that status as an alien lacking work authorization does not disqualify an employee from establishing a prima facie case under Title VII was a natural product of the decisions found in case precedent. *McDonnell Douglas Corp. v. Green* set forth a proof scheme for proving employment discrimination. *Ross v. Communications Satellite Corp.* extended the proof scheme advanced in *McDonnell Douglas* to retaliatory claims brought under § 2000e-3. Based on these two decisions, the *Egbuna* court specified the three elements an employee must satisfy to establish a prima facie case of retaliation. The decision of the U.S. District Court of California in *Tortilleria*, which held that Title VII extends coverage to unauthorized aliens and that the coverage of Title VII is not altered by the IRCA, although not entitled to controlling weight, is important because it offers support to the Fourth Circuit's conclusion in *Egbuna* that work eligibility is not part of a prima facie case of discrimination. The line of case law preceding *Egbuna* is a progression by the courts to an acknowledgment that undocumented aliens have rights which Title VII protects.

The holding in *Egbuna* sets an important precedent by establishing two principles for claims brought by an alien employee under Title VII. First, an undocumented alien who is ineligible to work in

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[47] *Id.* (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974)). *See also International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 364 (1977).

[48] *Id.*

[49] *Egbuna*, 95 F.3d at 357.

[50] 95 F.3d at 357.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.* at 357-58.

[55] *Id.* at 358.

[56] *Id.*

[57] *Id.*

the United States under the IRCA can bring a Title VII action for refusal to hire because status as an alien without work authorization does not disqualify a former employee from establishing a prima facie case of discrimination or retaliation against an employer. Second, an employer may not escape liability for a Title VII violation on the basis of an employee's undocumented status; thus, the parties should proceed through the *McDonnell Douglas* framework. The court acknowledged that employees who are undocumented aliens are entitled to the same projections as other employees who have work eligibility.[58] This holding disallows employers from using employees' lack of employment authorization as a means of escaping liability for a Title VII violation.

Because litigants are required to proceed through the *McDonnell Douglas* framework, the employer must offer a legitimate, nondiscriminatory reason for any adverse action it took against an employee, and it cannot offer the undocumented status of the employee as a reason for acts of discrimination if the employer did not actually rely on that reason.[59] The employee can show that the employer's reason is pretextual through evidence which includes facts as to the employer's treatment of respondent during a prior term of employment; the employer's reaction to the employee's legitimate activities; and the employer's general employment policy and practice.[60] *Egbuna* accords undocumented aliens access to the courts of the United States by recognizing that they are "employees" under Title VII and that the goal of Title VII is to protect all employees' access to United States agencies and courts.

The burden on the employee to establish a prima facie retaliation case "is not onerous."[61] The prohibition Congress has placed on retaliation exists to ensure that employees "will not fear to assert their substantive rights, which are the heart of Title VII."[62] However, the likelihood that an undocumented alien would bring a claim of discrimination at the risk of being penalized administratively for an immigration violation through deportation is minimal. In addition, if the undocumented employee unlawfully entered into the United States, unlike Egbuna who had work authorization at the time of entry, the employee may risk greater repercussions because unlawful entry is a criminal act.[63] The court in *Tortilleria* noted that the primary reason for the lack of case law on point was "no doubt[,] . . . fear of deportation."[64]

Illegal aliens come to the United States in the hope of procuring employment. They do not come seeking the protection of this country's labor laws. Congress did not intend Title VII to guarantee a job, regardless of qualification, to every person.[65] Title VII is, rather, an effort by the legislature to fight employment discrimination.[66] The *Egbuna* court acknowledges that an applicant's lack of employment authorization "remains a relevant consideration," and may be offered by the employer as the legitimate reason for its actions.[67] Extending Title VII's coverage to undocumented aliens reduces the incentive to hire unqualified workers and discourages illegal immigration, which is consistent with the objectives of the IRCA. The Eleventh Circuit noted that uniformly applying the labor laws removes the economic incentive to employing illegal workers.[68]

The dissent in *Egbuna* dismisses the policy considerations of the majority decision. Moreover, Judge Russell fails to substantiate his opinion with case law, and he fails to address the decision of the court in *Tortilleria*, the only other court that has been presented with the specific question before the *Egbuna* court. Existing case precedent establishes a progression towards protecting unauthorized aliens under Title VII despite the provisions of the IRCA. The majority's decision in *Egbuna* is supported both by case precedent and policy and should be upheld upon rehearing en banc by the Fourth Circuit.

Summary and Analysis Prepared by:

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[58] Although the *Egbuna* court focused on retaliatory claims, these principles may be applied to other claims of discrimination or retaliation by employees who lack work authorization.

[59] *Egbuna*, 95 F.3d at 357.

[60] *McDonnell Douglas*, 411 U.S. at 805.

[61] *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

[62] *Ross*, 759 F.2d at 366.

[63] INA § 275 (a), 8 U.S.C. § 1325 (Supp. 1993).

[64] *Tortilleria*, 758 F. Supp. at 593.

[65] *McDonnell Douglas*, 411 U.S. at 800.

[66] 411 U.S. at 800.

[67] *Egbuna*, 95 F.3d at 357.

[68] *Sure-Tan*, 467 U.S. at 889.