The Migrant and Seasonal Agricultural Worker Protection Act: "Rumors of My Death Have Been Greatly Exaggerated"

The Migrant and Seasonal Agricultural Worker Protection Act affords "whistleblower" protection to migrant farmworkers who are retaliated against for complaining about substandard housing conditions. This feature of the Act, which resides within the Act's private right of action, offers a more effective remedy than administrative enforcement. This comment describes this remedy, analyzes key strengths and weaknesses and suggests improvements for enhanced utilization in meeting the Act's goals.

INTRODUCTION

Non-union migrant farm workers are among the most vulnerable and mistreated employees in the United States with respect to wages, terms of employment, and housing conditions.[1] Yet, fearful of retaliation and loss of the opportunity to work, they hesitate to complain about the often dismal health and safety conditions characteristic of many labor camps.[2]

Ten years ago, Congress enacted a modified legislative scheme in renewed recognition of farm workers' need for basic protection from exploitation—the federal Migrant and Seasonal Worker Protection Act ("AWPA" or "the Act").[3] AWPA, which replaced the Farm Labor Contractor Registration Act of 1963 ("FLCRA"), provides for both equitable and legal remedies to seasonal and migrant farm workers for farmers' failure to comply with registration, employment and housing

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[1] "The agricultural worker's employment had been 'historically characterized by low wages, long hours and poor working conditions.' " H. REP. NO. 885, 97th Cong., 2nd Sess. 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, in Judith Hall, Comment, *Migrant Farmworkers: The Legislature Giveth and Taketh Away*, 1 S. J. AGRI. L. REV. 83 (1991).

[2] "[F]arm workers who attempt to assert their rights must overcome a general background of fear and intimidation caused by the widespread practice of retaliation against those who complain about violations." Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317, 1332 (5th Cir. 1985).

[3] 29 U.S.C.S. §§ 1801-72 (Law. Co-op. 1990).

condition regulations. However, as is typical of many large-scale, federal regulatory efforts, inadequate funding and staffing has undermined administrative enforcement of the Act.

The Act also provides for a private right of action, which can be brought independent of or in addition to invocation of the Act's administrative provisions. Further, there exists the equivalent of "whistleblower protection"[4] under the Act protecting farm workers from retaliation for filing actions alleging substandard housing conditions. This affords non-union migrant farm workers a significant "safety net" when administrative regulation fails: workers need not wait for the rare enforcement agent to intervene on their behalf, and they are protected from retaliation when they act on their own.

In light of recently exposed weaknesses of administrative enforcement of AWPA,[5] this comment takes a critical look at the private right of action and anti-retaliation features of AWPA. What emerges is a favorable diagnosis of AWPA's ability to improve labor camp housing conditions. Employers who fail to comply with applicable housing codes or who then retaliate against farm workers who complain can be held liable for money damages as well as for equitable relief. The financial repercussions of a suit and having to defend provision of substandard housing are presumed to serve as major deterrents of continuing housing provision violations.

However, the remedy is useless unless it is invoked. Thus, the long-term prognosis for AWPA's effectiveness in improving migrant worker

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[4] While the term "whistleblower" originated with federal employees whose careers were compromised or cut short when they disclosed illegal or improper government activities, it is now used in a more general sense to reflect protection of classes of people at particular risk of retaliation for seeking basic legal protections. Bruce Fong, *Whistleblower Protection and the Office of Special Counsel: The Development of Reprisal Law in the 1980s*, 40 AM. U. L. REV. 1015, 1017 (1991). Several federal statutes contain specific provisions prohibiting retaliation for reporting violations of the statute, including, for example: The Clean Air Act, 42 U.S.C. § 7622(a); the Energy Reorganization Act, 42 U.S.C. § 5851(a); the Federal Mine Safety and Health Act, 30 U.S.C. § 815(c)(1); the Occupational Safety and Health Act, 29 U.S.C. § 660(c)(1); among others, including AWPA. Also, there are now several whistleblower nonreprisal state statutes, and even in the absence of express statutory authority, public policy has been held to warrant such protection. Note, *Employer Opportunism and the Need for a Just Cause Standard*, 103 HARV. L. REV. 510, 512 (Dec. 1989).

[5] According to Roger Rosenthal, the Executive Director of the Migrant Legal Action Program in Washington, "[t]he US Department of Labor's record of enforcement here . . . is simply terrible." Remarks at the Conference on Security and Cooperation in Europe Briefing Concerning the Status of Migrant Farmworkers in the US, Federal News Service, July 20, 1992 (LEXIS, Labor library, BNA file) [hereinafter *Transcript*]. Also, see Hall, *supra* note 1.

housing conditions depends in part on facilitating access to the remedy through relatively minor legislative modification and through concerted effort by advocates in spreading the news about the Act's whistleblower protection feature.

I. BACKGROUND OF AWPA

The Migrant and Seasonal Agricultural Worker Protection Act, which became effective in September of 1983, was intended to rectify various problems of its predecessor, the Farm Labor Contractor Registration Act of 1963 ("FLCRA").[6] FLCRA was "designed to curtail existing abuses against farmworkers, including inadequate housing, unsafe transportation, and the misrepresentation of the nature of their work and pay."[7] However, the law, ignored by farmers and enforcement agents alike, failed to deter exploitation of farm workers. Needed reforms led to AWPA.[8]

A. The Purpose of AWPA and General Provisions

AWPA is intended to provide federal protection for non-union seasonal and migrant farm workers because circumstances of poverty, transiency and illiteracy render them uniquely vulnerable to exploita-

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[6] For comprehensive discussion of the development of AWPA as a response to problems with FLCRA, see: Donald Pedersen, *The Migrant and Seasonal Agricultural Worker Protection Act: A Preliminary Analysis*, 37 ARK. L. REV. 253, 254-258 (1983); Marion Quisenbery, *A Labor Law for Agriculture: The Migrant and Seasonal Agricultural Workers' Protection Act*, 30 S. DAK. L. REV. 311, 311-313 (Spring 1985); and John Dingfelder, *The 1983 Migrant and Seasonal Agricultural Workers Act Results in a Harvest of Litigation*, 11 J. AGRIC. TAX'N. AND L. 3, 4-5 (Spring 1983). In sum, many of AWPA's substantive provisions essentially are the same as FLCRA's. One significant change was in response to ambiguity of "farm labor contractor," which was the only entity subject to the FLCRA. AWPA's expanded coverage reaches "agricultural employers," in addition to farm labor contractors, though not all of AWPA's informational and record-keeping requirements apply equally to both groups. For purposes of this comment, the distinction is relevant only insofar as it alerts farmers previously not covered by FLCRA to their status as potential defendants under AWPA's private right of action and whistleblowing provisions, both of which were available previously under FLCRA.

[7] John Dingfelder, *The 1983 Migrant and Seasonal Agricultural Workers Act Results in a Harvest of Litigation*, 11 J. AGRIC. TAX'N. AND L. 3, 4 (Spring 1983), citing to S.REP. NO. 202, 88th Cong., 2d Sess. 1 (1963) *reprinted in* 1964 U.S.C.C.A.N. 3690; S.REP. NO. 1295, 93rd Cong., 2d Sess. 1-3, (1974) *reprinted in* 1974 U.S.C.C.A.N. 6441, 6442.

[8] *Id.* at 4-5.

tion.[9] There are an estimated 1.5 million to 2.5 million farm workers in the United States.[10] The National Labor Relations Act ("NLRA") expressly excludes agricultural workers,[11] though some states, including California, have enacted alternative legislation for farm workers which closely resembles NLRA protection.[12] However, according to David Martinez, secretary-treasurer of the United Farm Workers of America (UFW), an estimated 80 per cent of farm workers in the Salinas, California area are not covered by union contracts, and of the 10,000 workers represented by UFW, only about 2,000 work under a contract.[13] To the extent union contract coverage in Salinas, California, is representative of other geographical regions, it is clear the number of farm workers not afforded union protection is significant, rendering AWPA protection that much more important.

The major provisions of AWPA relate to farm labor contractor registration requirements; information and recordkeeping requirements; wages, supplies, and other working arrangements; motor vehicle safety; compliance with written agreements; criminal sanctions; judicial enforcement; administrative sanctions; waiver of rights (which is void under AWPA as contrary to public policy[14]); authority to obtain information; and state laws and regulations (AWPA is not pre-emptive of State law but is intended to supplement it[15]).

B. AWPA Provisions of Particular Interest to this Comment

Three provisions are of primary interest to the scope of this comment. Section 1823 relates to the safety and health features of housing, requiring those who own or control real property used to house work-

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[9] "It is the purpose of this Act to remove the restraints on commerce caused by activities detrimental to migrant and seasonal agricultural workers; to require farm labor contractors to register under this Act; and to assure necessary protections for migrant and seasonal agricultural workers, agricultural associations, and agricultural employers." 29 U.S.C.S. § 1801 (Law. Co-op. 1990). Also, AWPA was enacted to "reverse the historical pattern of abuse and exploitation" suffered by farm workers. H. REP. No. 885, 97th Cong., 2nd Sess. 3 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4549.

[10] *Federal Laws Found Lacking in Guarding Farm Worker Rights*, N.Y. TIMES, Feb. 25, 1992, at A10.

[11] 29 U.S.C.S. § 152(3) (Law. Co-op. 1975).

[12] CAL. LAB. CODE §§ 1140-66.3 (Deering 1991 & Supp. 1992) is the Agricultural Labor Relations Act protecting farmworkers who are organized, or who seek to become so, in California.

[13] *Chavez Leads Salinas March*, THE FRESNO BEE, July 27, 1992, at B4.

[14] 29 U.S.C.S. § 1856 (Law. Co-op. 1990).

[15] *Id.* at § 1871.

ers comply with federal and state safety and health standards.[16]

Section 1855, the "whistleblower" provision, prohibits discrimination against or treating differently a migrant worker because she, with just cause, filed a complaint or instituted a proceeding under or related to AWPA.[17] Such prohibited discriminatory acts include firing or evicting complaining farmworkers. Constructive discharge of a farm worker, that is, causing a farm worker to quit through coercion or intimidation because she registered a complaint, also is actionable under this section.[18]

Section 1854(a) provides for the private right of action.[19] Any person aggrieved by a violation of the Act may file suit in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy and without regard to the citizenship of the parties. Exhaustion of administrative remedies is not a prerequisite to filing a law suit (The Secretary of Labor has responsibility for administrative enforcement of AWPA.[20])

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[16] "Safety and health of housing. (a) Except as provided in subsection (c), each person who owns or controls a facility or real property which is used as housing for migrant agricultural workers shall be responsible for ensuring that the facility or real property complies with substantive Federal and State safety and health standards applicable to that housing. . .

(c) This section does not apply to any person who, in the ordinary course of that person's business, regularly provides housing on a commercial basis to the general public and who provides housing to migrant agricultural workers of the same character and on the same or comparable terms and conditions as is provided to the general public." *Id.* at § 1823.

[17] "Discrimination prohibited. (a) No person shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any migrant or seasonal agricultural worker because such worker has, with just cause, filed any complaint or instituted, or caused to be instituted, any proceeding under or related to this Act, or has testified or is about to testify in any such proceedings, or because of the exercise, with just cause, by such worker on behalf of himself or others of any right or protection afforded by this Act." *Id.* at § 1855.

[18] Migrant Legal Action Program, A Sword and Shield for Farmworkers: The Anti-Retaliation Provisions of AWPA and FSLA, AWPA Issue Paper #6, August, 1991, at 4-5 (citations omitted) [hereinafter AWPA Issue Paper #6].

[19] "Private right of action. Any person aggrieved by a violation of this Act or any regulation under this Act by a farm labor contractor, agricultural employer, agricultural association, or any other person may file suit in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy and without regard to the citizenship of the parties and without regard to the exhaustion of any alternative administrative remedies provided herein." 29 U.S.C.S. § 1854(a) (Law. Co-op. 1990).

[20] *Id.* at §§ 1852-53.

Unlimited actual damages are available under AWPA.[21] Alternatively, discretionary statutory damages, limited to $500 per violation per affected farm worker (in a class action, there is a limit of $500,000), are available.[22] Liquidated damages are available even without a showing of actual injury.[23] When the court determines damages, it is to consider the following factors:

> (1) nature and persistence of the violations — including whether the violations are substantive or technical; (2) the extent of the defendant's culpability; (3) damage awards in similar cases; (4) the defendant's ability to prevent future violations of the AWPA and (5) the circumstances of each case.[24]

III. Scope of This Comment

This comment accepts as valid the criticisms of administrative enforcement of AWPA as described in a recent law review comment focused on that topic.[25]

The major criticism is the inability of the Department of Labor ("DOL"), as the agency charged with administrative enforcement, to maintain adequate enforcement staffing levels in the face of dwindling resources.[26] The number of DOL investigators assigned to AWPA, and consequently the number of investigations of alleged AWPA violations that can be done, has remained virtually unchanged since FLCRA was replaced by AWPA in 1983, contrary to DOL assurances.[27] It is unlikely in this age of federal budget reduction demands that this will improve any time soon.[28]

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[21] *Id.* at § 1854(c)(1), though the "no limit" language is found in the legislative history section of H.Rep. No. 885, 97th Cong., 2d sess. 21 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4567.

[22] 29 U.S.C.S. § 1854(c)(1)(B) (Law. Co-op. 1990).

[23] Aviles v. Kunkle, 765 F.Supp. 358, 366 (S.D. Tex. 1991), citing Alvarez v. Joan of Arc, Inc., 658 F.2d 1217, 1219 (7th Cir. 1981). Referring to the damages specified by the Act (liquidated damages), the *Aviles* court stated: "[t]his provision [42 U.S.C. § 1854(c)(1)] has a dual purpose. It allows the plaintiffs to recover for harm they have suffered even though they cannot prove actual injury, and it promotes compliance with the AWPA's requirements, thereby deterring future abuses." *Id.* at 366.

[24] *Id.* at 367, citing Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317, 1332-1333 (5th Cir. 1985).

[25] Hall, *supra* note 1.

[26] *Id.* at 88.

[27] *Id.* at 91-93.

[28] There is a glimmer of hope for long-term improvement in administrative enforcement of AWPA: the last three years has seen a special program whereby various government agency enforcement resources, not just those of the Department of Labor, are

Also, there is another, more invidious reason administrative enforcement of AWPA fails to resolve problems such as substandard housing for migrant farm workers. Lack of respect for and prejudice toward farm workers, who are mainly Hispanic and who are all poor,[29] cannot be eliminated administratively. Furthermore, it is too easy to assign lowest priority to enforcement of regulations designed to protect a non-vocal minority group.

AWPA's private right of action (as opposed to its administrative regulation) should get farm workers past the barriers of prejudice and selective enforcement and into court. In court, at least there is formal recognition of the need to treat all plaintiffs equally, regardless of their ethnic background, social class, or popularity as a social cause.

However, only a very small number of litigated cases have involved AWPA.[30] Because this is attributable in large part to farm workers' fear of retaliation,[31] AWPA's "whistleblower" protection assumes particular importance. Though not a new provision, it needs a new emphasis. When farm workers are informed about and come to believe the right to complain about the condition of labor camps is itself protected by the Act, the fear of retaliation can be overcome so that they will file more complaints.

The private right of action under AWPA has great potential for deterrence of continuing housing provision violations. Bringing a farmer into court to justify dismal housing conditions serves this purpose, especially since associated court opinions and documents have become grist for the media mill,[32] and since the farmer need only comply with the Act to avoid being sued.

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coordinated and targeted to locations representing concentrations of migrant workers. *Transcript, supra* note 5, at 8.

[29] According to Carlos Marentes, director of the Border Agricultural Workers Union in El Paso, Texas, "the annual salary of agricultural workers in the [New Mexico] region was $5,300 in 1991. This is not even one-third of what an American worker that lives in poverty, according to the guidelines established by the federal government, earns." *Transcript, supra* note 5, at 16.

[30] A search for U.S. District Court cases in LEXIS, Genfed library, that even mentioned the Migrant and Seasonal Agricultural Worker Protection Act identified only 62 cases, as of August, 1992.

[31] See *supra* note 2.

[32] In California, just between May and August, 1992, there was a "spate" of housing and/or retaliation cases in the news. These included Marquez v. Gerawan Ranches, filed in U.S. District Court in Fresno, THE FRESNO BEE, June 8, 1992, at A1; an action filed by a farm worker with the California Labor Commissioner, THE FRESNO BEE, August 1, 1992, at B1; and Rivas v. Schmidl Farms, Inc., which was settled before trial, THE FRESNO BEE, May 22, 1992, at B4.

Indeed, given the serious problems with AWPA's administrative enforcement, the private right of action serves as the only viable avenue for changing labor camp conditions for non-union migrant workers. The remainder of this comment serves to update farmworkers, advocates, litigators and farmers on the significant features of this remedy.

Specifically, Section IV describes who is and who is not covered by AWPA in terms of housing complaint cases. Section V updates the legal status of key issues related to the private right of action and whistleblower provisions of AWPA. Section VI shows how AWPA's private right of action and whistleblower provisions apply to housing complaint cases. Section VII presents recommendations and is followed by a conclusion.

IV. AWPA Coverage with Respect to Housing Complaints[33]

A. Types of Agricultural Employers Subject to Liability[34]

Contrary to FLCRA, AWPA's predecessor, AWPA encompasses both farm labor contractors and agricultural employers, though only farm labor contractors remain subject to the rather extensive reporting and informational requirements of AWPA. However, agricultural employers, agricultural associations, and farm labor contractors all fall within AWPA's housing condition provisions, unless one of the statutory exceptions applies.[35] A fourth class of persons subject to the Act are those who own or control farm worker housing but who are not agricultural employers, agricultural associations or farm labor contractors.[36]

"Agricultural employer" means a person who owns or operates a farm, ranch or other agricultural business.[37] As already indicated, an

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[33] This section of the comment provides an overview of AWPA's coverage as it relates to housing conditions and retaliation; it is not intended to serve as a comprehensive presentation of all of AWPA's provisions. The reader interested in AWPA coverage beyond the scope of this comment is encouraged to consult the text of the Act itself, which can be found at 29 U.S.C.S. §§ 1801-72 (Law. Co-op. 1990).

[34] For simplicity, after introductory remarks, all persons subject to liability under the Act will be referred to generically as "farmers"; the various agricultural operations will be referred to as "farms" or "farm operations."

[35] See *infra* p. 7.

[36] 29 U.S.C.S. §§ 1823(a), (b) and (c) (Law. Co-op. 1990).

[37] " 'Agricultural employer' means a person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed or nursery, or who produces or conditions seed, and who either recruits, solicits, hires, employs, furnishes, or transports a migrant or seasonal worker." *Id.* § 1802(2).

agricultural employer is not a farm labor contractor. Recently, a United States Appeals Court held that forestry operations are considered agricultural employers for purposes of AWPA.[38] Forestry operation refers to "recruiting, soliciting, hiring, employing, furnishing or transporting any migrant or seasonal worker for all predominantly manual forestry work, including but not limited to tree planting, brush clearing, precommercial tree thinning and forest fire fighting."[39]

The term "agricultural association" refers to any non-profit or cooperative association of farmers, growers, or ranchers, incorporated or qualified under applicable State law, which recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal worker.[40]

A "farm labor contractor" is a person other than an agricultural employer, an agricultural association, or an employee of same, who for some consideration recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal worker.[41]

"Owning" farm worker housing means having a legal or equitable interest in a facility or property;[42] "controlling" means having the power or authority to oversee a facility personally or through an agent.[43]

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[38] FLCRA initially adopted the definition of agricultural used in the Fair Labor Standards Act and the Internal Revenue Code. The Department of Labor interpreted this language to exclude forestry, viewing "agriculture" as limited to "work performed by a farmer or on a farm . . ." Bresgal v. Brock, 843 F.2d 1163, 1165 (9th Cir. 1987). When FLCRA was rewritten in 1974, the definition was expanded to include "horticultural commodity," and AWPA adopted this expanded version. *Id.* at 1165. According to the *Bresgal* court, analysis of the legislative intent of FLCRA (and AWPA) compelled a decision that therefore, forestry workers are covered: "the conditions Congress addressed in the Act, and the persons protected, are the same in the forestry industry as in more conventional agricultural industries . . . As the district court noted, 'it is inconceivable that Congress intended to protect workers planting fruit trees in an orchard, and to disregard workers planting fir trees on a hillside, when both groups suffer from the same clearly identified harm.' " *Id.* at 1166.

[39] *Id.* at 1171.

[40] 29 U.S.C.S. § 1802(1) (Law. Co-op. 1990). Examples of agricultural associations include the Yuba-Sutter (California) Farm Bureau, and the California Canning Peach Association.

[41] *Id.* §§ 1802(7),(6).

[42] 29 C.F.R. § 500.130(b) (1985).

[43] *Id.* § 500.130(c).

B. Some Agricultural Entities Are Exempt

Certain types of farmers[44] and farm operations are exempt from the Act. It can be argued that the reason for exempting some entities is that the original intent of FLCRA (AWPA's predecessor) was to curtail abuses by independent farm labor contractors.[45] Not until AWPA was enacted were persons other than farm labor contractors covered. This gave rise to exemptions when independent farm labor contracting activity is not the basis for procurement of farm workers. Thus, a family farming operation which recruits its own workers was not the type of entity Congress sought to regulate. More than likely, these exemptions resulted from successful lobbying by farmers rather than well-reasoned Congressional intent, since they do allow some farmers to escape liability for the same conduct for which their non-exempt counterparts are liable.[46]

1. The Family Business Exemption

The family business exemption applies when: (1) the farm is owned by immediate family members; and (2) when the family members do all of the recruiting of the farm worker labor force.[47] Once non-family members are involved in soliciting, employing, transporting or otherwise furnishing migrant workers to the farm, the exemption is lost and the farmer becomes subject to AWPA.[48] A farmer who relies on a defense that she did not ratify or explicitly authorize such labor contracting activity likely will be unsuccessful: a farmer cannot reap the benefits of someone else's recruitment and argue that it was unautho-

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[44] The reader is reminded that henceforth, for simplicity, all persons subject to liability under the Act will be referred to generically as "farmers"; the various agricultural operations will be referred to as "farms" or "farm operations."

[45] See Dingfelder, *supra* note 7, at 13.

[46] AWPA represents a consensus reached among competing interest groups, so that some compromises, such as this one, were made. See Quisenbery, *supra* note 6, at 313.

[47] "Any individual who engages in a farm labor contracting activity on behalf of a farm, processing establishment, seed conditioning establishment, cannery, gin, packing shed, or nursery, which is owned or operated exclusively by such individual or an immediate family member of such individual, if such activities are performed only for such operation and exclusively by such individual or an immediate family member, but without regard to whether such individual has incorporated or otherwise organized for business purposes." 29 U.S.C.S. § 1803(a)(1) (Law. Co-op. 1990).

[48] In Martinez v. Shinn, Findings of Fact and Conclusion of Law, United States District Court, Eastern District, Case No. C-89-813-JBH, entered May 20, 1991, at 34. *See also*, Bueno v. Mattner, 829 F.2d 1380 (6th Cir. 1987), *cert. denied*, 486 U.S. 1022 (1988).

rized in order to circumvent liability for AWPA violations.[49]

In a case involving a family farming business as defendants, the Court held that they could not avail themselves of the family business exemption,[50] relying in part on federal regulations defining "immediate family" as spouses, children, stepchildren, foster children, parents, stepparents, foster parents, and siblings.[51] The defendant family asserted that they did all the hiring of farm workers for their farm. The facts indicated otherwise: a non-family member hired by defendants as a field foreman testified that he was authorized to bring workers to the farm to work and did so. Defendants' acceptance of some workers with the knowledge that they were there because of the non-family recruiter's efforts precluded them from claiming the benefit of the family business exemption.[52]

At least one case has held that simply transporting workers to and from work constituted independent farm labor contracting activity, overcoming the asserted family business exception, since it was the "exclusive method employed by the defendants to get their workers to and from their farm," though the Court in this case acknowledged this was a case-specific holding.[53]

2. The Small Business Exemption

The small business exemption[54] applies to an employer who did not, during any calendar quarter during the preceding calendar year, use more than 500 "man days" of agricultural labor.[55] A "man day" (or worker day) refers to days on which an employee works for one hour or more.[56] AWPA exempts small farms because they were not intended to be subject to the "complicated regulatory regimes"[57] imposed on farm labor contractors and large farming operations.

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[49] Avilas v. Kunkle, 765 F.Supp. 358, 362 (S.D. Tex. 1991).

[50] Bueno v. Mattner Farms, 829 F.2d at 1382.

[51] *Id.* at 1383, citing to 29 C.F.R. § 500.20(o).

[52] *Id.* at 1384.

[53] Calderon v. Witvoet, 764 F.Supp. 536, 540 (C.D. Ill. 1991).

[54] "Any person, other than a farm labor contractor, for whom the man-days exemption for agricultural labor provided under section 13(a)(6)(A) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)(6)(A)) is applicable." 29 U.S.C.S. § 1803(a)(2) (Law. Co-op. 1990).

[55] Aviles v. Kunkle, 765 F.Supp. at 358.

[56] Salinas v. Rodriguez, 963 F.2d 791, 794 at n.4 (5th Cir. 1992).

[57] *Id.* at 794.

3. Other Exemptions.

Other entities exempt from AWPA include labor organizations, non-profit charitable or educational institutions, sheep sheering operations, and poultry operations, among others.[58]

C. Types of Farm Workers Covered by AWPA

The Act provides different protections depending upon whether one is a "seasonal" or a "migrant" worker. A migrant worker[59] is a type of seasonal worker. Specifically, the term "migrant worker" encompasses workers who are employed in agricultural employment of a seasonal or other temporary nature and who are required to be absent overnight from their permanent residences.[60] AWPA's housing provisions apply only to migrant workers; seasonal workers as defined under AWPA do not live in farm labor camps.

A farm worker whose permanent residence is in a foreign country is expressly exempt from AWPA's coverage.[61] This is in deference to the Immigration and Nationality Act of 1952, and now the Immigration Reform and Control Act of 1986, by which farmers are prohibited from hiring foreign workers absent Department of Labor certification that not enough domestic workers are available, among other criteria.[62]

Independent contractor migrant workers are not covered by AWPA, presumably because they are deemed to be in a better position to protect themselves against exploitation by their employer, given that they

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[58] 29 U.S.C.S. § 1803(3) (Law. Co-op. 1990).

[59] *Id.* § 1802(8)(A).

[60] "The term 'migrant agricultural worker' does not include: (1) any immediate family member of an agricultural employer or a farm labor contractor; or (2) any temporary nonmigrant alien who is authorized to work in agricultural employment in the United States under sections 101(a)(15)(H)(ii)(a) and 214(c) of the Immigration and Nationality Act (8 U.S.C. secs. 1101(a)(15)(H)(ii)(a), 1184(c))." 29 U.S.C.S. § 1802(8)(B) (Law. Co-op. 1990).

[61] *Id.* Also, the same applies to seasonal workers, under 29 U.S.C.S. § 1802(10)(B)(iii) (Law. Co-op. 1990).

[62] *See* Immigration and Nationality Act, 8 U.S.C.S. §§ 1101(a)(15)(H)(ii)(a), 1186 (Law. Co-op. 1990). Leaving foreign farm workers without statutory protection equivalent to AWPA seems to create an underclass from an underclass, especially since neither domestic nor foreign farm workers are covered by the National Labor Relations Act (29 U.S.C.S. § 152(3) (Law. Co-op. 1990)), which indicates agricultural workers are excluded from the definition of "employee." Consequently, foreign farm workers constitute the absolute orphans of agricultural employment. For detailed discussion of this and associated issues, see Gail Coleman, Note, *Overcoming Mootness in the H-2A Temporary Foreign Farmworker Program*, 78 GEO. L.J. 197 (October, 1989).

assume employer-like status themselves, with its associated power and control. To distinguish between a farmer's "employees" who are covered by AWPA, and independent contractors, who are not, a court is guided by various factors to aid in assessing "the 'economic dependence' of the putative employees, the touchstone for the test."[63] Such factors include:

> (1) the degree of control which an employer has over the manner in which work is performed; (2) the extent of the investments of the employer and the worker; (3) the degree to which the worker's opportunity for profit and loss is determined by the employer; (4) the skill and initiative required to perform the job; and (5) the permanence of the working relationship.[64]

In addition, there are two factors of particular significance: "(1) how specialized the nature of the work is, and (2) whether the individual [the 'contractor' alleged to be sufficiently independent to be the employer] is 'in business for himself.' "[65] The more power and control the worker has over his own and other employees' working and housing conditions, the more likely a court will find that he is an independent contractor and thereby exempt from the Act.

V. Recent Case Law Refinement of AWPA

As is true of any new legislation, it took time to work out some of the interpretive "kinks" in AWPA, and major issues remain to be resolved. This section highlights these issues and provides an overview of recent, relevant case law.

A. Absence of Attorney Fee Provision

There is no attorney fee provision in AWPA.[66] This could undermine completely the effectiveness of AWPA's private right of action, because migrant workers typically are unable to finance their own litigation;[67] however, most of the litigated cases reviewed for this comment also involved the Fair Labor Standards Act ("FLSA"), which does allow attorney fees.[68] Also, concurrently filing a tort claim (as for emo-

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[63] Aviles v. Kunkle, 765 F.Supp. at 363, citing to Brock v. Mr. W Fireworks, 814 F.2d 1042, 1043-44 (5th Cir. 1987), *cert. denied*, 484 U.S. 924 (1987).

[64] *Id.*

[65] Beliz v. W.H. McLeod & Sons Packaging Co., 765 F.2d 1317, 1327-28 (5th Cir. 1985).

[66] Gooden v. Blanding, 686 F.Supp. 896, 897 (S.D. Fla. 1988).

[67] *Transcript*, *supra* note 29.

[68] Gooden v. Blanding, 686 F.Supp. at 897.

tional distress) with an AWPA claim could allow for attorney fees.[69] In actuality, then, lack of an attorney fee provision need not discourage litigators from assuming these cases. Obviously, though, amendment of AWPA to include attorneys fees for plaintiffs would go a long way in encouraging private attorneys to take on more AWPA housing complaint cases and relieve the burden on programs such as Rural Legal Services, Inc. in California, which receives government funding for representing migrant farm workers.[70]

B. AWPA Bypasses "At-Will" Employment

"At-will" employment refers to the mutual right of employer and employee to terminate a non-contractual employment relationship at any time, with or without cause.[71] The mandated disclosure of employment term sections of AWPA effectively convert an at-will employment relationship to a contractual relationship,[72] thereby affording contractual protection to the farmworker-farmer employment relationship that would be unavailable otherwise.

Specifically, AWPA requires that the terms of employment be stated in writing and posted, which is construed as forming a contract.[73] A farmer's ability to "fire at will" is limited to legitimate reasons for terminating an employment contract, as for poor job performance: he cannot fire or evict a farm worker just because the worker complains about housing conditions. Thus, AWPA's whistleblower protection is augmented by contractual protection of the employment relationship, serv-

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[69] Even though attorneys fees may be recoverable only if there is an agreement between the parties or a statute allowing same, prevailing plaintiffs usually can get attorney fees in tort actions as part of their damage award. For example, in California, CIVIL CODE section 3333 allows for recovery of damages for all detriment proximately caused by a tort, which can include cost of bringing suit. See, e.g., National Union Fire Insurance Company of Pittsburgh, PA v. Furth, 558 F.Supp. 94 (N.D. Cal. 1983).

[70] The California Rural Legal Assistance, Inc., as been described as "the light in the tunnel for the farmworker." Hall, *supra* note 1, at 97.

[71] *See* California's "at-will" labor code, at LABOR CODE § 2922 (Deering 1976). The at-will doctrine is eroding quickly as discrimination, whistleblower and public policy legislation and case law develop. See, in particular, Foley v. Interactive Data Corp., 47 Cal.3 654, 678 [254 Cal.Rptr. 211] (1988). Nevertheless, the remarks here are relevant because "at-will" remains the law in many jurisdictions.

[72] "The law (AWPA) requires advance disclosure of wages and working conditions and makes those contractually enforceable standards." *Transcript*, *supra* note 5, at 6.

[73] 29 U.S.C.S. §§ 1821(a)(4), 1831(a)(1)(D) (Law. Co-op. 1990). Also see §§ 1822(c) and 1832(c). These provisions require written disclosure of place of employment, wages to be paid, the crops involved, the duration of employment, the benefits to be provided, among other concerns.

ing as further encouragement for farm workers to file housing complaint actions and for private attorneys to represent them.

AWPA's whistleblower provision also affects a farmer's ability to refuse to re-hire workers. In many cases, it is normal for migrant farm workers to expect to return to work for the subsequent growing season.[74] In a case involving retaliatory discharge associated with a wage dispute, an agricultural employer indicated to the plaintiff-workers that unless they dropped their legal action, they would not be able to return.[75] Since initiating such legal action is protected activity, the defendant-farmer was in violation of AWPA's anti-retaliation provision.[76]

This protection of a future work right can be deemed equivalent to contractual protection, which again places the farmer-migrant worker employment relationship outside of the "at-will" doctrine.[77] Further, many jurisdictions recognize a common law "public policy" exception to the "at-will" doctrine even in the absence of a statute. Public policy prohibits firing a worker for engaging in protected activity, such as whistleblowing, thus providing a remedy under a tort theory.[78]

In sum, reliance on the "at-will" doctrine as a defense will fail in AWPA retaliation actions.

C. "Intentional" Violation, Defined

AWPA provides for damages for "intentional" violations,[79] which case law has interpreted to mean volitional conduct as opposed to knowledge of the Act and its provision.[80] In other words, voluntary

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[74] For a comprehensive discussion of theories and case law supporting a remedy of re-hiring in a future growing season, see Migrant Legal Action Program, *Anti-Retaliation Remedies Under the AWPA*, AWPA Issue Paper No. 4, Revised July 31, 1990 [hereinafter AWPA Issue Paper #4].

[75] Martinez v. Shinn, Findings of Fact and Conclusions of Law, United States District Court, Eastern District of Washington, Case No. C-89-813-JBH, entered May 20, 1991. (The opinion in this case can be found at Martinez v. Shinn, 1991 U.S. LEXIS 10796 (1991), in which the Court amended the judgment in part without altering the substance of the conclusions of law.)

[76] 29 U.S.C.S. § 1855(a) (Law. Co-op. 1990).

[77] *See* AWPA Issue Paper #4, *supra* note 74.

[78] *See*, e.g., Tameny v. Atlantic Richfield Co., 27 Cal.3d 167 [164 Cal.Rptr. 839, 610 P.2d 1330] (1980).

[79] 29 U.S.C.S. § 1854(c)(1) (Law. Co-op. 1990).

[80] A violation is intentional under the Act if it is the natural result of one's conscious and deliberate conduct; it does not require awareness of the existence of the Act. Bueno v. Mattner Farms, 829 F.2d 1380, 1385-86 (6th Cir. 1987), *cert. denied*, 486 U.S. 1022 (1988). *See also* Martinez v. Shinn, 1991 U.S. Dist. LEXIS 10796 (E.D. Wash. 1991); Osias v. Marc, 700 F.Supp. 842 (D. Md. 1988); Colon v. Casco, Inc., 716

provision of housing that does not meet state and federal codes by a farmer will be deemed intentional for purposes of AWPA. Note this does not mean the farmer sets out to violate the Act, only that he lets migrant farm workers live in substandard housing. Knowledge of the Act or of the substandard nature of the housing is irrelevant. Thus, farmers who rely on lack of knowledge about AWPA as an affirmative defense will be unsuccessful.

D. Statute of Limitations

A statute of limitations prevents stale claims, requiring that an action be brought within a certain period of time from when the alleged harm occurred. Policy considerations supporting statute of limitations include the fact that over time, evidence disappears and witness' memories fade. Time compromises a litigant's ability to defend himself. When a law itself does not state a statute of limitations, courts must decide which limitation term to apply. Surprisingly, AWPA does not contain a statute of limitations, and courts are divided on what term to apply. Some courts have relied on the federal "catch-all" four-year term, others on various state civil action terms.

In a Florida United States District Court case, the Court held that the federal four-year statute of limitations applied for actions on a "contract, obligation, or liability not founded on a written instrument . . ."[81] In a California federal appellate case, the Court held that absent a provision in AWPA, California's three-year statute of limitations for private suits for damages applies, as opposed to its one-year term for penal actions.[82]

Leaving determination of the applicable statute of limitations to the courts leads to inconsistent rulings among jurisdictions, among courts, and even among individual cases. Plus, the legislation underlying the "borrowed" statute of limitations[83] can be amended without regard to its effect on AWPA litigation. Also, variation among jurisdictions leads to forum shopping, since an AWPA action can be brought in any federal district court with jurisdiction.[84] All of this imposes an undue bur-

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F.Supp. 688 (D. Mass. 1989).

[81] Marquis v. United States Sugar Corporation, 652 F.Supp. 598, 602 (S.D. Fla. 1987), relying on 15 U.S.C.S. § 15b (Law. Co-op. 1990).

[82] *See* Rivera v. Anaya, 726 F.2d 564, 567 (9th Cir. 1984), and California Code of Civil Procedure §§ 340(1), 338(1) (Deering 1972 & Supp. 1991).

[83] An example of a "borrowed" statute of limitations occurs when a court applies a jurisdiction's statute for contracts to an AWPA claim.

[84] 29 U.S.C.S. § 1854(a) (Law. Co-op. 1990).

den on litigants, which in turn can discourage otherwise interested attorneys from filing complaints for migrant workers. Since this is diametrically opposed to AWPA's intent, the Act should be amended to establish a uniform statute of limitations.

E. Jury Trial

The Act does not expressly provide for trial by jury, but some cases have been or could have been tried before a jury.[85] However, in at least two cases, it was held there was no right to a jury trial as AWPA relief is primarily equitable,[86] though money damages also can be awarded.[87]

Providing a right to jury trial in AWPA actions would undermine a provision of the Act intended to encourage settlement;[88] when determining the amount of damages to be awarded, a court is authorized to consider whether an effort was made to settle before resorting to litigation.[89] Federal Rules of Evidence prohibit this same information from being put before a jury when it fixes damages.[90] Thus, if a jury is used, the court cannot hear whether settlement was attempted and so the intent of the settlement provision is frustrated.

Of course, bifurcation is available when non-statutory damages are sought, as for tort claims, but this represents additional burden on the courts and on the litigants.[91] The better view, then, seems to be that since AWPA is a remedial statute that allows court discretion in fashioning a remedy, which may or may not include money damages, and since it also seeks to encourage settlement of disputes, its equitable character prevents a right to jury trial, except in those actions where tort damages are also sought.[92]

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[85] As examples, see Salinas v. Rodriguez, 963 F.2d 791 (5th Cir. 1992), in which jury misconduct was alleged; and Colunga v. Young, 722 F.Supp. 1479, 1488 (W.D. Mich. 1989), in which the Court stated, "Young waived his right to a jury trial by failing to make a timely demand," implying a jury trial was available.

[86] Calderon v. Witvoet, 764 F.Supp. 536, 544-545 (C.D. Ill. 1991); citing to Hampton v. Barefoot, 101 Lab. Cas. (CCH) P34,562 (E.D.N.C. 1984).

[87] Equitable remedies include, as examples, back wages, reinstatement and injunctive relief, whereas legal remedies allow for money damages.

[88] 29 U.S.C.S. § 1854(c)(2) (Law. Co-op. 1990).

[89] Calderon v. Witvoet, 764 F.Supp. at 545.

[90] FED. R. EVID. 408 (West, Fed. Pract. & Proc. 1980 & Supp. 1992).

[91] "Bifurcation" refers to trying the liability issues separately from and prior to trying the damages issues. BLACK'S LAW DICTIONARY (6th ed. 1990).

[92] The court in Calderon v. Witvoet, 764 F.Supp. at 539, was more affirmative in essentially ruling in favor of bifurcation when at issue is the FSLA's provisions for back wages, which goes to a jury, and liquidated damages, which remains within the court's discretion. *Id.* at 544.

F. "Filing a Complaint" versus Complaining

It is not clear precisely what conduct triggers AWPA's whistleblower protection, that is, what "filing a complaint," as opposed to "instituting, or causing to be instituted, a proceeding," means under AWPA's discrimination provision.[93] It simply may refer to filing a court action (complaint) as distinguished from initiating an administrative proceeding, as both are available under AWPA. However, it may mean that a farm worker has a remedy only if she is retaliated against for filing and serving a complaint in the strictly legal sense, or for reporting to some official administrative agency, as opposed to, for example, reporting to co-workers or to the employer.

There is recognition that informal complaints trigger AWPA's whistleblower protection. In a case that settled before trial, plaintiffs were seeking relief for having been retaliated against for threatening to complain to government authorities; also, two of the plaintiffs merely were associated with the complainant.[94] Note that these plaintiffs had not actually complained to a regulatory agency. Thus, it can be argued a farm worker is not limited to complaining about housing to a regulatory agency to secure AWPA's protection.[95]

Accommodating informal complaints under AWPA is subject to criticism as opening the flood gates to frivolous claims. However, AWPA's whistleblower provision requires just cause in registering complaints,[96] meaning the farm worker must believe that it was his complaint that led to retaliation in order for his claim to be heard.

VI. Application of AWPA's Private Right of Action and Whistleblower Protections to Housing Complaints

AWPA's whistleblower provision[97] does not expressly prohibit discrimination against farm workers who complain about housing conditions. Thus, it is necessary to consider simultaneously the housing provision of AWPA, which states: "each person who owns or controls a [residential] facility . . . shall be responsible for ensuring that the facil-

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[93] 29 U.S.C.S. § 1855 (Law. Co-op. 1990).

[94] Basulto v. Matt Dietz, L-83-94 (S.D. Tex. 1983), in AWPA Issue Paper #6, *supra* note 18, at 17.

[95] AWPA Issue Paper #6, *supra* note 18, at 6.

[96] "No person shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any migrant . . . worker because such worker, has, with just cause, filed any complaint . . ." (emphasis added). 29 U.S.C.S. § 1855(a) (Law. Co-op. 1990).

[97] 29 U.S.C.S. § 1855(a) (Law. Co-op. 1990).

ity or real property complies with substantive Federal and State safety and health standards applicable to that housing."[98] Certification by the relevant housing regulatory agency or health department reflects such compliance.[99]

A. Types of Code Violations That Lead To Liability

Compliance with both state and federal codes is required. Farm workers' housing might meet state requirements but be deficient under federal regulatory standards, leaving the farmer liable.[100] This is the case where a state's regulations do not expressly incorporate the federal standards.[101]

It is imperative to recognize that obtaining a certificate of compliance does not in and of itself relieve farmers of responsibility since the housing must be kept in the condition existing at the time of certification.[102]

Further, while technical violations are identified readily and would seem to constrain liability, in fact non-technical violations are just as likely to result in liability. For example, a court has said even were it to exclude the plaintiffs' allegations related to a stove and hot water availability (technical violations), it still had to consider that the farm workers' housing was unsanitary, with missing screens and garbage cans without lids, which led to "worse health and safety problems, such as mice and other rodents."[103]

Indeed, many of the factors leading to liability under AWPA's housing provision are impossible to delineate definitively. Often, one can only get an indisputable sense things are not right:

> What I mean by 'crowded housing conditions' is not, perhaps, what is generally thought to be crowded housing. What I mean is two families of 17 people sharing a two-room shack in Southwest Michigan. It's the 19 lone male migrants from Mexico sharing a two-bedroom house in Parlier, California . . . Crowded housing in Immokalee, Florida, means [a] couple with a young baby sharing a small trailer with seven teenage young Gua-

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[98] *Id.* § 1823(a).

[99] An example of the types of conditions covered by a state's regulations is provided in Fields v. Luther, 1988 U.S. Dist. LEXIS 5405 *33 (D. Md. May 4, 1988), which involved violation of the Code of Maryland Regulations, requiring working toilet facilities, facilities for storing clothing and personal property, housing free of insects, rodents and other vermin. Most complaints relate to such basic sanitation and physical safety concerns.

[100] Howard v. Malcolm, 658 F.Supp. 423, 432 (E.D.N.C. 1987).

[101] *Id.* at 432. Federal standards related to farm housing can be found at 42 U.S.C.S. § 1479 (Law. Co-op. 1990 & Supp. 1992).

[102] Howard v. Malcolm, 658 F.Supp. at 432-433.

[103] *Id.* at 436.

> temalan migrants who live — who sleep on [the] floor, separated from the couple by a blanket . . . [C]rowded housing meant that workers who slept in the orange groves surrounding Immokalee could take a shower for a dollar at the general store.[104]

1. Illustrative Case

A case that illustrates types of housing code violations involved a class action filed by migrant farm workers who were employed by and living in housing owned by defendant Berrybrook Farms, Inc., in Michigan.[105]

The defendants' labor camps at issue here were not licensed by the Michigan Department of Health ("MPDH") for occupancy as agricultural labor camps at the time in question and had numerous health and safety code violations, including: inadequate heating;[106] the presence of waste water on the ground near some of the housing units and drinking water outlets; holes and cracks in the floors, walls, and ceilings of housing units; leaking roofs; broken and/or ill-fitting windows and doors; torn screens; exposed and/or improperly installed electrical wiring; spliced electrical cords; unsecured propane gas tanks; lack of fire exits in some units; insufficient showers; insufficient laundry facilities; lack of clothing storage facilities; dirty and torn mattresses; broken light fixtures; debris on camp grounds; and kinked and cut gas lines. Even after the MDPH granted temporary occupancy licenses, the camps remained in continual violation of substantive health and safety standards, despite repeated notices.

For the housing violations, the Court awarded the maximum statutory damages of $500.00 per plaintiff, for a total of $92,500.00, based on 185 persons in the class affected by this particular violation. Defendants' "lackadaisical attitude toward compliance" led to the award of maximum damages.[107]

Shortly after this law suit was filed, two of the plaintiffs had been denied re-employment and were told to leave. The Court found "de-

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[104] Comments made by Dr. Ed Kissam, a consultant on farm labor policy, in *Transcript*, *supra* note 5, at 11.

[105] Rodriguez v. Berrybrook Farms, Inc., 1990 U.S. Dist. LEXIS 7678 (W.D. Mich. 1990). Note that numerous AWPA violations in addition to those related to housing also were alleged.

[106] Michigan health and safety regulations require heaters to be provided in all labor camps occupied before May 31 and after September 1. There were some portable electric heaters, but these were inadequate to heat the housing units to the required 68 degrees. *Id.* at 11, n.10.

[107] *Id.* at 49.

fendant Rodriquez's action to be in retaliation for the plaintiffs' exercise of rights afforded to them by the MSAWPA."[108] An amount of $250.00 was awarded to each plaintiff, which is less than the $500.00 allowable only because there were no other instances of retaliation.

B. Substantive versus Technical Violations

One criticism aimed at the private right of action under AWPA is an unfounded assumption that it leads to meritless or frivolous cases.[109] This proposition contradicts the very foundation for AWPA, which is that migrant workers need encouragement to file complaints in the face of retaliation. Further, it was not the small, insignificant violations that Congress had in mind in enacting AWPA.

In a recent Washington case, while the Court found that the defendant's labor camp was in violation of some technical provisions of the state's housing code, it found that these violations did not rise to the level of the egregious substantive violations of concern to Congress when it enacted AWPA.[110] The Court stated:

> These technical violations did not endanger the health or safety of plaintiffs. The conditions at the Shinn & Son labor camp certainly are not ideal, however, Congress has made it clear that the state is primarily responsible for insuring that state standards are being met . . . The court is also cognizant of the fact that agricultural employers are under no legal obligation to provide housing (let alone rent-free housing) to their employees. Unfortunately, in considering whether housing is below standards, economic realities force the court to consider whether some housing is at least better than no housing at all.[111]

Substantive federal standards are defined as including, but not limited to, those providing for:

> fire prevention, an adequate and sanitary supply of water, plumbing maintenance, structurally sound construction of buildings, provision of adequate heat as weather conditions require, and reasonable protections for inhabitants from insects and rodents . . .[112]

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[108] *Id.* at 21.

[109] "During the [AWPA] oversight hearings, farm owners testified that the private right of action provision was improperly used. (cite omitted) They contended that they were continually harassed by litigation over small infractions under the Act (cite omitted)." Hall, *supra* note 1, at 96.

[110] H.R. REP. No. 470, 97th Cong., 2nd Sess. 17-18 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4563-4564.

[111] Martinez v. Shinn, Findings of Fact and Conclusions of Law, United States District Court, Eastern District of Washington, Case No. C-89-813-JBH, entered May 20, 1991, at 39-40.

[112] Rodriguez v. Berrybrook Farms, Inc., 1990 U.S. Dist. LEXIS 7678, *29-30

Also, as mentioned before, an action brought under AWPA's anti-retaliation provision requires "just cause."[113] This is intended to deter claims that are frivolous on their face. In other words, a migrant worker must have reason to believe the retaliatory action taken against him is related to exercising his rights under the Act, though it is not necessary that he be correct.[114]

Though rare, plaintiffs can and do lose their cases on the merits.[115] In an action involving allegations of retaliatory discharge for filing a lawsuit, the Court determined the workers were fired because they refused to work as promised, not because they filed a law suit.[116]

All this, combined with the fear of retaliation most migrant workers already feel when considering complaining about their housing conditions, renders any concern about needless or frivolous complaints unjustified, at least as a basis for not encouraging farm workers to file actions.

VII. RECOMMENDATIONS

A court in an AWPA action stated:

> [T]he legislative history of the Act notes that farmworkers who attempt to assert their rights must overcome a general background of fear and intimidation caused by the widespread practice of retaliation against those who complain about violations. Accordingly, awards should be adequate to encourage workers to assert their statutory rights.[117]

This opinion misses the point. No matter how much migrant workers might be awarded, unless they believe they are safe from retaliation,

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(W.D. Mich. 1990), relying on 29 C.F.R. § 500.133.

[113] 29 U.S.C.S. § 1855(a) (Law. Co-op. 1990); see *supra* note 96. AWPA Issue Paper #6, *supra* note 15, at 14, proposes a construction for "just cause" in the AWPA retaliation context: "The AWPA test for 'just cause' may be stated as follows: A migrant or seasonal agricultural worker exercises a right or protections under the Act, on behalf of himself/herself or others, with 'just cause' where such worker reasonably suspects that he/she has such a right or protection afforded by law and/or that he/she may complain about it." The author indicates that the "just cause" requirement rarely is raised and suggests plaintiffs wait for the defense to raise it as an affirmative defense.

[114] AWPA Issue Paper #6, *supra* note 18, at 7.

[115] Plaintiffs prevail in about 90% of all AWPA actions (not just those involving retaliation). Telephone interview with Jim Strouthman, of Migrant Legal Action Program in Washington, D.C., (June 30, 1992).

[116] Caro-Galvan v. Curtis Richardson, Inc., No. 89-0295-CIV-ORL-18 (M.D. Fla. May 10, 1991), (plaintiffs plan to appeal), in AWPA Issue Paper #6, *supra* note 18, at 19.

[117] Fields v. Luther, 1988 U.S. Dist. LEXIS 5405, *33 (D. Md. May 4, 1988) (citations omitted).

they will not risk losing their opportunity to work by filing lawsuits against their employers.

Therefore, since the main reason this remedy is not invoked more often is that farm workers fear retaliation, what needs to be done now is extensively publicize AWPA's whistleblower protection. Advocates and plaintiffs' attorneys should encourage local news coverage of pending and settled cases involving retaliation. Attorneys should focus on this feature of AWPA whenever discussing cases with prospective clients. Migrant worker legal and social service assistance agencies, through client contact and through regular informational meetings and seminars related to legal rights of migrant workers, should include a focus on this topic. Law schools, especially those in agricultural communities, should highlight the issue in seminars and workshops for students and for the legal community. In short, any of the myriad means of informing people about their rights should be used.

Finally, it is crucial that AWPA's anti-retaliation provision be discussed in terms of "whistleblower" protection. The public is familiar with the term and it connotes official, legal sanction. It also demands attention and respect, which is what securing more humane housing conditions for migrant workers is all about.

VIII. Conclusion

AWPA's private right of action provision, in combination with its whistleblower protection provision, can serve as a powerful means of securing more humane housing conditions for migrant farmworkers, independent of administrative enforcement. Once migrant farm workers begin to file more claims, farmers will seek to avoid suit by complying with the Act's housing provisions.

To be even more effective, the Act requires amendment to include a statute of limitations and an attorney fee provision, and there is a continuing need for further judicial clarification of the right to jury trial and complaint procedures. In spite of these flaws, AWPA, as the "patient," is still very much alive.

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