

**Testimony of Mary Bauer
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before the
Committee on Health, Education, Labor and Pensions
United States Senate
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***“Ending Abuses and Improving Working
Conditions for Tomato Workers”***

Thank you for the opportunity to speak to you about the abuses experienced by farmworkers in the United States.

My name is Mary Bauer. I am the Director of the Immigrant Justice Project of the Southern Poverty Law Center. Founded in 1971, the Southern Poverty Law Center is a civil rights organization dedicated to advancing and protecting the rights of minorities, the poor, and victims of injustice in significant civil rights and social justice matters. Our Immigrant Justice Project represents low-income immigrant workers in litigation across the Southeast.

During my legal career, I have represented and spoken with literally thousands of farmworkers in many states. Currently, the Southern Poverty Law Center is representing agricultural workers in at least six class action lawsuits in the South. I have handled dozens of wage and hour cases in many states, and I am familiar with the kinds of routine exploitation that low-wage immigrant workers generally—and farmworkers specifically—experience.

In preparation for this hearing, I interviewed workers and advocates in Immokalee, Florida about their experiences in the field. What they told me is consistent with my own experiences working with farmworkers: Immokalee tomato workers are desperately poor, fearful of retaliation, lack benefits most workers take for granted, and denied access to basic legal protections.

Farmworker Demographics

There are two to three million farmworkers in the United States. Nearly 80 % are male, and most are younger than 31 years of age. Most farmworkers are married and/or have children, but most live apart from their immediate family members as a function of their employment.¹

¹ National Agricultural Workers Survey, U.S. Department of Labor, 2005.

While the federal government has estimated that the average annual income of farmworkers is a mere \$11,000², that estimate is actually quite high because it includes higher paid workers, such as crewleaders. A scholar studying farmworkers has said:

“Seasonal farmworkers are the poorest laborers in the United States, earning an average of \$6500 per year. Farmworkers who migrate are poorer than settled seasonal laborers, with migrants earning \$5,000 per year. The most vulnerable migrant workers, such as those laboring for farm labor contractors in eastern states, earn annual wages as low as \$3500.”³

Piece-rate workers are generally paid by the bucket—in tomatoes, as little as 40 to 45 cents per bucket (a bucket is 32 pounds of tomatoes). At that rate, farmworkers have to pick around two tons of produce (125 buckets) to earn 50 dollars. The piece rate wages paid to tomato workers have not changed significantly in more than twenty years.⁴ In addition, workers reported that there is wide uniformity in the wages paid by tomato growers.

Migrant farmworkers are very poor, and they receive very few social benefits. Less than 1 % of farmworkers receive general assistance welfare, and only 2% receive Social Security benefits.⁵

Farmworkers have long periods of unemployment, and most do not receive any form of pay, including unemployment compensation, during those periods. Crop workers are employed in the U.S. an average of 34 1/2 weeks (66%) of the year.⁶

By the time a migrant farmworker child is 12 years old, he or she may work in the fields between 16-18 hours per week, leaving little time for school work.⁷

Farmworker Health and Safety

Agriculture is consistently rated as one of the most dangerous occupations in the United States.⁸ Farmworkers suffer from the highest rate of toxic chemical injuries and skin disorders of any workers in the country.⁹ The children of migrant farmworkers have

² National Agricultural Workers Survey, U.S. Department of Labor 2005.

³ Daniel Rothenberg, *With These Hands: The Hidden World of Migrant Farmworkers Today* (1998), p. 6.

⁴ Review of data from the Florida Department of Labor, 1980 to present.

⁵ National Agricultural Workers Survey, U.S. Department of Labor, 2005.

⁶ National Agricultural Workers Survey, U.S. Department of Labor, 2005.

⁷ Migration Education Messages and Outlook (MEMO) 1994.

⁸ National Center for Farmworker Health.

⁹ National Agricultural Workers Survey, U.S. Department of Labor, 2005.

higher rates of pesticide exposure, malnutrition, and dental disease than the general population. Children of migrant farmworkers are also less likely to be immunized against disease.¹⁰

Only 10 % of farmworkers report having employer-provided health insurance.¹¹ None of the Immokalee workers I interviewed reported having any health insurance whatsoever.

Agricultural Exceptionalism in the Law

Farmworkers were excluded from nearly all major federal labor laws passed during the New Deal. Some laws have been amended since then, but many exemptions remain. The dire situation faced by farmworkers stems from their lack of economic and political power. Because farmworkers have no measurable political influence, there has been little organized opposition to the efforts of agribusiness interests to deny farmworkers most of the legal protections other American workers take for granted.¹² Among other things:

- § Farmworkers are not covered by workers' compensation laws in many states.
- § Farmworkers are not entitled to overtime pay under federal law.
- § On smaller farms and in short harvest seasons, farmworkers are not entitled to the federal minimum wage of \$5.85 per hour.¹³
- § Child labor laws are riddled with exemptions for farmworkers. Children may legally perform farmwork as young as 10 years of age. By contrast, 16 is the minimum age for most non-agricultural jobs.
- § In some states, farmworker children are exempt from the state's compulsory education laws.¹⁴

¹⁰ National Center for Farmworker Health.

¹¹ National Institute for Occupational Safety and Health, 2004.

¹² Farmworkers' lack of political clout predates the relatively recent transformation of the farm labor workforce to one dominated by undocumented workers. Even during the decades when most farmworkers were U.S. citizens, their itinerant employment schedules, coupled with local residency requirements, prevented the vast majority of them from registering as voters.

¹³ Also, in most southern states, either there is no state minimum wage or farmworkers are expressly excluded from the state statute's coverage.

¹⁴ Under Alabama Statute § 16-28-6(4), children who are legally employed under the state child labor code are not obligated to attend school. Because Alabama's child labor law (Ala. Stat. § 25-8-1) exempts agriculture, children employed in agriculture are not required to attend school in the state.

§ Many state health and safety laws exclude farmworkers.¹⁵

§ Farmworkers are not covered by the National Labor Relations Act and thus have no protection against unfair labor practices when they seek to collectively act for better wages or working conditions, except in the handful of states that have passed statutes extending NRLA-type protections to agricultural workers.

Although this hearing is not focused on conditions affecting H-2A workers, it should be noted that the Department of Labor's existing proposals to eviscerate the legal protections for those workers is likely to have a deleterious impact on the wages and working conditions of farmworkers generally. While the specifics of the Department of Labor's proposals to change the H-2A regulations are beyond the scope of my testimony today, the Southern Poverty Law Center strongly opposes efforts by the Department to slash H-2A workers wages and weaken the modest labor protections of the H-2A guestworker program.

Farmworker Conditions in the Southeast Are the Worst in the Nation

It is not merely coincidental that most of the major documentaries and exposés relating to farmworkers over the past four decades, from the epic "Harvest of Shame" aired in November 1960 to the April 2003 *New Yorker* article on "American Slaves Today," have focused on conditions in the Southeast. Historically, the worst abuses of migrant farmworkers have occurred in the region. The Southeastern states generally have few laws regulating employment, and those that exist largely exclude farmworkers. The farmworker population in the Southeast has always been composed principally of racial or ethnic minorities and has suffered considerable prejudice as a result. Finally, far more than in any other section of the country, growers in the Southeast have relied on farm labor contractors, or "crewleaders," to recruit, supervise, transport, and pay the harvest workers. Undercapitalized and poorly regulated, farm labor contractors oftentimes abuse or cheat the workers, with the growers avoiding liability by contending that the migrants are employees of the crewleader, rather than the farm.

In Florida, the Coalition of Immokalee Workers has committed to eliminating slavery and other abuses in the agricultural industry. The Coalition has been pivotal in making possible several important slavery and peonage prosecutions. In a recent case brought to court, a federal grand jury indicted six people in Immokalee on January 17, 2008 for their part in what U.S. Attorney Doug Mallow called "slavery, plain and simple."¹⁶ Unfortunately, despite the concerted efforts of the Coalition, slavery and peonage continue in the fields of Florida and the U.S.

¹⁵See, e.g., Ala. Stat. § 25-1-1; Ark. Code Ann. § 11-2-101; O.C.G.A. (Georgia) §§ 34-2-2, 34-2-10; La. R.S. § 23.13.

¹⁶ Ft. Myers News-Press, "Group Accused Of Keeping, Beating, Stealing From Immokalee Laborers" January 18, 2008.

The federal government must increase its enforcement efforts to end these terrible abuses. Any focus on changing practices must entail a high-level focus on the companies using the services of these farm labor contractors and crewleaders. As United States Judge K. Michael Moore of the Southern District of Florida noted at the sentencing of one defendant found guilty of running a slavery operation in Florida:

"others at another level in this system of fruit-picking, at a higher level ... are complicit... They rely on migrant workers, and they create a legal fiction or corporation that insulates them between them and the workers themselves so that they can be relieved of any liability for the hiring of illegal immigrants. And yet they stand to benefit the most."¹⁷

In crafting solutions now, Congress should be mindful of its own unsuccessful efforts to regulate abuses in the agricultural industry by targeting solely farm labor contractors. In 1964, Congress passed the Farm Labor Contractor Registration Act, which has been widely viewed as a failure, and the Act was later repealed.¹⁸ Congress later enacted the Migrant and Seasonal Agricultural Worker Protection Act to regulate employers directly.¹⁹ It is clear that reform will not occur as a result of a crackdown on unscrupulous crewleaders because those crewleaders lack the power to bring about real change.

Farmworkers Lack Effective Legal Remedies

Workers face dramatic barriers to obtaining legal redress when their rights are violated. Migrant farmworkers are disproportionately poor, non-English speaking, geographically isolated immigrants. For many, they are in an unfamiliar country with virtually no money, thousands of miles from home. They do not speak English. They are fearful of retaliation by an employer who is often also their landlord. Farmworkers' very reasonable fear is that the result of their asserting their rights will be not only losing their jobs and their income and being blacklisted from future employment, but also facing eviction and, often, deportation. When their rights are violated, they have few places, if any, to turn.

Government enforcement of basic labor protections has decreased for all American workers in recent decades. The number of wage and hour investigators in the Department of Labor (DOL) declined by 14 % between 1974 and 2004, and the number of completed compliance actions declined by 36 %. During this same period, the number of U.S.

¹⁷ Quoted in Rural Migration News; *See also* Miami Herald "Fields of Pain," series beginning, August 31, 2003.

¹⁸ Pub. L. No. 88-582, 78 Stat. 920 (1964) (repealed 1983); Michael G. Tierce, Note, *The Joint Employer Doctrine Under the Federal Migrant and Seasonal Worker Protection Act*, 18 RUTGERS L.J. 863, 869 (1987) ("It is generally agreed that FLCRA failed to achieve its objective of improving the working conditions of the migrant farmworkers.")

¹⁹ 29 U.S.C. §§1801-1874.

workers covered by the Fair Labor Standards Act *increased* by more than half — from about 56.6 million to about 87.7 million.²⁰ The Brennan Center for Justice concluded in 2005 that “these two trends indicate a significant reduction in the government’s capacity to ensure that employers are complying with the most basic workplace laws.”²¹

Over the past 15 years, the U.S. Department of Labor, the agency charged with primary enforcement of federal laws protecting migrants, has sharply reduced its resources directed to cases of farmworker abuse. This reduction is particularly acute in the Southeast. Although historical data reveal that more violations of farmworker protective laws occur in the Southeast than in any other area of the country, the Department of Labor’s efforts have lagged badly in this region.

There is a particular absence of enforcement against growers, with the majority of enforcement resources devoted to judgment-proof, itinerant farm labor contractors, or “crewleaders,” despite the fact that the principal federal farmworker protective law provides that growers are responsible for ensuring farmworkers are properly paid, housed, and transported whenever the growers “employ” the workers.²²

For many years, enforcement of farmworkers’ legal rights has come, in part, through advocacy undertaken by grantees of the Legal Services Corporation (“LSC”). Beginning in the mid-1970s, the LSC started making special grants for LSC programs to serve migrant farmworkers in various states. Because of the restrictions placed on those programs in 1996, these programs have been unable to file class action lawsuits and to represent undocumented workers for more than 10 years. These restrictions mean that LSC programs cannot bring the very impact litigation most likely to bring about legal change.

There have been some efforts to interest private practitioners in taking on representation of migrant workers in the Southeast. Unfortunately, migrant farmworker cases are generally unattractive to the private bar. The logistics of such litigation are daunting, and the cases are not generally financially lucrative.

Farmworker advocates have also attempted to use the Justice Department’s Civil Rights Division as a mechanism to address situations that constitute peonage. However, jurisdiction is limited to those matters that reach the threshold of peonage. Very few criminal cases have been, or will be, brought. For each worker who can present a credible, corroborated claim of threat, there may be a hundred victims who have suffered

²⁰ Brennan Center for Justice, *Trends in Wage and Hour Enforcement by the U.S. Department of Labor, 1975-2004*, Economic Policy Brief, No. 3, September 2005.

²¹ *Id.*

²² Most courts analyzing such situations have concluded that the growers “employ” migrant workers supplied to them by farm labor contractors. *See, e.g., Charles v. Burton*, 169 F.3d 1322 (11th Cir. 1999); *Torres-Lopez v. May*, 111 F.3d 633 (9th Cir. 1997); *Antenor v. D & S Farms*, 88 F.3d 925 (11th Cir. 1996); *Luna v. Del Monte*, 2008 U.S. LEXIS 21636 (N.D. Ga. 2008).

the same kind of harm, but may not be able to prove that they are victims of a severe form of trafficking.

In addition, criminal cases will not result in farmworker victims being adequately compensated; even in the rare case where the contractor is prosecuted, most of the victims will never receive even their unpaid minimum wages.

Perhaps the greatest shortcoming of reliance on criminal prosecutions to curb farmworker exploitation has been the inability to reach those who benefit economically and have the power to restrain violations of the workers' rights—the farm owners who employ the services of the farm labor contractors.

Women Workers Face Systemic Abuse on the Job

It is estimated that there are 70,000 women farmworkers in Florida alone.²³ For some women workers, problems include chronic sexual harassment on the job. The problem has received little public attention but is well-known to farmworker women, many of whom remain silent about sexual exploitation on the job.

According to a study done by Maria Elena Trevino-Lopez, "... Ninety % of the farmworker women, the overwhelming majority of these women being immigrants, reported that sexual harassment is a major problem confronting women farmworkers in the workplace."²⁴ While investigating harassment of farmworker women in California, the U.S. Equal Employment Opportunity Commission found that hundreds, if not thousands, of farmworker women had to have sex with supervisors to get or keep jobs.²⁵ In addition, these women put up with a constant barrage of grabbing, touching and propositions for sex by their supervisors.²⁶

In one of the few such lawsuits ever brought on behalf of farmworker women in the U.S., the Southern Poverty Law Center represented five Haitian women who were sexually harassed on the job while working in the packing house of Gargiulo, Inc. in Immokalee, Florida. The lawsuit alleged that the women were subjected to repeated, unwelcome sexual advances by their supervisor and then faced retaliation after they complained. The women, who worked as tomato graders, rejected the supervisor's advances and then were suspended without pay, subjected to adverse working conditions and either fired or not rehired for a new packing season.

²³ Larson, A Farmworker Enumeration Study, 2000; National Agricultural Workers Survey, U.S. Department of Labor.

²⁴ Dominguez, Maria M. *Sex Discrimination & Sexual Harassment in Agricultural Labor*. 6 Am. U.J. Gender & L. 231, 14 (Fall 1997)

²⁵ Ontiveros, Maria L. *Lessons from the Fields: Female Farmworkers and the Law*. Maine Law Review, 55 Me. L. Rev. 157, 8 (2003).

²⁶ Id.

In reaching a settlement in 2007, Gargiulo, Inc., one of Florida's largest fruit and vegetable wholesalers, agreed to pay \$215,000 and entered into a consent decree to change its practices.²⁷

In another case involving women in tomato packing, the EEOC Miami District Office filed a Title VII action alleging that defendants, national produce companies, subjected three female employees at its Immokalee, Florida vegetable grading and packing facility to a sexually hostile work environment through the offensive verbal and physical conduct of two supervisors. The complaint also alleged that one of the employees was discharged in retaliation for rejecting the sexual advances of her supervisor. Defendants' sexual harassment policy was written only in English even though its workforce was comprised largely of immigrants of Haitian or Hispanic descent who read little or no English.²⁸

In addition to sexual harassment in the workplace, immigrant women face other forms of gender discrimination, including unequal pay for equal work, pregnancy discrimination and disparate treatment.

Tomato Workers in Immokalee Report Chronic Workplace Abuse

I have conducted numerous interviews with tomato workers and their advocates, in Florida and in other states. They report the following chronic difficulties:

- Workers suffer recurring problems with unpaid “waiting time” and other violations of the Fair Labor Standards Act. Workers routinely report that they show up for work and are required to wait, often for hours, until the dew dries and the tomatoes can be picked. Similarly, when it rains, workers are routinely required to wait, and are not paid for that time. As one worker told me: “We are paid only when we pick; we are paid only for the buckets we produce.”²⁹
- I spoke with Immokalee tomato pickers about claims that workers average over \$12 per hour. Every worker and every advocate with whom I spoke disputed that contention. One workers’ response summed up the general refrain: “If it were only so!”
- Workers reported to me that their paystubs routinely fail to reflect the actual number of hours worked. Workers report that the hour records on their pay stubs are routinely falsified to show that they have worked substantially fewer hours than they did, in fact, work. Workers report that they are paid only by their production, and the hours are “doctored” to coincide with their production. Thus,

²⁷ *EEOC v. Gargiulo, Inc.*, No. 2:05-cv-460-Ft.M-29-SPC (M.D.Fla. 2005)

²⁸ *EEOC v. Produce, Inc., and Six L's Packing Co.* No. 2:03-cv-570-FtM-29DNF (M.D. Fla. November 30, 2004)

²⁹ See, for example, *Mesa et al v. Ag-mart*, (M.D.Fla, January 26, 2007).

workers on identical crews who work identical hours (and who travel to the fields together) will have wildly disparate hours reported on their pay.

- Workers suffer long periods of unemployment and are forced to migrate to obtain other low-paying, short-term jobs. When they do not work—for a day, or a week, or a month—they receive no pay. For low-income families, this is devastating.
- Workers report that government enforcement, particularly as to wage and hour violations, has no practical effect on their own employment situation. Most workers told us that they would not consider calling the Department of Labor under any circumstances. None report having seen or spoken with any government enforcement agents.
- Workers report chronic discrimination in hiring, placement, and working conditions. Employers have a strong preference for young men. Men over the age of 35 are considered undesirable. Women, too, are less desirable. All workers reported that sexual harassment of women on the job is a problem.
- Workers report that there are significant difficulties in obtaining safe and decent housing at affordable rates.³⁰
- We received numerous reports that children of very young ages work in the field to “help out” the family income. These children typically do not receive their own paystub (a violation of law); their production is simply added onto the pay of their parents.
- Workers report significant problems with uncompensated accidents and illnesses. Because workers are not paid when they do not show up for work (no worker reported having either health insurance or paid vacation or sick time), workers routinely work even when hurt or sick.
- Workers report significant problems with fears of retaliation if they complain or assert their rights. As one worker said: “If you say something, they fire you.”
- Workers report significant problems with unsafe and uninsured transportation to and between fields.
- Workers report very significant problems with exposures to pesticides. Many incidents of the overuse of pesticides in the tomato industry, and the effects on workers and their families, have been well-documented.³¹ According to the Palm

³⁰ See *Renteria-Marin, et al. v. Ag-Mart Produce Inc., et al*, 488 F. Supp. 2d 1997 (M.D. Fla. 2007).

³¹ See *Palm Beach Post* “Why Was Carlitos Born This Way?” March 16, 2005; see also *Herrera v. Ag-Mart Produce, Inc.*, Circuit Court of Hillsborough County, Florida, Case No. 06-001725, Division B

Beach Post, in a recent 10-year period, Florida inspectors found 4609 violations of pesticide regulations, but only 7.6 % resulted in fines.

- Some workers are employed through farm labor contractors, rather than directly through the employer. This exacerbates existing abuses, and means that workers have fewer real remedies.

Conclusion

The exploitation of migrant farmworkers is one of the major civil rights issue of our time. Laws excluding farmworkers from protection and the restrictions that keep legal services lawyers from effectively representing the most vulnerable workers are morally unacceptable.

Far more can be done to improve conditions for farmworkers in the Southeastern United States and in the U.S. more generally. There is no justification for the continued agricultural exceptionalism that is codified in our laws. Farmworkers who labor long, arduous hours should be paid overtime wages and they should be eligible for unemployment compensation when they are out of work. The restrictions on legal services undermine efforts to enforce legal protections. Congress alone has the authority to change many of those laws.

Congress must demand an increase in the effective enforcement of the legal rights of workers by the Department of Labor and other agencies—with a strong, targeted focus on growers and associations, rather than on crewleaders.

We must all support the efforts made by workers themselves to improve their wages and working conditions. Where workers come together to take courageous actions to enforce their rights—such as the workers who have created the Coalition of Immokalee Workers—those efforts should be supported. The workers who do the backbreaking work to put produce on our table should receive a decent, living wage. Each day we accept the benefits of that labor; we should also accept the concomitant responsibility to ensure that workers are treated fairly.

Thank you again for the opportunity to testify. I welcome your questions.