S196568

#6

IN THE SUPREME COURT OF CALIFORNIA

VICENTE SALAS,
Petitioner and Appellant,
v.
SIERRA CHEMICAL CO.,
Defendant and Respondent.

PETITION FOR REVIEW

Appeal from the Court of Appeal
Third Appellate District, Case No. C064627
Superior Court of California, County of San Joaquin
Superior Court Case No. CV033425

Christopher Ho, SBN 129845
Araceli Martínez-Olguín, SBN 235651
The LEGAL AID SOCIETY-
EMPLOYMENT LAW CENTER
180 Montgomery Street, Suite 600
San Francisco, CA 94104
Telephone: (415) 864-8848

David C. Rancaño, SBN 121000
RANCAÑO & RANCAÑO
1300 10th Street, Suite C
Modesto, CA 95354
Telephone: (209) 549-2000

Attorneys for Petitioner
VICENTE SALAS

IN THE SUPREME COURT OF CALIFORNIA

VICENTE SALAS,
Petitioner and Appellant,
v.
SIERRA CHEMICAL CO.,
Defendant and Respondent.

PETITION FOR REVIEW

Appeal from the Court of Appeal
Third Appellate District, Case No. C064627
Superior Court of California, County of San Joaquin
Superior Court Case No. CV033425

Christopher Ho, SBN 129845
Araceli Martínez-Olguín, SBN 235651
The LEGAL AID SOCIETY-
EMPLOYMENT LAW CENTER
180 Montgomery Street, Suite 600
San Francisco, CA 94104
Telephone: (415) 864-8848

David C. Rancaño, SBN 121000
RANCAÑO & RANCAÑO
1300 10th Street, Suite C
Modesto, CA 95354
Telephone: (209) 549-2000

Attorneys for Petitioner
VICENTE SALAS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

State Statutes

State Rules

Federal Cases

Federal Statutes

Federal Regulations

Other Authorities

INTRODUCTION

Petitioner Vicente Salas seeks review of a lower court decision that, if left to stand, would seriously undermine California's strong employment protections for workers, particularly including undocumented immigrant workers, notwithstanding contrary U.S. Supreme Court precedent and the Legislature's enactment of SB 1818.

ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeal properly applied the after-acquired evidence and unclean hands doctrines to deny Petitioner any legal recourse for Respondent's discriminatory actions.

2. Whether the Court of Appeal correctly interpreted the Legislature's intent in enacting SB 1818, which declared that "[a]ll protections, rights and remedies available under state law are available to all individuals who have applied for employment, or are or who have been employed, in this state, regardless of immigration status."

3. Whether the Court of Appeal erred in affirming the entry of summary judgment against Petitioner despite the existence of numerous significant disputes of material fact, and in affirming or failing to affirm the admission of certain testimonial evidence by the trial court.

4. Whether the trial court properly sustained Respondent's defenses of unclean hands and equitable estoppel based on the allegation that Petitioner had misrepresented whether his doctor had cleared him to return to work.

GROUNDS FOR REVIEW ARE PRESENT

Review of a decision of the Court of Appeal is appropriate "[w]hen necessary to secure uniformity of decision or to settle an important question of law." Cal. Rules of Court 8.500(b)(1).

As set forth herein, the opinion of the court below warrants review for several significant reasons. First, it applies the after-acquired evidence and unclean hand doctrines to defeat the civil rights protections of the Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code § 12900 *et seq.*, a result squarely at odds with the decision of the U.S. Supreme Court in *McKennon v. Nashville Banner Publishing Co.* (1995) 513 U.S. 352. Second, it interprets SB 1818, a landmark remedial statute enacted in response to an adverse decision of the U.S. Supreme Court, in a manner inconsistent both with the statute's plain language as well as the Legislature's express intent. Lastly, the decision below seriously misapplied well-established standards applicable to summary judgment which, if followed by other courts, would create confusion in the lower courts over the applicable burdens of proof.

STATEMENT OF THE FACTS

A. FACTUAL BACKGROUND

This Petition arises from a lawsuit commenced in San Joaquin County Superior Court by Petitioner Vicente Salas ("Salas") against his former employer, Respondent Sierra Chemical Company ("Sierra"). Salas was first hired by Sierra in 2003 as a production worker, and was consistently recalled to work after seasonal layoffs. Eventually, Salas accrued seniority status, and he became a permanent Sierra employee in 2006. The first amended complaint alleges that Salas became disabled as a

result of a back injury sustained on the job in 2006, and that Sierra refused to reasonably accommodate his disability in violation of the FEHA. The amended complaint also alleged that subsequently, in 2007, Sierra ultimately refused to recall Salas from layoff because of his disability and for his filing of a workers' compensation claim, constituting a wrongful denial of employment in violation of public policy. Salas seeks compensatory, general, and punitive damages, prejudgment interest, and his reasonable attorneys' fees and costs of suit; he seeks no prospective remedies such as reinstatement or front pay.

B. PROCEEDINGS IN THE TRIAL COURT

Sierra moved for summary judgment, filing a motion based almost exclusively on a half-page declaration purporting to be executed by someone in North Carolina who stated that the Social Security number Salas provided Sierra was also the declarant's own number. Sierra also produced a declaration from its president asserting that it had a "long-standing policy that precludes [the] hiring of any job applicant who is prohibited by federal immigration law from working in the United States." Sierra asserted that the foregoing declarations conclusively established both that Salas had used a false Social Security number in order to get his job, and that Sierra would not have hired him had it known of Salas's alleged undocumented status.

Based on those "undisputed facts," Sierra argued that Salas had neither rights against nor remedies for Sierra's discriminatory actions. It relied, first, on *Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620, a case in which plaintiffs' breach of contract and wrongful termination claims (for whistleblowing) were held barred by the

"after-acquired evidence" doctrine because they failed to disclose their criminal records despite a government-imposed requirement that employees not have been convicted of felonies. Sierra asserted that Salas's claims were similarly barred, claiming that it would never have hired him had it known of his alleged lack of employment authorization. In particular, Sierra cited *Camp* for the proposition that notwithstanding the U.S. Supreme Court's holding in *McKennon v. Nashville Banner Publishing Co.* (1995) 513 U.S. 352 that the after-acquired evidence doctrine could not act as a total bar to a federal age discrimination claim, such a complete bar was justified "where an employee who is disqualified from employment by government-imposed requirements nevertheless obtains a job by misrepresenting the pertinent qualifications." *Camp*, 35 Cal.App.4th at 638.

Sierra further opined that *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, which in *dicta* found a claim of wrongful termination brought by an undocumented plaintiff to be barred by the unclean hands doctrine inasmuch she was not eligible to be hired in the first place (while allowing her sexual harassment claims to proceed), also compelled the dismissal of all of Salas's claims. Sierra so argued even though Salas's complaint alleged discrimination that occurred during his employment, similar to the sexual harassment in *Murillo*.[1]

The trial court denied Sierra's motion, finding that numerous disputed issues of material fact precluded entry of summary judgment.

---

[1] Sierra also argued that it had no duty to refrain from discriminating against Salas because of his disability since, at the time of its refusal to recall him from layoff, he was not a Sierra employee. Sierra waived this argument on appeal, evidently understanding that the FEHA protects all persons from employment discrimination, not simply current employees.

Among the triable issues precluding summary judgment on Sierra's after-acquired evidence and unclean hands defenses, the court found, were whether the documentation Salas presented to show his work authorization was valid and whether he was entitled to work in the United States.

Sierra subsequently sought a writ of mandate from the Third Appellate District directing the trial court to reverse its denial of summary judgment. The Court of Appeal issued an alternative writ directing the trial court to enter judgment for Sierra or to show cause why reversal was not warranted. The trial court thereupon vacated its prior order and entered judgment for Sierra.

C. PROCEEDINGS IN THE COURT OF APPEAL

Salas appealed from the judgment in Sierra's favor, arguing: *inter alia*: 1) that nothing in the record demonstrated that Salas was unauthorized to work in the United States; 2) that, in any event, Salas's immigration status was irrelevant to his claims in light of the Legislature's 2002 enactment of SB 1818,[2] which provides that "[a]ll protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state."; [3] and 3) that the trial court improperly overlooked numerous disputes of material fact in entering summary judgment.

---

[2] Codified at Cal. Civ. Code § 3339, Cal. Gov't Code § 7285, Cal. Health & Safety Code § 24000, and Labor Code 1171.5.

[3] Labor Code § 1171.5(a).

In its response, Sierra reiterated its arguments that Salas was barred by the after-acquired evidence and unclean hands doctrines from seeking any relief, again relying on *Camp* and *Murillo*. As to Salas's argument that SB 1818 made his immigration status irrelevant to his failure to accommodate and discriminatory denial of employment claims, Sierra responded only that its focus on the validity of his Social Security number had nothing to do with Salas's immigration status but, instead, only with his "ineligibility for employment."

The Court of Appeal affirmed the entry of summary judgment for Sierra. *Salas v. Sierra Chemical Co.* (August 9, 2011) 198 Cal.App.4th 29, 2011 WL 3518264.[4] It held that Salas had not raised a triable issue of material fact to counter either of the declarations offered by Sierra. First, it concluded that the declaration ostensibly procured from the individual in North Carolina, without more, was evidence sufficient to infer that the number used by Salas was not his. *Id.* at *8. Next, the Court of Appeal found the declaration of Sierra's president to be conclusive proof of a policy against hiring undocumented workers, disregarding conflicting evidence of a supervisor's statement that as long as he was happy with his employees' work, he would not fire them due to Social Security number discrepancies, and Salas's personal knowledge of Sierra's hiring of undocumented workers. *Id.* at *9.

Stating that "[t]his case is a failure to hire case," *id.* at *5, the Court of Appeal determined that *Camp* required dismissal of Salas's denial of employment claim on after-acquired evidence grounds in that the federal Immigration Reform and Control Act of 1986 ("IRCA") made it unlawful

---

[4] A true and correct copy of the Court of Appeal's opinion is bound at the back of this Petition.

for aliens to use false documents to obtain employment, and required employers to report their employees' Social Security numbers via the I-9 form. *Id.* at *7. The Court of Appeal further concluded that "unlike the sexual harassment claim in *Murillo*, Salas's discrimination claims are tied to the failure to hire", *id.* at *8 (internal citation omitted), because Salas was denied employment allegedly in retaliation for his disability – thus dismissing those non-termination claims as well. It reasoned that *Murillo* was distinguishable in that "this is not a case of pervasive discriminatory conduct that caused injuries during the term of employment", *id.* – even though Sierra's failure to accommodate Salas's back injury required him to work through pain and, indeed, resulted in yet another injury after his supervisors told him "to stop complaining and get back to work." Appellant's Appendix (hereinafter "AA"), vol. 2, 345 ¶ 3 & 366 ¶¶ 5-6.[5] Again relying on *Camp* and *Murillo*, the court also upheld Sierra's after-acquired evidence and unclean hands defenses, reasoning simply that "[b]ecause Salas was not lawfully qualified for the job, he cannot be heard to complain that he was not hired." *Id.* at *10.

Finally, the Court of Appeal rejected Salas's argument that SB 1818 precluded the use of the after-acquired evidence and unclean hands defenses to deny Salas the protections of California law. The court acknowledged that SB 1818 reaffirmed "the irrelevance of immigration status in enforcement of state, labor, employment, civil rights, and employee housing laws," *id.* at *12. Despite that, however, it concluded

---

[5] Citations to Appellant's Appendix refer to the Appendix filed with the Court of Appeal and direct the Court to the volume and page number of that Appendix.

that subsection d) of SB 1818,[6] which stated that "[t]he provisions of this bill are declaratory of existing law", was nonetheless intended by the Legislature to keep in place *Camp* and *Murillo* even where they could operate to make immigration status relevant to, indeed if not dispositive of, the ability of immigrant workers to seek the protections of California employment and civil rights laws against unlawful workplace practices.[7]

ARGUMENT

A. Review Should be Granted to Correct the Derogation of Civil Rights Caused by the Misapplication of the After-Acquired Evidence and Unclean Hands Doctrines.

The Court of Appeal's use of the after-acquired evidence and unclean hands defenses to bar all of Salas's claims as a matter of law seriously threatens to derail California civil rights protections. This is so because *Salas* applied those doctrines to entirely eviscerate potentially meritorious civil rights claims solely on the basis of wholly unrelated wrongdoing by the employee,[8] and did so in the face of well-established U.S. Supreme Court authority unequivocally rejecting that absolutist approach.[9] More importantly, though, allowing those defenses to preclude

---

[6] The quoted language appears at Labor Code § 1171.5(c).

[7] A petition for rehearing was not filed with the Court of Appeal.

[8] Petitioner in no way concedes that Sierra has discovered any wrongdoing by Salas, nor that there was sufficient evidence in the record for the Court of Appeal to have concluded that Salas utilized a Social Security number that did not belong to him. *See infra* sec. D.

[9] FEHA is interpreted by reference to federal anti-discrimination statutes because of the similarities between the statutes. *See, e.g., Pantoja v Anton* (2011) 198 Cal.App.4th 87 (quoting *Lyle v. Warner Bros. Television*

the pursuit of an employment discrimination claim leaves hollow the paramount public purpose of FEHA: rooting out invidious discrimination in employment.

In *McKennon v. Nashville Banner Publishing Co.* (1995) 513 U.S. 352, the U.S. Supreme Court considered the implications of precluding civil rights claims on the basis of employee misconduct that would have resulted in the employee's termination. *Id.* at 356-59. Noting the public and remedial purposes of the federal Age Discrimination in Employment Act ("ADEA"), the Court unanimously ruled that the unclean hands defense has no application in discrimination cases "where a private suit serves public purposes." *Id.* at 360 (quoting *Perma Life Mufflers, Inc. v. Int'l Parts Corp.* (1968) 392 U.S. 134, 138). It further concluded that while the after-acquired evidence doctrine should serve to limit the remedies that a plaintiff might recover, "an absolute rule barring backpay . . . would undermine the ADEA's objective of forcing employers to consider and examine their motivations, and of penalizing them for employment decisions that spring from [impermissible] discrimination." *Id.* at 362. In so holding, the Court struck a balance between giving full effect to the societal condemnation of invidious bias embodied in the civil rights protections contained in the ADEA and the legitimate interests of an

---

Productions (2006) 38 Cal.4th 264, 278); *Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 379; *Kohler v. Inter-Tel Technologies* (9th Cir. 2001) 244 F.3d 1167, 1172. Indeed, it often "offers greater protection and relief to employees than [federal law]." *Murillo*, 65 Cal.App.4th at 842; *see also Page v. Superior Court* (1995) 31 Cal.App.4th 1206, 1215 (deviating from federal law to allow a worker's cause of action against a supervisor in their individual capacity because Legislature intended FEHA to be more protective).

employer in light of misconduct discovered since the employee's termination.

Accordingly, federal courts in California have since applied *McKennon* to limit the *remedies* available under FEHA to victims of employment discrimination who are discovered to have engaged in conduct that would have resulted in their termination.[10] But by barring all of Petitioner's claims as a matter of law, *Salas* impermissibly strikes at the heart of FEHA, following a dangerous path paved in large part by *Camp* and *Murillo* – two cases that misapplied *McKennon*.

Camp largely disregarded *McKennon* as well as relevant case law presaging *McKennon*. *See Cooper v. Rykoff-Sexton, Inc.* (1994) 24 Cal.App.4th 614. With scant reasoning, *Camp* announced a rule wholly precluding wrongful termination claims by plaintiffs who had exposed their former employers to potential liability by lying on their job applications. *See Camp*, 35 Cal.App.4th at 639. *Camp*'s holding might be somewhat less problematic if limited to its facts or to the types of claims that were before the court – breach of contract and the wrongful termination of a whistleblower and her husband.[11] *See id.* at 627-28 & 633 n.9. But *Murillo*

---

[10] *See, e.g., Rivera v. NIBCO, Inc.* (9th Cir. 2004) 364 F.3d 1057, 1069-70 (concluding that evidence of plaintiffs' immigration status might affect damages, but had no bearing on questions of liability for violating plaintiffs' civil rights); *Ashman v. Solectron, Inc.* (N.D. Cal. Aug. 4, 2010) No. CV 08-1430 JF, 2010 WL 3069314, *8-9 (concluding that after-acquired evidence affects only remedies available to plaintiff under both FEHA and federal employment discrimination law).

[11] *Camp* misconstrued Mr. Camp's allegations that he was fired because of his wife's actions, *see* 35 Cal.App.4th at 635 n.13, as a claim "for marital status discrimination" under FEHA. *See id.* at 632 n.8. Such a construction is plainly mistaken and should be extended no deference, given that the source of Mrs. Camp's claims were statutory protections for

questionably construed *Camp*'s deviation from *McKennon* as establishing a rule for discriminatory termination claims under FEHA[12] and, in *dicta,* opined that plaintiff's claims for wrongful termination would be foreclosed by unclean hands resulting from her lack of work authorization.[13] *See* 65 Cal.App.4th at 845.

The court below, however, took *Camp* and *Murillo* a step further in the wrong direction — *i.e.,* by allowing the after-acquired evidence and unclean hands doctrines to extinguish *any* claim in its entirety so long as it could somehow be "tied to" a termination claim, however tenuously.[14]

---

whistleblowers and in no way implicate FEHA. *See id.* at 627-28. Moreover, *Camp* later made clear that it has given little, if any, consideration to the nature of any FEHA claim or the implications of applying the after-acquired evidence and unclean hands defenses to such civil rights claims. *See id.* at 635 n.13.

[12] The wrongful termination claims in *Murillo* are properly understood as asserting the plaintiff's civil rights under FEHA, as her termination was alleged to have resulted from her report of a supervisor's sexual harassment. *See* 65 Cal.App.4th at 840.

[13] The application of the unclean hands and after-acquired evidence defenses on the plaintiff's wrongful termination claims were not before the court, as the plaintiff had long before dismissed them. *See* 65 Cal.App.4th at 841.

[14] The "tied to" standard announced by the court below would be unworkable because of the difficulty in arriving at a bright-line rule for determining what claims were "tied to" a termination. For example, potentially any workplace violation that a worker complained about to her employer could readily be "tied to" a termination where the employer, as here, then fired or refused to hire her in reprisal for her complaint. Any claim arising from the initial violation, under *Salas*, would thereby have enough of a nexus with the denial of employment to be extinguished along with it. *See infra* n.21. Among other things, this could lead to the perverse result in similar cases that employers would have an incentive to claim that any denial of employment was in retaliation for an assertion of rights

Salas, 2011 WL 3518264 at *8. Thus, in any case where a worker's immigration status might (with or without a valid basis) be called into question, [15] as happened here, *Salas* creates the specter of countless meritorious claims being dismissed outright or, perhaps worse, not brought at all, because of its clear deterrent effect.

Salas's unprecedented extension of the after-acquired evidence and unclean hands defenses, as questionably articulated in *Camp* and *Murillo*, to wholly deprive Petitioner of any legal recourse for *any* of Sierra's discriminatory actions would therefore have enormous negative consequences for the ability of immigrant workers to enforce California's

---

regarding other workplace abuses. Conversely, plaintiffs would have the burden of demonstrating that a non-termination claim for which they sought relief was *not* connected in any way to a subsequent termination – exactly the reverse of the burden of proof in retaliation claims, where the plaintiff must demonstrate a causal nexus between the protected act (e.g., a complaint about working conditions) and the alleged retaliatory action.

[15] Seizing on *Camp*'s conclusion that the "potential detrimental impact" plaintiffs' misconduct would cause the employer merited a departure from *McKennon*, *Camp*, 35 Cal.App.4th at 636, the court below drew several erroneous conclusions regarding the harm that could flow to Sierra had Salas actually used a Social Security number that did not belong to him. In fact, while IRCA requires an employer to review the documents proffered by an employee to confirm her identity and work authorization, it need only affirm that it *reviewed* those documents, *see* 8 C.F.R. § 274a.2(a)(3), and does not attest to the validity of the documents presented. *See* 8 C.F.R. § 274a.4 (establishing a rebuttable presumption for good faith compliance). Similarly, while the IRS may fine employers who submit inaccurate returns regarding the payment of wages, *see* 26 U.S.C. § 6721, that penalty is waived where the failure to provide accurate information results from a misrepresentation by the employee. *See* 26 C.F.R. § 301.6724-1(c)(6)(ii). Contrary to *Salas*'s conclusion, unless an employer pays a role in the misrepresentation, it is exposed to no liability.

civil rights laws.[16] It would plainly frustrate the Legislature's purposes in enacting SB 1818, discussed *infra*. It would also represent a sharp break with analogous Title VII precedent which has held uniformly that undocumented workers are, in almost all instances, entitled to exactly the same rights and remedies against workplace exploitation as legally authorized workers are.[17]

Review should be granted to correct the Court of Appeal's extreme and unreasonable application of the after-acquired evidence and unclean

---

[16] In fact, one Court of Appeal has previously disapproved of a central tenet of those cases as applied to SB 1818. *Farmers Brothers Coffee v. Workers' Compensation Appeals Board* (2005) 133 Cal.App.4th 533, 542-43 (rejecting suggestion that "one who obtains employment in a manner contrary to federal law should not benefit from that illegal employment relationship" and "declin[ing] petitioner's suggestion that we insert such a policy into [Labor Code § 1171.5].").

[17] *See, e.g., Rivera*, 364 F.3d at 1070 ("[O]verriding national policy against discrimination would seem likely to outweigh any bar against the payment of back wages to unlawful immigrants in Title VII cases."); *Avila-Blum v. Casa De Cambio Delgado, Inc.* (S.D.N.Y. 2006) 236 F.R.D. 190, 192 (holding magistrate judge did not err in concluding that *Hoffman Plastic Compounds, Inc. v. NLRB* (2002) 535 U.S. 137, which concluded that an undocumented worker was not entitled to back pay remedies for termination in violation of the National Labor Relations Act, was limited to actions under the NLRA); *EEOC v. Bice of Chicago* (N.D. Ill. 2005) 229 F.R.D. 581, 583 (finding immigration status irrelevant to claims or defenses in an employment discrimination case); *Escobar v. Spartan Security Services* (S.D.Tex. 2003) 281 F.Supp.2d 895, 897 (opining that *Hoffman* is inapplicable to Title VII claims); *De La Rosa v. N. Harvest Furniture* (C.D.Ill. 2002) 210 F.R.D. 237, 238 (same); *see also* EEOC Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws, *available at*: http:www.eeoc.gov/policy/docs/undoc-rescind.html (last visited Sept. 15, 2011) (stating that *Hoffman* "in no way calls into question the settled principle that undocumented workers are covered by the federal employment discrimination statutes[.]")

hands doctrines, and to prevent the backsliding on California's civil rights protections that *Salas* invites.

B. SB 1818 Cannot Sensibly be Understood to Preserve Contrary Case Law That Would Eviscerate its Plain Intent.

In affirming the grant of summary judgment, the Court of Appeal adopted a nonsensical construction of SB 1818 that would in fact *undo* existing protections for all workers regardless of their immigration status. It not only ignored the plain language of that statute; it also subverted the Legislature's expressly stated purposes in enacting it.

In 2002, following the decision of the U.S. Supreme Court in *Hoffman Plastic Compounds, Inc. v. NLRB* (2002) 535 U.S. 137, the Legislature enacted SB 1818 out of a concern that *Hoffman*'s withdrawal of back pay remedies to undocumented workers fired in violation of the National Labor Relations Act might be interpreted to have a limiting effect on California protections for all employees irrespective of their immigration status. In its bill analysis, the Senate Committee on Labor and Industrial Relations discussed *Hoffman* at length, and noted the concern of the bill's proponents that "the Hoffman decision has the potential effect of undercutting state remedies for illegal labor practices, and that this measure is needed to keep our state's labor and civil rights' [sic] remedies intact, and enhance compliance."[18]

---

[18] A true and correct copy of this bill analysis of SB 1818 is appended hereto as Attachment A for the convenience of the Court. It is also available online at http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_1801-1850/sb_1818_cfa_20020514_164726_sen_comm.html. This Court has looked to committee analyses as an aid to discerning the Legislature's intent in enacting legislation, *see, e.g., In re J.W.* (2002) 29 Cal.4th 200, 211-12.

Accordingly, SB 1818, as codified in Labor Code § 1171.5, provides as follows:

> The Legislature finds and declares the following:
>
> a) All protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state.
>
> (b) For purposes of enforcing state labor and employment laws, a person's immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person's immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law.
>
> (c) The provisions of this section are declaratory of existing law.
>
> (d) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

As one Court of Appeal previously observed, "These statutes leave no room for doubt about this state's public policy with regard to the irrelevance of immigration status in enforcement of state labor, employment, civil rights, and employee housing laws. Thus, if an employer hires an undocumented worker, the employer will also bear the burden of complying with this state's wage, hour and workers' compensation laws." *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452,

460, *disapproved on other grounds, People v. Freeman* (2010) 47 Cal.4th 933; *see also Reyes v. Van Elk, Ltd.* (2007) 148 Cal.App.4th 604, 615 (citing *Hernandez* with approval). Indeed, every previous published decision by a California court concerning SB 1818 has understood it to mean exactly what it says. It would be nonsensical at best to read into that statute's broad language, as did the court below, a *sub silentio* carve-out that would exclude from coverage precisely those workers the Legislature sought to protect from *Hoffman*'s potential consequences.

Quite to the contrary, as a remedial statute Labor Code § 1171.5 should be construed broadly so as to effectuate its purposes, *see, e.g., Murphy v. Kenneth Cole Productions* (2007) 20 Cal.4th 1094, 1103 ("statutes governing conditions of employment are to be construed broadly in favor of protecting employees."). In fact, earlier this year, this Court, affirming the Legislature's intent in passing SB 1818 to "protect undocumented workers from sharp practices in the wake of *Hoffman*", interpreted Labor Code § 1171.5 broadly to extend its protections to work performed in California by nonresidents. *Sullivan v. Oracle Corporation* (2011) 51 Cal.4th 1191, 1197 n.3.

Notwithstanding the above, and ignoring SB 1818's plain language, the Court of Appeal read into the bill's "declaratory of existing law" language an intent on the part of the Legislature to leave all contrary prior law, including the decisions in *Camp* and *Murillo,* untouched. *Salas*, 2011 WL 3518264 at *12. But even leaving aside the bill's stated purposes, this argument fails on independent grounds, as an examination of SB 1818's legislative history makes clear.

In the Senate's third reading analysis of SB 1818,[19] the text of the bill is first set forth, including subsection d), which states that "[t]he provisions of this bill are declaratory of existing law."[20] It is then followed immediately by the following section:

> *EXISTING LAW provides:*
>
> *1) A framework for the enforcement of minimum labor standards relating to employment, civil rights, and special labor relations.*
>
> *2) Authority to various state agencies to remedy specific violations where an employee has suffered denial of wages due, proven discrimination, unlawful termination, suspension, or transfer, for the exercise of their rights under the law.*
>
> *3) For remedies such as reinstatement and back pay awards for monies due the employee in order to make them whole.*

It is in this context that SB 1818's "declaratory of existing law" language is properly understood. Far from constituting a wholesale ratification of the entire body of pre-existing California law, including decisions such as *Camp* and *Murillo* that are directly at odds with SB 1818, the Legislature was simply indicating that nothing in the bill was meant to disturb the existing legal framework established for the protection of

---

[19] A true and correct copy of the third reading analysis of SB 1818 is appended hereto as Attachment B for the convenience of the Court. It is also available online at http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_1801-1850/sb_1818_cfa_20020823_000220_asm_floor.html. This Court has looked to third reading analyses as an aid to discerning the Legislature's intent in enacting legislation. *See, e.g., Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 459.

[20] This language appears in subsection c) of Labor Code § 1171.5.

workers who had been unlawfully treated. Any other understanding of subsection d) would render SB 1818 an empty letter inasmuch as it would leave standing case law that would thwart the statute's plain remedial purpose, that of ensuring that all persons in California would enjoy equal rights and remedies in the workplace irrespective of immigration status.

The Court of Appeal's nullification of SB 1818 must be corrected. In *Shoemaker v. Myers* (1990) 52 Cal.3d 1, for example, this Court held that an employee's claim under a "whistleblower" statute was not pre-empted by the Workers' Compensation Act. *Shoemaker* noted that had the Legislature considered existing workers' compensation remedies adequate to address the problem of retaliation against whistleblowing public employees, it would not have enacted the statute:

> We do not presume that the Legislature performs idle acts, nor do we construe statutory provisions so as to render them superfluous. The whistle-blower statute was a legislative expression intended to encourage and protect the reporting of unlawful governmental activities, and to effectively deter retaliation for such reporting. The Legislature clearly intended to afford an additional remedy to those already granted under other provisions of the law; otherwise [former Government Code] section 19683 [the whistleblower statute] would be rendered meaningless.

Id. at 22.

So it is here. It cannot be coherently argued that the Legislature, when it plainly sought to eliminate distinctions between California workers based on their immigration status for purposes of state law protections, instead engaged in the "idle act" of drafting a statute that left in place contrary case law that defeated that very purpose. *See Hernandez*, 109 Cal.App.4th at 459 ("[W]e observe the Legislature apparently felt strongly enough about the sensitive subject of immigration status to put essentially

identical language in three separate statutes."). Yet that is the interpretation the Court of Appeal imposed on the statute when it incorrectly construed a single sentence in the bill as swallowing the whole.[21] This Court should correct the error of the court below in reading SB 1818 out of existence by its very own terms.

---

[21] The Court of Appeal justified its strained construction of the bill by contending that "it does not frustrate the purposes of SB 1818 because it allows undocumented immigrants to bring a wide variety of claims against their employers as long as these claims are not tied to the wrongful discharge or failure to hire." *Salas*, 2011 WL 3518264 at *12. The court's attempt to reconcile its implausible reading of SB 1818 with the Legislature's deeply stated concerns is, however, unpersuasive. *Hoffman* arose in the context of an employer's firing of an undocumented worker in retaliation for his union organizing activities. Far from concluding that the employee had no right to be protected from unlawful termination, however, *Hoffman* held only that he was ineligible to receive his lost wages as one of the remedies for that termination, and left other remedies in place. *Hoffman*, 535 U.S. at 152. It would be difficult indeed to assert that in enacting SB 1818 due to its concerns over *Hoffman*, the Legislature actually intended to go even further than *Hoffman* in depriving undocumented workers of pre-existing legal protections.

In any event, the Court of Appeal's proffered distinction between termination or non-hire claims and claims regarding other forms of workplace abuses would result in little if any benefit to undocumented workers. Indeed, the linkage drawn by the court below between Sierra's failure to accommodate Salas's back injury, which occurred prior to and apart from his termination, is an apt illustration of how employers could readily circumvent any arguably surviving portions of SB 1818. Following this example, employers could avoid liability for any unlawful acts against undocumented workers simply by retaliatorily terminating them once they sought to assert their rights. *See supra* n.14.

C. Summary Judgment was Improper Because Sierra Failed to Meet its Burden as the Moving Party and the Court of Appeal Failed to Draw Reasonable Inferences in Favor of the Non-Moving Party.

Review should be granted to correct the Court of Appeal's clear misapplications of established summary judgment standards. The court below incorrectly shifted the burden of production to Salas when Sierra failed to meet its initial burden of presenting admissible and undisputed evidence that it was entitled to judgment. *Lane v. City of Sacramento* (2010) 183 Cal.App.4th 1337, 1342-43 (reversing summary judgment for moving party's failure to meet burden under Cal. Code Civ. Proc. § 437c(p)(2)). Additionally, it failed to draw all reasonable inferences in favor of Salas, the non-moving party. *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (reaffirming standard on summary judgment for viewing evidence in light most favorable to the nonmoving party). Because of the numerous triable issues of material fact in this case, the Court of Appeal erred in granting summary judgment.

1. Sierra Failed to Prove That the Social Security Number Salas Used Was Not His.

As the moving party, Sierra had the burden of establishing an affirmative defense through undisputed admissible evidence. *Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162. As a foundation for its unclean hands and after-acquired evidence defenses, Sierra contended that Salas's Social Security card was "fake" and that Salas had fraudulently used "someone else's number in order to obtain employment with Sierra Chemical." AA, vol.1, 59. Despite the numerous material factual disputes that remained, the Court of Appeal concluded that Salas was required to offer additional evidence to prove that the Social Security number belonged

to him.[22] This was clear error that merits correction to provide guidance to lower courts about the proper application of summary judgment standards.

In support of its motion for summary judgment, Sierra proffered a photocopy of Salas's Social Security card,[23] documents relevant to his employment on which the Social Security number had been written,[24] and copies of documents related to Salas's employment with RO-Lab American Rubber Co., Inc., where Salas worked in 2007, and to whom he provided the same Social Security card and number.[25] Sierra also presented the declaration of one Kelley R. Tenney, an individual ostensibly residing in North Carolina.[26] Contrary to Sierra's assertions – and the Court of Appeal's conclusions – these items do not establish that the Social Security number Salas used was "fake", nor do they prove that the Social Security number does not belong to him.

To the contrary, the documents demonstrate that Salas consistently used the same Social Security card and number between 2003 and 2007 in applying for employment and filling out his W-4 federal tax withholding forms. Further, because these employment forms required Salas to state under oath that the information he provided, including his Social Security number, was true, they provide a basis for finding that the Social Security number in question indeed belonged to him. Similarly, while Tenney's

---

[22] *Salas*, 2011 WL 3518264, *8 ("[W]hile Salas could have disputed this evidence with evidence of his own, he chose not to do so.").

[23] AA, vol.1, 120-21 & 127-28.

[24] *Id.* at 119, 122, 126, 129, 132, 150 & 164.

[25] *Id.* at 223-228.

[26] *Id.* at 344-46.

declaration asserted a claim to the Social Security number and stated that he did not know Salas and did not give him permission to use his Social Security number, that testimony alone scarcely establishes that the number was Tenney's. There is no evidence as to when and where Tenney obtained his Social Security number, nor a photocopy of Tenney's Social Security card, nor of any other possible indicia of its authenticity as to Tenney as its sole and valid holder. As such, Tenney's declaration supports only his *belief* the number belonged to him. This is plainly insufficient to prove the Social Security Administration ("SSA") issued the number to him alone, and the court below erred in finding otherwise. Consequently, disputed issues of fact existed as to who the Social Security number belongs to and whether Salas's use of the Social Security number was improper.[27] The court's insistence that Salas put forth additional evidence, *see Salas,* 2011 WL 3528264, *8 (stating a current declaration was necessary from Salas), would only have been appropriate once the burden of production had shifted, and was not merited here because, at best, Sierra's evidence contradicted Salas's claim to the number; it neither established that the number did not belong to him nor that he fraudulently used the number.

---

[27] But even assuming *arguendo* the court below correctly determined the number was Tenney's based on the declaration alone, Sierra failed to advance undisputed evidence that Salas fraudulently used the number or that his Social Security card was a "fake". Finding that Salas had fraudulent intent and falsified records based on solely on the fact that they number belonged to someone else, turns the summary judgment standard on its head by drawing inferences in the light most favorable to the moving party.

2. Questions of Material Fact Remain Regarding Whether Sierra Would Have Hired or Recalled Salas had it Known that he was Using Another Person's Social Security Number.

The Court of Appeal wrongly determined that Salas failed to establish a triable issue of fact as to whether Sierra had a policy of refusing to employ persons unauthorized to work in the United States. The evidence indicates that Salas informed his supervisor, Leo Huizar, that Salas and several other employees had received letters from the SSA stating its records indicated that their names did not match their Social Security numbers,[28] that Sierra affirmatively reassured Salas that he and his co-workers need not worry about any discrepancies with their Social Security numbers, and that Sierra would not terminate them over such discrepancies. AA, vol.2, 346 ¶ 8. Additionally, Salas offered evidence that he knew of several undocumented immigrants who worked at Sierra. Salas also testified that he did not know of any instance in which Sierra had ever discharged a person based on a lack of work authorization. *Id.* at ¶ 9. Viewing these facts in the light most favorable to Salas as the non-moving party, this evidence would allow a reasonable trier of fact to find that Sierra did not consistently implement its policy of not employing unauthorized workers, as necessary to the after-acquired-evidence defense. The court below erred in concluding otherwise.

---

[28] Sierra argued that the trial court erred in admitting Huizar's statements. In its opinion, the Court of Appeal states that it did not address this issue, and it is therefore not at issue for review. *Salas,* 2011 WL 3518264, at *9 n.3.

3. Whether Salas Made Intentional Misrepresentations Was a Question of Fact for the Jury That Precluded Summary Judgment.

The Court of Appeal failed to recognize the unique role of triers of fact in resolving questions of intent and erred by resolving attendant questions of fact in Sierra's favor. Sierra's unfounded assertion that Salas intentionally deceived the company by misrepresenting his Social Security number required Sierra to prove that Salas *intended* to commit fraud. *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 482 ("It is the element of intent which makes fraud actionable."). Such questions of intent are uniquely unsuited to summary adjudication. *See Hunter v. Up-Right, Inc.* (1993) 6 Cal.4th 1174, 1185 ("Fraud is easily pleaded, and in all likelihood it would be a rare wrongful termination complaint that omitted to do so. Much harder, however, is the defense of such claims and their resolution at the summary judgment or demurrer stage of litigation.").

Sierra's motion rests on the baseless contention that Salas intentionally misrepresented his Social Security number. But the evidence of signed employment forms by Salas and conversations with management about discrepancies in Social Security numbers in fact support the contrary notion – that Salas had no intent whatsoever to defraud Sierra. Especially given the risks associated with notifying his employer of the potential problem with his Social Security number, Salas acted with integrity by notifying Sierra of this potential problem. Thus, there were triable issues of fact regarding Petitioner's intentions which should have been submitted to a jury. The court below erred in finding otherwise.

D. The Court of Appeal Erred in Inferring Salas's Lack of Employment Authorization From The Purported Discrepancy Regarding His Social Security Number.

The Tenney declaration hardly proves that the Social Security number used by Salas belonged to Tenney, *see supra*. But even leaving that aside, the Court of Appeal also erred in concluding that Salas's proffer of the same Social Security number was indisputable proof that he was not authorized to work in the United States, that he could permissibly have been fired by Sierra on that basis, and that his claims are thus barred by the after-acquired evidence and unclean hands doctrines.

To begin with, the determination of an individual's immigration status is within the expertise of the appropriate federal agencies, not that of the judiciary. *See, e.g., NLRB v. Apollo Tire Co., Inc.* (9th Cir. 1979) 604 F.2d 1180, 1183 ("Questions concerning the status of an alien and the validity of his papers are matters properly before the Immigration and Naturalization Service.").[29] And even if Salas's number were the same as that issued to another person, Sierra would hardly be able to claim that this constituted "constructive knowledge" within the meaning of IRCA that

---

[29] Requiring judicial bodies to determine the immigration status of plaintiffs appearing before them would be an impossible if not nightmarish undertaking. As one Court of Appeal observed, "[i]f compensation benefits were to depend upon an alien employee's federal work authorization, the Workers' Compensation Appeals Board would be thrust into the role of determining employers' compliance with the IRCA and whether such compliance was in good faith, as well as determining the immigration status of each injured employee, and whether any alien employees used false documents." *Farmers Brothers Coffee*, 133 Cal.App.4th at 540-41 (noting further that "[t]hus, the remedial purpose of workers' compensation would take on an enforcement purpose, in direct *conflict* with the IRCA.").

Salas was undocumented.[30] Such knowledge is a prerequisite to any defense that Sierra had information sufficient to compel Salas's termination for purposes of the after-acquired evidence doctrine. It is well established, however, that the threshold for "constructive knowledge" is not met simply on the basis of an allegedly discrepant Social Security number.[31] For example, in a case involving an employer's termination of employees who had been listed in "no-match letters" issued by the SSA, the U.S. Court of Appeals for the Ninth Circuit recently held:

---

[30] IRCA makes unlawful the knowing employment of undocumented workers. 8 U.S.C. § 1324a(a)(1)(A), (a)(2). IRCA's regulations define "knowing" as including not only actual knowledge but also "constructive knowledge." 8 C.F.R. § 271a.1(l)(1).

[31] Similarly, courts have found the "constructive knowledge" needed to justify an employee's termination present only where the employer was directly informed by federal immigration authorities of an employee's lack of status. *See, e.g., New El Rey Sausage Co. v. INS* (9th Cir. 1991) 925 F.2d 1153, 1158 ("New El Rey was provided with specific, detailed information. The INS told it whom it considered unauthorized and why. Under these circumstances, the ALJ properly found that a constructive notice standard was appropriate."); *Mester Mfg. Co. v INS* (9th Cir. 1989) 879 F.2d 561, 566-67 (finding "knowledge" within the meaning of 8 U.S.C. § 1324a(a)(2) where employer was presented by INS, after audit of its I-9 forms, with names of seven particular employees who lacked authorization to work in the U.S.). Other decisions, not involving direct information from immigration authorities, are in accord. *See, e.g., Mountain High Knitting, Inc. v. Reno* (9th Cir. 1995) 51 F.3d 216, 220 (holding that even information from the INS regarding Social Security number discrepancies was insufficient to create "knowledge" on the employer's part); *Collins Foods Int'l, Inc. v. INS* (9th Cir. 1991) 948 F.2d 549, 555 (holding that neither discrepancies in employee's Social Security card nor different spellings of his name gave rise to constructive knowledge, and characterizing the standard established by *Mester* and *New El Rey* as one of "willful blindness").

> [A]n SSN discrepancy does not automatically mean that an employee is undocumented or lacks proper work authorization. In fact, the SSA tells employers that the information it provides them "does not make any statement about . . . immigration status" and "is not a basis, in and of itself, to take any adverse action against the employee."

Aramark Facility Services v. Service Employees International Union, Local 1877, AFL-CIO (9th Cir. 2008) 530 F.3d 817, 826.

In upholding the trial court's denial of legal recourse to Salas on the sole basis that the Social Security number he provided was claimed by another person, therefore, the Court of Appeal ignored applicable federal immigration law. Its error must be rectified.

E. The Court of Appeal Erred In Other Respects.

The Court of Appeal erred in affirming the admission of Tenney's testimony because the testimony is mere conclusion, unsupported by fact, and was offered to show that the SSA issued Tenney the Social Security number. Furthermore, because the Court of Appeal incorrectly determined that Huizar's statements did not create a triable issue of fact, it failed to affirm the trial court's determination that the statements were in fact admissible.

Sierra's claims regarding the defenses of unclean hands and equitable estoppel based on the allegation that Salas had misrepresented whether his doctor had cleared him to return to work were not addressed by the Court of Appeal. Had it done so, however, it should have rejected those defenses. Sierra failed to establish Salas's deceit based upon the conversations between Salas and Huizar. Sierra also failed to show undisputed facts necessary for a summary judgment ruling based on these defenses.

CONCLUSION

For the foregoing reasons, Petitioner Vicente Salas respectfully requests that the Court order review of the decision below.

Dated: September 16, 2011

Respectfully submitted,

David C. Rancaño
RANCAÑO & RANCAÑO

Christopher Ho
Araceli Martínez-Olguín
The LEGAL AID SOCIETY –
EMPLOYMENT LAW CENTER

By: _____
CHRISTOPHER HO

Attorneys for Petitioner
VICENTE SALAS

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I certify that this Petition for Review contains 7,733 words, exclusive of the caption page, tables of contents and authorities, signature blocks, this Certificate and that appearing on the page following, and the attachments hereto.

Dated: September 16, 2011

Respectfully submitted,

David C. Rancaño
RANCAÑO & RANCAÑO

Christopher Ho
Araceli Martínez-Olguín
The LEGAL AID SOCIETY –
EMPLOYMENT LAW CENTER

By: 

CHRISTOPHER HO

Attorneys for Petitioner
VICENTE SALAS

CERTIFICATE OF SERVICE

I, DJUNA GRAY, declare:

I am a citizen of the United States, over 18 years of age, employed in the County of San Francisco, and not a party to or interested in the within entitled action. I am an employee of THE LEGAL AID SOCIETY - EMPLOYMENT LAW CENTER, and my business address is 180 Montgomery Street, Suite 600, San Francisco, CA 94104.

On September 16, 2011, I served the within:

PETITION FOR REVIEW

__X__ by U.S. mail to the persons and at the address set forth below:

Arnold J. Wolf
Freeman, D'Aiuto, Gureve,
Keeling & Wolf
1818 Grand Canal Boulevard,
Suite 4
Stockton, CA 95207

Clerk's Office
Third Appellate District
621 Capitol Mall, 10th Floor
Sacramento, CA 95814

Clerk's Office
San Joaquin Superior Court
222 E. Weber Avenue
Stockton, CA 95202

I declare under penalty of perjury under the laws of the State of California and of the United States of America that the foregoing is true and correct. Executed on September 16, 2011.

DJUNA GRAY

Senate Committee on Labor and Industrial Relations
Richard Alarcon, Chair

Date of Hearing: May 14, 2002
Consultant: Patrick W. Henning

2001-2002 Regular Session
Fiscal: Yes
Urgency: Yes

Bill No: SB 1818
Author: Romero
Amended: May 9, 2002

Subject:

Undocumented Workers: back pay remedies.

Purpose:

To limit the potential effects of a recent U.S. Supreme Court decision on the state's labor and civil rights laws by establishing a separate civil penalty against employers that violate the laws.

Analysis:

Existing law provides a framework for the enforcement of minimum labor standards relating to employment, civil rights, and special labor relations. Various state agencies have the authority to remedy specific violations where an employee has suffered denial of wages due, proven discrimination, unlawful termination, suspension, or transfer, for the exercise of their rights under the law. Among the many remedies, the state may issue reinstatement and back pay awards for monies due the employee in order to make them whole.

In March 2002, the United States Supreme Court ruled that the federal Immigration Reform and Control Act of 1986 (IRCA) precluded back pay awards to undocumented workers, even though they might be victims of unfair labor practices, because the workers were never legally authorized to work in the United States (Hoffman Plastic Compounds, Inc. v. NLRB [00-1595]).

This Bill, an urgency measure, limits the potential effects of Hoffman by establishing a separate civil penalty equal to the amount of a back pay remedy issued by the state in order to create a disincentive to unlawful practices and enhance compliance, and structures a process by which an employee may collect that civil penalty. It would amend the following California Codes: Labor, Government, Health and Safety, Civil, and Civil Procedure. Specifically, it:

-finds and declares that all applicants for employment, current or former employees, are covered by all the rights, remedies, and protections, regardless of immigration status, except any right to reinstatement or employment which is barred by federal law; such

findings would be declarative of existing law. Also, that it is consistent with the exercise of the police powers of the state to ensure that employers who violate labor and civil rights laws do not gain competitive advantage over law-abiding businesses, and that remedies be provided workers who have suffered financial harm in the exercise of their rights.

-establishes a civil penalty against an employer who violates an existing law that provides for a back pay remedy, if a court or administrative agency has determined that a person is ineligible for the award because he or she is unauthorized to work under federal immigration laws. The amount of the civil penalty would be not less than the back pay award.

-permits the affected employee to recover the civil penalty levied against the employer through court action or administrative agencies. If that right is found in conflict with federal immigration law, the penalty would be deposited in a special fund where the individual would be able to draw from it only when the initiating state agency finds that it would further the purposes and enhance compliance with labor and civil rights laws.

-prohibits an inquiry into a person's immigration status until a court or administrative agency considers a remedy which includes reinstatement or employment, and that such inquiry is clearly compelled by other law.

-declares that provisions of the measure are severable. Invalidity by a court of one provision shall not affect the validity of others.

Comments:

1. The author, source of this measure, and the sponsors argue that the Hoffman decision has the potential effect of undercutting state remedies for illegal labor practices, and that this measure is needed to keep our state's labor and civil rights' remedies intact, and enhance compliance. Supporters state that it is in conformity with the Hoffman decision, while at the same time properly enforcing state law.

   The Los Angeles Times reported on April 22nd that some firms are trying to use the Hoffman decision as basis for avoiding claims over workplace violations, seeking to use the ruling to avoid minimum wage and workers' compensation awards, even asking for the documents of a worker who complained of sexual harassment, according to advocates for low-wage workers.

   The Time's story also stated that in Los Angeles, a U.S. District Court judge decided the immigrant status of supermarket janitors was not relevant in a class-action suit that seeks to collect minimum wages for years of work. And a San Diego Superior Court judge decided a fast food employee who was paid $2 an hour for seven years was entitled to $32,000 for missing minimum wage. In both cases, employers had unsuccessfully cited the Supreme Court decision.

2. Federal Government Enforcement. Although spokespersons for the U.S. Department of Labor argue that the agency will continue vigorous enforcement of labor laws, regardless of immigration status, the U.S. State Department issued information that government officials were studying the impact of Hoffman:

> "The U.S. Department of Labor (DOL), the Equal Employment Opportunity Commission (EEOC) and other government offices believe the Supreme Court ruling will affect a variety of programs and policies, not only concerning pay and job reinstatement but also remedies for victims of sexual, age, racial or other forms of discrimination.
>
> "Traditionally the EEOC has included undocumented workers among those protected by discrimination laws and has issued updated reminders to employers. DOL enforces minimum wage and overtime standards and other wage requirements under both the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Workers Protection Act."

3. The Hoffman Decision. In the U.S. Supreme Court case, Hoffman Plastics Compounds hired an employee who presented seemingly valid documents verifying his authorization to work in the United States. Hoffman later fired the worker and other employees for engaging in union-organizing activities. The National Labor Relations Board (NLRB) determined that these terminations violated federal labor law, and, to remedy the situation, the NLRB issued a cease and desist order to the employer and required Hoffman to offer reinstatement and back pay to the terminated employees. When the amount of back pay was being calculated, the employee admitted that he was an undocumented worker and had given false identification documents to the employer. Despite this admission, the NLRB awarded the employee back pay from the date of his termination until the date he admitted being in the United States illegally. The NLRB justified its decision by claiming that the best way to accommodate and further federal immigration policies was to provide labor law protection and remedies to undocumented workers in the same manner as other employees. The federal appeals court agreed with the NLRB.

The Supreme Court, in a 5-4 decision, found that the back pay award to an undocumented worker who has never been legally authorized to work in the United States contravened federal immigration policy and thus, was impermissible. Although recognizing that the NLRB has broad discretion in fashioning remedies, the Court stated that awards of reinstatement and back pay are routinely set aside when employees have committed serious illegal conduct in connection with their employment. Here, the federal immigration law directly prohibited employment. Thus, the NLRB's back pay award to the worker gave him payment for wages that could not have been lawfully earned in a job that was obtained by criminal fraud.

Dissenting justices argued that the ruling may encourage employers to hire illegal immigrants and disregard labor laws without fear of penalty.

4. Recent Amendments. The introduced version of this measure related to a different subject matter.

Support:

California Labor Federation, AFL-CIO (Sponsor)
Lieutenant Governor Cruz M. Bustamante (Co-Sponsor)
Asian Law Caucus (Co-sponsor)
California Applicants' Attorneys Association
California Catholic Conference of Bishops
California Conference Board of the Amalgamated Transit Union
California Conference of Machinists (Co-sponsor)
California Immigrant Welfare Collaborative
California Rural Legal Assistance Foundation (Co-sponsor)
California State Council of Laborers
California Teamsters Public Affairs Council
Coalition for Humane Immigrant Rights of Los Angeles (Co-sponsor)
El Centro Del Pueblo
Engineers and Scientists of California
Garment Workers Center (Co-sponsor)
Hotel Employees and Restaurant Employees International Union (Co-sponsor)
Jockeys' Guild (Co-sponsor)
La Raza Centro Legal, Inc.
Legal Aid Society- Employment Law Center
Maintenance Cooperation Trust Fund (Co-sponsor)
Mexican American Legal Defense and Educational Fund (Co-sponsor)
National Council of La Raza (Co-sponsor)
Region 8 States Council, United Food and Commercial Workers Union (Co-sponsor)
Service Employees International Union (Co-sponsor)
State Building and Construction Trades Council of California (Co-sponsor)
Sweatshop Watch (Co-sponsor)
Teamsters Public Affairs Council (Co-sponsor)
United Farm Workers of America, AFL-CIO (Co-sponsor)
18 individual letters

Opposition:

California Manufacturers and Technology Association (CMTA)

* * *

SENATE THIRD READING
SB 1818 (Romero)
As Amended August 22, 2002
Majority vote

SENATE VOTE: 23-14

LABOR AND EMPLOYMENT 6-1

Ayes: Koretz, Negrete McLeod, Chu, Havice, Migden, Shelley

Nays: Wyland

SUMMARY: Amends the Civil, Government, Health and Safety and Labor Codes to include legislative findings and declarations regarding the protections, rights and remedies of employees, regardless of immigration status, under state law. Specifically, this bill:

1) States legislative findings that:

   a) All protections, rights and remedies available under state law are available to all individuals who have applied for employment, or who are or who have been employed, in this state, regardless of immigration status. (Excludes reinstatement remedies prohibited by federal law from this protection.)

   b) For purposes of enforcing state labor, employment, civil rights, and employee housing laws, a person's immigration status is irrelevant to the issue of liability.

   c) In proceedings or discovery undertaken to enforce state laws no inquiry shall be permitted into a person's immigration status except where there is clear and convincing evidence that such inquiry is necessary in order to comply with federal immigration law.

   d) The provisions of this bill are declaratory of existing law.

   e) The provisions of this bill are severable and that invalidity of one provision will not affect other provisions.

EXISTING LAW provides:

1) A framework for the enforcement of minimum labor standards relating to employment, civil rights, and special labor relations.

2) Authority to various state agencies to remedy specific violations where an employee has suffered denial of wages due, proven discrimination, unlawful termination, suspension, or transfer, for the exercise of their rights under the law.

3) For remedies such as reinstatement and back pay awards for monies due the employee in order to make them whole.

FISCAL EFFECT: None

COMMENTS: In March 2002, the United States Supreme Court ruled, in a 5 - 4 decision, that the federal Immigration Reform and Control Act of 1986 (IRCA) precluded back pay awards to undocumented workers, even though they might be victims of unfair labor practices, because the workers were never legally authorized to work in the United States [Hoffman Plastic Compounds, Inc. v. NLRB 122 S. Ct. 1275 (2002)].

On July 19, 2002, the National Labor Relations Board (NLRB) released a memorandum from the Office of the General Counsel, which sets forth guidance as to procedures and remedies concerning employees who may be undocumented aliens in light of the Supreme Court's decision. The memorandum notes that the decision has left intact several basic principles as set forth in prior court and NLRB decisions, and that the Supreme Court decision reaffirmed the Court's prior holding that undocumented aliens are employees under the National Labor Relations Act (NLRA), and thereby enjoy protections from unfair labor practices.

The memorandum advises that while conditional reinstatement remains appropriate to remedy the unlawful discharge of undocumented employees whom an employer knowingly hires, where a respondent as in Hoffman, established that it would not have hired or retained the employee, had it known of his undocumented status, reinstatement is not appropriate.

Conversely, the memorandum asserts that even though Supreme Court decision was limited to precluding back pay for employees, where the employer did not have knowledge of the employee's immigration status, back pay is also inappropriate where the employer knew of the employee's immigration status.

Additionally, the memorandum contends that as the Supreme Court did not preclude back pay for undocumented workers for work previously performed under unlawfully imposed terms and conditions, but rather precluded back pay for "work not performed," that back pay in situations such as a unilateral change of pay or benefits is appropriate.

The author and proponents argue that the Hoffman decision has the potential effect of undercutting state remedies for illegal labor practices, and that this measure is needed to keep our state's labor and civil rights' remedies intact, and enhance compliance. Proponents, contend that the Supreme Court's recent decision in Hoffman promotes and rewards the unscrupulous practice of hiring and then retaliating against undocumented workers. They also assert that by allowing employers to use undocumented workers as strikebreakers, the Supreme Court has undermined the rights of all union members. Additionally, employers who fear unionized workers who are fighting for better wages and working conditions now have an added incentive to hire undocumented workers, knowing that they will not have to compensate the workers they fire for otherwise unlawful union activities.

Analysis Prepared by: Liberty Sanchez / L. & E. / (916) 319-2091

FN: 0006729

Filed 8/9/11

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

VICENTE SALAS, Plaintiff and Appellant, v. SIERRA CHEMICAL CO., Defendant and Respondent.	C064627 (Super. Ct. No. CV033425)

APPEAL from a judgment of the Superior Court of San Joaquin County, Elizabeth Humphreys, Judge. Affirmed.

Rancaño & Rancaño and David C. Rancaño; Stevens Law and Margaret P. Stevens for Plaintiff and Appellant.

Freeman D'Aiuto Pierce Gurev Keeling & Wolf, Arnold J. Wolf and Thomas H. Keeling for Defendant and Respondent.

Plaintiff Vicente Salas appeals from a summary judgment entered in favor of defendant Sierra Chemical Co. (Sierra Chemical). We affirm the judgment.

BACKGROUND

Sierra Chemical manufactures, packages, and distributes chemicals primarily used for water treatment. Demand for Sierra Chemical's products rises in the spring and summer due to the increased use of swimming pools, and declines during the fall and winter. Because of this, the company employs a number of seasonal production line workers.

In May 2003, Sierra Chemical hired Salas to work on its production line, filling containers with various chemicals. Salas provided the company with a resident alien card and a Social Security card. After Salas signed an Employment Eligibility Verification Form (I-9), on which he wrote the Social Security number, Sierra Chemical's general manager used the resident alien card as verification of Salas's identity and eligibility to work in the United States. Salas also signed an Employee's Withholding Allowance Certificate (W-4), which included the same Social Security number. Salas also printed this number on his employment application and signed the application verifying the truth of the information contained therein and acknowledging that any false statements would be grounds for dismissal.

In October 2003, Salas was laid off as part of Sierra Chemical's annual reduction in production line staff. He was recalled to work in March 2004, laid off in December 2004, and again recalled to work in March 2005. When Salas was rehired in 2004, he provided Sierra Chemical with the same resident alien card and Social Security card used to secure his initial

employment. He also filled out and signed an I-9 and W-4, both of which included the same Social Security number. By December 2005, Salas had accrued enough seniority to avoid being laid off that year.

In March 2006, Salas injured his back while stacking crates at the last stage of the production line. He reported the injury to Leo Huizar, the production manager, and went to Dameron Hospital Occupational Health Services (Dameron Hospital) for treatment. The next day, Salas returned to work with the following restrictions: "1) no lifting over 10-15 pounds, 2) no prolonged sitting, 3) no prolonged standing or walking, and 4) limited bending, twisting or stooping at the waist." Sierra Chemical accommodated these restrictions by allowing Salas to sweep the work area, rinse empty containers, and perform other production line duties that did not require lifting crates. When Salas provided Huizar with a doctor's release in June 2006, he was returned to full duty.

In August 2006, Salas again injured his back while stacking crates at the end of the production line. He returned to Dameron Hospital for treatment and was placed on the same work restrictions. Following this injury, Salas brought a workers' compensation claim against Sierra Chemical and its insurance carrier, State Compensation Insurance Fund. In December 2006, Salas was again laid off as part of Sierra Chemical's annual reduction in production line staff.

In May 2007, Salas received a letter informing him that Sierra Chemical was recalling employees who were laid off the

previous year. The letter instructed Salas to contact Huizar to "make arrangements to return to work" and also stated: "Bring a copy of your doctor's release stating that you have been released to return to full duty." According to Huizar, Salas contacted him after receiving this letter and stated that he could not return to work because he had not received a medical release, but that he expected to receive such a release following his doctor's appointment in June. Huizar agreed to hold the job open until Salas received the release, but never heard back from Salas.

However, according to Salas, Huizar contacted him in March 2007. When Salas said that he wanted to return to work, Huizar asked whether he was "100% recovered" from his back injury. Salas informed Huizar that he was "not completely healed," to which Huizar responded that allowing him to return to work would violate Sierra Chemical's policies. After receiving the recall letter in May 2007, Salas again talked to Huizar, who said that "he wanted [Salas] to work with them but only if [he] was fine, a hundred percent well with [his] back. If not, then [he] should not show up to work." Salas did not return to work.

The Litigation

Salas sued Sierra Chemical, alleging disability discrimination in violation of the Fair Employment and Housing Act (FEHA) and denial of employment in violation of public policy. Specifically, Salas alleged that Sierra Chemical failed to make reasonable accommodation for his disability and failed to engage in an interactive process to determine such a

reasonable accommodation. (Gov. Code, § 12940, subds. (a), (m), (n).) Salas also alleged that Sierra Chemical denied him employment to punish him for filing a claim for workers' compensation benefits, and to intimidate and deter him and others from bringing such a claim.

Following an in limine motion filed by Salas in which he advised the trial court that he would assert his Fifth Amendment right against self-incrimination in response to any questions concerning his immigration status, Sierra Chemical discovered that the Social Security number used by Salas to secure employment with the company belonged to a man in North Carolina named Kelley R. Tenney.

The Summary Judgment Motion

Sierra Chemical moved for summary judgment claiming the doctrine of after-acquired evidence barred Salas's causes of action as a matter of law. This was so, argued Sierra Chemical, because there was no genuine factual dispute concerning (1) Salas's use of a counterfeit Social Security card with another person's Social Security number in order to secure employment with the company, and (2) Sierra Chemical would not have hired or recalled Salas had it known that he was using a counterfeit Social Security card with another person's Social Security number. Sierra Chemical also claimed the doctrine of unclean hands barred Salas's causes of action because the misrepresentation of his eligibility to work in the United States and fraudulent use of another person's Social Security

number amounted to inequitable conduct that directly related to his causes of action.[1]

In support of the motion, Sierra Chemical provided a declaration from Tenney stating that the Social Security number Salas used to secure employment with the company was Tenney's Social Security number and declaring that Tenney neither knew Salas nor gave Salas or anyone else permission to use his Social Security number. Sierra Chemical also provided a declaration from the president of the company, Stanley Kinder, stating that Sierra Chemical had "a long-standing policy that precludes [the] hiring of any job applicant who is prohibited by federal immigration law from working in the United States. That policy also precludes the hiring of any applicant who submits false information or false documents in an effort to prove his or her

---

[1] Sierra Chemical also claimed the doctrine of unclean hands barred Salas's causes of action for another reason. Despite the undisputed fact that Salas's doctor had released him to regular work duty in January 2007, Salas misrepresented to Huizar that he had not been released to full duty. This misrepresentation, argued Sierra Chemical, directly related to Salas's claim of failure to accommodate because there would have been no need to provide a reasonable accommodation or engage in an interactive process had Salas told the truth about his release to full duty. Sierra Chemical also asserted that this misrepresentation estopped Salas from pursuing his claims, that he suffered no damages because he was ineligible to work in the United States, and that his employment denial claim was not a legally cognizable cause of action. Because Sierra Chemical defends the trial court's grant of summary judgment solely on "the defenses of unclean hands and after-acquired evidence arising from Salas's use of a Social Security number which had been issued to someone else in order to obtain a job with Sierra Chemical," we do not further address these additional arguments. Nor do we address Salas's responses to them.

eligibility to work in the United States." Kinder further stated: "If it is learned that a Sierra Chemical employee submitted false information and/or false documents to establish his or her eligibility to work in the United States, that employee would be immediately terminated."

Salas opposed the motion, arguing that whether or not he misrepresented his Social Security number to Sierra Chemical is irrelevant because the company "may be held liable for disability discrimination under FEHA, regardless of [his] immigration status." Salas also argued that Tenney's statement that the Social Security number in question belonged to him was "a mere conclusion, unsupported by any foundation and completely uncorroborated," and was therefore insufficient to establish that the Social Security Administration assigned the number to Tenney as opposed to Salas, or that the number was not mistakenly assigned to both Tenney and Salas. Salas further argued that, even if Tenney's declaration is "taken at face value," because Salas swore under penalty of perjury when he filled out his employment paperwork that the Social Security number belonged to him, this created a triable issue of material fact. Finally, Salas argued that Sierra Chemical provided no evidence that he submitted a counterfeit Social Security card to secure employment with the company.

In opposition to the motion, Salas submitted his own declaration. This declaration did not state that the Social Security number Salas used to secure employment with Sierra Chemical, and claimed by Tenney to belong to him, actually

belonged to Salas. Instead, Salas declared: "In late 2004 or early 2005, I received a letter from the Social Security Administration, stating my name and Social Security number do not match their records. During the same period, several of my coworkers . . . at Sierra Chemical also received letters from the Social Security Administration. We talked among ourselves at work, and at an informal meeting we compared the letters we received. We all received identical form letters. A few days later, [Huizar] spoke to us as a group and stated we need not worry about any discrepancies with Social Security numbers. [Huizar] said [Kinder] was happy with our work and that as long as he remained happy, he would not fire us over a discrepancy with a Social Security number." Salas also stated: "During the three years I worked for Sierra Chemical, I personally knew several immigrants working at Sierra Chemical, some of whom admitted to being undocumented workers. I never heard of Sierra Chemical discharging any person due to a discrepancy with a Social Security number, or for any other immigration-related issue."

The Trial Court's Ruling

The trial court initially denied the motion, finding the following to be triable issues of material fact: (1) "Did the Social Security Administration err in issuing the same number to two separate people, or did [Salas] submit a false Social Security card as well as a false Alien Registration card to [Sierra Chemical]?"; (2) "Did [Salas] have the right to work in the United States of America based upon his Alien Registration

card?"; (3) "Was [Salas's] Alien Registration card valid?"; and (4) "Did [Salas] apprise [Sierra Chemical's] agent of the notice he claims he received from the Social Security Administration regarding his name and number not matching and, if so, did [Sierra Chemical] take any action or just ignore this information?"

Sierra Chemical filed a petition for writ of mandate and prohibition in this court seeking reversal of the trial court's decision denying the summary judgment motion. We issued an alternative writ directing the trial court to either grant the relief requested or show cause why the relief requested should not be granted. Thereafter, the trial court vacated its order denying the summary judgment motion and entered judgment in favor of Sierra Chemical. Salas appeals.

DISCUSSION

I

Summary Judgment Principles

We begin by summarizing several principles that govern the grant and review of summary judgment motions under section 437c of the Code of Civil Procedure.

"A defendant's motion for summary judgment should be granted if no triable issue exists as to any material fact and the defendant is entitled to a judgment as a matter of law. [Citations.] The burden of persuasion remains with the party moving for summary judgment. [Citation.]" (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1002-1003 (*Kahn*); Code Civ. Proc., § 437c, subd. (c).) Thus, a defendant moving

for summary judgment "bears the burden of persuasion that 'one or more elements of' the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense' thereto. [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, (*Aguilar*); Code Civ. Proc., § 437c, subd. (o)(2).) Such a defendant also "bears the initial burden of production to make a prima facie showing that no triable issue of material fact exists. Once the initial burden of production is met, the burden shifts to [plaintiff] to demonstrate the existence of a triable issue of material fact." (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1250, citing *Aguilar, supra*, 25 Cal.4th at pp. 850-851.)

On appeal from the entry of summary judgment, "[w]e review the record and the determination of the trial court de novo." (*Kahn, supra*, 31 Cal.4th at p. 1003.) "While we must liberally construe plaintiff's showing and resolve any doubts about the propriety of a summary judgment in plaintiff's favor, plaintiff's evidence remains subject to careful scrutiny. [Citation.] We can find a triable issue of material fact 'if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.' [Citation.] Moreover, plaintiff's subjective beliefs in an employment discrimination case do not create a genuine issue of fact; nor do uncorroborated and self-serving declarations. [Citations.]" (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433; see also *Sangster v. Paetkau* (1998) 68

Cal.App.4th 151, 163 ["responsive evidence that gives rise to no more than mere speculation cannot be regarded as substantial, and is insufficient to establish a triable issue of material fact"].)

II

After-Acquired-Evidence

The after-acquired-evidence doctrine operates as a complete or partial defense where, after an allegedly discriminatory termination or refusal to hire, the employer discovers employee or applicant wrongdoing that would have resulted in the challenged termination or refusal to hire. (*Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 842 (*Murillo*); *Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620, 632 (*Camp*); *Shattuck v. Kinetic Concepts, Inc.* (5th Cir. 1995) 49 F.3d 1106, 1108 ["the pertinent inquiry, except in refusal-to-hire cases, is whether the employee would have been fired upon discovery of the wrongdoing, not whether he would have been hired in the first instance"].)

This is a refusal to hire case. Salas claims that Sierra Chemical refused to hire him following his seasonal lay off as retribution for his previous workers' compensation claim. Salas also claims that Sierra Chemical discriminated against him because of his back injury, and rather than provide a reasonable accommodation for this disability or engage in an interactive process to determine whether such an accommodation could be reached, the company instead refused to allow him to return to work. Sierra Chemical asserts that the after-acquired-evidence

doctrine provides a complete defense to these claims because (1) Salas used a Social Security number that belonged to another person in order to secure his employment with the company, and (2) Sierra Chemical would not have hired Salas had it known of this misrepresentation. Thus, in determining whether the trial court properly granted summary judgment for Sierra Chemical, the pertinent inquiry is whether there exist any triable issues of material fact concerning these points, and if not, whether the doctrine provides a complete or partial defense.

In *Camp, supra*, 35 Cal.App.4th 620, the Camps, husband and wife, sued their former employer for wrongful termination. (*Id.* at pp. 627-628.) Kendra Camp claimed to have been discharged for informing management about insider trading. Ronald Camp claimed to have been fired solely because he was married to Kendra. (*Id.* at pp. 631-632.) During discovery, the former employer, Jeffer Mangels, discovered that the Camps had been convicted of a felony, which they fraudulently omitted from their employment applications. Because Jeffer Mangels was a contractor for the Resolution Trust Company (RTC), an agency of the federal government with responsibility for the sale and liquidation of savings and loan associations, federal law required the company to certify that none of its employees had ever been convicted of a felony. (*Id.* at pp. 626-628.) Jeffer Mangels moved for summary judgment based on the after-acquired-evidence doctrine and prevailed. (*Id.* at p. 632.)

The Court of Appeal affirmed, holding that the doctrine barred the Camps' wrongful termination claims. (*Camp, supra*, 35

Cal.App.4th at p. 638.) While acknowledging that the doctrine does not always operate as a complete defense to a wrongful termination claim (citing *Cooper v. Rykoff-Sexton, Inc.* (1994) 24 Cal.App.4th 614 [age discrimination case in which plaintiff's employment application misrepresented employment history and failed to disclose that two previous employers had fired him] and *McKennon v. Nashville Banner Publ. Co.* (1995) 513 U.S. 352 [130 L.Ed.2d 852] [age discrimination case in which plaintiff removed and copied several confidential documents concerning company's financial condition]), the court explained that "the nature of the Camps' misrepresentations and their potential detrimental impact on Jeffer Mangels distinguish this case from prior decisions." (*Id.* at pp. 635-636.)

Unlike cases where an employer's "self-imposed" policies are violated by applicant misrepresentations or employee misconduct, "the Camps misrepresented a job qualification imposed by the federal government, such that they were not *lawfully* qualified for the job." (*Camp, supra,* 35 Cal.App.4th at p. 636.) The court also explained that "the Camps' misrepresentations placed Jeffer Mangels in the risky position of certifying to the federal government -- inaccurately -- that all of the firm's employees met the RTC's qualifications. The Camps thus put Jeffer Mangels not only in jeopardy of losing its contract with the RTC but also of being accused of making false statements itself." (*Id.* at p. 637.)

The court further explained that "the use of after-acquired evidence must 'take due account of the lawful prerogatives of

the employer in the usual course of its business and the corresponding equities that it has arising from the employee's wrongdoing.' [Citation.]" (*Camp, supra*, 35 Cal.App.4th at pp. 637-638.) And "where an employee who is disqualified from employment by government-imposed requirements nevertheless obtains a job by misrepresenting the pertinent qualifications[,] . . . the employee should have no recourse for an alleged wrongful termination of employment. As stated by another court, '[t]he present case is akin to the hypothetical wherein a company doctor is fired [for improper reasons] and the company, in defending a civil rights action, thereafter discovers that the discharged employee was not a "doctor." In our view, the masquerading doctor would be entitled to no relief . . . .' [Citation.]" (*Id.* at p. 638.)

In *Murillo, supra*, 65 Cal.App.4th 833, Murillo sued her former employer, Rite Stuff Foods, for wrongful termination, breach of contract and the covenant of good faith and fair dealing, discriminatory sexual harassment, and several tort claims tied to the harassment. (*Id.* at pp. 838-839.) The sexual harassment claim was based on the conduct of Murillo's supervisor, Atilano, who allegedly touched her inappropriately and made repeated sexual propositions throughout her employment with the company. During discovery, Murillo admitted to being an undocumented alien who had used counterfeit resident alien and Social Security cards to obtain employment. (*Id.* at p. 839.) Defendant moved for summary judgment, relying on Murillo's admission and a declaration from the president of the

company stating that Murillo would have been immediately fired had her undocumented status been known. (*Ibid.*) The trial court granted the motion. (*Id.* at p. 840.)

The Court of Appeal reversed. With respect to the wrongful termination and contract claims, the court explained that Murillo raised a genuine factual question as to whether defendant would have fired her immediately upon learning of her undocumented status. (*Murillo, supra*, 65 Cal.App.4th at p. 846.) This question was raised by evidence that Atilano knew Murillo was an undocumented alien and told her how to procure false documents, defendant's general manager knew the company hired undocumented workers and took no steps to discharge them, and the president of the company once stated that "most of his employees were undocumented." (*Id.* at pp. 840, 846.) Thus, defendant "failed to establish as a matter of law that, as a matter of settled company policy, it would have fired plaintiff immediately upon learning of her undocumented status." (*Id.* at p. 847.) However, as we will explain more fully in the next section of this opinion, the court also held that the doctrine of unclean hands barred Murillo's wrongful termination and contract claims. (*Id.* at p. 845.)

With respect to the discrimination and tort claims based on the sexual harassment, the court found "no sound reason" the after-acquired-evidence doctrine should bar these claims. (*Murillo, supra*, 65 Cal.App.4th at p. 847.) As the court explained, "the plaintiff need not resign or be discharged to have a cause of action for sexual harassment. Plaintiff

therefore need not hitch her sexual harassment wagon to the wrongful discharge star." (*Id.* at p. 848.) While plaintiff "cannot complain of having lost her employment, in that she was never entitled to it in the first place," during the period of employment she was "entitled to all the protections available under employment law." (*Id.* at pp. 848-849.) The court concluded: "Where, as here, the discriminatory conduct was pervasive during the term of employment, therefore, it would not be sound public policy to bar recovery for injuries suffered while employed. In applying the after-acquired-evidence doctrine, the equities between employer and employee can be balanced by barring all portions of the employment discrimination claim tied to the employee's discharge." (*Id.* at p. 850.)

In this case, unlike *Murillo*, there is no evidence that Salas used a counterfeit resident alien card to obtain employment. Thus, we cannot rely solely on the federal requirement, found in the Immigration Reform and Control Act of 1986 (IRCA), that employers refrain from knowingly hiring or continuing to employ unauthorized aliens. (8 U.S.C. § 1324a, subds. (a), (b) [valid resident alien card sufficient to establish both employment authorization and identity].) However, IRCA also "prohibits aliens from using or attempting to use '*any* forged, counterfeit, altered, or falsely made document' or '*any* document lawfully issued to or with respect to a person other than the possessor' for purposes of obtaining employment in the United States." (*Hoffman Plastic Compounds, Inc. v. NLRB*

(2002) 535 U.S. 137, 148 [152 L.Ed.2d 271, 282] (*Hoffman*) italics added; 8 U.S.C. § 1324c, subd. (a).) Federal law also "requires that employers gather and report the [Social Security numbers] of their employees to aid enforcement of . . . immigration laws." (*Cassano v. Carb* (2d Cir. 2006) 436 F.3d 74, 75; 8 C.F.R. § 274a.2, subds. (a), (b)(1)(i) [employer must ensure that employee completes section 1 of I-9 form, which requires employee to verify his or her Social Security number].)

Additionally, federal law requires all employers "to withhold certain income taxes and Social Security taxes and file a report with the Internal Revenue Service as to each individual employee. These reports require identification of the employee by Social Security number." (*Sutton v. Providence St. Joseph Med. Ctr.* (9th Cir. 1999) 192 F.3d 826, 831; *Seaworth v. Pearson* (8th Cir. 2000) 203 F.3d 1056, 1057; 33A Am.Jur.2d (2009) Federal Taxation, ¶ 9110, p. 488 [employers must file quarterly employment tax returns with Internal Revenue Service and annual information returns (Form W-2) with Social Security Administration]; 26 U.S.C. § 6109, subds. (a), (d) [employer making information return must include Social Security number of person or persons with respect to whom information is being furnished].) Employers who file inaccurate returns are subject to penalties. (26 U.S.C. § 6721.)

Here, Sierra Chemical produced evidence, in the form of Tenney's sworn statement, that the Social Security number Salas used to obtain employment belonged to Tenney. Sierra Chemical also provided a declaration from Kinder stating that Sierra

Chemical had "a long-standing policy" that "precludes the hiring of any applicant who submits false information or false documents in an effort to prove his or her eligibility to work in the United States."

These facts, if not genuinely disputed by Salas, would entitle Sierra Chemical to judgment as a matter of law based on the complete defense of the after-acquired-evidence doctrine. Like *Camp*, and unlike the cases it distinguished, Salas misrepresented a job qualification imposed by the federal government, i.e., possessing a valid Social Security number that does not belong to someone else, such that he was not lawfully qualified for the job. Further, Salas placed Sierra Chemical in the position of submitting a perjurious I-9 form and filing inaccurate returns with the Internal Revenue Service and the Social Security Administration. In these circumstances, Salas should have no recourse for an allegedly wrongful failure to hire.

Moreover, unlike the sexual harassment claim in *Murillo, supra,* 65 Cal.App.4th 833, Salas's discrimination claims are tied to the failure to hire. As already indicated, Salas claimed that Sierra Chemical discriminated against him because of his back injury, and rather than provide a reasonable accommodation for this disability or engage in an interactive process to determine whether such an accommodation could be reached, the company instead refused to hire him. Unlike *Murillo*, this is not a case of pervasive discriminatory conduct that caused injuries during the term of employment. Instead,

much like the husband's discrimination claim in *Camp* was tied to the wrongful discharge, Salas's discrimination claims are tied to the failure to hire and would also be barred.

Salas claims that he raised a triable issue of fact with respect to whether the Social Security number he used belonged to him or Tenney. We disagree. All Salas had to do to raise such a factual issue was submit a declaration stating that the number belonged to him. But instead of doing this, Salas stated in his declaration that he received a letter from the Social Security Administration informing him that the number he was using did not match their records. Thus, Salas's own declaration corroborates Tenney's statement that the number in question belonged to Tenney.[2] And while it is possible that the Social Security Administration mistakenly gave the same number to two people, such speculation is insufficient to establish a triable issue of material fact. (See *Sangster v. Paetkau*,

---

[2] Salas also claims the trial court erred by admitting Tenney's statement that the Social Security number in question belonged to him because "[h]is testimony fails to establish that the Social Security Administration ever assigned him this number, or that he has used this number for any purpose (including for his taxes or employment), or for how long he has used this number." He also complains that Tenney did not attach to his declaration a copy of his Social Security card or another document showing that he has used the number. The only legal authority cited in support of this argument is Evidence Code section 702, requiring a witness to have personal knowledge of the matter concerning which he or she testifies. We conclude that a witness has personal knowledge of his or her Social Security number, such that corroborating documentation is not required in order to make such a statement admissible.

supra, 68 Cal.App.4th at p. 163.) Nor does the fact that Salas signed W-4 and I-9 forms containing the number create a triable issue of material fact. The question is not whether Salas claimed the number to be his when he filled out the forms. He clearly did. The question is whether the number actually belonged to him. Sierra Chemical submitted evidence that the number did not belong to Salas. And while Salas could have disputed this evidence with evidence of his own, he chose not to do so.

Salas also claims that he raised a triable issue of fact with respect to Sierra Chemical's policy of refusing to hire applicants who submit a false Social Security number. We are not persuaded. Unlike *Murillo, supra* 65 Cal.App.4th 833, where plaintiff submitted direct evidence that the company knowingly hired undocumented aliens and took no steps to discharge them, Salas submitted mere speculation. According to his declaration, he and several other employees had an informal meeting with Huizar to discuss the letters they received from the Social Security Administration. Huizar told the employees that Kinder "was happy with [their] work and that as long as he remained happy, he would not fire [them] over a discrepancy with a Social Security number." In order to find a triable issue of fact, we would have to draw the inference that Sierra Chemical did not have a settled policy of refusing to hire an applicant who submits a *false* Social Security number from the fact that Huizar told Salas that he would not be fired over a *discrepancy* with a Social Security number. However, as Salas himself observed in

his opposition to the summary judgment motion, a discrepancy with a Social Security number could be caused by typographical errors, unreported name changes, or inaccurate or incomplete records. Thus, the fact that Sierra Chemical would not fire him over a discrepancy with a Social Security number is not inconsistent with Kinder's declaration that Sierra Chemical had a settled policy of refusing to hire applicants who submit a false Social Security number.[3]

Nor does Salas create a triable issue of fact by stating that he "personally knew several immigrants working at Sierra Chemical, some of whom admitted to being undocumented workers," and "never heard of Sierra Chemical discharging any person due to a discrepancy with a Social Security number, or for any other immigration-related issue." The fact that Salas knew of undocumented aliens working at Sierra Chemical does not establish that Sierra Chemical knew that these employees were undocumented. And the fact that Salas never heard of an employee being fired for these reasons does not establish that the company did not have a settled policy of refusing to hire applicants who submit a false Social Security number.

Because Salas's claims are barred by the doctrine of after-acquired-evidence, the trial court properly granted summary judgment in favor of Sierra Chemical.

---

[3] Because we have concluded that Huizar's statements do not create a triable issue of fact, we need not address whether, as Sierra Chemical argues, the trial court erred by admitting these statements over hearsay and foundation objections.

III

Unclean Hands

The unclean hands doctrine "demands that a plaintiff act fairly in the matter for which he seeks a remedy. He must come into court with clean hands, and keep them clean, or he will be denied relief, regardless of the merits of his claim. [Citations.]" (*Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 978.) This doctrine "protects judicial integrity and promotes justice. It protects judicial integrity because allowing a plaintiff with unclean hands to recover in an action creates doubts as to the justice provided by the judicial system. . . . The doctrine promotes justice by making a plaintiff answer for his own misconduct in the action. It prevents 'a wrongdoer from enjoying the fruits of his transgression.' [Citations.]" (*Id.* at pp. 978-979.)

"The doctrine of unclean hands requires unconscionable, bad faith, or inequitable conduct by the plaintiff in connection with the matter in controversy. [Citations.] Unclean hands applies when it would be inequitable to provide the plaintiff any relief, and provides a complete defense to both legal and equitable causes of action. [Citations.] 'Whether the defense applies in particular circumstances depends on the analogous case law, the nature of the misconduct, and the relationship of the misconduct to the claimed injuries.' [Citation.]" (*Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 56; *California School Employees Assn., Tustin Chapter*

No. 450 v. Tustin Unified School Dist. (2007) 148 Cal.App.4th 510, 523.)

In both *Murillo* and *Camp*, the Court of Appeal held that, aside from the doctrine of after-acquired-evidence, plaintiffs' wrongful termination claims were barred by the doctrine of unclean hands. (*Murillo, supra*, 65 Cal.App.4th at pp. 844-845; *Camp, supra*, 35 Cal.App.4th at pp. 638-639.) As the *Camp* court explained: "[T]he Camps' misrepresentations about their felony convictions relate directly to their wrongful termination claims. Since the Camps were not lawfully qualified for their jobs, they cannot be heard to complain that they improperly lost them. Given the nature of the misrepresentations, their potential damage to Jeffer Mangels, and the fact that the Camps were disqualified from employment by means of governmental requirements, the public policies of the state are adequately served by barring the Camps' claims and allowing them, if they so desire, to report Jeffer Mangels's alleged wrongdoing to the appropriate authorities." (*Camp, supra*, 35 Cal.App.4th at p. 639.) In *Murillo*, it was undisputed that plaintiff obtained false resident alien and Social Security cards and used them to obtain employment with Rite Stuff Foods. The court held that the unclean hands doctrine barred plaintiff's wrongful discharge and contractual claims because "[p]laintiff's misrepresentations went to the heart of the employment relationship and related directly to her wrongful discharge and contractual claims." (*Murillo, supra*, 65 Cal.App.4th at p. 845.)

Similarly, here, Salas's use of another person's Social Security number to obtain employment with Sierra Chemical went to the heart of the employment relationship and related directly to his claims that Sierra Chemical wrongfully failed to hire him following his seasonal lay off and discriminated against him by failing to provide a reasonable accommodation for his back injury. Because Salas was not lawfully qualified for the job, he cannot be heard to complain that he was not hired. This is so even though he alleges that one reason for the failure to hire was Sierra Chemical's unwillingness to accommodate his disability.

In light of the nature of the misrepresentation, the fact that it exposed Sierra Chemical to penalties for submitting false statements to several federal agencies, and the fact that Salas was disqualified from employment by means of governmental requirements, we conclude that Salas's claims are also barred by the doctrine of unclean hands.

IV

Senate Bill No. 1818

Nevertheless, Salas claims that Senate Bill No. 1818 (SB 1818) precludes application of the after-acquired-evidence and unclean hands doctrines in this case. We disagree.

In *Hoffman, supra*, 535 U.S. 137 [152 L.Ed.2d 271], the United States Supreme Court held that the policies underlying IRCA prohibited the National Labor Relations Board (NLRB) from awarding backpay to illegal immigrants who, in violation of the National Labor Relations Act, were terminated because of their

participation in the organization of a union. (*Id.* at pp. 140-141, 148-152.) Declining to permit the NLRB to "award backpay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud," the high court explained: "Congress has expressly made it criminally punishable for an alien to obtain employment with false documents. There is no reason to think that Congress nonetheless intended to permit backpay where but for an employer's unfair labor practices, an alien-employee would have remained in the United States illegally, and continued to work illegally, all the while successfully evading apprehension by immigration authorities." (*Id.* at p. 149.)

Shortly after *Hoffman* was decided, our Legislature enacted SB 1818, which added four identical provisions to California's statutes: "The Legislature finds and declares the following: [¶] (a) All protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state. [¶] (b) For purposes of enforcing state labor, employment, civil rights and employee housing laws, a person's immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person's immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that the

inquiry is necessary in order to comply with federal immigration law. [¶] (c) The provisions of this section are declaratory of existing law. [¶] (d) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application." (Stats. 2002, ch. 1071, § 1, pp. 6913-6915; Lab. Code, § 1171.5; Civ. Code, § 3339; Gov. Code, § 7285; Health & Saf. Code, § 24000.)

Salas argues that because *Hoffman, supra,* 535 U.S. 137, precludes the NLRB from awarding backpay to illegal immigrants, and because SB 1818 was enacted to "limit the potential effects of [this decision] on the state's labor and civil rights laws . . . ." (Sen. Com. on Labor and Industrial Relations, Analysis of SB 1818 (2001-2002 Reg. Sess.) as amended May 9, 2002, p. 1), the enactment must allow him to recover backpay for the allegedly discriminatory failure to hire regardless of whether the after-acquired-evidence or unclean hands doctrines would otherwise preclude him from bringing claims tied to the failure to hire. We are not persuaded.

Issues of statutory interpretation are questions of law subject to de novo review. (*Coburn v. Sievert* (2005) 133 Cal.App.4th 1483, 1492.) "'When construing a statute, we must "ascertain the intent of the Legislature so as to effectuate the purpose of the law."' [Citation.] 'In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according

significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose.' [Citation.] At the same time, 'we do not consider . . . statutory language in isolation.' [Citation.] Instead, we 'examine the entire substance of the statute in order to determine the scope and purpose of the provision, construing its words in context and harmonizing its various parts.' [Citation.] Moreover, we '"read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.'"'" (*State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1043; *San Leandro Teachers Assn. v. Governing Bd. of San Leandro Unified School Dist.* (2009) 46 Cal.4th 822, 831.)

Read together, the provisions of SB 1818 make explicit California's preexisting "public policy with regard to the irrelevance of immigration status in enforcement of state labor, employment, civil rights, and employee housing laws. Thus, if an employer hires an undocumented worker, the employer will also bear the burden of complying with this state's wage, hour and workers' compensation laws." (*Hernandez v. Paicus* (2003) 109 Cal.App.4th 452, 460, disapproved on another ground in *People v. Freeman* (2010) 47 Cal.4th 993.) However, while SB 1818 provides that undocumented workers are entitled to "[a]ll protections, rights, and remedies *available under state law*," the enactment does not purport to enlarge the rights of these workers, instead declaring that its provisions are "*declaratory of existing law.*" (Stats. 2002, ch. 1071, pp. 6913-6915, italics added.)

Existing law precluded an employee who "misrepresented a job qualification imposed by the federal government," such that he or she was "not *lawfully* qualified for the job," from maintaining a claim for wrongful termination or failure to hire. (*Camp*, *supra*, 35 Cal.App.4th at p. 636; *Murillo*, *supra*, 65 Cal.App.4th at p. 847; see also *Shattuck v. Kinetic Concepts, Inc.*, *supra*, 49 F.3d at p. 1108.) This rule applies regardless of immigration status. And it does not frustrate the purposes of SB 1818 because it allows undocumented immigrants to bring a wide variety of claims against their employers as long as these claims are not tied to the wrongful discharge or failure to hire. (See *Murillo*, *supra*, 65 Cal.App.4th at p. 848.) Accordingly, at the time SB 1818 was enacted, an undocumented immigrant possessed no right under state law to maintain a claim for an allegedly discriminatory termination or failure to hire when the claim would otherwise be barred by the after-acquired-evidence or unclean hands doctrines.

Salas's reliance on the legislative history is also unpersuasive. The purpose of SB 1818, *as amended May 9, 2002*, was to "limit the potential effects of [the *Hoffman* decision] on the state's labor and civil rights laws by establishing a separate civil penalty against employers that violate the laws." (Sen. Com. on Labor and Industrial Relations, Analysis of SB 1818, *supra*, p. 1.) This civil penalty was to be equal to the amount of a backpay award, and would be available if existing law provided for a backpay remedy and a court or administrative agency determined that the person seeking the

remedy was ineligible because he or she was unauthorized to work under federal immigration laws. (*Id.* at pp. 1-2.) However, this civil penalty was eliminated by subsequent amendments to the bill. (Assem. Floor Analysis, 3d reading analysis of SB 1818 (2001-2002 Reg. Sess.) as amended Aug. 22, 2002.)

We cannot conclude from the fact that the Legislature considered enacting a provision imposing a civil penalty that would have been equal to a backpay award, that by failing to enact such a provision, the Legislature must have intended backpay awards to be available under state law for a wrongful failure to hire regardless of whether plaintiff misrepresented that he was lawfully qualified for the job. Indeed, far from authorizing a backpay award regardless of federal employment requirements, SB 1818 has been held to be consistent with the backpay prohibition of *Hoffman, supra,* 535 U.S. 137, because "[u]nder existing law, backpay is not recoverable by an employee who would not be rehired regardless of any employer misconduct. [Citation.] Thus, where reinstatement is prohibited by federal law, [Labor Code] section 1171.5 would also prohibit backpay, which was the intent of the Legislature in passing [Labor Code] section 1171.5 and related statutes." (*Farmer Brothers Coffee v. Workers' Compensation Appeals Bd.* (2005) 133 Cal.App.4th 533, 541, citing *Rivcom Corp. v. Agricultural Labor Relations Bd.* (1983) 34 Cal.3d 743, 773-774.)

DISPOSITION

The judgment is affirmed. Vicente Salas shall reimburse Sierra Chemical Co. for its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

HOCH, J.

We concur:

RAYE, P. J.

HULL, J.