Case No. S196568

IN THE SUPREME COURT OF CALIFORNIA

VICENTE SALAS,
Petitioner and Appellant

vs.

SIERRA CHEMICAL COMPANY,
Defendant and Respondent

RESPONDENT'S SUPPLEMENTAL REPLY BRIEF

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

California Cases

Other State Cases

Federal Cases

Statutes

I. INTRODUCTION.

Hoffman Plastic Compounds, Inc. v. NLRB (2002) 535 U.S. 137, held that an award of backpay to an undocumented worker for violation of the National Labor Relations Act would conflict with "explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA" and "would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations." (*Id.* at p. 151.)

The wide ranging discussion in Salas' Supplemental Brief artfully dodges what Sierra Chemical suggests is the fundamental question raised by the preemption issue for which the Court requested supplemental briefing: in light of *Hoffman's* holding, how could an award of compensatory damages to an undocumented worker not conflict with and be an obstacle to federal immigration policy?

The heart of Salas' argument is that the Supreme Court wrongly decided *Hoffman*, that the majority erred in disregarding IRCA legislative history which showed Congress' intent to leave

state and federal "workplace protections" in place and in ignoring the negative impact of a denial of "equal remedies" to undocumented workers on IRCA's objective of discouraging illegal immigration. (Salas Supplemental Brief ("SSB") pp. 22-23.)

The argument which Salas presents is really a call to turn *Hoffman* upside down by adopting the reasoning of Justice Breyer's dissent. Salas cites cases which have held that IRCA did not preempt tort remedies and workers' compensation and Fair Labor Standard Act benefits. (SSB, pp. 12-15, fns. 14, 16.) Nothing in the results or discussion in those cases abrogates *Hoffman's* holding that an award of backpay to an undocumented worker for violation of the National Labor Relations Act would conflict with and be an obstacle to IRCA. Absent a meaningful distinction between the award of damages in *Hoffman* and those available to an FEHA plaintiff, which Salas does not make, *Hoffman's* holding is dispositive of the issue whether an award of compensatory damages to an undocumented FEHA plaintiff conflicts with and is an obstacle to IRCA.

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II. ARGUMENT.

A. The Conflict Between An Award of Backpay And Federal Immigration Policy Identified in *Hoffman* Exists In A Claim For Compensatory Damages By An Undocumented FEHA Plaintiff.

Hoffman's holding is based on a conflict which the Court found between an award of backpay to an undocumented employee and federal immigration policy, which has at its core the denial of employment to illegal aliens. (*Hoffman, supra,* 535 U.S. at pp. 147-148.) The Court held that an award conflicted with the policy of denying employment to undocumented workers:

> We find, however, that **awarding backpay to illegal aliens runs counter to policies underlying IRCA**, policies the Board has no authority to enforce or administer. Therefore, as we have consistently held in like circumstances, the award lies beyond the bounds of the Board's remedial discretion.

(*Id.* at pp. 148-149 [Emphasis added].)

Hoffman's analysis is applicable to an award of compensatory damages to an undocumented worker plaintiff in an FEHA action. In addition to damages for backpay, an FEHA plaintiff is potentially entitled to damages for emotional distress and punitive damages.

Surely this constellation of awards presents at least as strong a conflict as an NLRB backpay award to IRCA's "central policy" of "combating the employment of illegal aliens." (*Hoffman*, *supra,* 535 U.S. at pp. 147-148.) The Supreme Court's discussion is clear that there is simply no way to reconcile compensatory damage awards to undocumented workers and IRCA:

> The Board contends that awarding limited backpay to Castro [the undocumented worker] "reasonably accommodates" IRCA, because, in the Board's view, such an award is not "inconsistent" with IRCA. . . . The Board further argues that while IRCA criminalized the misuse of documents, "it did not make violators ineligible for back pay awards or other compensation flowing from employment secured by the misuse of such documents." . . . This latter statement, of course, proves little: The mutiny statute in *Southern S. S. Co.* [(1942) 316 U.S. 31] and the INA in *Sure-Tan* [(1984) 467 U.S. 883] were likewise understandably silent with respect to such things as backpay awards under the NLRA. What matters here, and what sinks both of the Board's claims, is that 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. **Far from "accommodating" IRCA, the Board's position, recognizing employer misconduct but discounting the misconduct of illegal alien employees, subverts it.**

(*Id.* at pp. 149-150 [Emphasis added.] [Footnote omitted].)

Hoffman's finding that a backpay award would be an obstacle to federal immigration law is equally clear:

> Indeed, awarding backpay in a case like this not only trivializes the immigration laws, it also condones and encourages future violations. . . .

(*Id.* at p. 150.) *Hoffman's* obstacle analysis is even more compelling when applied to an award of the additional damages available to an undocumented worker plaintiff in an FEHA action.

B. Salas' Effort To Distinguish And Marginalize *Hoffman* Should Be Rejected.

Salas argues that *Hoffman's* holding was "narrow" and, for a variety of reasons, of limited applicability to the issue here. (SSB, pp. 18-20.) First, he argues that *Hoffman* "affirms" that undocumented workers are covered by the NLRA. This means, the

argument continues, that *Hoffman* "counsels a contrary conclusion" to Sierra Chemical's contention that Salas' use of an invalid Social Security number deprives him of his ability to maintain an FEHA action: "even though Castro [the undocumented Hoffman employee] had tendered false documentation to obtain employment, he still had rights under the NLRA and remedies for their violation." (SSB, p.18.) Sierra Chemical suggests that a more accurate reading of *Hoffman* is that the undocumented worker had no remedy for the employer's NLRA violation. Rather, the remedy existed in the sanctions which the NLRB can impose on the employer. Here the remedy lies in the power of the Fair Employment and Housing Authority to remedy unlawful discrimination. (Government Code sections 12960 *et seq.*, 12965, 12973, and 12974.)

Salas' second argument is that *Hoffman* should be "properly limited to the legal framework from which it arose." (SSB, p. 18.) "More than anything else," the argument continues, the Court's decision hinged on a limitation of the NLRB's "administrative discretion in attempting to interpret IRCA." (SSB, p. 19.) This means, the argument concludes, that "*Hoffman* therefore did not

reach the question whether the *courts* - whose role certainly encompasses weighing and resolving conflicts between arguably competing statutes - would have authority to make a backpay award." (SSB, p. 19 [Emphasis in original].) But *Hoffman* not only reached the question, but also proceeded to "weigh and resolve" the conflict between a compensatory damage award and IRCA.

Salas' third argument is that "*Hoffman's* analysis would necessarily have been different had it been undertaken not in the NLRA context but, instead, in the context of an employment discrimination statute." (SSB, pp. 19-20.) This argument falls into the category of "wishful thinking." As discussed above, *Hoffman's* view of the conflict with and obstacle to IRCA presented by a backpay award is clear. It was also divorced from the decision's impact on potential NLRA remedies:

> As we concluded in *Sure-Tan* [(1984) 467 U.S. 833], "in light of the practical workings of the immigration laws," any "perceived deficiency in the NLRA's existing remedial arsenal," must be

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/ / /

> "addressed by congressional action," not the courts. *Id. at 904.* In light of IRCA, this statement is even truer today.

(*Hoffman, supra,* 535 U.S. at p. 152.)

Salas cites *Rivera v. NIBCO, Inc.* (9th Cir. 2004) 364 F.3d 1057 as supporting the proposition that *Hoffman* is not applicable to Title VII actions. The Court's discussion in *Rivera* arose in the context of its review of a discovery order. Although Judge Reinhardt provided multiple procedural reasons why *Hoffman* did not compel the conclusion that the prohibition of a backpay award in the context of a NLRB proceeding applied also to a title VII action, noticeably absent from the opinion is a substantive analysis why the rationale for *Hoffman's* holding that "[c]ongress has expressly made it criminally punishable for an alien to obtain employment with false documents" and "[t]here is no reason to think that Congress nonetheless intended to permit backpay" (535 U.S. at p. 149) would not apply to a Title VII action. Indeed, there is nothing in *Hoffman* that remotely suggests that Congress intended to permit backpay or other damages to an undocumented Title VII or FEHA plaintiff.

Salas cites a number of cases that have rejected "*Hoffman-*

based preemption challenges" in claims for workers' compensation and FLSA benefits and for common law torts. (SSB, pp. 11-15, fns. 14,16.) Salas cites these cases for their view that preemption of benefits for undocumented aliens would work against federal immigration policy by reducing potential costs to employers and thereby incentivizing them further to hire undocumented employees. This view of preemption's impact of IRCA is the same expressed in *Hoffman's* dissent and rejected by the majority. Salas' citation of opinions that disagree with *Hoffman's* analysis is part and parcel of his argument that the Supreme Court wrongly decided the case.

Farmer Brothers Coffee v. Workers' Compensation Appeals Board (2005) 133 Cal. App.4th 533, directly addresses *Hoffman's* holding that an award of backpay to an undocumented worker conflicts with and is an obstacle to IRCA. In holding that an undocumented worker was entitled to worker's compensation benefits, *Farmer Brothers* stated:

> We conclude that the Workers' Compensation Act, with the addition of section 1171.5 prohibiting reinstatement remedies to undocumented aliens, is not in conflict with the IRCA and comports with

> the reasoning of *Hoffman*, *supra*, 535 U.S. 137, since prohibited remedies necessarily include backpay.

(*Id.* at p.542.)

Abel Verdon Construction v. Rivera (KY 2010) 348 S.W. 3d 749, which held that IRCA did not preempt the application of Kentucky's workers' compensation statute to an undocumented worker, stated:

> *Hoffman* does not support the conclusion that Verdon [the employer] seeks. A federal law preempts a state law implicitly when it is impossible to comply with both of them or when the state law creates an obstacle to accomplishing federal objectives. Unlike the statute at issue in *Hoffman*, Chapter 342 [Kentucky's workers' compensation statute] does not conflict with the objectives of the IRCA, which are to deter employers from hiring unauthorized aliens and to deter aliens from entering the United States illegally in order to obtain employment. **Nor does Chapter 342 permit an unauthorized alien to be compensated due to the termination of an employment that itself is illegal.**

(*Id.* at p. 755 [Emphasis added] [Footnote omitted].)

In *Grocers Supply, Inc. v. Cabello* (Tex.App. 2012) 390 S.W.3d 707, the court held that the IRCA did not preempt Texas

tort law so as to preclude damage awards to undocumented aliens:

> For its preemption argument, Grocers relies predominantly on Hoffman and some federal and state court opinions in which courts have concluded lost wages are barred or otherwise preempted by IRCA. . . . We conclude, based on our analysis, that *Hoffman* does not mandate preemption of the Cabellos' lost wage and earning capacity claims. First, *Hoffman* was not a preemption case. The Supreme Court in that case was addressing the relationship between IRCA and the NLRA, two federal statutes, and an employer's illegal firing of an illegal alien. Federalism concerns were neither at issue nor addressed. . . .
>
> *Hoffman* also was decided on limited grounds. The question before the Supreme Court was whether the NLRB had the discretion to "select and fashion remedies for violations of the NLRA" that were in conflict with "policies underlying IRCA." *Hoffman*, 535 U.S. at 142, 149. . . .
>
> Contrast *Hoffman* with the Cabellos' tort claims and the jury's awards. We are not presented with a question of discretionary authority of a federal agency such as the NLRB to fashion remedies for violation of a federal act--discretion the Supreme Court previously had held to be limited. We are instead presented with the question of federal preemption of the field of common law torts--a field where States are traditionally given great latitude on state

> sovereignty grounds. . . . In *Hoffman*, the Supreme Court emphasized its consistent holdings giving little or no deference to NLRB-fashioned remedies that exceeded the Board's remedial discretion. *Hoffman*, 535 U.S. at 149. The threshold we must apply for determining that IRCA has implicitly preempted Texas common law is far higher than the threshold for determining whether a federal agency acted beyond its remedial discretion. *Hoffman* is not controlling here.

(*Id.* at pp. 720-721.)

Grocers' analysis misses the point. *Hoffman's* holding was based on the relationship between a backpay award for a NLRA violation and IRCA. The Supreme Court's holding that a backpay award conflicted with and was an obstacle to IRCA was the basis for its decision that the NLRB did not have the authority to award backpay to an undocumented worker. The fact that Hoffman was not a "preemption case" does not diminish the force of its conflict analysis.

Balbuena v. IDR Realty LLC (N.Y. 2006) 845 N.E.2d 1246, which held that IRCA did not preempt an award of lost wages for an employer's failure to adhere to workplace safety requirements

stated:

> Aside from the compatibility of federal immigration law and our state Labor Law, plaintiffs here--unlike the alien in *Hoffman* --did not commit a criminal act under IRCA. Whereas the undocumented alien in *Hoffman* criminally provided his employer with fraudulent papers purporting to be proper federal work documentation, there is no allegation in these cases that plaintiffs produced false work documents in violation of IRCA or were even asked by the employers to present the work authorization documents as required by IRCA. Notably, IRCA does not make it a crime to work without documentation. *Hoffman* is dependent on its facts, including the critical point that the alien tendered false documentation that allowed him to work legally in this country (*see Hoffman*, 535 U.S. at 149). This was a clear violation of IRCA. We see no reason to equate the criminal misconduct of the employee in *Hoffman* to the conduct of the plaintiffs here since, in the context of defendants' motions for partial summary judgment, we must presume that it was the employers who violated IRCA by failing to inquire into plaintiffs' immigration status or employment eligibility . . . .

(*Id.* at p. 360.)

In *Asylum Co. v. D.C. Dept. of Employment Services* (D.C. 2010) 10 A.3d 619, the court held that *Hoffman* did not preclude

workers' compensation awards to undocumented aliens:

> In contrast -- and contrary to the Employer's assertion -- the award in issue here is not an award of back pay, but instead is an award of wage-loss benefits. Wage-loss benefits are "predicated upon the loss of wage-earning capacity." . . . Their purpose is to compensate a worker for inability "to earn a living . . . because of a work-related injury or illness." . . . Thus, wage-loss benefits under the Act are not designed to make a worker whole for what he would have earned if he had continued working for his employer during the disability period. . . . Accordingly, unlike the back pay award in *Hoffman*, the award in this case did not conflict with IRCA by requiring the employer to pay "wages that [the undocumented worker] could not lawfully have . . . earned." *Hoffman*, 535 U.S. at 149. For that reason, we agree with courts that have held that *Hoffman* does not preclude awards of workers'-compensation-type wage-loss benefits to undocumented aliens.

(*Id.* at pp. 632-633 [Citations omitted.] [Footnotes omitted].)

III. CONCLUSION.

The conflict between an award of backpay and IRCA identified in *Hoffman* applies to an undocumented FEHA plaintiff's compensatory damages claim. Neither Salas' argument, nor any of

the authority he cites, provides a rationale to exempt an undocumented FEHA plaintiff's compensatory damages claim from *Hoffman's* conclusion regarding IRCA that "[t]here is no reason to think that Congress nonetheless intended to permit backpay." (535 U.S. at p. 149).

Dated: June 11, 2013

Respectfully submitted,

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By _____
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CERTIFICATE OF WORD COUNT

(Calif. Rule of Court 8.204(s)(1))

The test of this brief consists of 3351 words as counted by the word processing program (Word Perfect) that was used to generate this brief.

Dated: June 11, 2013

FREEMAN FIRM

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PROOF OF SERVICE

I hereby certify that I am a citizen of the United States, over the age of eighteen years, and not a party to this action. My business address is 1818 Grand Canal Boulevard, Suite 4, Stockton, California 95207. I served the foregoing document entitled:

RESPONDENT'S SUPPLEMENTAL REPLY BRIEF

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The acts described above were undertaken and completed in San Joaquin County on June 11, 2013.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on June 11, 2013, at Stockton, California.

Angela N. Yess