Case No. S196568

IN THE SUPREME COURT OF CALIFORNIA

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

ANSWER TO 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

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I. INTRODUCTION.

The Petition for Review seeks to transform the application of basic equitable principles to Plaintiff's damage claim into a major assault on workers' rights.

In August 2007, Plaintiff Vicente Salas ("Salas") sued defendant Sierra Chemical Co. ("Sierra Chemical") for disability discrimination. Salas' first Complaint alleged that Sierra Chemical had wrongfully terminated him because he was making a workers' compensation claim and that Sierra Chemical had failed to accommodate his disability. In fact, Sierra Chemical had not terminated Salas and, on the termination date alleged in the Complaint, he was actually working for the company on duty modified to accommodate a back injury which he'd reported suffering on the job. Sixteen months after filing his Complaint, Salas amended to allege that Sierra Chemical had wrongfully denied him employment because of his disability.

Sierra Chemical had hired Salas in May 2003 to work on its production line. In March 2006, Salas reported that he'd injured his back. Sierra Chemical arranged for him to get medical treatment. The following day he was released to return to work on restricted duty which continued until he was released to full duty in June.

In August 2006, he reported a re-injury and was again placed on restricted duty. On December 7, Salas' treating physician returned him to full duty because he failed to appear at a medical appointment. On December 15, Sierra Chemical laid Salas off as part of the company's seasonal reduction of its production line staff required by the falloff in demand for its swimming pool chemicals. On January 4, 2007 Salas saw a second doctor who had been designated as Salas' primary care provider at the request of the Rancano law firm, which Salas had hired two days after the August re-injury. The second doctor declared him fit for full duty the same day.

On January 31, Salas went to work for a company known as RO-Lab American Rubber Co., Inc.

According to Salas, Sierra Chemical foreman Leo Huizar called him on March 1, 2007 to return to work, but said that he "had to be 100% well" before he could come back. On May 1, 2007, Sierra Chemical sent Salas a letter advising that he was being recalled. Again according to Salas, when he responded to the letter, Huizar said that Salas had to be released to full duty before he would be allowed to return to work. In neither conversation did Salas advise Huizar of the work release by the doctor chosen by the Rancano law firm or of the fact that he was employed somewhere else. Nor did he or the Rancano

law firm contact Sierra Chemical to discuss the restrictions he could work under. Instead three months later, while Salas was still employed at RO-Lab American Rubber Co., Rancano filed this action.

Trial was set for April 6, 2009. In December 2008, Salas filed a motion to amend his Complaint to change the allegation that he had been terminated to an allegation that he had been denied employment. Also in December 2008, Sierra Chemical filed a motion for summary judgment/adjudication of Salas' Complaint. On March 11, 2009, the court granted Salas' motion for leave to amend his Complaint and denied Sierra Chemical's motion for summary judgment/adjudication.

Prior to the April 2009 trial date, Salas filed an in limine motion which asserted that Salas would assert his Fifth Amendment rights in response to any question as to his immigration status and sought an order that any such questions be put to him outside of the presence of the jury. Up to this point, Sierra Chemical had no reason to doubt the authenticity of any of the documents which Salas had provided with his employment application. The allegation in Salas' in limine motion led to an investigation which resulted in the company discovering that the Social Security number which Salas had represented as his own belonged to a person in North Carolina named Tenney. Sierra Chemical's second motion

for summary judgment/adjudication followed.

The motion was based on the unclean hands doctrine, the doctrine of after-acquired evidence, and estoppel, because of Salas' use of a Social Security number that belonged to another person in order to obtain employment with Sierra Chemical and his failure to advise the company that he had been released to full duty by a doctor chosen by the Rancano firm prior to the May 2007 recall. The lower court denied the motion, but later, after the Court of Appeal granted an alternative writ, vacated its denial order and granted the motion.

The issue before the Court of Appeal was whether there was any triable issue of material fact regarding the defenses of unclean hands and after-acquired evidence arising from Salas' use of a Social Security number which had been issued to someone else in order to obtain a job with Sierra Chemical.[1] Salas has repeatedly attempted to mischaracterize Sierra Chemical's argument as attacking his standing to maintain this action based on his immigration status. That was not the basis of Sierra Chemical's motion for summary judgment and it is not the basis on which the company argues that Salas is barred from asserting the claim

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[1] Sierra Chemical did not argue before the Court of Appeal that the unclean hands, after-acquired, and estoppel defenses barred Salas' action because of his failure to disclose his prior medical release to full duty.

in his Amended Complaint.

The Court of Appeal held that Salas' claim was barred by the after-acquired evidence and unclean hands doctrines because of Salas' misrepresentation regarding the social security number he submitted. The Court found that Senate Bill No. 1818 ("SB 1818") did not disallow these defenses because law existing at the time of the bill's passage 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.

Salas argues that review should be granted because: (1) the court applied the after-acquired evidence and unclean hands defenses "to defeat the civil rights protections of the Fair Employment and Housing Act ('FEHA') ... , a result squarely at odds with *McKennon v. Nashville Banner Pub. Co.* (1995) 513 U.S. 352"; (2) the court interpreted SB 1818 "in a manner inconsistent with the "statute's plain language and the Legislature's express intent; and (3) the court's decision "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." (Petition for Review ("Petition"), p. 2.)

Each of these arguments is flawed. Salas' assertion that the Court of Appeal's decision "seriously threatens to derail California's civil rights protections" is just one of the many exaggerations with which the Petition seeks review. The court of appeal decisions which Salas attacks here in addition to the one at hand, *Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620 and *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, each discuss *McKennon* and each concludes that the unclean hands doctrine bars a claim based on acts not occurring during employment where the plaintiff's misrepresentation goes to the heart of the employment relationship and relates directly to the wrongful discharge claim.

Salas' contention that the Court of Appeal misinterpreted SB1818 is belied by the analysis in the Opinion. (Opinion, pp. 24 *et seq.*) An unbiased reading of the legislative history and the case law at the time the bill was enacted precluded an employee who misrepresented a federally required job qualification from maintaining a claim for wrongful termination or failure to hire.

The Petition presents an apocalyptic portrait of the summary judgment process throughout California if the Court of Appeal's ruling regarding shifting burdens of proof is allowed to stand. The problem with the argument is that the Court got it right. When Sierra Chemical produced evidence that the social

security number which Salas had represented as belonging to him in fact belonged to another person, the burden shifted to Salas to produce evidence that the number was his. As the Court of Appeal observed, he could have raised a triable issue by simply declaring under penalty of perjury that the number belonged to him. Of note the arguments which the Petition actually presents regarding the Court of Appeal's purported procedural errors do not support the negative systemic consequences which Salas asserts as a ground for review.

II. STATEMENT OF THE CASE.

A. Statement of the Facts.

1. Sierra Chemical's Business.

Sierra Chemical is in the business of manufacturing, repackaging, and distributing chemicals primarily used in the water treatment business including both commercial and residential swimming pools as well as potable and waste water treatment plants. Consumer demand for Sierra Chemical's products increases significantly around spring when the weather gets warmer and then decreases significantly in the late fall or early winter when the weather gets cooler, so that Sierra Chemical decreases its operations as consumer demand decreases. This results in a seasonal reduction in its production line staff through layoffs and, when consumer demand increases, a recall of those who were laid

off. (Appellant's Appendix II ("AA"), Tab 24, p. 389 [Cummings Declaration, ¶¶ 4-5].)

2. Salas' Employment with Sierra Chemical: 2003-2006.

Salas submitted a job application to Sierra Chemical on April 27, 2003. Included in the application was Salas' purported Social Security number. On May 13, he signed INS Form I-9 verifying under penalty of perjury that the information he provided on the form was correct. Included in that information was the same Social Security number he claimed was his. And he attached a copy of a Social Security card that contained the same number. Salas began working for Sierra Chemical on approximately May 14, 2003. (AA I, Tab 16, pp. 119-122; Tab 24, p. 388 [Cummings Declaration, ¶ 9].)

Salas worked on the production line filling containers with Sierra Chemical's products. The production line employees fill different size containers with specific products. There are two bottling lines to fill one gallon bottles, as well as a production line to fill larger containers ranging from 5 gallons to 53 gallons. Normally only one production line is operated at a time and all production workers are required. The production line operates in an "assembly line" fashion. One to two employees remove empty bottles from returned crates, remove the caps, and place the bottles on one conveyer and the

crates on another. The empty bottles travel through a bottle washer and the crates travel through a crate washer. An employee inspects the bottles and crates to verify they are clean and ready to be filled. The empty clean bottles go through a rotary bottle filling machine where the product is placed in the bottle. The lead operator operates the fill machine and places the caps on the bottles. The filled capped bottles go through a cap tightening machine where the caps are tightened. They then pass through a rinsing area where any spilled product is rinsed off the bottle. An employee wipes the bottle following the rinse to remove most of the rinse water. An employee puts the filled bottles into a clean crate and another employee stacks the filled crates on a pallet. Stacking the crates on a pallet is the only step that requires lifting more than 15 lbs. Therefore, with the exception of the lead operator who operates the filling machine, Sierra Chemical requires the employees to constantly rotate through the different positions during each shift so that no one person is doing all of the heavy lifting all of the time. (AA II, Tab 24, pp. 387-388 [Cummings Declaration, ¶¶ 6-7].)

Sierra Chemical laid off Salas as part of its annual reduction of the production line staff in October 2003 and then recalled in March 2004. He was again laid off December 2004 and recalled the following March. By December 2005, Salas had accrued enough seniority that three of his co-workers were laid

off instead of him. (AA II, Tab 24, pp. 388-389 [Cummings Declaration, ¶¶ 10-12].)

3. Salas' Employment with Sierra Chemical: 2006-2007.

On March 1, 2006, Salas reported a back injury while stacking crates and was taken to Dameron Hospital Occupational Health for treatment. He returned to work the next day with the restrictions of no lifting over 10-15 pounds, no prolonged sitting, no prolonged standing or walking, and limited bending, twisting or stooping at the waist. Sierra Chemical placed him on modified duty which included sweeping the work area, rinsing empty containers, and performing duties on the production line other than taking the filled containers and putting them in crates and stacking the crates on pallets. He remained on modified duty until he provided a release to full duty on June 9, 2006. (AA II, Tab 24, p.395 [Huizar Declaration, ¶¶ 12-15].)

Salas informed his supervisor that he re-injured his back on August 16, 2006. He again treated at Dameron Hospital Occupational Health. He returned to work that day and completed his shift under the same restrictions as before. He failed to show for his next four scheduled shifts. When he did return, he was placed on modified duty which continued until he was laid off on December 15,

2006.[2] (AA II, Tab 24, p.395 [Huizar Declaration, ¶¶ 16-18].)

4. Salas' Medical Treatment and Work in 2007.

Salas had retained Rancano two days after the injury he reported in August 2006 to represent him in a worker's compensation claim against Sierra Chemical and the State Insurance Fund, its carrier. In November 2006, Rancano notified the State Fund that Salas had selected the Patel medical group as his new primary care physician. The State Fund approved Salas' choice of Patel in December 2006. (AA II, Tab 22, pp. 358-359 [Taylor Declaration, ¶¶ 1-3].)

On January 4, 2007, Salas went to an appointment with a physician in the Patel group, Dr. Adapa, who found "excessive subjective complaints" and declared him fit for regular duty with no work restrictions. (AA I, Tab 16, pp. 217-218.) According to Salas, Dr. Adapa "didn't say that I could work with restrictions. He only said 'You're released,' without any explanation." (AA I, Tab 16, p.157 [Salas Deposition 139:14-18].)

Following Dr. Adapa's report, Rancano requested that the State Insurance Fund assign another physician as his primary care provider. When the Fund

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[2] Dameron Occupational Health had returned Salas to full duty on December 7 because he failed to keep his scheduled appointment. (AA II, Tab 24, p. 392.)

denied the request, Rancano sought an expedited hearing before the worker's compensation appeals board to authorize a new primary care provider. The appeals board granted Salas' request to see a Stockton physician, Dr. Alan Jakubowski, as his new primary care provider.[3] (AA II, Tab 22, p. 359 [Taylor Declaration, ¶ 4].)

5. Salas Gets a Job with Another Employer.

On January 31, 2007, Salas started working at RO-Lab American Rubber Co., Inc. (Respondent's Appendix ("RA"), Tab 3, pp. 13-15 [Salas Deposition 13:23-14:12; 19:11-22].)

6. Sierra Chemical's 2007 Recall.

According to Salas' Declaration, Sierra Chemical foreman Leo Huizar called him on March 1, 2007 and asked if he wanted to go to work. Salas responded that he did and Huizar told him to show up the next day. Huizar then asked Salas if he was fully recovered from his back injury and if he was still seeing a doctor. Salas answered that he was not completely healed and Huizar told him that he could not return to work like that and that it would violate the

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[3] According to Salas, he had sought a change from Dameron Occupation Health to Dr. Patel's medical group because he lived in Tracy and it was difficult for him to go to Stockton for treatment for his injuries. (AA II, Tab 20, p. 345 [Salas Declaration ¶ 5].)

company's policies to allow him to return to work. (AA II, Tab 20, p.346 [Salas Declaration, ¶ 7].)[4]

Sierra Chemical sent Salas a recall notice on May 1, 2007, instructing him to contact Huizar to make arrangements to return to work. According to Salas' deposition testimony, he got in touch with Huizar after receiving the letter and told him that he had received it. Huizar said that he wanted Salas to work but only if his back was 100% well, and if it wasn't, he shouldn't show up for work. Salas then said that he wasn't going to be able to work and Huizar answered that he wouldn't be able to work until he was 100% well. (AA I, Tab 16, p. 142 [Salas Deposition 142:1-21].) According to Salas' Declaration he told Huizar that "I could work within my restrictions" and that Huizar said that "I could not go to work unless I was 100% recovered." (AA II, Tab 24, pp. 367-368 [Salas Declaration, ¶ 11].) Also according to Salas he did not tell Huizar that Dr. Adapa had told him that he was released to full duty "[b]ecause he did not ask me. He only asked if my back was well." (AA I, Tab 16, p. 157 [Salas Deposition 139:11-24].)

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[4] Sierra Chemical objected to the statements of Huizar as an unauthorized admission. (AA II, Tab 29, pp. 486-487, objection number 17.) The lower court overruled the objection. (AA II, Tab 34, p.522.)

There is no evidence that Salas requested a work accommodation other than his purported statement to Huizar that "I could work within my restrictions," which appears in his Declaration but not in his deposition. There is no evidence that a request for a work accommodation came from the Rancano law firm, which had been representing him since August 2006 and which filed this action.[5] Huizar subsequently learned that Salas was employed somewhere from his production co-workers. (AA I, Tab 16, p. 203 [Huizar Deposition, 144:18-145:6].)

Sierra Chemical did not hear from Salas again until it was served some months later with the Complaint.

B. Statement of the Proceedings Below.

1. Salas' Complaint & Discovery Responses.

Salas' first Complaint, filed on August 28, 2007 alleged that "on or about November 1, 2006," Sierra Chemical had "terminated plaintiff's employment . . . to punish plaintiff for exercising a legal right, and to intimidate and deter plaintiff, and other persons similarly situated, from bringing a claim for

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[5] Rancano, which had been representing Salas since August 2006, sent a letter to the State Fund in December 2006, notifying the Fund of Salas' layoff and requesting benefits. (RA, Tab 3, p.77)

workers' compensation benefits." (AA Tab 1, p.3 [Complaint, ¶ 12].) The Complaint also alleged that Sierra Chemical failed to provide a reasonable accommodation for Salas' disability and failed to engage in the informal interactive process to determine a reasonable accommodation. (AA I, Tab 1, p.3 [Complaint, ¶ 7].)

Salas' contention that he had been terminated and not laid off persisted through his discovery responses. (See, e.g. Salas' April 21, 2008 Response to Request for Admission number 3, RA Tab 3, pp. 71, 74.)

2. Sierra Chemical's First Summary Judgment Motion & Salas' Amended Complaint.

On December 16, 2008, Salas filed a motion for leave to amend his Complaint. (AA I, Tab 4, p. 12.) Sierra Chemical opposed the motion on a number of grounds including the timing of the motion in light of the April 6, 2009 trial date, which required a motion for summary judgment to be heard no later than March 6, 2009. On March 11, 2009, the lower court granted Salas' motion for leave to amend his Complaint, but allowed Sierra Chemical the right to take additional discovery. (AA I, Tab 5, p. 29.) Salas filed the Amended Complaint on March 24. (AA I, Tab 6, p. 31.)

The Amended Complaint alleged that "[o]n or about November 1, 2006" Sierra Chemical "denied plaintiff employment to punish plaintiff for exercising a legal right, and to intimidate and deter plaintiff, and other persons similarly situated, from bringing a claim for workers' compensation benefits." (AA I, Tab 6, p.33 [Amended Complaint, ¶ 12].)

3. Salas' First Summary Judgment Motion.

On December 18, 2008, Sierra Chemical filed a motion for summary judgment to be heard on March 6, 2009, which was 30 days before the scheduled April 6, 2009 trial date. (Respondent's Appendix ("RA"), Tab 1, p.1) On March 11, 2009, the court denied the motion. (RA, Tab 8, pp. 179-181.)

4. Salas' In Limine Motion & Sierra Chemical's Second Summary Judgment Motion.

Trial was scheduled to begin on April 6, 2009. The parties filed their in limine motions prior to trial as required by the local rules. Salas' in limine motion number 7 advised the court that he would assert his Fifth Amendment rights in response to any question as to his immigration status and sought an order that any such questions be put to him outside of the presence of the jury. (RA, Tab 8, p.43.)

Up to this point Sierra Chemical had no reason to doubt the authenticity of any of the documents which Salas had provided with his employment application. The allegation in Salas' in limine motion led to an investigation which resulted in Sierra Chemical discovering that the Social Security number which Salas had represented as his own belonged to a person in North Carolina named Tenney. Sierra Chemical's second summary judgment followed.

Sierra Chemical sought summary judgment on the grounds that: (1) after acquired evidence of Salas' use of another person's Social Security number to obtain employment with Sierra Chemical barred his claims; (2) Salas' use of another person's Social Security number and his failure to disclose that he had been released to full duty barred his action because of the doctrine of unclean hands; and (3) Salas' failure to disclose that he had been released to full duty estopped him from pursuing his claims. (AA I, Tab 9, pp. 46-69.) The trial court denied the motion. (AA I Tab 34, p. 516.)

On January 7, 2010, the Court of Appeal issued an alternative writ of mandate and prohibition. (AA II, Tab 37, p. 540.) On January 22, 2010, the trial court vacated its order denying Sierra Chemical's motion for

summary judgment and granted the motion and entered judgment in favor of Sierra Chemical. (AA II, Tab 35, p. 526; Tab 38, p. 560.) Salas' appeal followed. (AA II, Tab 40, p. 564.)

The Court of Appeal held that Salas' disability discrimination claim was barred by the after-acquired evidence doctrine because there was no evidence that Salas had his own social security number or that Sierra Chemical would have rehired him had it known that he did not possess his own social security number. The Court also held that Salas' claim was barred by the unclean hands doctrine because his misrepresentation that the social security number submitted to Sierra Chemical "went directly to the heart of the employment relationship and related directly to his claims that Sierra Chemical wrongfully failed to hire him after his seasonal layoff and discriminated against him by failing to provide a reasonable accommodation for his back injury." (Opinion, p. 24.) The Court found that Senate Bill No. 1818 ("SB 1818") did not preclude application of the after-acquired evidence and unclean hands defenses because law existing at the time of the bill's passage "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.'" (Opinion, p.28 [Citations omitted].)

III. WHY THE PETITION SHOULD NOT BE GRANTED.

A. The Court Of Appeal's Proper Application of the After-Acquired Evidence & Unclean Hands Doctrines Is not a Threat to "Derail California Civil Rights Protections."

Salas argues that the Court of Appeal's "use of the after-acquired evidence and unclean hands defenses to bar all of Salas' claims as a matter of law seriously threatens to derail California's civil rights protections." (Petition, p. 8.)

Salas cites *McKennon v. Nashville Banner Pub. Co.* (1995) 513 U.S. 352 in support of this hyperbolic assertion. In *McKennon*, the court held that impact of after acquired evidence of wrongdoing by a plaintiff-employee under the Age Discrimination Act of 1967, 29 U.S.C. sections 621 *et seq.*, had to be determined on a case by case basis:

> The proper boundaries of remedial relief in the general class of cases where, after termination, it is discovered that the employee has engaged in wrongdoing must be addressed by the judicial system in the ordinary course of further decisions, for the factual permutations and the equitable considerations they raise will vary from case to case.

(*Id.* at p. 361.)

Camp v. Jeffer, Mangels, Butler & Marmaro (1995) 35 Cal.App.4th 620 and *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, both discuss *McKennon* and each concludes that the unclean hands doctrine bars a claim based on acts not occurring during employment where the plaintiff's misrepresentation goes to the heart of the employment relationship and relates directly to the wrongful discharge claim. As noted in *Camp*, "California courts often look to decisions construing federal antidiscrimination statutes in deciding issues of state employment law," but "refer to federal decisions only 'where appropriate.'" (35 Cal.App.4th at p. 635.)

There is nothing in the FEHA which calls for allowing a claim by a plaintiff alleging disability discrimination resulting from a refusal to hire where the employee is disqualified from employment under federal law because he does not have a valid social security number.

1. An Employee Who Misrepresents a Government-imposed Job Qualification Cannot Maintain a Discrimination Action.

Murillo, supra, 65 Cal.App.4th 833, 845-846, and *Camp, supra*, 35 Cal.App.4th 620, 638-639, hold that an employer's discovery that an employee has misrepresented a job qualification required by the federal

government such that the employee is not lawfully qualified for the job is a complete defense to a discrimination action under both the after-acquired evidence doctrine and the doctrine of unclean hands.

Where an employee's misrepresentation goes directly to the heart of the employment relationship and relates directly to the wrongful discharge claim, those claims are barred by the doctrine of unclean hands. (*Murillo, supra*, 65 Cal.App.4th at p. 845.) The defense of after-acquired evidence involves a different analysis: in order to invoke this doctrine, the employer must show that had the employer known of the misrepresentation, it would have terminated the employee.[6] (*Murillo, supra*, 65 Cal.App.4th at pp. 845-846.)

Having a valid Social Security number is a job qualification that federal law imposes for all jobs because employers are required by law to obtain and report the Social Security numbers of its employees:

> Plaintiff's reliance on anti-discrimination statutes is misplaced because defendants' policy of requiring SSNs applied equally to all employees

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[6] As applied to Salas' claim the defense of after-acquired evidence requires that Sierra Chemical show that it would not have rehired Salas had it known that the Social Security number which he was representing as his own belonged to someone else.

> and was also a necessary consequence of defendants' obligations under federal law. As the District Court noted, federal law requires that employers gather and report the SSNs of their employees to aid enforcement of tax and immigration laws.

(*Cassano v. Carb* (2nd Cir. 2006) 436 F.3d 74, 75.)

Federal law required Salas to have a valid Social Security number before he could work for Sierra Chemical. Thus in *Sutton v. Providence St. Joseph Medical Center* (9th Cir. 1999) 192 F.3d 826, 830-831, the court affirmed the dismissal of a job applicant's religious discrimination lawsuit because his refusal to provide social security number barred his hiring as a matter of federal law. (See also *Seaworth v. Pearson* (8th Cir. 2000) 203 F.3d 1056, 1057.)

2. Salas' Claim Is Barred by the Doctrine of Unclean Hands.

In *Murillo, supra*, an employee brought an action against her former employer for wrongful discharge, sexual harassment, and other contractual and tort claims. The employer asserted the defense of unclean hands based on the employee's use of false alien registration and Social Security card to obtain employment. The court held:

> Plaintiff's misrepresentation went to the heart of

> the employment relationship and related directly to her wrongful discharge and contractual claims. The unclean hands doctrine therefore would bar those claims.

(65 Cal.App.4th at p. 845.)

Murillo devoted a significant portion of its opinion to discussing the difference between a sexual harassment claim, which occurs during employment, from a claim based on acts that did not occur during employment :

> "[W]hen the workplace is permeated with discriminatory intimidation, ridicule and insult that is ' "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," ' the law is violated. [Citation.]" . . . . That is, once discriminatory conduct in the form of sexual harassment meets this requirement, the wrong and the injury occasioned by it are complete even though the plaintiff does not lose any tangible job benefit. . . .
>
> In short, 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.
>
> * * *
>
> It may be that plaintiff cannot complain of having lost her employment, in that she was never entitled

> to it in the first place. . . .Nonetheless, she was employed by defendant. Her fraud did not void her employment contract; it merely rendered it voidable should her employer seek to rescind it.

(65 Cal.App.4th at p. 848 [Citations omitted].)

Salas' claims, like the *Murillo* plaintiff's wrongful discharge claim, did not arise from anything that happened during his employment. According to Salas' Amended Complaint, Sierra Chemical is liable for *denying him employment* on a modified basis to accommodate his disability. Denying a person employment is by definition not an act that occurs during employment. Under *Murillo's* distinction between acts occurring during employment and those not occurring during employment, the unclean hands defense is available to Sierra Chemical.

3. Salas' Claim Is Barred by the After-Acquired Evidence Doctrine.

In *Camp*, *supra*, the plaintiffs, husband and wife, were hired by the defendant law firm, a contractor for the Resolution Trust Corporation (RTC). Because the RTC was a federal agency responsible for the sale and liquidation of savings and loan associations placed in receivership or conservatorship, a condition of the defendant representing the RTC was that none of its employees could have a prior felony conviction. The wife

plaintiff was terminated shortly after she reported to human resources and a member of the defendant's management committee her supervisor's confession that he was engaging in insider trading. The reason given for her termination was excessive spelling errors in a letter she had typed. Around the same time, the husband plaintiff was also terminated for using company time and resources for a personal matter. Both sued, claiming, among other things, that their terminations violated public policy.

During discovery, the defendant learned that the plaintiffs had lied on their job applications when they each stated that neither had been convicted of a felony. The defendant's motion for summary judgment was granted based on this after acquired evidence.

Affirming, the appellate court concluded that the after acquired evidence of the plaintiffs' misrepresentations barred them from *any* recovery.

> The [plaintiff] Camps' misrepresentations about their felony convictions went to the heart of their employment relationship with [defendant law firm] Jeffer Mangels. Under its contract with the RTC, Jeffer Mangels was obligated to ensure that none of its employees had ever been convicted of a felony. In moving for summary judgment, Jeffer Mangels established that the Camps had in fact been convicted of a felony. Further, 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. Moreover, given the function of the RTC, the nature of the Camps' past criminal conduct - - conspiring to defraud a federally insured bank - - magnified the potential adverse consequences to Jeffer Mangels of certifying that none of its employees were convicted felons.

(*Camp*, *supra*, 35 Cal.App.4th at p. 637.)

As discussed above, having a valid Social Security number is a job qualification that federal law imposes for all jobs because employers are required by law to obtain and report the Social Security numbers of its employees. And in *Murillo*, *supra*, the court analyzed the after-acquired evidence in the context of a former employee's use of a false Social Security number to obtain employment.

The employee's complaint sought damages for wrongful termination, sexual harassment, and other tort and contractual claims. Conceding that the use of a false alien registration and social security card would bar her wrongful discharge cause of action under the unclean hands doctrine, the employee dismissed that claim. *Murillo* then analyzed the after-acquired

evidence defense as applied to the employee's remaining claims. The court concluded that the employer failed to establish that the after-acquired-evidence doctrine barred the employee's remaining claims as a matter of law because the employee produced admissible evidence that raised a factual issue as to whether the employer actually would have refused to hire her or would have fired her immediately upon learning of her undocumented status.

Here, Sierra Chemical submitted the Declaration of Stan Kinder, its president and chief executive officer that: (1) Sierra Chemical has a long-standing policy precluding the hiring of any applicant who submits false information; (2) if he had learned that an employee had submitted false information, that employee would be immediately terminated; and (3) he learned that the Social Security number which Salas was using had not been assigned to him only within the last 60 days. (AA I, Tab 11, pp. 99-100.)

Salas' evidence consisted of his Declaration that: (1) in late 2004 or early 2005, he received a letter from the Social Security Administration stating that his name and Social Security number did not match their records; (2) during the same period several of his co-workers at Sierra Chemical also received identical form letters from Social Security; (3)

Huizar, his foreman, told him and the employees who received the letters that Sierra Chemical's president 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; (4) during the years he worked at Sierra Chemical some workers admitted to being undocumented; (5) he never heard of Sierra Chemical discharging any person due to a discrepancy with a Social Security number. (AA II, Tab 20, p. 346 [Salas Declaration ¶¶ 8, 9].)

Sierra Chemical objected to these statements in Salas' Declaration on a number of grounds including lack of foundation and hearsay. (AA II, Tab 29, p. 487, objections 18, 19.) Although the lower court overruled the objections (AA II, Tab 34, p. 522), the statement attributed to Huizar about the response of Sierra Chemical's president to a Social Security number "discrepancy" is undoubtedly hearsay.

Salas argued before the Court of Appeal an exception to the hearsay rule, namely, that Huizar's statements were admissible under Evidence Code sections 1220 (admission of a party opponent) and 1222 (authorized admission). (AOB 42 ff.) But Salas did not lay a proper foundation for the applicability of the party admission (Evid. Code, § 1220) or authorized

admission (Evid. Code, § 1222) exceptions to the hearsay rule. (See *Morgan v. Regents of the University of California* (2000) 88 Cal.App.4th 52, 70 [proponent of hearsay evidence has burden of laying foundation showing authority to speak].) Salas argued that Huizar's position as Production Manager of Sierra Chemical's Stockton facility gave him authority to speak for the company on its personnel policy, but there was no evidence that Sierra Chemical ever gave him any such authority.

Salas also did not produce any evidence that Sierra Chemical ever knowingly hired or retained an "undocumented" worker, a worker who had submitted a Social Security number belonging to another person, or a worker who did not have his own Social Security number. As a result there was no admissible evidence rebutting Kinder's Declaration that had Sierra Chemical known Salas was submitting false information, *i.e.* the Social Security number of another person, to obtain employment, he would not have been hired, and that had the company learned after hiring that false information had been provided, he would have been fired.

The Court of Appeal found that the evidence Salas submitted to rebut Kinder's Declaration was mere speculation and did not create a triable issue of fact whether Sierra Chemical had a settled policy of refusing to hire

a person who submitted a social security number which belonged to someone else.[7]

B. The Court of Appeal Properly Analyzed SB 1818.

Salas' lengthy discussion of SB 1818, which makes immigration status irrelevant to the determination of liability under the state's employment laws, has no bearing on Sierra Chemical's argument that Salas' misrepresentation that he possessed a Social Security number precludes him from maintaining this action.[8]

The motion was based on Salas' use of a Social Security number which belonged to another person and his ineligibility to work in the United

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[7] As a result of its finding, the Court did not address Sierra Chemical's arguments regarding its hearsay and foundation objections.

[8] Sierra Chemical could have based unclean hands and after-acquired defenses on Salas' immigration status, had the evidence so warranted. Salas' claim for backpay is the equivalent of a "reinstatement remedy prohibited by federal law" because "[u]nder existing law, backpay is not recoverable by an employee who would not be rehired regardless of any employer misconduct." (*Farmer Brothers Coffee v. Workers' Compensation Appeals Board* (2005) 133 Cal.App.4th 533, 541 ["Thus, where reinstatement is prohibited by federal law, section 1171.5 would also prohibit backpay, which was the intent of the Legislature in passing section 1171.5 and related statutes."].)

States because he did not have a Social Security number of his own. Cases such as *Cassano v. Carb, supra*, 436 F.3d 74, explain the rationale for requiring employers to gather and report social security numbers as being an aid to the enforcement of tax and immigration laws. (*Id.* at p. 75.) But that doesn't transform an argument based on Salas' ineligibility for employment because he didn't have a Social Security number in his own name into an argument based on his immigration status. A valid social security number is a necessary condition of employability under federal law. (*Sutton v. Providence St. Joseph Medical Center, supra,* 192 F.3d at pp. 830-831; *Seaworth v. Pearson, supra,* 203 F.3d at p. 1057.)

Salas' attack on the Court of Appeal's analysis of SB 1818 is wrong. In *Hoffman Plastic Compounds, Inc. v. NLRB* (2002) 535 U.S. 137, the Court held that the policies underlying the Immigration Reform and Control Act of 1986 ("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.):

> 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.)

Following the *Hoffman* decision, the 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* precluded 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 whether the after-acquired-evidence or unclean hands doctrines would otherwise preclude him from bringing claims tied to the failure to hire.

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 analysis of SB 1818's legislative history is also flawed. The purpose of SB 1818, as amended May 9, 2002, was to "limit the potential

effects of [*Hoffman*] 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.) The 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, the 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.)

The fact that the Legislature considered enacting a provision imposing a civil penalty that would have been equal to a backpay award but failed to enact such a provision does not support Salas' argument that in enacting SB 1818 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. SB 1818 has been held to be consistent with *Hoffman's* backpay prohibition of *Hoffman, supra* 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.)

C. The Court of Appeal Properly Applied the Principles That Govern the Adjudication of Summary Judgment Motions.

In support of its motion for summary judgment/ adjudication, Sierra Chemical produced the Declaration of Kelly Tenney, who stated that his Social Security number was xxx-xx-4253. (AA I, Tab 12, p. 103.)

Salas admitted that he represented his Social Security number as being xxx-xx-4253 in both his job application to Sierra Chemical and RO-Lab American Rubber Co., Inc.:

(1) He submitted a job application to Sierra Chemical on April 27, 2003, on which he wrote his purported Social Security number, xxx-xx-4253. (AA II, Tab 19, p. 297, undisputed fact no. 1.)

(2) He also completed IRS Form W-4 informing Sierra Chemical of

the number of "allowances" he was claiming for purposes of payroll taxes and wrote the same Social Security number, xxx-xx-4253, on that form as he did on the other. (AA II, Tab 19, p. 298, undisputed fact no. 3.)

(3) He was again laid off and then recalled, and on March 24, 2005, he submitted a third IRS Form W-4 on which he again wrote the same Social Security Number, xxx-xx-4253. (AA II, Tab 19, p. 299, undisputed fact no. 8.)

(4) He used the same Social Security number, xxx-xx-4253, and Social Security card to misrepresent his eligibility to work in the United States to his current employer RO-Lab American Rubber Co., Inc. (AA II, Tab 19, p. 300, undisputed fact no. 10.)

Salas failed to produce any evidence that Social Security number xxx-xx-4253 was his nor did he produce any evidence that he has a valid Social Security number. His failure to produce any such evidence established there was no triable issue of fact regarding his misrepresentation of Tenney's Social Security number as being the one which he had been issued or his possession of a valid Social Security number. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 [opposing party has burden of producing evidence to rebut moving party's prima facie showing

of entitlement to judgment as a matter of law]; Code Civ. Proc., § 437c, subd. (c) [only admissible evidence can establish existence of triable issue of material fact].)

Salas argues that there was a triable issue of fact whether he would have been rehired had Sierra Chemical known that he didn't have his own social security number. As discussed above, the evidence which Salas submitted through his own Declaration was inadmissible and therefore legally insufficient to rebut the Kinder Declaration. Moreover, the issue is irrelevant to the defense of unclean hands. (*Murillo, supra*, 65 Cal.App.4th 845-846.)

Salas argues that there was a triable issue of fact whether his misrepresentation was "intentional." Contrary to Salas' characterization of Sierra Chemical's motion, it was based on Salas' submitting a social security number which belonged to another person because he did not have his own social security number and was not legally qualified to work in this country. His "intent" is irrelevant.

Salas argues that the Court of Appeal erred in inferring his "lack of employment authorization from the purported discrepancy" with the social security number he submitted to Sierra Chemical. According to Salas, this

is an inquiry which should be conducted by immigration authorities and not the judiciary. Again, the issue is not Salas' immigration status. It is whether he had his own social security number entitling him to work.

IV. CONCLUSION.

Sierra Chemical's motion was not based on Salas' immigration status and there is nothing in California or federal law which precludes the company from asserting the defenses of unclean hands and after-acquired evidence. Salas produced no evidence that the Social Security number he submitted to Sierra Chemical was his or that he has ever been assigned a number of his own. Sierra Chemical's motion established that as matter of law Salas' claims are barred by the doctrines of unclean hands and after-acquired evidence because of Salas' use of another person's Social Security number to obtain employment.

Dated: October 5, 2011.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT
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The text of this brief consists of 8,179 words as counted by the word processing program (Word Perfect) that was used to generate this brief.

Dated: October 7, 2011

Freeman, D'Aiuto, Pierce, Gurev, Keeling & Wolf

By _____
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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:

ANSWER TO PETITION FOR REVIEW

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TRIAL COURT:
Clerk, San Joaquin County
Superior Court
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Court of Appeal:
Third District Court of Appeal of the State of California
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Sacramento CA 95814

The acts described above were undertaken and completed in San Joaquin County on October 7, 2011

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 at Stockton, California.

Virginia Gall