No. S196568

IN THE SUPREME COURT OF CALIFORNIA

VICENTE SALAS,
Plaintiff and Appellant,
v.
SIERRA CHEMICAL CO.,
Defendant and Appellee.

APPELLANT'S OPENING 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

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

Norman Pine, SBN 67144
PINE & PINE
14156 Magnolia Blvd., Suite 200
Sherman Oaks, CA 91423
Telephone: (818) 379-9710

Attorneys for Plaintiff and Appellant
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Telephone: (818) 379-9710

Attorneys for Plaintiff and Appellant
VICENTE SALAS

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INTRODUCTION

This appeal presents the question of whether an employee is barred as a matter of law from any remedies for his employer's unlawful discrimination in violation of the Fair Employment and Housing Act, solely because the employer allegedly believes that the employee used someone else's Social Security number when earlier applying for the job. The Court of Appeal answered that question in the affirmative, rejecting the application of a statute, SB1818, aimed at avoiding such a result and on the basis of the after-acquired evidence and unclean hands doctrines. The lower court's opinion misreads the statute, misapplies these doctrines, and provides employers who engage in unlawful discrimination with a way to avoid any liability, contrary to the law and public policy of this state and to the detriment of all California workers.

ISSUES PRESENTED FOR REVIEW

1. 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."

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

3. Whether the Court of Appeal erred in affirming the entry of summary judgment against Plaintiff and Appellant despite the existence of numerous significant disputes of material fact.

STATEMENT OF THE FACTS

This matter arises from a lawsuit commenced in San Joaquin County Superior Court by Plaintiff and Appellant Vicente Salas ("Salas") against his former employer, Defendant and Appellee 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 amended complaint (Appellant's Appendix[1] (hereafter "AA"), (Vol. 1, 31-35) alleges that Salas became disabled as a result of a back injury sustained on the job in 2006, and that Sierra refused either to engage in the interactive process or to reasonably accommodate his disability in violation of the Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code § 12900 *et seq.* The amended complaint further alleges 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.

A. 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 an individual in North Carolina named Kelly R. Tenney, who stated that the

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[1] 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.

Social Security number that Salas provided Sierra was the declarant's own number.[2] (AA, Vol. 1, 102-04.) Tenney has never been produced or deposed. Sierra also produced a declaration from its president, Stanley Kinder, 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." (AA, Vol. 1, 99-101.) 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 and moved for summary judgment. The trial court denied Sierra's motion in a detailed order, finding upon its review of the record that there existed numerous disputed issues of material fact, going both to the merits and the affirmative defenses, thereby precluding summary judgment. (AA, Vol. 2, 516-24.) Among other things, the trial court found triable issues of material fact regarding whether Salas had in fact presented a false Social Security card; whether he was in fact entitled to work in the United States based on his alien registration card; whether he had informed Sierra that he had received a "no-match" letter from the Social Security Administration ("SSA") and, if he had, whether Sierra took any action based on that information pursuant to the professed policy testified to by Kinder; and

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[2] In its relevant entirety, the declaration stated: "My Social Security Number is [number]. [¶] I do not know who Vicente Salas is and have not given him or anyone else permission to use my Social Security Number."

whether the SSA might have issued the same Social Security number to both Salas and Tenney.

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 summarily entered judgment for Sierra. (AA, Vol. 2, 525-26.)

B. 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; and 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,[3] 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." (Labor Code § 1171.5.)

The Court of Appeal affirmed the entry of summary judgment for Sierra. (*Salas v. Sierra Chemical Co.* (2011) 198 Cal.App.4th 29 [129 Cal.Rptr.3d 263].) 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 conclude that the

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[3] SB 1818 is codified in materially identical language at Cal. Civ. Code § 3339, Cal. Gov't Code § 7285, Cal. Health & Safety Code § 24000, and Cal. Labor Code § 1171.5.

number used by Salas was not his. (129 Cal.Rptr.3d at 273.) Next, the Court of Appeal found the declaration of Sierra's president to be conclusive proof of a policy against hiring undocumented workers, disregarding *inter alia* 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 273-74.)

Stating that "[t]his case is a failure to hire case," (*id.* at 269), the Court of Appeal relied on *Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620, a case in which the plaintiffs had sued their former employer for breach of contract and wrongful termination in violation of public policy, alleging they had been fired in retaliation for reporting insider trading within the firm. The court in *Camp* had affirmed summary judgment for the employer, finding that the plaintiffs' misrepresentations regarding prior felony convictions barred their claims under the after-acquired evidence doctrine. Reasoning that since the firm was required by a contract to certify to the federal government that none of its employees had ever been convicted of a felony, *Camp* held that dismissal was justified since "the Camp's misrepresentations about their felony convictions relate directly to their wrongful termination claims." (*Id.* at 639.) The court below relied on *Camp* to dismiss Salas's denial of employment claim in its entirety on after-acquired evidence and unclean hands grounds inasmuch as the federal Immigration Reform and Control Act of 1986 ("IRCA") made it unlawful for aliens to use false documents to obtain employment, and required employers to report their employees' Social Security numbers via the I-9 form. (*Salas,* 129 Cal.Rptr.3d at 272.)

The Court of Appeal further relied upon *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, a decision which – in *dicta*[4] – relied on *Camp* and found a claim of wrongful termination brought by an undocumented plaintiff to be barred by the after-acquired evidence and unclean hands doctrines on the ground that "she was never entitled to [be hired] in the first place" (*id.* at 848), but which allowed her sexual harassment claims to proceed. The *Salas* court concluded that, unlike the sexual harassment claims in *Murillo*, "Salas's discrimination claims are *tied to* the failure to hire" (*id.* at 273; emphasis added; internal citation omitted) inasmuch as Salas was denied employment allegedly in retaliation for his disability, and dismissed Salas's non-termination claims as well on that basis. It additionally 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." (AA, Vol. 2, 345 ¶ 3 & 366 ¶¶ 5-6.) The Salas court also concluded that the unclean hands doctrine provided Sierra with a complete defense, 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 275.)

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

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[4] The plaintiff in *Murillo* had already dismissed her claims relating to her termination. (*Id.* at 839.)

status in enforcement of state, labor, employment, civil rights, and employee housing laws". (*Id.* at 276.) It nevertheless concluded that subsection d) of SB 1818, which states that "[t]he provisions of this bill are declaratory of existing law",[5] was intended by the Legislature to keep *Camp* and *Murillo* in place, (*id.* at 277), even where they could operate to make immigration status relevant to, if not dispositive of, the ability of immigrant workers to avail themselves of the protections of California civil rights laws against unlawful workplace practices.

Salas timely petitioned for review of the Court of Appeal's opinion. On November 16, 2011, this Court granted review.

THE STANDARD OF REVIEW

On appeal from the entry of summary judgment, this Court reviews the record and the determination of the trial court de novo. (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1103.)

ARGUMENT

The decision below should be reversed for three reasons. First, the court below interpreted SB 1818, an urgency statute enacted by the Legislature to safeguard for undocumented workers the vitality and effectiveness of California's labor and employment laws, so as to render it a nullity. Second, by applying the after-acquired evidence and unclean hands doctrines to deprive Salas of his FEHA claims in their entirety, the Court of Appeal failed to understand that the reach of those doctrines must be carefully balanced with California's supervening public policy against discrimination. Finally, in contravention of settled summary judgment

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[5] The quoted language appears at Labor Code § 1171.5.

procedure, the court below ignored or reasoned away plain disputes of material fact to find, erroneously, that Sierra had made out its affirmative defenses.

I. SB 1818, Enacted Precisely to Safeguard the Rights of Workers Lacking Employment Authorization, Mandates that Salas's Discrimination Claims Proceed to Trial.

SB 1818 is an unambiguous declaration that California labor and employment laws apply equally to all workers in this state irrespective of their immigration status. It was enacted by the Legislature in 2002 in response to the 5-4 U.S. Supreme Court decision in *Hoffman Plastic Compounds, Inc. v. NLRB* (2002) 535 U.S. 137, a case arising under the National Labor Relations Act ("NLRA"). Prior to *Hoffman*, there had existed a well-established judicial consensus that, with few exceptions, undocumented workers were entitled to rights and remedies equal to those enjoyed by all workers under such mainstay protective statutes as the NLRA,[6] the Fair Labor Standards Act,[7] and Title VII of the Civil Rights

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[6] *See, e.g., Sure-Tan, Inc. v. NLRB* (1984) 467 U.S. 883, 891; *NLRB v. Sure-Tan* (7th Cir. 1978) 583 F.2d 355, 358; *NLRB v. Apollo Tire Co., Inc.* (9th Cir. 1979) 604 F.2d 1180, 1183; *Local 512, Warehouse and Office Workers' Union v. NLRB ("Felbro")* (9th Cir. 1986) 795 F.2d 705, 716 (*abrogated by Hoffman*); *NLRB v. Ashkenazy Property Management Corp.* (9th Cir. 1987) 817 F.2d 74, 75; *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.* (2d Cir. 1997) 134 F.3d 50, 56; *NLRB v. Kolkka* (9th Cir. 1999) 170 F.3d 937, 941. *But see Del Rey Tortilleria, Inc. v. NLRB* (7th Cir. 1992) 976 F.2d 1115, 1121-22.

[7] *See, e.g., Mester Mfg. Co. v. INS* (9th Cir. 1989) 879 F.2d 561, 567; *Patel v. Quality Inn South* (11th Cir. 1988) 846 F.2d 700, 704; *In re Reyes* (5th Cir. 1987) 814 F.2d 168, 170.

Act of 1964.[8] Indeed, even when Congress enacted the Immigration Reform and Control Act of 1986 ("IRCA"), which for the first time made it unlawful for employers to knowingly hire unauthorized workers, it made explicit that the presumption of equal rights and remedies for those workers was to remain untouched.[9] *Hoffman*, however, held that an undocumented worker who was unlawfully fired in retaliation for his union activities could not recover back pay as a remedy for that unlawful labor practice. In sharply departing from the longstanding baseline of equal rights and remedies, *Hoffman* thus portended that significant distinctions might be drawn elsewhere between the workplace protections to which undocumented workers were entitled as compared to those enjoyed by all others, with possible spillover effects into the realm of state law.

The Legislature was quick to respond to this threat to the rights of undocumented California workers. Acting barely five months after

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[8] *See, e.g., EEOC v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1517; *Rios v. Enterprise Ass'n Steamfitters Local Union 638* (2d Cir. 1988) 860 F.2d 1168, 1172; *Bevles Co. v. Teamsters Local 986* (9th Cir. 1986) 791 F.2d 1391, 1392-93.

[9] In its report on IRCA, the House Judiciary Committee stated that undocumented workers continued to be fully covered by workplace laws. (*See, e.g.*, H.R. Rep. No 99-682(1), at 58, *reprinted in* U.S. Code Cong. & Admin. News 5662 [IRCA's employer sanctions provisions should not "be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal *or state* labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in practices *protected by existing law*."] (emphasis added). The House Labor and Education Committee, in its own report on IRCA, likewise stated that "[t]o do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.")

Hoffman was decided, the Legislature enacted SB 1818, which (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.

(emphasis added.)

SB 1818 could hardly be clearer. A worker's immigration status is irrelevant to coverage by state labor and employment laws, and (absent exceptions not present here) discovery into a worker's immigration status is prohibited.[10] As one Court of Appeal has observed:

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[10] Courts have consistently rejected federal pre-emption challenges to SB 1818. (*Farmers Bros. Coffee v. Workers' Comp. Appeals Bd.* (2005) 133 Cal.App.4th 533, 540 [holding that Labor Code § 1171.5 "expressly

> [The statutory codifications of SB1818] 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.[11]

Thus, in addition to ensuring that *all* California workers continue to enjoy the full protections of all labor and employment laws, irrespective of immigration status, an underlying purpose of SB1818 was also to curb *Hoffman*'s reach so that unscrupulous employers would have no additional incentive to hire undocumented workers.

SB 1818's legislative history bears out that the Legislature was deeply apprehensive about *Hoffman*'s possible negative impacts on the vitality of state laws ensuring fair and nondiscriminatory employment conditions for all workers. In its bill analysis, for example, the Senate Labor and Industrial Relations Committee 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

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declared immigration status irrelevant to the issue of liability to pay compensation to an injured employee", and rejecting argument that equal coverage of undocumented workers conflicted with *Hoffman*]; *Reyes v. Van Elk, Ltd.* (2007) 148 Cal.App.4th 604, 615, 618 [upholding Labor Code § 1171.5 against pre-emption argument, and noting that "[a]llowing employers to hire undocumented workers and pay them less than the wage mandated by statute is a strong incentive for the employers to do so, which in turn encourages illegal immigration."] (citing *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452))

[11] *Hernandez*, 109 Cal.App.4th at 460 [finding trial court abused its discretion in permitting defense counsel "to portray plaintiff as an illegal alien"], *disapproved on other grounds*, *People v. Freeman* (2010) 47 Cal.4th 933.

is needed *to keep our state's labor and civil rights'* [sic] *remedies intact,* and enhance compliance."[12] (*Id.* at 2 [emphasis added].) The Committee also pointedly voiced its concomitant concern that "employers who violate labor and civil rights laws *do not gain competitive advantage over law-abiding businesses.*" (*Id.* at 1 [emphasis added].)

These legislative goals are further spelled out in the Senate Third Reading analysis of SB 1818:[13]

> 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, [sic] contend that the Supreme Court's recent decision in Hoffman promotes and rewards the *unscrupulous practice of hiring and then retaliating against undocumented workers.*

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[12] A true and correct copy of this committee bill analysis of SB 1818, as to which judicial notice was previously requested, is appended to this Brief 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 (last visited Feb. 28, 2012).

This Court has looked to committee analyses as an aid to discerning the Legislature's intent in enacting legislation. (*See, e.g., Sullivan v. Oracle Corp.* (2011) 51 Cal.4th 1191, 1197 n.3 [examining Assembly and Senate committee analyses of Labor Code § 1171.5].)

[13] A true and correct copy of the Senate third reading analysis of SB 1818, as to which judicial notice was previously requested, is appended to this Brief 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 (last visited Feb. 28, 2012). 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.)

Id. at 2 (emphasis added).

Indeed, just last year, in *Sullivan v. Oracle Corp.* (2011) 51 Cal.4th 1191, this Court looked to Labor Code § 1171.5 in deciding whether state law overtime provisions applied to work performed in California by non-residents. In so doing, this Court noted and discussed the Legislature's stated intention "to protect undocumented workers from sharp practices in the wake of *Hoffman Plastic Compounds, Inc. v. NLRB*, in which the high court held the National Labor Relations Board could not award backpay to a foreign national not legally entitled to work in the United States." (*Id.* at 1197 n.3 [internal citations omitted].)

Sullivan, further, emphasized SB 1818's purpose of avoiding the perverse incentives that would arise from the creation of a subclass of undocumented workers who did not possess the rights and remedies available to all others. It noted:

> To exclude nonresidents from the overtime laws' protection would tend to defeat their purpose by encouraging employers to *import unprotected workers from other states*. Nothing in the language or history of the relevant statutes suggests the Legislature ever contemplated such a result. A contrary conclusion would be difficult, if not impossible, to reconcile with the Legislature's express declaration [in SB 1818] that "[a]ll protections, rights, and remedies available under state law ... are available to all individuals ... who are or who have been employed, in this state." (Lab. Code, § 1171.5, subd. (a).)

(*Id.* at 1198.)

Thus, in enacting SB 1818, the paramount purpose of the Legislature was to ensure a level legal playing field so that unprincipled employers would not be incentivized to prefer undocumented workers over those who were work-authorized. The Legislature wanted to prevent such a scenario

for several reasons. Plainly, it was concerned that depriving undocumented workers of equal rights and remedies would result in a two-tiered system of laws, one that would both leave workers without rights and reward unscrupulous employers who could exploit those workers with relative impunity. And, as evidenced in the legislative history, the Legislature additionally wanted to protect honest businesses that would be placed at a competitive disadvantage if they complied with state laws, while their less honest competitors were able unlawfully to decrease their costs of doing business.[14]

Each of these reasons underscores that the Legislature would *not have intended* to withhold the benefits of SB 1818 from those who were "undocumented." Nor would it have surprised the Legislature that the workers whose rights it affirmed by passing SB1818 might (quite unsurprisingly) have obtained their employment using invalid documents. In its bill analysis, for instance, the Senate Committee on Labor and Industrial Relations specifically noted that the *Hoffman* majority had decried a situation in which undocumented workers could recover wages

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[14] The four dissenting justices in *Hoffman* expressed the same concern. "[T]he general purpose of [IRCA's] employment prohibition is to diminish the attractive force of employment, which like a "magnet" pulls illegal immigrants toward the United States. . . . [¶] To *deny* the Board the power to award backpay, however, might very well increase the strength of this magnetic force. That denial *lowers the cost to the employer of an initial labor law violation* (provided, of course, that the only victims are illegal aliens). . . . [¶] As I just mentioned and as this Court has held, the immigration law foresees application of the Nation's labor laws to protect 'workers who are illegal immigrants.'" (*Hoffman*, 535 U.S. at 155-56 (Breyer, J., dissenting) (emphasis added; internal citations omitted).)

"earned in a job that was obtained by criminal fraud."[15] (*Id.* at 3.) The Committee's analysis went on, however, to point out that the "[d]issenting justices [in *Hoffman*] argued that the ruling may encourage employers to hire illegal immigrants and disregard labor laws without fear of penalty." – echoing the Legislature's concern on that very issue. (*Id.*)

Thus, when it enacted SB 1818, the Legislature was well aware – and in fact *intended*, for compelling public policy reasons – that persons who had misrepresented their ability to work lawfully in the United States would be covered by it. Indeed, it could hardly be otherwise. Assuming that employers comply with IRCA's requirement to review employment authorization documents for each new hire for Form I-9 purposes, persons lacking work authorization would *a fortiori* be able to obtain employment only by tendering false documents.[16]

Accordingly, the Court of Appeal's interpretation cannot stand. It is impossible to sensibly read into SB 1818's broad language a *sub silentio* carve-out that would exclude from coverage precisely those workers the

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[15] The worker who was fired by the employer in *Hoffman* had used another person's birth certificate to obtain his employment there. (535 U.S. at 141.)

[16] *See, e.g.*, Eduardo Porter, "Illegal Immigrants are Bolstering Social Security With Billions," New York Times, Apr. 5, 2005, *available online at* http://www.nytimes.com/2005/04/05/business/05immigration.html?pagewanted=print&position= (last visited Feb. 28, 2012) ("Since 1986, when the Immigration Reform and Control Act set penalties for employers who knowingly hire illegal immigrants, most such workers have been forced to buy fake ID's to get a job."). It would be difficult to argue that the Legislature was somehow oblivious to this commonly-understood fact when it enacted SB 1818. A true and correct copy of this article, as to which judicial notice has previously been requested, is appended to this Brief as Attachment C for the convenience of the Court.

Legislature sought to protect from *Hoffman*'s potential consequences. Quite to the contrary, 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."].) And as noted *supra*, this Court has recently seen fit to give Labor Code § 1171.5 broad application. (*Sullivan,* 51 Cal.4th at 1197 n.3 ["Section 1171.5 . . . cannot reasonably be read as speaking only to undocumented workers, given that it was drafted and codified as a general preamble to the wage law and broadly refers to 'all individuals' employed in the state."].)

Additionally, when the Legislature provides that a statute is "declaratory of existing law," it does so to state its intent that the statute is but a clarification, and not a modification, of the law and thus "appl[ies] to all existing causes of action from the date of its enactment." (*Western Security Bank, N.A. v. Superior Court* (1997) 15 Cal.4th 232, 244; *see also Carter v. Cal. Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 930; *McClung v. EDD* (2004) 34 Cal.4th 467, 471-72.) Thus, the Legislature's use of the phrase "declaratory of existing law" simply indicated that the rights reaffirmed in SB 1818 would not be interpreted as having only prospective effect. To instead construe "declaratory of existing law" as ratifying the entire body of pre-existing California law, including *Camp* and *Murillo* , would be to give SB 1818 "an obviously absurd effect," which is to be avoided. (*Carter*, 38 Cal.4th at 922.)[17]

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[17] Moreover, that the Court of Appeal misconstrued "declaratory of existing law" is also made clear by SB 1818's legislative history, in which the Legislature said what exactly it meant by "existing law." In the Senate's Third Reading Analysis, for example, the statement that "[t]he

provisions of this bill are declaratory of existing law" is immediately followed by this language:

> 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.

(*Id.* at 1.) This side-by-side juxtaposition of "declaratory of existing law" with the statement of what that "existing law" also appears in the Assembly Labor and Employment Committee's report on SB 1818, at 1-2. (A true and correct copy of the Assembly Labor and Employment Committee report on SB 1818 is appended as Attachment D to the Second Motion for Judicial Notice, filed herewith. It is also available online at http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_1801-1850/sb_1818_cfa_20020625_112455_asm_comm.html (last visited Feb. 28, 2012). And a materially identical statement of "existing law" is contained in the Senate Labor and Industrial Relations Committee's bill report. (*Id.* at 1.)

In any event, the Court of Appeal's application of its construal of the phrase "declaratory of existing law" is selective at best. Although it assumed that *Camp* and *Murillo* formed the relevant "existing law," the court ignored the fact that "existing law" would also include California precedent *affirming* equal rights for undocumented persons and the inadmissibility of immigration status. (*See, e.g., Clemente v. State of California* (1985) 40 Cal.3d 202, 221 [affirming order denying discovery of plaintiff's citizenship]; *Rodriguez v. Kline* (1986) 186 Cal.App.3d 1145, 1148 [assuming without discussion that undocumented plaintiff had standing to bring personal injury suit].) Similarly, the Court of Appeal's construction of "existing law" would also necessarily include contrary authority on the application of the after-acquired evidence doctrine. (*See, e.g., Cooper v. Rykoff-Sexton, Inc.* (1994) 24 Cal.App.4th 614, 617-18 [holding that falsification of an employment application is not a complete

The Legislature enacted SB 1818 to limit the possible effects of *Hoffman* on California's employment laws and to make an employee's immigration status irrelevant. It would be illogical to conclude, as did the court below, that the Legislature instead engaged in the "idle act" of drafting a statute that somehow preserved contrary case law that defeated its very purpose. (*See Cal. Mfrs. Ass'n v. Pub. Utils. Comm'n.* (1979) 24 Cal.3d 836, 846 (rejecting the construction of a statute that would render it entirely superfluous, assuming the Legislature "had no such intent"].) Such a reading "would be difficult, if not impossible, to reconcile," *Sullivan*, 51 Cal.4th at 1198, with the Legislature's expressly stated intent in enacting SB 1818. Certainly, every indication is to the contrary. (*See, e.g., 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 unreasonably imposed on the statute when it construed a single sentence in the bill as swallowing the whole.

The Court of Appeal insisted that its strained construction of the bill "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." (129 Cal.Rptr.3d at 273.) It is difficult to understand, however, how the wholesale dismissal of employment denial claims, and any other claims found to be "tied to" those claims in some manner, can be

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defense to an employment discrimination claim, and noting that "[a]lthough résumé fraud is a serious social problem, so is termination of employment in violation of antidiscrimination laws . . .".]).

justified on the grounds that some other causes of action may survive. Certainly, this scarcely redeems the deprivation of remedies for other civil rights abuses that transgress California public policy. Indeed, under *Salas*, undocumented plaintiffs whose only claims were for discriminatory termination or other unlawful denials of employment would be left with no legal recourse at all. Moreover, it would be anomalous to conclude that the Legislature's purpose in preventing *Hoffman* from weakening state law is sufficiently satisfied by an interpretation of SB 1818 that, in fact, would result in greater deprivations of rights than *Hoffman* itself.[18]

Had the Legislature intended through SB 1818 to deny equal civil rights protections to employees who had presented false documents to obtain their jobs under any circumstances, it would have said so. (*Sullivan,* 51 Cal.4th at 1197 ["The Legislature knows how to create exceptions . . . when that is its intent."].) It did not. Indeed, its intent was just the opposite. This Court should correct the Court of Appeal's error in construing SB 1818 to be an internally inconsistent law that took away the very rights that, on its face, it sought to reaffirm. To the contrary, this Court should hold simply that this critically important statute means just what it so clearly says.

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[18] Even while finding that undocumented workers were ineligible for back pay remedies under the National Labor Relations Act, *Hoffman* reaffirmed that such workers still remained fully covered by the NLRA and were entitled to its other remedies. (*Id.*, 535 U.S. at 144, 152 [noting that in *Sure-Tan v. NLRB* (1984) 467 U.S. 883, the Court had already "affirmed the Board's determination that the NLRA applied to undocumented workers."].) And nowhere does *Hoffman* suggest that the presentation by a worker of false immigration-related documents, as was the case there, would deprive him or her of statutory coverage.

II. The Court of Appeal's Misapplication and Unwarranted Expansion of the After-Acquired Evidence and Unclean Hands Doctrines Impermissibly Derogate Workers' Civil Rights.

Even if SB1818 is not interpreted to safeguard Salas's claims, the Court of Appeal's flawed conclusion that the after-acquired evidence and unclean hands defenses operate to bar them as a matter of law – solely on the basis of wholly unrelated alleged wrongdoing[19] – must be reversed on other grounds. In particular, instead of permitting evidence of employee wrongdoing to unilaterally trump a worker's protections against civil rights abuses, as the *Salas* court did, this Court must balance the legitimate interests of employers with the need to give effect to the strong public policy against employment discrimination.

Salas would establish a rule allowing the after-acquired evidence and unclean hands defenses to bar employment discrimination claims in their entirety. But permitting that decision to stand would be to turn a blind eye to "the public policy of this state to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgement on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation . . ." (Gov't Code § 12920.)

These rights are of the highest public importance and may not be trammeled lightly. As this Court has clearly stated, California's interest in

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[19] Salas in no way concedes that Sierra has discovered any wrongdoing on his part, nor that there was sufficient evidence in the record for the Court of Appeal to have concluded that he used a Social Security number that did not belong to him. (*See infra* §§ III. A, B.)

advancing a "policy that promotes the right to seek and hold employment free of prejudice is fundamental." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1139 n. 14 [internal quotations omitted].) The Legislature has deemed these rights paramount because "denying employment opportunity and discriminating [on the basis of the enumerated traits] foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interests of employees, employers and *the public in general.*" (Gov't Code § 12920 [emphasis added].) The Legislature thus intended that FEHA "provide effective remedies that will both prevent and deter unlawful employment practices and redress the adverse effects of those practices on aggrieved persons." (Gov't Code § 12920.5.)

The overriding significance placed by the Legislature and this Court on FEHA's anti-discrimination protections underscores, by comparison, the cavalier manner with which the Court of Appeal cast them aside. Indeed, rather than running roughshod over FEHA by holding it to be trumped completely by the after-acquired evidence and unclean hands doctrines, as it did, the Court of Appeal should have sought to harmonize those doctrines with the Legislature's clearly stated public policy concerns. (*See Stevenson v. Sup. Ct. of Los Angeles Cnty.* (1997) 16 Cal.4th 880, 909 [noting that a court's function "is simply to recognize and implement, not to question, the Legislature's considered judgments."].)[20]

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[20] Indeed, in *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1044-45, this Court unanimously and explicitly rejected the use of an affirmative defense to bar liability as a matter of law for harassment endured at the hands of a supervisor, despite a plaintiff's failure to report the harassment. Instead, to carry out FEHA's purposes, this Court

To the contrary, the Court of Appeal overlooked California case law that harmonized the need to give effect to FEHA with an employee's wrongdoing,[21] and erroneously relied on *Camp*, a case that did not apply the after-acquired evidence or the unclean hands defenses in a civil rights

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concluded that an affirmative defense would only serve to limit remedies in such cases. *Id.*

[21] In *Cooper v. Rykoff-Sexton, Inc.* (1994) 24 Cal.App.4th 614, the plaintiff claimed that he was wrongfully terminated on the basis of his age. (*Id.* at 615.) Defendant argued that Cooper's misrepresentations on this job application mandated dismissal of all of his claims. Noting that there were no previous California decisions on point, *Cooper* concluded that:

> Neither sound public policy nor the general law of contract dictates that an employee who can show that despite loyal and competent service he was fired without cause, in violation of a term of his employment contract – or because of his age, in violation of statute – nonetheless has forfeited all resulting legal remedies against his employer because of material misrepresentations he made years earlier in his employment application. Although resumé fraud is a serious social problem, so is termination of employment in violation of antidiscrimination laws or in breach of contract."

(*Id.* at 618.)

While other courts that have commented on the use of after-acquired evidence in civil rights cases, they have either merely applied *Camp*'s standard, (*Thompson v. Tracor Flight Systems, Inc.* (2001) 86 Cal.App.4th 1156 [accepting *Camp*, but nevertheless affirming the trial court's refusal to bar recovery or to equitably reduce damages pursuant to the after-acquired evidence doctrine for FEHA violations, in light of jury finding that plaintiff did not engage in wrongdoing that would have led to her termination]), or differentiated after-acquired evidence of wrongdoing from medical evidence related to an employee's ability to perform a job's required duties. (*Finegan v. Cnty. of Los Angeles* (2001) 91 Cal.App.4th 1 [finding such medical evidence admissible in a FEHA disability discrimination case, but not exploring the bounds of when an employer may rely on after-acquired evidence of wrongdoing to justify an unlawful action].)

context. In *Camp*, the plaintiffs were spouses who worked for the defendant law firm, which represented a federal agency that required the firm to certify that none of its employees had ever been convicted of a felony. The Camps sued the law firm, alleging three causes of action that sounded in contract and a cause of action for wrongful termination in violation of public policy.[22] (35 Cal.App.4th at 627-28.) Neither plaintiff raised FEHA or other civil rights claims: Mrs. Camp alleged that she had been terminated because she had reported a partner's insider trading, and Mr. Camp asserted that he was terminated solely because he was married to Mrs. Camp.[23] (*Id.* at 627.)

During the course of the litigation, it was revealed that the plaintiffs had previously been convicted of felonies and had lied to the firm about their respective criminal records. (*Id.* at 628.) Without the benefit of any authority apart from an abrogated federal case (*see id.* at 638 [quoting *Summers v. State Farm Mut. Auto. Ins. Co.* (10th Cir. 1988) 864 F.2d 700,

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[22] With the exception of one, which was alleged only with regard to Mrs. Camp, all of the contract claims were advanced on behalf of both plaintiffs. (*Camp*, 35 Cal.App.4th at 628.)

[23] *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 whistleblowers or sound in contract, and in no way implicate FEHA. (*See id.* at 627-28; *see also Hope Int'l Univ. v. Superior Court* (2004) 119 Cal.App.4th 719, 742 [noting that cases where a plaintiff alleges that an adverse action was taken against plaintiff because of something about plaintiff's spouse "are not true marital discrimination cases"] (citing *Chen v. Cnty. of Orange* (2002) 96 Cal.App.4th 926, 943))

708]), *Camp* reasoned that it was proper to entirely foreclose the plaintiffs' contract and wrongful termination claims because their misrepresentations "went to the heart of their employment relationship" and had put the firm in jeopardy with regard to the certification required by a federal agency client. (*Id.* at 639.)

Whether or not the result in *Camp* was appropriate given the facts and claims in that case, *Salas* erred in relying on it. Importantly, *Camp*, a case that involved totally inapposite issues, had no occasion whatsoever to consider the special and countervailing importance of FEHA claims, or the public policy implications of applying the after-acquired evidence and unclean hands defenses so as to completely bar relief for civil rights violations. (*See id.* at 635 n.13 [declining to determine whether Mr. Camp's claim stated a cause of action under FEHA]; *id.* at 639 [noting that the state's public policies at issue would be adequately served by plaintiffs' reporting the insider trading to the appropriate authorities].)[24]

Murillo, which improperly extended *Camp*'s holding into the civil rights context, likewise provides no support for extinguishing Salas's claims, as it notably fails to give proper weight to the deep public policy concerns animating FEHA. In *Murillo*, the plaintiff alleged multiple causes of action, including FEHA claims, arising from sexual harassment she endured during her employment, as well as for wrongful termination in

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[24] Moreover, in *Camp*, it was undisputed that the plaintiffs had pled guilty to the crimes at issue and had made misrepresentations to their employer concerning those crimes. In the case at bar, by contrast, there is no record evidence sufficient to prove that Salas provided Sierra with an invalid Social Security number. (*See infra* Section III.A, B.) Nor has any federal agency with appropriate jurisdiction and expertise ever determined that the Social Security number used by Salas is not his.

retaliation for her complaints about the harassment. (65 Cal.App.4th at 838-39.) During her deposition, Murillo acknowledged that she was an undocumented immigrant and that she had used false documents to obtain her employment. (*Id.* at 839.) On that basis, the defendant moved for summary judgment, asserting that Murillo's claims were barred by the after-acquired evidence and the unclean hands defenses in that she had misrepresented that she was work authorized. Plaintiff thereupon dismissed all of her claims related to her discharge. (*Id.*)

Although *Murillo* permitted the plaintiff's non-discharge claims to proceed (*id.* at 852), *Murillo* – in *dicta* – went on to opine that had the question been presented, it would have applied *Camp* to find Murillo's wrongful termination claim barred by the unclean hands doctrine.[25] (*See id.* at 845.) Instead of distinguishing *Camp* and acknowledging FEHA's critical remedial and deterrent goals, as it should have done (that is, had its discussion not been *dicta*), *Murillo* unjustifiably – and without any additional authority – extended *Camp*'s rule to foreclose civil rights claims related to wrongful termination. In effect, *Murillo*'s *dicta* placed the important public policies behind California's civil rights protections on a par with complaints about insider trading.

Salas impermissibly builds on the preceding ill-considered jurisprudence to diminish workers' civil rights still further. Where *Murillo* at least preserved an employee's ability to seek redress for civil rights violations that occur during the course of employment, *Salas* instead takes the additional step of permitting the after-acquired evidence and unclean

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[25] This claim is properly understood as asserting Murillo's rights under FEHA, because her termination was alleged to have resulted from her reporting a supervisor's sexual harassment.

hands doctrines to extinguish any civil rights claim in its entirety so long as it can somehow be "tied to" an employment denial claim, however tenuously. (*Salas*, 129 Cal.Rptr.3d at 272.) By foreclosing Salas's disability discrimination claims – those alleging Sierra's failure, during Salas's employment, to engage in the interactive process and to accommodate his disability – the Court of Appeal barred claims that are separate and distinct from Sierra's decision not to rehire Salas. This vague and amorphous "tied to" standard must be rejected inasmuch as potentially any workplace civil rights violation could be deemed to be "tied to" a denial of employment – where, for example, as is alleged here, the employer fires or refuses to hire the plaintiff in retaliation for his or her complaints about workplace discrimination.[26]

The result of such a relaxed standard would be that so long as a defendant employer manages to raise sufficient questions about a plaintiff's work authorization (with or without a valid basis),[27] it might escape any

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[26] Among other things, this could lead to the perverse result that in such cases, employers would be encouraged to claim that any termination or denial of employment was in retaliation for an assertion of rights regarding workplace abuses, as was alleged in the case at bar. Conversely, plaintiffs would have the burden of proving a negative – *i.e.*, demonstrating that a non-termination claim for which they sought relief was *not* connected in any way to a subsequent termination.

[27] Analogizing from *Camp*'s conclusion that the "potential detrimental impact" of plaintiffs' misconduct justified fully foreclosing Salas's claims (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. (198 Cal.App.4th at 272.) In fact, while IRCA requires an employer to review the documents proffered by an employee to confirm his identity and work authorization, the employer need only affirm that it *reviewed* those documents (*see* 8 C.F.R. § 274a.2(a)(3)), and it does not attest to the

liability for discrimination, irrespective of whether the plaintiff asserts a claim stemming either from a discriminatory denial of employment, or from any discrimination arising during the course of their employment that could conceivably be "tied to" a denial of employment. Indeed, *Salas* itself freely acknowledges that its holding effectively immunizes Sierra from liability for any discriminatory conduct in which it might have engaged.[28]

Because only a few state courts have assessed the proper role of after-acquired evidence and the unclean hands doctrines in the civil rights context, this Court should look to federal jurisprudence for guidance regarding how to give full effect to FEHA's deterrent and remedial goals.[29] Unlike the court below, when the U.S. Supreme Court considered the implications of precluding civil rights claims on the basis of employee misconduct that would have resulted in employment termination, it did not

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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 assumption, unless an employer pays a role in the misrepresentation, an employer is exposed to no liability.

[28] "Because Salas was not lawfully qualified for the job, he cannot 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.*" (129 Cal.Rptr.3d at 275 [emphasis added].)

[29] FEHA is sometimes interpreted by reference to federal anti-discrimination statutes because of the similarities between the statutes. (*See, e.g., Lyle v. Warner Bros. Television Productions* (2006) 38 Cal.4th 264, 278; *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1131-32; *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1040.)

bar those claims as a matter of law. To the contrary, noting the public and remedial purposes of the federal Age Discrimination in Employment Act ("ADEA"), a unanimous high court ruled that the unclean hands defense has no application in discrimination cases "where a private suit serves public purposes." (*McKennon v. Nashville Banner Publishing Co.* (1995) 513 U.S. 352, 360 [quoting *Perma Life Mufflers, Inc. v. Int'l Parts Corp.* (1968) 392 U.S. 134, 138].)

McKennon 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 high 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 employer in light of misconduct discovered since the employee's termination. The contrary rule announced by the decision below would, moreover, fly in the face of the well-established recognition that, if anything, FEHA offers *more expansive* protections than federal law.[30] [31] (*See, e.g., Reid v. Google* (2010) 50

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[30] This is especially so with regard to protections offered against disability discrimination. California has repeatedly embraced broad definitions of "disability" in its civil rights statutes. (*See* Cal. Gov. Code § 12926.1 [enacted 2000] ["The Legislature finds and declares as follows: (a) The law of this state in the area of disabilities provides protections independent from those in the federal Americans with Disabilities Act of 1990 (Public Law 101-336). Although the federal act provides a floor of protection, this state's law has always, even prior to passage of the federal act, afforded additional protections; (b) The law of this state contains broad definitions of physical disability, mental disability, and medical

Cal.4th 512 [rejecting the categorical "stray remarks" doctrine prevalent in federal courts]).

McKennon's judicious and balanced approach has consistently been followed by federal courts analyzing federal employment discrimination claims to limit a plaintiff's remedies, but not to extinguish her claims.[32] [33]

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condition."]; *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1027).

[31] *Salas* also represents a sharp break from extensive Title VII jurisprudence which has held uniformly that undocumented workers are, almost without exception, entitled to exactly the same rights and remedies against workplace exploitation as legally authorized workers. (*See, e.g., Rivera v. NIBCO, Inc.* (9th Cir. 2004) 364 F.3d 1057, 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* 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 Feb. 28, 2012) [stating that *Hoffman* "in no way calls into question the settled principle that undocumented workers are covered by the federal employment discrimination statutes[.]".])

[32] *See, e.g., Perkins v. Silver Mountain Sports Club* (10th Cir. 2009) 557 F.3d 1141, 1149 [affirming that after-acquired evidence was irrelevant to issue of liability and relevant only to question of damages]; *Quinn-Hunt v. Bennet Enterprises, Inc.* (6th Cir. 2005) 122 Fed. App'x 205, 208 [reversing grant of summary judgment based on after-acquired evidence]; *Crapp v. City of Miami Beach* (11th Cir. 2001) 242 F.3d 1017 [concluding that judgment in defendant's favor on the basis of after-acquired evidence

discrimination he suffered nor would it deter the defendant from future acts of discrimination]; *Russell v. Microdyne Corp.* (4th Cir. 1995) 65 F.3d 1229 [reversing grant of summary judgment to defendant based on after-acquired evidence and concluding that plaintiff remained eligible for damages until date misconduct was discovered]; *Mardell v. Harleysville Life Ins. Co.* (3d Cir. 1995) 65 F.3d 1072, 1074 [rejecting argument that if employee lied to obtain job, she cannot maintain employment discrimination claim because it contravenes the letter and the spirit of *McKennon* and anti-discrimination laws].

[33] Every state court of last resort that has addressed the conflict between employment discrimination protections and the equitable defenses raised in this case has rejected an absolute bar on such claims, even where the plaintiff may have been barred by government-imposed requirements from holding the job in the first place. (*See, e.g., Cicchetti v. Morris Cnty. Sheriff's Office* (2008) 194 N.J. 563, 588 [affirming that after-acquired evidence does not foreclose civil rights claims in cases of aggravated harm or egregious discriminatory conduct because doing so "would lead to abhorrent results: acts that our statutes condemn would be permitted; discriminatory behaviors, however vile and reprehensible, would go unpunished."]; *Brooks v. Lexington-Fayette Urban Cnty. Hous. Auth.* (Ky. 2004) 132 S.W.3d 790, 805-06 [rejecting application of unclean hands defense to civil rights claims and concluding that, in civil rights cases, allowing after-acquired evidence to limit remedies, but not bar recovery, strikes the proper balance]; *O'Day v. McDonnell Douglas Helicopter Co.* (1998) 191 Ariz. 535, 539-40 [rejecting after-acquired evidence as absolute bar to recovery in civil rights case because it would fail to give any consequence to employer's wrongful conduct, and instead finding such evidence only relevant to remedies]; *Barlow v. Hester Industries, Inc.* (1996) 198 W.Va. 118, 133 [same]; *Walters v. U.S. Gypsum Co.* (Iowa 1995) 537 N.W.2d 708, 711 [same, in disability discrimination case, and rejecting application of unclean hands defense]. *See also, Gassmann v. Evangelical Lutheran Good Samaritan Soc., Inc.* (1997) 261 Kan. 725, 727-28 [observing in *dicta* that the after-acquired evidence doctrine should not act as a complete bar against civil rights claims, because they raise public policy concerns].)

Moreover, in several states where the question has not yet reached the court of last resort, intermediate appellate courts have taken the same approach. (*See, e.g., Baldwin v. Cablevision Sys. Corp.* (N.Y. App. Div.

Federal courts that have considered FEHA claims have taken the same approach.[34] By contrast, in completely barring such civil rights claims as a matter of law, *Salas* impermissibly struck at the heart of FEHA's civil rights purposes. Allowing its rule to stand would flout the public policies embodied in FEHA and frustrate the larger societal benefit that flows from individuals asserting their civil rights. (*See Flannery v. Prentice* (2001) 26 Cal.4th 572, 582-53. ["There is no doubt that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies

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approach. (*See, e.g., Baldwin v. Cablevision Sys. Corp.* (N.Y. App. Div. 2009) 65 A.D.3d 961, 967 [holding after acquired evidence only limits damages in civil rights cases and does not entitle defendants to summary judgment]; *Meads v. Best Oil Co.* (Minn. Ct. App. 2006) 725 N.W.2d 538, 546 [same, in disability discrimination case]; *Johnson v. Bd. of Trustees of Durham Technical Cmty. Coll.* (N.C. Ct. App. 2003) 157 N.C.App. 38, 48 [same]; *Janson v. North Valley Hosp.* (Wash. Ct. App. 1999) 93 Wash.App. 892, 900 [same]; *Wright v. Rest. Concept Mgmt., Inc.* (Mich. Ct. App. 1995) 210 Mich.App. 105, 109-13 [same, and rejecting application of unclean hands defense].)

In addition, every state court that has considered the issue has also rejected the use of after-acquired evidence as a complete bar to recovery for retaliatory discharge claims brought under workers' compensation laws. Instead, they have found that such evidence at most limits a claimant's remedies. (*See, e.g., Riddle v. Wal-Mart Stores, Inc.* (Kan. Ct. App. 2000) 27 Kan.App.2d 79, 87; *Trico Technologies Corp. v. Montiel* (Tex. 1997) 949 S.W.2d 308, 312; *Thompson v. Better-Bilt Aluminum Products Co., Inc.* (Ariz. Ct. App. 1996) 187 Ariz. 121, 129.)

[34] *See, e.g., Rivera,* 364 F.3d at 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].

embodied in constitutional or statutory provisions."] [internal quotations omitted].)

To give full effect to the overriding public policy of this state to eradicate employment discrimination, this Court should hold that in the civil rights context, neither the after-acquired evidence nor unclean hands doctrines may bar in their entirety challenges to employer behavior that violates core civil rights principles, and that these doctrines at most might operate to limit a plaintiff's remedies. By so doing, this Court will send a clear message that the Court of Appeal's application of those doctrines to deprive Salas of any recourse for Sierra's violations of his civil rights is antithetical to FEHA's paramount dual purposes of deterring civil rights violations and compensating victims when their rights are violated.

III. The Court Below Erred in Finding that Sierra Had Proven Up Its Affirmative Defenses.

As described above, the Court of Appeal erred both in finding that SB 1818 did not make Salas's immigration status irrelevant to his civil rights claims, and that Sierra's affirmative defenses trumped those claims in their entirety. But even leaving those errors aside,[35] the court below also erred when it reversed the trial court and determined that Sierra had proven up its defenses with undisputed evidence. It contravened familiar summary judgment principles in so doing.

The law relating to affirmative defenses in summary judgment proceedings is well established:

> The burden on a defendant moving for summary judgment based on an affirmative defense is different than the burden to

[35] For the limited purposes of this section *only*, we assume *arguendo* that the affirmative defenses were neither precluded neither by SB1818 nor by sound public policy and persuasive authority to the contrary.

> show that one or more elements of a cause of action cannot be established. Instead of merely submitting evidence to negate a single element of a claim, or offering evidence such as insufficient discovery responses to show that the plaintiff does not have evidence to create a triable issue, a defendant has the initial burden to show that undisputed facts support each element of the affirmative defense.

(6 Witkin, California Procedure, Proceedings Without Trial, § 237 (5th ed. 2008) [citing *Consumer Cause v. SmileCare* (2001) 91 Cal.App.4th 454, 467].) Only *after* the defendant has proven its defense with undisputed evidence, therefore, does the burden shift to the plaintiff to demonstrate the existence of a triable issue. (*See, e.g., Lowe v. California League of Professional Baseball* (1997) 56 Cal.App.4th 112, 123-24 [reversing grant of summary judgment for defendants where defendants' evidentiary filings were insufficient to provide the factual basis for their affirmative defense, and thereby did not shift the burden to plaintiff to demonstrate a triable issue of fact].)

A. The Court of Appeal Erred in Finding that Salas's Social Security Number Was Invalid.

In seeking judgment based on its affirmative defenses, Sierra was required to prove them up with evidence not susceptible of reasonable dispute. Both of its two defenses, in turn, depended upon Sierra's proving that Salas had provided it with a false Social Security number.

Had Sierra in fact been able to do so with credible and sufficient evidence, it would then have been proper to require Salas to counter with evidence establishing a genuine dispute on that matter. Instead, the Court of Appeal required Salas to *rebut* the Tenney declaration, and improperly

granted Sierra summary judgment when it erroneously determined that Salas had not done so.[36] (*Salas*, 129 Cal.Rptr.3d at 272-73.)

A fundamental problem with the Court of Appeal's reasoning, however, is that the conclusory Tenney declaration hardly amounted to dispositive proof that the Social Security number used by Salas did not belong to him. No foundation for Tenney's statements was provided; no copy of Tenney's alleged Social Security card was provided; and no other indicia, foundational or otherwise, were provided to support a factual determination that Tenney was undeniably the number's sole and valid holder. At best, Tenney's declaration supports only his *belief* that the number belonged to him. It does not resolve whether Tenney was mistaken; whether the Social Security Administration might have inadvertently assigned the same number to two people[37]; and, as noted,

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[36] Although it was not incumbent upon Salas to do so, as the evidentiary burden had never shifted to him, Salas nonetheless provided a photocopy of his Social Security card (AA, Vol. 1, 120-21 & 127-28), documents relevant to his employment on which the Social Security number had been written (AA, Vol. 1, 119, 122, 126, 129, 132, 150 & 164), 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 (AA, Vol. 1, 223-28). This evidence demonstrated 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 ample basis for finding that the number in question indeed belonged to him. At the very least, this evidence bears out the existence of a material factual dispute not appropriately resolved on summary adjudication, as the trial court recognized.

[37] The Social Security Administration has acknowledged that it cannot guarantee that different individuals will not inadvertently be issued the

given Tenney's conclusory statements, it in no way proves that the number belonged to Tenney. Given these holes in Defendant's showing, the burden never properly shifted back to Salas to present any evidence. Thus, the Court of Appeal erred in concluding that Sierra's affirmative defenses had been established.

In short, the issue of whether Salas provided Sierra with an invalid Social Security number (let alone whether he did so with fraudulent intent[38]) is one that only a jury can properly resolve. Evidence exists on both sides of the question, and so summary judgment was improper.

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same Social Security number. (*See, e.g.*, "The Story of the Social Security Number," Social Security Bulletin, Vol. 69, No. 2, 2009 (*available at* http://www.socialsecurity.gov/policy/docs/ssb/v69n2/ssb-v69n2.pdf) (last visited Feb. 28, 2012), at 63-64 ["[P]rior to 1961 SSA field offices issued new SSNs. Only a fraction of these SSN assignments were screened at the central office for a previously assigned SSN, and then only manually. Thus, issuing duplicate SSNs was possible. Beginning in 1961, the central office in Baltimore issued all new SSNs, but it was not until 1970 that an electronic method of checking for previously issued SSNs . . . was devised."] (internal citations omitted); Social Security Administration, Annual Performance Plan for Fiscal Year 2013, February 2012, at 48), (*available at* http://www.socialsecurity.gov/budget/2013APP.pdf) (last visited Feb. 28, 2012) [noting that since 2008, 0.1% of all Social Security numbers have been incorrectly assigned, and that a number is "correctly assigned" where, *inter alia*, "the individual did not receive a Social Security Number that belongs to someone else."]) These documents are appended as Attachments E and F, respectively, to the Second Motion for Judicial Notice, filed herewith.

[38] Although Sierra did not allege fraud as an affirmative defense, AA, Vol. 1, 37-42, it nonetheless asserted below that Salas "fraudulently presented a Social Security number that belonged to someone else." (Respondent's Brief, 31, 34-35.) In this connection, the Court of Appeal noted that Sierra's unclean hands defense was predicated on the assertion that Salas was guilty of the "fraudulent use of another person's Social Security number." (129 Cal.Rptr.3d at 267.) Sierra's baseless assertion

Instead, the Court of Appeal proceeded to draw inferences *against* Salas, the non-moving party, and found the Tenney declaration to suffice as credible proof that Salas's number was not his. In so doing, the court below misapplied fundamental summary judgment standards.[39] Reversal is warranted on this ground as well. (*See Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851.)

B. The Court of Appeal Erred in Concluding that the Purported Discrepancy Regarding Salas's Social Security Number Indicated He Was Not Authorized to Work in the United States.

As just discussed, the Tenney declaration does not establish that the Social Security number used by Salas belonged instead to Tenney. But even leaving that aside, the Court of Appeal also erred in concluding that Salas's proffer of the same Social Security number as that ostensibly

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required it 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."].) No such evidence has been advanced. To the contrary, the evidence of Salas's conversations with management about discrepancies in Social Security numbers in fact support the opposite conclusion – 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 candor and integrity by doing so.

[39] In this regard, the Court of Appeal made the striking assertion that it was proper to subject "plaintiff's evidence ... *to careful scrutiny*." (129 Cal.Rptr.3d at 269; emphasis added). This statement is at squarely odds with basic summary judgment principles. (*See, e.g., McDonald v. Antelope Valley Comm. College Dist.* (2008) 45 Cal.4th 88, 96-97 [stating that a reviewing court must "'view the evidence in the light most favorable to plaintiff[ ] as the losing part[y]' and 'liberally construe plaintiff['s] evidentiary submissions and *strictly scrutinize defendant's own evidence*, in order to resolve any evidentiary doubts or ambiguities in plaintiff['s] favor.'"] (emphasis added).)

claimed by Tenney was indisputable proof that Salas was not authorized to work in the United States.

To begin with, the determination of an individual's immigration status is exclusively 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."].) Indeed, requiring (or even allowing) civil 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."].)

Moreover, 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 Salas was undocumented.[40] Yet such knowledge is a prerequisite to any defense that

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[40] 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 actual knowledge and "constructive knowledge." (8 C.F.R. § 271a.1(l)(1).)

Sierra had information sufficient to require it to terminate Salas. Courts have consistently held that the threshold for "constructive knowledge" is not met simply on the basis of an allegedly discrepant Social Security number. 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:

> [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 fact, the 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.].)[41]

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[41] Other decisions, not involving information received from federal immigration authorities, are in accord. (*See, e.g., Mountain High Knitting,*

In denying legal recourse to Salas on the sole basis that the Social Security number he provided was claimed by another person, the Court of Appeal ignored applicable federal immigration law. This error must be rectified.

C. The Court of Appeal Erred In Finding No Triable Issue Concerning Sierra's Policy Concerning Undocumented Workers.

To prove up its after-acquired evidence defense, Sierra was required to establish that it had a policy or practice of terminating any employees it discovered to be undocumented. But here, much as before, the Court of Appeal erred, first by assessing Sierra's evidence too generously and then again by subjecting Salas's evidence to a standard much harsher than appropriate for the non-moving party.

The Court of Appeal's initial error was to conclude that Sierra's sole evidence regarding its policy – the declaration of Sierra's president, Stanley Kinder – was sufficient to shift the burden to Salas. (AA, Vol. 1, 83-84; 99-101.) (*See, e.g., Anderson v. Liberty Lobby* (1986) 477 U.S. 242, 255 [observing that adjudication of a summary judgment motion is not a "trial on affidavits."]; *Krantz v. BT Visual Images, L.L.C.* (2001) 89 Cal.App.4th 164, 173 [finding conclusory declarations an insufficient basis for summary judgment].)

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].)

Instead, Kinder's self-serving declaration should have been strictly construed. (*Eagle Oil & Refining Co. v. Prentice* ("*Eagle Oil*") (1942) 19 Cal.2d 553, 556.) Had it done so, the court below would have found that all the key assertions were conclusory, and insufficient to shift the burden to Salas.

Kinder's declaration suffered from many conspicuous factual omissions. For instance: when was Sierra's "long-standing policy" adopted? Was it even in effect when the issue of Salas's retention came up? Was it a written policy and, if not, who (besides Kinder) allegedly even knew about it? What facts would trigger (or possibly excuse) the policy's implementation? Who would even determine that an employee was allegedly prohibited by federal law from working, and on what basis?

Far more significantly, Kinder offered no information about the policy's enforcement history. The most striking question is whether the alleged policy was *consistently enforced* or only enforced when an employee had asserted legal rights under California employment statutes? Indeed, with the lone exception of enforcement against Salas (after the company learned of his physical disability), *nothing* in the Kinder declaration – particularly when it is strictly construed – states that any other specific person *was ever subjected* to this alleged policy.

It seems unnecessary to similarly detail all the questions left unanswered (or affirmatively raised) by Kinder's declaration. It should be sufficient to note that the glaring absence of *any supporting detail* should have lead the court to conclude that Sierra failed at the outset to establish the necessary foundation for its asserted defense. (*See Murillo* , 65 Cal.App.4th at 845-46 [rejecting declaration from defendant's president that it would have fired plaintiff, in light of other testimony that defendant

had prior knowledge that some of its employees were not work authorized].)

But even assuming *arguendo* that the burden properly shifted to Salas, the Court of Appeal nonetheless erred by applying an impermissibly strict standard to the evidence Salas put forward. *See Eagle Oil,* 19 Cal.2d at 556 ("the affidavits of the party against whom the motion is made must be accepted as true, and . . . such affidavits to be sufficient need not necessarily be composed wholly of strictly evidentiary facts."].) In this respect, Salas's responsive declaration contains more than enough evidence to contradict Kinder's declaration and create one or more triable issues. For example, Salas's declaration states that he informed his *supervisor*, Leo Huizar, that Salas and several other employees had received letters from the SSA stating that its records indicated that their names did not match their Social Security numbers. In response, Huizar met with Salas and the other employees a few days later to affirmatively reassure them that Sierra would not terminate them over such discrepancies. (AA, Vol. 2, 346 ¶ 8.) Salas additionally testified that he knew of several undocumented immigrants who worked at Sierra, and that he did not know of any instance in which Sierra had ever discharged an employee based on a lack of work authorization. (AA, Vol. 2, 346 ¶ 9.[42])

The court below found Salas's testimony insufficient to create a triable issue as to the actual existence of Sierra's stated policy. (129 Cal.Rptr.3d at 274.) Had the proper summary judgment standards been

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[42] The court below suggested that the trial court may have erroneously admitted Salas's testimony despite possible hearsay problems (129 Cal.Rptr.3d at 274 n.3) – ignoring *Eagle Oil*'s statement that "affidavits [of the non-moving party] to be sufficient need not necessarily be composed wholly of strictly evidentiary facts." (19 Cal.2d at 556.)

applied by the court below, a different result would have been mandated.[43] Reversal is appropriate for this reason as well.

CONCLUSION

For the foregoing reasons, Plaintiff and Appellant Vicente Salas requests that the Court reverse the decision of the court below.

Dated: March 1, 2012

Respectfully submitted,

David C. Rancaño
RANCAÑO & RANCAÑO

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

Norman Pine
PINE & PINE

By: _____
CHRISTOPHER HO

Attorneys for Plaintiff and Appellant
VICENTE SALAS

[43] The Court of Appeal erred in other respects as well. Among other things, it erred in affirming the admission of Tenney's testimony because it is mere conclusion, unsupported by fact, and was offered to show that the SSA issued Tenney the Social Security number. Further, 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.

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520(c)(1) of the California Rules of Court, I certify that this Appellant's Opening Brief contains 12, 502 words, exclusive of the caption page, tables of contents and authorities, statement of issues presented for review, signature blocks, this Certificate and that appearing on the page following, and the attachments hereto.

Dated: March 1, 2012

Respectfully submitted,

David C. Rancaño
RANCAÑO & RANCAÑO

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

Norman Pine
PINE & PINE

By: _____
CHRISTOPHER HO

Attorneys for Plaintiff and Appellant
VICENTE SALAS

Slip Copy, 2010 WL 3069314 (N.D.Cal.), 23 A.D. Cases 821
(Cite as: 2010 WL 3069314 (N.D.Cal.))

H

United States District Court, N.D. California,
San Jose Division.
William A. ASHMAN, Plaintiff,
v.
SOLECTRON, INC., a Delaware corporation, and Does 1 through 10, Inclusive, Defendants.

No. CV 08-1430 JF.
Aug. 4, 2010.

West KeySummary**Federal Civil Procedure 170A**
2497.1

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2497 Employees and Employment Discrimination, Actions Involving
170Ak2497.1 k. In General. Most Cited Cases

Genuine issues of material fact existed as to whether an employee's supervisor knew the employee had cancer and terminated him on the pretext of a cost-cutting reorganization. Therefore, summary judgment in favor of the employer was precluded on the employee's claims for violations of the ADA and the California Fair Employment and Housing Act (FEHA). It was undisputed that the employer had conducted an internal review that considered personnel changes for the purposes of lowering costs, but the supervisor's assertion he did not know the employee had cancer was inconsistent with testimony that he should have known and inconsistent with the record which contained correspondence between the parties regarding the employee's medical condition. Americans with Disabilities Act of 1990, § 102(a), 42 U.S.C.A. § 12112(a); West's Ann.Cal.Gov.Code § 12940(a).

Stephen Robert Pappas, Attorney at Law, Palo Alto, CA, for Plaintiff.

Benjamin A. Emmert, Robert James Wilger, Littler Mendelson, P.C., San Jose, CA, for Defendants.

ORDER [FN1] GRANTING IN PART AND DENYING IN PART MOTION FOR SUMMARY JUDGMENT AND DENYING MOTION TO STRIKE

FN1. This disposition is not designated for publication in the official reports.

JEREMY FOGEL, District Judge.

*1 Defendant Solectron Corporation ("Solectron") moves for summary judgment. Plaintiff William Ashman opposes the motion, and moves to strike the testimony and declarations of Grainne Blanchette and Monica Ek offered by Solectron. The Court has considered the moving papers, the declarations, and the oral arguments of counsel presented at the hearing on July 2, 2010. For the reasons discussed below, Solectron's motion will be granted in part and denied in part, and Ashman's motion will be denied.

I. BACKGROUND

A. Factual Allegations

On July 21, 2003, Ashman, who at the time was fifty-two years old, was hired by Nasser Mirzai, Solectron's Senior Manager for Global Material Systems Information Technology, to work at Solectron's office in Milpitas, California as an IT server administrator. (Pl. Opp'n 3:11-12, June 10, 2010.) As a condition of his employment, Ashman agreed to Solectron's work rules. (Blanchette Decl. ¶ 4, Oct. 2, 2008; Pl. Dep. 45:2-5.) Among other things, Ashman agreed that he would return and not retain any of Solectron's property upon termination of his employment. (Blanchette Decl. ¶ 4, Ex. B.)

Along with Darby Winborn, Chanh Chi, and Eric Oo, Ashman was a member of Solectron's Windows NT Support Team. (Pl. Dep. 23:22-24:8 .) All four members of the team were generally responsible for maintaining and upgrading Solectron's Windows computers, but each member specialized in certain aspects of the team's day-to-day functions. (Pl. Dep. 37:15-28:2; Mirzai Dep. 22:21-23:4.) All four team members reported directly to June Babilla, who reported to Mirzai.

On September 15, 2005, Ashman was diagnosed with squamous cell carcinoma. (Pl. Opp'n 5:3-4.) Pursuant to his physician's instructions, Ashman requested a leave of absence ("LOA") from Solectron. (Pl. Opp'n 5:6.) The LOA was granted, and on October 15, 2004, Ashman began radiation and chemotherapy treatment. (Pl. Opp'n 5:8.) Ashman had informed Babilla of his medical condition, and Alfred Cheung was hired on a ninety-day contract at about the same time. (Pl. Opp'n 5:10-16.) Cheung's job functions included "backup/restore, account management, data center walk-throughs, and 'building' servers." (Pl. Opp'n 6:11.)

Ashman claims that during his LOA, he remained in email correspondence with Mirzai and Babilla about his medical condition. On February 21, 2005, Ashman returned to work. (Pl. Opp'n 6:25.) Shortly thereafter, Ashman was notified that he was being laid off. Ashman was told that Solectron needed to reduce cost and that his job tasks could be performed elsewhere at a lower cost. Ashman refused to sign his severance agreement. His last day of employment with Solectron was March 31, 2005.

Ashman filed a charge of disability and age discrimination against Solectron with the Equal Employment Opportunity Commission ("EEOC") on April 6, 2005. The EEOC eventually issued a letter of determination finding good cause for the charge. (Ashman Decl. ¶ 16, Ex. D, June 10, 2010.)

*2 On or about June 15, 2006, Solectron discovered that there had been unlawful access to its computer system and reported the incident to the Milpitas Police Department. (Blanchette Decl. ¶¶ 11-19.) An investigation determined that the party involved was Ashman. Ashman subsequently pled no contest to related misdemeanor charges. (Pl.Dep.98:25-99:16.)

In July 2005, Ashman was hired by Taos Mountain, Inc. (Pl.Dep.114:10-116:6.) He worked there from July 24, 2005 to January 20, 2006, when he resigned voluntarily to work on a political campaign. (Pl.Dep.116:10-22.) Ashman returned to Taos Mountain on April 16, 2005, but was terminated on September 27, 2006 because he had used Taos Mountain property in his unlawful access of Solectron's computer system. (Pl.Dep.116:10-117:25.)

B. Procedural History

Ashman filed the instant action on March 3, 2008. The operative amended complaint, filed on March 18, 2008, asserts claims for relief pursuant to: (1) the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 *et seq.*, (2) the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 623 *et seq.*, (3) the California Fair Employment and Housing Act ("FEHA"), Cal. Gov.Code § 12926(d), for failing to accommodate a medical condition, (4) FEHA, Cal. Gov.Code § 12940(a), for age discrimination in employment, and (5) California common law, for tortious discharge in violation of public policy.

III. EVIDENTIARY OBJECTIONS[FN2]

FN2. Only evidentiary objections affecting the disposition of the instant motion for summary judgment are addressed in this order.

Solectron objects to portions of Ashman's declaration on the grounds of hearsay, lack of personal knowledge, and impermissible opinion. Hearsay is a statement, other than one made by the declarant, offered in evidence to prove the truth of the matter asserted. Fed.R.Evid. 801(c). Hearsay is inadmissible except as provided by the Federal Rules of Evidence or other rules prescribed by the Supreme Court. The testimony of a witness who does not have personal knowledge of the subject of his or her testimony is inadmissible. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony. Fed.R.Evid. 602. When a witness provides testimony other than as an expert, the witness' testimony in the form of opinions or inferences is limited to those "rationally based on the perception of the witness, and [ ] helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and [ ] not based on scientific, technical, or other specialized knowledge...." Fed.R.Evid. 701.

Objection No. 1

Solectron objects to Ashman's description of his understanding of Cheung's job duties. Ashman bases his statement on his personal knowledge of the job tasks he and his teammates performed, and he prefaces his statement by indicating that his conclusions are limited by the extent of his personal knowledge. However, at least part of the statement is inadmissible hearsay, specifically: "It is my understanding that Alfred Cheung took over my responsibility when I

went on leave of absence in October 2004, and never relinquished it after that." Ashman's understanding is based on the statements of others, and offered for the truth of the matter asserted. SUSTAINED IN PART.

Objection No. 2

*3 Solectron objects to Ashman's statement that his supervisor "[Babilla] also told me that she would need to bring in a temporary employee for three months to fulfill my role while I was on leave." (Ashman Decl. ¶ 5.) However, Babilla's alleged statement was made in her capacity and within the scope of her authority as Ashman's supervisor. OVERRULED.

Objection No. 3

Solectron objects to Ashman's statement that he received an email from Babilla introducing Cheung and describing Solectron's need to have Cheung fill in for him. Ashman asserts that "[i]n conformity with this expressed need, on October 15, 2004, Ms. Babilla sent an email to her group (including me) introducing Alfred Cheung, a contract employee, and describing for him job duties identical to mine." (Ashman Decl. ¶ 6.) The email was sent by Babilla in her capacity and within the scope of her authority as Ashman's supervisor. OVERRULED.

Objection No. 4

Solectron objects to Ashman's statement that he discovered documents he characterizes as "smoking guns," including an organizational chart with his name on it that said "LOA" and a presentation showing him as one of four employees to be included in a reduction in force at Solectron. Ashman has not shown that he has personal knowledge as to when the documents were created or who created them. SUSTAINED.

Objection No. 8

Ashman asserts that, "Solectron never engaged in any kind of interactive process with me to determine how to accommodate my cancer disability, other than Ms. Babilla telling me to take as much time as I needed and that she would hire a temporary employee." (Ashman Decl. ¶ 13.) Although it cannot be offered as a legal conclusion, the statement is probative with respect to Ashman's experience of Solectron's handling of his termination. OVERRULED.

Objection No. 11

Solectron objects to Ashman's statement that, "It is my understanding that Alfred Cheung, the contractor who had been engaged by Solectron to fulfill my duties while I was on medical leave, remained with Solectron after my termination in the same capacity in which he had been hired." (Ashman Decl. ¶ 15.) Solectron may cross-examine Ashman as to the basis for his understanding. OVERRULED.

Objection No. 12

Solectron objects to Ashman's statement that he filed a charge with the EEOC and that among the documents he provided was a so-called "smoking gun" document that Ashman had accessed and downloaded from a Solectron account without authorization. The statement is as follows:

> I filed a charge of discrimination based on disability and age with the United States Equal Employment Opportunity Commission ("EEOC") on April 6, 2005. Among other documents, I submitted the above-mentioned "smoking gun" documents and Babilla email to the EEOC as evidence of discrimination. After investigating, the EEOC issued a Determination finding '... reasonable cause to believe that [Solectron] violated the ADEA and ADA' on July 7, 2007, but was unable to resolve the matter through negotiation.

*4 (Ashman Decl. ¶ 16.) Solectron quotes the Court's December 1, 2008 order barring Ashman from using or referring to any privileged documents, but it ignores the following statement in that order: "After all the documents are returned to Solectron, Ashman will be permitted to use any document produced by Solectron during the normal course of discovery." (Order Granting Mot. to Compel Return 9:7-11, Dec. 1, 2008.) Magistrate Judge Lloyd since has ordered that the so-called "smoking gun" document be provided to Ashman. OVERRULED.

III. MOTION TO STRIKE

A. Legal Standard

"If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed.R.Civ.P. 37(c)(1). Fed.R.Civ.P. 26(a) requires, in part, that a party "without awaiting a discovery request, provide to the other parties: (i) the name and, if known, the address and telephone num-

ber of each individual likely to have discoverable information ..." Rule 26(e) requires a party to supplement its Rule 26(a) disclosure "in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing ..."

Whether a supplemental disclosure is timely is determined not only by the circumstances under which the complaining party learned of the incomplete or incorrect disclosure but also by deadlines set by the trial court.

> In these days of heavy caseloads, trial courts in both the federal and state systems routinely set schedules and establish deadlines to foster the efficient treatment and resolution of cases. Those efforts will be successful only if the deadlines are taken seriously by the parties, and the best way to encourage that is to enforce the deadlines. Parties must understand that they will pay a price for failure to comply strictly with scheduling and other orders, and that failure to do so may properly support severe sanctions and exclusions of evidence.

Wong v. Regents of the Univ. of Cal., 410 F.3d 1052, 1060 (9th Cir.2005).

B. Discussion

Pursuant to Fed.R.Civ.P. 37(c), Ashman moves to bar Solectron from using any testimony of Monica Ek and Grainne Blanchette and to strike their declarations. (Mot. to Strike 2:2-8, May 28, 2010.) As a threshold issue, Solectron contends Ashaman's motion is procedurally defective pursuant to Fed.R.Civ.P. 7 and this Court's local rules and that these defects "significantly prejudice[ ] Solectron's ability to anticipate and respond to the motion." (Def. Opp'n 9:26-27, June 11, 2010.) However, Ashman's motion appears to comport with the applicable federal and local rules.

Discovery in this action closed on March 31, 2010. Any supplemental disclosure after such date would be untimely. *See Wong*, 410 F.3d at 1062 (concluding the supplemental disclosure made two days after notice of incomplete disclosure but *after* deadline for discovery cut-off was "tardy ... nor ... harmless"). Solectron nonetheless argues that Ek's declaration should not be stricken because Ashman knew that Ek was a likely witness and was aware of the scope of her possible testimony. (Def. Reply to Mot. to Strike 19:3-4.) The Court agrees. Ek's declaration provides additional evidence of Solectron's termination practices. To the extent that Ek is testifying as a custodian of records, the Court perceives no prejudice to Ashman. To the extent that Ek is testifying from her personal knowledge as a human resource manager, the scope of her testimony was entirely foreseeable.

*5 Solectron relies on Blanchette's declaration to support its argument with respect to the limitation on back pay that might be awarded should Ashman prevail on his claims of discrimination or wrongful termination. Although Blanchette's declaration was not formally disclosed previously, Ashman had notice of the substance of Blanchette's testimony on October 2, 2008, when Blanchette filed a declaration in connection with Solectron's motion to dismiss. (Doc. No. 31, Nov. 3, 2008.) The motion to strike is denied.

IV. SUMMARY JUDGMENT

A. Legal Standards

1. Rule 56(c)

A motion for summary judgment should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Material facts are those that might affect the outcome of the case under the governing law. *Id.* at 248. There is a genuine dispute about a material fact if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.* The moving party bears the initial burden of informing the Court of the basis for the motion and identifying portions of the pleadings, depositions, admissions, or affidavits that demonstrate the absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Where the party moving for summary judgment would not bear the ultimate burden of persuasion at trial, it must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at

trial. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir.2000). If the moving party meets its initial burden, the burden shifts to the nonmoving party to present specific facts showing that there is a genuine issue of material fact for trial. Fed.R.Civ.P. 56(e); *Celotex Corp.*, 477 U.S. at 324.

The evidence and all reasonable inferences must be viewed in the light most favorable to the nonmoving party. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir.1987). Summary judgment thus is not appropriate if the nonmoving party presents evidence from which a reasonable jury could resolve the material issue in its favor. *Anderson*, 477 U.S. at 248-49; *Barlow v. Ground*, 943 F.2d 1132, 1134-36 (9th Cir.1991). A high standard for granting summary judgment is particularly appropriate in a discrimination case "because the ultimate question is one that can only be resolved through a searching inquiry-one that is most appropriately conducted by a fact-finder, upon a full record." *Schnidrig v. Columbia Mach., Inc.* 80 F.3d 1406, 1410 (9th Cir.1996) (quoting *Lam v. Univ. of Hawaii*, 40 F.3d 1551, 1563 (9th Cir.1994)).

2. The parties' respective burdens

*6 The ADA and FEHA prohibit an employer from discriminating against a qualified individual because of a disability. 42 U.S.C. § 12112(a); Cal. Gov.Code § 12940(a). Under both California and federal law, an individual is qualified if he or she can fulfill the essential functions of the position. 42 U.S.C. § 12112(b)(5); Cal. Gov.Code § 12940(a). The ADEA and FEHA prohibit an employer from discriminating against employees above the age of forty on account of their age. 29 U.S.C. §§ 623(a)(1), 631(a); Cal Gov.Code § 12940(a).

In cases in which direct evidence of discrimination is lacking, a plaintiff first must establish a *prima facie* case of discrimination. *See Ritter v. Aircraft Co.*, 58 F.3d 454, 456 (9th Cir.1995) ("Standards of proof in ADEA discrimination suits parallel those in Title VII suits."). Specifically, the plaintiff must show that (1) he is covered under the respective law, (2) he was performing his job satisfactorily, (3) he suffered an adverse employment action; and (4) the relevant circumstances support an inference that such action was taken because of his membership in a covered class. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) ("[T]he precise requirements of the *prima facie* case can vary with the context and were 'never intended to be rigid, mechanized, or ritualistic.' ") (internal citation omitted).

Once the plaintiff has established a *prima facie* case of employment discrimination, the burden then shifts to the employer to present evidence that it had a non-discriminatory reason for its action. If the employer has carried its burden, the plaintiff "then must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for [termination] were in fact a coverup for a ... discriminatory decision." *Id.* at 805. This "shift back to the plaintiff does not place a new burden of production on the plaintiff." *Noyes v. Kelly Servs.*, 488 F.3d 1163, 1169-70 (9th Cir.2007). The burden on the defendant, "having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) (internal citation omitted). The plaintiff then must establish through either direct or circumstantial evidence a reasonable inference that the adverse employment decision was due in wholly or in part to discriminatory intent, thus countering the non-discriminatory reason provided by the employer. *See McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1123 (9th Cir.2004). *See also Schnidrig*, 80 F.3d at 1409 ("[V]ery little evidence is necessary to raise a genuine issue of fact regarding an employer's motive; any indication of discriminatory motive ... may suffice to raise a question that can only by resolved by a fact-finder."); *Lam*, 40 F.3d. at 1564 ("We require very little evidence to survive summary judgment precisely because the ultimate question is one that can only resolved through a 'searching inquiry'-one that is most appropriately conducted by the fact finder, upon a full record.")

*7 In *Noyes*, the Ninth Circuit articulated two possible ways in which a plaintiff can show that the employer's reason was pretextual: "(1) *indirectly*, by showing that the employer's proffered explanation is unworthy of credence because it is internally inconsistent or otherwise not believable, or (2) *directly*, by showing that unlawful discrimination more likely motivated the employer." 488 F.3d at 1170 (emphasis in the original). "These two approaches are not exclusive; a combination of the two kinds of evidence may in some cases serve to establish pretext so as to make summary judgment improper. In this case, while

the indirect evidence and direct evidence are independently sufficient to allow the [plaintiffs] to proceed to trial, it is the cumulative evidence to which a court ultimately looks." *Chaung v. Univ. of Cal. Davis*, 225 F.3d 1115, 1127 (9th Cir.2000). However, the plaintiff cannot defeat a defendant's motion for summary judgment merely by questioning the credibility of the defendant's proffered reason for the challenged employment action. *See Cornwall v. Electra Cent. Credit Union*, 439 F.3d 1018, 1028 n. 6 (9th Cir.2006).

B. Disability discrimination claims (Claims 1 and 3)

Solectron concedes for the purposes of the instant motion that Ashman can establish a *prima facie* case under the ADA and FEHA. Ashman alleges that he was treated differently from similarly situated non-disabled employees, and that Solectron failed to accommodate his disability. However, Solectron asserts that Ashman was selected for termination "after his primary job duties were transferred from Milpitas to Mexico as part of Solectron's Company-wide cost cutting reorganization necessitated by adverse economic conditions." (Def. Reply to Summ. J. 3:20, June 18, 2010.)

The Court concludes there is a genuine issue of material fact as to whether Mirzai knew that Ashman had cancer and terminated Ashman on the pretext of a cost-cutting reorganization. It is undisputed that Mirzai selected Ashman for termination. (Mirzai Dep. 62:5-10.) It also is undisputed that Solectron conducted an internal review that considered personnel changes for the purpose of lowering costs. At the same time, Mirzai's assertion that he did not know that Ashman had taken a LOA because of cancer is inconsistent with his testimony with respect to his supervisory responsibilities and his statement that he had intimate knowledge of the job duties of Ashman's team. Mirzai's assertion also is inconsistent with the statement of Ashman's immediate supervisor Babilla-who did know that Ashman was on leave for treatment of his cancer-that "if one of my staff is sick and going to be needing to take time off, I would be notifying [Mirzai] of that...." (Babilla Dep. 23:11-13, 30:13-31:3.) The record also contains correspondence from Ashman to Mirzai discussing Ashman's medical status and treatment. (Mirzai Dep. 39:23-40:20, 45:24-57:11.)

Solectron claims that Ashman's duties did not require "hands on work on the physical computer infrastructure" but instead involved primarily computer account administration, a type of work that easily could be outsourced. (Mot.Summ. J. 4:1-8, May 21, 2010.) This claim is inconsistent with Babilla's deposition testimony. (Babilla Dep. 20:15-21:2.) The record also supports a reasonable inference that Cheung was hired to fill in for Ashman during the LOA. Indeed, there is evidence that Mirzai directly sought permanent employment for Cheung after Ashman's termination despite Mirzai's stated desire to reduce Solectron's employee headcount. (Pappas Decl. Ex. 7.)

***8** In addition, the Court takes note of the EEOC's determination that Ashman had good cause to bring a charge of disability discrimination. *See Chandler v. Roudebush*, 425 U.S. 840, 863 n. 39, 96 S.Ct. 1949, 48 L.Ed.2d 416 (1976) ("Prior administrative findings made with respect to an employment discrimination claim may, of course, be admitted as evidence at a federal-sector trial de novo.")

C. Age discrimination claims (Claims 2 and 4)

Ashman alleges that Solectron discriminated against him because of his age. To establish a *prima facie* case of age discrimination, Ashman must show he was a protected under the ADEA and FEHA, that he was performing his job satisfactorily, that he suffered an adverse employment action, and that the relevant circumstances permit an inference of discrimination on the basis of age. Reviewing all the evidence in the record, the Court concludes that Solectron is entitled to summary judgment on Ashman's age discrimination claims. Ashman conceded at his deposition that although his age "could have been" a reason for his termination, "[t]he main reason I was terminated was because I was-my leave of absence for cancer." (Pl.Dep.88:11-15.) While the record contains substantial evidence that Ashman's medical condition may have affected Solectron's employment decisions, there is no evidence other than Ashman's own speculation that age had any role in such decisions.

D. Wrongful termination in violation of public policy (Claim 5)

To establish a claim for wrongful termination in violation of public policy, a plaintiff must prove the employer violated a statutory or regulatory provision in terminating his employment. *See Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 254 Cal.Rptr. 211,

765 P.2d 373, 379 (Cal.1988). As discussed above, the Court concludes that Solectron is not entitled to summary judgment on Ashman's claims of disability discrimination, which are based on federal and state statutes.

V. LIMITATION OF DAMAGES

As an alternative to summary judgment, Solectron seeks a ruling limiting Ashman's entitlement to back pay, front pay, and punitive damages. Solectron relies on the well-established principle that:

> Once an employer learns about employee wrongdoing that would lead to a legitimate discharge, [a court] cannot require the employer to ignore the information, even if it is acquired during the course of discovery in a suit against the employer....[F]ormulation of a remedy should be calculation of backpay from the date of the unlawful discharge to the date the new information was discovered. In determining the appropriate order for relief, the court can consider taking into further account extraordinary equitable circumstances that affect the legitimate interests of either party.

McKennon v. Nashville Banner Publishing, Co. 513 U.S. 352, 362, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995).

Solectron argues that any award of damages to Ashman must be limited because Ashman retained company documents after his termination in violation of his employment agreement (Mot. Summ. J. 20:17-19; Pl. Dep. 39:1-22, 40:12-25.) The relevant portion of that agreement required Ashman, upon termination, to return to Solectron all company documents, correspondence, property, or reproductions in his possession. Solectron contends that Ashman's admitted retention of Solectron documents was "theft of Solectron's property and, had Solectron known Plaintiff improperly retained these documents and had he still been a Solectron employee, it would have terminated his employment immediately and he could not have be rehired." (Mot.Summ. J. 20:25-28.) However, the post-termination provisions of an employment agreement ordinarily may be enforced only where there has been a lawful termination of employment. *See Guz v. Bechtal Nat.*, 8 P.3d 1089, 349 (Cal.2000) ("The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made.*") (emphasis in original).

*9 Solectron also asks the Court to consider Ashman's unlawful conduct in accessing Solectron's computer system on March 31, 2005. Solectron contends that any award of back pay must be cut off as of September 21, 2006, the date on which Solectron discovered Ashman's unlawful access. In *O'Day v. McDonnell Douglas Helicopter Co.* the Ninth Circuit held that, "An employer can avoid backpay and other remedies by coming forward with after-acquired evidence of an employee's misconduct, but only if it can prove by a preponderance of the evidence that it would have fired the employee for that misconduct." 79 F.3d 756, 761 (9th Cir.1996); *accord Washington v. Lake County*, 969 F.2d 250, 255 (7th Cir.1992); *Smallwood v. United Air Lines, Inc.*, 728 F.2d 614, 616 n. 5 (4th Cir.1984).

Recognizing that an employer has a strong incentive to limit possible back pay by discovering previously undisclosed wrongdoing on the part of a plaintiff and claiming it would have resulted in immediate discharge, the court observed that an employer cannot merely make a "bald assertion" that it would have terminated the employee. *O'Day*, 79 F.3d at 762. However, the plaintiff in *O'Day* did not contest that he had committed wrongdoing, and testimony that the plaintiff would have been terminated was "corroborated by both the company policy ... and by common sense." *Id.* (rejecting plaintiff's contention his "rummaging through his supervisor's office for confidential documents" was protected activity.) "[W]e are loathe to provide employees an incentive to rifle through confidential files looking for evidence that might come in handy in later litigation." *Id.* at 763.

Similarly here, Ashman was arrested and pled no contest to accessing Solectron's computer system unlawfully after his termination. (Pl. Dep. 98:25-99:16; Mot. Summ. J. 21:15.) Solectron's assertion that it would have fired Ashman upon discovering that he was looking through private emails of senior Solectron executives, together with the record evidence of Solectron's policy toward such access, is more than sufficient to establish that Ashman would have been terminated. Accordingly, any award of back pay will be limited to the amount that Ashman would

have earned from the date of his termination to the date that Solectron discovered Ashman's unlawful access of its computer system. (Mot. Summ. J. 21; Emmert Decl. ¶ 18, May 21, 2010.) *See O'Day, 79 F.3d at 764* ("[Plaintiff] would be entitled to some remedy for the discrimination.... [H]e would at the very least be entitled to backpay from the date of his wrongful termination to the date that [defendant] learned of his wrongdoing....").

VI. PUNITIVE DAMAGES

Solectron argues that as a matter of law Ashman cannot establish a claim for liquidated or punitive damages under the ADA and FEHA. Both statutes require a showing of a reckless disregard as to whether an employment action was in contravention of law. (Mot.Summ. J. 23:16-20.) As discussed above, there is a genuine issue of material fact as to whether Solectron's cost-cutting plan was a pretext for Ashman's termination. A reasonable jury could find that Solectron knew or recklessly disregarded the fact that such a termination would contravene the ADA or FEHA.

VI. ORDER

***10** Good cause therefor appearing:

(1) Solectron's motion for summary judgment is GRANTED IN PART AND DENIED IN PART as set forth above.

(2) Ashman's motion to strike is DENIED.

IT IS SO ORDERED.

N.D.Cal.,2010.
Ashman v. Solectron, Inc.
Slip Copy, 2010 WL 3069314 (N.D.Cal.), 23 A.D. Cases 821

END OF DOCUMENT

ATTACHMENT A

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)

* * *

ATTACHMENT B

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

ATTACHMENT C

The New York Times
nytimes.com

April 5, 2005

Illegal Immigrants Are Bolstering Social Security With Billions

By EDUARDO PORTER

STOCKTON, Calif. - Since illegally crossing the Mexican border into the United States six years ago, Ángel Martínez has done backbreaking work, harvesting asparagus, pruning grapevines and picking the ripe fruit. More recently, he has also washed trucks, often working as much as 70 hours a week, earning $8.50 to $12.75 an hour.

Not surprisingly, Mr. Martínez, 28, has not given much thought to Social Security's long-term financial problems. But Mr. Martínez - who comes from the state of Oaxaca in southern Mexico and hiked for two days through the desert to enter the United States near Tecate, some 20 miles east of Tijuana - contributes more than most Americans to the solvency of the nation's public retirement system.

Last year, Mr. Martínez paid about $2,000 toward Social Security and $450 for Medicare through payroll taxes withheld from his wages. Yet unlike most Americans, who will receive some form of a public pension in retirement and will be eligible for Medicare as soon as they turn 65, Mr. Martínez is not entitled to benefits.

He belongs to a big club. As the debate over Social Security heats up, the estimated seven million or so illegal immigrant workers in the United States are now providing the system with a subsidy of as much as $7 billion a year.

While it has been evident for years that illegal immigrants pay a variety of taxes, the extent of their contributions to Social Security is striking: the money added up to about 10 percent of last year's surplus - the difference between what the system currently receives in payroll taxes and what it doles out in pension benefits. Moreover, the money paid by illegal workers and their employers is factored into all the Social Security Administration's projections.

Illegal immigration, Marcelo Suárez-Orozco, co-director of immigration studies at New York University, noted sardonically, could provide "the fastest way to shore up the long-term finances of Social Security."

It is impossible to know exactly how many illegal immigrant workers pay taxes. But according to specialists, most of them do. Since 1986, when the Immigration Reform and Control Act set penalties for employers who knowingly hire illegal immigrants, most such workers have been forced to buy fake ID's to get a job.

Currently available for about $150 on street corners in just about any immigrant neighborhood in California, a typical fake ID package includes a green card and a Social Security card. It provides cover for employers, who, if asked, can plausibly assert that they believe all their workers are legal. It also means that workers must be paid by the book - with payroll tax deductions.

IRCA, as the immigration act is known, did little to deter employers from hiring illegal immigrants or to discourage them from working. But for Social Security's finances, it was a great piece of legislation.

Starting in the late 1980's, the Social Security Administration received a flood of W-2 earnings reports with incorrect - sometimes simply fictitious - Social Security numbers. It stashed them in what it calls the "earnings suspense file" in the hope that someday it would figure out whom they belonged to.

The file has been mushrooming ever since: $189 billion worth of wages ended up recorded in the suspense file over the 1990's, two and a half times the amount of the 1980's.

In the current decade, the file is growing, on average, by more than $50 billion a year, generating $6 billion to $7 billion in Social Security tax revenue and about $1.5 billion in Medicare taxes.

In 2002 alone, the last year with figures released by the Social Security Administration, nine million W-2's with incorrect Social Security numbers landed in the suspense file, accounting for $56 billion in earnings, or about 1.5 percent of total reported wages.

Social Security officials do not know what fraction of the suspense file corresponds to the earnings of illegal immigrants. But they suspect that the portion is significant.

"Our assumption is that about three-quarters of other-than-legal immigrants pay payroll taxes," said Stephen C. Goss, Social Security's chief actuary, using the agency's term for illegal immigration.

Other researchers say illegal immigrants are the main contributors to the suspense file. "Illegal immigrants account for the vast majority of the suspense file," said Nick Theodore, the director of the Center for Urban Economic Development at the University of Illinois at Chicago. "Especially its growth over the 1990's, as more and more undocumented immigrants entered the work force."

Using data from the Census Bureau's current population survey, Steven Camarota, director of research at the Center for Immigration Studies, an advocacy group in Washington that favors more limits on immigration, estimated that 3.8 million households headed by illegal immigrants generated $6.4 billion in Social Security taxes in 2002.

A comparative handful of former illegal immigrant workers who have obtained legal residence have been able to accredit their previous earnings to their new legal Social Security numbers. Mr. Camarota is among those opposed to granting a broad amnesty to illegal immigrants, arguing that, among other things, they might claim Social Security benefits and put further financial stress on the system.

The mismatched W-2's fit like a glove on illegal immigrants' known geographic distribution and the patchwork of jobs they typically hold. An audit found that more than half of the 100 employers filing the most earnings reports with false Social Security numbers from 1997 through 2001 came from just three states: California, Texas and Illinois. According to an analysis by the Government Accountability Office, about 17 percent of the businesses with inaccurate W-2's were restaurants, 10 percent were construction companies and 7 percent were farm operations.

Most immigration helps Social Security's finances, because new immigrants tend to be of working age and contribute more than they take from the system. A simulation by Social Security's actuaries found that if net immigration ran at 1.3 million a year instead of the 900,000 in their central assumption, the system's 75-year funding gap would narrow to 1.67 percent of total payroll, from 1.92 percent - savings that come out to half a trillion dollars, valued in today's money.

Illegal immigrants help even more because they will never collect benefits. According to Mr. Goss, without the flow of payroll taxes from wages in the suspense file, the system's long-term funding hole over 75 years would be 10 percent deeper.

Yet to immigrants, the lack of retirement benefits is just part of the package of hardship they took on when they decided to make the trek north. Tying vines in a vineyard some 30 miles north of Stockton, Florencio Tapia, 20, from Guerrero, along Mexico's Pacific coast, has no idea what the money being withheld from his paycheck is for. "I haven't asked," Mr. Tapia said.

For illegal immigrants, Social Security numbers are simply a tool needed to work on this side of the border. Retirement does not enter the picture.

"There will be a moment when I won't be able to continue working," Mr. Martínez acknowledges. "But that's many years off."

Mario Avalos, a naturalized Nicaraguan immigrant who prepares income tax returns for many workers in the area, including immigrants without legal papers, observes that many older workers return home to Mexico. "Among my clients," he said, "I can't recall anybody over 60 without papers."

No doubt most illegal immigrants would prefer to avoid Social Security altogether. As part of its efforts to properly assign the growing pile of unassigned wages, Social Security sends about 130,000 letters a year to employers with large numbers of mismatched pay statements.

Though not an intended consequence of these so-called no-match letters, in many cases employers who get them dismiss the workers affected. Or the workers - fearing that immigration authorities might be on their trail - just leave.

Last February, for instance, discrepancies in Social Security numbers put an end to the job of Minerva Ortega, 25, from Zacatecas, in northern Mexico, who worked in the cheese department at a warehouse for Mike Campbell & Associates, a distributor for Trader Joe's, a popular discount food retailer with a large operation in California.

The company asked dozens of workers to prove that they had cleared up or were in the process of clearing up the "discrepancy between the information on our payroll related to your employment and the S.S.A.'s records." Most could not.

Ms. Ortega said about 150 workers lost their jobs. In a statement, Mike Campbell said that it did not fire any of the workers, but Robert Camarena, a company official, acknowledged that many left.

Ms. Ortega is now looking for work again. She does not want to go back to the fields, so she is holding out for a better-paid factory job. Whatever work she finds, though, she intends to go on the payroll with the same Social Security number she has now, a number that will not jibe with federal records.

With this number, she will continue paying taxes. Last year she paid about $1,200 in Social Security taxes, matched by her employer, on an income of $19,000.

She will never see the money again, she realizes, but at least she will have a job in the United States.

"I don't pay much attention," Ms. Ortega said. "I know I don't get any benefit."

CERTIFICATE OF SERVICE

I, PAMELA MITCHELL, 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 March 1, 2012, I served the within:

APPELLANT'S OPENING BRIEF

__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
Attorneys for Defendant and Appellee Sierra Chemical Company

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 March 1, 2012.

PAMELA MITCHELL