No. S196568

IN THE SUPREME COURT OF CALIFORNIA

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

APPELLANT'S REPLY BRIEF

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

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INTRODUCTION

In its Answer Brief, Defendant and Appellee Sierra Chemical Company ("Sierra") self-righteously attempts to portray this as a case about "the fundamental unfairness of allowing a damages claim based on a person's not getting a job which he [] was not even legally able to hold." (Answer Brief ("AB") at 2.) Quite the contrary: it is, instead, about an employer trying to dodge any responsibility for its civil rights violations, based on its opportune discovery during litigation of purported information about Plaintiff and Appellant Vicente Salas ("Salas") that could not possibly have been a factor in its decisions to discriminate against him.

A rule that would permit Sierra to avoid being held accountable for its discriminatory acts in this way would be contrary to the law and public policy of this state. This is particularly so with regard to undocumented workers, because such a rule would reward employers who fail to comply with immigration law when they initially hire employees, while allowing them to later invoke the employees' immigration status to immunize themselves from liability for unlawful actions that they took against them.[1] Moreover, it would have a profound chilling effect upon the willingness and ability of undocumented workers to assert their rights in the workplace.

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[1] *See, e.g., Vargas v. Kiewit Louisiana Co.* (S.D.Tex. July 18, 2012, No. H–09–2521) 2012 WL 2952171, *5 ("To refuse to allow recover[y] against a person responsible for an illegal alien's employment who knew or should have known of the illegal alien's status would provide an incentive for such persons to target illegal aliens for employment in the most dangerous jobs or to provide illegal aliens with substandard working conditions."), quoting *Rosa v. Partners in Progress, Inc.* (2005) 152 N.H. 6, 13 (same, and further observing that "[i]t would allow such persons to treat illegal aliens as disposable commodities who may be replaced the moment they are damaged.").

Such a result cannot be countenanced for another reason: it would be fundamentally unfair to honest businesses that try to follow California's labor and employment laws. Law-abiding employers that comply with the wage and hour laws, for example, or with requirements to accommodate disabled employees, would be at a competitive economic disadvantage vis-à-vis unscrupulous businesses that flout those laws, knowing that their workers could be intimidated into silence. Sierra simply does not respond to this important policy consideration, which was set forth in the Opening Brief. (*See* Opening Brief ("OB") at 10-14.)

ARGUMENT

As a threshold matter, Sierra's Answer Brief rests upon three fundamental mischaracterizations of this case: first, that it is simply a "failure to hire" case; second, that Salas merely seeks back pay remedies for Sierra's discriminatory actions; and, third, that this case is not about Salas's immigration status but, instead, about the allegation that he misrepresented his Social Security number to Sierra. None of those characterizations is accurate.

First, like the court below,[2] Sierra treats this case as if it only involved a "failure to hire" claim. It does so apparently to invite the Court to dispose entirely of Salas's claims based on Sierra's argument that *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833 forecloses any wrongful termination claim by an undocumented worker[3] – a flawed

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[2] *Salas v. Sierra Chemical Co.* (2011) 129 Cal.Rptr.3d 263, 269 ("This is a refusal to hire case.").

[3] *See, e.g.,* AB at 1 ("The principal issue which this appeal presents is whether the after-acquired evidence and unclean hands doctrines are complete defenses to [Salas's] wrongful refusal to hire claim"), 36 ("Salas'

argument that has been previously addressed. (OB at 24-25.) But Salas's first claim for relief is based on Sierra's failure to accommodate his back injury – a claim Sierra strives to bury.[4] Sierra, indeed, seeks to convey the impression that this case should be treated like one in which an undocumented worker is denied employment because of his lack of status – not as a civil rights case where, as here, an employee's disability was not accommodated and where, because of discriminatory animus, his employer refused to recall him back to work from his seasonal layoff.

Sierra's Answer Brief further suggests that Salas seeks only back pay remedies. But this is nothing more than a "straw man" argument since, in addition to back pay, Salas seeks general, compensatory, and punitive damages – remedies whose availability Sierra does not challenge. And in any case, Sierra's assumption that back pay would be unavailable to Salas rests entirely on *dicta* in a Court of Appeal decision that, when examined, cannot support the weight Sierra places on it.

Finally, in an effort to dismiss SB 1818 as irrelevant to this appeal, Sierra attempts to frame this case as being not about Salas's immigration status but, instead, his supposed misrepresentation of his Social Security

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claims, like the *Murillo* plaintiff's wrongful discharge claim, did not arise from anything that happened during his employment.").

[4] One of the few times Sierra acknowledges Salas's reasonable accommodation claim is when it attempts to question whether Salas ever requested a work accommodation. (AB at 20.) Sierra, however, nowhere raised such a contention below. (AA, Vol. 1, 46-98, Vol. 2, 468-79.) In any event, under the FEHA an employee need not make a request for a reasonable accommodation to be entitled to receive one; employers have an affirmative duty to provide a reasonable accommodation if they are actually or constructively aware of an employee's disability. (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 950-51.)

number. But given the Legislature's intent in enacting SB 1818 – a statute that protects the rights of workers lacking immigration status, who may include persons who have used false documentation to obtain employment – this is no more than a distinction without a difference.

These mischaracterizations seriously undermine Sierra's arguments, and Sierra's efforts to trade upon them should be rejected. To be sure, however, Sierra's discussions of SB 1818 and the application of its affirmative defenses are infirm for other reasons, most of which have been addressed in the Opening Brief. These matters are discussed more specifically below.

I. SB 1818 REQUIRES THAT SALAS'S DISCRIMINATION CLAIMS BE REMANDED FOR TRIAL.

Sierra cannot explain away SB 1818's clear statement that:

> [a]ll protections, rights, and remedies 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(a).) Nor does Sierra even attempt to respond to the bill's legislative history, which establishes the Legislature's three-fold purposes: 1) to avoid incentivizing the hiring – and subsequent exploitation – of undocumented workers; 2) to avoid giving legal sanction to the creation of a uniquely vulnerable underclass whose existence would erode employment conditions for *all workers*, whether authorized or not; and 3) to avoid placing law-abiding employers at an economic disadvantage vis-à-vis those competitors who seek out and exploit undocumented workers. (*See* OB at 10-14.)

Instead, Sierra only reiterates that a Social Security number is required to legally work in the United States.[5] Salas has never argued otherwise. But from that unremarkable proposition, Sierra draws a series of illogical conclusions. It first reasons that because Salas *allegedly* did not possess a valid Social Security number, he was therefore unemployable, and thus has no right to complain either about being refused employment, or about Sierra's unlawful refusal to engage him in the legally mandated interactive process to accommodate his disability while he worked there.[6] Such an analysis might be appropriate in a situation in which a job applicant who lacked work authorization documents was denied employment for that reason, and thus was never employed. But it can scarcely apply to eliminate, *retroactively*, the civil rights of an employee who was hired, then injured and discriminated against during his employment on the basis of his disability. This is so even if his employer later, during litigation, searched for and fortuitously discovered evidence supposedly indicating that it should not have hired the employee in the first place – the very result Sierra argues for here.[7] SB 1818, of course, was

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[5] Narrow exceptions to this rule exist, but are not germane here. (*See* Reply to Answer to Petition for Review at 4 n.7.)

[6] *See, e.g.*, AB at 26 ("Salas' argument mistates [sic] the scope of SB 1818 and its application to a disability discrimination claim based on an employer's failure to hire a person not legally qualified to work in the United States. [¶] The summary judgment motion was based on Salas' use of a Social Security number that belonged to another person and his ineligibility to work in the United States because he did not have a Social Security number of his own.").

[7] One court has discussed the compelling equities at play in a situation such as that presented here. (*See Rodriguez v. The Texan, Inc.* (N.D.Ill. Sept. 16, 2002, No. 01 C 1478) 2002 WL 31061237, *3 [granting, in Fair Labor Standards Act case, plaintiffs' in limine motion to deem employer's

enacted precisely to ensure that such discrimination against undocumented workers would *not* occur.

Sierra asserts that SB 1818 is irrelevant because summary judgment was granted due to Salas' purported lack of a "Social Security number of his own", and not because of his immigration status. (AB at 26.). But this argument would lead to the absurd result that in order to be covered by SB 1818, workers lacking immigration status – the stated beneficiaries of the statute – would be required to possess a valid Social Security number. As previously noted in the Opening Brief, it would have been self-defeating and entirely irrational for the Legislature to have enacted SB 1818, a law reaffirming the protections available to unauthorized immigrant workers, while at the same time intending to deny its coverage to persons who may have used false documentation to gain employment.[8] (OB at 14-16.) Nor

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Hoffman defense waived] ["[I]t surely comes with ill grace for an employer to hire alien workers and then, if the employer itself proceeds to violate [the law] . . . , for it to try to squirm out of its own liability on such grounds."]).

[8] Strictly speaking, a Social Security number is not required for purposes of IRCA's employment eligibility verification system. Although a Social Security card is one form of identification which may be used to prove work authorization (*see* Form I-9, Employment Eligibility Verification (available online at http://www.uscis.gov/files/form/i-9.pdf) at 5, List C), the employee may choose from many documents to present for that purpose. (*Ibid.*; 8 U.S.C. § 1324b(a)(6).) In addition, although Section 1 of the Form I-9 contains a blank for the employee's Social Security number (Form I-9 at 4), the Form specifies that "[p]roviding] the Social Security number is voluntary" except for employees being hired by employers who utilize the "E-Verify" electronic verification system. (*Id.* at 1.) In this regard, the statement in *Cassano v. Carb* (2d Cir. 2006) 436 F.3d 74 that "federal law *requires that employers gather and report the SSNs of their employees to aid enforcement of* tax and *immigration laws*" is misleading. (*See id.* at 75 (emphasis added; citations omitted)). Possession

can Sierra explain why – if the Legislature had, in fact, meant to exclude from SB 1818's protections any persons using invalid documentation – it would nonetheless have provided that "no inquiry shall be permitted into a person's immigration status" in labor and employment law cases, absent clear and convincing evidence of any federal law obligation to do so.[9] (Labor Code § 1171.5(b).)[10]

Sierra further contends that in enacting SB 1818 in response to *Hoffman Plastic Compounds, Inc. v. NLRB* (2002) 535 U.S. 137, the Legislature construed "any reinstatement remedy prohibited by federal law" to somehow include back pay, and that therefore Salas cannot recover back pay, thus effectively disposing of his action in its entirety.[11] This

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of a Social Security number is, however, generally required under the Internal Revenue Code for wage reporting purposes (26 U.S.C. § 6109(d)).

[9] Sierra's proffered reading of SB 1818, moreover, has already been implicitly rejected by the Court of Appeal. *Farmers Brothers Coffee v. Workers' Compensation Appeals Bd.* (2005) 133 Cal.App.4th 533, 543 (discussing Labor Code § 1171.5, rejecting employer's suggestion that "[o]ne who obtains employment in a manner contrary to federal law should not benefit from that illegal employment relationship", and declining to read such a policy into Labor Code § 3351(a).).

[10] Sierra has implicitly conceded the relevance of Salas's perceived immigration status to its motion for summary judgment. *See* AA, Vol. 1, 100:7-8 (raising to the trial court's attention that it has a "policy that precludes hiring any applicant who is prohibited by federal immigration law from working in the United States.").

[11] "Back pay" should not be confused with wages for work already performed, a remedy whose continued availability post-*Hoffman* is also widely acknowledged. (*See, e.g., David v. Signal Intern., LLC* (E.D.La. 2009) 257 F.R.D. 114, 123-24; *Zavala v. Wal-Mart Stores, Inc.* (D.N.J. 2005) 393 F.Supp.2d 295, 321-25; *Flores v. Amigon* (E.D.N.Y. 2002) 233 F.Supp.2d 462, 463-64.) In any event, Salas does not seek wages for work he had already performed.

reasoning, however, is founded entirely upon Sierra's misplaced reliance on *dicta* in *Farmers Brothers Coffee v. Workers' Compensation Appeals Bd.* (2005) 133 Cal.App.4th 533, [12] in which the Court of Appeal held that Labor Code § 1171.5 made clear that undocumented persons were protected by workers' compensation laws. The employer in that case argued that *Hoffman* intended to place employers in the position of enforcing the immigration laws, and thus that it was entitled to oppose an application for benefits where it was undisputed that the applicant was undocumented. In response to this argument, *Farmers Brothers* relied on a section of this Court's opinion in *Rivcom Corp. v. Agricultural Labor Relations Bd.* (1983) 34 Cal.3d 743 for the supposed general proposition that "backpay is not recoverable by an employee who would not be rehired regardless of any employer misconduct," and thereon concluded that "where reinstatement is prohibited by federal law, section 1171.5 would also prohibit backpay,"[13] thus "reconciling" Labor Code § 1171.5 with *Hoffman*. (*Id.* at 773-74.) But in the cited discussion from *Rivcom*, this Court simply interpreted a particular ALRB remedial order as covering only those employees who had been laid off as a result of the unlawful employer behavior at issue, not those employees who had been laid off for permissible reasons. Although

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[12] *Id.* at 542 n.7 ("The *sole issue* presented here is whether Ruiz is an employee for purposes of the Workers' Compensation Act, and since reinstatement, backpay, or any related issue has not been raised here or below, there is *no occasion to consider it.*") (emphasis added).

[13] At least one court has indicated that remedial orders to undocumented workers are permissible where, unlike reinstatement, they do not require or presume a continuing violation of IRCA. (*Madeira v. Affordable Housing Foundation, Inc.* (2d Cir. 2006) 469 F.3d 219, 242-47 [limiting *Hoffman*]) SB 1818's exception for "any reinstatement remedy prohibited by federal law" is properly understood in that light.

Farmers Brothers' core holding on the eligibility of undocumented workers for workers' compensation benefits was certainly correct, that court's conversion of the discussion in *Rivcom* into a broad proposition about the availability of back pay generally was unwarranted, and provides no basis for Sierra's contention that undocumented workers may not receive back pay remedies under the FEHA.[14]

As for the other remedies Salas seeks, Sierra does not dispute that even assuming *arguendo* Salas was unauthorized to work, he would be entitled to receive them. This is squarely in keeping with post-*Hoffman* authority in civil rights cases.[15] The availability of virtually all traditional

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[14] To the contrary, relevant precedent counsels that back pay remains available to undocumented workers who bring employment discrimination claims, *Hoffman* notwithstanding. (*See, e.g., E.E.O.C. v. Fair Oaks Dairy Farms, LLC* (N.D.Ind. Aug. 1, 2012, Civ. No. 2:11cv265) 2012 WL 3138108, *6 ["Denying backpay to illegal immigrants would interfere with the purpose of Title VII and chill the filing of complaints."]); *Chellen v. John Pickle Co., Inc.* (N.D.Okla. 2006) 446 F.Supp.2d 1247, 1286 (Title VII and § 1981 case), citing *Rivera v. NIBCO, Inc.* (9th Cir. 2004) 364 F.3d 1057, 1067-69; *De La Rosa v. Northern Harvest Furniture* (C.D.Ill. 2002) 210 F.R.D. 237, 238-39 (Title VII case) (*dicta*); *but see Escobar v. Spartan Security Service* (S.D.Tex. 2003) 281 F.Supp.2d 895, 897 (Title VII case) (*dicta*). *See also, e.g.,* Ho and Chang, *Drawing the Line after* Hoffman Plastic Compounds, Inc. v. NLRB*: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond* (2005) 22 Hofstra Lab. & Emp. L.J. 473, 503-17 (discussing *inter alia* reasons for limiting *Hoffman* to the NLRA statutory context and the importance of back pay remedies to the vitality of Title VII); *Madeira,* 469 F.3d at 247 [observing, in workplace injury case, that "unlike reinstatement, a lost earnings award to an injured worker does not require the worker or his employer actually to commit or continue to commit an IRCA violation."].)

[15] *See, e.g., Chellen v. John Pickle Co., Inc.* (N.D.Okla. 2006) 446 F.Supp.2d 1247, 1286 (finding compensatory and punitive damages available under Title VII and § 1981); *Escobar v. Spartan Security Service* (S.D. Tex. 2003) 281 F.Supp.2d 895, 897 (stating, in Title VII case, that

civil rights remedies *to undocumented workers* – as presumed in the very language of Labor Code § 1171.5(a) – defeats any suggestion by Sierra that Salas's action should not survive as a practical matter.[16]

Sierra reprises its contention that SB 1818's statement that its provisions "are declaratory of existing law" was, in fact, a ratification of *Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620 and *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833. Yet Sierra never attempts to explain why the Legislature would have gone to the effort of enacting legislation that would have been swallowed by the exception those cases purportedly create. (*See* OB at 18.) Likewise, it fails to explain why "existing law" would not also include other pre-existing authority, such as *Cooper v. Rykoff-Sexton, Inc.* (1994) 24 Cal.App.4th 614, that was squarely opposed to *Camp* and *Murillo*. (*See* OB at 22 n.23.) And it never responds to Salas's explanation that the "declaratory of existing law"

Hoffman "did not specifically foreclose all remedies for undocumented workers under either the National Labor Relations Act or other comparable federal labor statutes," and concluding that plaintiff's entitlement to remedies for harassment and retaliation was unaffected by his lack of work authorization); *see also Rivera v. NIBCO, Inc.* (9th Cir. 2004) 364 F.3d 1054, 1067 (suggesting, in *dicta*, continued availability after *Hoffman* of traditional anti-discrimination remedies under Title VII, including compensatory and punitive damages). *Cf. Tyson Foods, Inc. v. Guzman* (2003) 116 S.W.3d 233, 244 (finding, in workplace injury case, availability of common-law personal injury damages); *Renteria v. Italia Foods, Inc.* (N.D.Ill. Aug. 21, 2002, No. 02 C 495) 2003 WL 21995190, *6 (compensatory damages available under FLSA) (citing *Singh v. Jutla* (N.D.Cal. 2002) 214 F.Supp.2d 1056, 1061) (declining, in FLSA retaliation case, to read *Hoffman* as barring undocumented workers from seeking compensatory and punitive damages).

[16] It should be noted, however, that this Court need not reach the question of the availability of particular remedies in order to resolve this appeal.

phraseology was meant to ensure that SB 1818 would be treated as a clarification of the law and thus that it would apply to existing causes of action, not merely future cases. (*See* OB at 16.)

Finally, Sierra's attempt to distinguish *Sullivan v. Oracle Corp.* (2011) 51 Cal.4th 1191, in which this Court broadly interpreted Labor Code § 1171.5 to protect non-resident workers in California, misses the point. Certainly, non-resident workers are not necessarily undocumented. But *Sullivan* recognized that the exclusion of one class of workers from legal protections available to all others would, as here, encourage unscrupulous employers to hire those who were unprotected, and thus readily exploitable. (*Id.* at 1198.) To find that SB 1818 – despite its clear and sweeping affirmation that "all individuals regardless of immigration status" are to be covered by California's labor and employment laws – was in fact intended *sub silentio* to leave certain workers unprotected would, plainly, distort the clear statutory intent and frustrate sound public policy. Sierra confusingly states that "[t]here is no comparable governmental interest in prohibiting the assertion of equitable defenses to the wrongful refusal to hire action of a person not legally qualified to work at the job for which he was not hired." (AB at 32.) But Sierra provides no authority for this bald assertion that there is no public policy interest in avoiding the creation of a uniquely vulnerable underclass of workers that could be freely exploited and then fired with impunity. Indeed, the plain language of SB 1818 and all applicable authority are to the contrary.

The Court of Appeal's interpretation of SB 1818 cannot stand given the statute's plain text and its legislative history. Both make clear the Legislature's intent to preserve equal rights for *all* workers regardless of their immigration status. The position advanced by Sierra would lead to

treating SB 1818 as a meaningless act of the Legislature, a result to be avoided. (*See, e.g., Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22 ["We do not presume that the Legislature performs idle acts, nor do we construe statutory provisions so as to render them superfluous."]) For these reasons, this Court should interpret SB 1818 as requiring reversal and the reinstatement of Salas's claims.

II. THE AFTER-ACQUIRED EVIDENCE AND UNCLEAN HANDS DOCTRINES MUST BE APPROPRIATELY BALANCED WITH WORKERS' CIVIL RIGHTS.

Sierra's brief begins by dismissing the importance of workplace rights as "a manufactured policy concern." (AB at 1.) But this view is inconsistent with the great importance that the Legislature and this Court have placed on eliminating employment discrimination. (*See* OB at 20-21.) Sierra merely asserts – without addressing arguments made in the Opening Brief – that *Camp* and *Murillo* allow a worker's civil rights claims to be foreclosed as a matter of law based on subsequently-discovered evidence that had nothing to with an employer's discriminatory decisions and actions. To let stand such a result would establish a rule by which an employer could retroactively immunize its violations of California's fundamental public policies.

Sierra advances no real reason why this Court should affirm the Court of Appeal's broad and unprecedented application of the unclean hands and after-acquired evidence defenses to extinguish civil rights claims.[17] Though the court below relied on *Camp* and *Murillo* for its

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[17] Indeed, some scholars question the applicability of these defenses to any employment cause of action. (*See, e.g.,* Pandya, *Unpacking the Employee-Misconduct Defense* (2012) U. Pa. J. Bus. L. 14(4) 867-925.) Moreover, Sierra's argument further highlights the disturbing role that

conclusions, neither the holdings in *Camp* or *Murillo,* nor *Murillo*'s *dicta,* support the ruling that Salas's claims are entirely barred by either of the two equitable defenses.[18] (*See* OB at 22-27.) Moreover, Sierra fails to shed light on why contrary California case law which limited the reach of these equitable defenses in the *civil rights* context should be ignored. (*See, e.g.,*

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after-acquired evidence might play in cases brought by undocumented workers. If these doctrines are allowed to apply as Sierra urges, they would establish a dynamic by which dubious employers who turn a blind eye to a worker's lack of employment authorization are later rewarded in the course of civil litigation for engaging in the essentially retaliatory act of investigating a plaintiff's immigration status. (*See* Hart, *Retaliatory Litigation Tactics: The Chilling Effects of "After-Acquired Evidence"* (2008) 40 Ariz. St. L.J. 401, 435-52) [describing the chilling effect the after-acquired evidence doctrine has on civil rights plaintiffs and arguing that a claim of retaliation could be premised on the assertion of the after-acquired evidence defense or the search for such evidence]; *see also Sure-Tan, Inc. v. National Labor Relations Board* (1984) 467 U.S. 883, 895-96 [concluding that where adverse actions are taken because a worker engaged in protected activity still constitutes retaliation, even when the employer's acts, when viewed in isolation, would otherwise be permitted]). To incentivize such investigations into a plaintiff's immigration status would thwart the FEHA's paramount policy of eradicating employment discrimination.

[18] Sierra suggests that because *McKennon v. Nashville Banner Publishing Co.* (1995) 513 U.S. 352 embraced a "case to case" application of the after-acquired evidence doctrine that somehow supports foreclosing Salas's claims on the basis of Sierra's unclean hands defense. (AB at 32-33.) That is blatantly unfounded. *McKennon* rejected the operation of the unclean hands defense in instances, like the one at bar, where "a private suit serves important public purposes." (*McKennon*, 513 U.S. at 360.) *McKennon* did not establish a rule absolutely barring back pay because to do so "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 . . . discrimination." (*Id.* at 362.)

Cooper v. Rykoff-Sexton, Inc. (1994) 24 Cal.App.4th 614, 618; *see also* OB at 22 n.23.)

Instead, Sierra likens this case to others where plaintiffs refused to provide their Social Security numbers to an employer, suffered an adverse employment action *because of that fact*, and brought suit alleging discriminatory treatment. (*See* AB at 35-36.) But none of those cases concluded that a plaintiff's failure to provide a Social Security number limited her ability to assert her right to be free from discrimination. Rather, those courts affirmed dismissal of the plaintiffs' claims because they each found, upon consideration of their merits, that the employers' actions were not discriminatory. (*See Sutton v. Providence St. Joseph Med. Ctr.* (9th Cir. 1999) 192 F.3d 826, 830-31 [concluding that it would cause defendant an undue burden to accommodate plaintiff's sincerely-held religious belief barring him from providing his Social Security number]; *Seaworth v. Pearson* (8th Cir. 2000) 203 F.3d 1056, 1057-58 [same]; *Cassano v. Carb* (2d Cir. 2006) 436 F.3d 74, 75-76 [relying on *Sutton* and *Seaworth* to conclude that if courts had not found discrimination in cases where a plaintiff possessed a sincerely-held religious objection to providing their Social Security numbers, it would not do so where the plaintiff did not even state a religious basis for doing so].)[19] Moreover, in each of these cases the employer's challenged employment action was actually based on the employee's failure to provide a Social Security number. Here, by comparison, Salas has alleged that Sierra's adverse actions were based on his disability, and Sierra now seeks to avoid liability for those actions by

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[19] It is ironic that *Sierra* exclusively relies on federal case law to bolster this argument given the limited deference it argues for with regard to *McKennon* because it is a federal case. (AB at 33.)

raising after-the-fact questions about Salas's Social Security number – something Sierra had no suspicions about when it took its adverse actions against him.

Sierra then returns to likening this case to *Murillo*. (AB at 36-37.) That contention is misplaced. First, Sierra ignores the fact that *Murillo*'s proclamations regarding the applicability of the unclean hands defense to foreclose a wrongful termination claim are *dicta.* (*See Murillo*, 65 Cal.App.4th at 839, 845; OB at 24-25.) Second, Sierra fails to address Salas's point that *Murillo* did not afford due consideration to the public purposes served by employment discrimination claims when it imported the after-acquired evidence doctrine into the civil rights context. (*See* OB at 24-25.) Moreover, Sierra glosses over the fact that the court below did not merely apply the standard announced in *Murillo*, but went further – announcing a new vague and amorphous "tied to" standard, which it used to dismiss Salas's claims related to Sierra's failure to accommodate his disability. (*See* OB at 26-27).

Sierra also attempts to force Salas's claims into the *Murillo* mold by asserting that they "did not arise from anything that happened during his employment." (AB at 36.) But the Amended Complaint references a physical injury that Salas suffered in the course and scope of his employment, and from which his discrimination claims flow. (*See* AA, Vol. 1, 32:8-10, 23-25.) Likewise, Sierra wrongly asserts that Salas's claims are "based on what occurred before Sierra [] hired him." (AB at 37.) Nonsense. Salas was not an applicant whose job application was rejected. Rather, he was on the job at Sierra in 2006 when he initially injured himself and when Sierra stopped accommodating his disability, which led to him

being reinjured. (AA, Vol. 2, 345 ¶ 3-4 & 366 ¶ 6-7.)[20] Further, in 2007 Sierra had *recalled* Salas to work, and refused to employ him only *after* Salas disclosed that he would need an accommodation to return to work. (*Id.* at 346 ¶ 7, 366 ¶ 10–11.)

Similarly, *Shattuck v. Kinetic Concepts, Inc.* (5th Cir. 1995) 49 F.3d 1106 offers no support for Sierra's position that Salas's claims should be dismissed as a matter of law. Sierra cites that court's generalized statement regarding 'refusal to hire' cases, but it fails to mention that *Shattuck* was not a refusal to hire case, and that the statement was *dicta*.[21] (*See* AB at 41-42.) Indeed, *Shattuck* actually followed *McKennon*'s teaching that falsifying information on a job application "*does not* provide immunity from liability but may affect the remedy." (*Shattuck,* 49 F.3d at 1108; emphasis added.) Rather than supporting the dismissal of Salas's claims, *Shattuck* counsels only "[c]utting off relief at the time [of] a legitimate discharge." (*Id.* at 1109.) Had the court below truly followed *Shattuck*, it would have let Salas's claims go forward and merely foreclosed any damages beyond the date Sierra discovered his alleged wrongdoing.

Despite its lip service to the "good reasons to apply overtime, workplace safety, non-discrimination, and other rules and regulations" for the protection of California employees (AB at 1), Sierra argues for nothing

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[20] Salas does not waive the alternative argument that he was at all times an employee of Sierra pursuant to the operative collective bargaining agreement. (AA, Vol. 2, 518:7-9.)

[21] Sierra further fails to point out that *Welch v. Liberty Machine Works, Inc.* (8th Cir. 1994) 23 F.3d 1403, 1405, which applied the "would have been hired" inquiry Sierra proposes, was abrogated by *McKennon*. (*See McKennon*, 513 U.S. at 359 [rejecting the reasoning contained in *Summers v. State Farm Mutual Automobile Insurance Co.* (10th Cir.1988) 864 F.2d 700, on which *Welch* relied].)

less than the elimination of those rights when it comes to undocumented workers. Yet, as seen, none of its authorities support the necessary consequence of that argument: the creation of a uniquely vulnerable worker underclass that would be powerfully deterred from asserting its legal rights which, in any event, would effectively cease to exist. In short, Sierra's assurances that California's labor and employment rights would not suffer are hollow.

To give full effect to the fundamental rights codified in the FEHA, therefore, this Court should conclude that neither the unclean hands nor the after-acquired evidence doctrine forecloses civil rights claims as a matter of law. Further, the Court should conclude, consistent with *McKennon* and the overwhelming weight of authority,[22] that the presence of after-acquired evidence *at most* affects a civil rights plaintiff's remedies, not her ability to seek redress for an employer's unlawful actions. Reversal is independently required on this basis as well.

III. TRIABLE ISSUES OF FACT REMAIN CONCERNING SIERRA'S AFFIRMATIVE DEFENSES.

Sierra's brief defense of the misapplication of summary judgment standards by the court below contains no material that has not already been addressed by Salas. For the reasons already detailed in the Opening Brief, Sierra's proffer of the Tenney declaration hardly satisfied the initial threshold Sierra had to meet in order to shift the burden to Salas to respond with rebuttal evidence. (*See* OB at 33-36.) Even leaving aside *arguendo*

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[22] *See* OB at 29 n.32 (gathering federal authorities rejecting use of after-acquired evidence to foreclose civil rights claims as a matter of law) & n.33 (gathering state court decisions); *see also* Pandya, *supra* note 13, at 872 n.17 (same).

the utter irrelevance of Salas's immigration status to Sierra's liability for its actions against him, therefore, the Tenney declaration would at most create a factual issue for trial, unsuitable for resolution on summary judgment.[23]

Sierra is forced to retreat to the dead end of rejecting as mere "speculation" Salas's assertion that the Social Security Administration ("SSA") may have issued duplicate numbers.[24] While it certainly cannot be assumed that the SSA did so here, Salas has presented factual evidence, compiled by the SSA itself, which indicates that such anomalies have in fact occurred. (OB at 34 n.37.) This is sufficient to create a disputed issue of fact incompatible with summary judgment.

Similarly, as has been previously detailed (OB at 39-42), Sierra's contention that the self-serving declaration of Stanley Kinder proved Sierra's alleged policy of terminating any employees it learned were undocumented is meritless. For one thing, all of its key assertions were conclusory in nature and unsupported by any detail. (*Eagle Oil & Refining Co. v. Prentice* (1942) 19 Cal.2d 553, 556.) Moreover, even assuming *arguendo* that the burden properly shifted to Salas on either of these points,

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[23] *See, e.g., Merchants Building Maintenance LCC* (2012) 358 NLRB No. 67, *14-*15 ("The Respondent failed to show that that the discriminatees were undocumented workers . . . . Many of the alleged discriminatees' SSNs did not, apparently, match the names given to the Respondent. . . . The Respondent's evidence, *at most*, shows the employees provided *inaccurate* SSNs for some reason.") (emphasis added).

[24] Certainly, the trial court did not view this possibility as "speculation." In its initial ruling on Sierra's summary judgment motion, the trial court identified the question as a triable issue of material fact precluding summary judgment. (AA, Vol. 2, 518:12-15 ["*Did the Social Security Administration err in issuing the same number to two separate people*, or did Plaintiff submit a false Social Security card as well as a false Alien Registration card to Defendant?"]; emphasis added.)

the court below applied an impermissibly burdensome standard to Salas's responsive declaration. (*Ibid.*)

Finally, notwithstanding Sierra's effort to dismiss the role of federal immigration authorities in determining an individual's work authorization, it still remains the case that the determination of whether someone is eligible to be employed in the United States is properly left by the judiciary to those federal agencies. (*NLRB v. Apollo Tire Co., Inc.* (9th Cir. 1979) 604 F.2d 1180, 1183.) That it was Salas's Social Security number that is the purported source of Sierra's *ex post facto* concerns (*i.e.,* over "whether he had his own Social Security number entitling him to work") (AB at 48) does not alter this conclusion. As has already been explained, a seeming discrepancy with a Social Security number "does not automatically mean that an employee is undocumented or lacks proper work authorization." (*Aramark Facility Services v. Service Employees International Union, Local 1877, AFL-CIO* (9th Cir. 2008) 530 F.3d 817, 826.) In view of the notorious complexity of "the Byzantine realm of immigration law"[25] – and, in particular, given the irrelevance of immigration status to Salas's coverage by the FEHA – the court below erred in venturing any findings of fact as to Salas's supposed lack of work authorization.

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[25] *Carranza v. INS* (1st Cir. 2002) 277 F.3d 65, 68; *see also Lezama-Garcia v. Holder* (9th Cir. 2011) 666 F.3d 518, 538 (observing that "'[t]he maze of immigration statutes and amendments is notoriously complicated and has been described as 'second only to the Internal Revenue Code in complexity.'") (citing *Singh v. Gonzales* (9th Cir. 2007) 499 F.3d 969, 980).

CONCLUSION

For the foregoing reasons, as well as those contained in his Opening Brief, Plaintiff and Appellant Vicente Salas respectfully requests that this Court reverse the decision of the court below, and remand his claims for trial on their merits.

Dated: August 15, 2012

Respectfully submitted,

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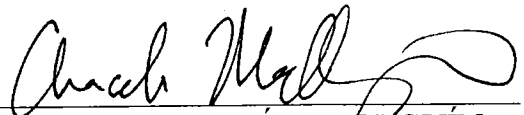
By: 
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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520(c)(1) of the California Rules of Court, I certify that this Appellant's Opening Brief contains 5,933 words, exclusive of the caption page, tables of contents and authorities, signature blocks, this Certificate and that appearing on the page following, and the attachments hereto.

Dated: August 15, 2012

Respectfully submitted,

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By: _____
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VICENTE SALAS

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 August 15, 2012, I served the within:

APPELLANT'S REPLY BRIEF

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

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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 at San Francisco, California on August 15, 2012.

PAMELA MITCHELL

Slip Copy, 2012 WL 3138108 (N.D.Ind.)
(Cite as: 2012 WL 3138108 (N.D.Ind.))

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Only the Westlaw citation is currently available.

United States District Court,
N.D. Indiana,
Hammond Division.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff
v.
FAIR OAKS DAIRY FARMS, LLC; Fair Oaks Dairy Products, LLC dba Fair Oaks Farms, Defendants.

Civil No. 2:11 cv 265.
Aug. 1, 2012.

Laurie A. Young, Michelle F. Eisele, Robin M. Lybolt, Equal Employment Opportunity Commission - Ind/In, Indianapolis, IN, for Plaintiff.

Kathleen A. Delaney, Amanda C. Couture, Delaney & Delaney Llc, Indianapolis, In, Patrick K. Ryan, Barce and Ryan, Kentland, IN, for Defendants.

OPINION AND ORDER

ANDREW P. RODOVICH, United States Magistrate Judge.

*1 This matter is before the court on the Motion to Stay Discovery as to Fair Oaks Dairy Farms, LLC Only [DE 30] filed by the defendant, Fair Oaks Dairy Farms LLC, on April 4, 2012, and the Motion for Protective Order Regarding Immigration Status and/or Employment History [DE 35] filed by the plaintiff, EEOC, on May 25, 2012. For the following reasons, the Motion to Stay [DE 30] is **DENIED,** and the Motion for Protective Order [DE 35] is **GRANTED IN PART** and **DENIED IN PART.**

Background

Martha Marquez filed a charge of discrimination with the EEOC on October 20, 2010, alleging that she was sexually harassed while employed by the defendants, Fair Oaks Dairy Farms and Fair Oaks Dairy Products. She accused the manager of the cheese and milk department of touching her vagina through her clothing and exposing his genitalia. After investigating Marquez's allegations, the EEOC found the evidence substantiated her claim and attempted to resolve the matter through conciliation. When conciliation failed, the EEOC filed its complaint on July 22, 2011, against Dairy Farms, alleging sexual harassment in violation of Title VII of the Civil Rights Act of 1964.

The EEOC amended its complaint on September 29, 2011, to add Dairy Products. Dairy Farms subsequently filed a motion to dismiss, arguing that it did not employ Marquez or the alleged harasser and could not be held liable for the incident. The EEOC opposed the motion. On April 4, 2012, Dairy Farms filed a motion to stay discovery pending the district court's ruling on its motion to dismiss. Dairy Farms argues that subjecting it to discovery would be burdensome, turn up irrelevant information, and cause unnecessary expense.

On May 4, 2012, Dairy Products served the EEOC and Marquez with discovery requests seeking Marquez's resume, educational diplomas, transcripts, attendance record, immigrant or nonimmigrant visa, passport, birth certificate, and state and federal tax returns. Dairy Products also inquired into Marquez's efforts to obtain subsequent employment and actual subsequent employment. Dairy Products contends that the information is relevant background information, will shed light on the damages Marquez suffered, and will support its affirmative defenses.

In the complaint, the EEOC states that it seeks "appropriate compensation for past pecuniary losses resulting from the unlawful employment practices." In a separate paragraph, the EEOC requests "compensation for past nonpecuniary losses resulting from the unlawful employment practices". The EEOC sent correspondence to Dairy Product's counsel stating that it does not seek back pay, front pay, reinstatement, or any other sort of pecuniary compensatory damages. Marquez's damages are limited to the emotional distress caused by the sexual harassment she experienced. Because of this limitation, the EEOC maintains that Dairy Product's discovery requests seek irrelevant information and seeks a protective order.

Discussion

*2 A court has incidental power to stay proceedings, which stems from its inherent power to manage its docket. ***Landis v. North American Co.,*** 299 U.S.

248, 254–55, 57 S.Ct. 163, 166, 81 L.Ed. 153 (1936); ***Walker v. Monsanto Co. Pension Plan,*** 472 F.Supp.2d 1053, 1054 (S.D.Ill.2006). The decision to grant a stay is committed to the sound discretion of the court and must be exercised consistent with principles of fairness and judicial economy. ***Brooks v. Merck & Co.***, 443 F.Supp.2d 994, 997 (S.D.Ill.2006); ***Rutherford v. Merck & Co.***, 428 F.Supp.2d 842, 845 (S.D.Ill.2006); ***George v. Kraft Foods Global,*** 2006 U.S. Dist. LEXIS 92886, *4 (S.D.Ill.2006). "Courts often consider the following factors when deciding whether to stay an action: (i) whether a stay will unduly prejudice or tactically disadvantage the non-moving party, (ii) whether a stay will simplify the issues in question and streamline the trial, and (iii) whether a stay will reduce the burden of litigation on the parties and on the court." ***Abbott Laboratories v. Matrix Laboratories, Inc.***, 2009 WL 3719214, *2 (N.D.Ill.2009). "The general test for imposing a stay requires the court to 'balance interests favoring a stay against interests frustrated by the action' in light of the 'court's paramount obligation to exercise jurisdiction timely in cases properly before it.' " ***SanDisk Corp. v. Phison Electronics Corp.*** ., 538 F.Supp.2d 1060, 1066 (W.D.Wis.2008) (*citing* ***Cherokee Nation of Oklahoma v. United States,*** 124 F.3d 1413, 1416 (Fed.Cir.1997)). The moving party must show good cause to stay discovery. ***Castrillon v. St. Vincent Hospital and Health Care Center, Inc.***, 2011 WL 4538089, *1 (S.D.Ind.2011) (applying Rule 26(c) good cause standard to motion to stay); ***DSM Desotech, Inc. v. 3D Systems Corp.***, 2008 WL 4812440, *1 (N.D.Ill. Oct.28, 2008) (same).

"The filing of a motion to dismiss by itself does not mandate a stay of discovery pending resolution of that motion, nor does the right to discovery continue in light of a pending dispositive motion ." ***Nexstar Broadcasting, Inc. v. Granite Broadcasting Corp.***, 2011 WL 4345432, *2 (N.D.Ind. Sept.15, 2011) (*citing* ***Duneland Dialysis LLC v. Anthem Ins. Co., Inc.***, 2010 WL 1418392, *2 (N.D.Ind. Apr.6, 2010) (*quoting* ***Simstad v. Scheub***, 2008 WL 1914268, *1 (N.D.Ind. Apr.29, 2008)). The decision to stay a case pending ruling on a motion to dismiss must be made on a case by case basis. "A stay is appropriate where the motion to dismiss can resolve the case, where ongoing discovery is unlikely to produce facts necessary to defeat the motion, or where the motion raises a potentially dispositive threshold issue, such as a challenge to plaintiff's standing." ***Nexstar Broadcasting***, 2011 WL 4345432 at *2. The court gives greater consideration to motions to stay discovery where the matter involves particularly complex issues. ***Nexstar Broadcasting***, 2011 WL 4345432 at *3. The court also will weigh the timeliness of the request. ***Castrillon,*** 2011 WL 4538089 at *2.

***3** Dairy Farms has provided no more than a bare bones argument that any discovery would be burdensome because it filed a motion to dismiss. However, Dairy Farms is not entitled to have discovery stayed solely because it filed a motion to dismiss. Dairy Farms must provide some explanation of the burden it will suffer as a result. Dairy Farms has not shown that the motion to dismiss will resolve the case, that the pending discovery requests are unrelated to the motion to dismiss, or that the motion raises a potentially dispositive threshold issue.

Dairy Farms' primary argument is that it will be dismissed from the case if its motion to dismiss is granted. In its motion to dismiss, Dairy Farms argues that it did not employ Marquez or the alleged harasser and that Title VII only extends to employers. However, the pending discovery requests appear to bear on the motion to dismiss and may help the EEOC defeat it. The EEOC has inquired into the organizational and ownership structure of Dairy Farms and Dairy Products which may help it determine who is liable for the alleged harassment. The court is less inclined to stay discovery if it may bear on the motion to dismiss.

Additionally, Dairy Farms has not argued that it will not be required to submit any discovery if the case is dismissed against it. If Dairy Farms is dismissed, the case would remain ongoing between Dairy Products and the EEOC. If there is a relationship between Dairy Farms and Dairy Products, Dairy Farms may be subjected to third-party discovery. Dairy Farms has not shown how its burden would be decreased by issuing a stay or what discovery would be eliminated. Without further explanation, Dairy Farms' only support is that if it is dismissed from the case "much of the information sought by Plaintiff from Farms will be irrelevant." Dairy Farms must do more than make boilerplate assumptions and should have provided specific examples of the potential irrelevancy. *See* ***Castrillon,*** 2011 WL 4539089 at *2 (denying motion to stay in part because the moving party still would have to produce discovery if its motion to dismiss was granted and because the moving party did not identify the specific requests that it alleged were burdensome).

The court cannot rely solely on Dairy Farms' assertion without greater explanation.

Dairy Farms has not pointed to a single discovery request that it alleges would be overly burdensome. *See* ***Castrillon,*** 2011 WL 4538089 at *2 (denying motion to stay in part because moving party did not identify specific discovery requests that were unduly burdensome or expensive). Again, Dairy Farms simply states that the discovery would be burdensome and expensive without greater detail. The insufficiencies are fatal to its request.

The only factor that weighs in favor of Dairy Farms' request is that the court has yet to hold a Rule 16(b) scheduling conference and set discovery deadlines. Absent deadlines, the EEOC will suffer little prejudice from a short stay of discovery. However, this single factor does not overcome the insufficiencies that are abundant in Dairy Farms' motion. Dairy Farms has not provided a single explanation of the burden it hopes to escape by staying discovery, nor has it shown how the discovery requests are overly burdensome. Dairy Farms cannot rely solely on the fact that it filed a motion to dismiss as a means of requesting a stay. *See* ***Castrillon,*** 2011 WL 4538089 at *2 (denying motion to stay because it was filed five months after the motion to dismiss, it was not evident the motion to dismiss would be granted, the motion to dismiss would not resolve all of the plaintiff's claims because her claims against two defendants would remain pending and would likely require the party requesting the stay to produce discovery, and because the motion did not identify any specific discovery requests that impose an undue burden or expense). The motion to dismiss will not resolve the case in its entirety, and discovery, including discovery served on Dairy Farms, may remain ongoing. Without greater explanation, the court finds the motion insufficient and **DENIES** the motion to stay.

4** The court now turns to the EEOC's motion for a protective order. A party may "obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things." Federal Rule of Civil Procedure 26(b)(1). For discovery purposes, relevancy is construed broadly to encompass "any matter that bears on, or that reasonably could lead to other matter[s] that could bear on, any issue that is or may be in the case." ***Chavez v. DaimlerChrysler Corp., 206 F.R.D. 615, 619 (S.D.Ind.2002) (*quoting* ***Oppenheimer Fund, Inc. v. Sanders,*** 437 U.S. 340, 351, 98 S.Ct. 2380, 2389, 57 L.Ed.2d 253 (1978)). Even when information is not directly related to the claims or defenses identified in the pleadings, the information still may be relevant to the broader subject matter at hand and meet the rule's good cause standard. ***Borom v. Town of Merrillville,*** 2009 WL 1617085, *1 (N.D.Ind. June 8, 2009) (*citing* ***Sanyo Laser Prods., Inc. v. Arista Records, Inc.,*** 214 F.R.D. 496, 502 (S.D.Ind.2003)). *See also* ***Adams v. Target,*** 2001 WL 987853, *1 (S.D.Ind. July 30, 2001) ("For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action."); ***Shapo v. Engle,*** 2001 WL 629303, *2 (N.D.Ill. May 25, 2001) ("Discovery is a search for the truth.").

A party may move for a protective order in order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense .... " Rule 26(c)(1). The party requesting the protective order carries the burden of demonstrating good cause; the moving party can satisfy that burden by showing some plainly adequate reason for the order. 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2035 (3d ed.1998). *See also* ***Gregg v. Local 305 IBEW,*** 2009 WL 1325103, *8 (N.D.Ind. May 13, 2009) ("The burden rests upon the objecting party to show why a particular discovery request is improper." (*citing* ***Kodish v. Oakbrook Terrace Fire Protection Dist.,*** 235 F.R.D. 447, 449–50 (N.D.Ill.2006)); ***McGrath v. Everest National Ins. Co.,*** 2009 WL 1325405, *3 (N.D.Ind. May 13, 2009); ***Carlson Restaurants Worldwide, Inc. v. Hammond Professional Cleaning Services,*** 2009 WL 692224, *5 (N.D.Ind. March 12, 2009)). Specific factual demonstrations are required to establish that a particular discovery request is improper and that good cause exists for issuing the order. *See* ***Felling v. Knight,*** 211 F.R.D. 552, 554 (S.D.Ind.2003) ("To establish good cause a party must submit 'a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements .' ") (*quoting* ***Wilson v. Olathe Bank,*** 184 F.R.D. 395, 397 (D.Kan.1999) (*quoting* ***Gulf Oil Co. v. Bernard,*** 452 U.S. 89, 102 n. 16, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981)). *See also* ***Harrisonville Telephone Co. v. Ill. Commerce Comm'n,*** 472 F.Supp.2d 1071, 1078 (S.D.Ill.2006) (stating that in order to establish good cause, the movant must rely on particular and specific demonstra-

tions of fact, rather than conclusory statements).

5** The parties first dispute whether Marquez's resume, educational diplomas, transcripts, and attendance records are subject to discovery. The EEOC argues that Marquez only has placed her employment with the defendants at issue by filing a charge with the EEOC, not her entire work history. *See* ***Woods v. Fresenius Med. Care Group of N. America, 2008 WL 151836, *1–2 (S.D.Ind. Jan.16, 2008) (explaining that the plaintiff does not put their entire work history at issue by filing a charge with the EEOC); ***EEOC v. Simply Storage Management, Inc.,*** 270 F.R.D. 430, 437 (S.D.Ind.2010). The defendants must show a specific reason for demanding information of past employment and demonstrate why the information is relevant to the case at hand. ***Woods,*** 2008 WL 151836 at *1. Otherwise, the information is irrelevant and outside the scope of discovery.

Dairy Products counters that it has a particularized need for the information to support its defenses, specifically its after acquired evidence defense. "Under this defense, after-acquired evidence of an employee's misconduct may limit damages." ***Sheehan v. Donlen Corp.,*** 173 F.3d 1039, 1047 (7th Cir.1999) (*citing* ***McKennon v. Nashville Banner Pub. Co.,*** 513 U.S. 352, 361–62, 115 S.Ct. 879, 886, 130 L.Ed.2d 852 (1995)). If the employer is found liable for discrimination, it only is liable for backpay or front pay from the time of the discharge until the time of the newly discovered evidence. ***McKennon,*** 513 U.S. at 362, 115 S.Ct. at 886. After-acquired evidence defenses usually arise when the employee misrepresented information on a resume or job application or committed misconduct post-hire. *See* ***Thompson v. Tracor Flight Systems,*** 86 Cal.App.4th 1156, 1173, 104 Cal.Rptr.2d 95 (Cal.App.2001). *See e.g.,* ***O'Neal v. City of New Albany,*** 293 F.3d 998, 1004 (7th Cir.2002); ***Coleman v. Keebler,*** 997 F.Supp. 1102, 1123 (N.D.Ind.1998). To relieve itself of liability, the employer must show that the wrongdoing was so severe that the employee would have been terminated had the employer been aware of the circumstances at the time of discharge.

Dairy Products explains that the above cited discovery request will answer whether Marquez truthfully recounted her educational and work histories when she applied for a job, what she was trained to do, what kind of disciplinary history she had, and how many English classes she had taken in the past. This information may bear on or lead to other admissible evidence showing whether Marquez lied in her application or committed misconduct post-hire, which may limit Dairy Products' liability.

The EEOC disputes the relevancy, arguing that the after acquired evidence defense is inapplicable because the damages sought are limited to those arising from the emotional pain and suffering Marquez experienced. However, in separate paragraphs, the Amended Complaint requests the "appropriate compensation for past pecuniary losses resulting from unlawful employment practices" and "past nonpecuniary losses resulting from the unlawful employment practices ... including emotional pain and suffering, loss of enjoyment of life, humiliation, embarrassment, and inconvenience."

***6** The court agrees that the after-acquired evidence defense would not apply if the EEOC only sought damages for emotional distress in its complaint, but the most recent complaint maintains the request for pecuniary damages and does not restrict it to pecuniary damages arising from emotional pain and suffering as limited in the following paragraph requesting non-pecuniary damages. The court reads this as requesting backpay. Because the most recent complaint requests such damages, the court will allow Dairy Products to pursue discovery of its after acquired evidence defense. It is undisputed that the information sought is related to the after acquired evidence defense.

Additionally, Marquez's employment options and training will bear on whether she mitigated her damages. Dairy Products also represents that the request will lead to information concerning Marquez's disciplinary history and may substantiate its stated reason for terminating her employment, helping to dispel any argument for pretext. The EEOC has not demonstrated that providing this information falls outside the broad definition of relevance or will cause annoyance, embarrassment, oppression, or undue burden or expense. The EEOC has failed to meet is burden and the requested information must be produced.

The second category of documents Dairy Products requests include Marquez's visa, passport, and birth certificate. Dairy Products states that it intends to use this information to run a background check on

Marquez, which is standard procedure in defending harassment claims. The EEOC disputes this request, arguing that discovery requests that touch on immigration status are off-limits when conducting discovery in Title VII claims. *See* ***EEOC v. City of Joliet,*** 239 F.R.D. 490, 493 (N.D.Ill.2006) (explaining that the prejudice that would result from permitting discovery of immigration status when suing an employer for an unfair employment practice would outweigh any probative value); ***De La Rosa v. Northern Harvest Furniture,*** 210 F.R.D. 237, 239 (C.D.Ill. Sept.4, 2002). Immigration status is not discoverable when it is relevant only to determine whether an employee can recover back pay in a Title VII claim. ***De La Rosa,*** 210 F.R.D. at 239. Denying back pay to illegal immigrants would interfere with the purpose of Title VII and chill the filing of complaints. ***City of Joliet,*** 239 F.R.D. at 493 ("As pointed out in ***Galaviz–Zamora [v. Brady Farms, Inc.,*** 230 F.R.D. 499 (W.D.Mich.2005)], other courts have found that the in terrorem effect of inquiring into the immigration status of employees suing their employer for unfair labor practices is devastating.").

Dairy Products does not assert that this information is pertinent to defend the case. Rather, it contends that the information is necessary to conduct a background check. Dairy Products has not explained what information may be revealed by a background check that may be relevant to defend Marquez's complaints, nor has it shown why all of this documentation is necessary to run a background check. The EEOC represents that Marquez's criminal history is encompassed by a different discovery request to which it did not object. Because Dairy Products received Marquez's criminal history from the EEOC and it is not clear what other information Dairy Products hopes to recover by requesting these documents, the court finds this request repetitive and overly burdensome. The EEOC's motion is granted with respect to the request for Marquez's visa, passport, and birth certificate as relevant.

*7 Finally, the EEOC objects to Dairy Products' request for Marquez's state and federal tax returns. Dairy Products argues that the information is relevant to show how the harassment impacted Marquez and whether she suffered emotional damage because of a change in her financial or living situation. This argument is attenuated at best. Permitting discovery of sensitive personal financial information will not likely lead to admissible relevant evidence. *See* ***EEOC v. DHL Exp.,*** 2011 WL 6825497, *4 (N.D.Ill.Dec.27, 2011) (explaining that discovery request seeking federal and state tax returns would be unduly burdensome and irrelevant to the charges of discrimination). Marquez's tax information will not show whether she suffered emotional harm because of a decrease in pay, nor is she alleging that she suffered mental harm because of deceased pay. Rather, her claim for emotional pain arises solely from the harassment she alleges to have suffered. The court grants the EEOC's protective order with respect to the request for Marquez's tax returns.

Based on the foregoing, the Motion to Stay Discovery as to Fair Oaks Dairy Farms, LLC Only [DE 30] filed by the defendant, Fair Oaks Dairy Farms, LLC, on April 4, 2012, is **DENIED,** and the Motion for Protective Order Regarding Immigration Status and/or Employment History [DE 35] filed by the plaintiff, EEOC, on May 25, 2012, is **GRANTED IN PART** and **DENIED IN PART** consistent with this order.

N.D.Ind.,2012.
E.E.O.C. v. Fair Oaks Dairy Farms, LLC
Slip Copy, 2012 WL 3138108 (N.D.Ind.)

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Not Reported in F.Supp.2d, 2003 WL 21995190 (N.D.Ill.), 149 Lab.Cas. P 34,771, 8 Wage & Hour Cas.2d (BNA) 1665
(Cite as: 2003 WL 21995190 (N.D.Ill.))

C

United States District Court,
N.D. Illinois, Eastern Division.
Jose RENTERIA, Daniel Adan, J. Socorro Olvera, Gabriela Olvera, Rosa Adan, Juan Francisco Cornejo, Jose Luis Montoyo, and Luis Angel Reyes, Plaintiffs,
v.
ITALIA FOODS, INC., Peter Carabetta, Felippo Carabetta, and Nicolina Carabetta, Defendants.

No. 02 C 495.
Aug. 21, 2003.

MEMORANDUM OPINION AND ORDER

KENNELLY, J.

*1 Plaintiffs are former employees of defendant Italia Foods. Defendants Peter Carabetta, Felippo Carabetta, and Nicolina Carabetta own Italia Foods, which manufactures frozen Italian food products for distribution to supermarkets. Plaintiffs claim that defendants violated the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–19 (count 1), and the Illinois Minimum Wage Law, 820 ILCS 105 (count 2), by failing to compensate plaintiffs at a rate of "time and one-half" for hours worked over forty per week. Certain plaintiffs also claim that defendants violated the FLSA by discharging them in retaliation for joining this lawsuit (count 3). In addition, plaintiff Jose Renteria claims that defendants violated the Illinois Wage Payment and Collection Act, 820 ILCS 115/1–115/15 (count 4), for failing to compensate him for all hours worked and to pay him earned vacation pay, and plaintiff Daniel Adan complains of retaliatory discharge under Illinois law (count 5). Italia has counterclaimed against Renteria for restitution and unjust enrichment and against Juan Cornejo for fraud. This case is presently before the Court on cross motions for summary judgment and certain plaintiffs' motion to dismiss certain counts of Italia's counterclaim.

Failure to Pay Overtime Wages

Plaintiffs contend that defendants violated the FLSA and the IMWL by failing to pay them appropriate overtime wages. Both acts obligate an employer to compensate its employees at one and one-half times the regular rate for all hours worked over forty per week. The FLSA states that

> no employer shall employ any of his employees who in any workweek is ... employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1). Apart from permitting recovery of unpaid overtime wages, the FLSA also permits plaintiffs to receive "an additional equal amount" as liquidated damages. *Id.* § 216(b). Where a FLSA violation has occurred, "double damages are the norm." *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310 (7th Cir.1986). To avoid liquidated damages, the employer bears the burden of demonstrating that its violation of the Act occurred in a good faith, reasonable belief that its actions were not illegal. If an employer

> shows to the satisfaction of the court that the act or omission giving rise to [the action under the Act] was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA] the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed [double damages].

29 U.S.C. § 260.

The Illinois Minimum Wage Law establishes a similar compensation scheme. The Act provides that "no employer shall employ any of his employees for a workweek of more than 40 hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than 1 1/2 times the regular rate at which he is employed." 820 ILCS 105/4a(1). The IMWL further provides for punitive damages of 2% of any such underpayments "for each month following the date of payment during which such underpayments remain unpaid." 820 ILCS 105/12(a). Punitive damages are available only if the "employer's conduct is proven by a preponderance of the evidence to be willful." *Id.*

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Thus under the Illinois statute, the plaintiff bears the burden of proving willfulness.

*2 The factual predicate for plaintiffs' FLSA and IMWL claims is undisputed. Prior to November 1999, plaintiffs were properly compensated at time and one-half for all overtime hours. Pls.' Resp. to Defs.' Rule 56.1 Statement of Facts ¶ 32. As of November 1999, Italia began compensating plaintiffs for overtime hours at their regular hourly rate. For the first pay period in which this occurred, Italia withheld proper tax deductions from plaintiffs' paychecks. From that time forward, however, Italia compensated plaintiffs for overtime hours by paying them straight time without any deductions. The reason for this shift from appropriate overtime compensation to this arrangement is disputed—defendants claim that plaintiffs requested to be compensated in this manner, Felippo Carabetta Dep. at 62, and plaintiffs contend that defendants instituted the change because they did not want to incur the expense of paying overtime wages, *see, e.g.,* Montoya Dep. at 30–31, or the expense of withholding taxes, *see, e.g.,* Adan Dep. at 53–54, 63. The reason for the violation, however, is immaterial to plaintiffs' claim for unpaid overtime. *See* Walton, 786 F.2d at 306 ("[T]he Fair Labor Standards Act is designed to prevent consenting adults from transacting about minimum wages and overtime pay."); 820 ILCS 105/12 ("[A]ny agreement between [an employee] and his employer to work for less than [the wages provided by the IMWL] is no defense to such action."). By failing to pay time and one-half for overtime work, defendants violated both Acts and are liable for the additional "half time" they failed to pay.

Defendants do not dispute the amount of unpaid overtime wages. They do, however, dispute the amount plaintiffs are entitled to receive in this lawsuit. Defendants argue that any award should consist of wages net of taxes. Plaintiffs contend that their award of delinquent "half time" should consist of gross wages. *See* Pls.' Mem. of Law in Supp. of their Mot. for Summ. J. at 3—4. Not surprisingly, plaintiffs cite absolutely no authority for this position; they are not entitled to receive delinquent overtime compensation "tax free." Rev. Rul. 72–268, 1972–1 C.B. 313 (amounts paid pursuant to the FLSA for unpaid overtime compensation are "wages" for purposes of federal employment taxes and income tax withholding); 86 Ill. Adm.Code 100.7030 (payments to Illinois employees "shall be subject to withholding of Illinois income tax if such payments are subject to withholding of federal income tax"). Defendants may deduct, as required by law, *see* 26 U.S.C. § 3402(a)(1); 86 Ill. Adm.Code 100.7030, any taxes they would have been required to withhold from the delinquent amounts had they been paid normally. *Cf. Ford v. Kaufman,* No. 84 C 10607, 1985 WL 584, at *1 (N.D.Ill. Apr. 15, 1985) (ordering an award for delinquent overtime compensation minus deductions for social security and taxes); *Archie v. Grand Cent. P'ship, Inc.,* 86 F.Supp.2d 262, 273 (S.D.N.Y.2000) (stating that in the FLSA context "courts are generally of one mind that withholding from back wages must be made" and citing cases).

*3 Defendants also argue that they are also entitled to subtract from the amount owed all the deductions they failed to withhold from the amounts they previously paid plaintiffs for overtime. The FLSA permits an employer to credit certain payments against any overtime it owes. Specifically, 29 U.S.C. § 207(h)(2) provides that "[e]xtra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable towards overtime compensation payable pursuant to this section." Although defendants maintain, presumably pursuant to this provision, that "[p]ayments or overpayments to employees in a form other than overtime compensation reduce the amount of unpaid overtime compensation premiums due," Defs.' Mot. for Summ. J. at 5, they do not argue that any of the listed subsections apply.[FN1] The statute is specific in what types of payments are permissible credits against overtime pay; delinquent withholding deductions are not among them. Moreover, defendants cite no authority for the proposition that plaintiffs must reimburse defendants for amounts that should have been withheld by the employer but were not. Defendants therefore may not deduct from the overtime amounts still owed any amounts that previously should have been withheld.

FN1. These subsections include:

> (5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular

> working hours, as the case may be;
>
> (6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;
>
> (7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek....
>
> 29 U.S.C. § 207(e).

The Court likewise rejects defendants' argument that they are entitled to offset against the amounts owed to certain plaintiffs sums that they contend these plaintiffs were improperly overpaid or that they allegedly received as a result of fraud. Again, such offsets are not among those permitted under the FLSA.

Limitations Period on FLSA Overtime Claims

Plaintiffs argue that they are entitled to unpaid overtime compensation reaching back three years from the date this suit was filed. An employer is liable for three years of back wages if the FLSA violation was "willful," but only two years if it was not. 29 U.S.C. § 255(a). This lawsuit was filed in January 2002. An employer's violation of the FLSA is "willful" for purposes of determining the limitations period if the employer either knew or acted with reckless disregard for whether its conduct was prohibited by the Act. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). Willful behavior is conduct that is more than simply negligent or unreasonable. *Id.*; & n. 13. In *Walton v. United Consumers Club, Inc., supra,* a FLSA case, the Seventh Circuit described "willfulness" as "denoting a range of culpability from gross negligence to actual knowledge plus malice depending on the context. Usually it denotes some highly culpable mental state either actual knowledge that one's acts violate the law or reckless indifference to the law." *Walton,* 786 F.2d at 308–09 (citations omitted). The plaintiff in a FLSA case bears the burden of establishing willfulness, *id.* at 308, which "requir[es] proof that 'the defendant's actions were knowing and voluntary and that he knew or reasonably should have known that those actions violated' the statute," *id.* at 312 (quoting *Herman v. National Broadcasting Co.*, 744 F.2d 604, 607 (7th Cir.1984)).

***4** Although the record establishes that the shift in overtime compensation was deliberately undertaken by the defendants, it is genuinely disputed whether plaintiffs can establish a "highly culpable mental state" on defendants' part. In other words, plaintiffs have not submitted evidence conclusively establishing that defendants acted with knowledge that the compensation scheme violated the law or with reckless indifference on this point. *Cf. Bankston,* 60 F.3d at 1254 ("It is easier for a plaintiff to receive liquidated damages under the FLSA than it is to extend the statute of limitations for FLSA claims...."). Plaintiffs will thus have to prove willfulness at trial in order to be able to recover damages under the FLSA relating to overtime worked before January 22, 2000.

Liquidated and Punitive Damages

Plaintiffs maintain that they are entitled to liquidated (double) damages under the FLSA and punitive damages under the IMWL. Until 1947, double damages were mandatory for FLSA violations. In that year, Congress passed the Portal–to–Portal Act, section 11 of which allows a district court, "in its sound discretion," to award a lesser amount of liquidated damages or none at all. 29 U.S.C. § 260. However, because the FLSA incorporates a "strong presumption" in favor of liquidated damages, to avoid them an employer must demonstrate that it acted in good faith and with a reasonable belief that its conduct did not violate the Act. *Walton,* 786 F.3d at 310; *see Avitia v. Metro. Club of Chicago, Inc.*, 49 F.3d 1219, 1226 (7th Cir.1995). Instances where doubling may not be appropriate, for example, include where "the violation was technical or inadvertent." *Walton,* 786 F.2d at 308.

As stated above, the parties dispute who instigated the shift in overtime compensation. Even were events to have occurred according to defendants' version, however, defendants must show that their com-

pliance with plaintiffs' alleged request was in good faith and that they had a reasonable basis for believing that the shift did not violate the FLSA. 29 U.S.C. § 260. Defendants fail to do so. They have adduced absolutely no evidence to this effect. In fact, all the evidence in the parties' submissions points the other way. Defendants plead ignorance of the Act's requirements, stating that they "are neither college graduates nor experts in accounting." Defs.' Resp. to Pls.' Mot. for Summ. J. at 7. But the fact that overtime wages were paid in compliance with the FLSA until November 1999 indicates that defendants were aware of their obligation to pay time and one-half for hours worked over forty per week. In any case, an employer's ignorance of the Act or its requirements does not constitute reasonable grounds for believing it was in compliance. *Sinclair v. Auto. Club of Okla., Inc.*, 733 F.2d 726, 730 (10th Cir.1984); *Marshall v. Brunner*, 668 F.2d 748, 753 (3d Cir.1982). Because defendants have failed to meet their "substantial burden," liquidated damages under the FLSA are appropriate. *Bankston v. State of Illinois*, 60 F.3d 1249, 1254 (7th Cir.1995).

*5 Plaintiffs maintain that they are also entitled to punitive damages under the IMWL. This statute employs a different standard of proof than the one that governs awards of liquidated damages under the FLSA. Under the IMWL, punitive damages are appropriate only if plaintiffs prove that defendants' conduct was willful. 820 ILCS 105/12(a).[FN2] As discussed in the previous section, an issue of fact exists regarding whether defendants acted willfully. Whether punitive damages are available is thus a matter to be determined at trial.

FN2. Defendants argue that punitive damages are available only in actions brought by the Illinois Department of Labor, not in private civil actions. They do not, however, cite any authority for this proposition, and the Court has not uncovered any in its own research.

Liability of the Carabettas

Plaintiffs argue that the Carabettas, as owners with operational control over Italia Foods, are jointly liable with Italia for the FLSA and IMWL violations. *See, e.g., Donovan v. Agnew*, 712 F.2d 1509, 1511 (1st Cir.1983). Defendants have not responded to this argument and thus are deemed to have conceded the point.

FLSA Retaliatory Discharge

The FLSA prohibits an employer from "discharg[ing] or in any other manner discriminat[ing]" against an employee for asserting a FLSA claim. 29 U.S.C. § 215(a)(3). In count 3, plaintiffs J. Socorro Olvera, Gabriela Olvera, Cornejo, Montoya and Reyes claim that they were fired from Italia Foods when Felippo Carabetta learned they had joined this lawsuit. Defendants argue that plaintiffs were never fired but rather were merely sent home early on the afternoon of January 29, 2002.[FN3]

FN3. Count 2 of the Second Amended Complaint names Rosa Adan as a plaintiff claiming retaliatory discharge. However, she seems to have dropped out of this claim. *See* Pls.' Mot. For Summ. J. ¶ 10; Pls.' Am. Resp. to Defs.' Mot. for Summ. J. at 9 (naming only Socorro Olvera, Montoyo, Cornejo, and Gabriela Olvera as the "January 29, 2002 Plaintiffs"). And that would make sense, as it appears that she was no longer worked for Italia Foods on this date. Felippo Carrabetta Dep. at 50, 90.

On the afternoon of January 29, Felippo Carabetta learned that the Olveras, Cornejo, and Montoya had joined the lawsuit originally filed by Renteria and Daniel Adan. Felippo Carabetta Dep. at 64. He says that he came to the production floor where plaintiffs were working and "told everybody go home for the day, no more work today ." *Id.* at 68. Defendants maintain that the early shutdown was an initial reaction to a possible emergency situation and that it was not intended as a termination of plaintiffs' employment. Specifically, Felippo testified that as a result of the lawsuit, he feared plaintiffs might tamper with the food and that not enough family members were present at the plant to supervise the workers. *Id.* at 72. He feared tampering because the complaint alleged food adulteration, and he was concerned that plaintiffs would sabotage the food in order to prove their case. *Id.* at 67. By contrast, plaintiffs have testified that Felippo said, "no more Italia Food, everybody go home now" and that they understood he was sending them home for good. Cornejo Dep. at 8; *see* J.Socorro Olvera Dep. at 7; Gabriela Olvera Dep. at 9; Montoya Dep. at 13. If plaintiffs' testimony is believed, a jury reasonably could find that they had been terminated.

For these reasons, a genuine issue of fact exists as to whether a termination actually occurred. Both sides' motions for summary judgment are therefore denied as to the claims of these plaintiffs.

The facts pertaining to Reyes's alleged discharge are somewhat different. His last day at Italia Foods was January 28, 2002. He claims that on that day Peter Carabetta sent him home early. But Reyes conceded at his deposition that he was told he was being sent home because there was no work for him and that he did not know whether this meant permanently or just for the day. Reyes Dep. at 6. As Reyes himself cannot say he believed he was being sent home permanently, no reasonable jury could find he was fired. Defendants are entitled to summary judgment on Reyes's retaliation claim.

Damages for FLSA Retaliatory Discharge

***6** Defendants maintain that if the Olveras succeed on their retaliatory discharge claim, they are not entitled to back pay, front pay, or compensatory damages because they were not legally authorized to work in the United States at the time of the events in question. In *Hoffman Plastic Compounds, Inc. v. NLRB*, 122 S.Ct. 1275 (2002), the Supreme Court noted that the Immigration Reform and Control Act of 1986, Pub.L. No. 99–603, 100 Stat. 3359 (codified as amended at 8 U.S.C. § 1324), constitutes a "comprehensive scheme prohibiting the employment of illegal aliens in the United States" and that it "forcefully" made combating the employment of illegal aliens central to immigration law policy. *Id.* at 1282. Under the IRCA's scheme, the Court held, an award of back pay to a worker discharged in violation of the National Labor Relations Act "runs counter to policies underlying the IRCA," *id.* at 1283, and would

> unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in [the Immigration Reform and Control Act of 1986]. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations.
>
> *Id.* at 1284.

Defendants argue that an award of back pay, front pay, or compensatory damages for a violation of the FLSA likewise would trench on the policies expressed in the IRCA. With regard to back pay and front pay, the Court agrees. The policies that motivated the enactment of the IRCA are certainly subject to debate, but the IRCA is the law of the land, and the Supreme Court has made it clear that awarding back pay to undocumented aliens contravenes the policies embodied in that law. An award of front pay would be inappropriate for the same reason: front pay essentially assumes that the worker will continue to work for the employer in the future, which is against the law for an undocumented alien. We reach a different conclusion, however, regarding compensatory damages. In *Hoffman Plastic,* the Supreme Court did not preclude the NLRB from taking *any* remedial action for the employer's improper firing of an undocumented worker; it expressly preserved the NLRB's ability to issue injunctive and declaratory relief. *Hoffman Plastic*, 122 S.Ct. at 1286. The remedy of compensatory damages, unlike those of back pay and front pay, does not assume the undocumented worker's continued (and illegal) employment by the employer. We therefore agree with the court in *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F.Supp.2d 1056, 1061–61 (N.D.Cal.2002)—as best we can tell, the only post-*Hoffman Plastic* decision to address the point—that compensatory damages for retaliatory termination under the FLSA remain available to undocumented workers. For these reasons, the Olveras' claims for back pay and front pay are stricken, but their claim for compensatory damages remains for trial.

Illinois Retaliatory Discharge

***7** Defendants move for summary judgment on Daniel Adan's state law claim of retaliatory discharge. Count 5 of the Second Amended Complaint alleges that Daniel Adan was terminated from his employment at Italia Foods because of his persistent complaints regarding the cleanliness and safety conditions of the manufacturing facility, especially the use of spoiled food products. Although an at-will employee is generally subject to discharge for any reason or no reason at all, Illinois law recognizes an exception for the tort of retaliatory discharge. To establish a cause of action for retaliatory discharge, a plaintiff must demonstrate that (1) he was discharged; (2) his discharge was in retaliation for his activities; and (3) the discharge violates a clear mandate of public policy. *Zimmerman v. Buchheit of Sparta, Inc.*, 164 Ill.2d 29, 35, 645 N.E.2d 877, 880 (1994).

Adan has no problem demonstrating the third element; compliance with health codes in the food industry is "a public concern of the highest magnitude." *Lanning v. Morris Mobile Meals, Inc.*, 308 Ill.App.3d 490, 493, 720 N.E.2d 1128, 131 (1999). Adan's proof fails, however, on the second element of this tort, which requires him to have some evidence, either direct or circumstantial, of a causal link between his complaints and the employment action. *Hartlein v. Ill. Power Co.*, 151 Ill.2d 142, 160, 601 N.E.2d 720, 728 (1992). Regarding causation, "the ultimate issue to be decided is the employer's motive in discharging the employee." *Id .* at 163, 601 N.E.2d at 730. The element of causation is not met if "the employer has a valid basis, which is not pretextual, for discharging the employee." *Id.* at 160, N.E.2d at 728.

Adan testified that he often complained to Peter and Felippo Carabetta about spoiled food during the course of his employment from 1999 to 2001; their response was that Adan should throw away any spoiled food that he encountered. Adan Dep. at 13, 16. In fact, Peter gave Adan the responsibility of filling out a U.S. Department of Agriculture logbook. *Id.* at 44. His responsibility was "to inspect all the working equipment, the machines, the containers, ... the floor, the tables for everything to be clean." *Id.* Adan does not contend that there were any negative repercussions when he reported unsanitary conditions in the logbook. *Id.* at 45. Moreover, it was Peter who explained to Adan how to detect when pasta had gone bad and needed to be disposed of. *Id.* at 49. However, Adan does claim that when Nicolina Carabetta was at the plant, she insisted that the spoiled pasta not be disposed of, but rather combined with the good pasta. He maintains that around September 2001, he found spoiled pasta and threw it away. When Nicolina arrived later that day, she asked for the pasta, and Adan admitted to disposing of it. According to Adan, Nicolina became upset, complaining about the money wasted by throwing away the pasta. Adan then spoke with Peter, who repeated that he should not mix in spoiled pasta but should throw it away, regardless of Nicolina's instructions. *See id.* at 19. After this incident, Adan alleges having voiced additional complaints about spoiled food in September and early October 2001. *Id.* at 20.

***8** The last day Adan worked at Italia Foods was December 21, 2001, with the next possible work day being December 26. *Id.* However, he was not fired or asked not to return to work on that day. According to Adan, Italia Foods did not always need him to work a full forty hours per week. *Id.* at 26. Because hours were somewhat irregular, Adan would know that he was needed at work if he received a telephone call from Peter Carabetta the night before *Id* . at 27. According to Peter Carabetta, he tried calling Adan several times to report for work between December 26 and December 31, 2001, but no one answered. Peter Carabetta Aff. ¶¶ 2, 3. Peter Carabetta's allegation that he attempted to reach Adan but was unsuccessful is consistent with Adan's testimony that he was experiencing telephone problems in December 2001 that caused him to miss many calls. Adan Dep. at 33. He acknowledges that if Peter tried to call him, it is probable that he would not have received the calls because of his telephone problems. *Id.* at 32. When Adan came to Italia Foods in early January to find out why he had not been called in to work, Nicolina told him that attempts had been made to reach him. Adan Dep. at 37, 38. According to Nicolina, she asked him why he did not report for work at the end of December or call to explain his absence. Nicolina Carabetta Aff. ¶ 8. He lied to Nicolina and told her that he had been to visit a sick relative in Texas. Adan Dep. at 51–52. Nicolina claims that she knew this explanation was a lie because one of Adan's co-workers at Italia Foods had told her that Adan had been working another full-time job and was therefore unable to work at Italia Foods during much of the last two weeks of December 2001. Nicolina Carabetta Aff. ¶ 5. Nicolina claims that she confronted him with this information and that Adan admitted that the reason he had missed work at Italia Foods was so that he could work his second job. *Id.* ¶ 13. Although Adan did in fact work a second job in December 2001—working 30 hours in the pay period ending December 23—he claims he was working the second shift and that it did not interfere with his work at Italia Foods. *See* Adan Dep. at 23. Nicolina claims that he was fired because of his unexplained absence and the fact that he lied about being in Texas when in fact he was working another job. Nicolina Carabetta Aff. ¶ 11.

Adan maintains that it was Peter's decision to terminate Adan's employment and that Nicolina's version of why he was fired is irrelevant. *See* Pls.' Amended Resp. to Defs.' Mot. for Summ. J. at 17. And despite Adan's confrontation with Nicolina, he maintains that the decision to terminate Adan was not hers. *Id.* It would make no sense, however, for Peter to encourage Adan to dispose of spoiled food, instruct

him on how to detect spoiled pasta, and put him in charge of sanitary inspections, as Adan has testified, and then fire him for bringing food spoilage to his attention. In light of Peter Carabatta's admitted encouragement of Adan's disposal of spoiled food, the complete lack of evidence of a retaliatory animus on Peter's part, the legitimate reasons for discontinuing Adan's at-will employment, and the temporal distance between his final complaint—which was at the latest sometime in early October—and his last day of employment in late December, Adan has failed to provide evidence from which a reasonable jury could find a causal connection between his complaints and termination. Because of this complete failure of proof on an element on which he will bear the burden at trial, summary judgment in defendants' favor is appropriate on this count. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial .").

Plaintiffs' Rule 26(a)(1) Disclosures

***9** Defendants argue summary judgment should be entered in their favor on plaintiffs' retaliatory discharge claim and Renteria's Illinois Wage Payment and Collection Act claim because of deficient Rule 26(a)(1)(C) disclosures. Federal Rule of Civil Procedure 26(a)(1)(C) provides that a plaintiff must provide a computation of any damages claimed and make available for inspection and copying the documents or evidentiary material bearing on the nature and extent of the injuries suffered. Defendants maintain that plaintiffs' initial and supplemental disclosures do not contain the required information. Under Rule 37(c)(1), "a party that without substantial justification fails to disclose information required by Rule ... 26(a)(1)(C) shall not, unless such failure is harmless, be permitted to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed." However, defendants took the deposition of every plaintiff and during these depositions had ample opportunity to gather information regarding damages. Defendants have not been prejudiced by the allegedly deficient initial disclosures, and their request for summary judgment on this ground is denied.

Motion to Dismiss Counterclaim

Plaintiffs Renteria and Cornejo have moved to dismiss counts 1, 7, and 8 of Italia's counterclaim pursuant to Federal Rule of Civil Procedure 12(b)(6). Dismissal for failure to state a claim is appropriate only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

Count 1 of the counterclaim alleges unjust enrichment by Renteria. Italia Foods, which offered medical and life insurance to its employees and their dependants, contends that Renteria was unjustly enriched because he falsely claimed that his girlfriend, Margarita Herrera, was his spouse in order that Italia Foods would provide her with insurance coverage. To state a claim of unjust enrichment under Illinois law, Italia need only allege that "there has been unjust retention of a benefit by one party to the detriment of another against the fundamental principles of justice and equity." *Firemen's Annuity and Benefit Fund v. Mun. Employees', Officers', and Officials' Annuity and Benefit Fund*, 219 Ill.App.3d 707, 712, 579 N.E.2d 1003, 1007 (1991). "[T]he essence of the cause of action is that one party is enriched and it would be unjust for that party to retain the enrichment." *Id.* Italia has met this threshold. Italia alleges that Renteria received a benefit—medical insurance for his live-in girlfriend—and that it was to the detriment of defendant, who paid the premiums for her in the mistaken belief that Herrera was Renteria's spouse. *Cf. Trs. of AFTRA Health Fund v. Biondi*, 303 F.3d 765, 782 (7th Cir.2002) (stating that because ERISA's civil enforcement provisions do not provide a remedy "for situations where a employee benefit trust fund has been defrauded by a non-fiduciary ... garden-variety state-law tort claims must, as a general matter, remain undisturbed" by ERISA's preemption clause). Renteria's motion to dismiss count 1 of the counterclaim is therefore denied.

***10** Count 8 of the counterclaim seeks restitution from Renteria pursuant to ERISA. ERISA permits the fiduciary of a benefit plan, which Italia Foods claims to be, to bring a civil action to obtain equitable relief to redress violations of a plan's terms. 29 U.S.C. § 1132(a)(3)(B)(i). Italia seeks restitution in the amount of the premiums paid on behalf of Herrera. Defendant cannot maintain a restitution action under ERISA, however, because the Act "does not provide *any* mechanism for plan administrators or fiduciaries to recoup monies defrauded from employee benefit trust funds by plan participants." *Trs. of AFTRA Health*

Fund, 303 F.3d at 782 (emphasis in original). Count 8 is therefore dismissed.

Count 7 of the counterclaim alleges fraud by Cornejo in that he applied for and received unemployment benefits when in fact he was not eligible for them. Italia contends that Cornejo misrepresented to the Illinois Department of Employment Security that he was involuntarily unemployed and actively seeking employment. Defendant maintains that both representations are false and were made with the intention of falsely securing unemployment benefits and that IDES relied on the misrepresentations in awarding him benefits. Italia Foods also maintains that as a result of Cornejo's alleged misrepresentations, it has been injured in an amount equal to the increased premiums it must pay for unemployment compensation insurance.

Italia, however, has not alleged the necessary elements of fraud. Under Illinois law, a plaintiff in a fraud action must show " 'a false statement of material fact made by defendant, defendant's knowledge or belief that the statement was false, *defendant's intent to induce plaintiff to act,* and *action by plaintiff in justifiable reliance on that statement,* and damage to plaintiff resulting from such reliance." ' *Dresser Indus. Inc. v. Pyrrhus AG,* 936 F.2d 921, 934 (7th Cir.1991) (quoting *Commercial Credit Equip. Corp. v. Stamps,* 921 F.2d 1361, 1366 (7th Cir.1990)) (emphasis in original). Italia does not allege, nor could it, that Corejo made the statements to Italia in the anticipation that Italia would rely on them. The statements, whether true or false, were made to IDES in the anticipation that it would rely on them to confer unemployment benefits. Count 7 is therefore dismissed for failure to state a claim.

CONCLUSION

Plaintiffs' motion for summary judgment [No. 40–1] and defendants' motion for summary judgment [No. 36–1] are granted in part and denied in part as stated in the foregoing memorandum opinion. As discussed in the opinion, the Court has determined certain issues with regard to counts 1 and 2 of the Second Amended Complaint, while other issues regarding these claims remain for trial. Counts 3 and 4 remain for trial. Summary judgment is entered in defendants' favor on count 5. Plaintiffs' motion to dismiss certain counts of the counterclaim [No. 61–1] is granted in part and denied in part; claims 7 and 8 of the counterclaim are dismissed for failure to state a claim. Plaintiffs are ordered to answer the remaining claims within seven days of this order.

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United States District Court, N.D. Illinois, Eastern Division.
Jose RODRIGUEZ, etc., et al., Plaintiffs,
v.
THE TEXAN, INC., Defendant.

No. 01 C 1478.
Sept. 16, 2002.

MEMORANDUM OPINION AND ORDER
SHADUR, Senior District J.

***1** This Court's June 27, 2002 approval of the jointly submitted Final Pretrial Order ("FPTO") in this Fair Labor Standards Act lawsuit has placed the case in a ready-for-trial posture. In accordance with the order entered at the time of the pretrial conference held to consider the FPTO, plaintiffs' counsel has filed three motions in limine, and defense counsel has in turn responded to two of the three motions. This memorandum opinion and order (1) addresses all three motions and (2) sets a trial date.

Fee–Shifting, Attorneys' Fees or Costs of Litigation

As the heading of this section suggests, one of plaintiffs' motions (Dkt.36–1) seeks to exclude any reference at trial to any of the captioned items even though they are potentially recoverable by plaintiffs. Because defense counsel has failed to respond to that motion, it is fair to assume the absence of any objection. Moreover, it is conventional wisdom that any mention of such items, all of which are for decision by the court rather than the jury, serve no appropriate purpose when injected into a jury trial (other than perhaps creating the potential for unfair prejudice that Fed.R.Evid. 403 balancing is designed to eliminate).

Defendants' Exs. 2 and 3

According to plaintiffs' next motion (Dkt.37–1), Defendants' Exs. 2 and 3 were not disclosed during discovery, having shown up instead in FPTO Ex. 3, the list of the parties' proposed trial exhibits. Defense counsel disputes that contention by asserting that those documents were in fact disclosed during the depositions of defendant Rochelle Raddatz and Denise Madden, an employee of co-defendant The Texan, Inc. According to defendants' response:

> The documents were not requested prior to the deposition in the request for production of documents, in that at no time did they request the corporation work schedules or health insurance records in the request for production.

That position is puzzling, for plaintiffs' counsel has attached as an exhibit to the motion in limine Plaintiffs' First Request for Production of Documents to Defendant, which followed the usual practice of asking for everything but the kitchen sink. It began with this first sweeping request for production:

> All documents relating to the Plaintiffs, including, but not limited to, the Plaintiffs' personnel file, records of hours worked, Plaintiffs' time cards, and records pertaining to their job duties, job responsibilities, job description, salary, hours worked, and receipt of minimum or overtime wages or compensation.

In light of that all-encompassing description (even apart from any of the later requests that might encompass the items at issue), it is difficult to understand any argument that Request No. 1 did not call for the express turnover of the late-designated exhibits now at issue. Even were that not the case, it just will not do for the recipient of a broad discovery request charged with such nondisclosure to respond that the other side should have been aware of an undesignated document because it was referred to during a deposition, any more than the mention of a person during the course of a deposition justifies a party's inclusion of such person on the witness list for trial when that party has not provided the person's identification in response to the standard discovery inquiry asking for the names of all persons who have any knowledge of facts relating to the litigation.

***2** This is not an issue to be resolved by such pejorative labels as "trial by ambush." Federal rules of disclosure embodied in Fed.R.Civ.P. ("Rules") 26 through 37 have long since supplanted the old "sporting" or "fox-hunt" approach to litigation, when parties went to trial without a full exploration of the

opponents' case. When a party makes a formal discovery request under those Rules, it is entitled to rely on the adversary's equally formal response rather than having to search out and explore other matters that the adversary may mention during the course of the discovery process without also appropriately supplementing the earlier formal response.

Accordingly defendants' response, on the present showing by the parties, is unpersuasive. This second motion by plaintiffs is also granted.

Mitigation of Damages

This third motion by plaintiffs (Dkt.38–1) seeks to head off any argument that plaintiffs' status as illegal aliens precludes them from recovering certain damages under principles articulated in *Hoffman Plastic Compounds, Inc. v. NLRB*, 122 S.Ct. 1275 (2002), decided at the Supreme Court's last Term to resolve an existing split among the Courts of Appeals (*id.* at 1279 n. 2). Thus the first mention of *Hoffman Plastic* came not from any assertion by defense counsel (by way of an affirmative defense or otherwise) that plaintiffs could not recover here because they lacked legal status to work in the United States or because they did not mitigate their damages, but rather from plaintiffs' effort to head off any such contentions.

In support of the motion, plaintiffs' counsel identified cases from no fewer than five Courts of Appeals (the First, Fifth, Eighth and Eleventh and the District of Columbia) that have uniformly held a failure to mitigate damages to be an affirmative defense under Rule 8(c), thus calling into play the familiar doctrine that affirmative defenses not raised in a party's responsive pleading are considered waived. Just a brief look by this Court disclosed that the Second Circuit has done the same, as stated in *Travellers Int'l, A.G. v. TWA, Inc.*, 41 F.3d 1570, 1580 (2d Cir.1994):

> Failure to mitigate damages is an affirmative defense and therefore must be pleaded. Fed.R.Civ.P. 8(c). The general rule in federal courts is that a failure to plead an affirmative defense results in a waiver. *See Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 642 n. 2 (2d Cir.1988); *see also* S Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1278 (2d Ed.1990).

And although plaintiffs' motion concludes the citation of its own laundry list of cases with a footnote stating "Plaintiffs have not found a single case in which a federal court has held that failure to mitigate damages is not an affirmative defense," defendants response is a meaningless one-sentence denial of that extended treatment after this equally uninformative reference to *Hoffman Plastic:*

> ***3** Defendants respond to Plaintiff' Paragraph 2 that *Hoffman* speaks for itself, and the question of what issues may remain unresolved is a question for the Court to determine.

Neither defendants' Answer to Complaint nor the FPTO says a word about a mitigation of damages defense, nor does either contain any reference to the illegality of plaintiffs' working in the United States. As *Hoffman Plastic* 's reference to a preexisting split in decisional law makes plain, this was not a new issue of which defendants could claim a lack of awareness.

In sum, plaintiffs' waiver argument is in accordance with universal caselaw. In addition, it surely comes with ill grace for an employer to hire alien workers and then, if the employer itself proceeds to violate the Fair Labor Standards Act (which this Court does not of course decide, but must assume for purposes of the present motion), for it to try to squirm out of its own liability on such grounds. For more than one reason, this is a classic case for the application of the principle of waiver uniformly announced by the Courts of Appeals that have considered the issue, and this Court also grants this last motion in limine.

Conclusion

For the reasons stated in this opinion, all of plaintiffs' motions in limine are granted. Because the parties (again as this Court had directed during the conference at which the FPTO was approved) have advised by letter as to their respective dates of availability for trial, this action is set for trial to begin at 9:30 a.m. October 29, 2002.

N.D.Ill.,2002.
Rodriguez v. Texan, Inc.
Not Reported in F.Supp.2d, 2002 WL 31061237 (N.D.Ill.), 147 Lab.Cas. P 34,633

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Only the Westlaw citation is currently available.

United States District Court,
S.D. Texas,
Houston Division.
Guadalupe Arenas VARGAS, et al., Plaintiffs,
v.
KIEWIT LOUISIANA CO., et al., Defendants.

Civil Action No. H–09–2521.
July 18, 2012.

Anthony G. Buzbee, Christopher K. Johns, The Buzbee Law Firm, Houston, TX, for Plaintiffs.

David S. Bland, Leblanc Bland P.L.L.C., Houston, TX, Beau Earle Leblanc, Brendhan H. Thompson, Charles G. Clayton, IV, Leblanc Bland PLLC, New Orleans, LA, for Defendants.

MEMORANDUM AND ORDER

KEITH P. ELLISON, District Judge.

*1 Pending before the Court is Defendants' Motion for Partial Summary Judgment on Plaintiffs' Wage Claims ("Motion"), filed by Defendant Kiewit Engineering Company ("KECO") (Doc. Nos.95, 96) and joined by Defendant Modjeski and Masters, Inc. ("Modjeski") (Doc. No. 98). After considering the parties' arguments and the applicable law, the Court must deny Defendants' Motion.

I. BACKGROUND

This case arises from the death of Martin Anastacio Reyes Osuna ("Reyes"). Reyes was a citizen of Mexico. He died while working on a construction project on the Huey P. Long Bridge in Bridge City, Louisiana. Plaintiff Guadalupe Arenas Vargas ("Arenas Vargas") brings suit individually as Reyes's wife, as representative of Reyes, and as next friend of Zaid Martin Reyes Arenas ("Reyes Arenas"), Reyes's son. Plaintiff also is a citizen of Mexico.

At the time of his death, Reyes was an employee of JL Steel Reinforcing, LLC ("JL Steel"). Plaintiff alleges that the injuries causing Reyes' death were sustained while Reyes and other JL Steel employees were working on a steel rebar cage. The employees climbed to the top of the rebar cage to release it from a crane that had placed the cage in place on top of the pier. The cage crashed to the ground, killing Reyes and another JL Steel employee.

The construction project was a joint venture of Kiewit Louisiana Co. ("Kiewit"), Massman Construction Co. ("Massman"), and Traylor Bros., Inc. ("Traylor"), along with a company they had jointly formed for purposes of the bridge project, Kiewit Massman Traylor Constructors ("KMTC"). KMTC contracted with the Louisiana Department of Transportation and Development ("LADOTD") to widen the bridge and subcontracted with JL Steel to perform a portion of the contract.

Reyes obtained his employment with JL Steel by providing a social security card and his Consular Identification Card. (JL Steel Personnel File of Martin Anastacio Reyes Osuna, Doc. No. 96–5.) However, Plaintiff has admitted that Reyes did not have authorization to remain or work in the United States. (Vargas Depo., Doc. No. 96–1, at 71, 72.) There is no indication whether JL Steel checked these documents or knew of their falsity.

Plaintiff's Fourth Amended Complaint alleges that Defendants are liable for Reyes's death on the basis of negligence. She brings a survival claim, under article 2315.1 of the Louisiana Civil Code, as well as a wrongful death claim, under article 2315.2.

The Court has previously dismissed Plaintiffs' claims against JL Steel (Doc. No. 19) and granted summary judgment to KMTC and the individual joint venturers, Kiewit, Massman, and Traylor (Doc. No. 71). The Court also denied Modjeski's Motion to Dismiss (Doc. No. 80), and thus Modjeski and KECO are the only remaining Defendants.

II. LEGAL STANDARD

A motion for summary judgment requires the Court to determine whether the moving party is entitled to judgment as a matter of law based on the evidence thus far presented. Fed.R.Civ.P. 56(c). Summary judgment is proper "if the pleadings, deposi-

tions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Kee v. City of Rowlett*, 247 F.3d 206, 210 (5th Cir.2001) (quotations omitted). A genuine issue of material fact exists if a reasonable jury could enter a verdict for the non-moving party. *Crawford v. Formosa Plastics Corp.*, 234 F.3d 899, 902 (5th Cir.2000). The Court views all evidence in the light most favorable to the non-moving party and draws all reasonable inferences in that party's favor. *Id.; see also Harvill v. Westward Communications, L.L.C.*, 433 F.3d 428, 436 (5th Cir.2005) (court may not make credibility determinations or weigh the evidence at the summary judgment stage). Hearsay, conclusory allegations, unsubstantiated assertions, and unsupported speculation are not competent summary judgment evidence. Fed.R.Civ.P. 56(e)(1); *see, e.g., Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir.1996); *McIntosh v. Partridge*, 540 F.3d 315, 322 (5th Cir.2008); *see also Little v. Liquid Air Corp.*, 37 F.3d 1069, 1975 (5th Cir.1994) (noting that a non-movant's burden is "not satisfied with 'some metaphysical doubt as to the material facts' ") (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)).

III. ANALYSIS

***2** Defendants assert that an award of "lost wages" [FN1] in this case would be in direct contravention of the Immigration Reform and Control Act of 1986 ("IRCA"). IRCA is a "comprehensive scheme prohibiting the employment of illegal aliens in the United States." *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 147, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002). IRCA is "focused foremost on the employer," *Bollinger Shipyards, Inc. v. Director, Office of Worker's Comp. Programs*, 604 F.3d 864, 874 (5th Cir.2010), as employers must examine specified documents for all newly-hired workers to verify their identity and eligibility for work in the United States. 8 U.S.C. § 1324a(b). Employers who hire employees who fail to provide the required documentation are subject to civil fines and criminal prosecution. 8 U.S.C. §§ 1324a(a)(1), 1324a(f)(1). Additionally, a potential employee who tenders false or fraudulent documents for purposes of obtaining employment is subject to fines and criminal prosecution, but the statute "provid[es] nothing regarding *civil* effects." *Bollinger Shipyards*, 604 F.3d at 874.

FN1. The Court assumes that Defendants are objecting to damages for past loss of earnings and loss of future earnings. In a wrongful death action, these damages are relevant to determine loss of support for any plaintiff who can show prior actual support from the decedent. *See Matis v. Joseph*, CIV. A. 05–2615, 2008 WL 3850489, at *2 (E.D.La. Aug.14, 2008). In a survival action, a plaintiff may recover damages for any loss of wages the decedent incurred before his death. *Subervielle v. State Farm Mut. Auto. Ins. Co.*, 32 So.3d 811, 814 (La.Ct.App.2009); *Hollingsworth v. State Through Dept. of Transp. & Dev.*, 663 So.2d 357, 361 (La.Ct.App.1995), writ denied, 666 So.2d 322 (La.1996). The Complaint alleges that Reyes was not killed instantly (Compl., Doc. No. 94, ¶ 6), but the Court is not aware of how long he survived. Thus, the Court will refer to loss of earnings under both the survival and wrongful death actions.

As the Fifth Circuit explained in *Bollinger Shipyards*, the Supreme Court, on multiple occasions, has addressed situations in which actions of the National Labor Relations Board have been in tension with other federal laws. *See Bollinger Shipyards*, 604 F.3d at 875–77 (discussing *Southern S.S. Co. v. N.L.R.B.*, 316 U.S. 31, 62 S.Ct. 886, 86 L.Ed. 1246 (1942); *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984); *Hofman Plastic*, 535 U.S. 137, 122 S.Ct. 1275, 152 L.Ed.2d 271). In *Hoffman Plastic*, the most recent decision in this line of cases, the Supreme Court held that allowing the Board to award backpay to undocumented immigrants would "unduly trench" upon the federal immigration policy expressed in the IRCA.

Although neither party discusses the relevant legal standards, it is important to enumerate the scope of the Supremacy Clause and the standards for determining preemption. Defendants assert that this case is governed squarely by *Hofman Plastic*. However, the Supreme Court in that case determined whether a *federal* statute unduly trenched upon IRCA; specifically, whether the NLRB exceeded its discretion in awarding backpay because the remedy conflicted with IRCA objectives. In this situation, however, the Court must determine whether IRCA preempts a *state* law, a

question which implicates federalism concerns. *See* *Madeira v. Affordable Housing Foundation*, 469 F.3d 219, 236 (2d Cir.2006).[FN2]

> FN2. Additionally, the case primarily relied upon by Defendants, *Veliz v. Rental Service Corp., USA, Inc.*, 313 F.Supp.2d 1317 (M.D.Fla.2003), does not discuss federalism concerns or the preemption standards, but merely concludes that awarding lost wages "trench[es] upon the immigration policy of the United States," "condon[es] prior violations of immigration laws," and is "tantamount to violating the IRCA." *Id.* at 1336.

The Supremacy Clause provides that federal law "shall be the supreme Law of the Land ..., any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. A state law is preempted by federal law where "(1) Congress expressly preempts state law; (2) Congressional intent to preempt is inferred from the existence of a pervasive regulatory scheme; or (3) state law conflicts with federal law or interferes with the achievement of federal objectives." *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 n. 1 (5th Cir.1995). The burden of persuasion lies with the party asserting preemption. *AT & T Corp. v. Pub. Util. Com'n of Texas*, 373 F.3d 641, 645 (5th Cir.2004).

***3** As to the first of the three means of preemption, IRCA does not expressly preempt state tort law allowing undocumented workers to recover compensatory damages; rather, the express preemption clause applies only to "any State or local law imposing civil or criminal sanctions" on persons who employ or assist in the employment of illegal aliens. 8 U.S.C. § 1324a(h)(2); *Madeira*, 469 F.3d at 239. As to the second, although Congress's interest is pervasive and dominant in immigration, tort and labor are areas that traditionally have been left to the states to regulate. *See* U.S. Const. art. I, § 8, cl. 4; *Madeira*, 469 F.3d at 240 (citing *Hines v. Davidowitz*, 312 U.S. 52, 62, 61 S.Ct. 399, 85 L.Ed. 581 (1941); *Silkwood v. Kerr–McGee Corp.*, 464 U.S. 238, 255, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984)).

The third means of preemption, implicit conflict preemption, presents the most difficult question. Federal law impermissibly conflicts with state law where "compliance with both federal and state regulations is a physical impossibility" or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. U.S.*, — U.S. ——, 132 S.Ct. 2492, 2501, — L.Ed.2d —— (2012) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963); *Hines*, 312 U.S. at 67). Providing damages for lost wages and complying with IRCA is not physically impossible. Thus, the Court must consider the latter criterion.

As the Supreme Court has noted, "the case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to 'stand by both concepts and to tolerate whatever tension there [is] between them.' " *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166–67, 109 S.Ct. 971, 103 L.Ed.2d 118 (1989) (citing *Silkwood*, 464 U.S. at 256). In its enactment of IRCA, Congress noted that the legislation was not intended "to undermine or diminish in any way labor protections in existing law." H.R. Rep. 99–682(I), at 58, *as reprinted in* 1986 U.S.C.C.A.N. at 5662; *see also Brown v. Ames*, 201 F.3d 654, 661 (5th Cir.2000) (finding a House Report relevant in this determination, and concluding that Congress did not intend to preempt state law). Tension between federal and state law is not enough to establish conflict preemption. *Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005, 1010 (9th Cir.2007) (citing *Silkwood*, 464 U.S. at 256); *Madeira*, 469 F.3d at 241.

Nothing in IRCA demands, or even implies, that tortfeasors should not be held liable for their negligence if the person whom they harm is working in this country illegally or has violated IRCA. Instead, as in *Hoffman Plastic*, the conflict at issue is whether the remedy of lost earnings based on U.S. wages is in conflict with the policy expressed in IRCA, as it presumes continued IRCA violations.[FN3] The Second Circuit exhaustively examined this issue in *Madeira*, and found that the New York provision at issue was not preempted by IRCA by comparing the situation to that in *Hofman Plastics*. *See* *Madeira*, 469 F.3d at 243–49. As in *Hoffman Plastics*, the Second Circuit considered a variety of factors in the "conflict balance." *Id.* at 246.

> FN3. Defendants have presented no argu-

> ments that convince the Court that *all* awards of future earnings present a potential conflict with IRCA. There is no reason that an award of lost earnings based on Mexican wages would present a conflict with IRCA, as it does not presume future violations of IRCA. Preventing Plaintiff from recovering lost earnings based on Mexican wages would only be a punishment for a previous IRCA violation, and one that is not contemplated by the statute. Thus, the Court evaluates only Defendants' argument in the alternative-that Plaintiff should be precluded from obtaining an award of lost earnings based on U.S. wages and should only be able to recover lost wages based on Reyes's earning potential in Mexico.

*4 Although surprisingly not cited by either party, the Court finds the Fifth Circuit's opinion in *Bollinger Shipyards* highly instructive in assessing this case in light of *Hoffman Plastic* and determining whether a conflict exists by balancing the relevant factors. In *Bollinger Shipyards,* the Fifth Circuit considered whether an undocumented immigrant could receive workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA"). It distinguished *Hofman Plastic* on three grounds. First, it found that workers' compensation under the LHWCA is a non-discretionary, statutory remedy, unlike the discretionary backpay awarded under the NLRA in *Hoffman Plastic.* Bollinger Shipyards, 604 F.3d at 877. Second, it found that, unlike the NLRA, the LHWCA's remedial scheme is a substitute for tort claims, and the Fifth Circuit had held previously that an undocumented immigrant has the right to sue a vessel owner in tort for negligence and recover future lost wages based on his employment at the time of injury. Bollinger Shipyards, 604 F.3d at 878 (citing Hernandez v. M/V Rajaan, 841 F.2d 582, *amended after rehearing,* 848 F.2d 498 (5th Cir.1988)). Third, the Fifth Circuit held that awarding benefits under the LHWCA does not "unduly trench upon explicit statutory prohibitions critical to federal immigration policy." Bollinger Shipyards, 604 F.3d at 879. To award benefits under the LHWCA, the employee did not need to remain in the United States illegally or trigger new IRCA violations, as LHWCA claimants are not required to mitigate damages by working. *Id.* Importantly, the court found that Plaintiff was not "being 'rewarded' for a past violation of the IRCA, as workers' compensation is not backpay, but compensation for an injury incurred." *Id.*

By this reasoning, the lost earnings damages available under wrongful death and survival statutes must not be preempted under the stricter standards applicable to state law preemption. Like workers' compensation, lost earnings must be awarded based on the evidence a plaintiff produces at trial to meet her burden. *See* Ryan v. Zurich American Ins. Co., 988 So.2d 214, 218 (La.2007) (appellate courts must determine if the factfinder abused its vast discretion in awarding damages and raise or lower the award to the highest (or lowest) point reasonably within the discretion of that court) (citing Coco v. Winston Industries, Inc., 341 So.2d 332 (La.1977)).

Lost earnings awards in wrongful death and survival actions are also clearly tort remedies equivalent to those authorized in *Bollinger Shipyards* and *Hernandez.* An award of lost earnings is intended to make the decedent, and those who relied on him for support, whole, by paying them the amount that the decedent would have earned if not for Defendants' negligence. In tort actions, "the wrong being compensated is personal injury not authorized by IRCA under any circumstances," unlike the layoff at issue in *Hoffman Plastic.* Madeira, 469 F.3d at 246. Specifically, in wrongful death and survival actions, the wage-earner is deceased, and thus there will be no new IRCA violations possibly triggered by this award; decedent cannot possibly mitigate any lost earnings damages. Moreover, as in *Hernandez,* Defendants are third parties that "do[ ] not stand in the same relationship to the decedent as an employer," which thus "does not present the conflict between federal labor policy and federal immigration policy present in both *Sure-Tan* and *Hoffman.*" Minerva Avalos v. Atlas World Group, Inc., 2:03CV174, 2005 WL 6736327, at *4 (S.D.Miss. Apr.4, 2005).

*5 Defendants stress that Reyes used false identification documents to obtain employment with JL Steel in violation of IRCA. Thus, they believe that an award of lost earnings would undermine immigration policy by condoning violations of IRCA and awarding wages to someone for wages that could not lawfully have been earned. However, this Court does not find the same danger of motivating immigration policy violations to be present in this case, as immigrants will not be motivated to violate IRCA in order to obtain additional U.S. wages after suffering fatal injuries.

Rather, the Court's ruling today counteracts another competing motivation—that of third-parties to exercise less caution and endanger the lives of any undocumented immigrants. *Madeira*, 469 F.3d at 248; *Rosa v. Partners in Progress, Inc.*, 152 N.H. 6, 868 A.2d 994, 1000 (N.H.2005) ("To refuse to allow recover against a person responsible for an illegal alien's employment who knew or should have known of the illegal alien's status would provide an incentive for such persons to target illegal aliens for employment in the most dangerous jobs or to provide illegal aliens with substandard working conditions.").

Additionally, Plaintiff will not be guaranteed future wages based on the rate Reyes would have received in the United States. Instead, Defendants will be entitled to establish that "the use of past wages to calculate future damages was factually improper and, if so, what a proper measure of damages should be." *Hernandez*, 848 F.2d at 500; *see also Coco*, 341 So.2d at 338 ("Wages at time of injury are usually suggestive of the individual's future earnings. This is not an absolute unvarying rule. In many instances, changes in work and increase of earnings would be more probable."). Defendants may present proof that Reyes "was about to be deported or would surely be deported," or proof that his false documents may have been discovered and thus eliminate his chances of continuing or finding additional work in the United States. *See Madeira*, 469 F.3d at 248–49 (approving an instruction to consider the worker's removability in calculating the amount of compensation to award). The precise language of this instruction will be decided after it is discussed by the parties prior to trial and submitted as part of their proposed jury instructions.

IV. CONCLUSION

Based on the foregoing, Defendants' Motion for Partial Summary Judgment on Plaintiff's Wage Claims (Doc. No. 95, 98) is **DENIED.**

IT IS SO ORDERED.

S.D.Tex.,2012.
Vargas v. Kiewit Louisiana Co.
Slip Copy, 2012 WL 2952171 (S.D.Tex.)

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