

# California Appellate Court Addresses a Key Question Linked to Both Immigration and Employment Law: May an Undocumented Worker Pursue a Discrimination Claim Based on a Refusal to Hire/Rehire?

By Bernadette M. O'Brien and Dona Lee Skeren

## **Introduction**

According to a recent decision by the California Court of Appeals, *Salas v. Sierra Chemical Company*,<sup>1</sup> an employee who uses false I-9 documentation to obtain employment may not subsequently pursue a claim against the employer for discrimination based on a refusal to hire/rehire. In reaching its decision, the court applied the doctrines of “after-acquired evidence”<sup>2</sup> and “unclean hands”<sup>3</sup> to hold that an undocumented worker could not recover back pay or be rehired, even though the worker’s claim, based on alleged disability discrimination, might have been a meritorious one pursuant to the Fair Employment and Housing Act (“FEHA”).<sup>4</sup>

However, employers should recognize that the *Salas* decision also confirms that undocumented workers remain entitled to all other protections under the law, such as claims for sexual harassment, if those claims arise while the undocumented worker is still on the job. Thus, although the court found for the employer in this case — and it is therefore an encouraging decision for employers — it may not be the “slam dunk” employers are looking for to defend workplace lawsuits brought by undocumented workers. Further, on November 16, 2011, the California Supreme Court granted a Petition for Review filed by counsel for Salas.

## **The Employer Allegedly Commits Disability Discrimination**

Vicente Salas worked for Sierra Chemical, a pool chemical business, as a seasonal worker from March 2003 to December 2006. As part of the hiring process, Salas completed and signed I-9 and W-4 forms, including the same Social Security number on both. While working for Sierra Chemical, Salas sustained two injuries to his back, one in March 2006 and the other in June 2006, for which he filed workers’ compensation claims. In December of 2006, while Salas was on modified duty and receiving medical treatment, he was laid off as part of Sierra Chemical’s annual reduction in production line staff. Salas alleges that when Sierra Chemical recalled him back after this layoff, his supervisor advised him that he must be “100% recovered” before Sierra Chemical would rehire him; therefore, he needed a full release (with no work restrictions) from his physician.

## **Employee Alleges Employer Failed to Both Engage in the Interactive Process and to Offer a Reasonable Accommodation**

Subsequently, Salas filed a lawsuit, alleging that Sierra Chemical discriminated against him because of his disability, specifically claiming that the company:

- Failed to engage in the interactive process;
- Failed to consider a reasonable accommodation; and,
- Retaliated against him for filing a workers’ compensation claim.

During the course of the lawsuit, Salas filed a motion *in limine* advising the trial court that he would assert his Fifth Amendment right against self-incrimination in response to any questions concerning his immigration status. Subsequently, Sierra Chemical discovered that the Social Security number used by Salas belonged to a man in North Carolina (Kelley R. Tenney). Based upon this new information, Sierra Chemical filed a motion for

<sup>1</sup> *Salas v. Sierra Chemical Co.*, 198 Cal. App. 4th 29 (Aug. 9, 2011), *rev. granted, depublished* (Nov. 16, 2011).

<sup>2</sup> The “after acquired evidence” doctrine applies in situations where, subsequent to an alleged discriminatory termination or failure to hire, the employer discovers evidence that the employee engaged in wrongdoing that would have resulted in the termination/refusal to hire.

<sup>3</sup> The “unclean hands” doctrine holds that it is inequitable to provide relief to a plaintiff who has engaged in unconscionable, bad faith or inequitable conduct.

<sup>4</sup> Cal. Gov’t Code § 12900 et seq.

summary judgment, which the trial court eventually granted. Salas appealed.

### **Court Holds for Employer Due to Employee's Undocumented Status**

On appeal, the court considered two factual issues. The first involved whether Salas used a Social Security number that belonged to another individual. On this point, Sierra Chemical provided the sworn statement of Mr. Tenney, who claimed that the Social Security number used by Salas actually belonged to him. Salas then submitted a declaration and a letter he received from the Social Security Administration informing him that the number he was using did not match their records, apparently as evidence to suggest that Salas did not realize the number belonged to another individual. However, the court found that Salas's declaration supported Tenney's declaration, instead of refuting it. The court also held that Salas could have declared the Social Security number to be his, but did not; and, that although it was possible the Social Security Administration had mistakenly provided the same number to two different individuals, such speculation was insufficient to establish a triable issue of material fact.

The next question considered by the court centered on whether Sierra Chemical would have even hired Salas if it had discovered his misrepresentation regarding the Social Security number. On this point, the court noted that Sierra Chemical provided a declaration from the company's president stating that it had "a long-standing policy" precluding "the hiring of any applicant who submits false information or false documents in an effort to prove his or her eligibility to work in the United States."<sup>5</sup> In rebuttal, Salas declared that his supervisor had advised him and other employees (who had also received a similar letter from the Social Security Administration) that Sierra Chemical would not terminate them over a discrepancy pertaining to their Social Security numbers. Salas also stated that he personally knew of other undocumented individuals working at Sierra Chemical, yet he had never heard of any employees being fired because of their undocumented status.

### **The After-Acquired Evidence Doctrine**

In spite of Salas's declaration, the court held that, as a matter of law, Salas had used a Social Security number that belonged to someone else. The court also determined that Sierra Chemical had an established policy of refusing to hire applicants who submitted false information or documents to obtain employment. In reaching

its decision, the court relied on the after-acquired evidence doctrine, which serves as a complete bar to an employee's claim for wrongful termination or refusal to hire/rehire, where the employer subsequently discovers employee misconduct justifying the termination or refusal to hire/rehire. Because Salas misrepresented his job qualifications, specifically that he was a documented worker, he was not legally qualified for the job. Based upon this, the *Salas* court found the after-acquired evidence doctrine barred the claims asserted by Salas. The court noted that although Salas claimed Sierra Chemical discriminated against him because of his back injury, specifically by failing to provide a reasonable accommodation for his disability, and by failing to engage in an interactive process to determine whether Sierra Chemical could offer an accommodation, such alleged actions by the company did not involve "*pervasive discriminatory conduct*" resulting in injuries suffered by the employee "*during*" the term of employment, but instead related to the refusal to rehire claim.<sup>6</sup> Therefore, since Salas's claims were tied to the failure to rehire, the after-acquired evidence doctrine operated as a complete defense.

### **The Unclean Hands Doctrine**

As noted above, the doctrine of unclean hands refers to unconscionable, bad faith or inequitable conduct by a plaintiff in connection with the matter in controversy. The doctrine requires that the plaintiff have "clean hands" or he/she will be denied relief *regardless of the merits of the claim*. A finding of unclean hands makes it inequitable to provide the plaintiff with relief and is thus a complete defense to all legal and equitable actions. However, where both parties have unclean hands, the doctrine will not be applied. Whether the defense of unclean hands applies depends upon the analogous case law, the nature of the misconduct and the relationship of the misconduct to the claimed injuries.

Therefore, in the employment law context, when an employee, due to his or her misrepresentations, obtains a job for which the employee is not lawfully qualified, and the misrepresentation directly relates to the claim for wrongful termination or refusal to hire/rehire, the employee cannot then complain that he or she was wrongfully terminated because the doctrine of unclean hands applies.

Salas provided Sierra Chemical with allegedly false I-9 documentation. This in turn caused the company to submit false information to the federal government, including inaccurate tax returns relayed to the Internal

<sup>5</sup> *Salas*, 198 Cal. App. 4th at 36.

<sup>6</sup> *Salas*, 198 Cal. App. 4th at 42 (emphasis added).

Revenue Service (“IRS”), subjecting Sierra Chemical to penalties. Accordingly, the court concluded that Salas could not file a disability discrimination lawsuit based on Sierra Chemical’s refusal to accommodate or to hire/rehire, regardless of the merits of his claim, since the doctrine of unclean hands barred the action.

### **The Impact of Senate Bill 1818**

Salas also argued that Senate Bill 1818 (“SB 1818”), which states that “a person’s immigration status is irrelevant” for purposes of enforcing state employment laws, barred the application of the doctrines of after-acquired evidence and unclean hands. SB 1818 provides, in relevant part:

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

(b) For purposes of enforcing state labor, employment, civil rights and employee housing laws, a person’s immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person’s immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law.

Salas argued that SB 1818 barred application of the doctrines of after-acquired evidence and unclean hands. The court noted, however, that “at the time SB 1818 was enacted, an undocumented immigrant possessed no right under state law to maintain a claim for an allegedly discriminatory termination or failure to hire when the claim would otherwise be barred by the after-acquired-evidence or unclean hands doctrines.”<sup>7</sup> Although SB 1818 provides that undocumented workers are entitled to “[a]ll protections, rights, and remedies available under state law,” the enactment does not purport to enlarge the rights of these workers but is, instead, “*declaratory of existing law*.”<sup>8</sup> Thus, the legislation did not preclude application of the after-acquired evidence or unclean hands doctrines in this case.

### **The Salas Decision and Workers’ Compensation Claims**

Employers and their defense counsel will be tempted in workers’ compensation cases to use the *Salas* case to defend Labor Code section 132a claims, as these may include lost wages and reinstatement remedies. Salas asserted a Section 132a claim based on alleged discrimination related to the workers’ compensation injury. However, there is very little mention of the 132a claim by the *Salas* Court, and the court does not make a determination regarding the allegation. The most likely reason for this is that the Workers’ Compensation Appeals Board (“WCAB”) has exclusive jurisdiction over 132a claims. Therefore, the question is this: If the 132a claim had been properly brought before the WCAB, could the employer have asserted the same defenses used in the *Salas* civil case?

Employers should recognize that pursuant to Labor Code section 3202, workers’ compensation laws “shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment.”<sup>9</sup> This liberal mandate applies to 132a claims as well.<sup>10</sup> Further, the Workers’ Compensation Judge (“WCJ”) has significant leeway in developing the record, as opposed to civil courts, which only consider the evidence presented. Thus, if something seems inadequately addressed, the WCJ attempts to develop the record further by asking his or her own questions. If the issue remains unclear, then the liberal mandate applies, and the WCJ will likely find for the employee.

Another important question that the *Salas* decision raises but does not answer is whether the court’s determination that Salas could not recover back pay would apply to an injured worker’s entitlement to temporary disability benefits, since such benefits serve as wage replacement. It is probable that this question will be addressed in a future decision. Hopefully, these important questions will be addressed on review by the California Supreme Court. For now, the authors opine that the final take for employers on the *Salas* case is that it is essential to have a clearly stated policy (e.g., in an employee handbook) and consistent practice of not hiring undocumented workers. Failure to do so may preclude an employer from successfully asserting the defenses (i.e., after-acquired evidence/unclean hands)

<sup>7</sup> *Salas*, 198 Cal. App. 4th at 48.

<sup>8</sup> *Salas*, 198 Cal. App. 4th at 35 (citing Stats. 2002, ch. 1071, § 1, at 6913–6915) (emphasized differently).

<sup>9</sup> Cal. Lab. Code § 3202.

<sup>10</sup> *Judson Steel v. W.C.A.B.*, 22 Cal.3d 658, 150 Cal. Rptr. 250, 43 Cal. Comp. Cases 1205 (1978).

needed to defeat an undocumented worker's claims for a discriminatory refusal to hire/rehire.<sup>11</sup>

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<sup>11</sup> An interesting side note is that Justice Andrea Hoch, joined by Justice Vance Raye and Justice Harry Hull, authored the *Salas* decision. Justice Hoch is well known in the workers' compensation field. He previously served as Administrative Director of the Division of Workers' Compensation, and he adopted the 2005 Permanent Disability Rating Schedule.