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August 2011

In *Salas v. Sierra Chemical*, a California Court of Appeal has confirmed an employer's ability to assert the after-acquired evidence doctrine as a defense in a failure to hire claim, even when the prospective employee may have a disability and the employer failed to engage in any interactive process, where the prospective employee presented false documentation of his legal right to be employed in the United States.

California Appeals Court Affirms Employer's Right to Not Hire Possibly Disabled, But Admittedly Dishonest, Applicant

By Helene Wasserman

In *Salas v. Sierra Chemical Co.* (Aug. 9, 2011 – 3d App. Dist.), a California Court of Appeal affirmed the trial court's order granting summary judgment in favor of Sierra Chemical and holding that the after-acquired evidence doctrine, as well as the equitable doctrine of "unclean hands," barred the plaintiff's claims for disability discrimination and failure to hire based on disability under California's Fair Employment and Housing Act.

Background

The plaintiff worked as a seasonal production line employee for Sierra Chemical. When he was initially hired, he presented a resident alien card and a Social Security card as identification. He also completed pre-hire paperwork, in which he identified his Social Security number. For several seasons, he was laid off at the end of the season, and then recalled. Each time he was recalled, he provided the same identification information. Ultimately, in 2005, he had accrued enough seniority to avoid being laid off that year.

In 2006, the plaintiff sustained an industrial injury, and was ultimately returned to work with restrictions. Later that year, he was injured at work again, and he filed a workers' compensation claim. In December 2006, Salas was notified of his layoff. When he was recalled in mid-2007, the plaintiff was told to bring a doctor's note releasing him to return to full duty in order to be rehired. According to the plaintiff, his supervisor advised that he could not return to work unless he was "100% recovered." The plaintiff did not return to work.

Instead, he filed a lawsuit against Sierra Chemical, asserting claims for disability discrimination in violation of California's Fair Employment and Housing Act and denial of employment in violation of public policy. The plaintiff asserted that the company failed to reasonably accommodate and failed to engage in the interactive process. The plaintiff also asserted that the company failed to rehire him in retaliation for his filing of a workers' compensation claim.

During the litigation, the plaintiff filed a motion advising the trial court that he intended to assert his Fifth Amendment right against self-incrimination in response to any questions regarding his immigration status. The company conducted discovery after this revelation, and learned that the Social Security number that the plaintiff had used to

secure employment belonged to someone else. As a result, Sierra Chemical moved for summary judgment. While the trial court initially denied the company's motion, ultimately, with instructions from the appellate court, the trial court reconsidered and granted the motion. The plaintiff appealed.

The Appellate Court's Decision

In *Salas*, the plaintiff asserted that Senate Bill 1818 (codified as Labor Code section 1171.5; Civil Code section 3339; Government Code section 7286; Health and Safety Code section 24000) precludes the application of either the after-acquired evidence or unclean hands doctrine. SB 1818 was enacted in 2002 to, in effect, legislatively limit the 2002 United States Supreme Court decision in *Hoffman Plastic Compounds, Inc. v. NLRB*¹ which held that the policies underlying the Immigration Reform Control Act prohibited the National Labor Relations Board from awarding backpay to illegal immigrants, who, in violation of the National Labor Relations Act, were terminated because of their participation in the organization of a union. SB 1818 makes explicit California's public policy with regard to the irrelevance of immigration status in enforcement of state labor and employment laws. If an employer hires an undocumented worker, that employer will bear the burden of complying with all laws related to the actual employment of the employee.

However, the rule set forth in two previous decisions, *Camp v. Jeffer, Mangels, Butler & Marmaro*² and *Murillo v. Rite Stuff Foods, Inc.*,³ precludes an employee who misrepresented lawful qualifications for a job to maintain claims for wrongful termination or failure to hire, regardless of immigration status. Because at the time SB 1818 was enacted an undocumented immigrant possessed no legal right to employment, claims related to hiring and termination are barred.

Relying heavily on *Camp*, the court stated that "[t]he after-acquired-evidence doctrine operates as a complete or partial defense where, after an allegedly discriminatory termination or refusal to hire, the employer discovers employee or applicant wrongdoing that would have resulted in the challenged termination or refusal to hire." For the doctrine to apply and provide the company with a defense to the plaintiff's claim, there had to be no genuine factual issues concerning whether the plaintiff used false documentation to secure his employment, and whether the company would not have hired him if it knew of the misrepresentation. The court determined, based upon undisputed evidence presented by the company, that Sierra Chemical had a "long-standing policy" that precluded hiring applicants who submit false information or false documents in order to establish eligibility to work in the United States. The company presented a declaration from the individual who bore the Social Security number that the plaintiff presented as his own, as well as a declaration from the company's president regarding its long-standing policy. Significantly, while *Salas* asserted his belief that his supervisor at Sierra Chemical was aware that there was a "discrepancy" in the plaintiff's and other employees' Social Security numbers and that he remained employed despite that knowledge, he never asserted that the Social Security number he presented actually belonged to him.

In *Murillo*, there were triable issues regarding whether the plaintiff would, in fact, have been terminated immediately had the employer learned that *Murillo* was an undocumented alien who used counterfeit resident alien and Social Security cards to obtain employment. However, in *Salas*, based on the above-referenced evidence, no triable issues existed. Further, the court distinguished between the fact that *Murillo* related to environmental harassment and discrimination that occurred *during* employment, whereas the instant case relates to failure to hire.

The significance of this case is multifold. Certainly, however, this case should not be read as affording employers carte blanche with regard to not engaging in the interactive process when interviewing potentially disabled applicants. The reason why the employer's process was not scrutinized was due to the unclean hands of and falsifications by the plaintiff. Similarly, employers should be cautious when interviewing and hiring employees to verify employment information provided by applicants. Finally, what significantly bolstered the employer's position in this case was the consistency of its practice to terminate individuals who provide false information during the hiring practice. Consistency in application of employment practices and protocols is paramount in all employment settings.

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¹ 535 U.S. 137 (2002).

² 35 Cal. App. 4th 620 (1995).

³ 65 Cal. App. 4th 833 (1988).