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California Supreme Court Says Undocumented Workers Can Pursue FEHA Discrimination Claims, Although Remedies Are Limited

The California Supreme Court has held in *Salas v. Sierra Chemical Co.*, Case No. S196568 (June 26, 2014), that immigrants who fraudulently use others' Social Security numbers to gain employment are still protected by California's anti-discrimination laws, though their recoverable damages may be reduced.

The plaintiff sued his former employer, Sierra Chemical Co., under California's Fair Employment and Housing Act (FEHA), seeking lost wages, among other remedies, and alleging that Sierra failed to provide him with a reasonable accommodation after he injured his back on the job and retaliated against him for filing a workers' compensation claim. During the course of the litigation, Sierra learned that the plaintiff was unauthorized to work in the United States and had falsified his employment application and additional employment records by using another person's Social Security number.

Based on this "after-acquired evidence," Sierra moved for summary judgment, arguing that it had a policy of refusing to employ persons who were unauthorized to work and that plaintiff's use of another person's Social Security number barred his FEHA claims. Sierra also argued that the plaintiff could not recover on his claim based on the doctrine of "unclean hands," which holds that a party that acted in bad faith is not entitled to recovery. The trial court ultimately granted Sierra's motion and the Court of Appeal affirmed. The California Supreme Court reversed.

As a threshold matter, the California Supreme Court first considered whether the federal Immigration Reform and Control Act of 1986 (IRCA, 8 U.S.C. § 1101 *et seq.*) preempts application of the FEHA's anti-discrimination protections to workers who are unauthorized aliens, as well as whether IRCA preempts provisions of California's Senate Bill 1818, enacted in 2002, which accords "state employment law protections to all workers 'regardless of immigration status.'" The Court concluded that IRCA does not *generally* preempt these provisions, but that it does bar an award of lost pay damages under the FEHA for any period of time *after* an employer's discovery of the employee's ineligibility to work in the United States.

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In particular, the Court explained that because IRCA bars employers from continuing to employ a worker who is unauthorized, IRCA would preempt a state law back pay award for the period *after* the employer discovers the worker's unauthorized status. On the other hand, IRCA does not prohibit payment or receipt of wages for the period before the employer discovers the worker's unauthorized status, nor would a damages award for the pre-discovery period frustrate the purposes of IRCA. The Court reasoned that because IRCA does not penalize unauthorized aliens from seeking or engaging in unauthorized work, there is no reason to believe that a damages remedy under FEHA would encourage illegal immigration – and conversely, the unavailability of a FEHA damages remedy might have the perverse effect of immunizing employers from liability for actions that violate FEHA and encouraging them to hire unauthorized workers.

Notably, the California Supreme Court declined to follow a U.S. Supreme Court decision, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), which held that policy underlying IRCA prohibited the National Labor Relations Board (NLRB) from awarding back pay to an unauthorized worker who used false documentation to procure a job. The California Supreme Court distinguished *Hoffman*, explaining that it did not address preemption of state law and that there are fundamental differences between the FEHA and the National Labor Relations Act (NLRA), which was at issue in *Hoffman*. The Court pointed out that in contrast to the NLRA, which the NLRB can enforce through remedial orders and its contempt power, the FEHA relies on private actions to enforce the fundamental public policy against employment discrimination.

The Court also considered whether the doctrines of after-acquired evidence and unclean hands provided the employer with a complete defense to the plaintiff's FEHA claim. The Court concluded that neither doctrine acts as a complete defense, but can limit the plaintiff's recovery. In particular, said the Court, not allowing unauthorized workers to obtain state remedies for unlawful discharge would effectively allow employers to discriminate against undocumented workers with impunity. The Court charged lower courts with determining appropriate remedies on a case-by-case basis, but cautioned that remedies such as front pay or reinstatement are not appropriate because an employer would be justified in firing an employee upon learning the employee lacks authorization to work.

Given the possible conflict with the U.S. Supreme Court's *Hoffman* decision, it remains to be seen whether the California Supreme Court's new decision will be the last word on whether FEHA claims are preempted by IRCA. In the meantime, the new ruling serves as a reminder to employers that there are no exceptions from the duty to ensure they maintain a workplace free from discrimination and retaliation.

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