Employer may not use evidence of conviction to dismiss discrimination claim

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In 2014, the California Supreme Court, in Salas v. Sierra Chemical Co., answered the long-disputed question of whether an employer may use evidence discovered after an allegedly wrongful decision was made to refute and ultimately dismiss an employee’s discrimination claim arising under California’s Fair Employment and Housing Act (FEHA).

Before the Salas decision, it was common for employers defending a discrimination claim to delve into the employee’s past to unearth facts that would justify or excuse a decision. This was known as the “after-acquired evidence” doctrine. In these cases, the employer would use the evidence acquired after the allegedly wrongful termination of employment or refusal to hire—often during the subsequent litigation—to argue that the new facts would have justified a lawful termination or refusal to hire had it been made aware of the facts. However, the Salas decision made clear that employers may not use such evidence as an absolute bar to a worker’s FEHA claims.

Recently, applying Salas, the California Court of Appeal issued a decision holding that an employer may not use after-acquired evidence of an employee’s past narcotics conviction to bar his failure-to-hire claim based on race under the FEHA.

Union member files discrimination suit

Raymond Horne is an African-American union member who served as an executive board member and officer of Glaziers Local No. 718 and served as a member of District Council 16, a labor organization made up of 16 local unions of drywall finishers, glaziers, painters, and floor coverers. In 2009 and again in February 2010, he applied for a union organizer position with the council but was rejected. In both instances, the position went to a Caucasian male. Horne sued the council for race discrimination, alleging that its refusal to hire him for the organizer position was racially motivated.

During the discovery phase of the litigation (when evidence is exchanged between the parties), Horne admitted that he had been convicted of possession of narcotics in 1997 (over 12 years before he had originally applied for the organizer position). He served six years in
prison and was ultimately paroled in 2003. The council, however, wasn’t aware of his conviction or parole status at the time it refused to hire him as an organizer in 2009 and 2010.

Once the council learned of Horne’s past conviction, it sought to dismiss his lawsuit on the grounds that federal law prohibits any person with a narcotics conviction from serving as a labor organizer. That makes sense—Horne wasn’t qualified under federal law to serve as a labor organizer, so he can’t now claim the union discriminated against him when it refused to hire him, regardless of the underlying reason.

Had the council known about the conviction, it would have disregarded Horne’s application, and he would have no viable claim against it because he couldn’t show he was qualified for the job. But the key to this dispute and the after-acquired evidence doctrine is the fact that the council wasn’t aware of the past conviction at the time it refused to hire him.

Initially, the trial court and the court of appeal agreed with the council that Horne wasn’t qualified for the organizer position no matter when the council acquired that information. Following the dismissal of Horne’s claims, the supreme court issued its opinion in Salas, holding that “the doctrines of after-acquired evidence and unclean hands are not complete defenses to a worker’s claims under California’s FEHA, although they do affect the availability of remedies.” In light of this holding, the court of appeal was asked to reconsider the dismissal of Horne’s claim.

After-acquired evidence not complete bar to FEHA claims

The dismissal of Horne’s case was based on the single argument that he was disqualified under federal law from the union organizer position because of his 1997 narcotics conviction. The parties didn’t dispute that the council was unaware of the conviction in 2010 when it decided not to hire him as an organizer. Did that still mean the council could rely on the past conviction as an excuse for not hiring him? Under Salas, the answer is no.

In cases in which the employer discovers evidence after the fact, “the employer’s alleged wrongful act in violation of the FEHA’s strong public policy precedes the employer’s discovery of information that would have justified the employer’s decision.” To hold otherwise would “eviscerate the public policies embodied in the FEHA by allowing an employer to engage in invidious employment discrimination with total impunity.”

While employers may not be able to use after-acquired evidence as a complete bar to FEHA claims, this evidence still affects the appropriate remedies an employee may seek: “The remedial relief generally should compensate the employee for loss of employment from the date on which the employer acquired information of the employee’s wrongdoing or ineligibility for employment.” Raymond E. Horne v. District Council 16 International Union of Painters and Allied Trades (California Court of Appeal, 1st Appellate District, 2/18/15).

Bottom line

The after-acquired evidence doctrine was a valuable tool for employers defending against a worker’s FEHA claims. It may not be a complete defense anymore, but it is still useful to limit the monetary damages employees may recover in the event they can prove discrimination at trial.

Of course, the best way to avoid an after-acquired evidence problem is to ensure that all employment decisions are based on legitimate nondiscriminatory reasons supported by evidence that would quickly and efficiently refute any discrimination claims. In addition, before making any hiring or other decisions, you should try to discover all relevant background facts regarding a prospective employee as early as possible. While that is proving to be more difficult in light of recent ordinances and laws that limit the use of criminal background checks, you should take every legal step permissible to discover information about employees or prospective hires that may affect any employment decision. And make sure your hiring processes and procedures are both effective and legal in light of these new laws.

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