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In the Supreme Court of the State of California

JANIS S. MCLEAN,

Plaintiff and Appellant,

v.

STATE OF CALIFORNIA, ET AL.,

Defendants and Respondents.

Case No. ________________

SUPREME COURT
FILED

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Court of Appeal, Third Appellate District, Case No. C074515
Superior Court of California, County of Sacramento,
Case No. 34-2012-00119161-CU-OE-GDS
Honorable Raymond M. Cadei

PETITION FOR REVIEW

KAMALA D. HARRIS
Attorney General of California
ALICIA FOWLER
Senior Assistant Attorney General
FIEL D. TIGNO
Supervising Deputy Attorney General

WILLIAM T. DARDEN
State Bar No. 155079
Deputy Attorney General
1515 Clay Street, 20th Floor,
P.O. Box 70550
Oakland, CA 94612-0550
Telephone: (510) 622-2196
Fax: (510) 622-2270
Attorneys for Petitioner State of California

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1515 Clay Street, 20th Floor,
P.O. Box 70550
Oakland, CA 94612-0550
Telephone: (510) 622-2196
Fax: (510) 622-2270
Attorneys for Petitioner State of California

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ISSUES PRESENTED

1. Whether, in a putative class action to recover penalties against an "employer" under Section 203 of the Labor Code, a former state employee may sue the "State of California" instead of the specific agency for which the employee previously worked.

2. Whether Sections 202 and 203 of the Labor Code, which provide a right of action for employees who "quit" their employment, authorize suit by an employee who retires from her job.

PETITION FOR REVIEW

Respondent State of California, et al.,[1] respectfully petitions this Court for review of the published decision of the Third District Court of Appeal in *Janis McLean v. State of California, et al.* (C074515) (*McLean v. State of California*), filed on August 19, 2014. A copy of the slip opinion is attached. (Cal. Rules of Court, Rule 8.504(b).)[2]

SUMMARY OF THE FACTS AND OF THE COURT OF APPEAL'S DECISION

In the operative First Amended Complaint ("FAC") Plaintiff Janis McLean ("McLean") alleged a single cause of action for penalties under California Labor Code Section 203, based on claimed violations of Labor Code section 202. (AA000006-09.) Labor Code section 203 permits an employee who is "discharged" or who "quits" to recover penalties in the event his or her "employer" willfully fails to pay wages owed at the time of

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[1] The opinion of the Court of Appeal affirmed the trial court's judgment of dismissal on behalf of the State Controller.

[2] No Petition for Rehearing was filed with respect to the Court of Appeal's opinion. (Cal. Rules of Court, Rule 8.504(b)(3).)

discharge or quitting, if that failure to pay violates specified provisions of the Labor Code, including Labor Code section 202. (Labor Code § 203.)[3]

McLean alleged that her final paycheck was paid outside of the time frame required by section 202(a). (AA000003.) With respect to deposits of certain amounts of money from her accrued but unpaid leave and vacation time that she asked to have transferred into her supplemental retirement plan in accordance with the provisions of section 202(b) and (c), she alleged that those transfers were made into her retirement accounts outside of the time frames specified by those sections. (*Ibid.*) For the year 2010, she claimed, the deposit into her account was not made within 45 days of her last day of employment, and, for the year 2011, the deposit was not made by February 1, 2011. (*Ibid.*) Because McLean had been made whole prior to the initiation of her suit, no damages were sought; instead McLean's suit sought only penalties under section 203, and attorneys' fees and costs. (AA 000001-09; Opn., at 2-3.)

McLean did not allege that she "quit" or was "discharged." Instead, she alleged that she "separated" from service with the Attorney General's Office on November 16, 2010, the same day she "retired." (AA000003) In fact, McLean's pleading itself alleged that those who "quit" and those who "retired" were separate categories: Her proposed class definition encompassed employees who "resigned *or* retired." (AA00004, italics added.)

Although McLean worked for DOJ, she did not sue DOJ. Instead, she sued only the State Controller and "the State of California."

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3 Statutory references are to the Labor Code unless otherwise specified.

(AA000002.) Her suit alleged that "defendants" failed to make payments to her and the Plaintiff Class of state employees. It alleged that "Plaintiff and the Class may bring suit against the State, including its department and agencies" for alleged violations of section 202 and for relief under section 203. (AA000007.)

Defendants demurred on several grounds (AA000011-66), three of which are most relevant to this Petition. First, Defendants contended that section 203, which permits penalty wages to be awarded only to an employee who is "discharged" or who "quits," does not apply to the separate category of employees who "retire." (AA000024-26.) Based upon a detailed analysis of the statutory scheme, case law, and statutory law, Defendants contended that a "retirement" was understood by the Legislature to be different from a "quit" and that a "retiree," for reasons consistent with the rationale behind the prompt-payment laws, was not entitled to statutory penalties. (*Id.*) The trial court agreed. (AA000109-112.) After McLean disavowed any intent to amend her complaint, the trial court sustained the demurrer, at her request, without leave to amend. (AA000111; 116-117.)

The Court of Appeal reversed. The opinion expressly recognized that, in the context of state civil service, a "retirement" is understood to be different from a "quit." (Opn., at 12 ["[i]t appears that the Legislature specified "quits, retires, or disability retires" in section 202(c) because that subdivision, unlike section 202(a) or section 203, applies only to state employees by its express terms, and in that context, the terms have different meanings."]) Although the court acknowledged that the Legislature never added those who "retire" to the protections of section 203, it held that McLean, who did not allege that she "quit" from state service, should

nevertheless be considered to be a person who "quit" for purposes of section 203, because she "quit to retire." (Opn. at p. 2, 8-14).

Second, Defendants argued that McLean, by suing the State of California and the State Controller's Office, sued the wrong defendants and improperly attempted to expand the scope of her class action beyond the DOJ, which was her "employer" for purposes of section 203. (AA000031-36.) As to the argument that the "State of California" employed McLean, Defendants cited extensively to state law making clear that appointments to state civil service are made by each appointing authority – in other words, by each separate entity that appoints employees to the state civil service and directly employs them. (*Ibid.*) Importantly, Defendants also argued that, in the context of a section 203 action, the responsibility for making the final wage payments (giving rise to the penalty claim at issue in McLean's suit) lies directly with each employee's appointing authority, here the DOJ. (AA000032-33; AA000042-43; AA000064.) Therefore, only DOJ would properly be subject to suit as McLean's "employer" for purposes of section 203. (AA000031-36.) The Court of Appeal rejected this argument with little analysis. It reasoned that, since McLean was a state civil service employee, and since the relevant statutes referred to "the state employer," McLean's section 203 employer was "clearly" the "State of California." (Opn. at p. 12-13.)

Defendants also argued that the State Controller did not employ McLean, and thus was not properly a defendant to McLean's section 203 claim. (AA000031-34.) The Court of Appeal found that the FAC did allege "wrongful conduct" by the Controller's office for purposes of section 203. Nevertheless, it found that dismissal of the State Controller was proper. (Opn. at p. 15.) The court reasoned that it was simply not

necessary to name the Controller's office as a party defendant, since an "action against state agencies in their capacity as such is, in effect, a suit against the state" and that it was therefore sufficient to name "only the state as a party defendant." (*Id.*)

Finally, Defendants challenged McLean's class allegations, arguing that she could not represent a class of employees who quit, because she had not quit. Defendants also argued that, since McLean's appointing power and employer was DOJ, she could only represent employees of DOJ, and could not represent any other employee employed by any separate appointing power.[4] The Court of Appeal "easily disposed" of these contentions by repeating its conclusion that "quit" includes those who quit "whether to retire or for other reasons" and that those who quit and those who retire "constitute a single group under the statutory scheme." (Opn. at p. 16.) The opinion concluded: "We have also explained that McLean's employer is the State of California. We do not opine on the issue of class certification or reach any other issue regarding McLean's class allegations." (Opn. at p. 16.)

LEGAL DISCUSSION

McLean sued under Labor Code section 203, which is part of a series of sections, beginning at section 200, dealing with payment of wages when an employee is discharged or quits his or her employment. (*See* Lab. Code,

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[4] The opinion of the Court of Appeal stated that Defendants did not raise this argument below, but that it would consider the "new" theory on appeal. (Opn. at p. 15.) Defendants, however, did make these contentions below. (AA000035-26.)

Division 2, Part 1, Chapter 1: Payment of Wages).[5] As relevant here, section 202 governs the immediate payment of wages when a non-contract employee "quits" his or her employment, requiring payment within 72 hours, or, if at least 72 hours prior notice was given, upon quitting. (Lab. Code § 202(a).) Section 203 provides that if "an employer" willfully fails to pay, in accordance with, *inter alia*, section 202, any wages of an employee who is discharged or who quits, the employer is liable to pay a penalty of continued wages for up to 30 days until paid. (Lab. Code § 203.) The Court of Appeal held that the "employer" of a civil service employee for purposes of section 203 is the "State of California."

However, in the context of Labor Code wage and hour penalty claims, the employee's employment relationship is not with the "State of California," but is instead with the employee's specific agency employer. It is the specific agency that, in order to further its statutory mandate, appoints employees into the civil service, supervises them, and controls the terms and conditions of their employment. Instead of requiring Plaintiff to sue her own employer, the Court of Appeal permitted her to sue the "State of California," potentially expanding McLean's suit to include, as she requested, all employees of all state agencies in all branches of government. This decision is inconsistent with the structure of California's government, and will create serious practical and logistical concerns for courts and every government employer in the state. Review should be granted, under Rule 8.500(b), to settle this important question of law.

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[5] Section 201 provides, with certain exceptions, that if an employer "discharges" an employee, earned and unpaid wages are generally due and payable immediately. (Lab. Code § 201(a).)

I. THE COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER THE "STATE OF CALIFORNIA" IS A PROPER DEFENDANT IN A SECTION 203 ACTION FOR PENALTIES

While this Court has addressed the question of the definition of an "employer" for purposes of the minimum wage laws as applied to employers in the private sector (*Martinez v. Combs* (2010) 49 Cal.4th 35), it has not considered the definition of an "employer" for purposes of prompt-payment wage claims against state agencies that appoint individuals into the state civil service in order to further those agencies' statutory mandate.[6] The Court of Appeal concluded that the "State of California" was itself the employer, instead of the entity that actually employed the Plaintiff. Accordingly, nothing in the Court's opinion would prevent an employee of a single state agency with an asserted Labor Code claim from suing the State as a whole, seeking to pursue certification of a class of all employees in all state agencies across all branches of government, and engaging in broad discovery and extended motion practice to support her class assertions, as Plaintiff in this case is attempting to do. As discussed below, the decision is inconsistent with the statutory scheme and the structure of state government. It will also create practical and logistical problems that will place significant and unwarranted burdens on the state and require extra case management efforts by trial courts from the beginning of any such litigation until its conclusion.

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[6] In *Martinez*, this Court held that the applicable Wage Orders will generally define the employment relationship, and thus who is liable as an employer, for purposes of the unpaid minimum wage statute, Labor Code section 1194. (*Martinez v. Combs, supra,* 49 Cal 4th 35, at 52.) However, the State of California is largely exempt from the Wage Orders. (See, e.g., IWC wage order 4-2001, Cal. Code. Regs., tit. 8, § 11040 1.(B).)

Section 203 provides that if "an employer" willfully fails to pay, in accordance with, *inter alia*, section 202, any wages of an employee who is discharged or who quits, the employer is liable to pay a penalty of continued wages for up to 30 days until paid. (Lab. Code, § 203.) In the context of state civil service, the "employer" of any civil service employee is that employee's appointing power, not the State as a unitary body. The non-unitary structural foundation for California's government is set forth in the Constitution and statutes of California. The Constitution establishes the three branches of government and the state civil service. (Cal. Const., art. IV-VII.)

As the Third District Court of Appeal itself has recognized, the work of the state is conducted by its agencies, and it is those agencies that employ the civil servants they appoint:

> In view of the size and complexity of state government, it has long been necessary that the business of the state be entrusted to departments, boards, commissions and agents. (*Ray v. Parker* (1940) 15 Cal.2d 275, 291 [101 P.2d 665].) The Legislature has declared: "It is the policy of this State to vest in the Governor the civil administration of the laws of the State and for the purpose of aiding the Governor in the execution and administration of the laws to divide the executive and administrative work into departments as provided by law." (§ 11150.) So far as consistent with law, and subject to the approval of the Governor, the head of each department has authority over the operations of the department including the power to appoint officers and employees, prescribe their duties, and fix their compensation. (§§ 11152, 11154.)

(*Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, 1337.)

State agencies are separate and distinct governmental entities, established under a variety of state laws and constitutional provisions. Each such appointing authority has its own unique mission and sphere of

responsibility. (See generally, Gov. Code, Division 3; §§ 11000-11201.)[7] In order to fulfill that mission, each entity appoints employees into the civil service. By statute, state employees are hired, supervised, and fired by their appointing authority - the agency for which they work. (See Gov. Code § 19050 [appointing power fills positions in the civil service]; § 19574 [appointing power responsible for taking adverse action against its employees].) More importantly, with respect to the specific obligation in this case – the responsibility to make final wage payments in accordance with sections 201 and 202 – that responsibility is placed upon the employing department, and not the State Controller or the "State of California." (*See* AA000064, State Administrative Manual, § 8580.4 [Request for Judicial Notice, Exh. B] ["Departments are responsible to ensure that payments to separating employees are in accordance with Labor Code Sections 201 and 202."].) McLean's appointing authority – the Department of Justice – had the responsibility to ensure that any payments under section 202 were timely made to her.[8] For all of these reasons, the Department of Justice was McLean's employer for purposes of section 203.

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[7] (See also *Greyhound Lines v. Department of the California Highway Patrol* (2013) 213 Cal.App.4th 1129, 1134-35; see also *People ex rel Lockyer v. Superior Court* (2004) 122 Cal.App.4th 1060, 1077-79 [agencies of the state each have a separate existence, independent responsibilities, duties, and powers, and often have conflicting interests and thus, in an action involving only the Attorney General and Department of Consumer Affairs, the People had no obligation to produce documents from other agencies].)

[8] This is true even if the controller had the duty to authorize the payment out of DOJ's budget allocation. (*See Tirapelle v. Davis, supra*, 20 Cal. App. 4th 1317, 1327-30 [discussing duties and responsibilities of the Controller regarding payment of wages and other claims]; *Futrell v. Payday California* (2010) 190 Cal.App.4th 1419, 1430-35 [payroll company not an "employer" for purposes of wage statutes under any test].) The State

(continued...)

The Court of Appeal's contrary conclusion (Opn. at p. 14) is in error. The statute's use of the term "state employer" in section 202(c) (Opn. at p. 15) does not undermine the conclusion that the employer is the appointing authority. In this context, the word "state" serves as an adjective. As this Court has recognized, the "state employer" of a state employee *is* the appointing power. (*Prof. Engineers in Cal. Gov. v. Schwarzenegger* (2010) 50 Cal.4th 989, 1034, and fn. 28 [Government Code section 19997, which permits an "appointing power" to lay off employees, is a statutory provision enacted by the "Legislature . . . . . that explicitly authorizes a *state employer*" to lay off state employees].)

In fact, the Third District Court of Appeal has itself recognized that the business of the state is "entrusted to departments, boards, commissions and agents" (*Tirapelle v. Davis, supra,* 20 Cal.App.4th 1317, 1337) and that it is the "appointing power" that establishes positions in the state service, as authorized by law and subject to the budget, establishes qualifications for those positions, holds examinations to fill them, and has discretion to select the appropriate candidates for appointment to the state civil service based on the rule of three, without interference from any civil service board. (*Prof. Engineers in Cal. Gov. v. State Personnel Bd.* (2001) 90 Cal.App.4th 678, 689-697.) Moreover, the very statutory scheme at issue in this case

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(...continued)
Controller installs and maintain a decentralized uniform state payroll system, but the responsibility for payroll entry into the system, and certification of the payroll, is with the appointing power. (Gov. Code §§ 12470-12477.) The Controller issues pay warrants, from the funds of each employer, in reliance upon the certification of employee pay information made by the appointing power. The Controller then authorizes payment of such warrants from the fund out of which the warrant is payable. (Id.; Gov. Code § 17000).)

demonstrates the Legislature's understanding that any given "state employee" is employed by his or her "appointing power." Section 202(c) itself specifically provides that when a "state employee" quits, retires, or disability retires, he must submit the written election to defer to "his or her appointing power," which authorizes the state employer to defer payment. (Labor Code § 202(c).)

The Court of Appeal should not have relied upon its decision in *Columbo v. State of California* (1991) 3 Cal. App. 4th 594, 598-99 in concluding that the "State of California" is the employer of civil service employees for purposes of section 203. *Colombo* involved a CHP officer who filed a workers' compensation claim for an on-duty injury against the CHP but then filed a separate lawsuit against CalTrans for creating the dangerous condition that led to his injury. In order to prevent double recovery in this personal injury action, the Court of Appeal concluded that the CHP officer was not employed by the CHP, but was rather, employed by the "State." (*Columbo, supra,* 3 Cal. App. 4th 594, 598-99.) In a Labor Code prompt payment case, however, there is no risk of double recovery if the plaintiff is allowed to pursue a claim only against his or her appointing entity. Moreover, each state entity has its own independent obligation to make final wage payments to its particular departing employees, and each will have its own individual factual defenses to any assertion of a willful failure to pay the final wage to any given employee based on individual circumstances.

The Court of Appeal's treatment of the State Controller's Office demonstrates the inconsistencies in finding that suit against the "State" is appropriate in a section 203 case. Citing *Bacich v. Board of Control* (1943) 23 Cal.2d 343, 346, the Court of Appeal affirmed the dismissal of the

Controller's Office as a defendant on the grounds that an action against a state entity is in effect a suit against the state and that it was "not necessary" to name the State Controller's Office as a defendant, because it was "sufficient" to name only the State of California. (Opn. at p. 15.) However, this case is unlike *Bacich*, a takings case, in which Plaintiff *named* the state entities responsible for the taking.[9] In contrast, in the FAC, McLean did not identify any other agency's conduct as the basis for her suit, nor did she specifically identify any other department or agency whose employees she is purporting to represent. It is one thing to hold, as the *Bacich* court held, that suit against identified state agencies are, in effect, suit against the "State" insofar as those state agencies may be exercising state power. It is quite another thing to hold that suit against the "State" is sufficient as a proxy for suit against each and every state entity that exercises any state power throughout all of state government.

Moreover, the Court of Appeal held that wrongful conduct had been pled, in McLean's section 203 suit, as against the Controller (Opn. at p. 15), even though McLean did not allege – and could not allege – that the Controller employed her. (AA000002.) Thus, the opinion affirmed the dismissal of the Controller while apparently holding, at the same time, that

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[9] The *Bacich* court held that suit against the State in lieu of those identified agencies was proper, but nevertheless affirmed the demurrer of the Board of Control, which had nothing to do with the construction that diminished the value of Plaintiff's property. Since McLean's naming of the controller is akin to the naming of the Board of Control in *Bacich*, and since McLean named no other responsible entity, the Court of Appeals should have affirmed the dismissal of the entire complaint under that authority.

wrongful conduct of the Controller justified suit against the "State of California" as an "employer" under section 203. The reasoning behind this holding is unclear: While McLean mentioned her work as a Deputy Attorney General, the only identified wrongdoer McLean named in the FAC is the Controller's Office, which, however, clearly did not employ McLean and thus could not have engaged in wrongful conduct as her "employer."[10]

A construction of section 203 that equates a public plaintiff's employer with the entire State of California, moreover, would lead to absurd results. Under this view of the statute, a plaintiff with a Labor Code dispute stemming from the actions or practices of a single state agency employer could initiate potentially sweeping litigation against all state agencies in all branches of government without naming the agencies involved or serving them with process. Without such notice, agencies would face significant difficulties in assessing potential conflicts, engaging appropriate counsel, determining their defenses, and, if necessarily, marshaling evidence to counter the claims. At the same time, trial courts would face the difficult task of managing the discovery and class-certification issues that would arise when hundreds of entities—all unnamed—potentially are involved. By authorizing suit against a former employee's "employer" only, the Legislature did not intend for these results.

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[10] Even if the appointing powers may have delegated certain final payment distribution responsibilities under sections 201-203 to another entity, such as the state controller or the treasurer, that delegation does not make those entities McLean's "employer" for purposes of the Labor Code. (*Reynolds v. Bement* (2005), 36 Cal. 4th 1075, 1086-89, abrogated on other grounds by *Martinez v. Combs, supra,* 49 Cal.4th 35, 66.)

In short, review by this Court is needed to clarify, in the context of a Labor Code section 203 class action, whether only the plaintiff's appointing authority should be considered the "employer" or, alternatively, whether the employer is the "State of California," and to clarify the nature of such an action with respect to separate state entities, particularly when they are not named and no factual allegations are asserted against them.

II. REVIEW IS NEEDED TO SETTLE AN IMPORTANT QUESTION OF LAW REGARDING THE APPLICABILITY OF SECTION 203'S PENALTY PROVISIONS TO RETIREES

The Court of Appeal's decision blurs the distinction between "quit" and "retirement" and will lead to confusion in the lower courts. It also leads to significant additional liability for California employers. Review is necessary to settle this important question of law.

A. The Court of Appeal's Decision Will Lead to Confusion Regarding Distinct Forms of Separation From Service and Risks the Imposition of Significant and Unwarranted Liability on State Agencies

The opinion of the Court of Appeal adds a new class of employees (retirees) to the protections of Labor Code section 203, by finding that a employee who retires is an employee who has "quit." In coming to this conclusion, the Court of Appeal's decision departs from statutory and decisional law of this state, which had previously distinguished between a "quit" and a "retirement" as separate concepts, and instead merges those separate concepts into one. The statutory law on this point in California is clear: State civil service employment like McLean's, which is held according to statute, may be terminated in three distinct ways – by termination, resignation, or retirement. (See, e.g., Gov. Code, § 19140(a) [expressly distinguishing between separation by resignation, separation by

retirement, and separation by removal for cause (termination)]; Gov. Code, § 19996 [tenure of public employment is during good behavior, and may be terminated through resignation, retirement, or removal for cause.].) This distinction is not limited to the public sector.[11]

Until the Court of Appeal's decision in this case, case law has been in accord. For instance, in one well-reasoned decision out of the Fourth District Court of Appeal, the Court of Appeal extensively analyzed California's civil service statutory scheme and concluded that a retirement did not constitute a resignation for purposes of civil service. (*Lucas v. State of California* (1997) 58 Cal.App.4th 744, 750-51.) The Third District Court of Appeal had also previously concluded that civil service separations may be either discharges, quits, or retirements, each of which is a separate and different type of event. (*Gore v. Yolo County D.A.'s Office* (2013) 213 Cal.App.4th 1487 ["At the point in time that an employee leaves employment, he or she falls into one of three categories – a resigned employee, a terminated employee, or a retired employee"].)

The Court of Appeal's conclusion that McLean "quit" when she "retired" because she "quit to retire," blurs the line between a retirement and a quit and conflicts with the statutory and decisional law in California set forth above. In so doing, it casts uncertainty into the highly regulated and often-litigated subject of separations from civil service.

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[11] Certainly, private sector employees "quit" regularly, and, of course, private employees may also "retire." (*In re Marriage of Lehman* (1998) 18 Cal.4th 169, 175 [marital dispute over division of husband's enhanced retirement program from PG&E]; *In re Marriage of Bowen* (2001) 91 Cal.App.4th 1291, 1294 [marital dispute over Federal Express retirement].)

Moreover, the Court of Appeal decision burdens employers with a heavy penalty obligation. The decision's impact upon the public treasury alone, however, may well be substantial in light of the fact that hundreds of thousands of workers are currently employed by state appointing authorities (and are accordingly potential retirees), with double that number already on the state retirement rolls. While individuals who retire from state service are, as a matter of state policy, paid within the timeframes set forth by section 201 and 202, this decision now provides them with the ability to sue for penalty wages on top of the monies they already receive as retirement wages. The expansion of liability to the state alone resulting from the Court of Appeal's opinion in this case may unnecessarily put substantial amounts of public money at risk.

B. The Term "Quit," as Used in Section 203, Does Not Include a "Retirement"

1. The Usual and Ordinary Meaning of "Quit" is Different From the Meaning of "Retire"

Principles of statutory interpretation start with the concept that words in a statute should be given their usual and ordinary meaning. (*Com. of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 501.) Here, the usual and ordinary meaning of the word "quit" is distinct from the usual and ordinary meaning of the word "retire." An employee who "retires" would not ordinarily say that he or she "quit" his or her job, and an employee who "quits" would not ordinarily say that he or she "retired." The commonly understood meaning of these two terms demonstrate their differences, not their similarities.

A "quit" is unconditional and unilateral, and effects an immediate severance of the employment relationship, whereas a retirement, even a

voluntary one, must be applied for and accepted by the retirement administrator, and may occur only if the underlying conditions to the retirement have been met. (See, e.g., Gov. Code §§ 21060-21120). Anyone (unless bound by a written contract) can quit a job at any time and at any age, but no one can retire until having reached retirement age and satisfying specified conditions. Even then, a quit relinquishes an office and severs ties to the employer, whereas a retirement represents an entitlement to continued salary in the form of deferred income payments. A retirement and a quit are different things, and the terms should not be interpreted to mean the same thing.

2. The Legislature Itself Distinguished Between a Quit and a Retirement in the Statute

The Legislature itself expressly distinguished, in the statutory scheme under which McLean sued, between a quit and a retirement. (Lab. Code § 202(c) ["when a state employee quits, retires, or disability retires" an election to defer may be submitted to his or her appointing power].) When the Legislature uses a term in one place and excludes it in another, it should not be implied where excluded. (*Johnson v. Arvin-Edison Water Storage Dist.* (2009) 174 Cal.App. 4th 729, 737; *see also* Sutherland, Statutes and Statutory Construction, 7th Ed. (2007), § 46:6). The construction of the Court of Appeal, however, implies the term "retire," a term that the Legislature included in section 202(c), into the term "quit" in section 202(a) and 203, places where the term "retire" was excluded.

The Court of Appeal reasoned that if sections 202 and 203, by using the term quit, did not already apply to an employee who retires, "it would clearly be unnecessary for section 202(c) to discuss employees who retire."

(Opn., at 12.)[12] However, the opposite is true: If the Legislature understood the word "quit" to include a retirement, then the use of the phrase, "quits, retires or disability retires" in section 202(c) would be unnecessary, as the use of the term "quit" would suffice and would already necessarily include the concept of retirement. Construing the statutes *in pari materia*, McLean's interpretation, as adopted by the Court of Appeal, renders the term "retires" in section 202(c) into surplusage. As this Court has held: "As we have stressed in the past, interpretations that render statutory terms meaningless as surplusage are to be avoided." (*People v. Hudson* (2006) 38 Cal.4th 1002, 1010.)

Statutes should be interpreted so as to give meaning to all of their parts. In this regard, all parts of a statute should be read together and construed in a manner that gives effect to each, yet does not lead to disharmony with the others." (*City of Huntington Beach v. Bd. of Admin.* (1992) 4 Cal.4th 462, 468 ["[L]egislation must be construed as a whole while avoiding an interpretation which renders any of its language surplusage."].) Defendant's interpretation satisfies these requirements, and gives effect to all parts of the statute. As discussed below, when section 202(c) was added to section 202, it was intended to codify the past practice of permitting the tax deferral of lump sum leave cash out upon a state agency attorney or judge's separation from state service. (AA0000059.) Since the intent of AB 1684 was to codify and authorize the practice for *all* state employees, and not just those who quit or were discharged, the new

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[12] Although the Court of Appeal criticized Defendant for "not discussing" this fact in its briefing, (Opn., at 12), Defendant did discuss the issue in detail. (Responding Brief, 16-20, 27-29.)

law would have to both: 1) exempt the deferred distributions from the "discharge" and "quit" requirements in section 201 and 202, and 2) ensure that the new provision was understood to authorize the deferral for all types of service separations, including retirements. In other words, it is because a retirement was understood to be different from a "quit" and a "discharge" that the Legislature needed to add the retirement terminology and scenarios within subsections (b) and (c), so that it was clear that the past practice was now again authorized not just for those who were discharged and who quit, but for all state employees who separated by discharge, quit, *or* retirement.

Other statutes in this same statutory scheme make clear that the Legislature knows how to add, define, and choose classes of employees to whom it will permit prompt payment penalties, and, in fact, has defined other groups of employees to whom the prompt-payment obligations apply more broadly where it chooses to do so. (See, e.g., Lab. Code § 201.5(d) [setting deadline for final payment to broadcast and production employees who are "terminated," and specifically defining termination to include "any end[ing]" of the employment relationship "whether by discharge, layoff, resignation, completion of employment for a specified term, or otherwise."].) Clearly, if the Legislature intended section 203 penalties to encompass all employee "separations," whether by "discharge, resignation, or retirement," it could easily have said so. It did not.

3. The Legislature Knew That a Quit Was Different From a Retirement at the Time it Amended the Statutory Scheme Under Which McLean Sued, and Did Not Add Retirees to the Penalty and Prompt Payment Provisions

The Legislature made certain of the prompt-payment provisions (including section 202 and 203) first applicable to state employers and

employees by the enactment of Assembly Bill 2410 in the year 2000.[13] (*See* Labor Code § 220(a)) (exempting state employees from certain Labor Code sections, but not from section 201, 202 or 203.) When the Legislature extended the requirements of sections 201 and 202 to the State in the year 2000, it had the unintended consequence of making unlawful a past practice in which state employees who quit or were discharged were allowed to defer payment of accrued leave balances into a supplemental retirement plan.[14] This required corrective legislation (Stats.2002, c.40 (AB 1684) § 6-7, eff. May 16, 2002), which added subsections (b) and (c) to sections 201 and 202, in order to codify the past practice of supplemental deferrals and make them lawful notwithstanding section 201 and 202.[15] Since the past practice permitted *any* separating employee to defer, and not just those who quit or were discharged, the legislation, in codifying the past practice,

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[13] Assembly Bill (AB) 2410 amended section 220, which had previously *excluded* State employees from the protections of sections 200 to 211, and 215 through 219. (Stats. 2000, c. 885 [AB 2410].)

[14] Faced with an immediate payment obligation to employees who were discharged or who quit under sections 201 and 202, state agencies could no longer process and tender accrued leave balances to supplemental plans without running afoul of the prompt payment obligations, and employees who were discharged or who quit were thus forced to take all accrued leave in a lump-sum final payment, often incurring a heavy tax liability.

[15] Subsection (b) provides that state agency employers are deemed to have made immediate payment of wages if the employee elects, prior to his or her discharge or quit, to contribute unpaid leave into his or her supplemental retirement plans in the current calendar year, in which case the contribution is to be tendered no later than 45 days following the final day of employment. Subsection (c) similarly permits a discharged or quitting state agency employee to defer payment of the same types of leave into his or her supplemental plan in the next calendar year, in which case the payments shall be tendered no later than February 1.

made clear that the deferral could be made by any employee who "quits, retires, or disability retires." (Lab. Code § 202(c).)

At the time of these amendments to this statutory scheme in the year 2000 and 2002, the Legislature was certainly aware of the existing body of statutory and decisional law discussed above regarding the distinct nature of retirements, quits, and discharges in the civil service and in the private sector. Nevertheless, when it amended the prompt-payment statutory scheme in the years 2000 and 2002, it did not amend section 202(a) and 203 to add those who "retire" to the prompt-payment and penalty obligations, which continued to apply to only those who "quit" or were "discharged." This can only be interpreted to mean that the Legislature intended for sections 202(a) and 203 to apply only to quits and discharges, and not to retirements. [16] (See, e.g., *People v. Scott* (2014) 58 Cal.4th 1415, 1424 ["It is a settled principle of statutory construction that the Legislature is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof. Courts may assume, under such circumstances, that the Legislature intended to maintain a consistent body of rules and to adopt the meaning of statutory terms already construed."].)

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[16] To be sure, the amendment would have been clearer if subsections (b) and (c) had instead been added to the Labor Code by separate provision. But the language in section 202 (b) and (c) does not state that these subsections modify only the "quit" circumstances in (a). Rather, they apply "[n]otwithstanding any other provision of law[.]"

4. Defendant's Interpretation of the Statute is Not Inconsistent With the Legislative Purpose Behind the Prompt Payment Laws

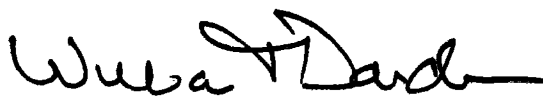
Importantly, this expansion of the statute by the Court of Appeal burdens employers in California with additional "penalty" wage liability, but without any compelling reason: Retirees who leave their workplace in due course after processing their retirement paperwork have already secured a stream of continuing income at the time they retire. Thus, the logic behind the enactment of the penalty provisions – to ensure that a laborer who is discharged or who quits is not made penurious by an employer's failure to make a timely final payment of wages – does not apply in the case of retirees. (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 82 [purpose of the prompt payment legislation is to ensure that a wage earner does not become a "charge upon the public" or suffer "deprivation of the necessities of life"].) While this rationale certainly applies in the event of a "discharge" or a "quit," which by definition are often unplanned or sudden, it is not the case with retirees, who have retired with their financial interests already secured. Thus, the Legislature may reasonably have determined that the extraordinary remedy of waiting time penalty wages should be imposed in the cases of discharges and quits (to avoid them from becoming public charges due to non-payment) but not in the case of retirees, who have already secured continuing wages in the form of retirement pay. The Court should grant review to settle these important issues.

CONCLUSION

The Petition for Review should be granted.

Dated: September 27, 2014

Respectfully submitted,
KAMALA D. HARRIS
Attorney General of California
ALICIA FOWLER
Senior Assistant Attorney General
FIEL D. TIGNO
Supervising Deputy Attorney General



WILLIAM T. DARDEN
Deputy Attorney General
Attorneys for Petitioner State of California

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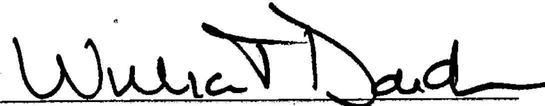
CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 5591 words.

Dated: September 25, 2014

KAMALA D. HARRIS
Attorney General of California



WILLIAM T. DARDEN
Deputy Attorney General
Attorneys for Petitioner State of California

CERTIFIED FOR PUBLICATION

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

FILED

AUG 19 2014

Court of Appeal, Third Appellate District
Deena C. Fawcett, Clerk
BY ________________ Deputy

JANIS S. McLEAN, Plaintiff and Appellant, v. STATE OF CALIFORNIA et al., Defendants and Respondents.	C074515 (Super. Ct. No. 34-2012-00119161-CU-OE-GDS)

APPEAL from a judgment of the Superior Court of Sacramento County, Raymond M. Cadei, Judge. Affirmed in part and reversed in part.

Kershaw, Cutter & Ratinoff, William A. Kershaw, Lyle W. Cook, and Stuart C. Talley for Plaintiff and Appellant.

The Law Offices of Brooks Ellison and Patrick J. Whalen for California Attorneys, Administrative Law Judges and Hearing Officers in State Employment as Amicus Curiae for Plaintiffs and Appellants.

Kamala D. Harris, Attorney General, Fiel D. Tigno, Supervising Deputy Attorney General, and William T. Darden, Deputy Attorney General, for Defendants and Appellants.

Plaintiff Janis McLean, a retired deputy attorney general, appeals from a judgment of dismissal after the trial court sustained the demurrer of defendants the State of California and the California State Controller's Office to her class action seeking waiting time penalties under Labor Code section 203[1] for the failure to comply with the prompt payment requirements of section 202. She contends the trial court erred in ruling that the term "quits" in sections 202 and 203 does not apply to employees who quit to retire.

As we will explain, in the context of sections 202 and 203, we agree with McLean that requirements applying to employees who quit also apply to employees who quit to retire. We therefore reverse the judgment as to the State of California. However, because we hold that it was unnecessary to name the California State Controller's Office as a defendant, we affirm the judgment of dismissal as to the controller's office.

BACKGROUND

The Complaint

The operative pleading is the first amended complaint (FAC). It alleges that McLean worked for the State of California until she retired from the Attorney General's office on November 16, 2010. She separated from service the same day she retired. She did not receive her final wages on her last day of employment or within 72 hours of that date. The correct amount of her wages for unused leave and vacation time were not transferred into her supplemental retirement plan within 45 days of the last day of her employment, as she requested. She did not receive wages that she had elected to defer to 2011 by February 1, 2011.

The FAC alleged, on information and belief, that defendants failed to make prompt payments required by section 202 to the Plaintiff Class. The Plaintiff Class was defined as all employees employed by the state who resigned or retired from their

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[1] Further undesignated statutory references are to the Labor Code.

employment November 2010 through March 2011, who did not receive prompt payment of wages as required by section 202.[2]

The FAC alleged that on June 14, 2011, McLean filed a claim with the California Victim Compensation and Government Claims Board on behalf of herself and the Plaintiff Class. The Board rejected the claim.

The FAC contained one cause of action titled "For Violations of California Labor Code Section 202 and Relief under California Labor Code Section 203." It alleged that section 202 required defendants to do the following for employees who resigned or retired: (1) pay final wages within 72 hours, or immediately at the time of resignation if given 72 hours notice of the employee's intent to resign; (2) transfer wages for unused leave and vacation time to a state sponsored supplemental retirement plan within 45 days of the employee's last day of employment, if the employee so requested; and (3) transfer any wages that the employee elects to defer to the following calendar year by February 1 of that next year. The FAC alleged defendant did not promptly pay McLean her full wages when she retired and that defendants did not timely pay final wages to the Plaintiff Class.

The FAC sought penalties, costs of suit and expenses, and reasonable attorney fees.

Defendants' Demurrer

Defendants demurred on the ground that the FAC failed to state facts sufficient to constitute a cause of action. Specifically, defendants contended that since McLean *retired*, rather than "quit," which is the relevant descriptive word actually used in the statute, there was no basis for her claim for penalties under section 203 and she had not stated a claim for a violation of section 202. Defendants argued that section 202 applied

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[2] We detail section 202 *post* in part III.

only to an employee who quits, and, by retiring, McLean did not quit. Further, defendants claimed that neither the State of California nor the California State Controller's Office was McLean's employer; rather, she was employed by the Department of Justice. Defendants moved to strike considerable portions of the FAC.

Defendants requested judicial notice of two documents: (1) the legislative history of Assembly Bill No. 1684, which approved a memorandum of understanding between the state and State Bargaining Unit 2, the Association of California State Attorneys and Administrative Law Judges, and amended section 202; and (2) provisions of the State Administrative Manual regarding payrolls upon employee separations.

McLean requested judicial notice of the Legislative Counsel's Digest of Assembly Bill No. 2410, which amended section 220 to make sections 202 and 203 applicable to the state. She also requested judicial notice of a different provision of the State Administrative Manual concerning the controller's payroll functions.

Ruling and Judgment

At the hearing on the demurrer, McLean indicated that if the trial court were to affirm its tentative ruling sustaining the demurrer, she would prefer that the demurrer be sustained without leave to amend, so she could immediately seek appellate review.

The trial court granted the requests for judicial notice. It sustained the demurrer without leave to amend, finding that section 203 does not authorize penalties for employees who have retired. The motion to strike was dropped as moot.

The court entered judgment in favor of defendants. McLean appealed.

DISCUSSION

I

Standard of Review

"Because the function of a demurrer is to test the sufficiency of a pleading as a matter of law, we apply the de novo standard of review in an appeal following the sustaining of a demurrer without leave to amend. [Citation.] We assume the truth of the

allegations in the complaint, but do not assume the truth of contentions, deductions, or conclusions of law. [Citation.] It is error for the trial court to sustain a demurrer if the plaintiff has stated a cause of action under any possible legal theory, and it is an abuse of discretion for the court to sustain a demurrer without leave to amend if the plaintiff has shown there is a reasonable possibility a defect can be cured by amendment. [Citation.]" (*California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 247.) We will affirm the trial court's decision to sustain the demurrer if it was correct on any theory. (*Stonehouse Homes LLC v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 539.)

"When considering an appeal from a judgment entered after the trial court sustained a demurrer without leave to amend, we 'accept as true all well-pleaded facts in the complaint and give a reasonable construction to the complaint as a whole.' [Citations.] In addition, we may consider matters that are properly the subject of judicial notice, and were considered by the trial court. [Citation.]" (*La Serena Properties, LLC v. Weisbach* (2010) 186 Cal.App.4th 893, 897.)

II

Statutory Interpretation

Resolution of this case requires interpretation of various provisions of the Labor Code. Our fundamental task in construing a statute is to ascertain the Legislature's intent so as to effectuate the purpose of the law. (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715.) The first step in the interpretative process is to examine the words of the statute, because "statutory language is generally the most reliable indicator of legislative intent." (*Ibid.*) We give the words of a statute their ordinary and usual meaning and construe them in the context of the statute as a whole. (*Ibid.*) "Courts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage. [Citation.]" (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22.)

"Ordinarily, if the statutory language is clear and unambiguous, there is no need for judicial construction. [Citation.] Nonetheless, a court may determine whether the literal meaning of a statute comports with its purpose. [Citation.] We need not follow the plain meaning of a statute when to do so would 'frustrate[] the manifest purposes of the legislation as a whole or [lead] to absurd results.' [Citations.]" (*California School Employees Assn. v. Governing Board* (1994) 8 Cal.4th 333, 340.)

When the plain meaning of the statutory language is insufficient to resolve the question of interpretation, we proceed to the second step of statutory construction. In this step, "we may consider various extrinsic aids to help us ascertain the lawmakers' intent, including legislative history, public policy, settled rules of statutory construction, and an examination of the evils to be remedied and the legislative scheme encompassing the statute in question. [Citation.]" (*McAllister v. California Coastal Com* (2008) 169 Cal.App.4th 912, 928.) "Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent. [Citations.]" (*Dyna–Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387; accord, *Mejia v. Reed* (2003) 31 Cal.4th 657, 663.) "Finally, the court may consider the impact of an interpretation on public policy, for '[w]here uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation.' [Citation.]" (*Mejia,* at p. 663.)

Labor Code provisions governing an employee's wages are liberally construed to effect their remedial purpose. (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1027.) Such laws "reflect the strong public policy favoring protection of workers' general welfare and 'society's interest in a stable job market.' [Citations.]" (*United Parcel Service Wage and Hour Cases* (2010) 190 Cal.App.4th 1001, 1009.) " '[I]n light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such

protection.' [Citations.]" (*Brinker,* at pp. 1026-1027; see also *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103 (*Murphy*) [given the Legislature's remedial purpose, "statutes governing conditions of employment are to be construed broadly in favor of protecting employees"].)

III
Prompt Payment Laws

The prompt payment of wages due an employee is a fundamental public policy of California. (*Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1147.) "Public policy has long favored the 'full and prompt payment of wages due an employee.' [Citation.] '[Wages] are not ordinary debts . . . . [Because] of the economic position of the average worker and, in particular, his dependence on wages for the necessities of life for himself and his family, it is essential to the public welfare that he receive his pay' promptly. [Citation.]" (*Pressler v. Donald L. Bren Co.* (1982) 32 Cal.3d 831, 837.)

The Labor Code contains several provisions governing the payment of wages to an employee who terminates service with his employer. Section 201 requires immediate payment of earned and unpaid wages to an employee who is discharged. There are special rules for temporary service employees (§ 201.3), employees engaged in the production or broadcasting of motion pictures (§ 201.5), employees engaged in the business of drilling oil (§ 201.7), and employees employed at venues that host live theatrical or concert events (§ 201.9).

Section 202, one of the sections at issue here, provides in relevant part as follows:

"(a) If an employee not having a written contract for a definite period *quits his or her employment*, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting.

. . .

"(b) Notwithstanding any other provision of law, the state employer shall be deemed to have made an immediate payment of wages under this section for any unused or accumulated vacation, annual leave, holiday leave, sick leave . . . or time off . . . , provided at least five workdays prior to his or her final day of employment, the employee

submits a written election to his or her appointing power authorizing the state employer to tender payment for any or all leave to be contributed on a pretax basis to the employee's account in a state-sponsored supplemental retirement plan . . . provided the plan allows those contributions. The contribution shall be tendered for payment to the employee's 401(k), 403(b), or 457 plan account no later than 45 days after the employee's last day of employment. . . .

"(c) Notwithstanding any other provision of law, when a *state employee quits, retires, or disability retires from his or her employment* with the state, the employee may, at least five workdays prior to his or her final day of employment, submit a written election to his or her appointing power authorizing the state employer to defer into the next calendar year payment of any or all of the employee's unused or accumulated vacation, annual leave, holiday leave, sick leave to which the employee is otherwise entitled due to a disability, retirement, or time off to which the employee is entitled by reason of previous overtime work where compensating time off was given by the appointing power. . . .

[¶] . . . [¶]

"Payments shall be tendered under this section no later than February 1 in the year following the employee's last day of employment. . . ." (Emphasis added.)

Section 203, subdivision (a) provides: "If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.3, 201.5, 202, and 205.5, any wages of an employee who is discharged or *who quits*, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days." (Emphasis added.)

Sections 202 and 203 apply to the state as an employer. (§ 220, subd. (a).)

IV

"Quits" as used in Sections 202 and 203

A. *Plain Meaning*

McLean contends the plain meaning of the term "quits," as used in the phrase *an employee who quits* in sections 202 and 203, includes an employee who "retires." McLean reasons that the terms "quits" and "retires" both refer to a voluntary separation from service and an employee must quit before she can retire. She contends the

"undeniable overlap" of the two terms requires that "quits" includes "retires." She argues the penalties provided in section 203 apply to the failure to pay wages timely to employees who terminate their service with the employer, whether the termination is initiated by the employer (a discharge), or by the employee (a quit). She posits there is no reason to believe the Legislature intended to treat employees who planned to retire upon separation of service differently than those who were discharged or who quit for other employment.

The parties and the trial court offer a variety of dictionary definitions to support their positions. Relying on the 1985 edition of New Webster's Dictionary, the trial court defined "retire" as "to go from a company or a public place into privacy" or "to withdraw from business or active life," while "quit" in the employment context means "to resign," which means "to give up, as an office or post." McLean relied on the Merriam-Webster online dictionary, which defined "quit" as "to leave a job" or "to stop working" (http://merriam-webster.com/dictionary/quit [as of 3/12/14]), and "retire" as "to stop a job or career because you have reached the age when you are not allowed to work anymore or do not need or want to work anymore." (http://merriam-webster.com/dictionary/retire [as of 3/12/14]) Defendants contend dictionary definitions are of little aid, but note that Black's Law Dictionary defines "retire" as "to terminate employment or service upon reaching retirement age." (Black's Law Dict. (5th ed. 1979) p. 1183, col. 2.) A later edition, however, defines "retirement" more broadly as "termination of one's employment or career, esp. upon reaching a certain age or for health reasons." (Black's Law Dict. (10th ed. 2014) p. 1510, col. 1.)

Like defendants, we find these dictionary definitions are not dispositive. However, we note that all of the definitions of the term "quit" seem to encompass the definitions describing retirement, as all the definitions speak to leaving a job.

Defendants contend the issue in this case must be understood in the context of civil service employment as McLean and the members of the class she purports to represent are civil service employees. They assert we need not determine how section 203 applies to any separation from service other than a civil service retirement.

Defendants argue that in the civil service context it is well recognized that a "quit" is different from a "retirement." (See *Gore v. Reisig* (2013) 213 Cal.App.4th 1487, 1493 ["At the point in time that an employee leaves employment, he or she falls into one of three categories—a resigned employee, a terminated employee, or a retired employee."]; *Lucas v. State of California* (1997) 58 Cal.App.4th 744, 750 [civil service statutes expressly distinguish separation from a civil service position by resignation and separation by service retirement].)

Defendants contend that in the civil service, a quit is clearly distinguishable from retirement, and this distinction is reflected in the language of subdivision (c) of section 202 (section 202(c)): "when a state employee quits, retires, or disability retires from his or her employment with the state." According to defendants, this language *distinguishes* between a quit and a retirement, and adds a third category, a disability retirement.

While the instant case involves civil service employees, section 202, subdivision (a) (section 202(a)) and section 203 are not so limited. These statutes apply to *all* employers and employees not otherwise excluded (such as city and county employees, who are excluded under subdivision (b) of section 220), including those in the private sector. (§ 220.) Nothing in the language of either statute permits an interpretation where the word "quits" has one meaning for the state employer and its employees, and another meaning where the employers and employees are in the private sector. We decline to adopt an interpretation of a statute which adds a distinction between types of employers and employees "which is neither expressly included in nor suggested by its plain language." (*Panos v. Superior Court* (1984) 156 Cal.App.3d 626, 630.) "Doing so would violate the cardinal rule that a statute ' . . . is to be interpreted by the language in which it is written, and courts are no more at liberty to add provisions to what is therein declared in definite language than they are to disregard any of its express provisions.' [Citation.]" (*Wells Fargo Bank v. Superior Court* (1991) 53 Cal.3d 1082, 1097.)

B. *Legislative History*

Since the plain language of the statutes does not definitively establish whether an employee who "quits" includes an employee who "retires," we turn to the second step of statutory construction and consider extrinsic sources.

Defendants rely on the legislative history of Assembly Bill No. 1684, which added subdivisions (b) and (c) to section 202 in 2002. The purpose of the bill was to approve a memorandum of understanding entered into by the state employer and State Bargaining Unit 2, the Association of State Attorneys and Administrative Law Judges. (Stats. 2002, ch. 40, §§ 1-2, p. 458.)

As the enrolled bill report explains, "This bill also corrects an unintended result that occurred with the enactment of AB 2410. AB 2410 amended section 220 of the Labor Code thereby making sections 201, 202, and 206.5 applicable to the State as an employer. As a result, the State employer is now required to tender the 'prompt payment of wages' due and owing to an employee upon separation from State employment. In the case of an employee terminated (discharged) by the employer, all wages must be tendered on his/her last day of employment. In the case of an employee who quits without giving the employer 72 hours' notice, the employer must tender payment within 72 hours of the employee's last day of employment. Because payments must be made within these time frames, the State can no longer allow employees to rollover into a subsequent tax year lump sum payments for accrued leave due the employee upon separation. Similarly, these shortened time frames place the State at risk to be assessed penalties in the event the lump sum contribution cannot be tendered to the employee's supplemental retirement plan (plan administrator or recordkeeper) within the time frame specified for payment under the Labor Code. Section 206.5 prohibits employers from entering into private agreements with employees to waive their right to prompt payment of wages. [¶] The intent in this bill is to restore a benefit State employees previously enjoyed which allows them to contribute the cash value of their accrued leave . . . to an employer sponsored 401(k), 403b, and/or 457 Plan on a pre-tax basis and/or defer receipt of payment for such

leave into the next tax year, subject to the payroll procedures of the State Controller's Office."

Defendants contend the newly created section 202(c) *had* to specify it applied to "an employee who quits, retires, or disability retires from his or her employment with the state," because under civil service a "quit" and a "retirement" were understood to be different things. They further contend the new law "ensure[d]" that a retirement was not included in the penalty provisions of section 203 (presumably by *not* amending §§ 202(a) and 203 to include the word retire, see part C, *post*).

Defendants' argument presupposes that the term "quits" in sections 202 and 203 may have a different meaning depending on whether state employment or private employment is at issue. We have rejected that interpretation of the statutes, as discussed *ante*. To the contrary, it appears that the Legislature specified "quits, retires, or disability retires" in section 202(c) because that subdivision, unlike section 202(a) or section 203, applies *only* to state employees by its express terms, and in that context, the terms have different meanings. Further, if the general rule of section 202(a) and the penalty provisions of section 203 *did not apply* to an employee who retires, it would clearly be unnecessary for section 202(c) to discuss employees who retire. Defendants do not discuss this fact, despite McLean's lengthy discussion of it in her briefing.

The legislative history offered by defendants does not show that in using the term "quits" in section 202(a) and section 203, the Legislature intended to exclude employees who separate from employment to retire.

C. *Rules of Statutory Construction*

Defendants contend that under well-settled rules of statutory construction, the terms "quits" and "retires" cannot have the same meaning because the Legislature used only the term "quits" in sections 202(a) and 203, while it used both "quits" and "retires" in section 202(c). They argue that "retires" cannot be implied in section 202(a) and section 203, and if "quits" includes "retires," then the use of "retires" in section 202(c) is surplusage. Although possessing some surface appeal, defendants' argument fails to persuade.

"When the Legislature 'has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded.' [Citation.]" (*Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 576.) "When two statutes touch upon a common subject, they are to be construed in reference to each other, so as to 'harmonize the two in such a way that no part of either becomes surplusage.' [Citations.] Two codes ' "must be read together and so construed as to give effect, when possible, to all the provisions thereof." ' [Citation.]" (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 778-779.)

We agree that: "Where different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117.) The inference, of course, is stronger when the different parts of the statute are enacted at the same time. (See *People v. Jones* (1988) 46 Cal.3d 585, 596 ["when different words are used in contemporaneously enacted, adjoining subdivisions of a statute, the inference is compelling that a difference in meaning was intended"], italics omitted.) That is not the case here as section 202(b) and (c) were added in 2002. (Stats. 2002, ch. 40, § 7, pp. 461-462.)

As discussed at length *ante,* section 202(c) refers to an employee who "quits, retires, or disability retires." A disability retirement is a particular type of retirement and therefore a subset of "retires." Thus, the phrase "quits, retires, or disability retires" can be understood as listing the types of separation from employment from the most general, "quits," to the most specific, "disability retires," rather than as listing three entirely distinct occurrences. The reason for the different language is explained by the different contexts. In enacting subdivisions (b) and (c) of section 202, the Legislature was concerned with only *state* employees, and understood that "quits," "retires," and "disability retires" have particular meanings in that context. This distinction is not generally made in private sector employment and so it was unnecessary to make it in the more general provisions of section 202(a) and section 203, which originally applied only to private employees and employers, and now apply to the State as well.

Finally, the rules of statutory construction must yield to the purpose and intent of a statute. (See *Costco Wholesale Corp. v. Workers' Comp. Appeals Bd.* (2007) 151 Cal.App.4th 148, 154-155 [the "last antecedent rule does not trump" considerations of "the spirit of the statute . . . as a whole"].) Statutes governing conditions of employment, such as the payment of wages, are to be liberally construed "in favor of protecting employees." (*Murphy, supra*, 40 Cal.4th at p. 1103.) This policy and purpose is not furthered by excluding retirees from the full protections of section 202, enforced by the penalty provisions of section 203. We interpret an employee who "quits" in section 202(a) and section 203 to include an employee who quits to retire.[3]

V

Proper Defendants

Defendants contend that even if McLean has a viable claim under section 203, the demurrer was properly sustained because she sued the wrong defendants. Since section 203 imposes penalties upon an employer, the proper defendant is her employer and defendants argue McLean's employer is the Department of Justice, which contains the Attorney General's office.

While the trial court did not reach this argument, we must address it. "A judgment of dismissal after a demurrer has been sustained without leave to amend will be affirmed if proper on any grounds stated in the demurrer, whether or not the court acted on that ground. [Citations.]" (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324.)

The State of California clearly was McLean's employer and defendants' argument to the contrary borders on frivolous. Defendants concede that McLean was a civil service employee. "The civil service includes every officer and employee of the State except as otherwise provided in this Constitution." (Cal. Const., art. VII, § 1, subd. (a); see

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[3] Amicus California Attorneys, Administrative Law Judges and Hearing Officers in State Employment requests that we take judicial notice of the original and amended versions of Assembly Bill No. 1684 and a CalPers publication relating to retirement. Because we find these documents are not necessary to our decision, we deny the request. (*Aguiar v. Cintas Corp. No. 2* (2006) 144 Cal.App.4th 121, 128, fn. 2.)

Colombo v. State of California (1991) 3 Cal.App.4th 594, 598 ["As a CHP traffic officer, Russell Colombo is a civil service employee of the State of California, paid by the state, not the CHP."].) Sections 202 and 203 apply "to the payment of wages of employees directly employed by the State of California." (§ 220, subd. (a).) Indeed, subdivision (b) of section 202 refers to "the state employer" and subdivision (c) of that section refers to "a state employee."[4]

Defendants contend the controller's office is not a proper party defendant because it is not McLean's employer. The FAC alleges that the controller's office "is responsible for disbursing any and all wages owed to" state employees upon resignation or retirement. It further alleges that the State of California and the controller's office failed to make these payments on a timely basis. Thus, the FAC alleges wrongful conduct by the controller's office. It is not necessary, however, to name the controller's office as a party defendant. An action against state agencies in their capacity as such is, in effect, an action against the state. Thus it is sufficient to name only the state as party defendant. (*Bacich v. Board of Control* (1943) 23 Cal.2d 343, 346 [approving substituting the state as party defendant in place of the defendants Board of Control, California Toll-Bridge Authority, and Department of Public Works].) Accordingly, the trial court did not err in sustaining the demurrer of the controller's office.

VI

Class Allegations

For the first time on appeal, defendants contend the demurrer was properly sustained because McLean does not have standing to represent the Plaintiff Class as defined in the complaint. The FAC defines the Plaintiff Class as employees employed by the state who resigned or retired during a certain time period. Defendants contend that

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[4] Defendants argue, unconvincingly, that these statutory terms are merely "helpful shorthand." To accept this argument is to find the words do not mean what they say, which would undermine the basic rule of statutory construction to give the words of a statute "their usual and ordinary meaning." (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601.)

since McLean retired instead of resigning, she cannot represent those who resigned and since the Department of Justice is her employer, she can represent only those employed by that agency.

Although defendants did not raise any challenge to the class allegations in the demurrer, "an appellate court may consider new theories on appeal from the sustaining of a demurrer to challenge or justify the ruling." (*Ortega v. Topa Ins. Co.* (2012) 206 Cal.App.4th 463, 472.)

We can easily dispose of these contentions. We have already explained that "quits" in sections 202 and 203 includes all employees who quit, whether to retire or for a different reason, and these employees constitute a single group under the statutory scheme. We have also explained that McLean's employer is the State of California. We do not opine on the issue of class certification or reach any other issue regarding McLean's class allegations.

DISPOSITION

As to defendant controller's office, the judgment is affirmed. As to defendant State of California, the judgment is reversed and the matter remanded for further proceedings. McLean shall recover costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3).)

DUARTE, J.

We concur:

BUTZ, Acting P. J.

HOCH, J.

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: *Janis McLean v. State of California, et al.*

No.: County of Sacramento Superior Court, Case No. 34-2012-00119161-CU-OE-GDS
Court of Appeal, Third Appellate District, Case No. C074515
Supreme Court of the State of California, Case No. TBD

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1515 Clay Street, 20th Floor, Oakland, CA 94612-0550.

On September 29, 2014, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with **GOLDEN STATE OVERNIGHT**, addressed as follows:

William A. Kershaw
Kershaw, Cutter & Ratinoff LLP
401 Watt Avenue
Sacramento, CA 95864
Counsel for Plaintiff

The Honorable Raymond M. Cadei
Superior Court of California
County of Sacramento
720 Ninth Street
Sacramento, CA 95814

Clerk
California Court of Appeal
Third Appellate District
914 Capital Mall
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 29, 2014, at Oakland, California.

Denise A. Geare	Denise A. Geare
Declarant	Signature

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