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. S221554

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

REPLY TO ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

The proper interpretation of sections 202 and 203 of the Labor Code raises important and unsettled questions meriting this Court's review.

As to the first issue presented in the petition for review, the Court of Appeal's ruling permits a single agency employee, claiming a violation by her employing agency of its obligation to her, to press allegations on behalf of employees of all other agencies that happen to be part of state government, even though those agencies owe her no obligation and breached no duty to her. This ruling conflicts with California statutes and case law regarding the role of an appointing power in state government. Plaintiff's contrary assertion, that the law is "settled" in this area, relies on inapposite authority that does not purport to authorize a putative class action to proceed against the entire State, without requiring the plaintiff to specify which agencies are even alleged to have violated the law.

Plaintiff's further argument that her proposed lawsuit poses no significant litigation-management issues is inconsistent with the way she has chosen to plead her claims. The allegations of Plaintiff's complaint purport to initiate potentially sweeping litigation against all state agencies without naming them or serving them with process. Review is necessary to settle this important question and to determine whether all state agencies are subject to suit in a section 203 action by a single agency employee by

the expedient of using the phrase the "State of California" as the putative denominated defendant in the caption of a complaint.

The second issue presented in the petition – whether a retiree is entitled to penalties under section 203 as someone who has "quit" – also merits this Court's review. Before the ruling of the Court of Appeal in this case, statutory and decisional law in California as to whether civil service "quits" are the same as civil service "retirements" was contrary to McLean's position in this case. McLean's answer suggests that these authorities are unimportant because they involve different statutes, but nowhere does she explain why the rule should be different for section 203 causes of action than for other cases involving civil service separations. Indeed, consistent with the accepted distinction between a retirement and a quit, McLean's complaint itself pleaded that a resignation and a retirement are different things.

Blurring the distinction between retirements and quits poses the risk of confusion in a highly regulated area of law. Moreover, contrary to McLean's view, distinguishing between a retirement and a quit is straightforward: if a retirement has not been processed prior to the employee's departure, it is a "quit"; if a planned retirement is processed (with continuity of income thus assured) at the time of departure, it is not.

Review on this issue is also warranted because the Court of Appeal's interpretation of the statute is incorrect. Reading the word "quit" to include

the word "retire" renders the statutory language surplusage and imposes upon California employers a burdensome penalty obligation not intended by the law. It is also inconsistent with the statute's legislative history. Review should be granted to settle this important question.

DISCUSSION

I. WHETHER A LABOR CODE SECTION 203 "EMPLOYER" IS AN AGENCY EMPLOYEE'S APPOINTING POWER OR, ALTERNATIVELY, ALL APPOINTING POWERS IN STATE GOVERNMENT, IS AN IMPORTANT QUESTION MERITING THIS COURT'S REVIEW.

Petitioner has found no other cases in California in which a court has previously sanctioned the type of suit approved here – a class claim seeking to include all state employees employed by all state agencies – by using the "State of California" designation in that unique context. Thus, McLean's claim that the law on this point is "settled" is incorrect. (Answer, at p. 1.) In fact, to the contrary, other courts in California have concluded that state agencies are separate entities and are not unitary in the sense McLean envisions. (*Greyhound Lines v. Department of the California Highway Patrol* (2013) 213 Cal.App.4th 1129, 1134-35 ["Thus, in the ordinary course of their duties, CHP and Caltrans are distinct and separate government entities"]; *People ex rel Lockyer* (2004) 122 Cal.App.4th 1060, 1077-79 ["Each agency or department of the state is established as a separate entity, under various state laws or constitutional provisions."].)

Importantly, the holdings of these cases are in accord with the structure of California's government as set forth in the statutory law of the State. Those provisions establish that state agencies are separate and distinct governmental entities, each established under different state laws and constitutional provisions, giving each its own unique mission and sphere of responsibility. (See generally, Gov. Code, Division 3; §§ 11000-11201.) Accordingly, McLean admits in her Answer, as she must, that the State functions "through a network of separate departments, agencies, and other entities." (Answer, at p. 5.)

In accordance with this fundamental structure of state government, civil service employees are hired, supervised, and fired by their specific 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].) Moreover, McLean does not and cannot dispute that it is each separate appointing power within that "network" (Answer, at p. 5) that is charged with making the timely final payments to each of its departing employees that she challenges in her suit. (AA000064.) Thus, McLean's appointing authority – the Department of Justice – had the responsibility, as

her "employer," to comply with the statutory obligation that is the basis for her suit.[1]

The case heavily relied upon by Plaintiff, *Colombo v. State of California* (1991) 3 Cal.App.4th 594, does not support her position. (Answer, at pp. 1-3.) After being injured in a freeway accident, CHP Officer Colombo sought to avoid the bar of workers' compensation by separately suing DOT for negligently maintaining the roadway in a condition that led to his injury, and if he had been permitted to do so, he would have obtained a separate recovery for injuries already covered by workers' compensation in connection with his employment by the CHP. The Court of Appeal appropriately prevented him from doing so. (*Colombo*, 3 Cal.App.4th 594, 598-99 ["Since workers' compensation is [Colombo's] exclusive remedy, the trial court properly sustained the state's demurrer without leave to amend."].)

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[1] McLean's effort to distinguish *Professional Engineers in Government v. Schwarzenegger* (2010) 50 Cal.4th 989, misses the point. (Answer, at pp. 6-7.) *Schwarzenegger* ultimately turned on the Legislature's power by appropriation to fund civil service positions to be filled by each appointing power. That is not an issue here. Moreover, it does not hold that a single agency employee like McLean may sue the "State" as an umbrella defendant to include each and every appointing power in California. To the contrary, Petitioner cited the case for the proposition that this Court observed that an appointing power is a "state employer" (Petition for Review, at p. 10), and McLean does not challenge that fact.

Of course, the CHP is a state agency, and thus Officer Colombo is, in that context, an employee of the "State of California," in that the State has delegated power to the CHP to perform certain functions and Colombo worked for that agency – the CHP. Colombo was not, however, an employee of DOT by virtue of his employment with the CHP, and the *Colombo* opinion does not hold that he was, and it does not give Colombo – or McLean – a right to sue a separate appointing power for its actions against its own employees that do not involve him. Unlike McLean, Colombo did not seek to sue the "State of California" as an umbrella defendant, in order to obtain jurisdiction over DOT's employment-related torts against its own employees. Instead, Colombo sought to separately sue DOT for independent torts allegedly committed against him for the alleged negligent maintenance of the roadway. In contrast, McLean has no claims against the other agencies she seeks to include within the scope of her suit.

Since courts have recognized that the State acts by and through its separate agencies, had McLean's suit sued the Department of Justice – or, to put it another way, had she sued the State of California, acting by and through the Department of Justice – then the Court of Appeal's opinion on this point would perhaps be settled and uncontroversial, as McLean claims. However, that is not what McLean did. McLean's suit – unlike others in which courts have approved the denomination of the defendant as the "State of California" – proffers the "State as Defendant" denomination in

an entirely new context, one in which it acts as an umbrella defendant that includes each and every appointing power in each branch of government, even though none of them employed McLean. However, an employee with a claim against his or her own agency, for a violation of an obligation owed by that agency to the employee, may not sue the "State of California" in order to turn his or her case into a class claim seeking to determine if other state agency employees may have had a similar experience with their own agencies, in order to then wrap those agencies and employees into his or her lawsuit.

A construction of section 203 that deems a plaintiff's public employer to be the State, moreover, raises significant practical concerns. Petitioner agrees that McLean's claims are not amenable to class certification (Answer, at p. 7), but the burdens on the courts and state agencies in getting to that point in the litigation could be significant. McLean's assertion that, in her case, discovery would be quite limited (Answer, at p. 8, n.5), is inconsistent with the way she pleaded her claims. By purporting to put at issue the conduct of all state agencies, her complaint seeks to open the door to discovery with respect to each agency in the State regarding whether any of its employees quit or retired, when notice of the departure was given to the agency, how much money was believed to be due the employee at the time of departure based upon the employee's timesheets up to his or her final day or work, how much was paid the

employee and when, and what the reason was for any late or inaccurate payments, if there in fact were any. While the section 202 (b) and (c) deferrals may have some common evidence available from the Controller's office, liability in a section 203 case hinges on whether or not any failure to pay is "willful." (Lab. Code, § 203.) Thus, the ultimate issue of the "willfulness" of any delay would involve fact-specific inquiry with each employing agency. Regardless, pre-certification discovery alone could impose substantial burdens upon otherwise uninvolved agencies that could find themselves a target of a lawsuit in which they were not served, had no prior notice or opportunity to defend, and that had nothing to do with McLean or any of her claims. Review should be granted to resolve these important issues.

II. WHETHER A QUIT INCLUDES A RETIREMENT FOR PURPOSES OF LABOR CODE SECTION 203 IS AN IMPORTANT QUESTION OF FIRST IMPRESSION THAT MERITS REVIEW BY THIS COURT

A. The Court of Appeal's Ruling is Inconsistent with the Established Distinction Between Quits and Retirements and Risks Uncertainty in Employment Litigation.

Far from being settled in McLean's favor, the decision of the Court of Appeal blurs the well-established and commonly understood distinction between a retirement and a quit. (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].)

McLean's complaint itself treats these concepts as distinct. While McLean's complaint alleges that she "retired"(AA000002), it repeatedly refers to employees who either resigned *or* retired from state service. (AA000003 ["Plaintiff . . . alleges that when an employee resigns or retires. . . "]; AA000004 [defining the proposed class as consisting of those who "resigned or retired" their state employment].) Tellingly, however, the complaint alleges that Labor Code section 203 penalties apply only upon a failure to pay upon "discharge or resignation" – and not upon retirement. (AA000007.)

Based upon the statutory law cited above - and the commonly understood difference between the two terms - California courts have affirmed the notion that these two types of separations (quits and retirements) are separate concepts. To demonstrate this point, Petitioner cited *Lucas v. State of California* (1997) 58 Cal.App.4th 744, 750-51 [retirement did not constitute a resignation for purposes of civil service] and *Gore v. Yolo County D.A. 's Office* (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"].) (Petition, at p. 15.) However, McLean's answer failed to respond to *Lucas*, and its only response to *Gore* is the

unremarkable (and uncontested) assertion that *Gore* involved a different statute. (Answer, at p. 11.) But McLean offers no reason why the conclusion and logic of that case – that retirements are different from quits – should not apply equally to section 203.

Plaintiff's answer also errs in citing *Smith v. Superior Court* (*L'Oreal*) (2006) 39 Cal.4th 77 for the proposition that the interpretation of section 203 should ignore case law distinguishing between quits and retirements. (Answer, at p. 10.) The *Smith/L'Oreal* case held that the release of a model upon completion of a one-day assignment was a "discharge" pursuant to section 201. While the discharge of an employee after completion of a one-day assignment was held by this Court to be a discharge for purposes of section 201, that holding does not compel the conclusion that a "quit" includes a "retirement" as those terms are used in sections 202 and 203. In this case, unlike in *Smith/L'Oreal*, the terms at issue are governed by a well-recognized distinction between a resignation and a retirement. Moreover, as discussed below, an examination of the statutory language, and relevant legislative history, demonstrates that, for purposes of sections 202 and 203, a "quit" does not include a retirement.

Reading "quit" to include a "retirement" also risks confusion. (Petition, at pp. 14-15.) First, the well-defined and well-understood distinction between these terms of art would be undermined. Second,

employers would be burdened with a penalty obligation with respect to employees not entitled to that penalty by statute.

McLean's concern that treating these two forms of separation differently would cause uncertainty is misplaced. (Answer, at p. 13.) If a retirement has not been processed prior to the employee's departure, it is a "quit," and the section 203 penalty obligation accordingly attaches to any employer's willful failure to make timely payment. However, if one's planned retirement is processed (with continuity of income thus assured) at the time of departure, it is not a quit, and no penalty attaches to any late payment. There is no danger of confusion for employers in interpreting section 203 consistently with the well-understood difference between a retirement separation and a resignation separation.

B. McLean's Reading of the Statute is Incorrect.

An examination of the text of the prompt-payment statutory scheme demonstrates that the Legislature, consistent with the settled understanding that a retirement and a quit are different things, recognized those distinctions and made the prompt-payment obligations dependent upon them. While McLean insists that the use of the terms "quits, retires, disability retires" in section 202(c) shows that the term "quit" includes within it the concepts of retirement and disability retirement (Answer, at p. 11), this interpretation turns the Legislature's use of the terms "retirement" and "disability retirement" into unnecessary surplusage. If, in

fact, it is clear that the term "quit" already includes the concept of a "retirement," then there would no reason for retirees to be mentioned in section 202 at all, as they would already have been encompassed within the Legislature's use of the term "quit."

Importantly, the legislative intent behind the amendment adding section 202(c) supports reading "quit" and "retirement" as different concepts. The intent of the 2002 amendments was to codify the benefit that all state employees (including those who quit, were discharged, or retired) had previously enjoyed that allowed deferrals of accrued leave into supplemental retirement plans. (Petition, at pp. 19-21.) When sections 201 through 203 were first made applicable to the State in the year 2000, that new law threatened the supplemental deferral benefit with respect to those who quit or were discharged, necessitating the 2002 amendments. (*Id.*)

In order to codify that benefit in 2002, the most logical location in the statutory scheme for placement of the amendment was in sections 201 and 202 - so as to clarify that those sections were not intended to forbid the supplemental deferral for those who "quit" or were "discharged." Nevertheless, as new standalone sections that imposed new time limits and requirements on the deferrals, the Legislature also had to include the separate category – retirees – into section 202(c), or else retirees would not have also had the benefit of the 45-day (section 202(b)) and February 1 (section 202(c)) deadlines in the new law. In other words, it is precisely

because of the understanding that a quit does not include a retirement that the Legislature had to ensure that those who voluntarily retired and those who disability retired (which may be voluntary or involuntary) also had the protection of the new deadlines and were included within the codification of the practice. Seen in this light, the fact that the Legislature did not, at the time it added those new sections into section 202, amend section 203 to include retirees within the protections of the penalty provisions, emphasizes the Legislature's determination that the extraordinary remedy of penalty wages should be available only to those "quit" without their retirement in place.

This reading is also consistent with the purpose of the statute, which this Court held is to "ensure that discharged employees do not suffer deprivation of the necessities of life or become charges upon the public." *Smith v. Superior Court*, *supra*, 39 Cal.4th 77, 90. State agency retirees *already* have continuing income protection, and if the Legislature wanted to extend another layer of income protection to retirees by virtue of waiting time penalties, it knew how 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."].) In this case, however, it did not.

Review should be granted to resolve this important question, and to ensure that employers are not charged with penalties in instances not intended by the Legislature.

CONCLUSION

Petitioner respectfully requests that review be granted on both issues presented in the Petition.

Dated: October 29, 2014

Respectfully submitted,

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OK2014902695

CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY TO ANSWER TO PETITION FOR REVIEW uses a 13-point Times New Roman font and contains 3219 words.

Dated: October 29, 2014

KAMALA D. HARRIS
Attorney General of California

WILLIAM T. DARDEN
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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. S221554

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 October 30, 2014, I served the attached **REPLY TO ANSWER TO PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with **GOLDEN STATE OVERNIGHT**, addressed as follows:

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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 October 30, 2014, at Oakland, California.

Denise A. Geare
Declarant

Denise A. Geare
Signature

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