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

OPENING BRIEF ON THE MERITS

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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.

INTRODUCTION

Under California Labor Code section 203, "an employer" that willfully fails to pay owed wages promptly after an employee "quits" or is "discharged" can be held liable for penalties of up to thirty days of wages.[1] After Plaintiff Janis McLean, a former Deputy Attorney General, retired from the California Department of Justice and was paid all owed wages, she sued "the State of California" under section 203, claiming that the payments were not timely and that the State therefore owed penalties to her and to a putative class of employees who worked for any department, agency, board, commission, court, or legislative body in the State. Because section 203 only authorizes suit by former employees against their own individual agency employer, and because it permits suit only by those

[1] All further statutory references are to the Labor Code unless otherwise specified.

who "quit" their jobs, McLean, a retiree, failed to state a claim for penalties against "the State" as a whole. The Court of Appeal's decision reinstating her claim should be reversed.

As to the first issue raised in the petition for review, McLean's suit cannot proceed against "the State of California," as pled, because in the case of a governmental agency, the "employer" under section 203 is the individual entity for which a public employee works and not "the State of California" as a whole. Although neither section 203 nor any other provision of the prompt-payment law defines the term "employer," the text of the statutory scheme suggests that the Legislature intended for individual state agencies—not a unitary entity denominated "the State" and consisting of every employing department, agency, board, commission, court, or legislative body—to be responsible for making prompt payments to their departing employees. Administrative interpretation of the statute also allocates responsibility for paying final wages to the individual department.

The structure of public employment in California confirms that the "employer" under section 203 is the specific agency or department for which the employee worked. Public employment in the State is governed by statute, and within that statutory framework, each state employee is appointed into a specific department, agency, board, commission, or other similar entity (commonly referred to as an "appointing power") and works exclusively for that entity. The appointing power, not "the State," has the

power to hire, supervise, fire, and control the key aspects of that person's employment. And although the Legislature, and in some cases the Governor and certain state departments, may play a role in the overall administration of the state workforce, their oversight role does not make them a civil servant's "employer."

Even were the Court to look beyond the statutory basis for state employment and to other commonly applied definitions of the term "employer," a civil servant's "employer" still should be considered to be the agency for which she works. For example, the primary factor in determining the identity of an "employer" in the common law is the authority to exercise direction and control over the employee's work. In state government, only the appointing power—not a unitary entity denominated "the State"—is able to direct and control an employee's work.

McLean's contrary reading of section 203 would lead to absurd results. In her view, a single agency employee in a section 203 case may initiate litigation against every separate state entity in California without naming them or serving them with process. Permitting such claims would impose onerous discovery obligations on uninvolved agencies and would create unwarranted trial-management problems for parties and the courts. There is no need, moreover, for courts to grapple with these challenging trial-management issues, for aggrieved employees may obtain all the relief to which they may be entitled in an action pleaded against their individual

agency employers, and there is therefore no need to expand section 203's definition of "an employer" beyond the individual's employing agency. Accordingly, the Court should conclude that, in the context of state civil service, the "employer" of any civil service employee, for purposes of a section 203 claim, is that employee's particular appointing power, and not the "State of California" as a whole.

As to the second issue raised in the petition for review, the Court of Appeal extended the reach of section 203, which permits suit for untimely payment by those who "quit," to include those who retire. In the court's view, employees who have come to the orderly end of their careers have "quit," because they "quit to retire." As the trial court recognized, however, under ordinary principles of statutory interpretation, one who "retires" from state service is not a person who has "quit" within the meaning of section 203. The trial court's conclusion is consistent with the statutory and decisional law in California, which recognizes that a "quit" and a retirement are distinct forms of separation. Consistent with this accepted understanding, the Legislature itself used the terms "quit" and "retire" separately in the prompt-payment statutory scheme, and yet applied the penalty obligations only to those who "quit."

Indeed, demonstrating the accepted and previously uncontroversial distinction between these two different forms of separation from service, McLean's own pleading repeatedly admitted the distinction between those

who quit and those who retire for purposes of the statute and repeatedly pled that she retired, not that she quit. Realizing, in response to the demurrer, that this admission was fatal to her claims, McLean sought through her briefing to conflate the concepts she had previously separated, arguing that she had "quit to retire."

Reading the word "quit" to include "retire," as the Court of Appeal did, 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 and with long-standing principles of statutory interpretation and construction. Blurring the distinction between "retirements" and "quits" also poses a risk of confusion to all California employers that is not presented by continuing to recognize the distinction. The trial court correctly held that section 203 does not apply to retirees.

Because McLean failed to sue the agency for which she worked (the Department of Justice) and because she alleged that she "retired" from state service rather than "quit," she has failed to state a claim under section 203. The judgment of the Court of Appeal should be reversed.

BACKGROUND

I. AFTER RETIRING FROM DOJ, PLAINTIFF FILED SUIT AGAINST THE STATE OF CALIFORNIA SEEKING PENALTIES UNDER LABOR CODE SECTION 203.

Plaintiff McLean worked as a Deputy Attorney General in the California Department of Justice until she "retired from the Attorney General's Office on November 16, 2010, and separated from service on the same date." (AA000003 [First Amended Complaint (FAC) at 3:7-8].) McLean elected to defer payment of her accrued but unused leave upon her retirement, which she would otherwise have received in a single, taxable, lump sum, and instead requested that those amounts be transferred into her supplemental retirement plans at future dates in 2010 and 2011. (AA000002 [FAC at 2:1-9]; AA0000003 [FAC at 3:15-19].)

McLean subsequently filed suit against the State, alleging that she was not paid her wages on her last day of employment or within 72 hours thereof as she claimed was required under Labor Code section 202(a). (AA000006.) She also claimed that the postings to her supplemental retirement plans for the 2010 and 2011 tax years occurred beyond the time frame that she claimed was required by Labor Code sections 202(b) and 202(c). (AA000003.)

Based on these asserted violations of section 202, McLean pleaded a single cause of action for penalties under California Labor Code section 203. (AA000006-09.) McLean sought no damages for the alleged

violations because, prior to filing suit, she received all owed wages and leave credits; instead, her FAC sought penalties, costs of suit, and attorneys' fees. (AA000009 [FAC, Prayer for Relief]; AA000109 [demurrer ruling recognizing absence of claim for damages].)

Although McLean admitted in the FAC that she retired as a Deputy Attorney General, a position within the Attorney General's Office in the DOJ, she did not sue DOJ.[2] Instead, McLean sued "the State of California" and the California State Controller's Office (AA000002), alleging that she was "employed by the State of California" (AA000002-03) and that the State Controller was responsible for "timely paying wages" to state employees. (*Ibid.*)

McLean's suit sought to represent a class of "all employees employed by Defendant in the State of California." (AA000004.) The FAC asserted that "Plaintiff and the Class may bring suit against the State, including its department and agencies" for relief under section 203 as a result of alleged violations of section 202. (AA000007-8.) McLean alleged that "defendants" failed to make payments to her and the Plaintiff Class, which the FAC defined as all persons who "resigned or retired from their employment with the Defendant State of California." (AA000001.)

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[2] See Gov. Code, § 12510 (Attorney General is head of the California Department of Justice.)

Although the FAC alleged that the Labor Code's prompt-payment obligation applies only "upon discharge or resignation" (AA000007 [FAC at 7:16-18]), McLean did not allege that she was discharged or that she resigned. Instead, the FAC asserted that McLean "retired" (AA000003 [FAC at 3:7]; AA000007 [FAC at 7:3]), and it distinguished between those who "retire" and those who "resign" (i.e. "quit"). (See, e.g., AA00001 [FAC at 1:26-27] (complaint brought on behalf of persons who "resigned or retired from their employment"); AA000002 [FAC 2:2-3] (immediate payment required when employee "resigns or retires").)[3]

II. THE TRIAL COURT DISMISSED THE COMPLAINT ON THE GROUND THAT SECTION 203 DOES NOT AUTHORIZE PENALTIES FOR THOSE WHO RETIRE.

Defendant State of California, acting by and through the State Controller, demurred to the FAC on several grounds. (AA000011-66.) Among other things, the demurrer asserted that section 203, which permits

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[3] (See also AA000002 [FAC at 2:3-4] (if employee "resigns or retires" and elects to contribute wages to supplemental retirement plan, transfer must be made in 45 days); AA000002 [FAC at 2:6-7] (if employee "resigns or retires" and elects to contribute wages to supplemental retirement plan in next calendar year, transfer must be made by February 1); AA000003 [FAC at 3:11-12](when employee "resigns or retires," a payroll system disburses wages); AA000004 [FAC at 4:11-14](defining proposed putative class as including employees who "resigned or retired" during the class period and who did not receive full and prompt payment of wages); AA000004 [FAC at 4:18-20] (alleging that more than a hundred employees either "resigned or retired" during the class period and did not receive prompt payment of the amount due); AA000005 [FAC at 5:3-4] (alleging predominating class-wide question common to the class as to whether prompt payment was made to employees who "resigned or retired").)

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.) The trial court agreed with that analysis, holding that section 203 does not authorize penalties for those who retire. (AA000109-112.) In light of this ruling, the court did not reach the other arguments made in the demurrer, including that McLean's suit improperly named "the State of California" as a defendant.

The trial court initially sustained the demurrer with leave to amend. (AA000110.) However, at oral argument, McLean disavowed any intent to amend her complaint and asked for the demurrer to be sustained with prejudice, a request that the trial court granted. (AA000111; 116-117.)

III. THE COURT OF APPEAL REVERSES, ALTHOUGH AFFIRMING DISMISSAL OF THE CONTROLLER'S OFFICE.

The Court of Appeal reversed the trial court's ruling in part and affirmed it in part. First, the Court of Appeal reversed the trial court's ruling that one who "retires" is not included within section 203's grant of a right to sue to those who have "quit" their job. (Opn., at pp. 8-14.) Although the court's opinion recognized that in the context of state civil service, a "retirement" is understood to be different from a "quit" (*id.*, at p. 12), it nevertheless held that McLean should be considered to be a person who "quit" for purposes of section 203, because she "quit to retire." (*Id.*, at pp. 2, 8-14).

The court also held that McLean properly sued the "State of California" instead of the DOJ. (Opn., at pp. 12-13.) The Court of Appeal reasoned that, since McLean was a state civil service employee and since the prompt-payment statutes use phrases such as "the state employer," McLean's section 203 "employer" was the "State of California." (*Ibid.*)

The Court of Appeal also rejected the demurrer's challenge to the FAC's class allegations. The court concluded that McLean, a retiree, could represent a putative class of employees who either quit or retired, because the statutory term "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 court also declined to limit the FAC's putative class to former DOJ employees, concluding that "McLean's employer is the State of California." (*Ibid.*) The court nevertheless declined to "opine on the issue of class certification or reach any other issue regarding McLean's class allegations." (*Ibid.*)

Finally, the court affirmed the trial court's dismissal of the State Controller as a defendant in the suit. (Opn., at p. 15.) The Court of Appeal did not address the argument that the Controller's Office was not subject to suit because it was not McLean's "employer," but nevertheless concluded that the FAC alleged "wrongful conduct" by that office. (*Ibid.*) Regardless, the court found it unnecessary for McLean to separately name the Controller because an "action against state agencies in their capacity as

such is, in effect, a suit against the state." (*Ibid.*) Thus, the court reasoned, it was sufficient for McLean's complaint to name "only the state as a party defendant." (*Ibid.*)

This Court granted the State's petition for review.

STANDARD OF REVIEW

Appellate courts review an order sustaining a general demurrer by giving the complaint a reasonable interpretation, but without assuming the truth of contentions, deductions, or conclusions of law. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.) A reviewing court should affirm the judgment if the trial court's decision to sustain the demurrer was correct on any theory. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742; *Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 808.)

When a demurrer is sustained with leave to amend but the plaintiff elects not to do so, strict construction of the complaint is required and courts presume that the complaint states as strong a case as the plaintiff can properly plead. (*Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1091, abrogated on other grounds by *Martinez v. Combs* (2010) 49 Cal.4th 35 (*Martinez*).)

A *de novo* standard of review applies to issues of statutory interpretation. (*Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 724.)

ARGUMENT

I. MCLEAN'S SUIT AGAINST "THE STATE" MUST BE DISMISSED BECAUSE CLAIMS UNDER SECTION 203 CAN ONLY BE BROUGHT AGAINST THE INDIVIDUAL AGENCY FOR WHICH THE EMPLOYEE WORKED.

McLean's section 203 claim should be dismissed because she did not sue her "employer," the California Department of Justice. Her putative class action against the entire "State of California" on behalf of former employees from every agency, board, commission, court, and legislative entity is improper and should be dismissed.

A. The Phrase "an Employer" in Section 203 Refers to the Specific State Agency for Which a Civil Service Employee Worked.

California's prompt-payment laws, codified at Labor Code sections 201, et seq., require employers to pay final wages promptly to an employee who is "discharged" or who "quits." (§§ 201, 202.) Although the statute's prompt-payment obligations originally applied only to the private sector, the Legislature extended those obligations to state employers in 2000. (See Stats. 2000, ch. 885, § 1 [AB 2410].).

Section 202, subdivision (a) (§ 202(a)) provides that, for an employee who "quits," the employer must pay owed wages within 72 hours of the employee's last day or immediately if the employee gives 72 hours' prior notice of his or her departure. (§ 202(a).) For state civil service employees, the law permits workers to defer payments of wages for certain unused leave and provides that state employers comply with their prompt-payment

obligations by delaying payments as the employee requests. Thus, section 202, subdivision (b) (§ 202(b)) provides that "the state employer shall be deemed to have made an immediate payment of wages" for unused leave time if the employee timely "submits a written election to his or appointing power authorizing the state employer to tender payment" for the leave credits to the employee's supplemental retirement plan. In such cases, the employer must tender the payments to the plan within 45 days of the employee's last day of work. (§ 202(b).)

Under section 202, subdivision (c) (§ 202(c)), an employee who "quits, retires, or disability retires from his or her employment with the state," may defer final payments even longer, into the next tax year, by "submit[ting] a written election to his or her appointing power authorizing the state employer to defer" the payments. (§ 202(c).) For employees who elect this option, the employer has until February 1 in the year following the employee's last day to make the required transfers. (*Ibid.*)[4]

Employers who willfully fail to comply with certain prompt-payment obligations are liable for penalties, often called "waiting time penalties," of up to thirty days in wages. Section 203 provides: "[i]f an employer

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[4] The Legislature's decision to "deem" that the statute has been complied with in the event a deferral request has been made by a state employee naturally flows from the fact that the employee has requested that payment be made past the 72-hour period.

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." (§ 203(a).)

In interpreting any statute like section 203, courts look first to "the statute's words, assigning them their usual and ordinary meanings, and construing them in context. If the words themselves are not ambiguous, [the Court will] presume the Legislature meant what it said, and the statute's plain meaning governs." (*Martinez,* supra, 49 Cal.4th at p. 51.) In this case, the prompt-payment law does not define the term "employer." Although this Court has addressed the question of the definition of an "employer" for purposes of the minimum wage laws as applied to private-sector employers (*id.* at p. 35), it has not considered the identity of "an employer" for purposes of section 203 penalty claims against state agencies that appoint individuals into the state civil service. The textual indicia in the statute nevertheless supports the conclusion that a civil servant's "employer" is her appointing power—the individual agency for which she works—and not "the State" as a whole.

To begin with, section 202 refers to the employee's "appointing power" and to the "state employer." (§ 202(b), (c).) An "appointing

power" (or "appointing authority") is the person or group within each state entity having the authority to make appointments to positions in the state civil service on that entity's behalf. (Gov. Code § 18524.) The appointment power generally lies with the head of each entity.[5] In McLean's case, the power of appointment of Deputy Attorneys General, like McLean, is granted to the Attorney General, who heads the DOJ. (Gov. Code § 12502.)[6] The term "state employer" refers to the particular entity for which the employee works. By using the word "state" as an adjective to modify the term "employer," the Legislature differentiates the "state" employers covered in the statute from other public sector employers, such as cities, counties and other municipal entities, and from private sector employers. These terms ("appointing power" and "state employer") together suggest that the statute assigns responsibility for making final wage payments to the individual agency, rather than to "the State" as a whole.[7]

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[5] However, the power may be exercised by a deputy or other authorized person. (Gov. Code § 18572.)

[6] The same is generally true for other state entities. For example, the Controller has the power to appoint those officers and employees necessary for the proper conduct of the Controller's office. (Gov. Code § 12402.)

[7] Each state entity that bears a section 202(b) or (c) payment obligation into a supplemental retirement plan will work with the Controller's Office in ensuring that the payments to the supplemental plans (continued...)

Administrative interpretation of these provisions confirms this view. After the Legislature subjected state employers to the prompt-payment laws in the year 2000, section 8580.4 of the State Administrative Manual placed the responsibility to make final wage payments in accordance with Labor Code sections 201 and 202 on each employee's employing department. (AA000064, Dept. Gen. Services, State Administration Manual [SAM] (Rev. 06/05) § 8580.4 ["Departments are responsible to ensure that payments to separating employees are in accordance with Labor Code Sections 201 and 202"].)[8]

Further reinforcing the statute's allocation of prompt-payment obligations to individual state agencies, section 203 imposes liability for violations of prompt-payment requirements only on employers who "willfully" fail to comply with the law. (§ 203(a).) Evidence of "willfulness" in connection with an employee's final pay, by its very nature, cannot be determined by reference to the actions of the "State of California" in the main; instead, "willfulness" depends upon the specifics

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themselves are processed on time. But there is no overarching "State of California" control entity that acts as an "employer" in such situations.

[8] The relevant section of the SAM, section 8580.4, is available at: http://www.documents.dgs.ca.gov/sam/SamPrint/new/sam_master/rev427sept14/chap8500/8580.4.pdf.

of the actions taken by the individual employing agency in connection with the employee's separation and final pay.

Contrary to the Court of Appeal's conclusion (Opn., at p. 15), section 220, subdivision (a) (§ 220(a)), which provides that certain sections of the Labor Code "do not apply to the payment of wages of employees directly employed by the State of California," does not make a public employee's employer the entire "State of California." Prior to its amendment in the year 2000, section 220(a) completely exempted from the protections of the prompt-payment and related laws any "employees directly employed by the State or any county, incorporated city or town, or any municipal corporation." (Deering's Ann. Lab. Code, § 220 [1991 ed.] p. 198.) The 2000 amendment removed certain of those exemptions and provided that "all other employment" would be subject to the provisions for which there was no exemption, including section 203. (§ 220(a).) Thus as amended, section 220(a) merely provides an exemption for state employers from certain Labor Code requirements; it does not purport to define which state entity is responsible for compliance with the prompt-payment obligations applicable to "all other employment," from which the State is no longer exempt.

In sum, although the statutory prompt-payment scheme does not unambiguously define the identity of a section 203 "employer," the text of

the statute is best read to apply to individual state agencies, rather than to "the State" as a whole.

B. The Structure of California's Civil Service System Confirms That a Civil Servant's "Employer" Is the Agency for Which He or She Works.

Where, like here, a statute does not, by its own terms, precisely define the employment relationship or those liable for violations, courts look to the statutory context, among other factors, for guidance. (See *Martinez*, *supra*, 49 Cal.4th at p. 52; *People v. Jefferson* (1999) 21 Cal.4th 86, 94 [when statutory language is ambiguous, the "court may examine the context in which the language appears, adopting the construction that best harmonizes the statute internally and with related statutes"].) Here, the context of public employment in California, the terms of which are set by statute (*Miller v. State of California* (1977) 18 Cal.3d 808, 813-14), demonstrates that a civil servant's "employer" is the specific agency for which he or she works.[9]

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[9] In other cases involving employment-related claims, the Court has looked to Industrial Welfare Commission (IWC) wage orders (see *Martinez*, *supra*, 49 Cal.4th at p. 66) or the common law (see *Metro. Water Dist. v. Superior Court* (2004) 32 Cal.4th 491, 500-501) to determine the identity of an "employer" or "employee." Neither of those sources is relevant here, as IWC wage orders do not address the prompt-payment and penalty obligations in sections 201-203 and generally do not apply to state agencies. (See, e.g., Lab. Code, § 18; IWC wage order 4-2001, Cal.Code.Regs., tit. 8, §§11040 2.(H).) And resort to the common law to define the term "employer" is inappropriate in a case involving state employment, which is held according to statute. As discussed below, the

(continued...)

As an initial matter, the structure of California's state government is non-unitary. The California Constitution establishes the three branches of government and the state civil service. (Cal. Const., art. IV-VII.) Each branch has its own structure and consists of a variety of separate and independent entities, which are many and varied.[10] Each has its own unique mission and sphere of responsibility, and is headed by a separate official, and each maintains a separate workforce to further the agency's individual mandate. As the Court of Appeal explained, "[i]n 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

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(...continued)
statutory framework of state employment makes plain that the employer of any state civil service employee is the specific state entity for which the employee works.

[10] By way of example, there are hundreds of separate departments, agencies, boards, and commissions within the executive branch of California's government, including independent, elected constitutional officers, and the agencies and departments those officers each control (such as the Governor, Lieutenant Governor, Secretary of State, Attorney General, State Controller, and State Treasurer) in addition to the Judicial Branch, the State Senate, and the State Assembly. (See Gov. Code, Title I, Division 2, sections 8900-10606 [Legislative Department]; Gov. Code, Title I, Division 3; Part 1, sections 11000-11840; 12800-15986 [State Departments and Agencies]; Gov. Code, Title I, Division 3; Part 2, sections 12000-12790; [Constitutional Officers]; Gov. Code, Title 8, section 68070-77655 [Courts].) Neither the Attorney General's office nor any other single department has legal control over all the agencies of the State. A list of various entities in the three branches of government is contained within the 2014 "California Roster" maintained by the Secretary of State. (See https://www.sos.ca.gov/admin/ca-roster/2014/pdf/00-2014-ca-roster.pdf.)

agents." (*Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, 1337.) For example, as to the two agencies most relevant to this litigation, the DOJ and the State Controller, the DOJ finds its authority in Government Code sections 15000 et seq., with the Attorney General acting as counsel to state departments and agencies. (Gov. Code, § 11040 et seq.; Gov. Code, § 11157.) The State Controller, as the superintendent of fiscal concerns of the State, has responsibility for auditing and ensuring accountability of the expenditures of public funds. (Gov. Code, § 12410.)

Courts have acknowledged this fundamental feature of state government and have recognized that state agencies are distinct from one another. Thus, for example, in *People ex rel. Lockyer v. Superior Court* (2004) 122 Cal.App.4th 1060, 1077-1079, the Court of Appeal held that "the People" were not obligated to produce documents held by non-party state agencies, because "[e]ach agency or department of the state is established as a separate entity, under various state laws or constitutional provisions." (*Id.* at p. 1078 ["the very nature of state agencies supports a finding that the People should not be deemed to have possession, custody or control over [other agencies'] documents"].)

Likewise, in *Greyhound Lines v. Department of the California Highway Patrol* (2013) 213 Cal.App.4th 1129, 1134-1135, the Court of Appeal treated the California Highway Patrol and Caltrans as distinct entities for purposes of determining whether a judgment against only one of

the agencies could be immediately appealed. The court explained that the two agencies are "governed by different statutory schemes and have different organizations, powers and duties." (*Id.* at p. 1134; see also *First Interstate Bank v. State of California* (1987) 197 Cal.App.3d 627, 633 ["the fact that a state agency is created by statute to discharge a duty constitutionally imposed on the state does not transmute the agency into 'the state'"].)

Consistent with this non-unitary structure of government, California statutes establish that civil servants work for distinct state agencies. Under California law, state civil servants are hired, supervised, and fired by the specific state entity 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].) The power to hire (also called the "appointment power") normally lies with the head of each such entity. It is the employing agency—not the "State of California" in the main—that establishes positions in the state service, as authorized by law and subject to the budget (Gov. Code, § 18805), 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. (See also *Prof. Engineers in Cal. Gov. v. State Personnel Bd.* (2001) 90 Cal.App.4th 678, 689-697.) By

statute, the head of each such department may arrange and classify the work of the department and may consolidate, abolish, or create divisions thereof. (Gov. Code, § 11152.) The head of each department may also adopt such rules and regulations as are necessary to govern the activities of the department and "may assign to its officers and employees such duties as he sees fit." (*Ibid.*) Finally, for "the betterment of the public service, he may reassign to any employees under the chief of any division, such duties as he sees fit." (*Ibid.*)

As further evidence of the role of the appointing power in state government, an examination of the Government Code reveals hundreds of instances where the Legislature has discussed the role of the "appointing power" (also referred to as an "appointing authority") in making personnel decisions involving its separate workforce.[11] Nowhere is any plenary

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[11] (See, e.g., Gov. Code, §§ 1301 [every office the term of which is not fixed by law is held at the pleasure of the appointing power], 18661[appointing authority's personnel practices subject to audit], 19818.12 [appointing power establishes positions in state service], 19173 [appointing power may reject probationer), 19253.5 [appointing power may require medical exam to evaluate capacity to perform job duties, and may demote or transfer employee], 19401 [appointing authorities of state government shall establish an effective program of upward mobility for employees in low-paying occupational groups], 19992.9 [appointing power to evaluate employee performance accurately and fairly], 19991.6 [appointing power to grant pregnancy leave], 18930.5 [appointing power may design, announce, or administer exams to establish employment lists], 19257 [appointing power must pay promised compensation or actual value of services to employee who accepts employment in good faith that is contrary to rules], 19592.2

(continued...)

authority over state employment placed with any overarching entity identified as the "State of California," nor does any one agency or authority —except an appointing power—have plenary authority over the terms and conditions of employment of any given employee.

Indeed, the State Personnel Board, which has jurisdiction to review disciplinary and other decisions of appointing authorities, has concluded as much. Explaining that the "State of California has a decentralized personnel system with each department separately budgeted and administered" and that "[e]ach department has a Director who is the 'appointing power' for that department and has the exclusive authority to hire employees" or to "discharge, demote, or transfer" them, the Board held that a Department of Corrections employee was employed by that department and not the State of California as a whole, as he had claimed. (*In the Matter of the Appeal by Stanley McNicol* (1994) Ca. State Personnel Bd. Case No. 32784, Board Dec. No. 94-14, 1994 WL 16006531, at pp. 15-17.) The Board found that, in light of the "composition, structure, and functions" of the state civil service and the "geographic separateness,

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(...continued)
[appointing power investigates employees suspected of misconduct and may order employee to take a leave pending investigation], 12575 [appointing power certifies payroll roster and Controller acts in reliance upon that certification], 19140 [appointing power may reinstate employee who resigned or service retired].)

administrative, or fiscal relationship" of the various state agencies, it would impose "major changes" on the structure of state government to find otherwise. (*Id.* at p. 16 [holding Department of Corrections not obligated to search for vacant positions for employee at other state agencies after employee became unfit to work in the department].)

When the Legislature subjected state employers to prompt-payment obligations in 2000, it did not intend to depart from this well-established structure or to affect a wholesale change to the civil service system. (See *People v. Yartz* (2005) 37 Cal.4th 529, 538 [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," internal quotation marks omitted].)

To be sure, the Legislature, the Governor, the Department of Finance, the California Department of Human Resources, and the Controller all play a role in the overall administration of certain aspects of the state civil service, such as setting the budget and handling the ministerial tasks of paying salary warrants of individual employees. (See *Tirapelle*, *supra*, 20 Cal.App.4th at pp. 1320-1341 [discussing the roles and limitations of the Legislature, the Department of Personnel Administration, the Department of Finance, the Governor, and the Controller in setting and implementing salary reductions for state employees]; *Prof. Engineers in Cal. Gov. v. Schwarzenegger* (2010) 50 Cal.4th 989, 1010-1041 [discussing the roles

and limitations of the Legislature, the Department of Personnel Administration, the Governor, and the Controller in setting furloughs for state employees].)[12] But this oversight and management do not vitiate or negate the fact that it is the employing entity, and no other entity, that controls the key aspects of the employment relationship, such as hiring, firing, evaluation, supervision, and promotion, and should therefore be considered the "employer" of a state civil service employee for purposes of section 203.

Nor does *Colombo v. State of California* (1991) 3 Cal.App.4th 594 (*Colombo*), on which the Court of Appeal relied (Opn., at p. 15), suggest that "an employer" under section 203 is "the State" as a whole. *Colombo* involved an officer in the California Highway Patrol 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, thus, in effect, seeking to file two discrete claims permitting separate recoveries for a single, work-related injury. (*Colombo, supra,* at p. 596.) To prevent this result, the *Colombo* court held that, for

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[12] Additionally, the State Personnel Board has been given quasi-judicial powers and acts something like a reviewing court, but its authority is limited to reviewing actions taken by appointing authorities. (*Larson v. State Pers. Bd.* (1994) 28 Cal.App.4th 265, 273-274.) While the board's authority is broad, it is not plenary. For example, in a discipline case, unless the evidence is insufficient or the employee can prove justification, the appointing power's action must stand. (*Id.*)

these purposes, Officer Colombo was not an employee of the CHP but was an employee of the State, reasoning that he was "paid by the state, not the CHP." (*Id.* at p. 598.)[13]

At its core, the *Colombo* holding is properly based on the principles of workers' compensation exclusivity and the rule in tort cases that a discrete injury gives rise to one claim for relief. (*Id.* at p. 599.) Importation of that doctrine, however, to a Labor Code section 203 case is inappropriate because, as with most cases involving employment issues, employment liability issues focus on the acts of the particular entity that has control over the terms and conditions of the employee's employment and is responsible for the employment decision at issue.

In sum, under California law, a civil servant works for the individual agency that appoints her into state service.

C. Interpreting a Section 203 "Employer" as an Individual State Agency Is Also Consistent with the Common-Law Understanding of an "Employer."

Because state employment is governed by statute and not contract, (*Miller*, *supra*, 18 Cal.3d at pp. 813-814), neither the common law nor contract principles apply to define the terms and conditions of government

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[13] The *Colombo* court apparently did not consider that Colombo's salary was paid out of money allocated to the CHP (Gov. Code, § 17000), nor the principle that the source of employee income does not control the determination of the employer-employee relationship. (*City of Los Angeles v. Vaughn* (1961)55 Cal. 2d 198, 200.)

employment. Nevertheless, the Legislature's designation of individual state agencies as the employer of their respective employees is consistent with the common-law definition of an employer applicable to the private sector. As this Court has noted, in the context of private sector employment, an "important, perhaps even the principal, test for the existence of an employment relationship" is control over the employee's work. (*Martinez*, *supra*, 49 Cal.4th at p. 76.)

In the context of state service, only individual state agencies provide the requisite direction and control over their workforces. As explained above, state agencies hire their own employees and supervise their work. State agencies assign employees their work duties and can impose adverse consequences on those employees who fail to adequately perform their jobs. (See *supra*, at pp. 20-23.) Only an individual appointing power—and not any single, unitary entity denominated "the State"—exercises that kind of day-to-day control over an employee.[14] The appointing power is

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[14] For these kinds of reasons, it is perhaps unsurprising that, when asked to identify the "employer" in employment discrimination cases, courts in other jurisdictions have regularly found that it is the agency that employs the plaintiff, and not the "State" as a whole, even under statutes that broadly define an "employer." (See, e.g., *Lyes v. City of Riveria Beach, Florida* (11th Cir. 1999) 166 F.3d 1332, 1345-1346 [presumption that separate and distinct governmental subdivisions should not be considered a single employer will control absent an intent to evade the discrimination law]; *Hearne v. Board of Educ. of the City of Chicago* (7th Cir. 1999) 185 F.3d 770, 777 [in suits against state entities, term "employer" is understood to mean the particular agency or part of the state apparatus that has actual (continued...)

therefore the "employer" even under the common-law understanding of that term.

D. Reading "an Employer" in Section 203 as an Individual State Agency Would Give Effect to the Remedies Permitted in the Statute While Avoiding Unnecessarily Complex and Burdensome Trial-Management Issues.

An interpretation of section 203 that requires prompt-payment claims to be brought against individual state agencies would give effect to the statute's purpose while avoiding unnecessary and complicated trial-management issues. Significantly, a civil service employee may obtain complete relief for successful claims under section 203 by suing the individual agency for which he or she worked. Pleading a section 203 claim against "the State" as a whole offers an aggrieved employee no remedial relief that could not be obtained against the agency. (Cf. *State v. Superior Court* (1974) 12 Cal.3d 237, 255 [dismissing State as defendant where Coastal Commission and its members were defendants and were the only entities able to set aside the Commission's allegedly unlawful denial of a development permit].)

(...continued)
hiring and firing responsibility]; *EEOC v. State of Illinois* (1995) 69 F.3d 167, 171–172 [finding that local school districts, not the State of Illinois, are the "employers" of public school teachers in Illinois for the purposes of Title VII]; *Neb. Op. Atty. Gen. No. 34*, 2000 WL 1113394 [individual state departments, boards, and commissions are the employer under the Nebraska Fair Employment Act, and not the "State of Nebraska"].)

By contrast, permitting section 203 claims to proceed against "the State" as a whole would subject the trial court and defendants to a host of trial-management problems. Under McLean's 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 (including that their own conduct was not "willful" within the meaning of the statute), and, if necessary, marshaling evidence to counter the claims. The lack of notice is particularly problematic in light of any potential conflicting interests that one entity might otherwise have against another.[15] Pragmatically, if all branches of government and all state entities were

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[15] For example, in this case, all entities, once they became aware of the litigation, could disclaim responsibility toward any employees whom they did not employ. The state Controller or the Treasurer, to the extent they acted as an agent of any appointing power in making any of the deferred payment transfers, would potentially have conflicting interests vis-à-vis the various appointing powers with respect to any alleged involvement in the late payments. (Cf. *Redevelopment Agency of the City of San Marcos v. Commission on State Mandates* (1996) 43 Cal.App.4th 1188, 1194-1197 [Department of Finance and the Commission on State Mandates were not merely two agents of the State representing the same interests, but were more like adversary parties that both had an interest and should have been named in the underlying writ petition; both had a right to represent their positions separately].)

considered to be encompassed within a single putative class employment lawsuit aimed at the "State of California," the costs of defending the entire State of California or paying any resulting judgment would either have to be absorbed by a single agency or spread among all agencies, even though only one of them employed the plaintiff.

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. In order to determine which state entity-employers may have made late final payments under section 202(a) to their departing employees, each of the hundreds of state entities that appoint individuals in the civil service in the three branches of government would have to be identified, the appropriate authority at each entity contacted and informed about the allegations, conflicts and representation decisions analyzed and made as to each entity, and factual investigation conducted by each appointing power in order to determine if any final payments were not timely made, and if so, whether it might be considered a willful non-payment in each individual case. In the context of state service, it is implausible that the Legislature intended to create such results when it extended to public employees the right enjoyed by their private-sector counterparts to sue a former employer that failed to make prompt payment of final wages. (*Smith v. Superior Court* (2006) 39

Cal.4th 77, 83 [courts "avoid[] a construction that would lead to absurd consequences"].)

Because section 203 authorizes suit only against an individual agency employer and because McLean refused to add DOJ, the agency for which she worked, as a defendant (AA000116-17), her suit against "the State of California" was properly dismissed.

II. SECTION 203'S PENALTY PROVISIONS DO NOT APPLY TO RETIREES.

McLean's suit also fails because, as a retiree, she is not eligible to seek the waiting-time penalties that section 203 authorizes for those who "quit" or who are discharged.

A. The Usual and Ordinary Meaning of "Quit" Is Different from "Retire."

As set forth above, section 203 provides waiting-time penalties when an employer willfully fails to timely pay owed wages to employees who "quit" or who are "discharged." The term "quit" does not encompass those who "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.) The commonly understood meaning of "quit" and "retire" demonstrates their differences, not their similarities. 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."

A "quit" is generally understood to be unconditional and unilateral, can be accomplished at any time at any stage of a person's career, and effects an immediate severance of the employment relationship. By contrast, a retirement may generally not be accomplished until specified conditions are met, including enrollment in a retirement plan, continued funding and membership in the plan, compliance with the plan requirements, and satisfaction of any legal requirements to permit the commencement of withdrawals, which may include reaching a set retirement age. (See, e.g., Gov. Code, §§ 21060-21120 [retirement must be applied for and accepted by the retirement administrator, and may occur only if the underlying conditions to the retirement have been met]; *In re Marriage of Lehman* (1998) 18 Cal.4th 169, 175 [discussing age and years-of-service requirements for company retirement plan].)

Dictionary definitions confirm that the common and ordinary meanings of the two terms are understood to refer to different things. For example, at the time of the passage of AB 2410, making sections 201-203 applicable to state agencies, "quit" was defined as "to give up or resign; let go; relinquish; to give up or resign one's job or position." (Random House Unabridged Dict., 2nd Ed. 1997, p. 1587.) A "quit" does not normally

indicate an intention to cease working entirely in order to pursue other interests, but indicates only an immediate intention to leave a particular job.

A retirement, on the other hand, has most commonly been understood to indicate a withdrawal from gainful employment. At the time AB 2410 was enacted, "retire" was defined as "to withdraw from office, business or active life, usually because of age; to retire at age 60." (Random House Unabridged Dict., *supra*, at p. 1644; see also Black's Law Dictionary (10th ed. 2014), at p. 1510 [defining "retirement" as the "[t]ermination of one's own employment or career, esp. upon reaching a certain age or for health reasons. . . ."].)

In light of the plain-meaning difference between "quit" and "retire," it is no surprise that McLean's complaint itself repeatedly distinguished between the two concepts, and, by repeated use of the connector "or" indicated that they were different terms with different meanings. (See *supra* at p. 8 & fn. 3.)

The common understanding of these terms is reflected in both private- and public-sector employment. Thus, for example, private-sector employees "retire" from their jobs when they become eligible for retirement benefits. (See, e.g., *Marriage of Lehman*, *supra*, 18 Cal.4th at p. 175 [employee "retired" and became eligible for enhanced retirement benefits]; *In re Marriage of Bowen* (2001) 91 Cal.App.4th 1291, 1294 [employee "worked for Federal Express until his retirement," at which

point he began to receive pension benefits].) And private sector employees, who are often employed at-will, may either quit their employment (§ 2922) or be discharged by their employer.

Likewise, under California's civil service statutes, public employment can be terminated in three distinct ways—by termination (discharge), resignation (quit), or retirement. (Gov. Code, § 19996 [tenure of public employment is during good behavior, and may be permanently terminated through resignation, retirement, or removal for cause].) Each is a distinct type of separation.

For example, resignations from employment with the appointing power are generally governed by Government Code section 19996.1 and the California Code of Regulations. (Gov. Code, § 19996.1 [resignations are subject to departmental rules and may only be set aside on grounds of mistake or lack of volition if a petition is filed within 30 days]; Cal. Code. Regs., tit. 2, § 599.825 [employee may resign from state service by submitting written resignation to appointing power and a copy shall immediately be filed by the appointing power]; *Bidwell v. State of California ex rel. Dep't of Youth Auth.* (1985) 164 Cal. App.3d 213, 221-223 [resignation from state employment is a permanent severance from employment that relinquishes rights to industrial disability leave benefits].) As to retirements, a voluntary service retirement is granted upon application to the Public Employee Retirement System (PERS), but only if

the member meets the age and service requirements. (See, e.g., Gov. Code, § 21060.)[16] A discharge, or removal for cause, is accomplished by means of an "adverse action" seeking dismissal from state service based on specified types of misconduct. (Gov. Code, § 19570 et seq.)

Case law also recognizes the distinct nature of each form of separation from state service. For instance, in *Lucas v. State of California* (1997) 58 Cal.App.4th 744, 750-751, 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. Likewise, in *Gore v. Yolo County District Attorney's Office* (2013) 213 Cal.App.4th 1487, 1492, the Court of Appeal explained: "[a]t 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 meaning of the terms used by the Legislature, both in their usual and ordinary meanings, and as commonly understood in the statutory and

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[16] The Legislature has comprehensively regulated separations from civil service by "retirement." (See Gov. Code §§ 20000-22970.89). Some retirements, like McLean's (but certainly not all), might be considered voluntary retirements under the Public Employees' Retirement Law. (See, e.g., Gov. Code §§ 21060-21063.) Other retirements may be simply situational, prompted by circumstance such as age or disability, even if both parties would prefer to continue the employment relationship. (See, e.g., Gov. Code, §§ 21130-21132 [compulsory retirements]; §§ 21150-21176 [disability retirements].)

decisional law of California, make clear that "quit" means something different from "retire."

B. Other Parts of the Prompt-Payment Scheme and the Statute's Legislative History Confirm That Employees Who "Quit" Do Not Include Those Who "Retire."

Other provisions of the prompt-payment statutes confirm that, in this context, the Legislature did not intend for the term "quit" to encompass the term "retire." Importantly, the Legislature specifically distinguished between the two concepts. As noted above, section 202(c) provides that a state employee who "quits, retires, or disability retires" is eligible to defer payment of owed leave into his or her supplemental plan to the next calendar year. (§ 202(c).)

By differentiating between an employee who "quits" and an employee who "retires," the Legislature demonstrated that the words mean different things. Moreover, reading the term "quit" to encompass the term "retire" would render the term "retires" in section 202(c) surplusage, contrary to this Court's admonition that "interpretations that render statutory terms meaningless as surplusage are to be avoided." (*People v. Hudson* (2006) 38 Cal.4th 1002, 1010).

In addition, when the Legislature has employed a term in one place and excluded 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, pp. 238-266.) Because the Legislature included the term "retires" in section 202(c) and excluded it from section 203, it should not be impliedly inserted into section 203. Indeed, when the Legislature added section 202(c) and expressly distinguished between a quit and a retirement by referring to those who "quit, retire, or disability retire," it made no changes to section 203, which it continued to apply only to those who "quit," and not to those who "retired" or "disability retired." (§§ 202(c), 203.) This is a further indication that the Legislature understood the difference between those who quit and those who retire, and intended to extend section 203 only to those who quit, and not to those who retire.

In rejecting this reading of the statute, the Court of Appeal observed that section 202(c) was added to the statutory scheme in 2002, after the prompt-payment law's original enactment, and concerned only state employees. Since section 202 and 203 originally applied only to private employers, the Court of Appeal reasoned, and since "[t]his distinction is not generally made in private sector employment," the court concluded it was not necessary for the Legislature to make the "same distinction" in sections 202(a) and 203 that it made in section 202(c). (Opn., at p. 13.) But as explained above, the distinction between a "quit" and a "retirement" does exist in both the public and private sectors.

In any event, the difference in time between enactment and amendment only further supports the distinction between the two. This is because the Legislature was presumed to have been aware of the difference between a "quit" and a "retirement" in state civil service employment, as set forth in statutory and decisional law, when it made sections 201-203 applicable to state employees in the year 2000 and when it amended sections 201 and 202 in 2002, and yet it did not add state "retirees" to the protections of section 203 at the same time. This can only be interpreted to mean that the Legislature intended for section 203 to apply only to quits and discharges, and not to retirements. (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," [brackets, internal quotation marks, and citation omitted].)

That the Legislature did not intend for the word "quit" to encompass other forms of employee separations is confirmed by the precise definitions it has used to describe the end of an employee's tenure in a job. For example, in section 201.5, subdivision (d), the Legislature set deadlines for final payment to broadcast and production employees who are

"terminated," and specifically defined "termination" to include "any end[ing]" of the employment relationship "whether by discharge, layoff, resignation, completion of employment for a specified term, or otherwise." This provision demonstrates that the Legislature knows how to add, define, and choose classes of employees to whom it will permit prompt-payment penalties. It did the same with section 203 when it specified that only those who "quit" are eligible to demand waiting-time penalties.

Finally, the history behind the Legislature's prompt-payment laws confirms that the statute's penalty provisions apply only to those who "quit" and not to those who "retire." From the time when they were originally enacted until today, California's prompt-payment laws have applied only to employees who "quit" or "resign[ed]." (See Stats. 1911, Ch. 663, § 1, p. 1269 [requiring payment of earned and unpaid wages within five days of when any employee "quits or resigns his employment"]; Stats. 1915, Ch. 143, § 3, p. 299 [providing for waiting-time penalties in the event of late payment of wages to any employee who "resigns or quits"]; Stats. 1919, Ch. 202, § 1, p. 294 [requiring payment within 72 hours to an employee who quits or resigns his employment, unless at least 72 hours previous notice had been given, in which case payment was due at the time of quitting]; Stats. 1937, Ch. 90, § 200, p. 197 [adoption of section 202, entitled "[q]uitting employee not under written contract for a definite period," and requiring payment to such employee not later than 72 hours

thereafter, unless 72 hours previous notice had been given, in which case payment was due "at the time of quitting"].) Throughout the statute's history, the Legislature has never expanded the scope of the laws to cover employees who "retire."

Moreover, contrary to the Court of Appeal's conclusion (Opn., at p. 12), the Legislature's addition of section 202(c), allowing deferrals by employees who "quit[], retire[], or disability retire[]," confirms that employees who "retire" are not those who "quit." When section 202(c) was added to section 202 in 2002, it was intended to ensure that all state employees could continue the past practice of deferring payments for accrued leave time that had been jeopardized when, in 2000, the Legislature required state employers to comply with the immediate final payment requirements of sections 201 and 202. (AA0000059, Cal. Dept. of Personnel Administration, Enrolled Bill Rep. on Assem. Bill No. 1684 (2001-2002 Reg. Sess.) May 30, 2001, p. 3.)

Because the intent of the 2002 amendment was to authorize the practice for all state employees, and not just those who quit or were discharged, the new law would have to both: (1) exempt the deferred distributions from the "discharge" and "quit" requirements in sections 201 and 202, and (2) ensure that amendment's language permitted the deferrals for all types of civil service separations, and not just for "discharges" and "quits." In other words, it is precisely because a retirement is 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.

C. Reading "Quit" as Distinct from "Retire" is Consistent With the Legislative Purpose Behind the Prompt-Payment Laws.

While it makes sense to impose prompt-payment requirements under threat of employer-paid penalty wages in the case of those employees who are unexpectedly or involuntarily discharged or who abruptly quit, the Legislature may reasonably have determined that retirees, who have substantial rights and are likely both leaving on good terms with their employer and on a more secure financial footing, are not in the same position. In *Smith v. Superior Court*, this Court articulated the purpose of the prompt-payment legislation: To ensure that a wage earner does not become a "charge upon the public" or suffer "deprivation of the necessities of life." (*Smith*, *supra*, 39 Cal.4th at p. 82.) As this Court noted, a primary concern behind the imposition of the penalty requirement was to provide a firm incentive to employers to pay laborers promptly, to avoid injury to them and possible injury to the public at large if laborers went unpaid and, unable to meet their obligations, created breaches of the peace. (*Id.* at pp. 87-89.) While this may be the case in the event of discharges or quits,

which by their nature are often unplanned or precipitous, it is less likely to be the case with retirees, who are more likely to be on a secure financial footing than those who have been discharged or who quit. Thus, while state agencies do make prompt payments to employees who "retire" from service as a matter of policy, the Legislature could 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 likely already secured protection in the form of a continuing income stream.

The Court of Appeal's holding also risks injecting confusion into employer-employee relationships. As explained above, "quits" and "retirements" are different kinds of separations that bring with them different consequences for both the employee and employer. (See, e.g., *In the Matter of the Appeal by Mary Catherine Gray* (1999) Cal. State Personnel Bd. Case No. 98-0578, Board Dec. No. 99-08, 1999 WL 33590902, at pp. 1-2 [noting benefits available to an employee who "disability retires," that are not available to other classes of separating employees].) If the line between a "quit" and a "retirement" is blurred, employees and employers will face added difficulty in identifying the rights and responsibilities of each party.

Finally, reading "quit" to not include "retire" would not leave civil service retirees without a remedy in the event of a failure to pay final wages upon retirement. Any retiree alleging that he or she was not paid his or her final paycheck for hours worked would retain the right to pursue any viable claims for non-payment through a civil action or through the Labor Commissioner. (§§ 217, 218.) And while any retiree who made an election to defer payment of his or her accrued leave balances under section 202(b) or (c) has no claim under section 203 for the reasons set forth above, any failure by the employer to timely make the payment into the supplemental retirement plan within the times set forth by statute would be remediable by a petition for writ of mandate.[17]

In sum, because McLean's complaint alleged that she "retired" from state service, section 203 does not grant her a right to sue her employer for penalties.

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[17] If there is an official duty to pay in a particular time, then the act of making the payment is a ministerial act, and mandamus is an appropriate remedy. (*Thorning v. Hollister* (1992) 11 Cal.App.4th 1598, 1603; *Kern v. Long Beach* (1947) 29 Cal.2d 848, 850.) Mandamus is available even if there is not private right to sue for damages. (See *California Association For Health Services At Home v. Department Of Health Services* (2007) 148 Cal.App.4th 696, 705.)

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Dated: February 6, 2015

Respectfully submitted,

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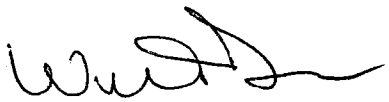

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OK2014902695

CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 8,916 words.

Dated: February 6, 2015

KAMALA D. HARRIS
Attorney General of California

WILLIAM T. DARDEN
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Attorneys for Defendant State of California

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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. 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 February 9, 2015, I served the attached **OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with **GOLDEN STATE OVERNIGHT**, addressed as follows:

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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 February 9, 2015, at Oakland, California.

Denise A. Geare
Declarant

Denise A. Geare
Signature

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