

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. C07451
Superior Court of California, County of Sacramento,
Case No. 34-2012-00119161-CU-OE-GDS
Honorable Raymond M. Cadei

**SUPREME COURT
FILED**

APR 20 2015

Frank A. McGuire Clerk

Deputy

OPPOSITION TO REQUEST FOR JUDICIAL NOTICE

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OPPOSITION TO MOTION FOR JUDICIAL NOTICE

Defendant-Respondent the State of California respectfully submits this opposition to Plaintiff-Appellant's request for judicial notice. Because the materials for which Plaintiff seeks judicial notice were not presented to either the trial court or the Court of Appeal, are not relevant to the issues presented to this Court on review, and are not otherwise the proper subject of judicial notice, Plaintiff's request should be denied.

ARGUMENT

Plaintiff's motion seeks judicial notice of two documents - a collective bargaining agreement for the years 2005-2007, and a W-2 issued by the State Controller from the year 2010 - which she asserts are relevant to the question of whether the State of California, as a whole, on the one hand, or her employing agency, on the other, is the proper defendant in a Labor Code section 203 action for penalties brought by a state agency employee. Neither document is the proper subject of judicial notice.

First, "[r]eviewing courts generally do not take judicial notice of evidence not presented to the trial court." (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444 n.3.) These documents were in existence long before Plaintiff litigated this issue at the trial court level and on appeal, and Plaintiff has not set forth a sufficient explanation for not having presented them below.

Whether the "State of California," as pled by McLean, is the proper defendant to a claim under Labor Code section 203 was squarely presented to the trial court as one of two independent grounds asserted in Respondent's demurrer (AA000011, AA000012), and has been the subject of extensive briefing throughout this litigation in both the trial court and the Court of Appeal. (See, e.g., Plaintiff's Opposition to Amended Demurrer, pp. AA000079-AA000094 [arguing the State of California was properly named as the defendant]; Responding Brief of the State of California,

California State Controller's Office (filed Dec. 26, 2013), pp. 31-36; Reply Brief of Appellant Janis S. McLean (filed Feb. 10, 2014), pp. 14-20.) Here, Plaintiff admits that she did not present either document to the trial court or the Court of Appeal, even though the issue of whether the State could properly be sued under Labor Code section 203 was in fact litigated in both courts by McLean. (Request for Judicial Notice, pp. 7-8.) Whether this issue was listed first or second in any of the parties' briefs (Request for Judicial Notice, p. 8) is irrelevant and does not excuse Plaintiff's failure to present these materials below. (See *Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 325, as modified (Jan. 18, 1996) [declining to take judicial notice of materials not presented to the superior court where the issue on appeal was whether the trial court erred in sustaining a demurrer to the complaint].) Moreover, while Plaintiff argues that her request is necessary to counter "factual" assertions, this matter arose in the context of a demurrer, and the issues involved are accordingly issues of law, and not, as McLean's motion would suggest, issues of disputed material fact.

Second, it is clear from Plaintiff's motion that she asks this Court to take notice not of the existence of the submitted documents but of facts, and inferences from those facts, that she asserts are contained within them, either directly or by implication. (See, e.g., Request for Judicial Notice, pp. 4-5.) Such a request fails because "matters of which judicial notice is taken are considered only for their existence, not for the truth of the matters asserted in them" (*In re Marriage of Eaddy* (2006) 144 Cal.App.4th 1202, 1209, citing *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063-1064, overruled on other grounds by *In re Tobacco Cases II* (2007) 41 Cal. 4th 1257.)

Third, the submitted materials are neither relevant nor helpful to the resolution of the issues presented in this case, which involve the statutory meaning of the term "employer" in Labor Code section 203. (See *Deveny*

v. Entropin, Inc. (2006) 139 Cal.App.4th 408, 418 [“a litigant must demonstrate that the matter as to which judicial notice is sought is both relevant to and helpful toward resolving the matters before th[e] court”].) As to the MOU Plaintiff proffers, negotiations and entry into contracts between the “state employer,” on the one hand, and recognized bargaining units for state employees, on the other, are governed by the Dills Act, which, unlike Labor Code section 203, specifically defines the terms “employer” and “state employer” for such purposes. (See Gov. Code, § 3513(j) [defining those terms to mean “the Governor or his or her designated representatives”]; § 3517 [Governor’s representatives to meet and confer in good faith with representatives of recognized employee associations in an attempt to reach an agreement]; § 3517.5 [agreement to be codified in an MOU]; § 19815.4, subd. (g) [Department of Personnel Administration acts as representative of Governor for purposes of section 3517].) Accordingly, the identity of the “employer” for purposes of meeting and conferring with state employee bargaining units under the Government Code provisions of the Dills Act is irrelevant to the determination of the “employer” responsible for willfully failing to issue a timely final paycheck to a discharged or quitting employee under Labor Code section 203.

Moreover, Plaintiff has not explained in her motion the relevancy of the MOU to any final payments due her as a result of her retirement in 2010; the document she presents to this Court is facially effective only through June 30, 2007, and she fails to explain to the Court any continuing viability of the Agreement past its expiration date.

Similarly, the fact that any individual state employee’s W-2 was issued by the State Controller - and accordingly bears the name of the Controller (“State of California, John Chiang, California State Controller”)

- is irrelevant with respect to the Legislature's intent as to the intended "employer" for purposes of Labor Code section 203.

Finally, Plaintiff has not laid an adequate foundation for the authenticity of the W-2 document attached as Exhibit B in her motion. (See *In re Estate of Dye* (2001) 92 Cal.App.4th 966, 985 [declining request for judicial notice where document lacked foundation].) The declarant simply states that Exhibit B is a true and correct copy of McLean's Form W-2 Wage and Tax Statement "obtained" from Plaintiff. (Decl. of Ian J. Barlow in Support of Plaintiff's Motion for Judicial Notice, pp. 1-2; see *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 525-526 [counsel's statement to court regarding source of document, even when declarant with personal knowledge of document is available, is not sufficient to establish authenticity].)

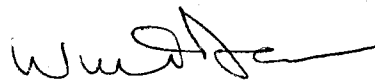
CONCLUSION

The request for judicial notice should be denied.

Dated: April 20, 2015

Respectfully submitted,

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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 April 20, 2015, I served the attached **OPPOSITION TO REQUEST FOR JUDICIAL NOTICE** by placing a true copy thereof enclosed in a sealed envelope with **GOLDEN STATE OVERNIGHT**, addressed as follows:

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County of Sacramento
720 Ninth Street
Sacramento, CA 95814

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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 April 20, 2015, at Oakland, California.

Denise A. Geare

Declarant

Denise A. Geare

Signature