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

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INTRODUCTION

In the context of state service, the term "employer" in Labor Code section 203 refers to the employee's appointing power, which bears responsibility for the predicate acts leading to liability or non-liability under the statute's express terms.[1] Defendant's interpretation is consistent with the realities of state employment, which, as structured in California's Constitution and laws, is with each employee's employing agency.[2] It is also consistent with the State Administrative Manual, which confirms that each state agency may make the final wage payment to its departing employees, from the agency's own revolving fund, so that prompt final payment for purposes of section 201 and 202 can be made.

Stressing form over substance, McLean argues that occasional reference to "state employment" and similar terminology in the statutes, or in discussions of them, should be interpreted to mean that state employees work for a unified, amalgamated entity consisting of every separate employing department, agency, board, commission, or other such entity in the state. McLean's interpretation is inconsistent with the legislative history behind the relevant amendments to the prompt-payment scheme, which suggests that the Legislature understood that the final wage payment obligation rested upon each individual state agency. Moreover, as a matter of statutory interpretation, it is clear that such adjectival references to the "state" act as a statutory signal, clarifying when any given provision applies to employees in state service, as opposed to municipal or private employees

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

2 For ease of reference, Defendant will use the word "agency" to refer to the various appointing powers in the branches of state service, including departments, agencies, commissions, boards, and other employing entities.

with respect to whom the statutes prescribe differing rights and obligations. In fact, the prompt-payment scheme itself contemplates that the "state employer" is the appointing power. By way of example, section 201(c) contemplates the circumstance where "the state employer discharges an employee." Since it is clear that state employee discharges are effected by the appointing power, the Legislature's use of the term "state employer" must be understood as a reference to the appointing power.

McLean's reliance upon the civil service provision in the California Constitution, together with the existence of a uniform payroll system, does not aid her claims. When examined closely, both sets of laws expressly confirm that "state employees" are in fact employed by the state agencies for which they work. Moreover, neither is McLean aided by the cases, statutes, and materials that she cites that arise in other statutory contexts, such as in workers' compensation, collective bargaining, and federal taxation matters. These separate statutory schemes do not control the definition of the "employer" in the context of a section 203 claim; those schemes involve other concerns and, unlike section 203, are governed by legislative definitions of the applicable "employer" for purposes of each. In fact, in cases like the ones cited by McLean, where it was clear that the employee worked for a single state agency and where no attempt was being made to expand the scope of suit *beyond* that agency, references to the employee working for the "state" in such cases can be understood as referring to employment with an agency of the state.

In the context of Labor Code wage-and-hour-penalty claims, the employment relationship of any given state employee is not with an indivisible, monolithic entity called the "State of California," but is instead with the employee's specific appointing power. Reading section 203 to reflect that reality would give section 203 plaintiffs all the relief to which they may be entitled, without imposing unwarranted litigation burdens upon

entities that have nothing to do with any given state agency employee's employment.

As for the second issue upon which review was granted, section 203 applies only to employees who quit, not to those who retire. Contrary to McLean's view, the plain meanings of "quit" and "retire" are different. McLean's approach to statutory interpretation is to redefine terms used by the Legislature to higher levels of abstraction in order to find some overlapping common meaning with other, different terms also used in the same statute. That approach, however, fails to respect the Legislature's explicit use of differing terminology and improperly renders its choices as surplusage. When the statutory scheme is properly construed, the Legislature's use of the phrase "retires or disability retires" following the word "quit" in section 202(c) was not, as McLean contends, meaningless, but was instead intended to refer to three entirely different types of separations. More importantly, as section 201.5(d) demonstrates, while the Legislature knows how to, and could have, broadly defined liability for penalties in section 203 to include retirements or any other type of "ending" of an employment relationship, it did not do so. The Legislature has often excluded certain types of prompt-payment violations from the penalty provisions, and did so here. If McLean is dissatisfied with the Legislature's choice, her remedy is to ask it to amend section 203. The decision of the Court of Appeal should be reversed.

ARGUMENT

I. A STATE EMPLOYEE'S APPOINTING POWER IS HIS OR HER "EMPLOYER" FOR PURPOSES OF SECTION 203.

A. The Text of Section 203 Indicates that the "Employer" Of a State Employee is the Appointing Power.

The text of section 203 demonstrates that a state employee's appointing power is the "employer" contemplated by the statute's

proscriptions and defenses, and not the monolithic "state employer" envisioned by McLean. Section 203 imposes liability upon an employer that "willfully"[3] fails to pay, without "abatement or reduction," any wages of an employee who is discharged or who quits, unless the employee "refuses to receive" or "avoids payment" when fully tendered. (§ 203(a).)

Giving the statute's language a "plain and commonsense meaning" (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 577) in the context of state service, it is clear that the appointing power is the intended section 203 "employer" of any state agency employee, because it is the appointing power that:

- Would have knowledge of when the final paycheck is due, because it would have terminated the employee or received notice of the employee's resignation. (See, e.g., Gov. Code, § 19574(a) [appointing power takes adverse actions]; Cal. Code Regs., tit. 2, § 599.825 [resignations to be submitted to appointing power].)
- Would be aware of the amount of wages due the employee on the employee's final pay date, because, as the employer, it would track and account for the number of hours worked, and amount of leave taken, by its employee in the employee's final month of employment. (Gov. Code, § 12475 [appointing power must certify attendance and payroll roster to controller].)

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[3] For purposes of section 203, a "willful" non-payment occurs when the employer "intentionally" fails or refuses to pay wages when due. (*Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7-8 [177 Cal.Rptr. 803].) However, a reasonable, even if mistaken, good faith belief that wages are not owed is a defense to liability. (*Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.* (2002) 102 Cal.App.4th 765, 782; Cal. Code Regs., tit. 8, § 13520, subd. (a).)

- Would issue the separating employee's final paycheck from *its own revolving fund* when needed to ensure prompt-payment in compliance with section 201 and 202. (State Administrative Manual, § 8595.)[4]
- Would receive the separating employee's election for retirement plan deferral of accrued leave and would be required to ensure timely processing of the request presented to it. (§ 202(b).)
- Would necessarily be aware of facts involving pay disputes regarding the amounts owed, reasons for late payments, and whether the employee attempted to evade payment.

In light of the nature and structure of state employment, the Legislature's reference in section 203 to a "willful failure" to timely pay all wages actually owed, without "abatement or reduction," to an employee

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[4] Responding to Defendant's reliance upon State Administrative Manual (SAM) section 8580.4 (Opening Brief on the Merits ["Opening Brief"], at p. 16), which places responsibility for section 201 and 202 compliance upon the individual employing agency, McLean claims that the SAM cannot mean what it says, because, according to her, responsibility for final wage payment "is given to the Controller's office." (Answer Brief on the Merits ["Answer Brief"], at pp. 29-30.) However, other provisions of the SAM demonstrate that "departments" – and not the Controller – may issue checks from each office's revolving fund for their separating employees that "are in immediate need of their final salary payments." (See SAM, § 8595, available for review at: http://www.documents.dgs.ca.gov/sam/SamPrint/new/sam_master/rev427sept14/chap8500/8595.pdf.; *Mandel v. Myers* (1981) 29 Cal.3d 531, 543 [relying upon provision in State Administrative Manual].) Thus, the responsibility for making the prompt final wage payment under section 201 and 202 does rest with the employing agency. Regardless, as discussed infra at p. 14, even those employee wages that are not initially advanced from an agency's revolving fund would in any event ultimately be funded from the employing agency's state budget fund allocations.

who is discharged or who quits, unless the employee "refuses to receive" or "avoids" payment when fully tendered, must refer to the appointing power. Therefore, the most reasonable interpretation of the language of section 203 would extend "employer" liability to the appointing power, and not to the "unified state employer" entity contemplated by McLean's pleading.

B. Other Provisions Within The Prompt-Payment Scheme Do Not Alter This Conclusion.

McLean's contrary arguments, based on other provisions within the prompt-payment scheme, do not impose liability on a unified "state employer." For example, McLean asserts that section 220(a), which exempts employees "directly employed by the State of California" from certain provisions of the Labor Code, defines her "employer" as the entire "State of California." (Answer Brief, at p. 10.) This assertion is incorrect; when the Legislature intends to define the term "employer," it knows how to do so.[5] Section 220(a) is not definitional.

McLean is also incorrect in arguing that the section 220(a) exemption language implies legislative intent for coverage liability under section 203 to run against a monolithic state employer instead of the appointing power. (Answer Brief, at p. 12-13.) McLean's interpretation is inconsistent with the legislative history behind the amendment to section 220(a) that first brought state employees within the reach of section 203. (Stats.2000, c.885 (A.B. 2410).)

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[5] See, e.g., § 3300 (defining "employer" for purposes of workers' compensation); Gov. Code, § 3513(j) (defining "state employer" for purposes of collective bargaining); Gov. Code, § 12926(d) (defining "employer" for purposes of the Fair Employment and Housing Act.)

In enacting A.B. 2410, the Legislature realized that the bill would require "all state departments and agencies" to issue pay warrants within specified time periods after termination or resignation of service and would impose additional costs and pressure on "state agencies and departments" to meet these provisions. (See Defendant's Motion Requesting Jud. Notice, at p.10; Declaration of Joel Tochterman in Support of Defendant's Request For Jud. Notice (Tochterman Decl.), ¶ 5, Ex. A, at pp. 93-95; Declaration of William T. Darden In Support of Request for Judicial Notice (Darden Decl.), ¶ 9, Ex. E.) It also recognized that applying these provisions, which are enforced by the State Labor Commissioner, to state agencies, would create a situation where "one state entity is prosecuting *another*." (i.e., another state agency.) (See Tochterman Decl., ¶ 5, Ex. A, at pp. 109-112 [emphasis added]; Darden Decl., ¶5, Ex. A [emphasis added].) These references, together with the other legislative history documents of which Defendant requests judicial notice, demonstrate that the Legislature understood that the payment requirements - and the prosecution of any section 203 violations - would run against the appointing power.

Second, the use of language regarding the "State of California" in section 220 must be understood in context. Until the enactment of A.B. 2410, the prompt-payment laws applied only to the private sector. (Stats.1937, c.90, p. 200, § 220.) A.B. 2410 applied certain provisions to state agencies, but continued to exempt state agencies from others. (Stats.2000, c.885, (A.B.2410) § 1.) Following the amendment enacted by A.B. 2410, the section continued to exempt and apply various provisions within the scheme to local public employers. (§220(b).) Therefore, following A.B. 2410's enactment, differing statutory obligations and exemptions applied to different types of employers, depending upon whether the employer is: 1) a city, county, or municipal employer; 2) a state employer; or 3) a private-sector employer. It was accordingly

necessary for the Legislature, in those provisions applicable only to state employers, to use the term "State of California" or "state employer" as an identifier, distinguishing state employers, as the relevant entities, from the other covered or exempted types of employers in the statutory scheme.[6]

Third, McLean's "directly employed" theory is simply inconsistent with the realities of state employment. To be sure, state agency employees are "directly employed" by state *agencies*, and such employees might be considered "directly employed" by the state insofar as they work for an agency *of* the "State of California." However, in the context of section 203, state employment is no broader than that.

Further, despite McLean's reliance on the use of the term "state employer" in section 202 and elsewhere (Answer Brief, at pp. 12-15, 23-25) such terminology does not demonstrate the existence of a separate and unified "state employer" entity that is separate and apart from the appointing power.[7] As discussed above with respect to section 220, any discussion, in section 202, of provisions intended to apply only to state employers, as opposed to private or local public employers, must

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[6] In fact, demonstrating this point, the legislative history regarding AB 2410 is replete with comparisons to "private sector" employee who enjoyed the prompt-payment protections, as opposed to "state employees" who did not. (See Tochterman Decl., ¶ 5, Ex. A, at pp. 44-45, 55, 73, 113, 118, 130, 139; Darden Decl., ¶¶ 6-8, 10-12, Ex. B, C, D, F, G, H.)

[7] While McLean asserts that the "State" is a *separate* unified employer involved in "wage payment transactions" together with the appointing power and the state employee (Answer Brief, at p. 24) she refers only to the State Controller, as the "other entity," because of its alleged involvement in certain payroll transactions. (Id., at pp. 24-25.) This assertion is inconsistent, however, with McLean's claim that the State as a "whole" employed her. Regardless, while the State Controller does employ its own employees, McLean was not one of them.

somewhere *necessarily* make clear that the discussion is about a "state" employer, so as to clarify the intent of the provision as being applicable to state, and not to private or local public sector, employees.[8]

Similarly, the Legislature's use of the terms "state employer" and "appointing power" in the same sentence in section 202(b) does not demonstrate that they are "separate" entities, as McLean claims. To the contrary, had the Legislature only used the phrase "appointing power" in section 202(b) and (c) without the clarifying "state employer" language, confusion would have been created as to the applicability of the new exemptions to private-sector or other local public entity employers, despite the fact that the exemptions were intended to apply only to state employees and their state employer. Without the statutory context of employment by a "state employer," any stand-alone use of the term "appointing power" by the Legislature would have yielded a statutory provision that was confusing and unclear.

In fact, other parts of the prompt-payment statutory scheme confirm Defendant's interpretation of the meaning of the term "state employer" as referring to the appointing power and not to any state monolith. For example, section 201(c) permits a supplemental distribution into the next tax year "when the *state employer discharges* an employee." (§ 201(c) [emphasis added].) Since "discharges" are undertaken by the *appointing*

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[8] While McLean rejects the argument that the word "state" acts as a modifier of the word "employer," the Legislature has routinely used similar adjectives to modify the term "employer" in other contexts. (See, e.g., Gov. Code, § 3595 ["higher education employer']; Gov. Code, § 7500.5 ["local public employer"]; Un. Ins. Code, § 710.4 ["public school employer"]; Un. Ins. Code, § 1118 ["domestic service employer"]; Un. Ins. Code, § 17001 ["private sector employer"]; Pub. Util. Code, § 99560.1 ["transit district employer"]; Educ. Code, § 69959 ["off-campus private sector employer"]; Health & Safety Code, § 1357.514 ["small employer"].)

power, which specifies the decision to terminate and sets an effective date (Gov. Code, § 19574(a)) it is accordingly the action of the *appointing power, as the "state employer,"* that would trigger section 201(c).[9]

Also unavailing is McLean's attempt to characterize the legislative history of A.B. 1684 as demonstrating the existence of a monolithic state employer. (Answer Brief, at pp. 12-13.) In the report McLean relies upon, the Department of Personnel Administration (DPA) (now the California Department of Human Resources, or CalHR) provided an analysis and recommendation as to whether the Governor should sign the bill. Nothing in the report addressed the issue of the identification of the section 203 "employer" in state service. Instead, the report focused on the issue of whether *state* (not private sector) employees should have restored to them the previously enjoyed benefit of supplemental deferrals upon a discharge or quit. As with the amendment to section 202 itself, any discussion of that amendment in the report *must* necessarily include a reference to the "state employer" in order to differentiate the provision under discussion as one applicable only to the state and not to private sector employers or local public agencies.[10]

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[9] The fact that the State Personnel Board has appellate jurisdiction over the discharge, if appealed, does not alter this result. If the employee appeals, and the SPB reverses, the SPB may order reinstatement and backpay. (Gov. Code, § 19584.) However, it is the appointing power's discharge of the employee on a date certain that would trigger the prompt-payment statute. (§ 201.)

[10] Moreover, the DPA's use of the phrase "the state employer" in the report must be understood in context of that agency's statutory role in collective bargaining. A.B. 1684's primary goal was the approval of a new MOU, negotiated by the DPA with the recognized bargaining unit for state attorneys. Collective bargaining in state employment is governed by the Ralph C. Dills Act. (Gov. Code, §§ 3512 et seq.) Unlike the prompt-payment statute, the Dills Act specifically defines the term "state

(continued...)

C. The Structure of California's Government Is Consistent with the Appointing Power Being the "Employer" for Purposes of Section 203.

Minimizing the role of the state employee's appointing power, McLean claims that the appointing power is merely the "place of work," akin to a department or unit within a large corporation. (Answer Brief, at p. 26.) However, a sovereign state government is not the equivalent of a private corporation; the relationship between the Department of Justice, on the one hand, and - for example - the Delta Protection Commission (or the Contractors State License Board, or the Student Aid Commission, or the Department of Toxic Substances Control, or the Supreme Court, or the Legislative Counsel, or any of the hundreds of other appointing authorities within state government) on the other, is far different than the relationship between different organizational units within a private company. As discussed in detail in Defendant's Opening Brief, each state agency has a separate statutory mission and organization, some even within different coordinate branches of government. (Opening Brief, at p. 19.) Each is headed by a different elected or appointed official, constitutional officer, board, or commission. (Opening Brief, at p. 18-20.) These disparate state

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(...continued)
employer," in the context of collective bargaining, to mean "the Governor or his or her designated representatives." (See Gov. Code, § 3513(j).) By statute, DPA is the Governor's designated representative. (Gov. Code, §§ 3517, 19815.4, subd. (g); *Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, 1322-1323.) Since each state employee bargaining unit represents employees working in many different state agencies, bargaining with such groups necessarily occurs in a broader context, with DPA acting on behalf of the statutory "state employer" for those specific purposes. DPA's use of the term, in the context of approval of the MOU negotiated by DPA with the state attorneys' union, is thus not instructive for purposes of the issue before this Court. (*Elsner v. Uveges* (2004) 34 Cal. 4th 915, 934, note 19 [EBR may be instructive on matters of legislative intent, but will not necessarily be given great weight].)

entities are not "unified" into any single entity that can or should be comparable to a private company.

McLean's assertion that the civil service provision in the state Constitution demonstrates that the State is a "unified employer" is incorrect. The state Constitution itself repeatedly refers to state employees as being "appointed or employed by" their respective employing agencies. (See, e.g., Cal. Const., art. VII, § 4(a) ["employees appointed or employed by the Legislature, either house, or legislative committees"]; Cal. Const., art VII, § 4(b) ["employees appointed or employed by councils, commissions or public corporations in the judicial branch"]; Cal. Const., art VII, § 4(e) ["employee(s) selected by each board or Commission"]; Cal. Const., art VII, § 4(f) ["employees of the Governor's office . . . and employees of the Lieutenant Governor's office directly appointed or employed by the Lieutenant Governor"]; Cal. Const., art VII, § 4(m) [selected "deputies or employees" employed by the Attorney General, the Public Utilities Commission, and the Legislative Council]; Cal. Const., art. XXXV, § 7 [exempting Institute of Regenerative Medicine and "its employees" from civil service].) These state employees, according to California's Constitution, are employed by their respective appointing powers.

Furthermore, despite McLean's assertions, the mere existence of a state "civil service" does not alter this result. The predecessor to the current civil service provision (presently found in Article VII of the State Constitution) was originally adopted in 1934, establishing a merit system intended to eliminate the spoils system in state government. (*California State Employees' Assn. v. Williams* (1970) 7 Cal.App.3d 390, 398 (citing Proposed Amendments to Constitution, Propositions and Proposed Laws, California Secretary of State (1934) p. 12).) While the civil service structure does attempt to ensure efficiency in government, fair treatment of employees across agency lines, and elimination of patronage-based

appointments into state employment by appointing powers, it does not create a monolithic state employer entity.[11] (*California State Personnel Board v. California State Employees Ass'n* (2005) 36 Cal.4th 758, 769, 772-773 [referring to appointing powers as "state employers" that must follow civil service rules].)

Importantly, the constitutional civil service provision is implemented by the state Civil Service Act. (Gov. Code, § 18500 et seq.; *California State Employees' Assn. v. Williams*, 7 Cal.App.3d 390, 395.) The purpose of the Civil Service Act, as with the constitutional provision it implements, is to promote efficiency in state service and to ensure that appointments are based on merit. (Gov. Code, § 18500.) As set forth in Defendant's Opening Brief, the Civil Service Act itself contemplates employment of state employees by the employees' various appointing powers. (Opening Brief on the Merits, at pp. 21-25.)

Also unavailing is McLean's reliance on the accounting and oversight roles played by the Controller or other similar agencies. (Answer Brief, at pp. 24-26) Just as private employers may have auditors, accountants, banks, outside counsel, and resort to judicial courts to determine disputes, so do state agencies, by virtue of entities like the Controller, the Treasurer, CalHR, and the State Personnel Board. In the context of state government, of course, these functions work somewhat differently than in the private sector, but that is because of the unique nature of the sovereign, acting, through its separate agencies, in the role of an employer.

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[11] In fact, the civil service does not even encompass all the state employees envisioned by McLean's claimed "unified state employer" entity. (See, e.g., Cal. Const., art. VII, § 4.)

McLean asserts that since the responsibility for the "payment of wages" is with the Controller's office, the State of California must be McLean's employer. (Answer Brief, at pp. 24-25.) Her analysis is faulty. While the Controller's role in auditing and transacting payments through a uniform payroll system ensures accountability in the expenditure of state funds by state agencies in an oversight role, that role does not create a monolithic state employer. To the contrary, as set forth supra at note 4 and surrounding text, while non-revolving fund warrants for regular pay are issued by the Controller, the appointing power would issue the final separation wage check from its own revolving fund to ensure prompt-payment to a separating employee pursuant to section 201 or 202. Moreover, it is the appointing power and not the "State" as a whole that tracks and accounts for hours worked and leave taken by any departing employee, and that is required by law to certify the payroll and attendance to the State Controller. (Gov. Code, § 12475.) The Controller's issuance of such funds after such certification is a ministerial act, once it is satisfied that the payment is proper and that the funds exist for such payment. (Gov. Code, § 12440.) Importantly, McLean's salary during the class period was paid out of budget monies allocated to the Department of Justice in the State Budget Act. (See, e.g., Stats 2010, Ch. 712, at p. 4403-4406.) Thus, agency funds pay the salary of agency employees.

McLean further asserts that Government Code section 12470, which creates a "uniform payroll system," demonstrates the existence of a unified state employer. (Answer Brief, at p. 24.) However, McLean's citation to the uniform payroll system statutes actually supports Defendant's argument, not McLean's, as the uniform payroll statutes specifically and explicitly recognize that state employees *work for the agencies that are included within* the payroll system. For example, Government Code section 12473 expressly provides that the "pay roll period *of employees of a*

state agency shall not be changed by inclusion of the agency into the uniform state pay roll system . . ." (Gov. Code, § 12473 [emphasis added].)[12] In light of the fact that the uniform payroll system statutes specifically contemplate that the state agency is the employer, and not the Controller or the entire "State of California," McLean's admission that her litigation in the main involves the State's uniform payroll system (Answer Brief, at p. 32) demonstrates the invalidity of her claims of a unitary state employer.

D. McLean's Attempt To Rely On Extra-Record Facts Is Improper And Unavailing.

McLean's attempt to rely on extra-record facts, such as a W-2 and a collective bargaining agreement, in order to bolster her claim of a state monolith, is improper, as argued in Defendant's Opposition to McLean's Request for Judicial Notice. (See Defendant's Opposition to Request for Judicial Notice, filed April 20, 2015 [arguing that McLean did not articulate a sufficient reason for her failure to present these documents to the trial court, and that McLean improperly seeks to have this Court take notice of facts and factual inferences contained in the documents and not just the existence of the documents themselves].)

Regardless, the "facts" she attempts to proffer are substantively irrelevant to the determination of the proper "employer" under section 203 of the Labor Code. McLean's reliance on the issuance of a W-2 by the State Controller, for instance, does not support her assertions. As discussed *supra*, while the Controller, as the state's auditor, does distribute regular

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[12] Section 12470 permits the Controller to provide for the "orderly inclusion of state agencies into the system." (Gov. Code, § 12470.) Section 12471 provides that the system shall provide "adequate accounting procedures *to enable each state agency to properly account salary and wage expenditures* under the uniform state accounting system." (Gov. Code, § 12471 [emphasis added].)

pay checks and the W-2, final paychecks to separating employees are normally to be issued out of the appointing power's revolving fund. (See note 4, supra, and accompanying text.) Moreover, under California law, the issuance of an employee's W-2 does not control the "employer" determination. California courts have rejected the claim that federal laws and regulations affecting the issuance of payroll and tax documents, such as the W-2, control the determination of an "employer" for purposes of the California Labor Code's wage statutes. (*Futrell v. Payday California, Inc.* (2010) 190 Cal.App.4th 1419, 1431 [payroll processing company which issued paychecks, drawn on its own bank account, issued W-2, and handled the ministerial tasks of calculating pay and tax withholding was not worker's "employer" for purposes of worker's claim under the Labor Code for failure to pay overtime].)

As to the collective bargaining agreement McLean proffers, as discussed above, recognized state employee associations bargain with the "state employer," which is defined in the Dills Act as DPA/CalHR (acting as the Governor's designee for purposes of bargaining with recognized employee associations.) In light of the separate context and definition of the applicable "employer" under the Dills Act, nothing in the bargaining agreement suggests that McLean's section 203 "employer" is the Governor or his designee, CalHR.

Regardless, McLean's conflicting theories of employment - by the Controller for tax purposes, or by CalHR for collective-bargaining purposes - are inapposite for purposes of the "employer" determination under section 203. Importantly, such theories are in any event also inconsistent with the "unified" state employer theory McLean espouses in this case.

E. Contrary to McLean's Assertions, No Prior California Case Has Established that the State Is a Unified Employer, as Pled by McLean.

McLean is also wrong in claiming that an "unbroken line of cases" establishes a monolithic state employer for purposes of section 203. (Answer Brief, at p. 16-18.) To be sure, the "State of California" is often subject to suit, and state employees are often considered and referred to as being employed "by the State" because of their employment by a particular state agency. But none of the cases she cites has arisen in the context framed by McLean's pleadings, in which she asserts a right to singularly sue, as her "employer," hundreds of separate state agencies, none of which employed her or had anything to do with the wage payment about which she complains.

Importantly, the cases she cites arise in the context of tort, workers' compensation, collective bargaining, and other areas of law, which involve different issues and considerations, different statutory schemes, and/or distinguishable definitions of the applicable "employer." As one respected employment treatise has noted, "[c]ounsel should be careful when using workers' compensation or tort authority as a guide in determining whether an employment relationship exists in the wage and hour context. Although some legal principles may be similar, the results may differ." (Wilcox, *California Employment Law* (2015) § 1.04[1][a], at p.1-14 - 1-15].) Nevertheless, these are precisely the cases upon which McLean relies.

For instance, McLean continues to heavily rely upon *Colombo v. State of California* (1991) 3 Cal. 4th 594, a workers' compensation case in which the Court of Appeal considered whether Plaintiff Colombo, a highway patrol officer, could sue the "State of California" in workers' compensation and, at the same time, also sue the same defendant – the "State of California" – as a "third-party tortfeasor" for purposes of a civil action

arising out of the same accident. (*Colombo*, 3 Cal.App.4th at p. 595.) The case is inapposite, for many reasons.

Colombo *conceded* that he was "an employee of defendant State of California" for purposes of both of his separate lawsuits against the "State of California." (*Colombo*, 3 Cal.App.4th at p. 597.) This admission, by itself, would have doomed his claim that the state was somehow *also* a "third-party tortfeasor" with respect to *itself.* Importantly, the case arose in workers' compensation, which, unlike the prompt-payment statute, specifically defines the term "employer" to include "[t]he State and every State agency." (§ 3300.) Finally, Colombo's suit involved two departments (the California Highway Patrol and the Department of Transportation) that are both contained within a single state agency (the Business, Transportation and Housing Agency, now called the California State Transportation Agency.) (*Colombo*, 3 Cal.App.4th at p. 598.) Under those facts, which are inapposite to the facts here, the Court of Appeal found that his complaint failed to negate application of the exclusive remedy provisions and was subject to demurrer. (Id. at p. 599.)[13]

In addition, none of the other cases McLean cites creates the unified state employer colossus that she imagines. For instance, McLean cites *California Correctional Peace Officer's Association v. State* (2010) 189 Cal.App.4th 489, a collective-bargaining case in which, as previously noted,

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[13] Similarly, McLean's citation to other workers' compensation cases (Answer Brief, at pp. 17-18), as with *Colombo*, involve different considerations and different statutory schemes. (*Wright v. State* (2015) 233 Cal.App.4th 1218 [raising question as to whether a prison employee's housing was on "employer" premises when employee was injured walking to work]; *Fields v. State* (2012) 209 Cal.App.4th 1390 [state not liable in *respondeat superior* for tortious driving by employee who was driving to work from a medical appointment]; *Vaught v. State* (2007) 157 Cal.App. 4th 1538 [suit arising from injury to park ranger in housing on premises was barred by workers' compensation bunkhouse rule].)

the Governor through his designee the DPA, is the "employer" under the governing statute. (See *supra* at section I.B.) Other "State of California" cases cited by McLean involve only a single agency. (*Valenzuela v. State of California* (1987) 194 Cal.App.3d 916 [California Highway Patrol]; *Lucas v. State of California* (1997) 58 Cal.App.4th 744 [Department of Consumer Affairs]; *Sacramento Typographical Union No. 46 v. State of California* (1971) 18 Cal.App.3d 634 [Office of State Printing].) In such single agency cases, counsel (and courts) may refer to employment by the "State of California" but this use of language must be understood to mean employment by the state agency, which is the identified actor and sole defendant, and not to employment by a unified monolith as envisaged by McLean. These cases simply do not stand for the proposition advanced by McLean.

F. Practical Considerations Favor Defendant's Interpretation Of The Statute.

McLean's claim that her case will raise no practical difficulties in litigation, and will not sweep unnamed and uninvolved agencies into any burdensome litigation, is without merit. Should this Court find that a retiree like McLean has a right to sue under section 203, and also has a right to sue all state agencies in California by virtue of his or her status as a "state employee," then McLean's class-wide section 202(a) claims for alleged late payment of her final month's pay could only be litigated by individually canvassing each and every separate appointing power in California to determine if, during the class period, personnel at the agency in fact received notice from any employee of resignation (or retirement, according to McLean) or discharged any employee. If so, each agency would then need to determine, in each case, the date of discharge, whether 72-hours notice was given in the case of each resignation or retirement, how many days were worked by each such employee in the last month of

employment, how much leave was taken by each such employee that month, how much was paid to the employee (by revolving fund check or otherwise) and when, and if less than the amount due, why a lesser amount was paid, how payment was offered or transmitted to the separating employee, and if the payment was not made in a timely manner pursuant to section 201 or 202, why the payment was late. These are facts within the knowledge of each putative class member's own individual employing agency.

In trying to convince this Court that her case presents no practical problems and that discovery could be limited to one or two agencies such as the Controller and CalHR, McLean's briefing on this point ignores her 202(a) claims and instead focuses on her section 202(b) and (c) claims, claims involving her choice to voluntary defer payment of her accrued and unpaid leave wages for later deposit into her supplemental retirement accounts. Her focus on these latter claims is a red-herring, for three reasons.

First, once McLean submitted to DOJ her request to defer payments of her unpaid leave balances into her supplemental retirement accounts, it was "deemed to have made an immediate payment" of those wages under section 202(b), and thus no section 203 penalty claim could possibly attach to any deferral that was beyond the 45 day (or February 1) payment dates set forth in subsection (b) or (c). (§§ 202(b), (c).) As mentioned in Defendant's Opening Brief, since those accrued and unpaid wages were deemed to have been paid immediately, they were not "late" for purposes of section 203 - even *if* a retiree is a person who has "quit" - and accordingly any claims by McLean that the statutory timetable otherwise set forth in the section 202(b) and (c) was not met would be remediable, if at all, only through a mandate action against DOJ, not through an action for penalties. (See Opening Brief, at p. 43, n. 17 and surrounding text.) Accordingly,

McLean's attempt to ignore her section 202(a) claims, which would require canvassing each state agency, in favor of her 202(b) and (c) claims, upon which her penalty claims may *not* rest, is sleight-of-hand.

Second, even if McLean's section 202 (b) and (c) claims were a viable basis for a section 203 lawsuit, discovery on these claims would still quite necessarily involve each appointing power for each class member, as it is the appointing power for each state employee that receives the deferral request from its employee, and processes it. The appointing power must also accurately account for attendance and leave of its employees, which determines the amounts of money available to the employee for supplemental plan deferrals. Moreover, if the employee has an amount of banked but unpaid leave that exceeds the maximum allowable contribution limits, that appointing power's calculation of accrued but unpaid leave also directly determines the amount of unpaid leave that must be paid to the employee as "final wages" once the maximum federal contribution amounts are taken into account.

Third, McLean's claim that discovery could easily proceed as against the State Controller as a defendant for purposes of her section 203 claim is legally infirm. The Controller's Office is not properly subject to suit, as it is not McLean's section 203 "employer," and was dismissed as a named defendant by the Court of Appeal, a ruling not challenged by McLean in this Court. Of course, if McLean's suit was properly limited to her employer, the DOJ, McLean could certainly seek relevant discovery from any third-party agency, such as the Controller or CalHR, if she believes that those agencies were somehow involved in any aspect of her final payment distributions.

Despite her claims to the contrary, McLean does seek to pursue sweeping litigation against every agency in state government without naming them or serving them with process. As explained in the opening

brief, such litigation could lead to a host of trial-management and discovery problems for trial courts. Alternatively, construing the section 203 "employer" to be the appointing power for any terminated or resigned state employee would create none of the problems of McLean's approach, and would at the same time give the terminated or resigned employee all the relief to which he or she might be entitled. Penalties, if any, would run against the appointing power that failed to make timely payment to the terminated or resigned employee, and no other uninvolved agency would bear the burden or expense of litigation for the mistake of another. This Court should find that the appointing power – in this case, the DOJ – was McLean's section 203 employer.

II. EMPLOYEES WHO RETIRE FROM STATE SERVICE HAVE NOT "QUIT" WITHIN THE MEANING OF SECTION 203.

A. The Plain and Ordinary Meaning of "Quit" Is Not The Same as "Retire."

As to this issue, McLean's primary argument is that "an employee who retires has necessarily quit his or her employment or been discharged from it" (Answer Brief, at p. 36) and, for that reason, the Court should ignore the Legislature's use of the word "retire" in the statutory scheme and may instead treat the separate word "quit" as if it also means "to retire."

McLean comes to this conclusion by ignoring the commonly understood distinctions between "quitting" and "retiring," and by defining the term "quit" so broadly as to mean any form of "giving up" employment. (Answer Brief, at pp. 37-38.) Having so redefined the word "quit," she then concludes that her "retirement" was necessarily a "quit," because she also "gave up" her employment. While any set of words in a statute might conceivably share a common meaning if redefined to a higher level of abstraction, this approach eviscerates the very point of using words in a

statute that have less abstract, and more concrete, meanings and fails to respect the differences between different words.

More importantly, however, McLean's syllogism about the statute results from false premises, because the word "quit" does not commonly refer to every form of volitional separation from, or ending of, an employment relationship. (Opening Brief, at pp. 31-35.) Fundamentally, McLean's mistake is that she confuses the concepts of "quitting" a job with the orderly ending of a career that is signified by a retirement. A retirement may be a form of an "ending" of employment, or of a "separation" from employment, but insofar as one ordinarily understands the differences between retiring and quitting, it is not a "quit."[14] Contrary to McLean's assertions, having come to the orderly end of a career by retirement would not ordinarily be considered by a reasonable employee to be the same as a "quit." In fact, a retiree, having come to the end of a long career, might well take considerable umbrage at being called a "quitter."

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[14] Particularly in light of the purpose behind the prompt-payment statutes, McLean's "plain meaning" examples of the words "quit" and "retire" (Answer Brief, at p. 39) do not undermine Defendant's position. For example, McLean's hypothetical employee who was "fired today" "for no good reason" and responded, after the firing, by deciding he was "too old for this nonsense" and was therefore going to retire (*ibid.*) creates no statutory-interpretation problem. Properly construed, the payment obligation would arise at the time the employer "fired" the employee, and payment of final wages would be due, even if the employee decided – because of the termination – to later submit retirement papers. Similarly, McLean's hypothetical 65-year-old employee who suddenly said "I quit work today" (*ibid.*) without having first secured his or her retirement, would have "quit" for purposes of section 202, and prompt payment would again be due, even if the employee later decided to submit retirement papers.

Regardless, McLean's assertion that a retirement "necessarily" involves either a "quit" or a "discharge" is incorrect; a retirement may well be something other than a "quit" or a "discharge." For example, some retirements are simply required by circumstance - such as reaching a mandatory retirement age (see, e.g., Gov. Code, § 21130) or as a result of a disability - even when the employee may have no desire to "quit" and the employer may have no desire to "discharge." Since the terms "quit" and "retire" are used separately in the statute and are commonly understood to refer to different concepts, McLean errs in ignoring those differences and treating them as having the same meaning. The terms are not coextensive.[15]

B. The Terms "Quit" and "Retire" As Used In The Prompt-Payment Scheme Refer To Different Types Of Separations From Employment.

A fundamental rule of statutory interpretation is to give meaning to each word used in a statute. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1010 ["interpretations that render statutory terms meaningless as surplusage are to be avoided"].) Despite the fact that section 202(c) specifically refers to an employee who "quits, retires, or disability retires," McLean proffers an interpretation that renders surplusage the words following "quit." (Answer Brief, at pp. 45-46.) McLean's interpretation, adopted by the Court of Appeal, urges that to "quit" includes to "retire" and that to "retire" includes to "disability retire." Therefore, the reasoning goes, since McLean "quit to retire," she is eligible for section 203 penalties.

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[15] Ironically, just as McLean's pleading itself recognized this well-understood distinction between a resignation and a retirement, even the collective bargaining agreement she now proffers to this Court recognizes that a retirement is different from a "separation" (i.e., a discharge or quit.) (Declaration of Ian Barlow In Support of Plaintiff's Motion for Judicial Notice, at p. 12 [distinguishing between a "separation or retirement"].)

An examination of the statutory scheme reveals the flaws in McLean's reasoning. (Opening Brief, at pp. 36-41.) Moreover, McLean's reliance on section 201 (Answer Brief, at p. 44) reveals yet another infirmity in her theory. When A.B. 1684 added subsections (b) and (c) to section 202, which governs final wage payments upon resignation, it also added subsections (b) and (c) to section 201, which governs final wage payment "upon discharge or layoff." (§ 201(b), (c).) As with section 202(c), section 201(c) extended the benefit of a deposit of accrued leave wages in a supplemental retirement plan for those who are discharged.

However, even though some retirements (for example, based upon age or disability) could certainly be considered involuntary and, in McLean's view, akin to a section 201 "discharge," the Legislature did not, in section 201(c), include the same "retire" or "disability retire" language included in section 202(c), and instead, applied that provision only when a "state employer discharges an employee." (§ 201(c).) In light of the legislative intent behind A.B.1684, which was to ensure that all separating employees were eligible for the supplemental deferral benefit (see Opening Brief, at p. 40) it is clear that individuals "involuntarily" retiring were not meant to be excluded from the ability to elect to defer payment of accrued and unpaid leave wages. (See Opening Brief, at p. 40.) Thus, the word "retire" in section 202(c) must be read to include all non-medical retirements, whether voluntary, involuntary, or situational, and the term "disability retire" must similarly be intended to include all medical retirements, whether involuntary, voluntary, or situational. Accordingly, the words "retire" and "disability retire" in section 202(c) are not types of "quits," as McLean claims, but instead refer to fundamentally different types of separations that are, at least in part, entirely unrelated to McLean's construction of the word "quit." Therefore, the three words in series are not surplusage and unnecessary, but are an important part of the statutory scheme, meant to

effectuate its purpose of permitting all state employees who separate, whether by voluntary or involuntary termination, resignation, or retirement, to defer payment of their accrued leave.

For the same reason, just as the word "quit" does not include the "retirement" or "disability retirement" contemplated in section 202(c), the word "discharge" in section 201 should not be interpreted to include an involuntary regular or medical retirement, because those types of separations are already separately covered in section 202(c). In other words, contrary to McLean's claim that the words "quit" and "discharge" in the statute were meant collectively to cover all types of separation from service, the statutory scheme proves just the opposite, and demonstrates that the Legislature's choice of wording was intentional, and differentiates between a "discharge," a "quit," and a "retirement."[16]

Moreover, McLean's assertion that the Legislature intended the words "discharge" and "quit" together to encompass all forms of an "ending" to the employment relationship does not survive in light of an examination of section 201.5(d), in which the Legislature actually extended the following prompt-payment obligation to all instances where "an employment terminates," which it defined as "when the employment relationship ends,

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[16] McLean's claim that a "discharge," for purposes of section 203 includes a "layoff" as set forth in section 201 (Answer Brief, at p. 44) does not support her claim that a "quit" in section 203 includes a "retirement." In section 201, the Legislature specifically addressed layoffs as a type of ending of the employment relationship that triggered a specific obligation to pay, within a certain time period for workers in certain industries. The Legislature did not, in section 202, similarly include a provision regarding timely payment of final wages for "retirees." Therefore, while there may or may not be a statutory inference that the Legislature considered a "layoff" to be a "discharge" for purposes of section 201, there is no similar statutory inference that it considered a "retirement" to be a "quit" for purposes of section 202.

whether by discharge, lay off, resignation, completion of employment for a specified term, or otherwise." (§ 201.5(d).) If the Legislature intended to extend the section 203 prompt-payment penalty obligation to all instances where the employment relationship terminated, it could have easily said so, but did not.[17]

McLean's assertion that this Court's decision in *Smith v. Superior Court* (2006) 39 Cal.4th 77 somehow forecloses any argument that a "quit" is different from a "retirement" (Answer Brief, at p. 47) is incorrect. At its core, this Court's decision in *Smith* was that a "discharge" for purposes of section 201 and 203 occurred even if the employment is not ongoing; rather, a discharge also occurs when an employee is discharged following a single-day job assignment. (*Smith v. Superior Court*, 39 Cal.4th at 90.) This Court's conclusion was bolstered by relevant legislative history indicating that a section 201 "discharge" for purposes of the prompt-payment law meant both an involuntary termination from ongoing employment and a release of an employee after completion of a specified job assignment. (*Id.*

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[17] McLean's reliance on the use of the "layoff" provision in section 201.5(d) does not support her claims. (Answer Brief, p. 45.) As to section 201.5(d), the Legislature's use of the term "layoff" following the term "discharge" is part of a series of terms demonstrating the intended scope of the "ending" of the employment relationship contemplated in section 201.5, which includes the "discharge" and "layoff" as specifically covered in section 201, the "resignation" covered in section 202, completion of specified term employment, and "otherwise." In other words, contrary to McLean's claims that this is just another example of the Legislature including unnecessarily cumulative and overlapping language in the statute, it in fact demonstrates the opposite - an intent to comprehensively include all possible types of endings of an employment relationship within the scope of the statute.

at pp. 89-93.)[18] McLean has no comparable evidence that the Legislature considered a retirement to be a quit for purposes of section 202.[19]

Responding to Defendant's point that separations from state service are generally either by a "quit," a "discharge" or a "retirement," McLean quibbles (Answer Brief at pp. 47-48) that there are many "finer distinctions" that can be made among the three general modes of separation, such as layoffs and terminations for medical reasons. While that may be true, it does not save her claims. The three-types-of separation discussion in this case is framed by McLean's pleading, where she admits that she retired, but sued under a statute that applies only to an employee who quits or is discharged, but that also uses the term "retire" in a way that distinguishes a "retirement" from a "quit." McLean's arguments about layoffs and medical terminations (as a form of "discharge") do not relate to the issue presented in this case, which has to do with the meaning of the term "quit."[20] The issue here is whether the Legislature intended to grant

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[18] The Legislature responded to the *Smith* decision by enacting section 201.3 (Stats.2008, c.169 (S.B. 940), §1) and clarifying that existing law did not consider the completion of an assignment by a temporary services employee to necessarily be a "discharge" as of the date the assignment ended. (*Elliot v. Spherion Pacific Work LLC* (CD Cal. 2008) 572 F.Supp.2d 1169, 1175-1177.)

[19] McLean asserts - incorrectly - that Defendant makes the same arguments made by the *Smith* defendant, and rejected by this Court in a footnote in that decision. (Answer Brief, at p. 48.) However, Defendant has made no such argument regarding section 2920.

[20] McLean asserts that Defendant's position somehow leads to the conclusion that a removal for cause, a layoff, or a discharge for medical reasons (Answer Brief, at pp. 47-48) as contemplated by Government Code section 19996 would not be a "discharge" for purposes of sections 201 and 203. While these issues are not presented in this case, a removal for cause is certainly a "discharge" as contemplated in section 201. A layoff is

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the remedy of waiting-time penalties to retirees under a section that facially applies only to those who "quit" or who are "discharged." As to that issue, the answer is clear: It did not.[21]

Regardless, McLean asks this Court, in the name of "liberal construction" of statutes governing wages, to re-write the statute to include that which the Legislature has never chosen to include. (Answer Brief, at p.

(...continued)
specifically mentioned by the Legislature in section 201, and would also appear to be a form of "discharge," albeit one based upon lack of work instead of one based upon poor performance, misconduct, the ending of an assignment, or otherwise. McLean's reference to a medical "discharge" would not present a section 203 problem. State employees with a disability are not separated if they are eligible for a disability retirement and the employee would normally be on a medical leave while his or her disability retirement application was processed. (Gov. Code, §§ 21153, 31721.) If an employee is not able to perform any job functions and waives disability retirement, he or she may be medically terminated, after notice and an opportunity to appeal to the SPB. (Gov. Code, §§ 18670 - 18683 and 19253.5; Cal. Code Regs., tit. 2, §§ 51.1 - 52.10, 53.3, 56.1-60.3, and 446.)

[21] McLean argues (Answer Brief at pp. 47-50) that some of Defendant's arguments regarding the recognized distinctions between quits and retirements arise in contexts other than the prompt-payment law. However, that is precisely the point: The distinction is so well-recognized that it permeates other areas of the law, giving rise to the inference that the Legislature understands the difference as well. In fact, the distinction is so well-recognized and ingrained that even McLean herself – before realizing her mistake – recognized the difference in her pleading. (See Opening Brief, at p. 8, n.3.) McLean's attempt to escape the consequences of her admissions by asserting that her pleading should be construed as asserting that a "quit" includes a resignation and a retirement (Answer Brief, at pp. 40-41, n.18) is inconsistent with her pleading, in which she *differentiates* between a resignation and a retirement by using the connector "or." (See Opening Brief, at p. 8, n.3.) Since McLean makes no meaningful attempt anywhere in her briefing to establish that a "resignation" is different from a "quit," her pleading distinction between a resignation and a retirement demonstrates that she understood the difference between the two distinct types of separations.

50.) However, while "Courts will liberally construe [] wage statutes, but they cannot interfere where the Legislature has demonstrated the ability to make its intent clear and chosen not to act." (*City of Long Beach v. Dep't of Indus. Relations* (2004) 34 Cal. 4th 942, 950.) As demonstrated by, inter alia, section 201.5(d), in the prompt-payment scheme itself, the Legislature "has demonstrated the ability" to define a provision covering all forms of endings of the employment relationship for purposes of section 203, and yet has "chosen not to act" by similarly broadly defining the types of "endings" of the employment relationship that would give rise to waiting-time penalties.

Moreover, the history of section 203 readily demonstrates that the Legislature has never chosen to extend a penalty remedy to all persons who are not paid promptly upon an employment separation. While there are many examples, a few will suffice. For instance, a violation of section 201.7 is not covered by section 203. Section 201.9 was enacted in 2006 (Stats.2006. c.685 [S.B. 1719], § 1) but remained outside the scope of the section 203 penalty provision for eight years, being added to section 203 only in 2014. (Stats 2014, c.210 [A.B. 2743], § 1.) Similarly, section 201.5, enacted in 1957 (Stats.1957, c.1118, p. 2419, §1) remained outside the scope of section 203's protections for 18 years, until 1975. (Stats.1975, c.43, p. 75, § 1.) Similarly, the Legislature has simply not extended the protections of section 203 to retirees.[22]

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[22] While McLean struggles to create "hypothetical" examples that she asserts would lead to confusion about whether any given separation was a "quit" or a "retirement," Defendant's interpretation in fact raises no practical problems for California employers in complying with the statute. While the hypothetical facts she posits (Answer Brief, at p. 53) are not raised in McLean's case, it is hard to imagine how an employee who suddenly "quit" *without* having retired, could somehow be considered, as McLean asserts, to have "retired" at the time of quitting in such a way as to

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The issue before this Court is not whether retirees have worked hard or are deserving of waiting-time penalties. Whether such facts are a sufficient basis for the imposition of waiting time penalties is an argument that must be made to the Legislature, which is certainly capable of responding by more broadly defining the entitlement to section 203 penalties. For now, it suffices that the Legislature has not chosen to extend section 203 penalty provision entitlements to retirees. As set forth in Defendant's opening brief, such a legislative distinction is not irrational, because retirees already enjoy substantial benefits and protections that are not held by those who quit or are discharged. (Opening Brief at p. 41.)

This result is also not inequitable. The retiree receives his or her final wage payment at the time of the employer's normal payroll distribution - as he or she always has over the course of a long career - and the employer is not rushed to make the difficult computations necessary to effectuate the final payment to departing retirees. If McLean believes that the Legislature should impose different requirements, enforced by prompt-payment penalties, for departing retirees, she is free to ask it to do so.

(...continued)
cause any confusion for an employer. It goes without saying that liability must hinge on the circumstances existing at the time the final wage payment is due under section 201 or 202. Importantly, an employee who quits without having secured a retirement is quite differently situated than was McLean, who in fact already had the security of a continuing income stream when *she* separated from employment "by retirement." Realistically, most employees who choose to retire from state service do so quite deliberately and have planned the retirement well in advance of their separation date. Regardless, employers, courts, and finders of fact are up to the task of deciding, in any given case, if an employee separated by retirement or by a quit.

CONCLUSION

The Court of Appeal's decision should be reversed, with directions to reinstate the trial court's judgment of dismissal of the entire action with prejudice.

Dated: May 26, 2015

Respectfully submitted,
KAMALA D. HARRIS
Attorney General of California
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WILLIAM T. DARDEN
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CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 7556 words.

Dated: May 26, 2015

KAMALA D. HARRIS
Attorney General of California
SUSAN SLAGER
Acting Senior Assistant Attorney General
FIEL D. TIGNO
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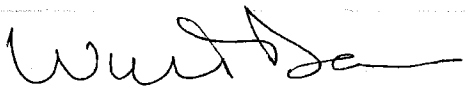

WILLIAM T. DARDEN
Deputy Attorney General
Attorneys for Petitioner State of California

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 May 26, 2015, I served the attached **REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with **GOLDEN STATE OVERNIGHT**, addressed as follows:

William A. Kershaw
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Clerk
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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 May 26, 2015, at Oakland, California.

Denise A. Geare
Declarant

Denise A. Geare
Signature

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