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

OCT 20 2014

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

APPELLANT'S ANSWER TO PETITION FOR REVIEW

KERSHAW, CUTTER & RATINOFF, LLP
William A. Kershaw (State Bar No. 057486)
Lyle W. Cook (State Bar No. 148914)
Stuart C. Talley (State Bar No. 180374)
401 Watt Avenue
Sacramento, California 95864
Telephone: (916) 448-9800
Facsimile: (916) 669-4499

Counsel for Plaintiff and Appellant,
Janis S. McLean

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

ANSWER TO PETITION FOR REVIEW

KERSHAW, CUTTER & RATINOFF, LLP
William A. Kershaw (State Bar No. 057486)
Lyle W. Cook (State Bar No. 148914)
Stuart C. Talley (State Bar No. 180374)
401 Watt Avenue
Sacramento, California 95864
Telephone: (916) 448-9800
Facsimile: (916) 669-4499

Counsel for Plaintiff and Appellant,
Janis S. McLean

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ARGUMENT 1

A. Whether The State Of California Employs State Employees Is A Settled Question Of Law With No Contrary Appellate Court Decisions 1

B. Whether Employees Who Quit To Retire Are Covered By California Prompt Pay Law Is A Settled Question Of Law With No Contrary Appellate Court Decisions 8

III. CONCLUSION 15

TABLE OF AUTHORITIES

CASES

Page(s)

Colombo v. State of California
(1991) 3 Cal.App.4th 594, 598 [5 Cal.Rptr.2d 567] 1,2,3

DaFonte v. Up-Right, Inc.
(1992) 2 Cal.4th 593, 601 [828 P.2d 140] 5

Gore v. Reisig
(2013) 213 Cal.App.4th 1487, [153 Cal.Rptr.3d 433] 10,11

Greyhound Lines, Inc. v. Department of California Highway Patrol
(2013) 213 Cal.App.4th 1129, 1135 [152 Cal.Rptr.3d 492] 6

Professional Engineers in California Government v. Schwarzenegger
(2010) 50 Cal.4th 989 [239 P.3d 1186] 6,7

Smith v. Superior Court
(2006) 39 Cal.4th 77 [137 P.3d 218] 10,14

Tirapelle v. Davis
(1993) 20 Cal.App.4th 1317, 1319-22 [26 Cal.Rptr.2d 666] 5

STATUTES

California Code of Civil Procedure
Section 382 7

California Labor Code
Sections 200 to 211 4
Section 201 10
Section 201.3 4
Section 201.5 4
Section 201.7 4
Section 202 .... *passim*
Section 202(a) 12
Section 202(b) .... *passim*
Section 202(c) 4,11,12
Section 203 .... *passim*
Section 203(a) 8,11
Section 203.1 4
Section 203.5 4
Section 204 4
Section 204a 4
Section 204b 4
Section 204c 4
Section 204.1 4
Section 205 4

TABLE OF AUTHORITIES, Cont.

Page(s)

Section 205.5 4
Sections 215 to 219 4
Section 220 3,14
Section 220(a) 3,4
Section 220(b) 4

California Rules of Court, Rule 8.500(b)(1) 7,9

CONSTITUTIONAL PROVISIONS

California Constitution Article IV-VII 3

MISCELLANEOUS

Richard P. Hill, *California Forms of Pleading and Practice* § 250.16 (Matthew Bender) 4

I. INTRODUCTION

Petitioner State of California ("Petitioner" or "State") has petitioned this Court for review of the published decision of the Third District Court of Appeal in *Janis McLean v. State of California, et al.* (Case No. C074515). The petition seeks review of two issues, neither of which requires review to secure uniformity of decision or to settle an important question of law.

II. ARGUMENT

A. Whether The State Of California Employs State Employees Is A Settled Question Of Law With No Contrary Appellate Court Decisions

The petition first requests review of the settled question of whether the State of California employs State employees. As the question itself suggests, the uncontroversial and settled answer is that the State is the employer. That is the holding of the Third District Court of Appeal in this case and that was the holding in *Colombo v. State of California* (1991) 3 Cal.App.4th 594, 598 [5 Cal.Rptr.2d 567] ("*Colombo*"), a case in which the State correctly urged that it, not its agencies, employed State civil service employees. In *Colombo*, review by this Court was requested and denied and publication was ordered.

In *Colombo*, the State and the Department of Transportation ("DOT") argued on demurrer that the plaintiff California Highway Patrol ("CHP") officer's workers' compensation claim was his only remedy against his employer, and that his employer was "the State of California, an entity which encompasses both the CHP and DOT." (*Id.* at p. 596.) The CHP officer, Russell Colombo, contended that he should be permitted to sue the State and the DOT because "the DOT and CHP are two separate and distinct departments of the state." (*Ibid.*) The trial court granted the demurrer. (*Ibid.*)

On appeal, the CHP officer in *Colombo* asserted that "the CHP and DOT are separate entities within state government, each with distinct responsibilities, and . . . only the CHP had control over [his] status as an employee." (*Id.* at p. 598.) He analogized to a case involving employment relationships in the private sector, arguing that the State was akin to a multiunit corporate enterprise, where a parent company had no right to control employees of a separate company division and a company's division could function as a separate business entity that was distinct in location, function and identity from its corporate parent. (*Id.* at pp. 597-98.)

The court rejected these arguments, holding that

> [a]s a CHP traffic officer, Russell Colombo is a civil service employee of the State of California, paid by the state, not the CHP. While the CHP has the supervisory authority over its traffic officers, another entity of the state, the State Personnel Board, has the ultimate say over appropriate punitive sanctions in employee disciplinary actions if the CHP's determination is disputed by its employee. Likewise, DOT employees are civil service employees of the state.

(*Id.* at 598 (citations omitted).) The court concluded that "lawsuits against state agencies are in effect suits against the state. *As a matter of law, it is the State of California which is the employer with the right of control over employees of both the CHP and DOT.*" (*Ibid.* (emphasis added) (citations omitted).)

The State argues that *Colombo* is merely a case about "double recovery." (Pet. at p. 11.) However, *Colombo* never analyzed double recovery issues; it analyzed the broader question of whether State employees are employed by the State of California or its agencies. Furthermore, it concluded that the State is the employer of State employees

after considering many of the same arguments and constitutional provisions relied upon by the State in this case.[1]

Importantly, the holding in *Colombo* is the law that the State itself urged, without the limitation on its holding it now wrongly urges. In *Colombo*, the State successfully argued that the State was a single entity and that its agencies should not be deemed to be separate and distinct employers simply because they perform separate functions for the State. Furthermore, in *Colombo*, the State argued to *publish* the appellate court's opinion and *against* review by the Supreme Court. Now it seeks to do the opposite on the same settled question of law.

Petitioner's reversal of course for purposes of Labor Code section 203 waiting time penalties is particularly inapt.[2] First, there is no reason to suppose the State is the employer when it seeks to benefit from that ruling under workers' compensation law, but not the employer under other sections of the Labor Code. Second, the plain language of the Labor Code sections at issue confirm the State is the employer for purposes of section 202 violations and section 203 waiting time penalties.

Section 220 specifies Labor Code sections that apply and do not apply to employees who are "*employed by the State of California.*" (§ 220, subd. (a) (emphasis added).) Under section 220, the totality of sections 202

---

[1] (*Compare* Pet. at p. 8 (citing Cal. Const., art. IV-VII and arguing that "[i]n the context of state civil service, the 'employer' of any civil service employee is that employee's appointing power" *to Colombo*, *supra*, 3 Cal.App.4th at p. 598 (citing Cal. Const., art. VII., § 1 and holding that the civil service system relates to every "employee *of the state* . . . .") (emphasis added); *compare* Pet. at pp. 8-9 (arguing that the State is not the employer because "[s]tate agencies are separate and distinct governmental entities" that are established under a variety of state laws and constitutional provisions and have "unique mission[s] and sphere[s] of responsibility.") *to Colombo*, at p. 598 (holding that "the fact that the departments perform different functions for the State of California [does not make them the employer] . . . *it is the State of California which is the employer.*") (emphasis added).)

[2] All further statutory references are to the California Labor Code unless otherwise indicated.

and 203 apply to employees of the State of California. (§ 220, subd. (b).[3]) On its face, section 202 applies to "the *state* employer," "*state* employees" and "[their] *employment with the state*." (§ 202, subds. (b) & (c) (emphasis added).) In addition, section 202, subdivisions (b) and (c) (hereinafter "section 202(b)" and "section 202(c)," respectively) directly distinguishes between the terms "state employer" and "appointing power." For example, section 202(b) describes the process between the State and appointing power where a State employee "submits a written election to his or her *appointing power* authorizing the *state employer* to tender payment for any or all leave" to the employee's retirement plan. (§ 202(b) (emphasis added).) Similarly, under section 202(c), "when a *state employee* quits, retires, or disability retires from his or her employment *with the state*," the employee may submit a "written election to his or her *appointing power* authorizing the *state employer*" to defer payment of unused or accumulated vacation or leave pay. (§ 202(c) (emphasis added).) Because the State and appointing powers have been expressly distinguished in the text of section 202, it cannot be said that appointing powers are the State employer.

Petitioner attempts to read the word "state" in the term "state employer" out of section 202 by arguing that the word "state" merely "serves as an adjective." (Pet. at p. 10.) Petitioner here presumes that reference to "state employer" cannot be understood in a straightforward way as a descriptive noun. It can. But even if one were to indulge in

---

[3] Under section 220, subdivision (a), sections 201.3, 201.5, 201.7, 203.1, 203.5, 204, 204a, 204b, 204c, 204.1, 205, and 205.5 "do not apply to the payment of wages of employees directly employed by the State of California." (§ 220, subd. (a).) However, according to section 220, subdivision (b), "[s]ections 200 to 211, inclusive, and Sections 215 to 219, inclusive" do apply to the State of California, with the exception of those statutes referenced under section 220, subdivision (a). (§ 220, subd. (b); *see also* Richard P. Hill, *California Forms of Pleading and Practice* § 250.16 (Matthew Bender) (Sections 200 to 211 "*are applicable to the payment of wages of employees directly employed by the state*, except for [the specific statutes referenced under section 220(a)].") (emphasis added).)

viewing the word "state" as an adjective, rather than as part of the noun, it can only be understood as specifying that the employer being referenced here is the State. Significantly, on Petitioner's view that the Legislature was using an adjective and the actual employer is the *appointing authority* employer, then "appointing authority" is the adjective that the Legislature should have used to specify the employer in section 202. Instead, the State, not the appointing authority, was specified as the employer.

Petitioner took a similar approach on appeal when, instead of arguing that the term "state" was simply an adjective, it argued that it was "merely 'helpful shorthand.'" (Opn. at p. 15, fn. 4.) The Third District Court of Appeal was correctly "unconvinced" and held that treating the term "state" as "helpful shorthand" was contrary to rules of statutory construction. (*Ibid.*) According to the Court of Appeal, "[t]o accept this argument is to find the words do not mean what they say, which would undermine the basic rule of statutory construction to give the words of a statute 'their usual and ordinary meaning.'" (*Ibid.* (quoting *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601 [828 P.2d 140]).)

The statutes and cases cited by Petitioner demonstrate that the State functions through a network of departments, agencies and other entities, but it fails to point to any authority, split in authority, or error that justifies reviewing the Court of Appeal's uncontroversial finding that the State is the employer of State employees. In fact, many of the cases cited by Petitioner are in accord with the settled law on this issue.[4]

[4] (*See, e.g.*, *Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, 1319-22 [26 Cal.Rptr.2d 666] (outlining the roles of the Governor, Legislature, State Controller ("Controller"), Department of Finance and Department of Personnel Administration ("DPA") in making and implementing budgetary decisions that impact State employee compensation *across* State agencies and describing the issue on appeal as whether the Controller has the authority "to refuse to implement salary reductions . . . by the [DPA] for certain employees *of the state* . . . .") (emphasis added); *see also id.* at p. 1322 (holding that "[i]n general, the DPA has jurisdiction over the *state's*

Petitioner cites to *Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989 [239 P.3d 1186] ("*Schwarzenegger*") to argue, incorrectly, that the State employer is the appointing power. (Pet. at p. 10.) However, that is not *Schwarzenneger's* holding. The *Schwarzenegger* court analyzed whether the Governor or DPA had authority to unilaterally impose mandatory "across-the-board" furloughs upon certain represented State employees. (*See*, *e.g.*, *Schwarzenneger*, *supra*, at pp. 999, 1035.) It found that the Governor's authority to order furloughs across State agencies did not turn on where State employees worked or approval by appointing authorities, it depended in part upon approval by the *Legislature*. (*Id.* at pp. 1040, 1043, 1047-48.) *Schwarzenneger* reinforces the State's role as employer and analyzes the roles that State agents or entities play in administering or enforcing employment rules *on behalf of* the State. (*See*, *e.g.*, *id.* at pp. 1015, 1019.) In fact, the court distinguishes between the authority of an "appointing power" and "the authority that *the state* Possesses to take actions or to make decisions *in its role as an employer.*" (*Id.* at p. 1034, fn. 28 (emphasis in the original).)

In *Schwarzenneger*, the court's analysis presumed the State was the employer and ultimately reached its holding concerning legislative authority over the subject matter at issue on that basis. If, on Petitioner's view, appointing powers were the employers, and not the State, there would have been no need to parse the respective roles of the branches of State government and its agencies. The simple answer (based on the State's misunderstanding of settled law) would have been that neither the

---

financial relationship with *its* employees, including matters of salary, layoffs and nondisciplinary demotions.") (emphasis added).); *Greyhound Lines, Inc. v. Dept. of Cal. Highway Patrol* (2013) 213 Cal.App.4th 1129, 1135 [152 Cal.Rptr.3d 492] (describing goals that the State carries out "*[t]hrough* Caltrans" and the State's ultimate responsibility for torts committed by its departments) (emphasis added).)

Governor, nor the Legislature, could possibly act on behalf of the State to furlough someone else's (the appointing agencies') employees. In short, *Schwarzenneger*, like all other cases touching upon this issue, recognized that the State employs State employees.

Under circumstances where the law is settled and there is no need for review to secure uniformity (Cal. Rules of Court, rule 8.500(b)(1)), Petitioner wrongly tries to create a sense of urgency or import by making up fearful consequences it says this case will have for all future section 203 claims against the State of California. (*See*, *e.g.*, Pet. at pp. 7, 13-14.) Petitioner's professed fears are not based in reality and reflect a misunderstanding of both the rules governing class actions and the rules governing discovery.

Petitioner first suggests that a plaintiff with a Labor Code dispute arising out of a single agency's conduct will somehow sweep into the litigation all State agencies and all branches of government. (Pet. at p. 13.) But if the State is properly named as the employer in a lawsuit, that cannot make the claim any broader than its facts. The rules of pleading and discovery do not allow unrelated conduct in unrelated agencies to be swept into litigation involving the conduct of a single State agency.

In addition, Petitioner wrongly seeks to paint a picture of unlimited and unmanageable discovery and motion practice in a class action where there are hundreds of unnamed entities. What Petitioner ignores is that the rules governing class actions require that they be cohesive and based on common or class-wide evidence. And, as in any case, the reach of discovery is limited by the rules of discovery. Contrary to Petitioner's hypothesis of out-of-control litigation, class certification depends upon a showing of superiority, which takes into account the judicial economy and manageability of class treatment as compared to the alternatives. (Code Civ. Proc., § 382.) Petitioner misunderstands the rules governing class

actions by wrongly supposing it is a tool to be feared because it will create inefficiencies and unnecessarily sprawling litigation.[5]

While due credit should be given to the strength of the arguments being advanced to the courts for resolution, the Third District Court of Appeal below heard the argument being made by Petitioner on this issue and correctly found that it "borders on frivolous." (Opn. at p. 14.) The settled question of whether the State is the employer is not deserving of this Court's review. Nothing in the petition calls into question this settled law.

B. Whether Employees Who Quit To Retire Are Covered By California Prompt Pay Law Is A Settled Question Of Law With No Contrary Appellate Court Decisions

Labor Code section 203 provides waiting time penalties for the late payment of wages and by its express terms applies to employees who quit their employment no matter what the reason for the resignation may have been. (§ 203, subd. (a).) The application of section 203 waiting time penalties to employees who quit to retire is so uncontroversial that this appears to be the first case in which any defendant employer has made an argument to the contrary. Because there has never been a "retiree defense" to the coverage of prompt pay law, the Court of Appeal's decision in this case preserved the *status quo ante* on this settled question. An important question of unsettled law is not raised simply because a defendant advances

---

[5] This case serves as an example of why Petitioner's fears are misplaced. The common conduct at issue is late payment of wages to State employees. On behalf of the State, the Controller is the agency responsible for handling payroll for all members of the putative class. Almost the entirety, if not the entirety, of relevant facts in this proposed class action are when did the class member separate from service from the State and when were the various categories of relevant wages paid. These are the facts that prove, for example, whether the deferred payments of wages were late under the 45-day rule in section 202(b). The relevant data is maintained by one State agency and can be easily discovered in a suit against the State. Relevant information may also be obtained by discovering the payment requests submitted by State employees through their centralized retirement service—Savings Plus—which administers 401(k) and 457 plans for State employees.

an argument so far beyond the boundaries of settled law that it has not been previously litigated.

Under these circumstances, where a previously noncontroversial issue has led to trial court error in the first instance, which has been subsequently corrected by a court of appeal on its review for error, discretionary review by this Court is not "necessary to secure uniformity of decision." (Cal. Rules of Court, rule 8.500(b)(1).) Petitioner has not pointed to any conflict in the decisions because there is none. Nor is a lack of uniformity ever likely to arise on the question of whether employees who quit to retire are included within the protection of California's prompt pay law. (§§ 202 and 203.)

In seeking review, Petitioner nowhere argues against the straightforward proposition that in order to retire an employee must first quit their employment (or more rarely) be discharged. Nor does Petitioner ever come to grips with the simple truth that the broad category of employees who quit their employment includes those who quit for specific reasons, including a planned retirement. Although one can speak more specifically of employees who quit to retire, or who quit to seek other employment, or who quit to travel the world, what is common to all these employees is that they voluntarily ended their employment, which is a quit under section 203.

Petitioner has nonetheless argued that its "retiree defense" to prompt pay law should be based on a distinction that is sometimes made between quits and retires. (Pet. at pp. 14-21.) The fact that a distinction is sometimes made between employees who voluntarily separate (quit) to retire and those who voluntarily separate for other reasons, does not create an exclusion from the broad coverage for an employee "who is discharged or who quits" under section 203. As the Court of Appeal correctly observes, "all of the definitions of the term 'quit' seem to encompass the

definitions describing retirement, as all the definitions speak to leaving a job." (Opn. at p. 9.)

In *Smith v. Superior Court* (2006) 39 Cal.4th 77 [137 P.3d 218], the defendant employer sought to limit the protection given under section 203 by arguing that any employment that ends by expiration of its appointed term cannot be conceived of as "a discharge or a quitting." (*Id.* at p. 93, fn. 10.) The court of appeal erroneously credited the defendant's argument that a more specific discussion of various kinds of discharges in cases deciding other issues supported the inference that the meaning of a section 203 "discharge" included only a "firing or layoff" and did not include employment of specified duration ending by its appointed term. (*Id.* at p. 90.) This Court found that resort to distinctions made in cases deciding other issues "bears little relevance here" where the question was the intended coverage of the sections 201, 202 and 203.[6] (*Smith*, at p. 90.) That a distinction is sometimes made in the cases between employees who retire and those who quit for other reasons does not exclude them from employees "who are discharged or who quit" under section 203.

For example, Petitioner relies on *Gore v. Reisig* (2013) 213 Cal.App.4th 1487 [153 Cal.Rptr.3d 433], which turned on whether the plaintiff was "an 'honorably retired peace officer' pursuant to former section 12027 of the Penal Code." (*Id.* at 1489.) The court understandably distinguished between three categories of employees "a resigned employee, a terminated employee, or a retired employee." (*Id.* at 1493.) In that case,

---

[6] The defendant employer in *Smith*, reasoning precisely as the employer defendant does here, also contended that "the Legislature was demonstrably aware that employment may end through means other than a discharge or a quitting, but made no attempt to refer to these situations in enacting sections 201 through 203." (*Smith, supra*, 39 Cal.4th 77, 93, fn. 10.) This reasoning was rejected when this Court found that "section 2920 simply addresses the circumstances under which an employment relationship is validly terminated. It does not address the matter of employee wages; nor does it purport to create exceptions to the wage payment requirements set forth in sections 201, 202, and 203." (*Ibid.*)

the distinction between employees resigning to retire and resigning for other reasons was relevant because "[t]he only persons entitled under the statute to carry a concealed and loaded weapon are retired employees, i.e., those employees who are no longer employed because they reached retirement age working as peace officers, and accepted retirement upon leaving employment." (*Ibid.*) Nothing in this distinction between employees who resign their employment to retire, which was essential to making the "honorably retired peace officer" determination in that case, purports to limit the reach of "an employee who is discharged or who quits" under section 203.

Petitioner also wrongly suggests that the Legislature's use of the phrase "quits, retires, or disability retires," in section 202(c) must mean that "retires" is different from and cannot be included within "quits." (Pet. at pp. 17-19.) But the series of terms used by the Legislature reveals precisely why that is a false inference from the text. "Disability retires" is different from (more specific than) "retires," but no one would suppose that someone who disability retires is not also someone who retires. For exactly the same reasons, "quit" in the context of "quits, retires or disability retires" must be understood as including employees who retire. (Opn. at p. 13.)

One need only read the text to know that Petitioner is wrong to suppose that the amendments to section 202(b) and 202(c) eliminated rather than established the obligation to make prompt payment to State employees who resigned their employment to retire. First, section 203 expressly applies to the entirety of section 202, including each of its three prompt pay rules. (§ 203, subd. (a) ("If an employer willfully fails to pay... in accordance with Sections ... 202... wages of the employee shall continue as a penalty....").) Second, under section 202(b), the Legislature imposed a new "45 day" requirement on deferred payments to retirement accounts. Subdivision (b) specifically includes payments to which the State employee

"is otherwise entitled due to a disability retirement" and must, therefore, be understood to apply to State employees who resign to retire. (§ 202(b).) Third, under subdivision (c), the Legislature imposed a new prompt pay deadline that includes State employees who resign to retire and requires that payment be made "no later than February 1 in the year following the employee's last day of employment." (§ 202(c).)

Each of the two mandatory time periods for prompt payment in subdivisions (b) and (c) expressly apply to State employees who resign to retire and were specifically tailored to allow the previously permitted retirement contributions and deferred payments to occur while also preventing the State from making these payments later than the reasonable time prescribed by statute. There is nothing to interpret in the subdivision (b) requirement plainly stating that "[t]he contribution shall be tendered for payment to the employee's 401(k), 403(b), or 457 plan account no later than 45 days after the employee's last day of employment" or in the subdivision (c) text requiring that "[p]ayments shall be tendered under this section no later than February 1 in the year following the employee's last date of employment." (§ 202(b) and (c).) Review is not needed to determine whether the Legislature has enacted prompt pay requirements that apply to State employees who retire because those requirements and the application of section 203 to them is expressly stated.

Petitioner's proposed construction would require that the two plainly stated obligations in subdivisions (b) and (c) of section 202 be ignored. Under no conceivable rule of construction can legislative commands of this sort be ignored, which was the result wrongly urged by Petitioner in the appeal below. As the Third District Court of Appeal correctly found in its decision, "if the general rule of section 202(a) and the penalty provisions of section 203 *did not apply* to an employee who retires, it would clearly be unnecessary for section 202(c) to discuss employees who retire." (Opn. at

p. 12 (emphasis in the original).)

Petitioner asserts that if the Legislature intended section 203 penalties to encompass all employee "separations," whether by "discharge, resignation, or retirement," it could easily have said so. (Pet. at p. 19.) What this ignores is that by using the broad "who is discharged or who quits" language the Legislature did say so. No exception is made for employees who quit to retire. Having specified the two broad categories, it was no more necessary to identify employees who quit to retire as included, than to identify employees who quit for other reasons. What is relevant to prompt pay law is the quit or the discharge, not the many possible reasons for, or circumstances contributing to, the quit or the discharge.

Petitioner also wrongly suggests that the Court of Appeal's decision will lead to confusion regarding what it views as distinct forms of separation from service. (Pet. at p. 14.) First, no confusion arises by treating all voluntary separations as quits under section 203. Second, confusion would arise if one were to accept Petitioner's unworkable suggestion that the reason for the voluntary separation is what determines an employer's prompt pay obligation. An employer should not have to discern whether one of its employees quits, hoping to retire, to determine whether the employee's wages must be paid promptly.

Petitioner also observes that the Court of Appeal decision "burdens employers with a heavy penalty obligation." (Pet. at p. 16.) But the specified penalty is exactly what the Legislature intended when it enacted section 203 to ensure that employers meet their obligation to make prompt payment of wages to employees. Petitioner may not like the burden imposed by the Legislature for violating prompt pay law, but the penalties have been enacted into law to promote compliance with the law. Review is neither necessary, nor proper, to eliminate section 203 penalties mandated by the Legislature on the ground that an employer finds the penalty

burdensome.

Nor does adding a concern for the "public treasury" improve upon the "burden" argument. (Pet. at p. 16.) The Legislature has specifically determined that the State, as the employer, is subject to prompt pay law, including section 203's provision for waiting time penalties. This occurred when the Legislature amended section 220 to make the State liable for waiting time penalties. Again, review by this Court is not necessary when Petitioner must concede that the State has been made subject to waiting time penalties by legislative action intended to achieve just that result.

Petitioner also urges what amounts to "means testing" as a rationale for excluding retirees from the protection given by prompt pay law. The notion is that retirees are less likely to be "made penurious by an employer's failure to make a timely final payment of wages." (Pet. at p. 22.) But the policy purpose underlying prompt payment law is not just to require payment to employees who may become "public charges due to non-payment." (*Ibid.*) "An employer who knows that wages are due, has the ability to pay them, and still refuses to pay them, acts against good morals and fair dealing…." (*Smith, supra,* 39 Cal.4th 77, 82.) The public policy regarding prompt pay law involves a broad public interest, not merely the interest of the employee. (*Ibid.*) Review is not needed to answer the question of whether there is an unstated exception to prompt pay law, simply because some groups of employees are less likely to become "public charges due to nonpayment."

Petitioner has not cited to any legislative history, or any source of any kind, to even remotely suggest that the Legislature singled out retirees with the intent of excluding them from the protection given to all other employees by prompt pay law. Instead, all employees who quit their employment, for whatever reason, were included within the protection of section 203's waiting time penalties. Because no split in authority exists

and no important and unsettled issue of law arises from Petitioner's misreading of prompt pay law, the petition seeking review of this issue should be denied.

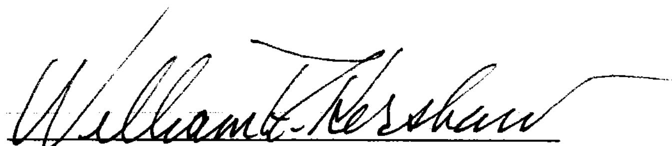
III. CONCLUSION

For the reasons described above, the Court should deny the petition for review.

Dated: October 17, 2014.

Respectfully submitted,

KERSHAW, CUTTER & RATINOFF LLP

By: 

WILLIAM A. KERSHAW
Counsel for Plaintiff and Appellant, Janis S. McLean

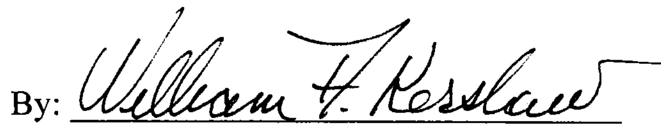
CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER TO PETITION FOR REVIEW uses a 13-point Times New Roman font and contains 4,741 words.

Dated: October 17, 2014.

Respectfully submitted,

KERSHAW, CUTTER & RATINOFF LLP

By: 

WILLIAM A. KERSHAW
Counsel for Plaintiff and Appellant, Janis S. McLean

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Janis S. McLean v. State of California, etc.

Sacramento Superior Court Case No. 34-2012-00119161-CU-OE-GDS

Third Appellate District Court of Appeal Case No. C074515

Supreme Court of the State of California, Case No. S221554

I, Lisa C. Anderson, declare as follows:

At the time of service, I was at least 18 years of age and not a party to this legal action. My business address is 401 Watt Avenue, Sacramento, California 95864.

On October 20, 2014, I served the **ANSWER TO PETITION FOR REVIEW** by overnight courier as follows: I enclosed a copy in separate envelopes, addressed to each individual addressee named below, and I deposited each sealed envelope with **FEDERAL EXPRESS** in Sacramento, California, for delivery as follows:

State of California
Department Of Justice
Attorney General of California
Kamala D. Harris
William T. Darden
1515 Clay Street, 20th Floor
Oakland, CA 94612
Telephone: (510) 622-2196
Counsel for Defendant and Respondent

Clerk – Court Of Appeals
Third Appellate District
914 Capital Mall
Sacramento, CA 95814

Sacramento Superior Court
The Honorable Raymond Cadei
720 Ninth Street
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Date: October 20, 2014.

Lisa C. Anderson