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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MISCELLANEOUS

INTRODUCTION

The State of California is the employer of state employees. Labor Code section 203 includes employees who quit their employment to retire.[1] Because the Court of Appeal correctly decided the issues presented to it, this Court should affirm.

First Issue Presented: Whether the State of California Is the Employer of State Employees.

In her amended complaint, Plaintiff Janis McLean ("McLean") alleged that she and members of the proposed class of state employees were employed by the State of California ("State"). (AA000001-04, ¶¶ 2, 4, 5, 9, 11, 18, 19.) McLean's allegation is correct as a matter of law.

The California Constitution declares that "[t]he civil service includes every officer and employee of the state except as otherwise provided in this Constitution." (Cal. Const., art. VII, § 1, subd. (a).) Consistent with the State's Constitution, when the Legislature extended prompt pay protection to certain public employees, it stated that the coverage extended to "the payment of wages of employees directly employed by the State of California." (Lab. Code, § 220, subd. (a).) McLean and the class of state employees she seeks to represent are the employees, directly employed by the State of California, who were given the protection of prompt pay law

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

when section 220 was amended by Assembly Bill No. 2410 (1999-2000 Reg. Sess.) ("AB 2410").

In *Colombo v. State of California* (1991) 3 Cal.App.4th 594, 598-599 [5 Cal.Rptr.2d 567] (*Colombo*) the State agreed that it was the employer of state civil service employees. More recently, the State has asserted as undisputed that a civil service employee "was an employee of the State of California." (*Wright v. State of California* (2015) 233 Cal.App.4th 1218, 1225 [183 Cal.Rptr.3d 135].) The State's repeated assertion that it is the employer of state employees is correct.

California cases addressing this issue, including *Colombo, Wright*, and the Court of Appeal below, have invariably found that the State of California is the employer. (See, e.g., *Cal. Correctional Peace Officers Assn. v. State of California* (2010) 189 Cal.App.4th 849, 853 [117 Cal.Rptr.3d 109].) The State has not advanced any California legal authority to the contrary. The State's authority stands only for the unsurprising proposition that the State acts as the employer through the executive and legislative branches and by means of its agencies, departments, offices, and other instrumentalities.[2]

The trial court did not decide the issue of whether the State could be sued as the employer of state civil servants for violations of prompt pay

[2] Hereafter, reference to state agencies or departments is intended to broadly refer to the many state entities where state employees work, including state agencies, departments, boards, commissions and offices.

law. On McLean's appeal to the Third District Court of Appeal the court ruled as a matter of law that McLean, as a state civil service employee, was employed by the State of California. (Opn., at pp. 14-15.) This Court should affirm that sections 202 and 203 apply to "the payment of wages of employees directly *employed by the State of California.*" (Lab. Code, § 220, subd. (a), italics added.)

Second Issue Presented: Whether Labor Code Section 203 Includes Employees Who Quit Their Employment To Retire.

This case also presents the question of whether an employee who voluntarily separates from his or her employment to retire is "an employee who is discharged or who quits" under section 203. As a matter of fact, no employee can retire unless they either quit their employment or are discharged from it. An employment relationship cannot end, whether it is followed by other employment or retirement, unless there is first a voluntary or involuntary separation from current employment, both of which are within the broad coverage of the "who is discharged or who quits" language of section 203, subdivision (a). There is no gap that retirees fall through any more than there is a gap for some other group of employees who may quit their employment for a different reason.

The dictionary definitions of "quit" and "retire" confirm that these words share the common meaning of giving up one's current employment. An employee may quit his or her current employment to seek other work or

to retire. Under prompt pay law it is the fact of separation that matters, not the employee's reasons for the separation.

On its face, section 203 makes no exception for employees who quit to retire, nor is there any means testing that would except an employer from prompt pay obligations upon a showing that an employee or group of employees (like those who quit to retire) may be in less need of wages due than some other group of employees. The State supposes that the legislature intended to exclude elderly employees who quit their employment to enjoy retirement because they may suffer less economically from the late payment of the wages. This supposition concerning legislative intent is so unlikely it becomes absurd and is in direct conflict with the text of the applicable statutes.

Section 220 expressly extends certain non-excluded provisions of prompt pay law to all employees directly employed by the State of California. Sections 202 and 203 are within the Labor Code provisions that were extended to employees of the State of California upon the passage and signing of AB 2410. Section 203, by its terms, provides for waiting time penalties for any violation of section 202 prompt pay requirements. Section 202, subdivision (c), unambiguously requires that "when a state employee quits, retires, or disability retires from his or her employment with the state" certain wage payments must be made "no later than February 1 in the year following the employee's last day of employment." (Lab. Code, §

202, subd. (c).) The plain meaning of sections 220, 203 and 202 compels the conclusion that the State of California is obligated to make prompt payment of wages to state employees who quit their employment to retire.

The State's putative retiree defense, which has been raised for the first time in this case, is contrary to the plain meaning of the applicable statutes, creates an exception where none exists, and violates the rule that statutes governing the conditions of employment must be interpreted broadly in favor of the employee with the objective of protecting the employee. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103, 1111, fn. 13 [56 Cal.Rptr.3d 880, 155 P.3d 284].) Creating a retiree defense to an employer's prompt pay obligation would also cause practical difficulties by tethering an employer's prompt pay obligation to the employee's changeable plans concerning future employment (intent to retire) or to the contingent fact of future employment (the fact of retirement). This would leave both employers and employees in doubt as to whether and how prompt payment obligations are to be enforced by waiting time penalties.

The State here seeks to avoid suit by contending it is not the employer of state employees and that quitting work to retire is not a quit for purposes of prompt pay law. The Court of Appeal was right to reject the arguments advanced by the State and correctly decided the issues presented to it. The Court of Appeal's decision should be affirmed.

PROCEDURAL HISTORY

McLean filed a class action complaint against the State of California and the State Controller's Office. The complaint was amended and the first amended complaint pled a single cause of action, under sections 202 and 203, on behalf of a class of state employees who had resigned or retired from their employment with the State during the period from November 2010 through March 2011. (AA000001-10.) The class was defined to include all state employees who "resigned or retired," which included the many members of the proposed class who resigned to retire. (AA000004, ¶¶ 18-19.) The complaint sought section 203 waiting time penalties for the entire class, which included all the state employees who resigned, whether to retire or otherwise, during the stated time period. (AA000007.)

In its tentative ruling the trial court granted defendants' demurrer to McLean's first amended complaint on the ground that "[b]ecause § 203 does not authorize penalties for employees who have retired, McLean's cause of action for penalties fails to state a valid cause of action." (AA000116.) The trial court did "not address the other arguments in support of and opposition to the demurrer." (*Ibid.*) McLean requested and received oral argument on the court's tentative ruling. (AA000113-114.)

During oral argument, McLean continued to argue that a quit to retire was a quit under section 203. (See AA000072-79.) McLean recognized that amendment was futile if the trial court adhered to its

tentative ruling that employees who retire are not employees who quit under section 203. Thereafter, the trial court granted the demurrer based on its construction of sections 202 and 203. The demurrer was not granted on the basis of a curable pleading defect. (See AA000113-117.) Because amendment was futile in light of the trial court's construction of sections 202 and 203, final judgment was entered against McLean. (AA000128-129.)

McLean filed a timely appeal to the Third District Court of Appeal. The primary issue on appeal was whether the trial court erred when it construed section 203's "who is discharged or who quits" language as excluding employees who voluntarily separated from their present employment to retire. The State also urged on appeal that it was not the employer of state employees. For the reasons stated in its Opinion, the Court of Appeal ruled in McLean's favor and reversed the trial court. (Opn., at pp. 8-15.)

STANDARD OF REVIEW

The standard of review for a trial court's ruling on a demurrer is de novo. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415 [106 Cal.Rptr.2d 271, 21 P.3d 1189].) Where the underlying issue is one of statutory construction it is also subject to de novo review. (*Regents of Univ. of Cal. v. Superior Court* (1999) 20 Cal.4th 509, 531 [85 Cal.Rptr.2d 257, 976 P.2d 808].)

"Sustaining a demurrer constitutes error if the complaint contains allegations that state a cause of action under any legal theory." (*Cwynar v. City and County of San Francisco* (2001) 90 Cal.App.4th 637, 650 [109 Cal.Rptr.2d 233].) On demurrer, the complaint is given a reasonable interpretation, reading it as a whole and its parts in their context. (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865 [62 Cal.Rptr.3d 614, 161 P.3d 1168].) The demurrer is treated as admitting all material facts properly pled, but does not assume the truth of contentions, deductions or conclusions of law. (*Ibid.*) In determining the sufficiency of the complaint, the complaint must be construed liberally by drawing all reasonable inferences from the alleged facts. (See, e.g., *City of Pomona v. Superior Court* (2001) 89 Cal.App.4th 793, 800 [107 Cal.Rptr.2d 710].)

ARGUMENT

I. THE STATE OF CALIFORNIA IS THE EMPLOYER OF STATE EMPLOYEES.

A. The California Constitution Establishes the State as the Employer of State Civil Service Employees.

The State's employer-employee relationship with state civil service employees is established by the California Constitution. The Constitution unambiguously declares that "[t]he civil service includes every officer and *employee of the state* except as otherwise provided by this Constitution." (Cal. Const., art. VII, § 1, subd. (a), italics added.)

Under the Constitution, "[i]n the civil service permanent appointment and promotion shall be made *under a general system* based on merit ascertained by competitive examination." (Cal. Const., art. VII, § 1, subd. (b), italics added.) The Personnel Board is constitutionally required to "enforce the civil service statutes and, by majority vote of all its members, shall prescribe probationary periods and classifications, adopt other rules authorized by statute, and review disciplinary actions." (*Id.*, art. VII, § 3, subd. (a).) Through its Personnel Board (and other state entities), and as required by civil service statutes, the State acts as the unitary employer on crucial employment matters. The Constitution not only names the State as the employer of state civil service employees, it requires that the State act as their employer under a general system of employment.

B. Labor Code Section 220, Which Extended Prompt Pay Protection to State Employees, Establishes the State of California as Their Employer.

When the Legislature extended prompt pay protection to state employees in 2000, it did so by AB 2410, which amended Labor Code section 220. As amended, subdivision (a) of section 220 provides as follows:

> (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. Except as provided in subdivision (b), all other employment is subject to these provisions.

The effect of this change in the law was to apply the rules governing payment of wages, unless specifically excluded, to "employees directly employed by the State of California."[3] Sections 201, 202 and 203 are not among the excluded sections and are, therefore, applicable to "the payment of wages of employees directly employed by the State of California." By its amendment of section 220 the Legislature has unambiguously declared that the State of California is the employer of state employees for purposes of the prompt pay obligations specifically extended to it. The Legislature is presumed to mean what it says. (*Martinez v. Combs* (2010) 49 Cal.4th 35, 51 [109 Cal.Rptr.3d 514, 231 P.3d 259].)

Despite section 220's precise definition of the public employers to whom prompt pay obligations are extended, the State argues that "neither section 203 nor any other provision of prompt pay law defines the term 'employer,'" and that "the text of the statutory scheme suggests that the Legislature intended for individual state agencies—not a unitary entity denominated 'the State' ... to be responsible for making prompt payments to their departing employees." (Opening Brief on the Merits, at p. 2.)[4] The State is wrong. Section 220, subdivision (a), provides an unambiguous ostensive definition of the relevant employer when it expressly

[3] McLean pled the statute (section 220) declaring that the State of California was her employer for purposes of the alleged violations of sections 202 and 203. (AA000007-08, ¶ 38.)

[4] Citations to the State's Opening Brief on the Merits filed February 9, 2015 will be short cited as "Br. at p. #."

denominates the "State of California" as the employer for purposes of payment of wages under the non-excluded Labor Code sections, which include sections 202 and 203.

The State, in the proceedings below, sought to avoid the import of specific references to the State as the employer by urging that they should be understood as "helpful shorthand." By "helpful shorthand" the State meant that specific references to the "State of California" or "state employer" should be understood as not referring to the State, but to the many agencies where state employees worked. The Court of Appeal correctly reasoned that "[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.' (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601 [7 Cal.Rptr.2d 238, 828 P.2d 140].)"[5] (Opn., at p. 15, fn. 4.)

The State also seeks to avoid the plain meaning of section 220 by supposing that the Legislature's reference to the "State of California" in section 220 was only meant to refer to the State as the employer for purposes of the Labor Code sections that *do not apply*, rather than the sections that *do apply*. (Br. at p. 17 ["Thus as amended, section 220(a) merely provides an exemption for state employers from certain Labor Code

[5] Nor is helpful shorthand in the form of misnomer needed. If the intended employer was *not* the State, then "appointing powers" or some other identifier could have been used to capture the intended meaning.

requirements"].) The State is incorrect. Section 220 was amended for the purpose of extending the protection of certain Labor Code sections to state employees, including sections 201, 202, and 203. The State of California is just as much the employer of state employees for purposes of the Labor Code sections that do apply as it is for those that do not apply.

The legislative history accords with the plain meaning of section 220. When section 220 was amended by AB 2410, the stated purpose was to "delete specified exemptions for the *state as an employer*" from provisions of the California Labor Code. (AA000092, italics added.)

Thereafter, when the Legislature addressed "an unintended result that occurred with the enactment of AB 2410," the enrolled bill report for Assembly Bill No. 1684 (Reg. Sess. 2001-2002) (amending sections 201 and 202) explicitly stated that "AB 2410 amended section 220 of the Labor Code thereby making sections 201, 202, and 206.5 applicable to the *State as an employer*." (AA000059, italics added.) The enrolled bill report recognized that "[a]s a result, the *State employer* is now required to tender the 'prompt payment of wages' due and owing to an employee upon separation from *State employment*." (*Ibid.*, italics added.) "[T]hese shortened time frames place *the State at risk to be assessed penalties* in the event the lump sum contribution cannot be tendered to the employee's supplemental retirement plan (plan administrator or record keeper) within

the time frame specified for payment under the Labor Code." (*Ibid.*, italics added.)

The exposure *of the State* to waiting time penalties when making certain types of wage payments (that could not be made immediately or within 72 hours) was the reason for amending sections 201 and 202. The subdivision (b) amendments to these sections relieved the State from the immediate or 72-hour obligation with respect to "accrued leave" that the state employee elected to contribute to the "employer sponsored 401(k), 403b and/or 457 Plan . . . ." (AA000059.) Instead, under the subdivision (b) amendments in both sections 201 and 202, the State is obligated to make the specified payments "no later than 45 days after the employee's last day of employment." (Lab. Code, §§ 201, subd. (b), 202, subd. (b).) The subdivision (c) amendments relieved the State from the immediate or 72-hour prompt pay obligation when the state employee elected to defer leave payments into the next year and replaced it with the obligation to make payment "no later than February 1 in the year following the employee's last day of employment." (*Id.*, §§ 201, subd. (c), 202, subd. (c).) Both of the amended prompt pay time frames used the term "shall," which under the Labor Code means "mandatory." (*Id.*, § 15.)

In sum, the Legislature first specifically made the "State of California" subject to section 203 waiting time penalties for section 202 and other prompt pay violations. (Lab. Code, § 220, subd. (a).) The

Legislature then recognized the existing time frames were too short for certain categories of wage payments that the State wished to continue paying and state employees wished to continue receiving. (AA000059.) New, but still mandatory, time frames were then established to govern the prompt payment of specified wages. (Lab. Code, §§ 201, 202, subds. (b), (c).) Under these circumstances, there is no uncertainty as to who the employer is or what the law requires. The State of California is the employer of state employees for purposes of prompt pay law.

C. In *Colombo v. State of California* the State Urged That It Was the Employer of State Employees and the Court of Appeal Agreed with the State and Correctly Decided the Issue on Grounds That Are Not Distinguishable.

In *Colombo*, the Court of Appeal affirmed the trial court's judgment granting the defendants' demurrer because, as a matter of law, the State and not its departments was the employer. (*Colombo*, *supra*, 3 Cal.App.4th at pp. 596, 598-599.) The crucial finding was that the State of California was the employer of state civil service employees. The court held:

> Colombo is a civil service employee *of the State of California*, paid by the state, not the CHP. [Citations.] . . . Likewise, DOT employees are civil service employees of the state. The fact that the departments perform different functions for the State of California does not mean they are akin to separate business entities within a multiunit corporate enterprise . . . both departments and their employees are agents of the state. [Citation.] Hence, lawsuits against state agencies are in effect suits against the state. [Citations.] *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. [Citation.] [¶] . . . [¶] *Colombo was an*

> *employee of the State of California, as were the DOT employees . . . .*

(*Id.* at pp. 598-599, italics added, fns. omitted.)

In *Colombo* the State represented—in a successful defense to a lawsuit—that the State, not its individual agencies or departments, was the employer. Now the State, in a complete reversal of its previous position, contends that it is only the individual place of work agencies, rather than the State, that employs state civil service employees.

The State seeks to distinguish *Colombo* by arguing that "the *Colombo* holding is properly based on the principles of workers' compensation exclusivity and the rule in tort cases that a discrete injury gives rise to one claim for relief." (Br. at p. 26, citing *Colombo*, *supra*, 3 Cal.App.4th at p. 599.) This is a misreading of the case. In *Colombo*, no party to the litigation disputed workers' compensation exclusivity and no party disputed the well-established principle that "the workers' compensation claim does not affect the employee's right to bring an action against any person *other than the employer* and certain coemployees for damages proximately resulting from the injury. [Citations.]" (*Colombo*, *supra*, 3 Cal.App.4th at pp. 596-597, original italics.) Instead, the outcome in *Colombo* turned entirely on whether the individual department where plaintiff worked, rather than the State, was his employer.

Although workers' compensation exclusivity may have served as an outcome-driven motivation for the state defendants' assertion that the State was the employer in *Colombo*, the question presented and decided was whether the State was the employer, not whether the State is the employer only when that result allows it to prevail in a lawsuit. None of the analysis in the *Colombo* decision, agreeing with the State that it employed state civil service employees, had the "heads I win tails you lose" character now asserted by the State to defend this lawsuit. In short, there is no principled distinction between the State is the employer holding in *Colombo* and the State is the employer holding by the Court of Appeal in this case. This Court should preserve the decades-old and on-point precedent in *Colombo* (and other cases) by affirming the Court of Appeal's decision in this case.

D. An Unbroken Line of Cases Establishes That the State of California Is the Employer of State Employees.

The State has not cited to a single California case that calls into question the holding in *Colombo* or that reaches a different result. The cases are all to the contrary.

In a case involving the alleged overtime wages of a state employee assigned to work within the Department of Corrections and Rehabilitation, the Court of Appeal found that "Defendant/respondent State of California (State) is the employer." (*Cal. Correctional Peace Officers Assn. v. State*

of California, supra, 189 Cal.App.4th at p. 853.)[6] In *Valenzuela v. State of California* (1987) 194 Cal.App.3d 916 [240 Cal.Rptr. 45] the court reached the same result when it found that Plaintiff was "a traffic officer employed *with* the California Highway Patrol" but "sued *his employer* the State of California (State) . . . ." (*Id.* at p. 918, italics added.)

In a case decided this year, "[t]he State filed a reply, asserting that it was 'undisputed that (1) Officer Wright was an employee of the State of California at San Quentin State Prison.'" (*Wright v. State of California, supra*, 233 Cal.App.4th 1218, 1225.) This assertion by the State, as to a state civil service employee, is in direct conflict with the State's assertion in this case. At the same time the State asserts an employer/employee relationship between the State of California and a state civil service employee in *Wright*, it disclaims that relationship here. The State's assertions in *Colombo* and in *Wright* were and are correct.

Case after case has recognized that the State of California is the employer of state employees. In *Vaught v. State of California* (2007) 157 Cal.App.4th 1538, 1542 [69 Cal.Rptr.3d 605], the State and the Court of Appeal recognized that plaintiff worked "for the State" through the Department of Parks and Recreation. The appellate court also recognized

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[6] The State's resort to a workers' compensation exclusivity distinction to avoid the holding in *Colombo, supra*, 3 Cal.App.4th 594 (see previous section) also fails in light of other precedent, like *California Correctional Peace Officers Association v. State of California, supra*, 189 Cal.App.4th 849, which reaches the same result when workers' compensation exclusivity is not an issue in the case.

that when there was a change in position, plaintiff "was not a new employee with the State, but rather was merely changing positions in that employment." (*Id.* at p. 1546.) In *Fields v. State of California*, the appellate court recognized that "the State of California (State)" was the employer of a state employee involved in an accident. (*Fields v. State of California* (2012) 209 Cal.App.4th 1390, 1393 [148 Cal.Rptr.3d 15].)

The State of California has been sued as the defendant employer in many other cases where no question has been raised as to the propriety of naming the State of California. (See, e.g., *Sacramento Typographical Union No. 46 v. State of California* (1971) 18 Cal.App.3d 634 [96 Cal.Rptr. 194] [class action against the State by its state employees for failure to provide required paid holidays].) Even the cases the State has cited for other purposes here and below reveal that the State can be sued as the employer of state civil service employees. (See, e.g., *Lucas v. State of California* (1997) 58 Cal.App.4th 744 [68 Cal.Rptr.2d 253].)

E. The State's Theory Proves Too Much.

The State reasons that it should not be a defendant in this case because "a unitary entity denominated 'the State'" does not act directly in employment matters. (Br. at p. 2, see also pp. 19, 21.) This proves too much. If a lack of direct action was enough to eliminate the State as a defendant, then the State of California could not be sued in any case because it always acts through branches, offices, agencies, institutions or

other instrumentalities.

The many cases properly brought against the State reveal that the State cannot escape suit simply because it is a "unitary entity" one step removed from its many state agencies. To the contrary, the State has long been recognized as a proper party defendant and, even when agencies are sued in its stead, this Court has held that the actions are in effect actions against the State. (*Bacich v. Bd. of Control* (1943) 23 Cal.2d 343, 346 [144 P.2d 818].)

F. Documents Subject to Judicial Notice Establish That the State Is the Employer of State Employees.

The issue of whether the State is the employer of McLean and other state employees comes to this Court after the state defendants' demurrer was granted and final judgment was entered against McLean on different grounds. The trial court did not address the issue. (AA000113-117.)

Because of this procedural history, McLean did not have the opportunity to demonstrate through evidence that she and similarly situated class members were employed by the State of California as she repeatedly alleged in her complaint. (See, e.g., AA000001-04, ¶¶ 2, 4, 5, 9, 11, 18, 19.) Although the issue can properly be decided in her favor as a matter of law, as it was by the Court of Appeal, documents subject to judicial notice

are relevant to this Court's consideration of the issue.[7]

The actual employer of state employees is well known. Every state employee's W-2 Form must truthfully identify his or her employer. The State of California was truthfully identified as McLean's employer on her W-2 Forms. (Plaintiff's Motion for Jud. Notice, at pp. 6, 12-13; Declaration of Ian J. Barlow in Support of Plaintiff's Motion for Jud. Notice ("Barlow Decl."), Ex. B.) The same is believed to be true of all state employees in the alleged class, each of whom had their W-2 Forms prepared by the State Controller. (AA000094.)

Further, where there is a written agreement covering the essential terms of employment it will necessarily identify who the employer is and speak to many aspects of the employment relationship. McLean was a member of an employee organization as provided for in the Ralph C. Dills Act ("Dills Act") (Gov. Code, §§ 3512-3524). Her bargaining unit was the California Attorneys, Administrative Law Judges and Hearing Officers in State Employment ("CASE"). Under the Dills Act, when agreement is reached between a recognized employee organization and the Governor, the

[7] In the State's brief to this Court it makes a number of factual assertions about the control that it says only individual agencies (as appointing powers) can exercise over state employees. (See Br. at pp. 3, 26-28.) No evidence is given to support these factual assertions. Under these circumstances, and because this Court has granted review of an important question, McLean has requested judicial notice of two documents that show the State of California employed her.

parties are required to "prepare a written memorandum of such understanding . . . ." (*Id.*, § 3517.5.)

The MOU for which judicial notice is requested provides that "[t]his Memorandum of Understanding (hereinafter 'MOU' or 'Agreement') is entered into by and between the State of California (hereinafter 'State' or 'State employer')" and CASE and that the purpose "is to improve employer-employee relations between the parties [where the State is the party employer] by establishing wages, hours, and other terms and conditions of employment." (Barlow Decl., Ex. A at p. A-02 [art. 2, sec. 1.1, subds. (A), (B)].) The stated purpose in the MOU is consistent with the purpose of the Dills Act. (Gov. Code, § 3512.) The Department of Justice, which the State asserts exclusively employed McLean, was not a party to the MOU governing McLean's wages, hours, and other terms and conditions of employment.

In the "State Rights" section (Article 3), the MOU expressly gives to the State of California:

> the exclusive right to determine the mission of its constituent departments, commissions, and boards; set standards of service; train, direct, schedule, assign, promote, and transfer its employees; initiate disciplinary action; relieve its employees from duty because of lack of work, lack of funds, or for other legitimate reasons; maintain the efficiency of State operations; determine the methods, means and personnel by which State operations are to be conducted; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work.

(Barlow Decl., Ex. A at p. A-03 [art. 3, sec. 3.1, subd. (B)].)

The State also has the "right to make reasonable rules and regulations pertaining to employees consistent with this MOU provided that any such rule shall be uniformly applied to all affected employees who are similarly situated." (Barlow Decl., Ex. A at p. A-03 [art. 3, sec. 3.1, subd. (B)].)[8] The MOUs entered into between the State of California and its represented civil service employees further demonstrate that the State of California is the employer of state civil service employees under a general system with uniform rules. On the specific subject of "Timely Payment of Wages," the State of California agreed "[n]othing in this subsection shall be construed as a waiver of any individual right an employee may have apart from this agreement, to bring a personal action *against the State* as the result of payroll errors or delays." (*Id.*, Ex. A at p. A-11 [art. 5, sec. 5.8, subd. (B)], italics added.)

The employer-employee relationship between the State of California and state employees is beyond reasonable doubt. The State of California pays the wages of state employees, not the place of work agencies. (See, e.g., *Colombo*, *supra*, 3 Cal.App.4th at p. 598.) The State of California declares itself as the employer of state employees on their W-2 Forms. (Barlow Decl., Ex. B.) It is the State of California, not the place of work

[8] This Court considered the text of this MOU in a 2010 decision. (*Prof. Engineers in Cal. Gov. v. Schwarzenegger* (2010) 50 Cal.4th 989, 1041, fn. 35 [116 Cal.Rptr.3d 480, 239 P.3d 1186].)

agencies, that enters into agreements with represented state employees as the party employer with all the rights of an employer. (*Id.*, Ex. A at pp. A-02 to A-03.) The State's present denial of its employment relationship with state employees comes after it has unambiguously declared itself as McLean's employer and agreed that it is the proper defendant for prompt pay suits brought by represented state civil service employees. The State's denial comes even after it has represented to a Court of Appeal that its employment of a state civil servant is undisputed.[9] (*Wright v. State of California, supra,* 233 Cal.App.4th 1218, 1225.)

G. Under Section 202 Appointing Powers Are Not the State Employer.

The State argues that "textual indicia" in Labor Code section 202 "supports the conclusion that a civil servant's 'employer' is her appointing power . . . ." (Br. at p. 14.) In making this argument, the State references terms like "particular entity" and "individual agency," which are nowhere to be found in section 202, while also offering a flawed analysis of the terms "appointing power" and "state employer," which are used in section 202. (Br. at pp. 14-15.)

[9] This same representation is currently before this Court in the State's Petition for Review of the appellate court's decision in *Wright v. State of California, supra*, 233 Cal.App.4th 1218, submitted on March 11, 2015. (See California Supreme Court Docket (Register of Actions) in *Wright v. State of California*, Case No. S224999 <http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=2102898&doc_no=S224999> [as of Apr. 1, 2015].)

The text referring to "appointing power" and "state employer" in section 202 cannot be understood as referring to the same entity as the State argues. Instead, what is contemplated by subdivisions (b) and (c) of section 202 is a set of wage payment transactions between three separate entities: the state employee, the appointing power and the state employer. Under subdivision (c), and similarly under subdivision (b), the employee may, at least five workdays prior to his or her final day of employment, submit "a written election to his or her *appointing power authorizing the state employer* to" defer or tender designated wage payments. (Lab. Code, § 202, subds. (b), (c), italics added.)

The "appointing power" cannot here be acting as the "state employer" because the appointing power transmits the employee's election and authorization to the state employer. The "appointing power" cannot accomplish the wage contributions and deferrals contemplated by subdivisions (b) and (c) of section 202 (by giving the employee's authorization to itself under the alternative guise of "state employer") because the "appointing power" does not have the capacity to pay either regular wages, retirement plan contributions or deferred wages to state employees.

The payroll functions of the State of California are carried out by the State Controller. (Gov. Code, § 12470.) Acting under a "uniform State payroll system," the Controller, among other things, computes pay and

retirement contributions, prepares payrolls and salary warrants, performs direct deposit payments, transfers funds for payroll disbursements, remits the amount of payroll deductions directly to the retirement systems, and prepares the Form W-2. (AA000094.) Because the place of work agencies do not function as the agency that pays the wages of state employees, the State's contention that these state agencies are the only possible defendants in this prompt pay action makes little sense.[10]

H. The State Exaggerates the Role of the Place of Work Agencies in Employment Matters and Fails To Account for the Fact That These (and Other) Agencies Are All Acting on Behalf of the State.

The State's argument that place of work agencies, like the Department of Justice, are the sole employers of state civil service employees ignores the fact that state employees are employed within the State's civil service. Civil service employees are defined as persons "legally holding a position in the State civil service." (Gov. Code, § 18526.) They are appointed to positions in the State civil service. (*Id.*, § 18525.) Dismissals, demotions, suspensions and other adverse actions are all subject to statutory rules in accordance with the State's Constitution. (*Id.*, § 18703.) Compensation is generally determined by the Legislature, the Department of Human Resources, or by agreement with the State. State

[10] The State notes that employee wages are accounted for as a part of the state's budget for state agencies. (Br. at p. 26, fn.13.) This accounting does not alter the fact that it is the State, through the Controller's Office, that pays the wages of state employees.

civil service wages are paid by the State. The State Controller is responsible for payroll. The Department of Human Resources is responsible for many other employment matters. In these and many other fundamental ways, there is no reasonable sense in which the place of work agency can be conceived of as the exclusive employer of state civil service employees.[11]

The State's argument to the contrary rests on the unsurprising fact that work performed by most state civil service employees is managed at a departmental, or lower, level and that decisions affecting employment may first be made at this level. This is what happens in any large company where there may be many departments, managers and supervisors, but the employer remains the company, not the departments or the department managers or supervisors. As the Court of Appeal correctly found in *Colombo* "[t]he fact that the departments perform different functions for the State of California does not mean they are akin to separate business entities within a multiunit corporate enterprise." (*Colombo*, *supra*, 3 Cal.App.4th at p. 598.) The court also recognized that the State of California "encompasses" its individual agencies, like CHP and DOT. (*Id.* at p. 596.)

Although it may appear that some inquiry is required to determine how much control over which aspect of employment is undertaken by

[11] The State glosses over the "oversight and management" of State employees by the Legislature, the Governor, the Department of Finance, the Department of Human Resources and the State Controller (Br. at pp. 24-25), while exaggerating the role of the place of work agencies.

which state agency or person, this wrongly presumes that an employer cannot act by agency or by its constituent parts in employment matters. The Industrial Welfare Commission ("IWC") has defined an employer as "'any person . . . who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of [an employee].'[12]" (*Martinez v. Combs*, *supra*, 49 Cal.4th at p. 60, italics omitted.) Even before adopting this definition, the IWC used the term "employ" to mean "'to engage, suffer, or permit to work.'[13] . . . ." (*Id.* at p. 69.) The State of California undeniably engages, suffers and permits the work of state employees. This is precisely what the State contemplates in its Constitution and in the many statutes governing the work of state employees. Nor is there any question that the State of California directly or indirectly, through an agent or any other person, exercises control over the wages, hours or working conditions of state civil service employees.

The State nonetheless contends that individual agencies, acting as "appointing powers," should be regarded as the exclusive employer of state civil service employees. (See, e.g., Br. at pp. 12-31.) But appointing powers act as directed by statute on employment matters and the

[12] "IWC former wage order No. 1, section 2; see, e.g., Wage Order No. 14 (Cal. Code Regs., tit. 8, § 11140, subd. 2(F))." (The intended citation is to Cal. Code Regs., tit. 8, § 11140, subd. 2(G), not Cal. Code Regs., tit. 8, § 11140, subd. 2(F).)

[13] "Wage Order No. 14 (Cal. Code Regs., tit. 8, § 11140, subd. 2(C))."

appointments they make are to positions, within classifications, within the state civil service. (Gov. Code, §§ 18522, 18523, 18524.) In making these appointments to state civil service positions, the place of work agencies must act in "strict accordance" with applicable sections of the Government Code. (*Id.*, § 19050.)

In its brief, the State discusses how the State is organized and ultimately concludes that "state agencies are distinct from one another." (Br. at p. 20.) This misses the point that individual state agencies, which may be distinct from one another, are all constituent parts of the State of California that are delegated responsibilities with respect to state employees. (See, e.g., *Colombo*, *supra*, 3 Cal.App.4th at p. 598.) This discussion also ignores that the state civil service operates under a general system of employment. (Cal. Const., art. VII, § 1.)

Factually, the State asserts that the "day-to-day" supervision and control over state civil service employees is accomplished by the individual place of work agencies, like the DOJ, so they should be viewed as the employer of state civil service employees. (Br. at pp. 3, 26-28.) But day-to-day supervision and control is not exercised as the State supposes. Instead, day-to-day supervision and control over most state civil service employees is accomplished by means of other state civil service employees. State civil service supervisory employees have been given extensive authority to exercise control and direction over other state civil service

employees. This supervisory authority includes the authority to "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct" other employees. (Gov. Code, § 3513, subd. (g).)

The legal authority cited by the State does not in any instance declare the proposition upon which the State depends.[14] No California authority cited by the State declares that the State of California is *not* the employer of state employees or that individual agencies rather than the State *are* the exclusive employers of state employees.[15]

The State relies on a section of the Administrative Manual which addresses departmental responsibility for separating employees consistent

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[14] The State footnotes a few employment discrimination cases as standing for the proposition "that it is the agency that employs the plaintiff, and not the 'State' as a whole." (Br. at p. 27, fn. 14.) In *Lyes v. City of Riveria Beach* (11th Cir. 1999) 166 F.3d 1332 (*Lyes*), the issue was aggregating employees for purposes of meeting the Title VII minimum, which was not allowed as between a City and a redevelopment agency. *Lyes* does not address the issue presented here. In *Hearne v. Board of Education* (7th Cir. 1999) 185 F.3d 770 and *EEOC v. Illinois* (7th Cir. 1995) 69 F.3d 167, the question was who was the employer for Title VII purposes where the agency or part of the state apparatus that has actual hiring and firing responsibility is deemed the appropriate defendant for purposes of a discrimination claim. Both of these cases involved school teachers; neither case involved state civil service employees. Suit against the state was inappropriate in those cases because the states were not involved in the discrimination. (See, e.g., *EEOC v. Illinois, supra,* 69 F.3d at pp. 170-171.) A different result would obtain as to the state's "*own* employees." (*Id.* at p. 170, original italics.) The Nebraska attorney general opinion cited by the State is not relevant authority, but did note that some courts have found suit against the state to be appropriate in a Title VII case. (Op.Neb.Atty.Gen. (Aug. 7, 2000, No. 34) at p. 5 [2000 WL 1113394].)

[15] McLean is not asserting that a state agency may never be sued by a state employee in an employment case. The issue here is whether the State may be sued as an employer under Labor Code sections 220, 202 and 203.

with the requirements of sections 201 and 202. (Br. at p. 16, citing AA000064.) The State mistakenly reads this as giving responsibility for prompt payment solely to "each employee's employing department." (Br. at p. 16.) Nowhere does the text identify the department as the employer of "separating employees." (AA000064.) Nor can the text be understood as limiting the delegated departmental responsibility to the particular department where a separating state employee worked. Some things, like the referenced return of credit cards, keys and so on, will naturally occur at the place of work for separating state employees. The actual responsibility to make payments of wages, however, cannot be understood as having been delegated solely to the department where a state employee worked because payroll responsibility is given to the State Controller's Office. (Gov. Code, § 12470; AA000094.)

In sum, the State's delegation of responsibility for some employment matters does not convert the agencies into the exclusive employers of state civil service employees. The State does not claim this effect as to the State Controller or the former Department of Personnel Administration, now Department of Human Resources, both of which have important responsibilities to state employees. Where the question is not whether agencies may act on behalf of the State, but whether the State is the employer of State civil service employees, the Constitution, statutes, case

law, and documents subject to judicial notice, all unambiguously establish the State of California as the employer of state employees.

I. Suit Against the State Will Not Impose Onerous Discovery Obligations on Unnamed and Uninvolved Agencies or Cause Burdensome Trial-Management Issues.

The State asserts that under McLean's view of the statutes a plaintiff with a Labor Code dispute stemming from the actions or practices of a single state agency "could initiate potentially sweeping litigation against all state agencies in all branches of government without naming the agencies involved or serving them with process." (Br. at p. 29.) The State's concern over unnamed agencies is misplaced. As a matter of both law and fact, nothing sweeps unnamed and uninvolved agencies of the State into litigation involving the alleged conduct of a single state agency. Where a single agency's conduct is at issue, the State, the single involved agency, or both, are often sued and no uninvolved and unnamed agencies have any untoward involvement in those lawsuits.

When the State turns its attention from hypothetical cases to this one, it ignores the alleged facts concerning the late payment of wages to McLean and to members of the proposed class. Mclean alleged a failure in the uniform and common payroll system that applies to all state employees (AA000003, ¶ 11) during the relevant period of a few months at the end 2010 and beginning of 2011 (AA000004, ¶ 18). It is the State of California, acting through the State Controller, that "operate[s] a uniform

state payroll system for all state agencies except the California Exposition and State Fair and the University of California." (Gov. Code, § 12470.) Unnamed and uninvolved agencies will not be swept into the rigors of this litigation, because this litigation involves the late payment of wages under the State's uniform payroll system.[16]

Because of the direct role played by the Controller, including the specific payment transactions here at issue, McLean sued both the State of California and the California State Controller. The Court of Appeal found that despite the allegations of wrongful conduct against the State Controller's Office, it is not necessary to name the Controller as a party defendant. (Opn., at p. 15.) The court reasoned that "[a]n action against state agencies in their capacity as such is, in effect, an action against the state. Thus it is sufficient to name only the state as party defendant." (*Ibid.*, citing *Bacich v. Bd. of Control*, *supra*, 23 Cal.2d at p. 346.) If for some reason the State cannot be sued, or an agency of the State must be sued, then (as McLean pled below) the State Controller is the proper agency defendant because the State Controller (not the place of work

[16] Discovery in this case will not be difficult, nor will it involve unnamed and uninvolved agencies. McLean believes that the data showing the violations of section 202's prompt pay requirements and the data necessary to calculate waiting time penalties is in the hands of the State Controller's Office or the Human Resources Department (formerly Department of Personnel Administration) or the retained third party administrator (Nationwide Retirement Solutions), or some combination of the above. In short, the State has the class-wide information, which can easily be produced in discovery.

agencies) was the state agency allegedly responsible for the late payment of wages in this case. (AA000003, ¶ 11.)

The State also raises the question of section 203 willfulness. (Br. at pp. 29-30.) The issue of willfulness can be easily addressed in this case because the State knew it had the alleged prompt pay obligations to class members and failed to meet those obligations by making timely payment.

McLean does not believe the State's speculations concerning discovery matters, class action procedures, trial management complexities, or unnamed and uninvolved agencies needs to be considered by this Court to decide either of the two issues presented. If considered, the Court should know that it is no part of McLean's view of her employer or the Labor Code that would sweep in uninvolved and unnamed agencies or lead to any of the difficulties imagined by the State. (Br. at pp. 29-30.)

II. LABOR CODE SECTION 203 INCLUDES EMPLOYEES WHO QUIT THEIR EMPLOYMENT TO RETIRE.

The second issue presented is whether an employee who "quits" under section 203 includes an employee who quits to retire.

A. The Statutes

In relevant part, section 203 states:

> (a) If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.3, 201.5, 202, and 205.5, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid

or until an action therefore is commenced; but the wages shall not continue for more than 30 days.

In relevant part, section 202 states:

(a) If an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting . . . .

(b) Notwithstanding any other provision of law, the state employer shall be deemed to have made an immediate payment of wages under this section for any unused or accumulated vacation, annual leave, holiday leave, sick leave to which the employee is otherwise entitled due to a disability retirement, or time off to which the employee is entitled by reason of previous overtime work where compensating time off was given by the appointing power, provided at least five workdays prior to his or her final day of employment, the employee submits a written election to his or her appointing power authorizing the state employer to tender payment for any or all leave to be contributed on a pretax basis to the employee's account in a state-sponsored supplemental retirement plan as described under Sections 401(k), 403(b), or 457 of the Internal Revenue Code provided the plan allows those contributions. The 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 . . . .

(c) Notwithstanding any other provision of law, when a state employee quits, retires, or disability retires from his or her employment with the state, the employee may, at least five workdays prior to his or her final day of employment, submit a written election to his or her appointing power authorizing the state employer to defer into the next calendar year payment of any or all of the employee's unused or accumulated vacation, annual leave, holiday leave, sick leave to which the employee is otherwise entitled due to a disability, retirement, or time off to which the employee is entitled by reason of previous overtime work where

> compensating time off was given by the appointing power. To qualify for the deferral of payment under this section, only that portion of leave that extends past the November pay period for state employees shall be deferred into the next calendar year . . . .
>
> Payments shall be tendered under this section no later than February 1 in the year following the employee's last day of employment . . . .

B. Rules of Statutory Construction

In construing a statute, the "fundamental task is to ascertain the Legislature's intent so as to effectuate the purpose of the statute." (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83 [45 Cal.Rptr.3d 394, 137 P.3d 218] (*Smith*).) The starting point is "the language of the statute, giving the words their usual and ordinary meaning." (*Ibid.*) The language "must be construed 'in the context of the statute as a whole and the overall statutory scheme, [giving] "significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose."' [Citation.]" (*Ibid.*) "If the statutory language is clear and unambiguous [the] inquiry ends." (*Murphy v. Kenneth Cole Productions, Inc.*, *supra*, 40 Cal.4th at p. 1103.)

Where the issue is whether the Legislature intended an exception, courts "must assume that the Legislature knew how to create an exception if it wished to do so." (*City of Ontario v. Superior Court* (1993) 12 Cal.App.4th 894, 902 [16 Cal.Rptr.2d 32].) For this reason, "[j]udicial construction, and judicially crafted exceptions, are permitted only where due process is implicated, or where literal construction would produce

absurd results." (*Cassel v. Superior Court* (2011) 51 Cal.4th 113, 124 [119 Cal.Rptr.3d 437, 244 P.3d 1080].)

If the statutory terms are found to be ambiguous, extrinsic sources may be examined, and the construction given to the statute should be the one "that comports most closely with the Legislature's apparent intent, endeavoring to promote rather than defeat the statute's general purpose, and avoiding a construction that would lead to absurd consequences." (*Smith*, *supra*, 39 Cal.4th at p. 83.) Where the statute governs the regulation of wages, hours and working conditions, it must be liberally construed in favor of the employee and in the manner that best effectuates the statute's protective intent. (See, e.g., *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1026-1027 [139 Cal.Rptr.3d 315, 273 P.3d 513].)

C. An Employee Who Retires Has Necessarily Quit His or Her Employment or Been Discharged from It.

Section 203 waiting time penalties are recoverable by any employee "who is discharged or who quits" and who establishes a prompt pay violation under section 202 or other specified sections. (Lab. Code, § 203, subd. (a).) No employee can retire unless he or she is discharged or quits because absent the quit or discharge—a voluntary or involuntary separation—the employee would remain employed and not be retired.

The discharge may be for cause or not for cause. The quit may be to retire or to seek another job. The employee may seek another job because

of a better offer of employment or dislike of present employment. The employee may quit to disability retire. None of the many possible and different reasons for a discharge or a quit changes the reality that when an employee retires they either quit their employment or were discharged from it.

Ceasing one's current employment (by a quit or a discharge) fully captures the immediate sense of "retire," which is not eliminated by the employee's expectations concerning future employment. When the State argues that "[t]he term 'quit' does not encompass those who 'retire'" (Br. at p. 31), it misses the plain fact that the term "quit" encompasses every employee who quits their employment to retire and many other employees as well.

D. The Terms "Quit" and "Retire" Share the Common Meaning of Giving up One's Employment.

The dictionary definitions of "quit" and "retire" share the common meaning of an employee giving up his or her employment. It is this common meaning that matters under section 203.

According to the Merriam-Webster Online Dictionary,[17] the relevant definition of "quit" is "to give up employment." (<http://www.merriam-

[17] "The Merriam-Webster Online Dictionary is based on the print version of Merriam-Webster's Collegiate® Dictionary, Eleventh Edition. The online dictionary includes the main A-Z listing of the Collegiate Dictionary, as well as the Abbreviations, Foreign Words and Phrases, Biographical Names, and Geographical Names sections of that book." (<http://www.merriam-webster.com/info/faq.htm> [as of Mar. 25, 2015].)

webster.com/dictionary/quit> [as of Mar. 25, 2015].) "Retire" means "to stop a job or career because you have reached the age when you are not allowed to work anymore or do not need or want to work anymore." (<http://www.merriam-webster.com/dictionary/retire> [as of Mar. 25, 2015].) It also means "to withdraw from one's position or occupation: conclude one's working or professional career." (*Ibid.*) Thus, both "quit" and "retire" plainly include, as an essential part of their most common meaning, an employee withdrawing from or giving up his or her employment.

The State refers to the Random House Unabridged Dictionary (2d ed. 1997) definition of "quit" as "'to give up or resign; let go; relinquish; to give up or resign one's job or position'" and the definition of "retire" as "'to withdraw from office, business or active life, usually because of age; to retire at age 60.'" (Br. at pp. 32-33.) Both of these definitions also include the common meaning of giving up present employment. The difference, which is not one that matters under section 203, is that the withdrawal from or giving up of present employment in the case of retirement is associated with the expectation that the employee is not going to seek future employment and that this expectation may often relate to advancing age.

In its ordinary meaning discussion, the State suggests that an employee who "retires" would not ordinarily say that he or she "quit" his or her job. (Br. at pp. 31-32.) But it is perfectly ordinary to say "I quit my job

today and plan to retire." Similarly, an employee might say, "I was fired from my job for no good reason. I'm too old for this nonsense. I'm retiring." Furthermore, if an employee at the age of 65 were to say "I quit work today" that could be understood in context as meaning the same as "I am retiring." One cannot even use the English language in a way that would support the State's ordinary meaning argument because it makes no sense to say, "I decided to retire today, but not to quit my employment."

The State recognizes that retirement "has most commonly been understood to indicate a withdrawal from gainful employment." (Br. at p. 33.) When it is voluntary, this "withdrawal from gainful employment" is a quit. The State nonetheless suggests that a "quit" is limited to "an immediate intention to leave a particular job," while retirement "has most commonly been understood to indicate a withdrawal from gainful employment." (*Id.* at pp. 32-33.) What the State is arguing is that an employee who quits working altogether (a retiree) *is not* an employee "who quits" under section 203, but an employee who quits a particular job *is* an employee "who quits" under section 203.

The State's argument is wrong for two reasons, both of which reveal the infirmity of the State's position. First, quitting work altogether (a retirement) is on its face a "quit." Second, the kind of quit that involves quitting work altogether, just like the job-specific quit that the State seeks to distinguish from it, cannot occur *without also quitting a particular job*,

i.e. giving up one's present employment. In other words "quits" and "retires" both equally require quitting a particular job and the meaning of "retires" only adds to it the intention of not seeking further employment.

The State's ordinary meaning analysis of the words "quit" and "retire" correctly recognizes that "quit" is the broader term that "can be accomplished at any time at any stage of a person's career." (Br. at p. 32.) The State then describes retiring, particularly from public employment, as a more particular circumstance that occurs under certain conditions at the end of a person's career. (*Id.* at pp. 33-34.) That a quit can occur at the end of a person's career, when he or she decides to retire, does not change the fact that a quit "can be accomplished at any time and at any stage of a person's career." (*Id.* at p. 32.) The last quit of a person's career is still a quit.

An employee who voluntarily retires always quits the particular job where he or she is presently employed and also, as the State puts it, hopes to "cease working entirely in order to pursue other interests." (Br. at p. 33.) The aspiration to "cease working entirely" does not take an employee who quits to retire outside the meaning of "an employee who is discharged or who quits" under section 203.[18]

[18] The State tries to bolster its ordinary meaning argument by claiming that McLean's pleadings distinguish "between 'quit' or 'retire.'" (Br. at p. 33.) The words actually used in the First Amended Complaint ("FAC") were "resign or retire," but the important point is that nowhere is it alleged that these groups could be, or were intended to be, mutually exclusive. To the contrary, as to the entire class alleged to have resigned or retired, the allegations of the FAC include both of them as similarly situated employees who have quit for purposes of section 203 waiting time penalties.

E. Section 203 Provides for Waiting Time Penalties for All Section 202 Violations and Section 202, Subdivision (c), Expressly Applies When a State Employee Quits, Retires, or Disability Retires.

Statutes "must be construed 'in the context of the statute as a whole and the overall statutory scheme, [giving] "significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose."' [Citation.]" (*Smith*, *supra*, 39 Cal.4th at p. 83.) Within prompt pay law, section 203 operates as the penalty statute for violations of section 202 and the two statutes should be read together.

Subdivision (a), of section 203, states: "[i]f an employer willfully fails to pay, without abatement or reduction, *in accordance with* Sections 201, 201.3, 201.5, 201.9, *202*, and 205.5, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof . . . ." (Lab. Code, § 203, subd. (a), italics added.) The intended meaning of section 203, subdivision (a), is obvious from the text. Employers must make the payments required by the identified sections within the required time or be subject to waiting time penalties. Section 202, including the prompt pay obligations found within

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(AA000001-7, ¶¶ 1-2, 4, 13, 18, 22-23, 32-36.) Read in reasonable context, the core allegation is that the entire class of employees who resigned or retired are employees who quit under sections 202 and 203. (See *Moore v. Regents of Univ. of Cal.* (1990) 51 Cal.3d 120, 125 [271 Cal.Rptr. 146, 793 P.2d 479] ["we assume that the complaint's properly pleaded material allegations are true and give the complaint a reasonable interpretation by reading it as a whole and all its parts in their context"].)

each of its subdivisions, is expressly within the coverage of section 203's waiting time penalties.

In turn, section 202, subdivision (c), imposes an unambiguous prompt pay obligation "when a state employee quits, retires, or disability retires" by commanding that any deferred payments "shall be tendered under this section no later than February 1 in the year following the employee's last day of employment." Like section 203's inclusion of section 202, section 202's inclusion of state employees who retire is beyond cavil. The State nonetheless argues that the section 202 prompt pay obligation that specifically applies "when a state employee quits, retires or disability retires" does not apply for purposes of waiting time penalties. It takes this position even though section 203 states that wage payments must be made "in accordance" with section "202" or be subject to waiting time penalties. (Lab. Code, § 203, subd. (a).)

The State's theory is that by describing the employees owed the section 202, subdivision (c), obligation as *including* any state employee who "quits, retires, or disability retires" the Legislature meant to *exclude* employees who retire. (Br. at pp. 36-37.) The State relies on the rule of statutory construction that a term employed in one place and excluded in another should not be implied where excluded. (*Ibid.*) But this rule has no application where section 203 broadly includes employees who quit to

retire (or to disability retire) and section 202 more specifically includes them.[19] In short, inclusion does not imply exclusion.

Section 203 cannot be understood as impliedly excluding any part of section 202 because it expressly includes the entirety of section 202. When the Legislature amended sections 201 and 202 to add subdivisions (b) and (c), it knew that the section 201 and 202 prompt pay requirements were subject to section 203 waiting time penalties. In fact, the amendments were undertaken for this very reason. (AA00059.)

The State's invitation to eliminate waiting time penalties for the specific prompt pay obligation it owed to state employees "when they quit, retire, or disability retire" should be declined. The Legislature is presumed to mean what it says. (*Martinez v. Combs* (2010) 49 Cal.4th 35, 51 [109 Cal.Rptr.3d 514, 231 P.3d 259].)

F. The Legislature's References to Included Groups of Employees in the Violation Statutes Are Not Intended To Exclude Those Groups from the "Who Is Discharged or Who Quits" Coverage of Section 203.

The State argues that by specifically including the word "retire" in section 202, while not including it in the more general "who is discharged or who quits" language in section 203, the Legislature must have intended

[19] Section 202, subdivision (b), expressly includes "sick leave to which the employee is otherwise entitled due to a disability retirement." By the State's logic, an included employee who must be paid disability retirement sick leave by tendering payment to the employee's retirement plan account "no later than 45 days after the employee's last day of employment" is excluded from the protection given by waiting time penalties because they were expressly *included* in section 202, subdivision (b), but not separately listed in section 203.

to exclude retirees from coverage for waiting time penalties under section 203. (Br. at pp. 36-41.) An examination of similar text in other sections subject to section 203 waiting time penalties demonstrates that the Legislature's more specific reference to included groups of separating employees is not intended to exclude the included groups from coverage under section 203.

For example, section 201, subdivision (a), states that "[if] an employer discharges an employee" payment must be made immediately. Section 201 also provides that in certain industries "[a]n employer who lays off a group of employees by reason of the termination of seasonal employment" must make prompt payment "within a reasonable time as necessary for computation . . . not [to] exceed 72 hours." In section 201, the more specific instance of a lay off is included. Section 203 does not specifically refer to or include "lay offs." No one could sensibly argue that the Legislature's more specific *inclusion* of laid off employees in section 201 was intended to *exclude* them from the "who is discharged" coverage of section 203, but this is precisely the mistaken construction urged by the State where "retires" is included in section 202, but not section 203.

The Legislature's more specific reference to included categories of employees in the violation statutes is a common feature of prompt pay law and cannot be said to support an inference of exclusion under section 203. In section 201.5, subdivision (d), for example, the Legislature used the

more specific and included term "lay off" following the more general term "discharge." (Lab. Code, § 201.5, subd. (d).) This parallels the Legislature's reference to "retires or disability retires" after the more general term "quits" in section 202, subdivision (c). Under the rule of construction advanced by the State, the Legislature's more specific reference to, and inclusion of, a "lay off" subgroup of employees in the violation statute would require their exclusion from the broad "who is discharged or who quits" coverage of section 203, subdivision (a). But there is no "lay off" defense to a prompt pay claim under sections 201, 201.5 and 203 any more than there is a "retiree" defense to a claim brought under sections 202 and 203.[20]

The State also contends that "reading the term 'quit' to encompass the term 'retire' would render the term 'retires' in section 202(c) as surplusage." (Br. at p. 36.) In making this argument the State assumes that any phrase like "quits, retires or disability retires" amounts to surplusage unless the terms are understood as mutually exclusive categories. The State's mutually exclusive reading cannot be right when "disability retires" is obviously included within the broader category of "retires" and where all employees who quit to retire are also employees who quit. The phrase "mammals, humans or males" cannot be understood as referring to

[20] In *Smith*, it was completely uncontroversial that a discharge subject to section 203 waiting time penalties included firing or a layoff. (*Smith*, *supra*, 39 Cal.4th at p. 90.)

mutually exclusive categories simply because parsimony could be served by a broader reference to "mammals." The Court of Appeal correctly construed the phrase "quits, retires, or disability retires" when it reasoned that

> [a] disability retirement is a particular type of retirement and therefore a subset of 'retires.' Thus, the phrase 'quits, retires, or disability retires' can be understood as listing the types of separation from employment from the most general, 'quits,' to the most specific, 'disability retires,' rather than as listing three entirely distinct occurrences.

(Opn., at p. 13.)

The Court of Appeal found that "[t]he reason for the different language is explained by the different contexts." (Opn., at p. 13.) This is borne out by the undoubted fact that under prompt pay law the violation statutes covered by section 203 waiting time penalties will often refer to more specific instances of a discharge or a quit without intending to exclude the specified subcategories from the broad "who is discharged or who quits" language of section 203. (See *infra* at pp. 43-45.)

The State's proposed construction, which is said to be in service of avoiding surplusage, would instead eviscerate the intended meaning of sections 202 and 203 by treating as of no consequence the obligation to promptly pay state employees who retire or be subject to waiting time penalties. As the Court of Appeal correctly observed, "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.)

G. This Court Has Previously Rejected Arguments of the Kind Now Made by the State.

In arguing that a quit to retire is not a quit, the State observes that resignations are treated differently from retirements under certain Government Code sections that deal with public service retirement. (Br. at pp. 34-36.) The State wrongly concludes that by distinguishing between resignations and retirements for certain purposes outside prompt pay law, the Legislature intended to exclude employees who quit to retire from the "who are discharged or who quit" coverage of section 203.

For example, the State urges that "under California's civil service statutes, public employment can be terminated in three distinct ways – by termination (discharge), resignation (quit), or retirement." (Br. at p. 34.) The State cites to Government Code section 19996 as establishing this proposition. But the section cited does not distinguish between a discharge, a quit and a retirement. Instead, it distinguishes, *inter alia*, a "layoff," a "removal for cause," a permanent or temporary separation "through retirement," and a termination "for medical reasons." (Gov. Code, § 19996.)

The text of Government Code section 19996 shows that many finer distinctions can be made among modes of separation for different purposes

without implying a section 203 exclusion as to any of them. If the inference of exclusion by reason of greater specificity in Government Code section 19996 is assumed to be true, as the State argues, then a "removal for cause" or termination "for medical reasons" would not be a discharge. But these are discharges and the State's conclusion is, therefore, mistaken.

The issue of whether a more specific reference to some end of employment scenario supports an inference of exclusion under California's prompt pay law was directly addressed by this Court in *Smith.* (*Smith, supra*, 39 Cal.4th at p. 93, fn. 10.) In *Smith*, 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." (*Smith, supra*, 39 Cal.4th at p. 93, fn. 10.) The defendant there, reasoning precisely as the State does here, 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 at p. 93, fn. 10.) This reasoning was rejected when this Court said, "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." (*Smith, supra*, 39 Cal.4th at p. 93, fn. 10.)

In *Smith*, this Court also addressed the ability of judges to make finer distinctions in cases where those distinctions were relevant to the issue presented. The Court of Appeal had erroneously credited the defendant's argument that a more specific discussion of various kinds of discharges in the decided cases 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. (*Smith, supra*, 39 Cal.4th 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 Labor Code sections 201, 202 and 203. (*Smith, supra*, 39 Cal.4th at p. 90.)

The State's mistaken reliance on the distinction between retirement and resignation, when made for other purposes, is illustrated by a case it cites. In *Gore v. Reisig* (2013) 213 Cal.App.4th 1487, 1489 [153 Cal.Rptr.3d 433], the issue was whether the plaintiff was "an 'honorably retired peace officer' pursuant to former section 12027 of the Penal Code." The distinction between employees resigning to retire and resigning for other reasons was relevant in *Gore* 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." (*Id.* at p. 1493.) Nothing in this distinction

between employees who resign their employment to retire, and those who resign for other reasons, which was essential to making the "honorably retired peace officer" determination in *Gore*, purports to limit the reach of "an employee who is discharged or who quits" under section 203.

H. Retirees Are Nowhere Excluded from the Protection Given by Prompt Pay Law, Which Is To Be Construed Broadly in Favor of Employees.

The Legislature is assumed to know "how to create an exception if it wished to do so." (*City of Ontario v. Superior Court, supra*, 12 Cal.App.4th at p. 902.) The construction sought by the State would require the Court to find an exception from prompt pay requirements where none is stated.

The State's proposed construction also seeks to narrow the protections given by sections 202 and 203 even though the statutes governing the conditions of employment must be interpreted broadly in favor of the employee with the objective of protecting the employee. (*Murphy v. Kenneth Cole Productions, Inc.*, *supra*, 40 Cal.4th at pp. 1103, 1111, fn. 13.) If any ambiguity exists, courts are directed to choose "the construction that comports most closely with the Legislature's apparent intent, endeavoring to promote rather than defeat the statute's general purpose, and avoiding a construction that would lead to absurd consequences." (*Smith*, *supra*, 39 Cal.4th at p. 83.) Here, sections 202 and 203 are to be construed "in the manner that best effectuates that protective

intent." (*Brinker Restaurant Corp. v. Superior Court*, *supra*, 53 Cal.4th at p. 1027.) Contrary to the rule for construing statutes of this kind, the State's proposed exclusion of employees who retire would narrow rather than promote the prompt pay protection given by sections 202 and 203.

I. As a Matter of Public Policy Employees Who Quit To Retire Are Entitled to the Same Prompt Pay Protection Given to All Other Employees.

"The public policy in favor of full and prompt payment of an employee's earned wages is fundamental and well established." (*Smith*, *supra*, 39 Cal.4th at p. 82.) Prompt payment is "indispensible to the public welfare." (*Ibid.*) An employer who refuses to pay wages in accordance with prompt pay law "acts against good morals and fair dealing." (*Ibid.*) Sections 201, 202 and 203 implement the "fundamental public policy regarding prompt wage payment." (*Smith, supra*, 39 Cal.4th at p. 82.)

Retirees, as a group, are usually elderly and are deserving of their hard earned retirement. There is nothing about this group of employees that reasonably supports the public policy inference that the Legislature intended to single them out to deny them the protections given to all other employees who quit or who are discharged. This group of employees has done nothing that is at odds with the policy objectives of prompt pay law when they resign their employment for the purpose of retiring, and no policy objective is furthered by excluding them. The State nonetheless argues that—because retirees are less likely to become charges upon the

public, create breaches of the peace, or otherwise stand in desperate financial need—they have been intentionally excluded from the protections given to all other employees under prompt pay law. (Br. at pp. 41-42.)

First, the public policy requiring prompt pay is not one based solely on financial need, but also recognizes that it is against good morals for an employer to refuse to make prompt payment of earned wages. "'[T]he policy involves a broad public interest, not merely the interest of the employee.'" (*Smith, supra*, 39 Cal.4th at p. 83, quoting *Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1147 [37 Cal.Rptr.2d 718].)

Second, employees who quit and seek other employment are often more financially secure than the employees who quit to retire. If financial need mattered in the sense urged by the State, then the prompt pay obligation could have been tethered to some level of income or savings or excused as to any beneficiary of a large trust. The notion that the Legislature intended to sub silentio single out and means test retirees for the purpose of excluding them from the protection of prompt pay law is indefensible.

J. Creating a Retiree Defense to Prompt Pay Law Would Be Unworkable as a Practical Matter.

The State's construction of prompt pay law supposes that every California employer whether public or private, big or small, has been given

a retiree defense to waiting time penalties. Not only is this defense inconceivable as a matter of legislative intent, the "practical difficulties" it would create counsels strongly against it. (*Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1398 [117 Cal.Rptr.3d 377, 241 P.3d 870] ["In light of the unambiguous statutory language, as well as the practical difficulties that would arise under defendant's interpretation, we conclude there is but one reasonable construction"].)

From the perspective of compliance and enforcement, a retiree defense poses many practical difficulties. Is it the subjective state of mind of the employee—a future intention to retire—that is controlling? Is it the later demonstrated fact of retirement? What if an employee quits, planning to retire, and then changes his or her mind? Does the employer lose its putative retirement defense by reason of a change of mind? Does an employee's status as an excluded retiree depend solely on the fact of some later employment? Does subsequent part time work operate to defeat the retirement defense? Shouldn't an employer be able to know whether a separating employee must be paid promptly without resort to some inquiry as to his or her pre-separation intentions or post-separation status?

The State argues that the Court of Appeal's holding "risks injecting confusion into employer-employee relationships." (Br. at p. 42.) The State contends that "[i]f the line between a 'quit' and a 'retirement' is blurred, employees and employers will face added difficulty in identifying the rights

and responsibilities of each party." (*Ibid.*) But the opposite is true. There is no difficulty, only certainty, in construing the broad "who is discharged or who quits" language of section 203 as including all employees who voluntarily separate by means of a quit, including those who quit to retire. Although creating an implied "retiree defense" to prompt pay law would surely blur lines and create practical difficulties, construing the statutes as written will not have this effect.

CONCLUSION

For the reasons stated here, and in the appellate court's opinion, the decision of the Court of Appeal should be affirmed.

Dated: April 2, 2015.

Respectfully submitted,

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By: 

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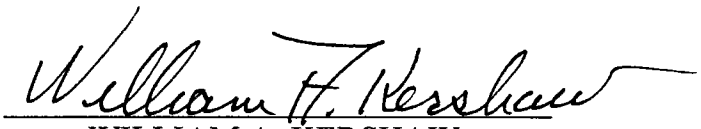
CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13-point Times New Roman font and contains 13,651 words.

Dated: April 2, 2015.

Respectfully submitted,

KERSHAW, CUTTER & RATINOFF LLP

By: 

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Counsel for Plaintiff and Appellant, Janis S. McLean

DECLARATION OF SERVICE BY MAIL

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 April 2, 2015, I served the **ANSWER BRIEF ON THE MERITS** 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:

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

Date: 4/2/15.

Lisa C. Anderson