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SUPREME COURT
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IN THE
SUPREME COURT OF CALIFORNIA

GEORGE MELENDEZ, et al.,

Plaintiffs and Appellants,

v.

SAN FRANCISCO BASEBALL ASSOCIATES, LLC

Defendant and Respondent.

COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION 3
CASE NO. A149482
SAN FRANCISCO SUPERIOR COURT, No. CGC-13-530672
HONORABLE CURTIS E.A. KARNOW

OPENING BRIEF ON THE MERITS

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I. ISSUE PRESENTED

"Whether plaintiffs' statutory wage claim under Labor Code section 201 requires the interpretation of a collective bargaining agreement and is therefore preempted by section 301 of the Labor Management Relations Act." (Order Granting Petition for Review)

II. INTRODUCTION

This case is about vindication of an important public policy of the State of California that has existed for over 100 years, the policy requiring prompt payment of earned wages to working men and women who find themselves out of work. See *Smith v. Superior Court (L'Oreal)* (2006) 39 Cal.4th 77. It has nothing to do with collectively bargained rights and obligations.

Given the text and Legislative history of Labor Code §§ 201, 203 and 219, and this Court's decision in *Smith, supra* (2006) 39 Cal.4th 77, collectively bargained rights and obligations cannot undermine the protections individual employees enjoy in California to prompt payment of wages owed when their employers release them from work whether by layoff or permanent discharge.

The unwaiveable statutory wage claims Plaintiffs assert do not require interpretation of a collective bargaining agreement ("CBA");

and therefore the Court of Appeal's finding of LMRA section 301 (29 U.S.C. §185) preemption is not warranted.

In *Smith, supra*, 39 Cal.4th 77, this Court provided the roadmap for interpretation and application of the word "discharge" as it appears in Labor Code § 201, logically and painstakingly applying tenets of statutory construction. *Smith, supra* passim.

This Court in *Smith* ultimately found that the purpose of Labor Code §§ 201 and 203 is to compel the prompt payment of wages to people released from employment irrespective of whether they were fired from long term employment or released from a one-day assignment. The nature of the hiring or work relationship was a non-issue, immediate payment of wages is required when periods of employment end. *Smith, supra*, 39 Cal.4th at 92.

The Court of Appeal opinion herein ignored the letter and intent of Labor Code §§ 201 and 203, as found in *Smith, supra.* The opinion adopted the position that preemption was warranted because, irrespective of the needs and out of work status of employees released from work addressed by the Legislature in Labor Code § 201, the nature of the relationship at hiring was of paramount importance. To discern what that relationship is, the Court of Appeal then found the

CBA must be interpreted. Slip Op. pg.7-8. It took this position in a context where nothing in the Agreement was in dispute and had to be interpreted, and where given *Smith, supra*, the CBA was irrelevant.

Had the Court of Appeal paid close attention to the letter and purpose of Labor Code § 201, and followed *Smith, supra*, 39 Cal.4th 77, resort to the CBA would not have been required.

The lesson of *Smith* is that releases from employment, whether permanent or temporary, are "discharges" irrespective of the nature of the initial hiring or an ongoing CBA relationship. Release from work into the ranks of the unemployed through layoff or permanent termination is the key factor in analysis and application of Labor Code § 201, not the undisputed text or fact of a CBA.

III. STATEMENT OF FACTS AND PROCEEDINGS BELOW

George Melendez, as well as those he seeks to represent, have worked intermittently for the Respondent San Francisco Baseball Associates LLC ("the Giants") for years. Mr. Melendez worked as a security guard. The Giants' guards, and other stadium employees are paid from several days to up to two weeks after the end of each period of intermittent employment. (Operative Complaint AA 0135-0137, and 0140).

Nothing in the record refutes the foregoing allegations. There is no evidence establishing that laid off employees are paid the wages owed to them immediately upon layoff, whether a layoff lasts several weeks or months.[1]

Melendez filed a class action complaint on November 25, 2015, and a First Amended Complaint on January 13, 2016 ("Complaint"). The Complaint asserts statutory claims on behalf of a class of all persons who have been intermittently employed by the Giants for limited duration assignments, claiming their wages, when they are periodically released from such assignments, are not timely paid. (AA 135-142) The class definition embraces all intermittently employed stadium workers, not just security guards.

The Complaint contains two causes of action: (1) A Class Claim for Violation of Labor Code § 201, seeking penalties pursuant to Labor Code § 203; and a (2) Claim for Penalties under PAGA Labor Code §§ 2698 and 2699, as a private attorney general. (AA0134-142).

The Complaint alleges, in relevant part:

---

[1] Contrary to the suggestion in the Court of Appeal Opinion (Slip Op. p.7), Plaintiffs have never asserted there is a layoff at the conclusion of each baseball game.

"1. This case arises out of the failure of defendant San Francisco Baseball Associates, LLC ("San Francisco Giants") to pay intermittently employed individuals immediately upon discharge from employment periods of limited duration.

2. Pursuant to Labor Code Section 201 and *Smith v. Superior Court* (2006) 39 Cal.4th 77, the San Francisco Giants employ a number of person (across of variety of job classifications) intermittently during the baseball season and throughout the rest of the calendar year. Defendants are required to pay such persons immediately at the end of each limited duration assignment. Defendants, in violation of Labor Code Section 201 paid these employees late, typically between five (5) and fifteen (15) days late. For himself and other similarly situated intermittent employees of the San Francisco Giants, Plaintiff seeks damages for continuation wages under Labor Code Section 203.

3. The San Francisco Giants' non-compliance with Labor Code Section 201 manifests itself in no less than three (3) ways. (1) At the end of the baseball season Defendants do not pay intermittently employed persons on the last day they work during the season. (2) During the baseball season, Defendants do not immediately pay intermittently employed employees on the last day they work during a home-stand. (3) Between baseball seasons, when intermittently employed persons are employed for events such as concerts, college football games, theatrical performances, fan appreciation days, a run of Cirque du Soleil shows, etc., Defendants do not immediately pay intermittently employed employees at the end of their work at these events.

****

16. ..... Plaintiff and other members of the Class were "discharged" at the end of each period of intermittent employment within the meaning of Labor Code Section 201 (*Smith v. Superior Court, supra*).

17. Pursuant to Labor Code Sections 201, the San Francisco Giants owed to Plaintiff and members of the Class immediate payment of their final wages at the time

> of each discharge. The immediate payment of said wages was due when the Giants discharged intermittently employed person (e.g. Plaintiff and the Class) at the end of a homestand, at the end of a baseball season, at the end of an inter-season event like a fan fest, college football game, a concert, a series of shows, or other events.
>
> ***
>
> 19. Defendants' failure to pay Plaintiff and members of the Class wages in accordance with Labor Code Sections 201 was willful. Defendants had the ability to pay final wages in accordance with Labor Code Sections 201, but intentionally adopted policies or practices incompatible with the requirements of Labor Code Section 201.
>
> 20. Pursuant to Labor Code Section 203, Plaintiff and members of the Class are entitled to continuation of their wages, from the day of each discharge they experienced until the wages were paid, up to a maximum of thirty (30) days per discharge. "[2]

The guards are represented by a union that has a collective bargaining agreement ("CBA") with the Giants. (AA 0160-176) The CBA gives the Giants absolute discretion in scheduling guards (AA 0165 Section 8). There is no provision in the CBA that addresses the timing of wage payments to laid off workers or otherwise. There is no dispute over the meaning of any terms in the CBA, nor over Respondent's position that there is an ongoing relationship between

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[2] As used in the complaint, a "discharge" from a period of intermittent employment was meant to represent temporary and/or indefinite layoffs that occur for vast numbers of employees when the baseball season ends, when home stands are over, and when off season events end.

the Giants and the employees covered by the CBA, even when those employees are laid off, not gainfully/actively employed by the Giants.

The Giants in their Opening Brief in the Court of Appeal acknowledged that, given the intermittent nature of stadium work, there are periods when guards in the putative class will not be scheduled for work, will be laid off in fact:

> "While the CBA gives certain employee classifications scheduling priority, it does not require that the Giants schedule any employee to work any specified number of hours, days, weeks, or months, or any specific number of games, homestands or seasons. [3]
>
> ***
>
> The facts will show that the Giants have exercised their discretion under the scheduling provisions of the CBA to not schedule Melendez (or other security guards) to work when AT&T Park is closed." AOB Ct. of Appeal. 25-26, 28.

A. Trial Court Proceedings

The Giants moved to compel arbitration arguing that Melendez was required to arbitrate his statutory claims pursuant to the arbitration provisions of the CBA. The motion separately claimed preemption applied pursuant to LMRA section 301 (29 U.S.C. §185). (AA 0091-0176)

[3] This conforms with practical reality. A baseball game with 40,000 fans is going to need more security guards at work than a private wedding at the stadium in the off-season when there may be only 400 guests.

Following a hearing, the trial court issued a written ruling denying the Giants' motion to compel arbitration. (AA 0255-0259) The court first found that the claims in the Complaint that statutory rights had been violated were not subject to the CBA's arbitration provisions:

> "[There is no language in the agreement [CBA] requiring arbitration of the claims in this case. The CBAs here require arbitration of claims involving the application or 'alleged violation of any of the terms of the Agreement' ... The suit here claims a violation of state statutes not a violation of the CBA." (AA 0255).[4]

On the preemption issue, the Superior Court found, inter alia:

> "*Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 211 (1985) makes the point that 'not every dispute concerning employment, or tangentially involving provisions of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor law.' There is no 'suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation.' *Id.* at 212. 'Clearly, § 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.' *Id." (AA0256)*

[4] The Court of Appeal agreed with this ruling. (Slip Op. p. 4-5)

The Trial court then quoted the United States Supreme Court opinion in *Livadas v. Bradshaw* 512 U.S. 107, 123 (1994):

> " 'In *Lueck* and in *Lingle* [ ] we underscored the point that § 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law, and we stressed that it is the legal character of a claim, as 'independent' of rights under the collective-bargaining agreement [citation] and not whether a grievance arising from 'precisely the same set of facts could be pursued [citation] that decides whether a state cause of action may go forward'." *(AA0256)*

On the "interpretation" issue raised by Section 301 preemption, the trial court found that Defendants' papers do not demonstrate that resolution of the state law claim requires interpretation of the CBA. (AA 0255). Further the trial court stated:

> "Finally, I note the Ninth Circuit's cautious wielding of the interpretation requirement: there is no preemption unless the use of the CBA is more than just a consideration or reference to the CBA:
>
> 'We have stressed that, in the context of § 301 complete preemption, the term "interpret" is defined narrowly---it means something more than "consider", "refer to", or "apply". '*Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1108 (9th cir. 2000)." (AA 0257)

The Giants timely appealed.

B. Decision of The Court of Appeal

The Court of Appeal acknowledged the parameters of preemption doctrine, citing *Levy v. Skywalker Sound* (2003) 108

Cal.App.4th 753, 762-769 for the proposition that for Federal preemption to apply the need to interpret the CBA must inhere in the nature of the plaintiff's claim. Slip Op. at 5.

However, the Court then found, apropos to the issue posed in the grant of review here, "While resolution of the controversy may not turn on the interpretation of any specific language in the CBA, it does not follow that the meaning of the CBA is irrelevant to the outcome of the dispute."

Without assessing Legislative intent, the Court then found that reference to the CBA was necessary to determine whether employees were "discharged". The Court set up an irrelevant dichotomy. The Court found that "discharge" under the Code turned on an answer to the question of whether employees were hired into a long-term relationship, or alternatively, were separately hired after layoffs each time they received a new assignment? (Slip Op. p. 7-8). To answer the irrelevant question it posed, the court then took the position that resort to the CBA was necessary.

The Court of Appeal found that if guards were initially ***hired*** for periods of time that extended beyond the layoffs they experienced, they were not "discharged" when laid off. The Court then concluded

that since determining the nature of the initial hiring will necessarily entail review of the CBA, preemption is warranted. Slip Op. 7-9.

Emphasizing an ongoing CBA relationship between out of work guards and the Giants, the Court of Appeal failed to consider whether, as a matter of law, "layoffs" experienced by the guards are "discharges" irrespective of any long term contractual relationships that remained in effect between the Giants and their out of work employees.

Pursuant to the Court of Appeal decision, a CBA that contemplates an ongoing relationship between laid off worker and their employers can trump Labor Code § 201's policy for dealing with the harsh reality of unemployment. As will be demonstrated infra, the premise upon which the Court of Appeal position relies is inapplicable to the analysis this case requires. "Layoffs" are a form of discharge under Labor Code § 201 irrespective of any relationship between the laid off employees and their employers; therefore, resort to a CBA to determine the nature of that relationship is completely unnecessary.

SUMMARY OF THE ARGUMENT

1. Labor Code § 219 and applicable precedent preclude waiver of the rights created by Labor Code § 201.

2. Only when interpretation of a collective bargaining agreement is required, does LMRA 301 preemption apply to a statutory claim. Interpretation of a CBA is not required here.

3. Interpretation of the CBA is not required in this case because:

   A. None of the CBA provisions are in dispute and the CBA is irrelevant to the outcome of this case.

   B. The reference to "layoffs" in § 201 makes clear that "layoffs are form of "discharge.

   C. The statutory scheme, the purpose of the law, and the meaning of "layoff" support the conclusion that the term "discharge" as used in Labor Code § 201 contemplates "layoffs" as a form of discharge irrespective of CBA terms.

   D. With "layoffs" a form of "discharge", and the periodic releases from employment experienced by the Giants' stadium workers, by definition, "layoffs", there is no cause to interpret the CBA.

   E. The holdings and rationale of *Smith v. Superior Court (L'Oreal)* (2006) 39 Cal.4th 77 are dispositive.

IV. ARGUMENT

A. Labor Code § 201 Rights Cannot Be Waived.

In determining whether interpretation of the CBA is required in this case, recognition of the inability of parties to a CBA to alter the rights created by Labor Code § 201 is a necessary starting point.

Labor Code § 201 provides in relevant part: that "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately...."

Pursuant to Labor Code § 203, an employer's willful failure to pay wages to a "discharged" employee in accordance with § 201 subjects the employer to penalties.

Labor Code § 219 provides that the rights and obligations set forth in the foregoing sections cannot be altered by agreement:

"[N]o provision of this article [which includes Labor Code § § 201 and 203] can in any way be contravened or set aside by a private agreement, whether written, oral, or implied." See also *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1112 (9th Cir. 2000), and *Livadas v. Bradshaw*, 512 U.S. 107, at 110 (1994).[5]

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[5] Both the 9th Circuit decision in *Balcorta, supra*, 208 F.3d 1102, and the Supreme Court decision in *Livadas, supra* 512 U.S. 107 addressed issue

Even if Labor Code § 219 had never been enacted, the Giants and the guards' union could not contract around the rights created by §§ 201 and 203:

" 'Under settled Supreme Court precedent, '[LMRA section] 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law.' [Citations.]' *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683, 695 (9th Cir.2001)." *Sciborski v. Pacific Bell* (2012) 205 CA 4th 1152, 1172.

B. LMRA Section 301 "Interpretation" Preemption Does Not Apply Absent A Genuine Need to Interpret a CBA

The issue as posed by this court in granting review asks whether the CBA between the Giants and the guards' union needs to be interpreted in order for there to be a determination of whether the statutory rights afforded by Labor Code § 201 have been violated.

While it is true that to further the goal of uniform interpretation of CBA's, the preemptive effect of LMRA Section 301(29 U.S.C. § 185) has been extended beyond suits that allege the violation of collective bargaining agreements, the breadth of that extension is limited.

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arising from application of Labor Code § 201 in collective bargaining agreement contexts.

Allis–Chalmers Corp. v. Lueck, 471 U.S. 202, 210–11 (1985) provides: "The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a [CBA] contract phrase or term be subject to uniform federal interpretation".

Thus, a state law claim will be preempted if it is so "inextricably intertwined" with the terms of a labor contract that its resolution will require judicial interpretation of those terms. *Id.* at 213.

In this matter, the rights of guards under Labor Code § 201 are not "inextricably intertwined" with the terms of the CBA. The interests of interpretive uniformity and predictability that require labor-contract disputes be resolved by reference to federal law are simply not involved in the adjudication of the immutable statutory rights at issue here.

"If the claim is plainly based on state law, § 301 preemption is not mandated simply because the defendant refers to the CBA in mounting a defense." *Cramer v. Consolidated Freightways, Inc.,* 255 F.3d 683, 691 (9th Cir.2001) (en banc), cert. denied 534 U.S. 1078 (2002).

Nor can a defendant invoke preemption merely by alleging a

"hypothetical connection between the claim and the terms of the CBA," or a "creative linkage" between the subject matter of the suit and the wording of the CBA. *Id.* at 691–92. To prevail, "the proffered interpretation argument must reach a reasonable level of credibility." *Id.* at 692. "'[L]ook[ing] to' the CBA merely to discern that none of its terms is reasonably in dispute does not require preemption." *Id.* quoting *Livadas,* 512 U.S. at 125.

In *Cramer,* the Ninth Circuit clarified the scope of the LMRA's preemptive effect as follows:

> "A state law claim is not preempted under § 301 unless it necessarily requires the court to interpret an existing provision of a CBA that can reasonably be said to be relevant to the resolution of the dispute." *Id.* at 693.

The above constraints on invocation of preemption doctrine are applicable here. Resort to the CBA to determine whether the statutory rights at issue have been violated is completely unnecessary. The defense raised by the Giants that invokes the CBA is completely meritless. It cannot "reasonably be said", given the language and intent of Labor Code § 201, that any of the CBA provisions referenced by the Court of Appeal and Giants are relevant to a determination of whether the statutory rights at issue have been violated.

The CBA does not have to be interpreted in order to assess whether a violation of Labor Code §201 occurs when employees are laid off, "released" from intermittent periods of employment. The language of the statute and its legislative history as applied to laid off employees of the Giants will control the outcome of this case, not whether they can only be permanently discharged for cause, do not have to reapply after a layoff, do not have to turn in their uniforms at the end of the baseball season, or enjoy benefits if, despite their periodic layoffs, in consecutive years they work over 300 hours a year. (CBA provisions the Court of Appeal and Giants conclude require preemption).

None of the CBA provisions have to be interpreted to adjudicate the applicability of Labor Code § 201 to the facts of this case. The CBA is irrelevant, and the meaning of its terms are not in dispute. *Lujan v. Southern California Gas Co.* (2002) 96 CA 4th 1200, 1206 – 1207, 1210.

C. Interpretation of the CBA is Not Required Because "Layoffs" In the Midst of Long Term Employment Relationships Are A Form Of "Discharge" Under Labor Code § 201 As A Matter of Law.

Even if this Court never decided *Smith, supra*, interpretation of the CBA would not be warranted here because the letter and intent of

the word "discharge" in Labor Code § 201 extends to layoffs, irrespective of what the court of appeal focuses on, the nature of employment relationship within which the layoffs occur.

As *Lujan, supra* (2002) 96 CA 4th 1200, 1206-1207, 1210 and *Sciborski, supra* (2012) 205 CA4th 1152, 1168-1174 make clear through their extensive discussion and application of Federal preemption principles, when the terms of a CBA are "irrelevant" to the outcome of a case, and where none of the terms of a CBA require interpretation, LMRA 301 preemption is inappropriate.

Here, as will be demonstrated below the meaning and application of Labor Code § 201 is completely a function of the law and tenets of statutory construction, therefore, the CBA is irrelevant, and the undisputed terms contained therein do not have to be interpreted.

Even if the CBA contained an undisputed term providing that security guards are employed for life, the layoffs they endure would still trigger the employer obligations contained in Labor Code § 201.

1. *Smith, supra* (2006) 39 Cal.4th 77 Establishes the Framework for Analyzing Whether Particular Separations from Employment Constitute "Discharges" Under Labor Code § 201, A Framework the Court of Appeal Ignored.

The Court in *Smith, supra,* was confronted with the question of whether the release of an employee who was hired for a one-day assignment, and completed that assignment was "discharged" as the term is used in Labor Code § 201. The Defendant argued, as the Giants in this case, that only permanent terminations from ongoing employment constituted "discharges" under § 201. The court rejected the Defendant's position, finding that releases from a period of employment or upon completion of an assignment qualify as "discharges" under the law. *Id,* 39 Cal.4th at 92. In reaching that conclusion, *Smith, supra* laid out the statutory construction analysis model that should have been used by the Court of Appeal in deciding this case.

Smith established that the task of the Court in determining the applicability of Labor Code § 201 to a set of facts is to ascertain Legislative intent, and in doing so, to look to the meaning of the words of the statute and read the statute "with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness" *Id,* at 83.

This Court went on to point out:

> "If the statutory terms are ambiguous, we may examine extrinsic sources, including the ostensible objects to be achieved and the legislative history... In such circumstances, we 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." *Id.*

Clearly, a 21st century CBA covering a discrete group of one employer's workers is not the type of extrinsic source this Court had in mind, in trying to discern the meaning of a hundred-year-old law.

In ascertaining the meaning of any Labor Code provision, this Court has also repeatedly emphasized:

> "[I]n light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection."

Ramirez v. Yosemite Water Co. (1999) 20 Cal.4th 785, 794, quoting *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 702.

It is patently clear, that the Court of Appeal did not "liberally construe" the statute, nor engage in any of the steps laid out in *Smith, supra,* nor heed *Smith's* findings regarding the "entire scheme of the law", the "legislature's apparent intent", and the "statute's general

purpose" even though the meaning of "discharge" as used in Labor Code §201 is the central issue in this case as it was in *Smith*.

Had the Court of Appeal followed *Smith*'s approach to Labor Code §201, it would have found that the terms of the CBA are irrelevant and do not have to be interpreted, that the seasonal and other releases from intermittent employment/layoffs alleged herein are, irrespective of CBA terms, "discharges" under Labor Code §201.

2. Interpretation of The CBA Is Not Required Because the Inclusion of A "Seasonal Layoff" Exception in Labor Code §201 Establishes That the Legislature Considers "Layoffs" A Form Of "Discharge" As A Matter of Law.

The first step in statutory construction is to examine the words of the statute. Here, the use of the word "layoff" in Labor Code § 201 is telling.

The complete text of Labor Code § 201 (a) provides:

> (a) If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately. An employer who **lays off** a group of employees by reason of the termination of seasonal employment in the curing, canning, or drying of any variety of perishable fruit, fish or vegetables, shall be deemed to have made immediate payment when the wages of said employees are paid within a reasonable time as necessary for computation and payment thereof; provided, however, that the reasonable time shall not exceed 72 hours, and further provided that payment shall be made by mail to any employee who so requests and designates a mailing address therefor.

The inclusion in the text of Labor Code 201 of an express exception from the immediate payment obligation for "An employer who **lays off a group of seasonal employees"** in the "curing, canning and drying" industry establishes that the legislature, when it enacted that exception in 1947, considered "layoffs" to be a form of "discharge" covered by Labor Code § 201.

Had the Legislature *not* considered such to be the case, writing a specific "seasonal layoff" exception for the curing, canning and drying industry into the statute would not be necessary. Consequently, the meaning of "layoff" should have been, but was not, central to the Court of Appeal analysis here.

This court in *Smith* expressly acknowledged the significance of the word *layoff* in Labor Code §201 as follows:

> "Article 1 [Labor Code 200 et seq.] also contains provisions recognizing that, in certain industries, extenuating circumstances may require additional time for calculating and distributing earned wages when an employee is discharged or laid off. Section 201, for example, provides that an employer who **'lays off a group of employees** ***by reason of the termination of seasonal employment*** in the curing, canning, or drying of any variety of perishable fruit, fish or vegetables, *shall be deemed to have made immediate payment* ' by paying the wages within a reasonable time as necessary to compute and pay such wages, in no event exceeding 72 hours. (§ 201, subd. (a), italics added; see *ante,* fn. 2.)

> Similarly, section 201.5 provides that, in the motion picture industry, when the terms of employment are such as to require 'special computation' to ascertain the wages due, an employer *'shall be deemed to have made immediate payment of wages within the meaning of Section 201'* in a **'layoff'** situation if it pays wages by the next regular payday following the layoff,....
>
> ***
>
> These exceptions to section 201's immediate payment requirement, especially section 201.5 and the exception within section 201 itself, **strongly imply the statutory discharge element is not limited to dismissals from ongoing employment. Notably, these exceptions pertain to situations anticipating the employees will complete the particular job assignment or period of service for which they were hired—i.e., when a discharge or a layoff occurs 'by reason of the termination of seasonal employment'** (§ 201, subd. (a)) or upon 'completion of a portion of a [motion] picture' (§ 201.5, 2d par.). **Redefining what 'immediate payment' means, vis-à-vis section 201, and articulating justifications for an extended payment period in the context of these selected industries, makes little sense if section 201's immediate payment requirement does not, in the first instance, generally apply to employment terminations resulting from completion of specified job assignments or periods of service."** *Smith, supra* 39 Cal.4th at 85-86 (Emphasis added)

This Court, through the foregoing, has acknowledged what is the thrust of the argument here, "layoffs", outside the motion picture industry or curing, canning and drying industries are a species of "discharge" that require immediate payments of owed wage. There is nothing in the above analysis that could be impacted by an

interpretation of a CBA. A "layoff" as a matter of law, not contract, is a "discharge" as that term is used in Labor Code § 201.

3. "Layoffs" Include the Temporary Releases from Active Employment Experienced by Workers Who Find Themselves Unemployed at the End of a Baseball Season, Home Stand, Or Inter-Season Event.

"Layoffs" are breaks in service that can be temporary, caused by the completion of specified assignments, or periods of service, with the possibility or reality of eventual recalls irrespective of CBA terms or other ongoing relationships between the employer who initiates the layoff and the employees laid off.

The United States Department of Labor Bureau of Labor Statistics' "Glossary" (www.bls.gov/bls/glossary.htm) defines "layoff" in a manner that contemplates temporary periods of unemployment as a form of layoff:

" 'Layoff' A separation of an employee from an establishment that is initiated by the employer; an involuntary separation; ***a period*** of forced unemployment." (Emphasis added)

The periods of forced unemployment at issue here, after baseball seasons, after off season special events, and after homestands, when an employee may not work for weeks or months,

clearly fit the above definition. These periods of forced unemployment result from "involuntary separations".

The same Department of Labor Glossary, in the definition of "Unemployed Persons", treats "layoffs" as applying to the circumstance at issue here, where guards may have an expectation of reemployment after layoffs. It provides in relevant part that:

> "... Persons who were waiting to be recalled to a job **from which they had been laid off** need not have been looking for work to be classified as unemployed"[6]

The American Heritage Dictionary 5th Edition, 2016 pg.997 defines "layoff" as "the act of suspending or dismissing an employee, as for lack of work or because of a corporate reorganization." This definition similarly describes what intermittently employed security guards experience—a *suspension* of work because of a lack of work.

An earlier edition of the American Heritage Dictionary also contained an apropos definition of "Layoff": "To suspend from employment, as during a slack period." The American Heritage

[6] The California Unemployment Ins. Code provides in relevant part, irrespective of Collective Bargaining Agreements: (a) An individual is "unemployed" in any week in which he or she meets any of the following conditions: (1) Any week during which he or she performs no services and with respect to which no wages are payable to him or her." This code section belies the fiction adopted by the Court of Appeal that temporarily laid off workers are not "discharged" and remain employed while laid off.

Dictionary of the English Language, 1969, pg. 742.

Webster's 3rd New International Dictionary 1981, defined the verb " layoff" with an emphasis on temporary: "to cease to employ a worker usu. Temporarily because of slack in production and without prejudice to the worker—usu. distinguished from fire."

The noun layoff, is defined in part, in the same dictionary, as "a period of being away from or out of work" Webster's Third New International Dictionary, 1981, pgs. 1281-1282

The dictionary and Department of Labor definitions underscore the conclusion that preemption in this case cannot be warranted. "Layoffs" trigger application of Labor Code § 201 irrespective of a CBA relationship between people who are, by definition, laid off and the employers who laid them off.

4. Precedent Similarly Treats "Layoffs" as Including the Intermittent Separations from Ongoing Employment at Issue Here.

Irrespective of CBA language, case law addressing "layoffs" also establishes that "layoffs" are what the Giants' employees experience when released from intermittent employment.

For example, the United States Supreme Court in *International Brotherhood of Teamsters v. United States* (1977) 431 U.S. 324, and

Franks v. Bowman Transportation Company (1976) 427 U.S. 747 used the word "layoff" to describe separations from employment in a context where CBA's preserved contractual rights in laid off workers during the periods when they were out of work. Similarly, *First National Maintenance Corp. v. NLRB* (1981) 452 U.S. 666, at footnote 14 makes clear that *layoffs* occur in contexts where laid off employees may have ongoing contractual rights under a CBA.

Campos v. EDD (1982) 132 Cal.App.3d 961 follows suit. *Campos, supra,* involves seasonal *layoffs* during an ongoing contractual, CBA, employment relationship where, as in this case, the employment relationship did not end at the time the *layoff* took place. The workers in *Campos*, including appellants, were, like the Giants' guards, seasonal employees who experienced periodic layoffs and were members of a union covered by a collective bargaining agreement. The agreements in *Campos* provided for a system of recalling laid-off workers according to seniority, i.e., the first employees hired would be the last laid off and the first to be recalled. *Id,* at 965

Seasonal layoffs over many years, in the midst of a long term ongoing employment relationship contractually governed and

contemplated by a CBA, did not prevent the Court in *Campos* from characterizing the *seasonal intermittent loss of work* as "layoffs".

If the concept of "discharge" only involved permanent separations from employment, as the Court of Appeal Opinion herein holds, "layoffs" would not be a form of "discharge". The cases cited above in which the United States Supreme Court, and the California Court of Appeal, use the word "layoff" in contexts where CBA rights continue during periods of "layoff", make clear that the premise upon which the Court of Appeal opinion is based is not viable. "Layoffs" are "discharges" and are not, per the case law, limited to permanent separations from employment.

5. The Labor Commissioner Treats "Layoffs" As Including Intermittent Separations from Employment.

The Labor Commissioner has, for over twenty years, maintained the position that "layoffs" are "discharges" covered by Labor Code 201 and not limited to permanent separations from employment. See Labor Commissioner Opinion Letter 1996.05.

The 2002 Update of the DLSE Enforcement Policies and Interpretations Manual; www.dir.ca.gov/dlse/DLSEManual provides, citing the *Campos, supra*:

> "3.2.2 Layoff. If an employee is laid off without a specific return date *within the normal pay period,* the wages earned up to and including the layoff date are due and payable in accordance with Section 201. (*Campos v. EDD* (1982) 132 Cal.App.3d 961...If there is a return date within the pay period and the employee is scheduled to return to work, the wages may be paid at the next regular pay day."

As recently as March of this year, this Court noted how DLSE Manual provisions inform this Court's analysis of Labor Code provisions:

> "[S]o long as we exercise our independent judgment, we may consider the DLSE's interpretation and the reasons the DLSE proffered in support of it, and we may adopt the DLSE's interpretation as our own if we are persuaded that it is correct [cite omitted] And, in doing so, we may take into consideration the DLSE's expertise and special competence, as well as the fact that the DLSE Manual is a formal compilation that evidences considerable deliberation at the highest policymaking level of the agency." *Alvarado v. Dart Container Corp.* 4 Cal. 5th 542, 229 Cal. Rptr. 347,360 (2018).

See also *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 262-263, 267.

The nature of the initial hiring of guards into a bargaining unit with a CBA, the focus of the Court of Appeal, is irrelevant. The fact of "discharges" in the form of what Courts, dictionaries and the DLSE recognize as "layoffs", when seasons, home stands or other assignments end, followed by periods of unemployment, make Labor

Code § 201 applicable in this case irrespective of the CBA, and whether the Giants' CBA contemplates an employment relationship that can last indefinitely absent resignation or permanent termination for just cause.

6. The Court of Appeal Failed to Apprehend the Entire Scheme of The Law, A Scheme That Does Not Remotely Contemplate Resort to A Collective Bargaining Agreement In the Context Of This Case.

Smith, supra 39 Cal.4th at 83 explained that in interpreting Labor Code § 201, courts should look to the entire scheme of the law under consideration. This Court then pointed out that, with the Legislature creating an exception to the "immediate payment" requirement for layoffs of seasonal workers in certain food industry jobs in Labor Code § 201, for oil workers laid off in Labor Code § 201.7, and laid off television and movie production employees in Labor Code § 201.5, without creating a like *exception* for people like Ms. Smith, the "immediate payment" requirement clearly applied to people like her whose work ends after completion of a one day assignment for which they were hired. *Id,* 85-86.

This Court's analysis of the "scheme of the law" applies with equal vigor here. The Legislature excepted some discharges/layoffs in

certain industries from the immediate payment requirement, but it did not except discharges/layoffs in professional sports.

In the wake of the decision in *Smith,* the Legislature enacted additional exceptions to the immediate payment requirement, albeit with specific conditions---one exception involves *layoffs* in the unionized concert production industry and the other in the temporary agency industry. See Labor Code §§ 201.9 and 201.3.[7] Those exceptions reinforce the position that a "look at the entire scheme of the law" renders application of preemption doctrine inappropriate here. No such exceptions were created after *Smith* for layoffs in the baseball industry.

Labor Code § 201.9's reference to ***layoffs*** in the live concert industry is telling. It sanctions a wage payment schedule upon layoff that deviates from Labor Code § 201 if, and only if, the modified schedule is negotiated in a collective bargaining agreement. The Legislature's approach speaks volumes as to how the Giants should proceed where there is no applicable exception in the law for baseball, and no statutorily mandated alternative timing provisions in the CBA.

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[7] The "Bill analysis" of the post-*Smith* exception enactments in 201.3, and 201.9 each specifically reference this Court's decision in *Smith, supra* as the impetus of the industry specific Legislated exceptions.

The course professional baseball needs to take, is to lobby for legislative changes that cover their industry, and if those changes involve collective bargaining agreements, negotiate appropriate wage payment provisions with the union. The Giants in this case are trying, through the Courts, to skip the Legislative steps obviously taken over the years by other industries. This assault on separation of powers cannot be countenanced. The Court of Appeal opinion, through its preemption holding, if not overturned, effectively usurps the Legislature's prerogative, exercised in the past, to enact exceptions to Labor Code § 201 as it sees fit.

The *statutory scheme* of the California Labor Code reinforces the conclusion that § 201 is intended to apply to Giants' employees who are "discharged" by layoff at the end of a baseball season, home stand, and inter-season event. There is clearly no need to interpret a CBA to reach this conclusion.

7. The Object of Labor Code § 201 Renders Resort to The CBA Unnecessary

In *Smith, supra* at 86-90, this Court detailed the origins of Labor Code § 201 as part of the process of ascertaining its meaning as intended by the Legislature. The opinion in *Smith,* concludes, in part, that Ms. Smith was entitled to immediate payment because the

purpose of Labor Code § 201 is "to ensure that discharged employees do not suffer deprivation of the necessities of life or become charges upon the public" when a period of employment ends. *Id*, at 90.

The same analysis should have been applied by the Court of Appeal here--an out of work, laid off security guard is as much at risk of suffering the deprivation of the necessities of life when becoming unemployed as a hair model hired for one show.

The Court of Appeal's invocation of preemption doctrine to suggest that a CBA can trump the legislative intent realized in Labor Code § 201 turns this critical aspect of statutory construction on it s head. Had the Legislature intended to deny employees subject to Agreements the benefits of the law, it would have made such object clear.

8. *Smith's* "Absurdity" Analysis Should Have Resonated with The Court of Appeal.

In the concluding section of *Smith*, the Court, buttressed its holding by pointing out the absurd consequence of an alternative holding:

> "Excluding employees like plaintiff from the protective scope of sections 201 and 203 would mean that employees who fulfill their employment obligations by completing the specific assignment or duration of time for which they were hired would be exposed to economic

> vulnerability from delayed wage payment, while at the same time employees who are fired for good cause [e.g. showing up drunk at the hair show] would be entitled to immediate payment of their earned wages (§ 201) and many employees who quit without fulfilling their employment obligations would have a right to wage payment no later than 72 hours after they quit (§ 202)." *Id*, at 93

This observation of the Court in *Smith*, would clearly apply to the circumstances operative here as well. Under the Court of Appeal's improper invocation of LMRA 301 preemption, a Giants' employee who shows up to work drunk on the last day of the season and gets fired for "just cause" pursuant to the terms of the CBA, would be entitled to immediate payment under Labor Code § 201 and penalties under Labor Code § 203 if not timely paid. At the same time, if the Court of Appeal preemption argument is not overturned, an employee who fulfills his obligations though the end of the season, and is laid off for several or many weeks or months, may have to wait weeks for his check, and never be entitled to penalties, no matter how late the check is, simply because the Giants' initial hiring of the out of work employee contemplated a long term ongoing intermittent employment relationship.

D. The Holdings in *Smith, supra 39 Cal.4th 77*, Preclude Section 301 Preemption.

As demonstrated supra, adopting the approach to statutory construction utilized by this Court in *Smith* in interpretation and application of Labor Code § 201 leads to the conclusion that the Court of Appeal's invocation of preemption doctrine was not warranted.

Additionally, the ultimate holdings of *Smith,* even without resorting to the tenets of statutory construction, justify the same conclusion. The Court of Appeal herein completely misconstrued *Smith*.

The Court of Appeal opinion states:

"In order to determine whether the conclusion of a baseball game or season or other event constitutes a discharge as interpreted in *L'Oreal,* it is necessary to first determine the terms of employment. (*Smith v. Superior Court* (*L'Oreal*), *supra,* 39 Cal.4th 77)." (Slip Opinion p.7)

This statement is wrong. *Smith* made abundantly clear that the nature of the employment relationship does not control, but rather, as discerned from legislative intent, the fact of "release" from active employment is the pivotal issue.

Smith rejected an argument that "discharges" only involve

releases from long term employment. The Court of Appeal in invoking preemption has revived the rejected view that "discharges" only apply to releases from long term employment, claiming that the CBA has to be consulted to ascertain whether the Giants' employees are hired into long term relationships or are separately hired each time there is a new home stand, season, or off-season event. (Slip Op. p. 7-8)

The Court of Appeal herein abdicated its obligation to discern legislative intent as *Smith* requires, and instead focused its analysis on the nature of the laid off employees' initial hiring, not the meaning of "discharge" as used in the Code:

> "In *L'Oreal* the plaintiff was hired for only a single day's work, so that when the day ended her employment terminated and she was therefore discharged within the meaning of the statute. Here, plaintiffs are union members and the terms of their employment are governed by the CBA. **It is essential to determine, therefore, whether the CBA provides for employment of security guards for only a single game or homestand or season or other event, or whether the agreement contemplates extended employment from season to season, event to event, year to year, recognizing that not every day will be a day of work. If the latter, there is no termination of employment, and therefore no "discharge," at the conclusion of each baseball game, homestand, season or other event."** (Slip Opinion p. 7-8, emphasis added)

The foregoing constitutes a complete misreading of *Smith,*

supra (L'Oreal). Nothing in *Smith* suggests *it is essential* to determine whether the Giants' employees are only hired for a season, homestand, or other event, rather than hired for extended employment from year to year, or season to season with periodic layoffs.

The upshot of *Smith, supra* (*L'Oreal*) directly applicable here, is that it does not matter whether an employee is employed for long term employment, short term employment, or one day. This Court made its views in this regard clear:

> "Relying in part on legal and non-legal dictionaries to ascertain the most commonly understood meaning of 'discharge,' the Court of Appeal concluded the term refers only to 'the affirmative dismissal of an employee by an employer from *ongoing* employment **and does not include the completion of a set period of employment** [like in this case] **or a specific task**.' (Italics added.) **We are not convinced."** (emphasis added) *Smith, supra* 39 Cal. 4th at, at 84.

Thereafter this Court explains its reasoning, and ultimately makes the point that Labor Code § 201's immediate payment requirement applies "to employment terminations resulting from **completion of specified job assignments or periods of service**." (Emphasis Added) *Id,* at 86. Completion of work at the end of a baseball season is "completion of a period of service", and completion of an assignment to work an off season event is "completion of a

specified job assignment", yet the Court of Appeal wrongly found that the layoffs at issue here may not trigger application of the immediate payment requirements of Labor Code § 201 if workers relegated to the status of the unemployed are subject to a collective bargaining agreement that contemplates years of intermittent work. Slip Op. 7-8.

This court explained, in *Smith, supra,* in language as applicable here as it was in *Smith:*

> "The plain purpose of sections 201 and 203 is to compel the immediate payment of earned wages upon a discharge. **As discussed, a discharge is commonly understood as referring both to an involuntary termination from an ongoing employment relationship and to a release of an employee after completion of a specified job assignment or duration of time.**" *Id,* at 92 (Emphasis added)

The Court of Appeal herein misapplied the above lesson of *Smith* by focusing on an irrelevant factual distinction, rather than the ultimate teaching that when assignment-based employees are put out of work by their employer, even if temporarily, they are "discharged". The lesson of *Smith* is that an end of a period of employment that transitions an employee into the ranks of the unemployed for weeks or months is the dispositive factor, not whether an employee was initially

hired for long term employment, a single assignment, or intermittent periods of employment and unemployment.

In *Smith,* Ms. Smith's employer contended that Labor Code § 201 only applies to employees hired for ongoing employment who are permanently let go from that ongoing employment. This court rejected that contention in *Smith, supra*, passim.

Yet, the Court of Appeal in this matter glommed on to the nature of the hiring in *Smith, supra,* as the distinguishing factor to warrant the conclusion that preemption is warranted. Slip Op. pg. 7-8.

Nothing in *Smith,* made the nature of the initial hiring dispositive. Not applying *Smith's* holdings that find the end of "set periods of employment", and "release of an employee after a job assignment or duration of time", to the facts operative here defies reason. Here, on account of discharges in the form of layoffs, employees experience what the court in *Smith* addressed, work that stops on account of the end of assignments/periods of employment/ durations of time.

If *Smith* remains good law, then the Court of Appeal was mistaken in indicating the CBA compels application of preemption doctrine. There is no need to interpret the Collective Bargaining

Agreement because none of its terms are in dispute, and since the "end of an assignment" or "completion of a period of service", like those that occur at the end of a home stand, baseball season or off-season events constitute, as *Smith* holds, are "discharges" under Labor Code § 201. *Lujan, supra* (2002) 96 CA 4th 1200, 1206-1207, 1210 and *Sciborski, supra* (2012) 205 CA4th 1152, 1168-1174

VI. CONCLUSION

There is no need to interpret a collective bargaining agreement to determine whether the claims in this case are meritorious.

The Court of Appeal's embrace of the preemption doctrine was misguided. With layoffs a form of "discharge" under § 201, even if a collective bargaining agreement treated the employees subject to layoff as permanent employees for life, incapable of ever being contractually "discharged", the statutory right under Labor Code § 201 to immediate pay upon layoff is not altered.

The laser focus of the Court of Appeal should have been directed at the statutory meaning of "discharge" as interpreted and applied by this court in *Smith, supra,* the Legislature's use of the word "layoff" in the context of the law, Legislative intent, the purpose of the law, and the plain meaning of the word "layoff".

The California legislature knows how to modify the statutory rights of employees covered by CBA's when it wants to. (See for example Labor Code §§ 201.9, 227.3, 512 (d), and 514). When it comes to the prompt payment requirements applicable to the facts of this case, the Legislature has not acted.

The lesson of *Smith, supra* was obviously lost on the Court of Appeal. Before preemption doctrine can be invoked to deny statutory rights to California employees subject to the terms of a CBA, the need to interpret the agreement must be real. Where, as here, there is no question that the letter of the law and tenets of statutory construction control application of the law to the facts, the CBA does not have to be referenced or interpreted.

As *Smith* points out, fired employees are not more economically or socially vulnerable as a result of deferred wage payments, or otherwise more deserving of immediate wage payments, than those employees who find themselves out on the street without work for other reasons. The impact of the Court of Appeal's improper application of preemption doctrine subverts *Smith's* teaching, potentially denying laid off employees their statutory rights.

Reversal is compelled by the facts, the law and reason.

Dated: April 12, 2018 Respectfully Submitted,

_ /s/ Dennis Moss

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.204(c)(1), 8.490(a)(1), the text of this brief consists of 8,845 words, as counted by the Microsoft Word 2010 word-processing program used to generate the brief, excluding signature blocks, this page, the Cover Page, the Table of Contents, and the Table of Authorities. Including those items renders the document 9,761 word in length.

Dated: April 12, 2018

_/s/ Dennis Moss

DENNIS F. MOSS
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PROOF OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 15300 Ventura Boulevard, Suite 207, Sherman Oaks, California 91403.
2. That on April 12, 2018 declarant served the **APPELLANT'S OPENING BRIEF ON THE MERITS** via True Filing and by depositing a true copy thereof in a United States mail box at Sherman Oaks, California in a sealed envelope with postage fully prepaid and addressed to the parties listed on the attached service list.
3. That there is regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 12th day of April 2018 at Sherman Oaks, California.

/s/

By: Lea Garbe

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