S245607

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

APPELLANTS' ANSWER TO AMICUS BRIEF

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I. INTRODUCTION

The appellate court in this matter disregarded dispositive United States Supreme Court authorities that establish that an independently provided state-law right is not preempted unless it depends on interpretation of the CBA. It further disregarded that the determination of whether an employee is "discharged" under state law is a purely factual question about conduct that does not require a court to interpret any term of the collective-bargaining agreement. (*Lingle v. Norge Div. of Magic Chef* (1988) 486 U.S. 399, 405-407); *Hawaiian Airlines, Inc. v. Norris et al.* (1994) 512 U.S. 246, 266; *Lividas v. Bradshaw* (1994) 512 U.S. 107, 108-109.) The appellate court also failed to properly analyze Labor Code §§ 201, 203, 219 and the unanimous decision of this Court in *Smith v. Superior Court (L'Oreal)* (2006) 39 Cal.4th 77, which establish timely payment of final wages as a minimum labor standard.

Amici Curiae Los Angeles Dodgers LLC and Other California Sports Organizations ("Amici") in their brief in support of San Francisco Baseball Associates LLC ("Giants") similarly disregard the law of preemption, the language of Labor Code § 201, the purpose of

Labor Code § 201 et seq, the meaning of "layoff," as well as the lesson, holdings, application and significance of *Smith, supra.*

The absence of authority and analysis in the Amicus Brief in support of Respondent is stunning. It reinforces the reality that the Giants' position does not stand up to scrutiny.

II. AMICI'S FACTUAL REPRESENTATIONS BELIE A MISGUIDED BELIEF THAT PARTIES HAVE THE POWER TO DECLARE FICTIONS AS FACTS AND THEN APPLY THE LAW TO THOSE DECLARED FACTS

Relying on the existence of CBAs, and provisions in those CBAs regarding, inter alia, seniority, drug testing, and contractual discharges for cause, Amici claim employees covered by their CBAs are continuously employed and are never laid off/discharged as those terms are used in Labor Code § 201. (Amicus Brief "Am. Brief", passim.)

It is axiomatic that employers cannot curb worker's rights based on contractually driven *factual conclusions*, usurping the role of the courts to decide whether facts exist that constitute a violation of non-negotiable state rights that employees enjoy irrespective of CBAs. [1]

[1] If Amici's conclusions regarding "no layoffs" and "continuous employment" were actually factual, they would have no reason to file a friend of the court brief --- their employees would not have

The analysis demanded by this case will necessarily turn on the facts of intermittent periods of employment and unemployment, and the legal conclusion that when an employee is relieved of duty by an employer for a lack of work, he or she is laid off and entitled to the benefits of Labor Code § 201.

There are necessarily numerous employees of the Giants and Amici who experience lengthy periods of unemployment and receive far fewer assignments than other employees. This reality is illustrated by statements in the Amicus Brief notwithstanding assertions of continuous employment and an absence of layoffs.

There are 81 regular season home games in a 365-day year. (Am. Brief pg. 10). At Dodger Stadium, for example, with 56,000 seats, for each home game with tens of thousands of fans, it is fair to say the Dodgers are going to have staffing levels that would probably include well over a hundred and fifty (150) maintenance/janitorial employees, over a hundred (100) ushers/customer service staff, close to a hundred (100) guards, dozens of ticket sellers, ticket takers and numerous employees who sell merchandise throughout the stadium. In

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experienced the employer determined breaks in service that animate this case.

contrast, on most non-game days during the season and during the late October through March off-season, staffing levels will be a fraction of the level on game days.

The Amicus Brief states that in addition to baseball games, at Dodger Stadium, there are "concerts, festivals, marathons, an annual fan fest event, stadium tours, etc." Conveniently, there is no reference to the number of concerts and other events that may utilize large number of employees. There is only one marathon, and one fan fest. Assuming those events involve staffing levels approaching the numbers applicable to home games, and assuming as many as four concerts a year, combined with baseball games, there are 87 assignments utilizing large numbers of employees. If the Dodgers make the playoffs, there may be close to 100 such assignments in a 365-day year.

The other 265 days in a year, Dodger Stadium may have other events; however, Amici's failure to disclose staffing levels on these non-game days renders their suggestion of continuous employment for all employees a fallacy.

On non-game days during the season and off season, there are three stadium tours at Dodger Stadium available to the public. The

Amicus brief mentions Dodger stadium tours, but, again, conveniently does not mention stadium staffing levels for the tours. Through an internet search, one person remarked there were 17 people on the Dodger stadium tour she took. (www.detourla.com/start-here-exploring-los-angeles/dodger-stadiumtour). On public tour days during and after the baseball season when the Dodgers are not playing at home, when there are 3 tours at the stadium, it would be non-sensical for the Dodgers to have staffing levels that even approach the game day levels of over 150 maintenance/janitorial employees, over 100 ushers, dozens of employees throughout the stadium selling merchandise including store employees, close to 100 security guards, and sufficient ticketing personnel required to scan tickets from tens of thousands of fans. Amici's claims of "continuous employment" and "no layoffs" consequently have to be taken with a grain of salt.

The Amicus Brief states an usher who works a concert on a Sunday could work a Dodger game on Monday. (Am. Brief pg. 11). Although that may be true, it is also true that an usher who works a concert at the stadium in November, may be laid off when the concert is over, and not work again at the stadium, depending on staffing needs, until a fan fest in late January or until baseball returns in

March. In suggesting all employees are "continuously" employed, Amici are either being disingenuous, or adopting a view of "continuous employment" that must be rejected if the letter and purpose of Labor Code § 201 is to be realized.[2]

A. Despite "No Layoff" And "Continuous Employment" Claims, The Amicus Brief Exposes the Fallacy of Those Assertions.

The Dodgers indicate that work schedules are "posted on a monthly basis so that employees are aware of when they will be working **(and not working) well in advance**." (Am. Brief pg. 12, emphasis added). This scheduling reality confirms that employment at the stadium is assignment based with periods when employees will be out of work. With the Dodgers, if there is a Billy Joel concert at Dodger Stadium in the off-season in, for example mid-November, in which one hundred ushers are needed and seventy-five security guards are needed, and on other days in November, no ushers are needed and

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[2] The Amicus Brief points out how other Amici also have events at their venues other than games. Without statistics as to the number of such events (such as proms and corporate receptions) they host, and staffing levels at each, such representations are no more than a smoke screen to obscure the reality that many employees experience lengthy periods without employment. "Continuous employment" for a few employees clearly does not equate to "continuous employment" for an entire workforce that includes large numbers of employees who experience layoffs on account of their employer's variable staffing requirements.

only seven guards are needed each day, it makes sense to post that schedule in October so people will know when they are working. It also makes sense to post schedules for December in November, and in December for January, so on and so forth, so that employees laid off after the Billy Joel concert, will know that they are not to return to work until, for example, a "Fan Fest" in January, or pre-season games in March.

In the discussion of facts in the Amicus Brief related to amicus Padres L.P., staffing variations over the course of a year, are similarly acknowledged, albeit obliquely. The Amicus Brief provides that Padres employees must be available for ticketed events that use at least half the stadium, not mentioning staffing levels at those events. This policy exposes the reality that all events are not of the size warranting large staffs. (Am. Brief pg. 13) The facts section as to the Padres in the Amicus Brief goes on to provide at page 13: "[T]he assignment of available work hours is primarily based on seniority." This evidences a further concession by the Padres, despite contrary pronouncements, that employees, depending on their seniority, are not continuously employed and employees with less seniority than others experience more days of unemployment through layoffs.

The foregoing practical reality makes clear that, contrary to Amici's protestations, employment is not continuous, but rather "assignment based", a term utilized in *Smith, supra passim,* and some employees will experience longer layoff periods than others on account of seniority-based assignments.

The Amicus Brief in the section on San Jose Arena Management, does not deny there are breaks in service experienced by employees between assignments, nor inevitable swings in staffing requirements, saying the employer "does not consider employees to be terminated at the conclusion of events or seasons". San Jose Arena Management does acknowledge there are "hiatuses" between events. A "hiatus" necessarily implies there are substantial reductions in staffing during hiatus periods. (Am. Brief pg. 14).

Whether or not employees are "continuously employed" or "laid off" for purposes of Labor Code § 201 is a matter of fact, and not a matter of an agreement between a union and its members' employers. Neither a CBA, nor parties to a CBA, for purposes of enforcement and application of the minimal standards established in the Labor Code, can proclaim "continuous employment" and "no

layoffs" as facts to avoid the law's requirements. Actual facts control enforcement and application of legal rights.

III. ARGUMENT

A. Amici Fail to Answer the Question Posed by This Court.

The issue posed by the court in granting review is:

> "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 Review).

The brief of Amici in Support of the Giants does not address this question, let alone establish why the Giants' Agreement has to be interpreted in order to determine whether a violation of Labor Code § 201 has occurred. This is not surprising. Even though the Court of Appeal ultimately gave deference to the CBA, it found that "resolution of the controversy may not turn on the interpretation of any specific language in the CBA" *Melendez v. San Francisco Baseball Associates LLC (2017)* 16 Cal.App.5th at 339, 345.

Appellants have argued at length that it was improper for the Court of Appeal to find preemption applicable, pointing out how interpretation and application of Labor Code § 201 is not, and cannot,

be dependent on the terms of a collective bargaining agreement. Amici did not provide any argument or authority refuting this analysis[3].

Amici remark that their employees are covered by collective bargaining agreements with seniority provisions, discharge for cause provisions, timing of wage payment clauses and other provisions that provide terms and conditions of employment other than those provided by the Labor Code. (Am. Brief, passim)[4]

Amici claim that, as a consequence of CBAs, their employees are continuously employed and never laid off; utilizing versions of the expression "continuously employed" nine times in the brief (Am. Brief pgs. 3, 8, 16, 21, 22, 23, and 28), and claiming the Amici Dodgers, Oakland Athletics, San Diego Padres, and San Jose Arena Management never lay any one off. (Am. Brief pgs. 12, 13, 14, 15). Amici never confront the reality that their claims of "continuous employment" and "no layoffs" are not actual operative facts that will be outcome determinative. This case will be determined on the basis

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[3] This is especially telling because the author of the Amicus Brief, Richard Simmons, is considered among the preeminent management side employment lawyers in the State.

[4] Significantly, the Giants' CBA contains no provisions contractually dictating when wages are to be paid.

of what the Legislature had in mind in using the expressions "laid off" and "discharge", not an employer's assertion that it does "not consider their employees to be terminated, laid off, or otherwise discharged between games, events, or baseball seasons." (Am. Brief pg. 12).

If an employee receives intermittent assignments from an employer, and as a consequence, experiences periods of weeks or months of unemployment initiated by their employer, irrespective of whether an employer or CBA characterizes that employment relationship as continuous, the legal, not contractual question remains as to whether the end of each period of employment, because of a lack of available work is a lay off warranting application of Labor Code § 201.

Self-serving statements of "continuous employment" and assertions that layoffs do not occur, cannot control where the impact of the law on transition from active employment to out of work status is at issue.

The Unemployment Insurance Code provides:

"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.
(2) Any week of less than full-time work, if the wages payable to him or her with respect to the week, when reduced by twenty-five

dollars ($25) or 25 percent of the wages payable, whichever is greater, do not equal or exceed his or her weekly benefit amount."

Unemployment Insurance Code §1252.

Just as interpretation of a CBA cannot alter the meaning of "unemployed" for purposes of application of the Unemployment Insurance Code, interpretation of a CBA cannot alter the meaning of "discharge" and "layoff" as those terms are used in Labor Code § 201. Nothing in Amici's Brief questions this conclusion.

Amici's misplaced factual assertions drawn from its position that employment continues during periods of unemployment does not compel preemption -- interpretation of the CBA. Amici's failure to point to one CBA provision that requires interpretation, when applying the law to actual facts, makes clear Amici's failure to address the question posed by this Court in granting review.

B. Amici Fail to Refute the Central Precepts of Preemption

As previously pointed out in Appellants' Opening and Reply Briefs, United States Supreme Court authority establishes that Section 301 of the Labor Management Relations Act (LMRA), 29 United States Code section 185(a), does not permit parties to waive independent, non-negotiable state rights in a CBA.

Lingle v. Norge Division of Magic Chef, Inc. (1988) 486 U.S. 399, 409-410 provides that preemption does not apply to the question of "whether an employee covered by a collective-bargaining agreement that provides her with a contractual remedy for discharge without just cause may enforce her state law remedy for retaliatory discharge."

Lividas v. Bradshaw (1994) 512 U.S. 107, 124 provides: "§301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law...it is the legal character of a claim, as 'independent' of rights under the collective-bargaining agreement...that decides whether a state cause of action may go forward. [Internal citations omitted.]".

Allis-Chalmers Corp. v. Lueck (1985) 471 U.S. 202, 211-212: "Nor is there any 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. Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored. Clearly, §301 does not grant the parties to a collective-

bargaining agreement the ability to contract for what is illegal under state law."

Amici do not cite or discuss *Lingle*, *Lueck, Livadas* or the other preemption cases cited in appellant's earlier briefs. Amici did not analyze or refute the United States Supreme Court precedent that "underscored the point that § 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law." (*Lividas*, *supra*, 512 U.S. at 123)

Federal and state courts construing the California Labor Code have consistently followed the highest Court's binding precedent and allowed claims based on state minimum labor standards, including timely payment of wages after discharge claims, to proceed in court. *Balcorta v. Twentieth Century-Fox Film Corporation* (9th Cir. 2000) 208 F.3d 1102. See also *Valles v. Ivy Hill Corp.* (2005) 410 F.3d 1071 holding that state-established rights to meal periods and penalties under California state law applied to workers covered by a CBA and were nonnegotiable.

In *Zavala v. Scott Brothers Dairy* (2006) 143 Cal.App.4th 585, 592-593, the Court pointed out that "...the Union could not waive plaintiffs' right to bring statutory labor-rights claims in court...Those

rights are independent of the collective bargaining process. They devolve on petitioners as individual workers, not as members of a collective organization. [Internal citations omitted]".

Amici, like the appellate court in this action, fail to recognize that claims based on state minimum labor standards, including timely payment of wages standards, are independent state created rights that are non-negotiable and cannot be waived. Just as it would be unlawful for an employer to pay less than the State mandated minimum, simply because a CBA that defines the minimum wage rate contained in State law, an employer cannot shield itself from liability under Labor Code § 201 by defining "discharge" in a manner inconsistent with State law.

C. The Right to Timely Payment of Wages Upon Discharge as the Term Is Used in Labor Code §201 Is an Independent State-Law Right That Cannot Be Waived by A CBA Simply Because A CBA Contains Discharge for Cause Provisions.

Amici, just as the Giants, put stock in the fact that their CBAs have contractually negotiated "discharge for just cause provisions". (Am. Brief pgs.12, 13,14, 15, 17, 23, 24). The question of whether a worker is "discharged" under Labor Code § 201 is purely a question of state law independent of whether a

worker is contractually discharged for just cause under the terms of a CBA. Preemption does not apply. Applicable precedent uniformly rejects preemption where employees are invoking state rights regarding "discharge" despite CBA provisions that reference "discharge".

The United State Supreme Court in *Lingle, supra* resolved the question of, "whether an employee covered by a collective-bargaining agreement that provides her with a contractual remedy for discharge without just cause may enforce her state-law remedy for retaliatory discharge." The Court of Appeal held the application of the state tort remedy was pre-empted by § 301 of the Labor Management Relations Act. The United States Supreme Court reversed.

The Court explained "the mere fact that a broad contractual protection against discharge may provide a remedy for conduct that coincidentally violates state-law does not make the existence ***or the contours of the state law violation dependent*** upon the terms of the private contract." (*Lingle*, *supra*, 486 U.S. at 412-13, emphasis added.) The Court observed that "purely factual questions" about an employee or employer's conduct and motives do not require a

court to interpret a CBA. (*Lingle*, *supra*, 486 U.S. at 407). Here, the foregoing analysis should also be applied. Preemption did not apply in *Lingle* because a State law claim of "discharge" does not require interpretation of a CBA. The issue of "discharge" raised by the State law claim in this case similarly does not require interpretation of a CBA.

In the post-*Lingle* case of *Hawaiian Airlines, Inc., supra* 512 U.S. 246, 266, the United States Supreme Court affirmed a state Supreme Court decision that held a state law cause of action was not preempted by the Railway Labor Act if it involves rights and obligations existing independent of the CBA. There, "Petitioners argue[d] that resort to the CBA is necessary to determine whether respondent, in fact, was discharged." *Id,* 512 U.S. at 266. The Court rejected this argument, holding: "This argument is foreclosed by *Lingle* itself. *Lingle* teaches that the issue to be decided in this action—whether the employer's actions ***make out the element of discharge under Hawaii law—is a 'purely factual question*** [Internal citation omitted.]" (Emphasis Added).

In *Balcorta v. Twentieth Century-Fox Film Corp.* (9th Cir. 2000) 208 F.3d 1102, the Ninth Circuit rejected the employer's

arguments that a claim for timely payment of wages after discharge under Labor Code § 201 was preempted by §301 of the LMRA because interpretation of the CBA was not required to determine what constitutes a "discharge" and what constitutes timely payment of wages under the law. *Id,* 208 F.3d at 1109. The Ninth Circuit held, "[i]n short, whether *Balcorta* was discharged does not require a court to interpret the collective bargaining agreement..." *Id,* 208 F.3d at 1110.

D. Amici's Reliance on CBAs To Suggest Statutory Discharges Do Not Occur When Their Unionized Employees Are Laid Off, Creates an Anomaly the Legislature Did Not Intend

In an effort to buttress its position that the Giants' guards are not discharged when out of work, Amici repeatedly assert that bargaining unit employees' conditions of employment are "governed" by CBAs, no one is laid off, employment is continuous, and unions should have an unimpeded right to negotiate terms and conditions of employment. Their position presupposes a dichotomy between unionized employees and non-union employees that the legislature never intended.

Amici's position begs the following question. If the Dodgers, Giants, or other Amici have union employees and non-union

employees that experience identical employment patterns with breaks in service of months or weeks on account of staffing needs, do non-union employees enjoy the benefits of Labor Code § 201, while union employees, who also find themselves out of work, have to wait up to two weeks for their final pre-layoff wages because a union has negotiated "terms" which are interpreted by employers as "continuous employment"?

The answer to this question is obvious. The Court of Appeal did not have the authority to create a CBA Labor Code § 201 "opt-out". By rationalizing its decision on the basis of the contract terms of the security guards' employment, it did just that - The power to create a CBA based exception to § 201 power lies exclusively with the Legislature.

In 1997, the Labor Commissioner pointed out in Labor Commissioner Opinion Letter 1997.07.15.:

> "The payment of wages at termination in California must be made pursuant to the provision of Labor Code §§ 201 and/or 202. There is no provision in the California statutes dealing with pay at termination which would allow the parties to a collective bargaining agreement to 'opt-out' of the state law minimum requires in this regard."

The minimum labor standards provided in the California Labor Code, including the right to timely payment of wages in Labor Code §§ 201 and 203, apply to all employees in California, whether their *terms of employment* are governed in part by a CBA or not.

Amici's position, if adopted, would require workers who are represented by organized labor to negotiate for the minimum labor standards provided by independent state law such as the benefit of prompt payment afforded by Labor Code § 201, while non-union employees would reap the benefit of Labor Code § 201 without having to negotiate for its application.

Nothing in the text of § 201 suggests this dichotomy was intended by the Legislature. Had the Legislature intended an exception for *unionized employees* in the Sports industry, it knew how to enact the exception. See for example Labor Code §§ 201.5 (d), 201.9, and 514.

Amici's position, like the Court of Appeal decision, is ultimately based on the erroneous premise that an employee's right to timely payment of wages is dependent upon the employer and union agreeing in a collective bargaining agreement to what constitutes "continuing employment", "discharge" and/or "lay off". Adoption of

this premise would render void the California minimum labor standards set forth in Labor Code § 201.

The question of whether an employee is "discharged" or is "continuously employed" for purposes of application of Labor Code § 201 is a fact question that cannot be dictated by private agreement. Otherwise, employers could simply require employees to sign agreements that state no employee is ever "discharged" within the meaning of the Labor Code.

Factual determinations as to whether a law has been violated cannot be resolved by reference to a contract. Parties to a contract cannot negotiate future fact findings. That being the case, there is simply no rational way to justify interpretation of the Giants' CBA as relevant to this case.

Amici state (Am. Brief pg. 5) that it is important that employers and unions negotiate terms and conditions of employment. Appellants do not dispute this fact. However, more importantly, it is irrefutable that unions and management negotiate against a back drop of laws that cannot be waived (Labor Code § 219). California law, buttressed by preemption doctrine, provides that negotiations must proceed from

a position that recognizes the State law is a floor that Unions should not have to fight to retain at the bargaining table.

E. Amici Fail to Address the Applicability of Labor Code § 201 to "Layoffs" And Fail to Confront the Plain Meaning Of "Layoff".

Proper interpretation and application of Labor Code § 201, consistent with the Legislative intent to provide for people who find themselves unemployed, compels a conclusion that when the Giants' employees are laid off, Labor Code § 201 applies.

Amici did not question the definition of "layoff" expounded upon by Appellants, and the applicability of the term in contexts where employees may have an expectation to be returned to employment in the future.

Amici did not question the significance of the word "layoff" in Labor Code § 201, nor this Court's conclusion in *Smith, supra* that its use signifies a definition of "discharge" that includes releases from work upon the end of an assignment.

Amici similarly did not have a response to the decades of Division of Labor Standards Enforcement authority treating temporary layoffs as a form of "discharge".

Instead, Amici simply declare throughout their brief, without analysis, statutory or precedential authority, and without support in the legislative history, that Appellants' interpretation of Labor Code § 201 was "overbroad" or "over-expansive". (Am. Brief pgs. 4, 8, 27 and 28). This position is erroneous.

In *Smith, supra,* this Court eschewed narrow construction of "discharge" through a methodical, clear assessment of plain meaning, the statutory scheme, and Legislative intent. This case clearly compels application of Labor Code § 201 consistent with this Court's *Smith* decision in a "layoff" context.

Importantly, this court in *Smith* looked to the legislative scheme as a whole and explained: "[r]edefining what 'immediate payment' means, vis-à-vis section 201 [for particular industries] 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 86, emphasis added)

Considering the legislative history and purpose of Labor Code § 201 since its origins in the early 1900's, this Court noted numerous public policy reasons supporting immediate payment of wages and found no suggestion that "fired employees" were more economically or socially vulnerable as a result of deferred wage payment than were "those employees who were not fired but released when their work was deemed completed." (*Smith, supra*, 39 Cal.4th at 89.)

This Court stated, "[a]ccordingly, it is not surprising, in light of the important public policy at stake, that the Legislature, rather than adopting a narrower construction of the statutory term "discharge"... instead undertook to enact only limited exceptions to the immediate payment requirement in three specified industries." (*Smith*, *supra*, 39 Cal.4th at 89.)

Amici's unsupported assertions that Appellants' interpretation of the word "discharge" is "overbroad", given the foregoing, does not stand up in light of the teachings of *Smith*. As this Court made clear, an employer effectuates a discharge within the contemplation of Labor Code § 201, not only when it fires an employee, but also when it releases an employee upon the

employee's completion of a job assignment or time duration --- for example, when laid off. "Released employees generally appear no less deserving or less in need of immediate wage payment than those who are fired..." *Smith, supra* 39 Cal.4th at 92)

World Series home runs, the existence of Collective Bargaining Agreements between Amici and Unions, seniority systems, employer assertions that their Out-of-Work employees "are not terminated", all referenced in Amici's brief, do not soften the blow of unemployment, do not pay the rent, feed the family, and help avoid credit card debt while waiting up to fifteen days for a pay check. In *Smith,* the foregoing types of concerns animated this Court's conclusions regarding Legislative intent. That Legislative intent has not changed, and the needs of out of work Californians have not changed.

F. Precedent Treats Temporary Separations of Unionized Employees As "Layoffs" Even When There Are Continuing Relationships Between the Separated Employees and Their Employers

Amici's "continuous employment" mantra in the face of the harsh realities employees face when subject to temporary layoffs is not unlike an argument the employer made in *International Brotherhood of Boilermakers et al. v. NAASCO Holidays, Inc.* (2017) 17 Cal. App. 5th 1105, 1112.

There are at least three ways California law looks out for the interests of people laid off from their gainful employment, Labor Code §§ 1400 et seq., The California WARN Act, the Unemployment Insurance Code, and Labor Code § 201. All three reflect a Legislative intent to ease the plight of Californians who find themselves out of work. See *Smith, supra* 39 Cal. 4th at 87-91, and *NAASCO, supra* 17 Cal. App. 5th at 1125-1126.

The *NAASCO, supra* case arose under the WARN Act. As in the instant case, employees who were employed pursuant to a union contract, were temporarily without work (3-5 weeks). *NAASCO*, relying on the fact that their temporarily out of work employees would only be out of work a short time, would not lose some of their union negotiated benefits while out of work, continued to accrue seniority while out of work, and would be returning to work after a short hiatus, argued that its temporary reduction in force of 90 employees was a "lull" in work, not a "layoff". Instead *NAASCO* contended the employees were experiencing a "furlough or manpower reduction" during which employees did not work and did not receive pay for their time out of work. *Id,* 17 Cal. App. 5th at 1112-1113, 1116. The Court in *NAASCO, supra* 17 Cal. App. 5th at 1118 rejected

NAASCO's argument, holding that a "layoff" occurs in the foregoing context despite the fact of short-term temporary breaks in service even if the employees are given return dates, and even if some form of a relationship exists between the employer and the out-of-work workers. The employer's position in *NAASCO* mirrors Amici's and Respondent's position here. While the *NAASCO* decision focused in part on the definition of "layoff" in the WARN Act, that analysis should apply with equal force here because the definition of "layoff" in the WARN Act , and the notion that layoffs can be temporary as expressed in *NAASCO*, are consistent with the plain meaning of "layoff" found in dictionaries, DLSE Opinions, and Supreme Court Cases where unionized workers who experience temporary separations from employment with recall opportunities are characterized as laid off.

"Layoff" is defined in the California WARN Act as "a separation from a position for lack of funds or lack of work." (Labor Code § 1400 subd. (c)) *Id*, at 1115. This definition, consistent with the plain meaning of layoff clearly encompasses the breaks in service here, where employees, as in *NAASCO,* are separated for temporary periods due to the fluctuating workforce needs of their employer. The

analysis in *NAASCO* clearly is apropos here, and therefore, Labor Code § 201's prompt payment provisions should be applied.

G. Amici's Concerns Should Be Addressed to The Legislature.

Without legal authority to support their position, Amici make public policy arguments that should properly be addressed to the Legislature. They argue, for example, that they do not know the time a game ends, therefore, it is difficult to generate timely wage payments. (Am. Brief pg. 25)

Other industries anticipated issues like this before and after *Smith*, and appropriately sought Legislative solutions. This Court, in *Smith*, found that a number of industries were exempted by the Legislature from the immediate payment requirements of Labor Code § 201 on account of extenuating circumstances, including the curing, canning and drying industries (72 hours instead of immediately), and motion picture industry if payment is made by the next regular pay day Labor Code § 201.5, and the oil drilling industry, within 24 hours, Labor Code § 201.7. See *Smith, supra*, 39 Cal.4th 277 (2006).

After *Smith*, other industries followed suit and achieved Legislative solutions to what they perceived as extenuating circumstances. Labor Code § § 201.3 and 201.9.

In a classic example of Expressio Unius est Exclusio Alterius, the Legislature's failure, before *Smith* and after *Smith,* to include Sports industries with union contracts within the industry exceptions to immediate payment, compels reversal of the Court of Appeal decision here.[5]

H. Amici's Parade of Dire Consequences Does Not Hold Up to Scrutiny.

Appellants do not assert that every break in service is a layoff. A layoff occurs only when an employer initiates a break in service on account of the unavailability of work for the employees, or a lack of funds. "Completion of an assignment," contrary to Amici's representation, does not necessarily equate to a layoff if an employee goes directly from one assignment to another. If the baseball season ends on a Friday, and on Sunday there is a concert at the stadium that an employee who worked the last game of the season works, Appellants would not consider the employee laid off for one day. However, if after the baseball season ended, the employee was not scheduled to work for a week or a month, Appellants and common

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[5] Attached hereto as Appendix A is an Article written by an attorney with the firm that originally represented Respondent in this action sounding the alarm, advocating that entities that employ workers intermittently should seek a Legislative solution in the wake of *Smith.*

sense would consider the hiatus a layoff. Ultimately it will be for the trial Court to determine how long of a break in service constitutes a layoff. The DLSE has opined that a return to work within a short time, (e.g. within a pay period,) takes the break in service outside the realm of a "layoff".

At pages 18-19 of the Amicus Brief, Amici suggest it is Appellants' position that when an employee chooses not to work specific event days, the time he takes off is a layoff. This is not the case. Employee initiated time off does not constitute a layoff. Definitionally, layoffs are initiated by management.

On Page 19 of the Amicus Brief, Amici pose a World Series conundrum that has a simple solution - pay the employees immediately after the first two games of the World Series because of the possibility that they will not be returning to work for some time. If the team returns to Los Angeles to play games six and seven, pay them again immediately after the final game.

At page 22 of the Amicus Brief, Amici claim:

> "[P]ursuant to the Dodgers' CBAs, employees do not gain the protections of the CBA or begin to accrue seniority until after working 60 events. However, under Petitioner's theory, employees would never meet this threshold as they would be repeatedly terminated as a result of gaps in their work schedules."

This is absurd. Discharges through layoff, pursuant to Labor Code § 201, do not prevent people from working 60 events and accruing seniority, or prevent them from being treated as not contractually discharged. If an employee works 60 events, he or she gains the protections of the CBA irrespective of the number of layoffs and immediate wage payments she received in the interim pursuant to § 201. The remaining concerns raised on page 23 are equally preposterous, relying on Contract interpretations that Amici would not have to accede to. Nothing in the proper application of Labor Code § 201 would require employees to re-apply for work after being laid off, to be rehired, to re-drug test, to have new background checks.

The reckless assertions beginning on the last two lines of page 23 of the Amicus Brief though the end of that Paragraph on page 24 are similarly without foundation in reality. Nothing in Labor Code § 201 requires Sports Organizations to not recall its experienced employees form layoff. Nothing in Labor Code § 201 compels a conclusion that a layoff for economic reasons such as a lack of available work, which is a "discharge" under the law, would or could trigger wrongful discharge suits, or arbitrations on account of contract provisions.

I. Solutions Abound for The One Practical Hurdle Compliance with Labor Code § 201 Presents

Aside from the Legislative solutions achieved by several industries to the dilemma of imprecise end times for last work days before layoffs, there are solutions which the Giants can take advantage of.

Option 1: The most direct solution is to simply pay the money immediately after the Layoff when due. Throughout the State, on a daily basis, employers discharge employees either by layoff or by permanent termination, and they prepare specially drawn pay checks. In many instances they prepare one check for the work up to the date of discharge, and another check to reflect the work on the discharge day. Payroll technology that has preprogrammed deduction information and withholding requirements when integrated with a timekeeping system in this modern day and age can generate last day worked pay checks seamlessly, incorporating the precise hours worked on the last day into a pay check electronically.

If the Giants do not want to invest in the computer programming involved, and the human resources necessary to generate and distribute hundreds of checks at the end of a concert, or at the end of the last game of the season they have other options.

Option 2: Lobby for Legislation that provides a solution tailor made for Sports Industry circumstances.

Option 3: Take advantage of overpayment rights. California law does not prohibit overpayments, and with agreement between employees and employers, California law allows for recoupment of overpayments from future wages. In an Opinion Letter Dated November 25, 2008, the DLSE was confronted with an employer practice to automatically pay employees for 75 hours every two weeks, even if they worked less than 75 hours. After the pay period, employees submitted electronic records reporting hours actually worked. In later pay periods, the employer would deduct from pay the overpayments that occurred. Given the Giants' representations regarding continuous employment, the Giants could recoup overpayment during one pay period, in future pay periods so long as the employee authorizes the deduction of the overpayment. DLSE Op. Ltr. 2008.11.25-1, DLSE Op. Ltr. 1999.09.22-1. Thus, if the Giants conservatively estimate that with pre-game work and post-game work, a Security guard will work at most 7.5 Hours on the last day of the season, with Agreement from the Guard, they can prepare a check in advance that contemplates 7.5 hours of work at the last

game, deliver that check at the end of the game, and recoup any over payment in a future check. If any employees would not authorize overpayment and recoupment, those employees would have to have their checks prepared on the basis of actual time worked during the last game. Given the tens of millions of dollars individual baseball players receive for a season's work, and the multi-billion-dollar deals baseball teams receive for broadcast rights, this solution or the solution of staffing up to generate checks is clearly not unreasonable.

Option 4: Negotiate a different deal with the union. In footnote 4 of the Court of Appeal Decision, the court recognized that the Giants obligation for timely payment was not subject to an exception pursuant to Labor Code § 201.9. The Giants have conceded this position by never asserting applicability of that section in any briefing, and rightfully so. The Giants and Amici host concerts at their venues. Labor Code § 201.9 provides:

> "Notwithstanding subdivision (a) of Section 201, if employees are employed at a venue that hosts live theatrical or concert events and are enrolled in and routinely dispatched to employment through a hiring hall or other system of regular short-term employment established in accordance with a bona fide collective bargaining agreement, these employees and their employers may establish by express terms in their collective bargaining agreement the time limits for

> payment of wages to an employee who is discharged or laid off."

The above makes clear that the Legislature has already provided the Giants with an opportunity to solve the perceived inconvenience of preparing checks at the end of a work period that ends at an unpredictable time. The CBAs between the Giants and the guards' union does not contain an express provision for the timing of payments of wages when employees are laid off, nor a provision for dispatch of employees through a hiring hall or similar system. (See AA 00160-00176 and AA 0240-0251).

Obviously, the parties to the CBA have the opportunity to negotiate a provision that brings them within the Labor Code § 201.9 exception. Until that time, compliance with Labor Code § 201 is required.

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IV. CONCLUSION

The Amicus Brief submitted by the Dodgers and others does not undermine the inevitable conclusion that reversal is warranted herein, preemption is not warranted, and the Giants have violated Labor Code § 201 when laying off employees.

Dated: January 7, 2019

Respectfully Submitted,

DENNIS F. MOSS
Attorney for Respondent
GEORGE MELENDEZ

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 6,992 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 7,879 word in length.

Dated: January 7, 2019

DENNIS F. MOSS
Attorney for Respondent
GEORGE MELENDEZ

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 January 7, 2019 declarant served the **APPELLANTS' ANSWER TO AMICUS BRIEF** 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 7th day of January 2019 at Sherman Oaks, California.

By: Lea Garbe

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APPENDIX A

ASAP™ A Littler Mendelson **Time Sensitive** Newsletter

in this issue:

JULY 2006

The California Supreme Court holds that the end of a short-term assignment is a "discharge" requiring the immediate payment of final wages.

California Edition

A Littler Mendelson California-specific Newslette

California Supreme Court Clarifies Meaning of "Discharge" Triggering Immediate Payment of Final Wages

By Paul R. Lynd and Adam J. Peters

In a major decision in *Smith v. Superior Court (L'Oreal USA, Inc.)*, No. S129476 (July 10, 2006), the California Supreme Court considered whether to apply California's statute requiring the immediate payment of final wages to employment relationships that end because of the completion of a specific assignment or period of time for which the employee was hired. The issue before the California Supreme Court was whether such an end of employment constitutes a "discharge," triggering the obligation to pay final wages immediately, or whether a "discharge" only means a firing or layoff. Giving a broad application of the term "discharge," the Supreme Court held that a "discharge" occurs in all of these circumstances.

The decision in *Smith* means an employer must pay final wages immediately and in full whenever an employee is released after completing either a specific assignment or the specific time duration for which the employee was hired. Failure to pay final wages immediately and in full can result in waiting time penalties under California Labor Code section 203.

The unanimous decision has significant implications for employers. It means that employers must take steps to ensure that they immediately pay final wages to an employee hired for a specific assignment or fixed period of employment. The decision poses significant problems for certain types of employers, such as temporary staffing agencies and others who have employees work intermittently on short assignments.

California's Final Wage Payment Requirements

Labor Code section 201(a) provides that "[i]f an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately." Labor Code section 203 imposes waiting time penalties upon an employer who "willfully" fails to pay final wages in accordance with Labor Code section 201(a) to an employee "who is discharged." These penalties can be substantial: Labor Code section 203 provides that wages continue at the employee's daily rate of pay until the final wages are paid, or an action to recover them is commenced, up to a maximum of 30 days.

The meaning of the term "discharge" is not defined in these statutes. It is not defined elsewhere in the Labor Code, or in any implementing regulations from the Labor Commissioner. Thus, in *Smith*, the meaning of the term "discharge" in Labor Code sections 201 and 203 was an issue of first impression

The Supreme Court's Broad Interpretation Of "Discharge"

In *Smith*, L'Oreal USA hired the plaintiff for one day to work as a hair model at a show. L'Oreal agreed to pay $500 for the one day's work. However, the plaintiff was not paid until over two months later. The plaintiff filed a class action lawsuit, and among her claims she sued for $15,000 in waiting time penalties for the alleged violation of Labor Code sections 201 and 203.

L'Oreal won summary adjudication on this claim in Los Angeles County Superior Court. There, it successfully argued that the plaintiff had not been "discharged" on these facts.

The Second District Court of Appeal in Los Angeles upheld this ruling. Relying on dictionary definitions, the court of appeal held that a "discharge" requires an affirmative act by an employer terminating an employee's otherwise on-going employment, such as a firing or a layoff. The court of appeal concluded that merely completing an assignment or agreed upon period of employment is not a "discharge."

The California Supreme Court disagreed, giving a broad reading to the term "discharge" in Labor Code sections 201 and 203. It concluded that "an employer effectuates a discharge within the contemplation of sections 201 and 203, not only when it fires an employee, but also when it releases an employee upon the employee's completion of the particular job assignment or time duration for which he or she was hired." The court based its interpretation on several factors, such as other dictionary definitions of "discharge," the legislative history of Labor Code section 201 tracing back to its origins in 1911, and the statutory construction of these Labor Code sections.

Comparing California's various provisions governing payment of final wages, the Supreme Court noted that an incongruity would result from any different conclusion. It noted 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 would be entitled to immediate payment of their earned income (§ 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).

Implications of the Supreme Court's Decision

The court's decision in *Smith* is consistent with the Labor Commissioner's long-standing interpretation of Labor Code sections 201 and 203. By confirming that position, it has significant implications for many employers. At the least, *Smith* requires all employers to ensure that they can immediately pay final wages in full to employees upon completion of the specific assignment or the fixed time period for which they were hired.

The decision has particular implications for temporary staffing agencies who employ individuals on temporary assignments. Similarly, other employers, such as in the entertainment industry, employ individuals who work only intermittently as needed. The *Smith* decision raises the question of whether the end of each of these assignments or temporary periods of employment constitutes a "discharge" and requires immediate payment of wages upon completion, even though the individual remains an employee and subject to recall for another assignment.

The fact that an individual is technically still an employee may be irrelevant for purposes of final pay requirements and avoiding waiting time penalties. The Labor Commissioner has taken the view that, if an employee is released from work without a specific return date within the normal pay period, the employment relationship has been terminated and final wages are due and payable immediately. The Labor Commissioner has also held that the definition of "discharge" and the requirements of Labor Code section 201 cannot be altered by agreement.

New assignments for temporary and intermittent employees are often uncertain when one assignment is completed. Taking *Smith* and the Labor Commissioner's interpretation together, they may require an employer to pay temporary or intermittent employers immediately upon completion of a fixed period of employment, or after each assignment when there is not a return date in the normal pay period. Such a requirement would put these employers in a difficult, and often impossible, position.

For some of these employers, the potential implications of *Smith* may require a legislative solution. Recognizing the realities of certain industries, the Legislature has exempted certain employers from the requirement that final wages be paid immediately to discharged employees. For example, employers in the motion picture industry may pay by the next regular payday (Labor Code § 201.5), employers in the oil drilling business have 24 hours excluding weekends and holidays (Labor Code § 201.7), and seasonal employers involved in curing, canning, or drying of perishable fruit, fish, or vegetables have 72 hours (Labor Code § 201(a)).

In 2004, the Legislature approved Assembly Bill 3018, which would have allowed some employers and employees in the live theatrical and concert entertainment industry to set alternative time limits for payment of final wages in their collective bargaining agreements. Governor Schwarzenegger vetoed the bill because he objected to meal period provisions that had been inserted into the legislation. After *Smith*, these issues likely will confront the Legislature again soon, but in a broader scope.

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