In the Supreme Court of the State of California

JANIS S. MCLEAN, Plaintiff and Appellant, v. STATE OF CALIFORNIA et al., Defendants and Respondents.	Case No. S221554

Court of Appeal, Third Appellate District, Case No. C074515
Superior Court of California, County of Sacramento,
Case No. 34-2012-00119161-CU-OE-GDS
Honorable Raymond M. Cadei

APPLICATION OF AARP TO FILE AMICUS CURIAE BRIEF; PROPOSED AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF JANIS MCLEAN

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To the Honorable Chief Justice Cantil-Sakauye and Associate Justices of the California Supreme Court:

Pursuant to California Rules of Court, rule 8.520(f), AARP respectfully applies to this Court for leave to file the accompanying Brief of Amicus Curiae in support of Plaintiff Janis McLean.[1]

AARP has a strong interest in the issues before this Court. In various ways, including legal advocacy as an amicus curiae, AARP supports the rights of all Americans, older workers in particular, to achieve financial security. Approximately half of AARP's members are either currently working or seeking employment, and AARP advocates for the fair treatment of older employees in the workforce. AARP is familiar with all the briefs that have been previously filed in this case, seeks to provide additional context as demonstrated below, and can provide the Court with a different perspective.

No party or counsel for any party authored any portion of the brief. No party or counsel for any party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than amicus curiae, their members and their counsel made a monetary contribution intended to fund the preparation or submission of the brief. (Cal. Rules of Court, rule 8.520(f)(4).)

[1] This Court's caption reflects McLean's status as Plaintiff and Appellant in the Court of Appeal. The Defendant, State of California, is the Petitioner in this Court.

STATEMENT OF INTEREST OF AMICUS CURIAE

AARP is a nonpartisan, nonprofit organization with a membership that helps people turn their dreams into real possibilities, strengthens communities and fights for issues that matter most to families, such as employment, healthcare, income security, retirement planning, affordable utilities and protection from financial abuse. One of AARP's primary objectives is to achieve dignity and equity in the workplace. AARP seeks to eliminate stereotypes about older workers, to encourage employers to hire and retain older workers, and to help older workers overcome obstacles in the workplace, including discrimination based on age. AARP also seeks to increase the availability, security, equity, and adequacy of public and private pension, health, disability and other employee benefits, which countless members and older individuals receive or may be eligible to receive upon retirement.

Approximately half of AARP's members are employed or seeking employment and are protected by the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34. Older workers residing in California are also protected by the California Fair Employment and Housing Act (FEHA), Gov. Code § 12900 et seq. Vigorous enforcement of the ADEA and FEHA, as well as other federal and state labor laws, is of paramount importance to AARP, its working members, and the millions of

other workers who rely on it to deter and to remedy discrimination in the workplace.

SUMMARY OF ARGUMENT

This case presents a question of statutory interpretation regarding the rights and remedies available to state employees when their wages are not paid promptly. This brief focuses on the second issue of the case, whether or not employees who retire and are not paid promptly are entitled to the same wage penalties as employees who quit. All parties agree that employees who quit are entitled to prompt payment of wages. Yet the State argues that the term quit does not include employees who retire. However, in other labor contexts such as unemployment compensation, the State considers retiring employees to be a subgroup of employees who quit. It is a fundamental public policy of California that all employees receive their wages promptly.

The State of California asks this Court to reverse the Court of Appeal's judgment and deny retirees, who by definition are older employees, employment benefits that non-retiring employees are entitled to. The differential treatment of employees in this case based on their retirement eligibility is nothing less than age discrimination. While the issue of age discrimination was not raised below, consideration of issues raised for the first time on appeal are permitted when important issues of public policy are involved and the question is purely a legal issue. (*Frink v. Prod* (1982)

31 Cal.3d 166, 169.) Additionally, the Court of Appeal's legally correct judgment may be affirmed on a ground that never occurred to the court or litigants. (See, e.g., *Fischer v. City of Berkeley* (1986) 475 U.S. 260.)

Both the ADEA and FEHA preclude state employers from discrimination in compensation or terms, conditions or privileges of employment because of age. Retirees who leave or quit their employment are entitled to wage penalties, an employment benefit, under the same standards as non-retiring employees.

I. THE TERM 'RETIRE' IS ENCOMPASSED WITHIN THE TERM 'QUIT' IN OTHER LABOR CONTEXTS

The central issue in this case is whether, in the context of Labor Code §§ 202 and 203, employees who quit include employees who also retire. The State argues that the usual and ordinary meaning of quit is different from retire. (State's Opening Brief at p. 31.) The terms quit and retire both generally refer to a voluntary separation from employment. California's Employment Development Department (EDD), however, defines the terms as inclusive of each other. Specifically, EDD classifies employees who retire voluntarily as a subgroup of employees who quit their employment when determining eligibility for unemployment compensation. (See, e.g., Cal. Emp. Development Dept., Benefit Determination Guide, Vol. Quit VQ 360, § E(2) Optional Retirement < http://bit.ly/1G8WLst > [as of June 18, 2015]; Cal. Emp. Development Dept., Benefit Determination Guide, Vol.

VQ 360, Reason for Decision, pt. I. Disqualification (H)-(I) <http://bit.ly/1IRUyVP> [as of June 18, 2015].) There is no legal distinction between employees who voluntarily quit their employment and those who voluntarily retire both are ineligible for unemployment insurance compensation. (*Ibid*.)

Other states also view the terms quit and retire as synonymous as long as the retirement is voluntary. (See, e.g., *In re Thomas* (1972) 281 N.C. 598, 692 [189 S.E.2d 245] (finding that an employee "voluntarily quit her job in order to retire" and was therefore not eligible for unemployment insurance compensation.)) The New York Unemployment Appeals Board likewise has held that a claimant who voluntarily retires quits his or her job. (N.Y. Dept. Lab., Unemp. Ins., Voluntary Separation § 1690 (2) <http://on.ny.gov/1H21D8x > [as of June 18, 2015].) Just as there is no legal distinction between a voluntary quit and a voluntary retirement for unemployment purposes, there should be no legal distinction between the two terms for purposes of the Labor Code.

II. WAGES ARE NOT ORDINARY DEBTS AND PUBLIC POLICY HAS LONG FAVORED THE FULL AND PROMPT PAYMENT OF WAGES DUE TO AN EMPLOYEE.

This Court has long recognized that "wages are not ordinary debts" and that unpaid wages should be preferred over other claims. (*In re Trombley* (1948) 31 Cal. 2d 801, 809.) More recently this Court reaffirmed this long-standing policy:

> It has long been recognized that wages are not ordinary debts, that they may be preferred over other claims, and that, because of the economic position of the average worker and, in particular, his dependence on wages for the necessities of life for himself and his family, it is essential to the public welfare that he receive his pay when it is due.

(*Smith v. Superior Court* (2006) 39 Cal. 4th 77, 82.)

Although it is likely that the Deputy Attorney General who brought this case was not in dire financial straits, other retirees are not as fortunate and must continue working.

III. OLDER WORKERS CAN NOT BE DENIED AN EMPLOYMENT BENEFIT BASED ON THEIR RETIREMENT ELIGIBILTY.

This case concerns a class of state employees covered by a public employees' retirement system. Most state employees, like the plaintiff, are covered by the California Public Employees' Retirement System (CalPERS). To be eligible for retirement under CalPERS, members must be at least age 50 with a minimum of five years credited service. (See CalPERS, *Your CalPERS Benefits: Planning Your Service Retirement* (Jan. 2015) at p. 4 < http://bit.ly/1IS1l1w >.) Certain other public employees are covered by other public pension plans, however, in order for a pension plan to be a qualified plan, employers must establish a normal retirement age which is usually defined as age 62 but can be as low as age 50 for certain public safety employees. (26 C.F.R. § 1.401(a)-1(2).)

The ADEA prohibits employers from discriminating against any individual with respect to the "terms, conditions, or privileges of employment, because of such individual's age." (29 USC §623(a).)[2] Interpreting the California Labor Code to deny wage penalties to older employees who depart their jobs to enter retirement while providing wage penalties to younger employees who depart for other reasons would cause the state law to directly conflict with § 623(a) of the ADEA. As a federal law, the ADEA preempts contradictory state legislation. (See, e.g., *EEOC v. Massachusetts* (1st Cir. 1993) 987 F.2d 64; *Hamm v. Rock Hill* (1964) 379 U.S. 306, 311-12 (Title VII); see also *Peatros v.Bank of America* (2000) 22 Cal. 4th 147) (A state law that conflicts with federal law is "without effect.")

In passing the Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433 (1990) 104 Stat. 978 (amending the ADEA, 29 U.S.C. § 621 et seq.), Congress thoroughly examined the practice of denying severance benefits to older workers based on pension or retirement eligibility and concluded that this practice violated the ADEA. Congress declared that "it

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[2] Federal laws like the ADEA and the ADA are applicable to state employers in actions for injunctive relief under *Ex Parte Young* (1908) 209 U.S. 123. (See, e.g., *Frew v. Hawkins* (2004) 540 U.S. 431 upholding *Ex Parte Young* prospective relief against state officers to vindicate federal law even though state sovereign immunity would preclude retrospective relief for money damages.)

is *per se* age discrimination to use pension-eligibility as a basis for denying an older worker any other benefits." (H.R. Rep. No. 101-664, 2d Sess., p. 35,40 (1990), italics added.) In so holding, Congress cited with approval *EEOC v. Borden's, Inc.* (9th Cir. 1984) 724 F.2d 1390, 1393-95, *overruled in part, on other grounds by Public Employees Retirement Sys. of Ohio v. Betts* (1989) 492 U.S. 158,[3] which held that employment decisions based on retirement status may violate the ADEA. (H.R. Rep. No. 101-664, 2d Sess. p. 38 (1990), see also, *EEOC v. Local 350 Plumbers & Pipefillers*, (9th Cir. 1992) 998 F.2d 641, 646-47(noting the close connection between age and retirement status.)

Similarly, FEHA precludes state employers from discrimination "in compensation or terms, conditions or privileges of employment." (Gov. Code § 12940(a).) FEHA prohibits employment discrimination based on a variety of grounds including age. (See Gov. Code § 12940(a).) "Although the FEHA differs from the ADEA in certain respects, their objectives are identical." (Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2014) ¶ 8:710, pp. 8-97.)

[3] The OWBPA was enacted to "overturn [] both the reasoning and holding" of the *Betts* decision. (S. Rep. No. 101-263, 2d Sess., p. 5, reprinted in 1990 U.S. Code Cong. & Admin. News, p. 1510.) In the OWBPA's legislative history, Congress "specifically agree[d] with and reaffirmed[ed]" the Ninth Circuit's holding in *Borden's.* (S. Rep. No. 101-263, 2d Sess., p. 22 (1990) reprinted in 1990 U.S. Code & Admin. News, p. 1527.)

Pension benefits, for example, qualify as terms, conditions, or privileges of employment even though they are received only after employment terminates. (See, e.g., *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans* v. *Norris* (1983) 463 U.S. 1073 (Title VII precludes employer from offering pension annuity plans that offer women lower monthly benefits).) Similarly, while wage penalties are employment benefits that eligible employees receive only after employment terminates, retiring employees should also be entitled to these benefits or the purpose of the ADEA will be defeated. (See, EEOC v. *Borden's*, *Inc.*, *supra*, 724 F.2d 1390 (finding severance pay policy discriminated against workers over 55).)

The California Legislature has declared "its intent that the courts interpret the state's statutes prohibiting age discrimination in employment *broadly and vigorously*, in a manner comparable to prohibitions against sex and race discrimination." (Gov. Code § 12941, italics added.) The California Legislature has expressly adopted the disparate impact theory in age discrimination cases so it is highly unlikely that the Legislature intended to treat older retiring workers differently. (See Gov. Code 12941.)

IV. MANY RETIREES CONTINUE WORKING

Retiring from a specific job does not necessarily mean that the employee has left the workforce. The State speculates that "…the Legislature *may* reasonably have determined that retirees, who have substantial rights and

are likely both leaving on good terms with their employer and on a more secure financial footing, are not in the same position." (State's Opening Brief at 41, italics added.)

The reality is many retirees continue working post retirement due to financial reasons. For many retirees working is a financial necessity, a result of a changing landscape in which workers are faced with a "do-it-yourself" approach to retirement income security." (Cahill et al., *Reentering the Labor Force After Retirement* (June 2011) Monthly Lab. Rev., p. 34.)

Many surveys consistently find that the majority of older Americans do in fact plan to work in some capacity in retirement. Both financial and non-financial reasons are cited. According to a 2011 SunAmerica survey, nearly two-thirds (65%) of pre-retirees aged 55+ indicate intent to work in retirement. (SunAmerica Financial Group, *The SunAmerica Retirement Re-Set Study: Redefining Retirement Post Recession* (2011), at p. 7 <http://www.agewave.com /research/retirementresetreport.pdf>.)

State employees also frequently reenter the job market after retiring. CalPERS has noted that a number of "retirees" return to work and as a result has published information for CalPERS members who intend to work in some capacity after retirement. (See, e.g., CalPERS, *A Guide to CalPERS: Employment After Retirement*, (Apr., 2015) at pp. 4-6 <http://bit.ly/1N7S6Md > (discussing limits on working for the State after

retirement); see also, CalPERS, *Your CalPERS Benefits: Planning Your Service Retirement, supra* (Jan. 2015) at p. 20.)

Some workers must retire due to the downsizing or closure of the business they worked for. (Employment Benefit Research Inst., *The 2011 Retirement Confidence Survey: Confidence Drops to Record Lows, Reflecting "the New Normal"* (Mar., 2011), No. 355, Issue Brief at p. 30 <http://bit.ly/1G97JOF >.) To deny older workers wage penalties simply because they retire from one particular job makes no sense in light of the fact that many retirees simply change jobs.

Other workers retire due to a health problem or disability. (*Id*.) These workers may have an even greater need for prompt payment of wages. Regardless of the reason for the retirement, all employees, including retirees are entitled to wages that are due to them. (Lab. Code §§ 202, 203, 220.)

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Dated: June 19, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with rule 8.520(c) California Rules of Court, the undersigned counsel for Amicus Curiae AARP hereby certifies that the foregoing Amicus Curiae's Brief was produced on a computer in 13-point type. The word count, including footnotes but excluding those parts not subject the word-count limitation contains 2430 words, as determined by the Microsoft Word word-processing system used by her firm.

Dated: June 19, 2015

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Case Name: *Janis McLean v. State of California et al.*

No.: County of Sacramento Superior Court, Case No. 34-2012-00119161-CU-OE-GDS
Court of Appeals, Third Appellate District, Case No. C074515
Supreme Court of the State of California, Case No. S221554

I am a citizen of the United States and employed in Cincinnati, Ohio. I am over the age of eighteen years and not a party to the within entitled proceeding. My business address is 8790 Governor's Hill Drive, Suite 102, Cincinnati, Ohio 45249.

On June 19, 2015, I served true copies of the: *Application Of AARP To File Amicus Curiae Brief; Proposed Amicus Curiae Brief In Support Of Plaintiff Janis McLean* to be served by overnight delivery with prepaid labels address as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 19, 2015 in Cincinnati, Ohio.

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