**S261247**

# In The Supreme Court of the State of California

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LYNN GRANDE
*Plaintiff and Respondent,*

v.

EISENHOWER MEDICAL CENTER
*Defendant and Appellant,*

FLEXCARE, LLC
*Intervener.*

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*On Review from the Court of Appeal for the Fourth Appellate District, Division Two*
*4th Civil No. E068730 and E068751*

*After an Appeal from the Superior Court of Riverside County*
*Honorable Hon. Sharon J. Waters, Judge*
*Case Number RIC1514281*

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## REPLY TO ANSWER TO PETITION FOR REVIEW

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## EISENHOWER MEDICAL CENTER'S PETITION FOR REVIEW SHOULD BE GRANTED

Does the law allow an employee to take the strategic move Grande did here, and first sue one of her joint employers on behalf of a class, claiming she was not compensated properly for nine days of employment, and then after settling that claim, bring another class action against the other joint employer for the same claimed injury based on the same hours worked at the same location over the same nine days of employment?

California employees and employers still don't know the answer to that question. That is because the courts of appeal have reached opposite decisions on it. Four justices would not allow the second lawsuit (the panel in *Castillo v. Glenair, Inc.* (2018) 23 Cal.App.5th 262 [*Castillo*] and the dissent in *Grande v. Eisenhower Medical Center* (2020) 44 Cal.App.5th 1147 [*Grande*]). Two justices – the majority in *Grande* – would allow an employee to file two separate lawsuits and adjudicate the same claims twice. Not only are employers left scrambling but trial courts have no clear direction on how to resolve the issues either.

In response to the separate petitions for review filed by Eisenhower and FlexCare, Grande does not dispute the facts giving rise to the petition. Nor does she dispute the clear conflict between *Castillo* and *Grande*. She only argues that the intermediate appellate decision that adopts her legal position (*Grande*) is the correct one and the decision that rejects her legal position (*Castillo*) is wrong. To clear up the obvious legal conflict created by *Castillo* and *Grande*, Grande suggests that the Court "de-publish *Castillo*" – an option that is no longer available. (See Answer Brief at 5.) Even if *Castillo* was wrongly decided in 2018, which it was not, the time to employ the depublication option for *Castillo* has long passed. (See Cal. Rules of Ct., rule 8.1125 [a request that the Supreme Court depublish an

opinion must be filed within 30 days after the decision is final in the Court of Appeal].)

The clear conflict between *Castillo* and *Grande* can only be resolved by granting review in *Grande*. Eisenhower's petition for review should be granted.

## GRANDE MAKES NO ATTEMPT TO DISPUTE THAT THE GROUNDS FOR REVIEW ARE MET BY EISENHOWER'S PETITION

In her answer, Grande argues review should not be granted because *Castillo* was decided wrongly on res judicata grounds, is distinguishable on the facts on agency grounds, and in any event, was wrongly decided on agency grounds. None of these arguments is sufficient to fend off this Court's review of the clear conflict in the law shown by Eisenhower's petition.

Addressing first Grande's argument that *Castillo* is distinguishable on the agency issue – it is not. In *Castillo*, the Court found agency based on the following facts: (1) "that Glenair was an agent of [the staffing agency] for the purpose of collecting, reviewing, and providing [the staffing agency's] employee time records to [the staffing agency] so that [the staffing agency] could properly pay its employees;" (2) "that [the staffing agency] authorized Glenair to collect, review, and transmit [the staffing agency] employee time records to [the staffing agency];" and (3) [t]hus, Glenair was authorized to represent, and did represent, [the staffing agency] in its dealings with third parties, specifically [the staffing agency's] payment of wages to its employees placed at Glenair." (*Castillo, supra,* 23 Cal.App.5th at p. 281.) For each of those facts supporting the Court's agency finding in *Castillo*, "Eisenhower" could be inserted to replace "Glenair," and the statements would be equally true. The same facts that

led the *Castillo* Court to find agency are also present here, and *Castillo* cannot be distinguished on its facts.

Eisenhower and FlexCare believe *Castillo* was rightly decided and *Grande* was wrongly decided. Grande takes the opposite view. At this stage of the process, the critical point is not which decision is right, but rather that there is a clear conflict in the law in two published Court of Appeal opinions in an area of significance for California businesses in general, and the healthcare industry in particular. That conflict must be resolved by this Court granting review. (See Cal. Rules of Ct., rule 8.500(b)(1).)

There also can be no dispute that the issue is one of widespread import. As FlexCare cited in its petition for review, the U.S. Bureau of Labor Statistics, in its 2018 quarterly census of employment and wages for California, shows almost 400,000 employees utilized temporary employment services in 2018, earning $15 billion in wages working at almost 5,000 establishments.[1] The temporary employment industry is an important and integral part of California's economy, benefitting both employees and employers by allowing flexibility in how the workforce adjusts to employment needs. The issue of law raised by this petition is an important one, warranting review. (*Ibid*.)

## CONCLUSION

As the dissent in the Court of Appeal stated, the majority opinion in *Grande* creates a "split of authority in this area." (*Grande*, *supra*, 44 Cal.App.5th at p. 1168 (Ramirez, P.J., dissenting).) To resolve that clear

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[1] See https://data.bls.gov/cew/apps/table_maker/v4/table_maker.htm#type=2&st=06&year=2018&qtr=A&own=5&ind=56132&supp=0.

split, Eisenhower urges the Court to grant this petition and address the important question of law it presents.

DATED: April 28, 2020

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
Including Professional Corporations

By: /s/ Richard J. Simmons
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**CERTIFICATE OF WORD COUNT**
**(Cal. Rules of Court, Rule 8.504(d))**

The text of this Reply to Petition for Review consists of 854 words, including all footnotes, as counted by the computer program used to generate this petition.

DATED: April 28, 2020

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By: /s/ Richard J. Simmons
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Lynn Grande v. Eisenhower Medical Center

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Diego, State of California. My business address is 501 West Broadway, 19th Floor, San Diego, CA 92101-3598.

On April 28, 2020, I served true copies of the following document(s) described as **REPLY TO ANSWER TO PETITION FOR REVIEW** on the interested parties in this action as follows:

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

Executed on April 28, 2020, at San Diego, California.

Pamela Parker

**STATE OF CALIFORNIA**
Supreme Court of California

# *PROOF OF SERVICE*

**STATE OF CALIFORNIA**
Supreme Court of California

Case Name: **GRANDE v. EISENHOWER MEDICAL CENTER (FLEXCARE)**
Case Number: **S261247**
Lower Court Case Number: **E068730**

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

4/28/2020

Date

/s/Pamela Parker

Signature

Vogel, Karin Dougan (131768)

Last Name, First Name (PNum)

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Law Firm