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

APPELLANT'S REPLY BRIEF

Dennis F. Moss SBN 77512
15300 Ventura Blvd.
Suite 207
Sherman Oaks, CA 91403
Telephone: (310) 773-0323
Facsimile: (818) 963-5954
dennis@dennismosslaw.com

Sahag Majarian II
SBN 146621
18250 Ventura Boulevard
Tarzana, CA 91356
Telephone: (818) 609-0807
Facsimile: (818) 609-0892
sahagii@aol.com

Attorneys for Plaintiffs and Appellants

GEORGE MELENDEZ, et al.

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

APPELLANT'S REPLY BRIEF

Dennis F. Moss SBN 77512
15300 Ventura Blvd.
Suite 207
Sherman Oaks, CA 91403
Telephone: (310) 773-0323
Facsimile: (818) 963-5954
dennis@dennismosslaw.com

Sahag Majarian II
SBN 146621
18250 Ventura Boulevard
Tarzana, CA 91356
Telephone: (818) 609-0807
Facsimile: (818) 609-0892
sahagii@aol.com

Attorneys for Plaintiffs and Appellants

GEORGE MELENDEZ, et al.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. INTRODUCTION

The question 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) [1]

In Respondent's Answering Brief on the Merits, (RAB), Respondent captures the essence of why preemption is not applicable in this matter. Quoting *Davis v. Farmers Ins. Exchange* (2016) 245 Cal. App.4th 1302, Respondent, (also referred to as "the Giants"), concedes that the rights at issue are *governed* by the law not a collective bargaining agreement:

> The chapter of the Labor Code **governing compensation and payment of wages includes provisions requiring immediate payment of wages upon discharge, layoff** or resignation (Lab. Code sections 201, 202), [and requiring regular payment of wages [during employment] (Lab. Code section 204).

Id, 245 Cal. App. 4th at 1331 (Emphasis Added; Brackets in the RAB p. 31).

---

[1] Even the Court of Appeal had its doubts. "While resolution of the controversy may not turn on the specific interpretation of any specific language in the CBA..." Slip Op.7

The foregoing statement of the law is at the center of the argument against preemption. The Code requires immediate payment upon layoffs. What constitutes a "discharge" and/or "layoff" as those terms are used in the Code are questions of law dependent on the language of the law and the legislative intent as discerned by the judiciary, not by a labor arbitrator. The collective bargaining agreement between the Giants and the guards' union does not have to be interpreted to determine what the Legislature had in mind. The outcome of the claims in this case are not dependent at all on the terms of the CBA, nor are they intertwined with the CBA. If the Giants' guards experience "layoffs" in the midst of their relationship with the Giants, and layoffs are "discharges" under Labor Code § 201, the class members are entitled to prompt payment of their wages when they experience layoffs. The answers to the legal questions posed are provided by this Court in *Smith v. Superior Court* (2006) 39 Cal. 4th 77, and the tenets of statutory construction applied therein.

There can be little doubt that "layoffs" are a form of "discharge" under Labor Code § 201. The primary basis of this Court's conclusion as to the meaning of "discharge" as applied to the facts in *Smith, supra,* is found in its reliance on the express "layoff" exceptions in the statutory scheme: the exception in Labor Code § 201 for layoffs in the "curing, canning and drying industries", and the "layoff" exception in

Labor Code § 201.5 in the television and motion picture industries. *Smith, supra* 39 Cal. 4th at 85-86.[2]

Building off those LAYOFF exceptions in the law, this Court concluded that Ms. Smith's release from work at the completion of a one-day assignment was akin to a layoff, and therefore a "discharge" warranting application of Labor Code § 201. *Smith, supra* 39 Cal. 4th at 85-94.

This Court's irrefutable reasoning in *Smith, supra,* distilled to its essence, is: Since the Legislature "deemed" it necessary to create "layoff" exceptions in the "curing, canning, and drying" industry in Labor Code § 201 and in the television and motion picture industry in Labor Code § 201.5, "layoffs" are a form of "discharge" under Labor Code § 201.

The Giants' argument for preemption, mirroring the Court of Appeal decision, argues for preemption by claiming the pivotal inquiry in application of Labor Code § 201 is the nature of an employee's initial hiring, and whether or not that hiring contemplated an "ongoing employment relationship". (RAB 44-48.) From this premise, the Giants argue that whether or not an employee is hired into an "ongoing employment relationship" can only be discerned in this case from the collective bargaining agreement. ("CBA")

---

[2] Since *Smith* the, the Legislature created another exception to Labor Code § 201 for layoffs in a particular industry. Labor Code § 201.9.

The Giants' position is not well taken for a number of reasons, the most important of which are the "layoff" is "discharge" conclusion in *Smith, supra,* the statutory scheme, and the object of the law, all painstakingly explained in *Smith.*

Additionally, there is no dispute about any of the terms of the collective bargaining agreement relied on by the Giants, nor is there any dispute that the guards apply for work and are hired into "ongoing employment relationships".

The legal issue presented by the facts of this case, different than the legal issue presented by the facts in *Smith,* is: Are recurrent "layoffs" in the midst of an ongoing relationship "discharges" under the law? This issue makes the terms of initial hiring irrelevant. The answer to the question posed turns on statutory construction, not whether guards, while out of work for weeks or months at a time, have an "ongoing employment relationship" memorialized in a CBA with the employer that laid them off.

The record does not refute the Complaint allegations that class members are not timely paid at the conclusion of periods of intermittent work after homestands, the baseball season, and after off season events. The Giants have not

refuted the fact that some guards, at times, experience periods of no work on account of fluctuating needs.[3]

None of the tools utilized to determine the meaning of Labor Code § 201 involve or can be impacted by a CBA entered into decades after the law's passage.

Given this Court's opinion in *Smith, supra,* the Giants focus on "hiring" and on an "ongoing employment relationship" (RAB passim) to justify preemption does not stand up to scrutiny.

Respondent's Answering Brief does not come close to establishing that a CBA interpretation is necessary, and preemption is warranted.

II. ALLEGATIONS AND FACTS REVISITED

There are 365 days in a year. On 81 of those days, during the months of April through October, the San Francisco Giants baseball team plays regular season games at AT&T Park. (RAB. 12.) At those home games, they provide security at a stadium for tens of thousands of fans, the baseball teams, television and radio personnel, ushers, concession workers, groundskeepers, ticket sellers, parking lot personnel, and other support personnel. When the Giants

---

[3] The Court of Appeal remarked that "Many [guards work regularly]" in a context where the record did not establish how many is "many", nor establish what is meant by "regularly". However, more significantly, by remarking that "Many work regularly", the Court acknowledged that there are those who do not work regularly. Slip Opinion 4

are not playing regular season games, the other 78% of the days of the year, there are other activities at the stadium, including parties, tours, fundraising events, youth clinics, and fantasy camps. (RAB 12.)

The Giants have undisputed absolute discretion to schedule only those numbers of security guards they believe are necessary. (CBA Section 8, AA0165, RAB 51.)

The Complaint alleges that after home stands, the baseball season, and offseason events, there is a reduction in the workforce and the employees let go are not timely paid. (FAC Pars. 2 and 3, AA0017.)

Despite providing some evidence in support of its Motion to Compel Arbitration (AA 0124-0177), the Giants did not provide data that suggested that when the Giants are not playing at home the same number of guards are employed day in and day out as are employed when there are 40,000 fans in the stadium; they did not provide evidence that when there is a party at the stadium in the offseason, with 100 guests, the complement of guards matches the number of guards employed when there are 40,000 fans in the stadium, nor did they establish when there are tours of the stadium in the offseason for boy scout troupes, or fantasy baseball camps are in session, the number of guards employed are the same number that are employed when there are 40,000 fans in the stadium. The Giants did not dispel the probability, inherent in the allegations, that some

class members may be without stadium work for weeks or months after the end of the baseball season, or after an offseason event.

This Appeal is grounded on the foregoing reality that, on the vast majority of days of the year, on account of fluctuating personnel needs, the Giants do not actively employ the number of guards who work during home games.

The Giants acknowledge Appellants' theory of liability recognizing that Appellants assert that guards are "discharged" or "laid off" when [they] are not scheduled to work." (RAB 50.) Additionally, the CBA specifically references temporary layoffs and recall from layoffs in Section 2, in expressly prohibiting, discrimination in layoffs and recalls from layoff. (AA0160, AA0240.)

III. ARGUMENT

A. Preemption Doctrine Revisited

> [A]n application of state law is pre-empted ... only if such application requires the interpretation of a collective-bargaining agreement.

Lingle v. Norge Div. of Magic Chef (1988) 486 U.S. 399, 413

Recent case law has crystallized the preemption doctrine that was originally explained in the AOB.

"§ 301 preemption protect[s] the primacy of grievance and arbitration as the forum *for resolving CBA disputes* and the substantive supremacy of federal law within that forum,

nothing more." *Alaska Airlines Inc. v. Schurke* (9th Cir. En banc Aug. 1, 2018) 898 F.3d 904, 920. (Emphasis added)

In *Alaska Airlines Inc., supra,* the Court distilled the Supreme Court's case law on preemption into a two-part inquiry into the nature of a Plaintiff's claim. *Id,* 898 F.3d at 920 -921

> *First,* to determine whether a particular right is grounded in a CBA, we evaluate the 'legal character' of the claim by asking whether it seeks purely to vindicate a right or duty created by the CBA itself. *Livadas,* 512 U.S. at 123 .
>
> *Alaska Airlines, supra,* 898 F.3d at 920-921.

Here, Respondent concedes the claim involves statutory rights and duties, not contractual rights and duties (RAB 21).

> *Second,* if a right is *not* grounded in a CBA in the sense just explained, we ask whether litigating the state law claim nonetheless requires interpretation of a CBA, such that resolving the entire claim in court threatens the proper role of grievance and arbitration. (cite omitted); *Livadas,* 512 U.S. at 124–25. "Interpretation" is construed 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). Accordingly, at this second step of an ... LMRA § 301 preemption analysis, claims are only preempted to the extent there is an **active dispute over "the meaning of contract terms."** *Livadas,* 512 U.S. at 124. "[A] *hypothetical* connection between the claim and the terms of the CBA is not enough to preempt the claim ...." *Cramer,* 255 F.3d at 691 (emphasis added). Nor is it enough that resolving

> the state law claim requires a court to refer to the CBA and apply its plain or undisputed language... (cites omitted)

Alaska Airlines, supra 898 F. 3d at 921-922. See also *Lujan v. Southern California Gas Co.* (2002) 96 Cal. App. 4th 1200, 1206 -1207.

In this matter, there are no contract terms that need to be interpreted, nor is there an "active dispute" over the meaning of contract terms. Appellants' position, and why Appellants should prevail is exclusively a matter of statutory construction.

B. Respondent Has Not Established That Any Aspect of The CBA Renders Appellants' Analysis of The Law, As Applied to The Facts of This Case, Erroneous.

Appellants' Opening Brief methodically sets forth the authority that establishes that when guards are released at the end of homestands, the baseball season, or at the conclusion of off-season events and not returned to work for what may be weeks or months, they are laid off and, therefore, "discharged" as the term is used in Labor Code § 201. Not one facet of that analysis involved terms of the CBA. As demonstrated below, the Giants have not established that reference to the CBA would have altered the analysis. (RAB, passim.)

1. Respondent Does Not Address Labor Code § 219.

Appellants' Opening Brief made the point that, pursuant to Labor Code § 219, the rights and obligations created by Labor Code § 201 cannot be "contravened or set aside by a private agreement". This position, which is the starting point for any preemption argument was buttressed in the AOB by *Balcorta v. Twentieth Century-Fox Film Corp.*, (9th Cir. 2000) 208 F.3d 1102, 1112, *Livadas v. Bradshaw,* (1994) 512 U.S. 107, 110 and *Sciborski v. Pacific Bell* (2012) 295 Cal. App. 4th 1152, 1172 (AOB 17-18).

Conspicuously absent from the Giants' Answering Brief is any discussion of Labor Code § 219, let alone its implications to the outcome of the preemption question.

2. Respondent Has No Answer To The Authority Establishing That Irrespective Of The Terms Of Any Collective Bargaining Agreement, "Layoffs" Include Temporary Breaks In Service.

The linchpin of Appellants' position is the use of the term "layoff" in Labor Code § 201. If the guards are experiencing "layoffs", as the term is used in the Code, a critical step in establishing entitlement to the benefits of Labor Code § 201 is established. The role of a court in interpreting the word "layoff" is to give the word its "usual and ordinary meaning". *Smith, supra* 39 Cal. 4th at 83.

To support the position that "layoff" is the right characterization of what the guards experience, Appellants did not invoke the CBA, but rather, adhered to the requirement to give words their ordinary meaning. Appellants relied on dictionary definitions of "layoff", Department of Labor definitions of "layoff", and the Unemployment Insurance Code definition of "Unemployed" (AOB 28-30). Those definitions pointed out how layoffs can be temporary or permanent.

Additionally, Appellants pointed out how the factual contexts of a number of Supreme Court cases, for example, *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 CBAs preserved contractual rights in temporarily laid off workers during the periods when they were out of work. (AOB 30-31). The Giants take issue with Appellants' reference to these authorities because the legal issues involved in those cases have nothing to do with this case. (RAB 38-39). That position misses the point intended by those references. They establish that the notion that the Giants' guards are experiencing "layoffs" in the midst of "ongoing CBA employment relationship" is not some far-fetched concept but a fact of mainstream industrial relations.

To the same effect, Appellants cited *Campos v. EDD*

(1982) 132 Cal. App. 3d 961, where seasonal employees subject to a CBA endured what was characterized by the Court as seasonal *layoffs* during an ongoing CBA employment relationship. (AOB 31.)

Finally, the AOB pointed out how the Division of Labor Standards Enforcement ("DLSE") treats what the Giants' guards experience as "layoffs". (AOB at 32-34.)

The Giants do not point to anything in the CBA that might, if interpreted by a labor arbitrator, impact the "layoff" conclusion. (See RAB, passim.) Instead, Respondent denigrates the inevitable conclusion compelled by the facts of this case with statements like the following: "[W]hat [Appellant] terms as a 'layoff' is just the passage of time between scheduled shifts in an ongoing employment relationship." (RAB 10.) This rhetorical ploy does not stand up to scrutiny because it is axiomatic that layoffs followed by returns to work are always going to "be passages of time between shifts".

The "passage of time between shifts" characterization fails to apprehend that layoffs are events that trigger periods of unemployment during which the letter and policy underlying Labor Code § 201 can only be vindicated by promptly paying the workers who find themselves unemployed. If a guard works the last game of the season in October and he is not put back on the schedule until a "fan appreciation day" in January, he has experienced what the

Giants euphemistically call a "passage of time between shifts". That passage of time is, nonetheless, a period of unemployment that fits neatly into the definition of "layoff".

With the Giants asserting that what the guards are experiencing are not "layoffs", but rather the mere passage of time between, shifts, the Court should consider *International Brotherhood of Boilermakers v. Nassco Holdings, Inc.* (2017) 17 Cal. App. 5th 1105 ("*Nassco*").

In *Nassco*, the Court pointed out that, as here, the employer's staffing requirements change frequently. *Id,* 17 Cal. App. 5th at 1112. In early 2014, *Nassco* determined it would need to temporarily reduce its labor force, a labor force subject to a collective bargaining agreement, because of a lull in available work – not unlike reductions implemented by the Giants at the end of a season or homestand. The reduction in force lasted three weeks for some employees and up to five weeks for others. The employees, all returned to work at the end of their layoffs. *Id;* 17 Cal. App. 5th at 1112.

The case involved the question of whether Defendant had to comply with the WARN Act.

Apropos here, given the Giants' "ongoing employment" theory, the Court in *Nassco* was able to find that "layoffs" encompass "a temporary job loss, **even if some form of the employment relationship continues** and the employees are given a return date". *Id,* 17 Cal. App. 5th at 1118

(Emphasis added).

Ultimately, utilizing the tools of statutory construction, the Court held: "[W]e find unconvincing NASSCO's insistence that a layoff is normally (or in modern times) defined to mean only a complete termination of employment ...." *Id.* 17 Cal. App. 5th at 1124.

The Court in *Nassco* rejected the Employer's argument that the layoff language in the Act only applies to permanent separations from employment, in part because the objective of the WARN Act is to help people who lose their jobs even if just temporarily, so they can pay their rent, meet mortgage payments, pay child support, car payments, grocery bills etc. *Id.* 17 Cal. App. 5th at 1126. As this Court made clear in *Smith,* the same considerations, addressing the economic vulnerability of unemployed workers, is the object of Labor Code § 201. *Smith, supra,* 39 Cal. 4th at 88-90, 94.[4]

The foregoing makes clear that preemption is not required to determine the meaning of "layoff" in the Labor Code, and that "layoffs" are what the Giants' guards experience.

See also Black's Law Dictionary 10th Edition: " **'Layoff' - The termination of employment at the employer's**

---

[4] In *Nassco,* despite a collective bargaining agreement, the court relied entirely on the tools of statutory construction to conclude that "layoff" include temporary separations from employment.

instigation, usu. through no fault of the employee; esp., the termination - either temporary or permanent - of many employees in a short time for financial reasons - also termed *reduction in force*."

3. Respondent Does Not Refute the Authority Establishing that "Layoffs" Are "Discharges" as A Matter of Law That Cannot be Altered by CBA Interpretations

The next step in establishing that Labor Code § 201 applies in this case without the need to interpret the CBA is to analyze whether "layoffs" are a form of "discharge" as that term is used in section 201.

a. The Law

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.

Labor Code § 201 (a) (emphasis added).

b. Respondent Has Not Established How the Tenets of Statutory Construction Applied by Appellants Should Have Been Applied Differently Because Of The CBA

In order to establish preemption is not required, Appellants establish that as a matter of law. Section 201 of the Labor Code requires the Giants to pay guards immediately when laid off irrespective of any CBA terms. Aside from merely citing to *Smith, supra,* Appellants apply the tenets of statutory construction utilized in *Smith, supra,* to the issue of whether the "layoffs" experienced by guards are "discharges" that compel application of Labor Code § 201. (AOB 23-end.)

i. Entire Scheme of The Law

In its quest to determine the meaning of "discharge" as applied to the facts of *Smith, supra,* this Court examined the "entire scheme of the law", especially language in the Code excepting from the immediate payment requirement, "layoffs" in the curing, canning and drying industries. *Smith, supra,* 39 Cal. 4th at 85-86, and the exception for "layoffs" in the motion picture and television industry. *Id.* 39 Cal. 4th at 86. Appellants did the logical thing; they adapted *Smith's* views on the significance of the Legislature's enactment of these exceptions and other provisions in the scheme of the law to the meaning of "discharge" as applied to layoffs in this case. (AOL 26-28, and 34-36.) The application of the "layoff"

exceptions in the law to discern the applicability of Labor Code § 201 to the layoffs at issue here is even more appropriate than the application in *Smith*, because Ms. Smith was not laid off. An added step was required in *Smith*, not required here, comparing Ms. Smith's situation to a layoff.

The Giants make no attempt to refute the logical adaptation of *Smith's* "layoff" reasoning to the circumstances of this case, where, different than Ms. Smith's situation, "layoffs" actually have occurred. Respondent similarly does not suggest how the terms of the CBA undermine this "Statutory scheme" analysis. (RAB passim.)

ii. Object of The Law

Another statutory construction tool used in *Smith, supra,* 39 Cal. 4th at 86-90 and adapted by Appellants here (AOB 36-37), is the idea that Courts should consider the object of the law, a lesson the Court of Appeal clearly forgot in this case.

After detailing the origins of the law, this Court concluded *that 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". *Id*, 39 Cal. 4th at 90. There is nothing in the origins of the law referenced by this Court that would suggest that this purpose of the law would not apply to "discharges" in the

form of "layoffs" of employees covered by collective bargaining agreements. *Id.* 39 Cal. 4th at 86-90.

Commenting on the source documents from which the origins of Labor Code § 201 were ascertained, this Court stated:

> Certainly nothing in these reports indicated a recognition that the consequences of delayed or withheld wages were dissimilar for these different categories of employees. **Nor was there any suggestion that fired employees were more economically or socially vulnerable as a result of deferred wage payment, or otherwise more deserving of immediate wage payment, than those employees who were not fired but released when their work was deemed completed.** ... Accordingly, 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" in response to the more inclusive construction reflected in the BLS biennial reports, instead undertook to enact only limited exceptions to the immediate payment requirement in three specified industries [one of which was the layoff exception in 201 for the curing, canning and drying industry]. ...
>
> *Smith, supra* 39 Cal. 4th at 89. (Emphasis added)

The adding of emphasis to the above quote is intended to highlight the parallel between that pronouncement by this Court in *Smith* and this case. The guards "are not fired but released when their work [at the end of a homestand, a season, or an offseason event] was deemed completed".

The Giants have not contended that the "object of the law" analysis in *Smith* would not apply with equal force when a collective bargaining agreement is in place, nor that the "object" is somehow different when employees are *laid off* for what could be up to weeks or months at a time instead of permanently let go. The Giants have not pointed to any clause of the CBA that would impact the application of *Smith's* "object of the law" analysis to this case. (RAB passim.)

iii. Absurdity Analysis

A natural consequence of the Giants' position is that a guard who comes to work drunk on the last game of the season, would be fired and paid immediately, but a guard who finishes his seasonal assignment without incident, who may be laid off for months until the next season, would have to wait several days for his wages. This hypothetical, drawn directly from *Smith, supra,* 39 Cal. 4th at 93, appears in a similar form in Appellant's Opening Brief. (AOB 37-38.) *Smith's* point was that the interpretation proffered by the employer in that case would lead to an absurd consequence, therefore, the Court reasoned the law could not mean what the employer contended it meant, that Ms. Smith, when she finished her assignment, would be denied the benefit of the immediate payment provisions of section 201.

The Giants did not provide any counterpoint to the use of *Smith's* "absurdity" reasoning in the context of this case, nor did they offer up any reason why application of that

analysis is inappropriate on account of a CBA or preemption doctrine. (RAB passim.)

C. Given the Clear Teaching of *Smith V. Superior Court* (2006) 39 Cal. 4th 77, The Thin Thread Upon Which the Giants' Preemption Position Is Based Cannot Be Sustained

1. There are No Disputes as To CBA Terms That Warrant Interpretation by A Labor Arbitrator.

With Appellants' theory of liability not tied into the question of an "ongoing employment relationship" between laid off guards and the Giants, but, rather, dependent on the law, statutory scheme, and the object of the law as revealed in *Smith, supra,* the Giants' claim as to the CBA source of that relationship does not warrant preemption.

The preemption argument made by Respondents relies on the collective bargaining agreement between the Giants and the guard's union, an "ongoing employment relationship" that Respondent derives from that collective bargaining agreement, and a skewed reading of *Smith, supra,* that fails to apprehend that recurrent "layoffs" represent a form of "discharge" not addressed in *Smith,* that occur in the course of an "ongoing employment relationship". (RAB 28-51.)

The Giants contend that guards are hired into an "ongoing employment relationship", and they are not "discharged" when they are released from work at the end of

a homestand, a season, or off-season event. They contend that when there are gaps that may last weeks or months between shifts guards are assigned and work, that when guards are laid off, in fact, they are not discharged. (RAB 28-51). Building on the foregoing, the Giants argue that the only way to determine that hiring into an "ongoing employment agreement" has occurred is to interpret the Collective Bargaining Agreement.

The Giants' preemption position, which eschews the text of the law, the statutory scheme, and the object of the law, would only matter if Appellants disputed the terms in the CBA relied on by the Giants, and recurrent "layoffs" were not "discharges" when they occur in the midst of an "ongoing employment relationship".

There are no disputes over the meaning of the CBA terms referenced by the Giants. There is nothing for a Labor Arbitrator to interpret in this case. There is no dispute over the existence of an ongoing employment relationship between the Giants and the guards, albeit marked by intermittent layoffs in the midst of that relationship.

Resort to the Collective Bargaining Agreement is not required, and therefore, preemption is not indicated. "Layoffs" are "Discharges" manifested by an involuntary change in a workers' status from gainfully employed to unemployed, not a contractual construct. Whether or not the nature of the contractual relationship between an employer

and its laid off employees is "ongoing" is totally irrelevant and does not have to be discerned by a labor arbitrator as a prerequisite to a liability determination.

That laid-off, unemployed workers have some rights by virtue of a contract with an entity that intermittently schedules them to work does not alter the fact of their out of work status when there is no work for them, nor the meaning of the word "discharge" under a statute that cannot, per Labor Code section 219, be undermined by a contract.

2. The Giants' and Court of Appeal's Embrace of "Hire" Language in *Smith*, In A Manner That Disregards the Plain Meaning of "Layoff", The Statutory Scheme, And the Object of The Law, Cannot Be Countenanced.

The basic facts of *Smith* are that Ms. Smith was an employee who was undoubtedly hired for a one-day job. She completed the assignment and was released by her employer, not unlike Giants' guards when they complete an assignment to work a homestand, a season, or an offseason event. *Smith, supra,* 39 Cal. 4th at 81.

Like the Giants' guards, Ms. Smith was not immediately paid her wages when released from her assignment. *Id.* 39 Cal. 4th at 81.

The employer in *Smith* argued that because Ms. Smith was not let go from an "ongoing employment relationship,"

Labor Code section 201 is inapplicable. *Id.* 39 Cal. 4th at 82-83. This mirrors the Giants' argument here. Ms. Smith contended that it did not matter that she was *hired* for only one day, instead of being hired for ongoing employment. *Id.* 39 Cal. 4th at 82. Ms. Smith prevailed. *Id.* 39 Cal. 4th at 90.

It appears that the origin of the "hiring" references in this Court's Opinion in *Smith, supra,* is derived from the framing of the issue by Ms. Smith, in a non-layoff context, that it should not matter to application of the Code that she was *hired* for only one day of work.

Embrace of "hiring" by the Court of Appeal, and the Giants, as a basis to ignore the fact that "layoffs" are "discharges" pursuant to Labor Code section 201, is not warranted.

Neither the Giants, nor the Court of Appeal have pointed to anything in the plain meaning of the law, the Legislative History, the statutory scheme, or the origins of the law, that suggest that the "layoff" as "discharge" reality is limited to circumstances where employees are permanently laid off from "ongoing relationships" formed at initial hiring.

The Court of Appeal and Giants fail to apprehend that the two types of discharge referenced in *Smith*, permanent discharge from ongoing employment and release from a job that was always contemplated to last only one day, are not

the only types of discharge contemplated by Labor Code 201.

Where *layoffs* are concerned, since they can occur in the midst of an employment relationship, the nature of the hiring holds absolutely no significance.

Absolutely nothing in the law, its history or purpose suggest that the nature of one's hiring could trump the rights to prompt pay upon "layoffs". When the Legislature intended collective bargaining exceptions to Labor Code § 201, it made its intent clear. Labor Code §§ 201.5, 201.9. Absent similar exceptions in the Legislation that create an exception for employees covered by CBAs in the baseball stadium industry on account of a hiring into an ongoing employment relationship, the Giants' reliance on that concept cannot require preemption.[5]

In *Smith*, the "hiring" references were made in connection with a factual reality that involved permanent discharge, not layoffs. In *Smith* the Court held,

> [W]e conclude 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.

---

[5] Even if the Giants' position had traction, preemption would not be warranted because there is nothing for an arbitrator to interpret. There is no dispute over whether the guards' layoffs occur in the midst of an ongoing employment relationship.

Smith, supra 39 Cal. 4th at 90.

Here, where the facts are different, vindicating the meaning and purpose of the law as described in *Smith,* can only occur by recognition that "discharges" also involve "layoffs" which do not necessarily occur at the end of an employment relationship.

Doing justice to *Smith's* analysis requires application of a holding that would be appropriate here along the lines of the following:

> [W]e conclude an employer effectuates a discharge within the contemplation of Sections 201 and 203, not only when it fires an employee, and not only 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, but also, irrespective of the terms of a collective bargaining agreement, when it lays off an employee.[6]

Smith, supra 39 Cal. 4th at 90.

D. The Giants' Invocation of Labor Code Section 204 Does Not Further Its Preemption Position Nor Warrant Deviation from The Requirements of Labor Code § 201

---

[6] Should this Court give more weight to the "hired for" references in *Smith,* than the layoff context demands, the Court should consider the following. An accepted definition of *hire* is "**to engage the labor or services of another for wages or other payment." Black's Law Dictionary 10th Ed. A laid off employee, pursuant to this definition, is arguably rehired when recalled from layoff and engaged to perform services for wages during a new time duration, a new assignment.**

In support of its position, the Giants make a merits argument that Labor Code § 204 controls payments to out of work guards because they are, by virtue of the CBA, in the "course of employment" when they are anything but in the course of employment. (RAB 31-34.) Guards are, when laid off, not in the course of employment, but rather out of work. See Unemployment Ins. Code § 1252.

In invoking Labor Code § 204 to justify preemption, Respondent states that the Legislature has established a detailed scheme for the timely payment of wages to workers who have an ongoing relationship with their employers. (RAB 32.) From this reasoning the Giants argue that the CBA is integral to determining whether an ongoing relationship exists. This argument does not hold up to scrutiny. Labor Code § 204 expressly provides a payment scheme for employees who are not owed wages pursuant to Labor Code §§ 201 and 202. Since, as established, *supra,* a layoff is a discharge as a matter of law, then the fact of an ongoing relationship between unemployed guards and the Giants is irrelevant. Labor Code § 204 by its terms only applies to wage payments not governed by Labor Code §§ 201 and 202

IV. CONCLUSION

Respondent has not made a compelling case for interpretation of the CBA. With there being no language in the law, nor legislative history that comes close to

suggesting that the "layoff" as "discharge" reference in Labor Code §201 would not apply to employees whose employment is covered by a collective bargaining agreement, preemption doctrine cannot apply.

Reversal of the Court of Appeal decision is required.

Dated: September 24, 2018 Respectfully Submitted,

_ /s/ Dennis Moss

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 5,880 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 6,695 word in length.

Dated: September 24, 2018 _ /s/ Dennis Moss

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 September 24, 2018 declarant served the **APPELLANT'S REPLY 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 24th day of September 2018 at Sherman Oaks, California.

/s/

By: Lea Garbe

SERVICE LIST

Clerk, California Court of Appeal
First District Court of Appeal
350 McAllister Street
San Francisco, CA 94102

Clerk, San Francisco Superior Court
400 McAllister St.
San Francisco, CA 94102

Attorney for Respondents and Defendants:

Nancy E. Pritikin
Babak Yousefzadeh
Brian S. Fong
SHEPPARD MULLIN RICHTER & HAMPTON LLP
Four Embarcadero Center, 17th Floor
San Francisco, CA 94111-4109