STATE OF CALIFORNIA GRAY DAVIS, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
Santa Rosa Legal Section
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H. THOMAS CADELL, *Of Counsel*

February 24, 2003

Rita Dermenjian
Sagaser, Franson & Jones
2445 Capitol St., 2nd Floor
Fresno, CA 93721-2224

Re: **Deductions Of Damages From Employee Wages** (00111)

Dear Ms. Dermenjian:

This is a belated response to your letter addressed to Anne Stevason, Chief Counsel of the Division of Labor Standards Enforcement, concerning deductions from employee wages. The division felt that while the inquiry was dated, the issues remain current and require an update from time to time.

In your letter, you state that during a one-month span, three employees were involved in "accidents" using your clients' company vehicle. "In one of the cases, the employee hit a stationary object and stated that he did not see the object. In other cases, the employees stated that they did not see the object [they hit] even though it was visible to a reasonable person."

You state that you are aware that under California law an employer may not deduct from the employee's wages any amount to compensate the employer for loss or damage caused by the employee's simple negligence. However, you state, "the employer is allowed to deduct from the employee's paycheck for willful misconduct or dishonesty. The employer may also deduct," you state, "from an employee's paycheck for its employee's gross negligence."

Your question, then, is what is the DLSE's interpretation of the term gross negligence and, further, would your client be allowed to deduct for the situations discussed above?

Over the years, the DLSE has written numerous opinions dealing with the issues you raised in your letter. We have continued to point out that while the IWC Orders ostensibly allow deductions for losses suffered as a result of a dishonest or willful act or through the gross negligence of the employee, the California courts have never endorsed this deduction and there appears to be no

statutory authority for allowing a deduction which does not meet the requirements of Labor Code § 224.

The Division of Labor Standards Enforcement, of course, does recognize that it is the agency mandated to enforce the IWC Orders. However, in view of the fact that the right of the Commission to adopt a provision which allows a deduction is unclear, the DLSE takes a very restrictive view of the provisions of Section 8 of the Orders. We have taken pains to point out that any employer who resorts to self-help does so at its own risk since even under the proviso contained in the IWC Orders, an objective test is applied to determine whether the loss was due to dishonesty or a willful or grossly negligent act. (O.L. 1993.02.22-2 and 1994.01.27). In the event it is determined that the employee was not guilty of a dishonest or willful act or gross negligence, the employee would be entitled to recover not only the amount of wages withheld, but any waiting time penalties due.

Your question is directed specifically at the phrase "gross negligence" for which, you state, you have been unable to locate an illustration. The term has been defined by the California courts. The term has criminal connotations and can be summarized as that state of mind that "exercise[s] so slight a degree of care as to exhibit a conscious indifference or 'I don't care attitude' concerning the ultimate consequences of [one's] actions." (See *People v. Ochoa* (1993) 6 Cal.4th 1199, 1208.) As defined for the jury in the instructions, it is that negligence "which is aggravated, reckless or flagrant and which is such a departure from what would be the conduct of an ordinarily prudent, careful person under the same circumstances as to be contrary to a proper regard for danger to human life or to constitute indifference to the consequences of such act. The facts must be such that the consequences of the negligent act could reasonably have been foreseen and it must appear that the danger to human life was not the result of inattention, mistaken judgment or misadventure but the natural and probable result of an aggravated, reckless or flagrantly negligent act." (CALJIC No. 3.36.)

Obviously, then, it is a very rare action which will be found to be grossly negligent. As to the illustrations you supplied of instances where your client has suffered some loss as a result of actions - or inaction - by employees, we point out that in your description you refer to the episodes as "accidents". The term "gross negligence" simply does not equate to that description.

We hope this adequately addresses the issues you raised in your letter. Thank you for your interest in California labor law.

2003.02.24

Yours truly,

H. THOMAS CADELL, JR.
Attorney for the Labor Commissioner

c.c. Arthur Lujan, State Labor Commissioner
Tom Grogan, Chief Deputy Labor Commissioner
Anne Stevason, Chief Counsel
Assistant Labor Commissioners
Regional Managers