No. S243805

IN THE SUPREME COURT OF CALIFORNIA

AMANDA FRLEKIN, ET AL.,

Plaintiffs and Appellants,

v.

APPLE, INC.,

Defendant and Respondent.

SUPREME COURT
FILED

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On a Certified Question from the
United States Court of Appeals for the Ninth Circuit
Case No. 15-17382

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Apple Inc. states that there are no interested entities or persons that must be listed in this certificate under California Rules of Court, rule 8.208.

Dated: September 11, 2019 GIBSON, DUNN & CRUTCHER LLP

By: ______________________________
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INTRODUCTION

Both parties agree that the Court's restatement of the certified question to include personal technology devices does not alter in any respect the legal analysis necessary to resolve this case. (Plaintiffs' Supplemental Brief ("PSB") at 1 ["The pertinent facts, law, and analysis are no different for 'personal technology devices' than for 'packages' and 'bags.'"].) The checks at issue—and any restrictions that accompany them—can be avoided at the employee's option, which means that Apple did not "control" employees during the time they spent undergoing checks. Nor are the checks—which have no relationship to the job duties Plaintiffs were paid to perform and which involved only minimal time and effort—compensable under the "suffer or permit" prong of the "hours worked" test in Wage Order No. 7.

ARGUMENT

I. Technology Checks, Like Bag Checks, Are Avoidable

Plaintiffs devote several pages of their supplemental brief to describing the supposedly onerous and restrictive conditions associated with checks of Apple-branded personal technology devices. (PSB 4–8.) Even assuming that the act of removing one's phone or tablet from one's purse or pocket and flipping to the "Settings" icon is the kind of "confine[ment]" and "employer-directed action[]" that constitutes "control" and thus merits compensation (PSB 4)—a doubtful proposition—it would make no

difference here because employees could avoid those checks by not bringing their Apple-branded personal technology devices to work. (ER14, 74; ABM 21–33.) As Plaintiffs stipulated in order to obtain class certification, "certifying the liability issue of whether Apple's bag check policy violates California's control test for all class members, regardless of the reasons why they brought a bag to work, will allow the Court to conclusively determine the central issues in this case." (SER25; see also SER5 [referencing personal technology devices as well].)

Nevertheless, in yet another effort to back away from that stipulation, Plaintiffs argue that Apple's policy "*presumes* that employees regularly bring their bags and Apple-branded tech devices to work" (PSB 8, italics added), and elsewhere assert that cell phones are such a ubiquitous and essential feature of modern life that they are, in essence, "required" to function in the world. (PSB 8 fn. 7.) But the question in this case is not whether employees are inseparable from their bags or electronic devices, but whether they were required to bring those items to work to perform their job duties. Apple did not require that, as evidenced by the fact that some employees chose not to bring those bags or devices. (SER5, 36, ER74.) Moreover, non-Apple-branded devices were not subject to search. (ER 118, 241–242.) Plaintiffs' strategic choice to concede that they were not required *by Apple*—affirmatively, effectively, or otherwise—to bring a bag or personal technology device to work precludes them from arguing now that employees

have some other "need" to bring those items to work. (SER5, 25, 27–38, ER7.)

Plaintiffs also renew their contention that the technology checks exerted control insofar as they "materially benefit[ted] Apple," and "enable[d] Apple to earn handsome profits" "without adopting other, potentially more costly measures to adequately secure the devices [they sell] from theft." (PSB 8.) But this is not the test for "hours worked": if it were, it would "render the 'control' prong meaningless" and could make compensable a range of activities that could, in theory, benefit an employer—such as a personal commute in one's own vehicle. (ER21; ABM 18, 36–37.)

Plaintiffs are equally mistaken that time spent at a worksite not engaged in work can be compensable even if not "unavoidably required." (PSB 10.) In *Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968, for example, the Court of Appeal described as "extremely significant" the fact that some employees could leave the worksite if they "made prior arrangements to re-enter." (*Id.* at p. 978, fn. 4.) These employees, the court concluded, "*were not restricted to the work site* for meal periods and, therefore, *did not remain subject to the employer's control.*" (*Ibid.*) Because employees here could also choose to avoid any "restrict[ion]" from the checks, *Bono*'s logic supports a finding of no control here as well.

The restrictions imposed on employees in *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, the other case Plaintiffs cite, are

nothing like those here. In *Mendiola*, employees could avoid the "restraint" of being required to stay at their worksite 24 hours a day only by seeking and obtaining advance permission—and even then, were only permitted to leave if they adhered to certain conditions and someone was available to relieve them. (*Id.* at p. 841.) Here, by contrast, the employee is in control and can avoid the checks simply by deciding not to bring a bag or personal technology device to work. That is exactly the sort of employee choice that *Overton v. Walt Disney Co.* (2006) 136 Cal.App.4th 263, found negated any employer "control." (*Id.* at p. 271; see also *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 588 ["Time employees spend traveling on transportation that an employer provides but does not require its employees to use may not be compensable as 'hours worked.'"]; *Taylor v. Cox Commcns. Cal., LLC* (9th Cir. Sept. 5, 2019, No. 18-55053) 2019 WL 4200961, *1 [no control where employer "did not require its field technicians to commute home in company vehicles," but merely provided that option as part of a "voluntary program"].)

For these reasons, and others discussed at length in Apple's previous briefs, the Court should conclude that time spent in bag and technology checks is not compensable under the "control" prong of the "hours worked" test.

II. Checks of Personal Technology Devices, Like Checks of Packages and Bags, Do Not Constitute "Work"

Plaintiffs' supplemental brief repeats the three core arguments from their merits briefing, namely that the time in question should be compensable under the "suffer or permit" prong of the "hours worked" test because it (1) involves physical and mental exertion, (2) benefitted Apple, and (3) need not be connected to Plaintiffs' job duties to constitute "work." (PSB 11–12.)

Although what constitutes "work" is not easy to define in the abstract, at a minimum, for the term to have any meaning, it must cover only activities that bear some connection to the tasks an employee is hired to perform. The closeness of the connection might vary in any given case, but the fact remains that there must be some link that transforms a set of acts from mere "exertion" to "work." (ABM 52, 55–56.) There are many forms of "exertion" an employee might engage in at the workplace, such as walking across the parking lot, searching for a security badge in one's purse, throwing away one's trash in the lunchroom, or putting one's belongings in a locker, to name just a few examples. But just because those acts are performed at the workplace does not make them "work." There must be some plus factor that makes the exertion compensable.

Plaintiffs' argument that the checks are "work" because they benefit Apple also proves too much. (ABM 56–57.) This Court already rejected that argument in *Martinez v. Combs* (2010) 49 Cal.4th 35, when it explained

that "the concept of a benefit is neither a necessary nor a sufficient condition for liability under the 'suffer or permit' standard." (*Id.* at p. 70.) And, as noted, the checks occurred here only because employees were allowed the option of bringing bags and personal technology devices to the workplace to begin with—which was not something Apple was obligated to permit.

Plaintiffs also contend that Apple's interpretation of "work" cannot be correct because in their view, it is "essentially the same standard" as federal law (i.e., duties employees were "hired to perform"), and Wage Order No. 7, unlike Wage Order Nos. 4 and 5, does not define "work" in relation to federal law. (PSB 11–12.) Plaintiffs are mistaken for at least two reasons. First, although California is of course free to depart from federal standards, there is nothing improper about looking to federal law for guidance on an issue of first impression under California law, and indeed, this Court has routinely done so in employment cases. (See, e.g., *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 658 ["Federal decisions have frequently guided our interpretation of state labor provisions," where those provisions "parallel[] [those] of federal statutes."]; *Nordquist v. McGraw–Hill Broadcasting Co.* (1995) 32 Cal.App.4th 555, 562 ["Because the California wage and hour laws are modeled to some extent on federal laws, federal cases may provide persuasive guidance."].)

Second, Plaintiffs' invocation of Wage Order No. 7 does not help them because it contains *no* definition of what constitutes "work" under the

"suffer or permit" prong at all. The fact that federal standards are explicitly incorporated into some Wage Orders does not imply that there can be no reasonable limit on what constitutes compensable work for industries covered by other Wage Orders, wherever those limits might be derived from.

Finally, Plaintiffs' effort to manufacture a relationship between their job duties and the checks of bags and personal technology devices is strained at best. "[L]oss prevention" may be a "team effort" (PSB 12), but the effort is directed at preventing thefts by *customers*, not theft by employees. (ABM 53–54.) Employees are expected to refrain from stealing as a condition of their employment—indeed, that is a "normal part of the employment relationship" (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 717)—but it can hardly be considered a job duty, or an activity that is related to a duty, in any sense of the word.

CONCLUSION

Because the checks at issue could be avoided at an employee's option—as Plaintiffs stipulated—and undergoing the checks did not constitute "work" under any reasonable reading of the term, the time employees spent in such checks is not compensable under California law.

Dated: September 11, 2019

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

In accordance with rule 8.520(c) of the California Rules of Court, the undersigned hereby certifies that this Supplemental Brief contains 1,636 words, as determined by the word processing system used to prepare this brief, excluding the cover information, the tables, the signature block, the attachment, and this certificate.

Dated: September 11, 2019

GIBSON, DUNN & CRUTCHER LLP

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CERTIFICATE OF SERVICE

I, Daniel K. Tom, declare as follows:

I am employed in the County of San Francisco, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 555 Mission Street, Suite 3000, San Francisco, CA 94105-0921, in said County and State. On September 11, 2019, I served the within:

SUPPLEMENTAL REPLY BRIEF

to each of the persons named in the attached service list at the address(es) shown, in the manner described below.

☑ **BY MAIL**: I caused to be placed a true copy in a sealed envelope addressed as indicated on the attached service list for collection and mailing, on the date mentioned above, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing with the United States Postal Service. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service in a sealed envelope with postage fully prepaid. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained in the proof of service.

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I certify under penalty of perjury that the foregoing is true and correct, that the foregoing document(s), and all copies made from same, were printed on recycled paper, and that this certificate was executed on September 11, 2019 at San Francisco, California.

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Daniel K. Tom