No. S243805

Supreme Court

OF THE

State of California

AMANDA FRLEKIN, ET AL.,

Plaintiffs, Appellants, and Petitioners,

v.

APPLE, INC.,

Defendant and Respondent.

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

Motion for Judicial Notice; Memorandum in Support; Declaration in Support; Proposed Order [Cal. Rules of Ct., rule 8.252(a)]

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MOTION FOR JUDICIAL NOTICE; MEMORANDUM IN SUPPORT

Pursuant to Evidence Code section 459 and California Rule of Court 8.520(g) and 8.252(a), petitioners Amanda Frlekin et al. respectfully ask the Court to take judicial notice of the following document, a true and correct copy of which is attached hereto:

Exhibit 12: Response of the Division of Labor Standards Enforcement ("DLSE") to Request for Determination, Docket No. 89-018 (April 26, 1990).

A portion of this document was quoted by the California Office of Administrative Law ("OAL") in its Letter Upholding Determination No. 11, Docket No. 89-018, Determination Dated July 31, 1990 (Sept. 7, 1990), which was attached as Exhibit 7 to petitioners' Motion for Judicial Notice filed on December 19, 2017.

By this motion, petitioners seek judicial notice of the full DLSE document, which just came into their possession. *See* Kralowec Decl., below, ¶2.

The document is the proper subject of judicial notice by this Court because it relates to Official Determination No. 11, Docket No. 89-018, of the OAL; is maintained as part of the OAL's official records; and constitutes an official act of the DLSE. *See* Kralowec Decl., ¶2. Pursuant to Evidence Code section 452, subdivision (c), the Court may take judicial notice of official acts of the executive branch of this state and of the "records, reports and orders of [state] administrative agencies." *Ordlock v. Franchies Tax Board*, 38 Cal.4th 897, 911 n.8 (2006); *see also White v. Davis*, 30 Cal.4th 528, 553 n.11 (2003). Like Exhibit 7 to petitioners' motion filed on December 19, 2017, the document is relevant because it addresses the reasons for the IWC's 1947 amendment to the definition of "hours worked."

The Court is respectfully asked to grant the motion for judicial notice in full.

Dated: January 31, 2018

Respectfully submitted,

By: _____
Kimberly A. Kralowec
THE KRALOWEC LAW GROUP

Lee A. Shalov
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Attorneys for Plaintiffs, Appellants, and Petitioners

DECLARATION OF KIMBERLY A. KRALOWEC IN SUPPORT OF MOTION FOR JUDICIAL NOTICE

I, Kimberly A. Kralowec, declare as follows:

1. I am an attorney licensed to practice law in the State of California. I am appellate counsel of record for petitioners Amanda Frlekin et al. in the above-referenced proceeding. I have personal knowledge of the matters stated below, and if called upon to testify, would do so competently as to them.

2. This month, my office received a copy of Response of the Division of Labor Standards Enforcement to Request for Determination, Docket No. 89-018 (April 26, 1990), attached hereto as Exhibit 1. The document was provided to us by the California Office of Administrative Law ("OAL") in response to a public records act request. Previous efforts to obtain a copy of this full document, including from the California Department of Industrial Relations ("DIR") and the Division of Labor Standards Enforcement ("DLSE"), had been unsuccessful.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on January 31, 2018 at San Francisco, California.

Kimberly A. Kralowec

No. S243805

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AMANDA FRLEKIN, ET AL.,

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[Proposed]
Order Granting Motion for Judicial Notice

Pursuant to Evidence Code sections 452, 453, and 459, and Rule of Court 8.252(a), the motion for judicial notice of petitioners Amanda Frlekin et al. is hereby granted in full.

_____
Justice

EXHIBIT 12

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re: Request for Determination Concerning The Underground Enforcement Policy Of The California Division Of Labor Standards Enforcement That Regulates Meal Periods Taken On An Employer's Premises	)	Docket No. 89-018

RESPONSE OF

THE DIVISION OF LABOR STANDARDS ENFORCEMENT

TO REQUEST FOR DETERMINATION

DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California
On Behalf Of
The State Labor Commissioner

By: H. THOMAS CADELL, JR.
Chief Counsel
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REQUEST FOR DETERMINATION

REQUESTING PARTY:
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AFFECTED STATE AGENCY:
DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
Telephone: (415) 557-3827

QUESTION:
Does the enforcement policy of the Division of Labor Standards Enforcement as set out in a letter written in response to a request for an opinion or in a declaration filed in a civil case amount to a regulation which was not issued in accordance with the requirements of the APA or does the issuance of such enforcement policies simply comply with the requirements of Labor Code §1198.4?

I. INTRODUCTION

On January 5, 1988, then State Labor Commissioner addressed a letter to Richard S. Rosenberg, an attorney with the firm of Ballard, Rosenberg & Golper, in which Mr. Aubry, in reply to an earlier letter from Mr. Rosenberg, reiterated a long-held enforcement policy of the Division of Labor Standards Enforcement (hereinafter "DLSE") regarding the interpretation of the term "hours worked" in connection with "employees required to remain on the employer's premises during meal periods." (See Request for Determination (hereinafter "REQUEST"), Exhibit 'A') Commissioner Aubry stated:

> "The Division has historically taken the position that unless employees are relieved of all duties and are free to leave the premises, the meal period is considered as 'hours worked'."

In support of the statement that this was a long-standing position, Commissioner Aubry attached to his January 5, 1988, letter, a copy of a declaration signed by former Labor Commissioner C. Robert Simpson which stated:

> "3. It is the policy of the Division of Labor Standards Enforcement that whenever an employer has employees under his dominion, direction or control, that employer is required to pay for the employees' time.
> "4. Whenever an employer requires his employees to remain on premises for meal periods he is exerting control and must pay for that time as 'hours worked' even if the employees are relieved of all other job duties."

The Requester, Richard J. Simmons, contends that it is not clear to him when the DLSE first adopted the enforcement policy because DLSE "never provided the public with a copy of its enforcement policy, mailed it to employers, or provided interested members of the public notice of or any opportunity to comment on the enforcement policy."

It is respectfully submitted that Requester provides no evidence that DLSE has "never provided the public with a copy of its enforcement policy" or that DLSE has never "mailed [the enforcement policy] to employers." Additionally, it is not clear to DLSE what authority Requester relies upon in concluding that the agency had any duty to "provide[d] interested members of the public notice of or any opportunity to comment on the enforcement policy".

As will be clearly shown, the interpretation of the IWC Orders which requires that the employee be allowed to leave the employer's premises is the only "legally tenable 'interpreta-

tion'" This conclusion is shared by the Requester as evidenced by the following language from "Wage and Hour Manual for California Employers" written and edited by Mr. Simmons:

> "Meal periods do not have to be counted as hours worked, either for purposes of the F.L.S.A. or the California Wage Orders, if (a) the employee is completely relieved of all duties, active or inactive; (b) the employee is free to leave his work station and the employer's premises; and (c) the meal period is at least 30 minutes long (a shorter period may be sufficient under special conditions under the F.L.S.A. but not under the Wage Orders). (Wage and Hour Manual, 3d ed., p. 179; See Exhibit 'A' Attached hereto)

The very documents which Requester submits clearly show that the DLSE has, pursuant to the mandate of the Legislature, provided the public with the enforcement policy statement and its opinion as to the interpretation of the provisions of the IWC Orders as evidenced by the letter which Requester attaches as Exhibit 'A' to the Request for Determination.

II. ARGUMENT

A. THE ROLE OF THE DIVISION OF LABOR STANDARDS ENFORCEMENT IS TO ENFORCE THE INDUSTRIAL WELFARE COMMISSION ORDERS AND INTERPRETATION NECESSARILY PRECEDES ENFORCEMENT

The "enforcement policy" of the DLSE is, in fact, nothing more than the only logical interpretation of the IWC Orders. In particular the policy arises from an interpretation of the term "Hours Worked" as defined in the Industrial Welfare Commission Orders. The interpretation is entirely consistent with the provisions of the IWC Orders which interpret the term "Hours Worked" as follows:

"'Hours Worked' means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (Emphasis added)

1. The California Industrial Welfare Commission Is The Administrative Body Charged With Adopting The Minimum Standards While The DLSE Is The Agency Charged With The Power To Adequately Enforce Those Minimum Standards

The case of Skyline Homes, Inc. v. Department of Industrial Relations (1985) 165 Cal.App.3d 239, 253, states:

"The relationship between the DLSE and the IWC is similar to that between the Occupational Safety and Health Standards Board and the Division of Occupational Safety and Health. The Division is charged with the power to 'adequately enforce and administer all laws and lawful standards and orders...' regarding safety in workplaces (§§ 60.5, 6307). The standards board, like the IWC, is responsible for adopting standards (§§ 140, 142.3).
In the case of Bendix Forest Products Corp. v. Division of Occupational Saf. & Health (1979) 25 Cal.3d 465, the standards board had adopted a regulation providing that hand protection may be required for employees whose work exposes their hands to dangerous substances, cuts or burns (Cal. Admin. Code, tit. 8, § 3384). Pursuant to this standard the division ordered the employer, a lumber company, to provide hand protection to its employees at company expense. The employer contended that the division was attempting to legislate a new standard and was encroaching on the authority of the standards board. The court held that "[t]he decision of the Division was not a quasi-legislative judgment promulgating a new regulation or standard but rather a specific application of laws and existing regulations. We see no conflict in the exercise of power vis-à-vis the Standards Board." (Id., at p. 471.)
Similarly, in this case, the DLSE is not promulgating regulations. The regulation is wage order 1-76, properly promulgated by the IWC. The DLSE is charged with enforcing the wage orders, and to do so, it must first interpret them. The enforcement policy is precisely that--an interpretation --and need not comply with the APA.

It is, of course, indisputable, that all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Since decisions of the Office of Administrative Law are reviewable in the Superior Court and since, beyond question, the Superior Court, under the doctrine of stare decisis is bound by decisions of the District Courts of Appeal, it is equally beyond question that the Office of Administrative Law is bound by the holdings in the Skyline and Bendix Forest Products cases, supra. (See Auto Equity Sales, Inc. v. Superior court of Santa Clara County 57 Cal.2d 450)

Equally clear, is that the Legislature fully intended that the Division was to formulate "enforcement policy statements or interpretations" of IWC Orders and to make those statements or interpretations available to the public "[u]pon request" (Labor Code §1198.4). Had the Legislature intended that these "enforcement policy statements or interpretations" were to be made available to the public only after compliance with the procedures of the Administrative Procedures Act it could have simply relied upon the power of the agency to promulgate regulations which, of course, would be "available to the public". Additionally, why would the Legislature have referred to "enforcement policy statements or interpretations" if it meant "regulations" and why, if the Legislature intended that the DLSE was to comply with the APA procedures before promulgating these "policy statements or interpretations", did it require that the DLSE furnish copies to the IWC?

The answers to all of these questions requires only the

exercise of common sense. Common sense would teach that it is ridiculous to conclude that an agency must adopt administrative regulations to interpret administrative regulations which have already been validly adopted. Where would such an absurd conclusion lead? Would such a process not require still more regulations to interpret those regulations?

2. Requiring The Division Of Labor Standards Enforcement To Comply With The Provisions Of The APA Before Adopting An Enforcement Policy Dealing With The IWC Orders Would Lead To Absurd Results

When an administrative agency is charged with enforcing a particular statute, its interpretation of the statute will be accorded great respect by the courts and will be followed if not clearly erroneous. (Judson Steel Corp. v. Workers' Comp Appeals Board (1978) 22 Cal.3d 658, 668) This deference is especially appropriate where the agency's interpretation is congruent with the statute's language and obvious purpose. "(W)here the language of a statutory provision is susceptible of two constructions, one of which, in application, will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted." (Clements v. T.R. Bechtel Co. (1954) 43 Cal.2d 227, 233) This statutory rule has direct application to the narrow interpretation which Requester seeks to place on Government Code §11347.5

If, as the Requester contends, DLSE may not interpret the IWC Orders absent compliance with the provisions of the APA, the

usual practice of furnishing information to the public would have to be abated despite the requirement contained at Labor Code §94. The letter from Mr. Rosenberg which is alluded to in Commissioner Aubry's letter of January 5, 1988 (REQUEST, Exhibit 'A') could not be answered without full compliance with the Act despite the mandate to the Division contained at Labor Code §1198.4. Thus, in a situation where an employer sought to implement a pay practice and contacted the DLSE requesting information as to how the agency would view such a pay practice, the DLSE would be required to notify all interested parties that this question had arisen and advise each interested party of the proposed answer to the question. If any interested party requested a hearing on the matter, the agency would have to convene hearings statewide in order to give all the interested parties an opportunity to address their concerns.

Obviously, such is not the state of the law. As the Supreme Court recognized in the Bendix Forest Products case and the Fourth District Court of Appeal reiterated in Skyline, the question of the interpretation of the IWC Orders in the Request under consideration here, arises in the context of "a specific application of laws and existing regulations." (Bendix Forest Products Corp. v. Division of Occupational Saf. & Health, supra, 25 Cal.3d 465, 471) Commissioner Aubry's letter to Mr. Rosenberg and the declaration of Labor Commissioner Simpson which was attached to that letter involved answers provided by DLSE in response to specific questions raised regarding existing regulations. In the case of the letter from Commissioner Aubry, the

response was to a letter from Mr. Rosenberg which posed the question regarding the position the Division takes in regard to payment of wages when the worker is required to remain on the premises during the meal period. In the case of the declaration of Commissioner Simpson, the response was to a law suit brought by J-M Manufacturing Company which raised the same issue.

Respondent is unaware of any requirement in the Government Code which would require an administrative agency to convene a hearing (after giving notice to all interested parties) to determine how it will answer a letter that it is required by law to answer. (See Labor Code §§ 94[1/] and 1198.4[2/]) Nor is there any requirement that an administrative agency such as the Division must hold a hearing (coupled with the notice requirements of the APA) to determine what answer it will give to a law suit filed against it or what arguments it will raise in its points and authorities to support its interpretation of the law it is mandated to enforce.

In summary, the specific documents (the January 5, 1988, Aubry letter and the May 16, 1985, Simpson declaration) relied

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1/ Labor Code §94:
"The office of the division shall be open for business from 9 o'clock a.m. until 5 o'clock p.m. every day except nonjudicial days, and the officers thereof shall give to all persons requesting it all needed information which they may possess."

2/ Labor Code §1198.4:
"Upon request, the Chief of the Division of Labor Standards enforcement shall make available to the public any enforcement policy statements or interpretations of orders of the Industrial Welfare Commission. Copies of such policy statements shall be furnished to the Industrial Welfare Commission."

upon by the Requester in this case are not "underground regulations" prohibited by the APA. Those documents are simply responses to requests for information. In the case of the letter of Commissioner Aubry, the document is a response to a request for an opinion regarding the interpretation of the IWC Orders which the employer could anticipate if enforcement became necessary. The response is mandated by law. In the case of the Declaration of Commissioner Simpson, the response simply states the historical position of the Division which, incidentally, represents the only logical interpretation of the IWC Orders definition of the term "Hours Worked".

It is interesting to note that while the letter from Commissioner Aubry to Mr. Rosenberg enclosed a copy of the points and authorities outlining the legal theory upon which the Division had relied, the Requester has failed to attach those points and authorities.

The provisions of Labor Code §1198.4 make it perfectly clear that the DLSE is required "[u]pon request" to make available to the public any enforcement policy statements or interpretations of orders of the Industrial Welfare Commission. There can be no question that the DLSE has the authority to enforce the IWC Orders. A statement by the DLSE that it will interpret the IWC Orders in a particular manner in the event of an court action does not require compliance with the APA. Consequently, any enforcement policy statement or interpretation, whether in the form of a letter, a declaration, an interpretive bulletin or procedure memorandum to the Division personnel which

deals with the enforcement of the IWC Orders are not subject to the APA. In addition, the language of §1198.4 requires the DLSE to make those policy statements or interpretations available only "upon request" and does not require that the DLSE notify all "interested parties" or send each such opinion to every employer in the State of California.

B. THE REQUESTER'S DISCUSSION OF THE FACTS AND DESCRIPTION OF THE LAW AND THE ENFORCEMENT POLICY OF THE DLSE DOES NOT ADDRESS THE ISSUE OF THE IWC DEFINITION OF "HOURS WORKED"

The enforcement policy which the Requester has chosen to question is that which requires "employers to treat 'off-duty' meal periods of employees as 'hours worked' whenever employees are asked (required) to remain on their employer's business premises during the meal period." (REQUEST, pgs. 4-5) The enforcement policy, the Requester admits, results from the DLSE's interpretation of the term "Hours Worked". (REQUEST, p. 4)

The term "Hours Worked" is defined in the IWC Orders[3/] as follows:

> "'Hours Worked' means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so."

3/ The provisions of Order 5-89 covering the Public Housekeeping Industry, provides at section 2(H) (C.C.R., tit. 8, §11050(2)(H)) that the term "Hours Worked" "in the case of an employee who is required to reside on the employment premises, that time spent carrying out assigned duties shall be counted as hours worked." This language was added to the provisions of Order 5 in 1976 and, despite the unsupported allegations of the Requester (REQUEST, p. 5, fn. 3) the language does not apply to all 15 of the IWC Orders. The IWC in its "Statement of Basis" for Order 5-76, stated: (Footnote Continued on page 11)