No. S243805

IN THE SUPREME COURT OF CALIFORNIA

AMANDA FRLEKIN, ET AL.,

Plaintiffs and Appellants,

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

ANSWER BRIEF ON THE MERITS

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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: March 19, 2018

GIBSON, DUNN & CRUTCHER LLP

By: Theodore J. Boutrous Jr. /SCH
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INTRODUCTION

This case involves the application of long-settled principles of California employment law to a set of undisputed facts. The only question before the Court is whether time spent undergoing checks of "bags *voluntarily* brought to work *purely for personal convenience* by employees" constitutes "hours worked." (*Frlekin v. Apple, Inc.* (9th Cir. 2017) 870 F.3d 867, 869 (*Frlekin*), italics added.) This Court's prior interpretations of the Wage Orders' "hours worked" definition, as well as the text and history of Wage Order No. 7 (hereinafter, "Wage Order"), both show that the district court correctly held that the answer to that narrow question is "no."

This Court's decision in *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575 (*Morillion*) is dispositive as to the "subject to the control of an employer" prong of the "hours worked" definition. *Morillion* held that "travel time" on employer-provided buses was compensable because employees were *required* to ride the buses to their work sites from an off-site parking lot and "were foreclosed from numerous activities in which they might otherwise engage if they were permitted to travel to the fields by their own transportation." (*Id.* at pp. 586–587.) In reaching that decision, this Court made clear that "employers may provide *optional* free transportation to employees without having to pay them for their travel

time, as long as employers do not *require* employees to use this transportation." (*Id.* at p. 594, italics added.)

Morillion thus established that time is compensable under the "subject to the control of an employer" prong only "[w]hen an employer *requires* its employees" to engage in a restrictive activity. (*Morillion*, *supra*, 22 Cal.4th at p. 587, italics added.) But in order to obtain certification of the broadest class possible and avoid individualized questions regarding why employees brought bags to work, Plaintiffs represented to the district court that they would litigate this case based only on the stipulated fact that every class member who brought a bag to work did so "voluntarily" and "purely for personal convenience." (SER5, 25, 27–38; ER7.)

Given that strategic decision, there cannot be any dispute that Apple employees were not required to bring any bags to work, and thus were not required to subject themselves to security checks. Instead, any employee who wanted to avoid a check could have simply chosen to leave the bag at home, in a car, or in lockers provided in off-site break rooms at certain stores. Thus, under the rule established in *Morillion*, these employees were not "subject to the control" of Apple within the meaning of the Wage Order's definition of "hours worked" during the checks, as they could have avoided the checks by choosing not to bring bags to work.

Plaintiffs also contend that even if employees were not subject to Apple's "control" during the checks, they met the "suffered or permitted to work" prong of the "hours worked" definition because the checks supposedly required some amount of "exertion" and provided a benefit to Apple. This proposed definition of "work" would broaden the term beyond all recognition. Both prior decisions in related contexts and common sense show that a brief check of belongings that has no relation to the job duties an employee was hired to perform is not the kind of activity that requires compensation.

While there may be other cases that present more difficult questions—for example, where an employer's policy is to subject all employees to a search, or where an employee claims that bringing a bag to work is necessary due to the nature of the work or a life necessity—*this* case, as it comes to this Court, does not raise any of those questions. Instead, because of the stipulation that any bags were brought voluntarily and purely for personal convenience, this case falls within the heartland of *Morillion*.

The Court should accordingly hold that the time employees spent undergoing checks of bags brought voluntarily and purely for personal convenience is not "hours worked," and is thus not compensable time.

FACTUAL AND PROCEDURAL BACKGROUND

As a result of stipulations Plaintiffs made to obtain class certification, the facts relevant to this narrow certified-question appeal are undisputed. They are summarized briefly below for the Court's convenience.

I. FACTUAL BACKGROUND

Apple Inc. is one of the world's leading technology companies. As part of its business, it operates retail stores worldwide, including in California, that display and sell Apple products. "Apple employs individuals in its retail stores . . . to facilitate the sale and service of Apple products." (Apple's Mot. for Judicial Notice, Ex. A at p. 2 ¶ 4.)

Apple employees in those retail stores are permitted to bring personal bags to their workplaces. (ER5–6.)[1] Plaintiffs stipulated that Apple did not require employees to bring these bags to perform their job duties or for any other reason, and if bags were brought, it was done voluntarily and purely for the employees' personal convenience. (SER5, 36; see also pp. 25–30, *post.*) And, in fact, not all employees brought bags to work: Apple's expert, Dr. Randolph Hall, analyzed six hours of video surveillance footage at the busiest times of day on the

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[1] "ER" and "SER" citations are to the Excerpts of Record and Supplemental Excerpts of Record filed in the Ninth Circuit.

busiest days of work during the class period at the San Francisco flagship Apple store, and recorded that 49% of the 399 employees observed left without carrying any observable item. (ER74.)

Those employees who chose to bring a bag to work could be subject to a visual inspection or pat-down of that bag by a manager or a security guard before they left the store (ER5–6), though that was not always the case. Managers had discretion as to whether to conduct checks (and to what extent), and a number testified they did not conduct any checks, or only did so infrequently. (ER75.) That comports with testimony from Plaintiffs that they sometimes did not go through a check even when they chose to bring a bag to their workplace. (ER75–76, SER46.) Some stores also had off-site break rooms with lockers where employees could store items without having to go through a check. (ER174.)

Several named Plaintiffs testified that these checks lasted only "a few seconds" (SER47), or "a couple of minutes" (SER47; see also ER78). Consistent with that testimony, Dr. Hall said that "a very high-end estimate for the average amount of bag/technology check time (including both inspection time and waiting time) experienced by Apple employees is 30 seconds per punch out." (SER47.)

II. PROCEDURAL HISTORY

In this lawsuit, four former Apple employees— Taylor Kalin, Aaron Gregoroff, Seth Dowling, and Debra Speicher—seek compensation for time

spent waiting for and undergoing checks of bags they voluntarily brought to their workplace, on the theory that such time constituted "hours worked" for which they should have been paid. (ER4–5.)[2] Based on that theory, Plaintiffs asserted claims under various sections of the California Labor Code on behalf of "current or former hourly-paid and non-exempt employee[s] of Apple Inc. who worked at one or more Apple California retail stores from July 25, 2009 to the present." (ER4–5.)

A. The Class Certification Decision

Following the completion of pre-certification discovery, Plaintiffs moved for class certification. At the hearing on Plaintiffs' motion, Apple argued that the district court should deny class certification because determining the reasons employees brought bags to work—whether out of necessity or purely out of convenience—could be resolved only on an individualized basis. (SER27–29.) To eliminate those individualized issues, Plaintiffs took the position that the reason for bringing the bags to work did not matter to their case, because in their view when "somebody gets into a bag check, they are under the control of the employer whether or not it's required." (SER30.)

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[2] Named plaintiff Amanda Frlekin asked to be dismissed as a representative plaintiff, and the district court granted that request. (ER550–551.)

The district court then asked Plaintiffs if they would agree to limit the scope of class proceedings to reflect the narrow theory of liability they had just articulated. As the court put it, "It would just be the bozo who wants to bring a big backpack full of playing cards to work and has no real need to do that and it's . . . *completely voluntary* on their part." (SER33, 36.) Plaintiffs agreed:

> We would say, Your Honor, if you would certify a class based upon . . . the common issue of whether or not standing in checks if you bring a bag is compensable under California law, we would be amenable to certifying the class on that basis . . . so we're not doing this on a piecemeal basis.

(SER36.) Plaintiffs confirmed their position in supplemental briefing following the class certification hearing, arguing that "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 issue in this case." (SER25, italics added.)

Taking Plaintiffs at their word, the district court agreed to certify a class "to adjudicate whether or not Apple had to compensate its employees for time spent waiting for bag searches to be completed 'based on the most common scenario, that is, an employee *who voluntarily brought a bag to work purely for personal convenience*.'" (ER7, italics added.) The notice sent to class members made this point expressly:

> In an Order dated July 16, 2015 (the "Order"), the Court ruled that the Action may proceed as a class action on behalf of Apple Employees (the "Class"). Plaintiffs have received the Court's approval to proceed with their claims only on the theory that Apple must compensate Apple Employees whenever they go through Checks regardless of why they bring bags or their owned Apple technology to work. Thus: THE CLASS WILL LITIGATE THIS CASE EXCLUSIVELY ON THE THEORY THAT ALL CLASS MEMBERS VOLUNTARILY CHOSE TO BRING BAGS AND/OR PERSONAL APPLE TECHNOLOGY TO WORK PURELY FOR PERSONAL CONVENIENCE.

(SER5.) The notice also explained the limits of what Plaintiffs would contend:

> PLAINTIFFS, ON BEHALF OF THE CLASS, WILL NOT CONTEND THAT ANY CLASS MEMBERS WERE REQUIRED TO BRING A BAG OR PERSONAL APPLE TECHNOLOGY TO WORK FOR ANY REASON WHATSOEVER. FOR EXAMPLE, PLAINTIFFS WILL NOT CONTEND THAT: APPLE REQUIRED CLASS MEMBERS TO BRING A BAG OR PERSONAL APPLE TECHNOLOGY TO WORK; THAT THE NATURE OF THE WORK REQUIRED CLASS MEMBERS TO BRING BAGS OR PERSONAL APPLE TECHNOLOGY TO WORK; OR THAT A NECESSITY OF LIFE REQUIRED CLASS MEMBERS TO BRING A BAG OR PERSONAL APPLE TECHNOLOGY TO WORK.

(SER5.)

To protect absent class members still further, the district court informed them that they could file a complaint in intervention if they wished to litigate a claim that they were "required" to bring a bag or personal Apple device to work. (SER6–7, 23.) The notice further

explained that unless a class member intervened or opted out, he or she would be bound to litigate based on the above facts:

> IF YOU DO NOT INTERVENE IN THIS ACTION OR EXCLUDE YOURSELF FROM IT, YOU WILL BE FOREVER BARRED FROM SUING APPLE FOR COMPENSATION FOR TIME SPENT IN CHECKS BASED ON A THEORY THAT YOU WERE REQUIRED, FOR ANY REASON WHATSOEVER, TO BRING A BAG OR PERSONAL APPLE TECHNOLOGY TO WORK.

(SER5.) No class member filed a complaint in intervention. (ER7, 10, 14, 18.)

B. The Summary Judgment Order

Following class certification, both parties moved for summary judgment on the question of whether time spent waiting for or undergoing checks of bags brought to work purely for personal convenience should be counted as "hours worked" under California law. After restating the rule that "hours worked" may consist of time in which an employee is "subject to the control of an employer" or time in which the employee is "suffered or permitted to work, whether or not required to do so" (ER8), the district court concluded that time spent waiting for or undergoing checks was not compensable under either prong. (ER8.)

With respect to the "subject to the control of an employer" prong, the district court, relying on this Court's decision in *Morillion* and the Court of Appeal's decision in *Overton v. Walt Disney Co.* (2006) 136 Cal.App.4th 263 (*Overton*), concluded that although an employee might be

physically restricted while awaiting or undergoing a bag check, she was not "subject to the control of an employer" for purposes of the Wage Order because she could "choose not to bring to work any bag or other items subject to the search rule." (ER8.) The court also explained that this choice was not "illusory," because class members were given the explicit option to intervene and litigate whether the choice to bring a bag was truly voluntary, and none did so. (ER10; see also ER14 ["[T]here is no dispute as to the genuine nature of our plaintiffs' freedom to choose to avoid searches."].)

With respect to the "suffered or permitted to work" prong, the district court concluded that the checks were not compensable because they were not "work." It noted that the checks "had no relationship to plaintiffs' job responsibilities" but instead were "peripheral activities relating to Apple's theft policies." (ER20.) The court also noted that the "plaintiffs themselves did not conduct the searches," but instead "passively awaited as their managers or security guards conducted the searches." (ER20.) The court also rejected Plaintiffs' argument that the activity could be deemed "work" because it provided some benefit to Apple, noting that such an interpretation "would render the 'control' prong meaningless," and would make compensable a range of activities—such as a personal commute in one's own vehicle—that plainly should not be. (ER21.) The court entered judgment for Apple. (ER22.)

C. The Ninth Circuit's Order

Plaintiffs appealed the judgment to the Ninth Circuit. Following the conclusion of briefing and oral argument, the Ninth Circuit certified the following question to this Court on the ground that it would be "dispositive" to the appeal before it, but that "no clear controlling California precedent exists":

> Is time spent on the employer's premises waiting for, and undergoing, required exit searches of packages or bags voluntarily brought to work purely for personal convenience by employees compensable as "hours worked" within the meaning of California Industrial Welfare Commission Wage Order No. 7?

(*Frlekin, supra*, 870 F.3d at p. 869.)

The Ninth Circuit acknowledged that Apple's argument regarding control found "strong support in the California Supreme Court's decision in *Morillion*," which had turned on the "mandatory nature" of the activity at issue. (*Frlekin, supra*, 870 F.3d at pp. 871–872.) Moreover, the court recognized that "[t]he case at issue involves only those employees who voluntarily brought bags to work purely for personal convenience." (*Id.* at p. 873.)

In a September 1, 2017 letter, Plaintiffs asked this Court to restate the certified question to include checks of "technology devices." (See Letter from K. Kralowec to Hon. Chief Justice and Associate Justices of the California Supreme Court (Sept. 1, 2017) p. 10.) But when the Court

decided on September 20, 2017 to grant review, it stated the question presented exactly as formulated by the Ninth Circuit (and thus without any reference to "technology devices").

ARGUMENT

Wage Order No. 7 defines "hours worked" as "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." (Cal. Code Regs., tit. 8, § 11070, subd. 2(G).) This Court has interpreted the test as encompassing two prongs or "independent factors, each of which defines whether certain time spent is compensable as 'hours worked.'" (*Morillion*, *supra*, 22 Cal.4th at p. 582.)

The "subject to the control of an employer" prong may include time when an employee is doing *something* required by the employer, even if that "something" is not part of the set of tasks the employee was hired to perform. By contrast, the "suffered or permitted to work" prong includes time in which the employee is "working, but is not subject to the employer's control," such as voluntarily performing a duty the employee was hired to perform following the end of a shift, where the employer knows or has reason to believe the work is occurring. (*Morillion*, *supra*, 22 Cal.4th at p. 585). This Court has also explained that the "suffered or permitted to work" prong "does not limit the 'control' clause under the

definition of 'hours worked.'" (*Id.* at p. 582.) Each prong has a distinct, independent meaning and may "be independently satisfied." (*Id.* at p. 584.)

Under either prong of the "hours worked" definition, time spent waiting for and undergoing bag checks is not compensable because employees can avoid the checks entirely by choosing not to bring a bag to work. To the extent employees choose to bring a bag, they are not "working"—meaning, performing any duties they were hired to perform—during the brief period of time in which the checks are occurring.

I. Employees Undergoing Checks Are Not "Subject to the Control" of Apple

The district court correctly determined that Apple employees were not "subject to the control" of Apple during bag checks because they could choose to avoid those checks by leaving bags at home, in their cars, or (at certain stores) in lockers in off-site break rooms. That decision necessarily followed from this Court's holding in *Morillion* that activities an employee is not required to perform do not qualify as employer-controlled within the meaning of the Wage Orders. Other courts, including the Court of Appeal in *Overton v. Walt Disney Co.*, as well as California employers, have followed and relied on this holding for more than seventeen years.

Plaintiffs attempt to distinguish *Morillion* and *Overton* by dwelling on an issue that is irrelevant to this case: whether an employer exercises control under the Wage Order when employees engage in restrictive

activities that are nominally avoidable, but, in Plaintiffs' view, practically unavoidable. That issue is not before the Court. The question certified by the Ninth Circuit asks whether time undergoing checks of "bags *voluntarily* brought to work *purely for personal convenience* by employees" constitutes "hours worked." (*Frlekin*, *supra*, 870 F.3d at p. 869.) Indeed, the district court excluded from the class definition instances where an employee had a life necessity that required bringing a bag to work, and instructed class members that, if they had such a necessity, they could file a motion to intervene. No such motions were filed. Given Plaintiffs' strategic decision to frame the issue narrowly, "this is not a case with an 'illusory' choice" (ER10), and the certified class, by definition, does not contain even a single employee who brought a bag to work for reasons she could not control, "such as the need for medication, feminine hygiene products, or disability accommodations" (SER40).[3]

The narrow question presented here is thus whether the "subject to the control of an employer" prong is satisfied, and whether Apple is therefore under an obligation to pay when it checks the bag of an employee

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[3] This case is therefore factually distinct from *Alcantar v. Hobart Service* (9th Cir. 2015) 800 F.3d 1047 (*Alcantar*), in which there was "a dispute of material fact as to whether th[e] choice" of employees was "genuine or illusory." (*Id.* at p. 1055.)

who freely chose to bring it to work for his own convenience. As explained below, this Court conclusively answered this question in *Morillion*.

A. *Morillion* Held that Employees Are Not "Subject to the Control of an Employer" During Voluntary Activities

Morillion defeats Plaintiffs' argument that they were "subject to the control" of Apple during checks. In *Morillion*, an agricultural employer required all of its field workers to report to a designated location at a specified time each day to board a bus that would take them to their work site. (*Morillion, supra*, 22 Cal.4th at p. 579.) The employer's buses picked up all of the workers in the morning, dropped them off at the work site for the day, and picked them up at the end of the work day to return them to the designated reporting location. (*Ibid.*) That meant that employees could not "drop off their children at school, stop for breakfast before work, or run other errands" while on the employer's bus. (*Id.* at p. 586.) In addition, the employer prohibited workers from using their own transportation to get to and from the work site; in fact, employees who attempted to use their own transportation were subject to discipline. (*Id.* at p. 579, fn.1.) On those facts, this Court held that the workers' "*compulsory* travel time" was compensable because their employer had "controlled" them within the meaning of the Wage Order by requiring them to engage in a restrictive activity—riding its buses. (*Id.* at p. 587, italics added.)

The dispositive fact in *Morillion* was that employees had no choice but to take the employer-provided transportation: "by *requiring* employees to take certain transportation to a work site, employers thereby subject those employees to [their] control by determining when, where, and how they are to travel." (*Morillion, supra*, 22 Cal.4th at p. 588, italics added.) The Court acknowledged that any time spent on an employer's bus entails a degree of control because, once on the bus, the employees are "foreclosed from numerous activities in which they might otherwise engage," such as "drop[ping] off their children at school," or "run[ning] other errands requiring the use of a car." (*Id.* at p. 586.) Yet the Court did not hold that time spent on any employer-provided bus is necessarily compensable. Instead, this Court expressly held that, in other situations, "employers may provide *optional* free transportation to employees without having to pay them for their travel time, as long as employers do not *require* employees to use this transportation." (*Id.* at p. 594, italics added.) It is only "[w]hen an employer *requires* its employees to meet at designated places to take its buses to work *and prohibits them from taking their own transportation*, [that] employees [are] . . . 'subject to the control of an employer.'" (*Id.* at p. 587, italics added.)

Morillion thus made clear that even a restrictive activity—such as riding on a bus—does not place an employee under an employer's "control" if the employee may freely choose to avoid the activity in the first

place. An activity must be both restrictive *and* required to constitute "hours worked" under the "subject to the control of an employer" prong. That holding disposes of Plaintiffs' theory here. (*Morillion, supra*, 22 Cal.4th at p. 586 [employer exercised control "by requiring [employees] to travel on its buses and by prohibiting them from effectively using their travel time for their own purposes"].)

Although Plaintiffs focus their attention on the restrictive activity (going through a bag check), they are looking at the incorrect point in the process. This case does not involve a mandatory airport-style screening where every person must be checked, whether or not they have bags with them. To the contrary, "there is no dispute" that all class members were "free[] to choose to avoid searches" simply by leaving their bags at home, in their cars, or (in certain stores) in lockers in off-site break rooms. (ER14, 174.) Therefore, because employees could have made a decision that would have eliminated the potential for a bag check, employees subjected to checks were not under the "control" of Apple within the meaning of the definition of "hours worked" as construed in *Morillion*.[4]

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[4] This case is thus quite different from a number of other cases in which employers subjected employees to searches regardless of whether they had bags. (See, e.g., *Greer v. Dick's Sporting Goods, Inc.* (E.D.Cal. Apr. 13, 2017, No. 15-cv-01063-KJM) 2017 WL 1354568, p. *5 [check policy applied to jackets as well as bags, and employees could be subject to visual inspection at any time]; *Moore v. Ulta Salon,*

[Footnote continued on next page]

The *Morillion* rule is well-settled California law, which courts have followed for nearly two decades. In *Overton*, for example, Disneyland employees argued that time spent commuting on an employer-provided shuttle from an off-site parking lot to their workplace was compensable as "hours worked." (*Overton*, *supra*, 136 Cal.App.4th at pp. 265–268.) The Court of Appeal applied the *Morillion* rule to hold that employees were not subject to their employer's control under the Wage Order during that time. (*Id.* at p. 271.) Discussing *Morillion*, the court emphasized that "[t]he key factor is whether [the employer] *required* its employees who were assigned parking in the [off-site] lot to park there and take the shuttle." (*Ibid.*, original italics.) Noting that ten percent of the employees did not even drive their cars to work, and therefore did not ride the employer's parking shuttles, the court concluded that the shuttles were not required. (*Ibid.*) Because the employer did not dictate how its employees got to work, but simply stated that if employees chose to drive, they needed to park in a remote lot and could take employer-provided shuttles to the work site, the shuttle rides did not establish employer control within the meaning of the Wage Order. (*Id.* at p. 274.)

[Footnote continued from previous page]

Cosmetics & Fragrance, Inc. (C.D.Cal. 2015) 311 F.R.D. 590, 595–596 [mandatory checks of bags, coats, and pockets].)