

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

AMANDA FRLEKIN; TAYLOR
KALIN; AARON GREGOROFF;
SETH DOWLING; DEBRA
SPEICHER, on behalf of
themselves and all others
similarly situated,
Plaintiffs-Appellants,

v.

APPLE, INC., a California
corporation,
Defendant-Appellee.

No. 15-17382

D.C. Nos.

3:13-cv-03451-WHA

3:13-cv-03775-WHA

3:13-cv-04727-WHA

**ORDER AND
AMENDED
OPINION**

Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding

Argued and Submitted July 11, 2017
Submission Withdrawn August 16, 2017
Resubmitted August 26, 2020
San Francisco, California

Filed September 2, 2020
Amended October 29, 2020

Before: Susan P. Graber and Michelle T. Friedland, Circuit Judges, and Consuelo B. Marshall,* District Judge.

Order;
Opinion by Judge Marshall

SUMMARY**

Labor Law

The panel reversed the district court’s grant of summary judgment in favor of defendant Apple, Inc., in a wage-and-hour class action brought by employees who sought compensation under California law for time spent waiting for and undergoing exit searches.

Upon the panel’s certification of a question of California law, the California Supreme Court concluded that time spent on the employer’s premises waiting for, and undergoing, required exit searches of packages, bags, or personal technology devices voluntarily brought to work purely for personal convenience by employees was compensable as “hours worked” within the meaning of California Industrial Welfare Commission Wage Order 7.

The panel reversed the district court’s grant of Apple’s motion for summary judgment and remanded with

* The Honorable Consuelo B. Marshall, United States District Judge for the Central District of California, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

instructions to (1) grant plaintiffs' motion for summary judgment on the issue of whether time spent by class members waiting for and undergoing exit searches pursuant to Apple's "Employee Package and Bag Searches" policy is compensable as "hours worked" under California law, and (2) determine the remedy to be afforded to individual class members.

COUNSEL

Kimberly A. Kralowec (argued) and Kathleen S. Rogers, The Kralowec Law Group, San Francisco, California; Lee S. Shalov and Brett R. Gallaway, McLaughlin & Stern LLP, New York, New York; for Plaintiffs-Appellants.

Julie A. Dunne (argued), DLA Piper LLP, San Diego, California; Richard H. Rahm, Littler Mendelson P.C., San Francisco, California; Theodore J. Boutrous Jr., Joshua S. Lipshutz, Bradley J. Hamburger, and Lauren M. Blas, Gibson Dunn & Crutcher LLP, Los Angeles, California; for Defendant-Appellee.

Michael D. Singer and Janine R. Menhennet, Cohelan Khoury & Singer, San Diego, California, for Amicus Curiae California Employment Lawyers Association.

ORDER

Appellee's Petition for Panel Rehearing is **GRANTED IN PART**. The opinion filed on Sept. 2, 2020, reported at 973 F.3d 947, is amended as follows.

On page 952, replace <Apple failed to raise this argument before the district court in opposing Plaintiffs' motion for summary judgment; the argument is therefore forfeited. *Davidson v. O'Reilly Auto Enters., LLC*, 968 F.3d 955, — (9th Cir. 2020)> with <It is unclear whether this issue was adequately raised in the district court, and the district court did not reach it. On remand, the parties may make their respective arguments about preservation of this issue and its merits, so the district court may consider those arguments in the first instance>.

No further petitions for panel rehearing or rehearing en banc will be entertained.

OPINION

MARSHALL, District Judge:

Plaintiffs Amanda Frlekin, Taylor Kalin, Aaron Gregoroff, Seth Dowling, and Debra Speicher brought this wage-and-hour class action on behalf of current and former non-exempt employees who have worked in Defendant Apple, Inc.'s retail stores in California since July 25, 2009. Plaintiffs seek compensation for time spent waiting for and undergoing exit searches pursuant to Apple's "Employee Package and Bag Searches" policy (the "Policy"), which states:

Employee Package and Bag Searches

All personal packages and bags must be checked by a manager or security before leaving the store.

General Overview

All employees, including managers and Market Support employees, are subject to personal package and bag searches. Personal technology must be verified against your Personal Technology Card (see section in this document) during all bag searches.

Failure to comply with this policy may lead to disciplinary action, up to and including termination.

Do

- Find a manager or member of the security team (where applicable) to search your bags and packages before leaving the store.

Do Not

- Do not leave the store prior to having your personal package or back [sic] searched by a member of management or the security team (where applicable).
- Do not have personal packages shipped to the store. In the event that a personal package is in the store, for any reason, a member of management or security (where applicable) must search that package prior to it leaving the store premises.

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