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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DIENNA HOWARD, on her own behalf  
and on behalf of a class of similarly  
situated employees,

Plaintiff - Appellant,

v.

GAP, INC.,

Defendant - Appellee.

No. 07-15913

D.C. No. CV-06-06773-WHA

MEMORANDUM\*

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

Argued and Submitted February 13, 2009  
San Francisco, California

Before: NOONAN, BERZON and N.R. SMITH, Circuit Judges.

Dienna Howard appeals the district court's dismissal of her suit filed against Gap, Inc. claiming that its alleged practice of requiring sales associates to purchase and wear Gap clothing as a condition of employment violated New York Labor

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Code § 198-b's prohibition against kickbacks and New York Labor Code § 193's prohibition of improper deductions from wages.

This court “review[s] dismissals for failure to state a claim pursuant to Federal Rule 12(b)(6) de novo.” *Livid Holdings, Inc. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005). “In conducting such a review, we generally limit consideration to the complaint and construe all allegations of material fact in the light most favorable to the nonmoving party.” *Id.* A complaint should not be dismissed under Rule 12(b)(6) “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

We cannot say under the plain language of either Section 198-b or Section 193 that Howard could prove no set of facts in support of her claim that would entitle her to relief. Howard's allegations, taken as true for the purposes of a motion to dismiss, are that she was compelled to use portions of her wages to purchase Gap clothing as a condition of her employment. We cannot say that there is no set of facts on which such purchases are not deductions from wages by separate transaction within the plain meaning of section 193. The allegations, as pled, are distinguishable from situations in which employees generally are required to purchase specific attire for work, because the allegations here are that the

payments for such clothes must be made directly to the employer. For similar reasons, we cannot say that the amended complaint fails to allege facts that would in no circumstances support a violation of section 198-b. That Howard did not allege that she could not use the clothes she purchased elsewhere in her ordinary life does not defeat her claim. Therefore we reverse and remand for discovery.

The case presents novel questions of New York law, most appropriately determined by the Court of Appeals of New York. That court does not accept questions referred to it by a district court but does accept questions from a federal court of appeals. We hesitate to refer a case with such an empty record.

**REVERSED and REMANDED.**