

“SITTING DOWN ON THE JOB” – AND NOT JUST IN CALIFORNIA

Publication
Sep 3, 2012

(Retail Industry Update, No. 3, September 2012)

You’ve probably heard a lot recently about employees of retail stores in California standing up for their right to sit down on the job. A California state law requires store employees to be provided with seating under certain circumstances, and the courts there have been busy interpreting and applying the law in response to numerous lawsuits.

Employees in states where such laws do not exist have tried to find other ways to force retail stores to let them sit down on the job. By claiming the need for an accommodation on account of disability, employees have challenged policies requiring that they stand when performing cashier or customer service duties.

A recent Georgia case illustrates why retail stores must ensure that job descriptions, training, and employee instructions support the reasons why the essential job duties of cashiers, customer service, or other store positions, cannot be properly performed by an employee who is sitting down on the job.

CALIFORNIA CASES CONTINUE

California law requires employers to provide “suitable seats” when the nature of the work reasonably permits. When the nature of the work requires standing, the law requires an adequate number of suitable seats in reasonable proximity to the work area, for use when employees are not engaged

Related People



C. R. Wright

Partner

404.240.4263

in active duties and the use of seats does not interfere with the performance of their job duties.

In June, a California federal court dismissed a class action against CVS Pharmacy, which alleged that the store failed to provide retail clerks with required seating. The court said in that case that the law does not apply to retail clerks in the stores because the majority of assigned duties must be performed while standing, noting that the store expects and trains cashiers to stand while performing job duties. Target is seeking a similar ruling in a pending California case, arguing that the nature of a cashier's duties does not permit the use of a seat. Cases against numerous other retailers have been met with resistance from employers seeking to avoid having to let employees take a seat.

BUT WHAT IF I NEED "ACCOMMODATION?"

Under the Americans with Disabilities Act (ADA), employers are required to provide reasonable accommodation when necessary to allow an individual to perform essential job duties. Individuals have claimed in some cases that it would be a reasonable accommodation for a retail store to allow cashiers or other store employees to periodically sit down. Courts have been receptive to such claims, particularly when it appears that such requests are reasonable.

For example, in *Talley v. Family Dollar Stores*, the U.S. Court of Appeals for the 6th Circuit sent a case back down for trial saying that a cashier's proposed use of a stool, which had been allowed by her employer in the past, may have been a reasonable accommodation. That case subsequently settled.

On the other hand, a retailer prevailed in a recent case from Georgia, *EEOC v. Eckerd Corp. d/b/a Rite Aid*. This case illustrates how retailers can be in a better position to defend the requirement that their employees stand up while performing job duties, even when the employee has been allowed to sit down in the past.

Fern Strickland had worked for Eckerd's since 1992. She had a note from her doctor indicating that she needed to sit down at work due to severe arthritis. While working for Eckerd's she had been allowed to sit down at work. When Rite Aid took over management, it questioned the need for

her to sit down and requested more information to determine what, if any, reasonable accommodation could be made.

The employee's doctor indicated that Strickland needed to sit down for thirty minutes of every hour at work. The fact that she had been sitting down on the job was causing productivity and personnel problems at the store. Finding that it was not reasonable to allow her to sit during half of her shift, and finding that no other reasonable accommodation was possible, Rite Aid terminated her employment in 2009. The cashier filed an EEOC Charge, and the EEOC filed a lawsuit on her behalf claiming that Rite Aid failed to provide a reasonable accommodation and terminated her employment on account of her disability.

The court found that the cashier job had significant physical requirements, including customer service, housekeeping, unloading, stocking, and other duties listed in the job description. The job description specified that cashiers must be able to regularly stand dynamically, to statically for long periods of time without a break, and occasionally to lift and carry up to 50 pounds.

The job description and management testimony also showed that cashiers are expected to work productively on the sales floor rather than sitting idly. The court found that the proposed reasonable accommodation, sitting down, would eliminate essential functions of the job rather than enable her to perform the required duties. Therefore, the proposed accommodation was found to be *per se* unreasonable.

The EEOC argued that the accommodation was required because the store had allowed her to sit for the past eight years, and that the standing and other duties she could not perform were not essential because she had not been required to do them for so many years. The court noted that when Rite Aid took over, it reduced the payroll budget and increased the expectations of cashiers. Additionally, the court said that just because the employer had been willing to allow the accommodation in the past did not make the accommodation reasonable or required under the ADA.

Because Rite Aid established that the sitting proposal was not reasonable, and because no other reasonable accommodation had been identified or proposed by the cashier despite numerous meetings between her and store management seeking to identify and discuss potential

accommodations, she was found to not be a qualified individual under the ADA.

The court also had to determine whether the requested accommodation was an undue hardship. Finding that Rite Aid's business model was based on lean staffing, and that the store was having trouble maintaining standards because the cashier was not performing required duties, the court concluded that the proposed accommodation would be an undue hardship for Rite Aid under the ADA. The court dismissed the EEOC's lawsuit finding that Rite Aid was justified in terminating the cashier's employment due to the fact that she could not perform the essential functions of the cashier job while seated.

OKAY, WHAT IF I NEED "ACCOMMODATION" AND GO TO TRIAL IN CALIFORNIA?

In the Georgia case, the court ruled in favor of Rite Aid at the summary judgment stage and dismissed the lawsuit before trial. In California, there was another case against Rite Aid brought by a store manager with arthritis – and that case was not dismissed on summary judgment, but went to trial.

Martha Palma worked for Rite Aid for more than 24 years. She said her performance reviews and her production were strong, and she was promoted to the highest position in the store where she worked. In 2010, she was diagnosed with rheumatoid arthritis, and she had to take medical leave. She alleged that Rite Aid afterward tried to manufacture fake reasons for firing her, and that in March of 2011 Rite Aid falsely alleged that it was firing her for "poor work performance," "breaking company protocol" and for "doing everything wrong."

A few months later she filed a lawsuit against Rite Aid, which claimed that it reasonably accommodated her and engaged in an appropriate interactive dialog about her need for accommodation, but also said her claims against the Company must fail to the extent that she could not perform the essential functions of her job after reasonable accommodations were made.

The jury awarded the former manager more than \$3.5 million based on its findings that she was able to perform her essential job duties; that her disability was a motivating reason for Rite Aid to terminate her employment; that she

requested reasonable accommodation and was willing to engage in an interactive process to explore a reasonable accommodation; and that Rite Aid failed to engage in a timely, good-faith interactive process to determine whether reasonable accommodation could be made.

WHAT WORKS?

There is no guarantee that other courts will rule the same way as the court did in the July 2012 Georgia case decision in favor of Rite Aid. But there are things that retail employers can do to make summary judgment dismissal of disability accommodation claims more likely. By implementing sound policies and practices, and by carefully following legal requirements, you will be more likely to prevail if standing requirements are challenged under the ADA. To maintain policies that do not allow employees to sit down at work you should:

- review job descriptions and requirements that say cashiers or other customer service employees must not sit down while working to make sure they are objectively valid (considering the reality of the store situation, staffing, etc.);
- individually evaluate requests from employees who say they should be allowed to sit down while working to determine how much sitting would be required, whether they could still perform all essential job duties, and what hardship would result at the particular store if the accommodation is allowed;
- engage in the ADA-required interactive process of communicating with the employee, the medical provider, and checking other sources to determine whether other accommodations might solve the problem; and
- document all actions taken in exploring accommodations and engaging in the interactive process.

By taking your time and making sure you've done everything correctly you can prevail in such cases. Before firing an employee who wants an accommodation – sit down and think about it.

For more information contact the author at CRWright@fisherphillips.com or (404) 231-1400.

