California Courts Continue To Address "Suitable Seating" Battles

Insights
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The standards for "suitable seating" cases in California were set by the California Supreme Court's landmark 2016 decision of *Kilby v. CVS Pharmacy, Inc.* Ever since this decision was handed down, employers and employee advocates have been battling in the courts and forcing judges to address the scope of an employee's right to "suitable seating." Although debates continue regarding what obligations employers have to provide such reasonable seating, it's not always a slam dunk for employees who demand seats in questionable situations. A common fact pattern arises from cashier positions with variable traffic levels. The workers often file claims seeking a sit-down break when traffic slows down, even though they may have received all legally required rest breaks.

Everyone knows what it's like waiting in a line at a drug store or grocery store while cashiers are busy scanning product codes and ringing up customers. The question often arises, "Should their employer be required to give them a place to sit, even while on the clock and not on a mandatory rest period?" The answer is not always clear, and litigation ensues.

Can They Do That?
In addressing this issue, we start with the Wage Orders promulgated by the Industrial Welfare Commission, a body (now temporarily disbanded) comprised of representatives of both workers and employers. Notably, Wage Order 7-2001 (regulating the mercantile industry) governs wage-and-hour and working regulations for drug and grocery stores. Section 14(A) of the Wage Order requires seats for workers when the *nature of the work* reasonably permits seats. Section 14(B) of the Wage Order further regulates when the employee is not actively working, as follows:

When employees are not engaged in the active duties of their employment and the *nature of the work* requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties.

Although both subsections require an analysis regarding what is meant by the "nature of the work," the Supreme Court rejected the defense argument that the requirements of sections 14(A) and 14(B) are mutually exclusive in terms of the protections afforded to a particular employee. "Both provisions may apply at various times during the workday, though not at the same time."

Court Battles Continue, Sometimes Resulting In Success For Employers

In *Jill LaFace v. Ralphs Grocery Co*. (Los Angeles Superior Court, LASC Case No. 632679), currently on appeal, the trial court determined that the plaintiff failed to establish grounds for relief under Section 14(A) or Section 14(b). The court held that the nature of the work in the busy grocery store did not "reasonably permit" the use of seats while working, and the cashiers were always activity engaged in performing their duties. Therefore, the court ruled, there was no requirement to provide a seat which would *not interfere* with the performance of their duties. Although this case was appealed, it's clear that this case involved a detailed fact analysis which will be rigorously reviewed by any appellate court under the standards of *Kilby*.

In *Kilby,* the Supreme Court determined that the IWC's intended meaning of "the nature of the work" involved a consideration of the intent underlying the seating requirement. The court rejected the employer's argument requiring the court to weigh tasks that permit seating against tasks that required standing. Importantly, the right to reasonable seating based on the "nature of the work" under section 14(A) should be an objective determination based on an analysis of the job as generally performed, not based on the physical differences between employees or accommodation issues relevant to disabled individuals. In other words, the inquiry was not about the nature of the worker. Under this test, the trial court should consider the overall job duties performed at the particular location by *all employees* and determine whether such duties reasonably permit seated work.

The court further reasoned that the proper approach is to "examine subsets of an employee's total tasks and duties by location, and consider whether it is feasible for an employee to perform each set of location-specific tasks while seated." Trial courts should consider more than whether a single task could be performed while seated, but address multiple factors, including: (1) if the duration and frequency of the seated task is negligible; (2) whether being seated would unduly interfere with other standing tasks or the quality and effectiveness of overall job performance; and (3) how to balance an employee's need for a seat with an employer's considerations of practicability and feasibility. Clearly, the employer's business judgment given the physical layout of the workplace have to be carefully examined.

The court further addressed the requirements of section 14(B), which applies when "standing employees are not engaged in the active duties of their employment." When not working, this regulation requires that "an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties."

Importantly, the IWC has stated that section 14(B) applies during "lulls in operation when an employee, while still on the job, is not then actively engaged in any duties." The facts in the recent *Ralphs* case make clear that sometimes courts will find that, given the nature of the job, the cashiers are simply too busy to make seating a reasonable requirement, during ongoing work or occasional lulls in work. Indeed, customers may get the wrong impression seeing a sitting employee in a demanding retail environment requiring constant movement and activity which to onlookers is

significantly and obviously impeded by occasional or frequent usage of chairs, and possibly, dangerous.

Tips For Employers: Be Prepared!

The *Ralphs* case currently on appeal is representative of cases typically filed by plaintiffs' attorneys advocating for employees who demand seats when the employer and employee disagree whether, given the nature of the work, seats are reasonably permitted while work is in progress, and further, whether seats should be provided during disputed lulls in the work day. Because unchecked seating cases could lead to absurd settlements and voluntary work adjustments that go beyond what the law is intended to do, employers should fight claims built on questionable legal foundations. Therefore, before the seating issues arises in litigation, employers seeking to defend possible issues regarding seating should retain legal counsel to assist in addressing the many factors relevant to prevailing on seating issues at trial.

For more information, contact the author here.

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