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CALIFORNIA SUPREME COURT CLARIFIES THE DUTY TO PROVIDE "SUITABLE SEATING"

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By Tom Geidt

On April 4, 2016, in *Kilby v. CVS Pharmacy, Inc.*, the California Supreme Court provided guidance on when, and under what circumstances, an employer must provide its employees with the opportunity to sit down while working. The Court's unanimous decision, authored by Justice Carol Corrigan, was issued in response to several questions posed by the Ninth Circuit Court of Appeals in pending seats litigation involving bank tellers and pharmacy customer service representatives.

Contrary to some news reports, the Court's decision did not bestow a new legal right for California workers to be provided with seats on the job for the first time; rather, this was a clarification of existing "suitable seating" regulations that have been on the books for many years. Until recently, however, these regulations have rarely been enforced. With the advent of California's "bounty hunter" law – the Private Attorneys General Act ("PAGA") – many "seats" lawsuits have been filed, prompting the need for clarification of the ground rules.

The plaintiffs and their advocates argued for a broad interpretation of the seating requirements, while employers argued for a narrower interpretation that would give employers latitude to make business judgments on when it is feasible for employees to remain seated while on the job. The Supreme Court rejected some of the arguments on both sides and adopted a middle ground "totality of circumstances" approach.

Evolution of the Suitable Seating Rules

For more than a century, the Industrial Welfare Commission wage orders have contained a seating requirement of one kind or another. Until 1972, only women and children had a statutory right, in specified circumstances, to be seated while working. In 1972 this right was extended to all employees regardless of age or gender. The seating rules have evolved over the years since then.

Currently, the wage orders contains the following two provisions, both of which have caused considerable confusion as to their proper meaning and how they fit together:

Section 14(A) of the mercantile industry wage order (and most of the other wage orders) provides: "All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats."

Section 14(B) states: "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."

Interpreting this language, the Supreme Court did not decide the merits of the seating lawsuits at issue. It made no broad pronouncements that bank tellers, retail store customer service representatives, or any other categories of workers are, or are not, entitled to seats for any or all of their workdays. However, the Court laid down the following general guidelines:

"Nature of the work." When determining whether the nature of the work reasonably permits the use of seats, courts must examine "subsets of an employee's total tasks and duties by location, such as those performed at a cash register or a teller window, and consider whether it is feasible for an employee to perform each set of location-specific tasks while seated." The Court rejected the employers' argument that courts should use a "holistic" consideration of all the varied tasks that an employee performs during the course of an entire workday.

Thus, where employees perform a mixture of duties throughout the day, some of which clearly require standing (such as stocking shelves) and others arguably could be done while seated (such as working at a cash register), the Court explained that employers should not take an all-or-nothing approach, but rather should focus on "actual work done and tasks grouped by their location." As the Court put it:

> There is no principled reason for denying an employee a seat when he spends a substantial part of his workday at a single location performing tasks that could reasonably be done while seated, merely because his job duties include other tasks that must be done standing.

On the other hand, the Court rejected the plaintiffs' counter-argument that employers must make a task-by-task evaluation of each single task performed throughout the workday, and then provide a seat for each task that can feasibly be performed seated, no matter how brief or infrequent it is.

Relationship of 14(A) and 14(B). The Court clarified that the requirements of Sections 14(A) and 14(B) are not mutually exclusive; both provisions may apply at various times during the workday, though not at the *same* time. 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 Court summarized:

> Taking the two provisions together, if an employee's actual tasks at a discrete location make seated work feasible, he is entitled to a seat under section 14(A) while working there. However, if other jobs duties take him to a different location where he must perform standing tasks, he would be entitled to a seat under 14(B) during "lulls in operation."

"Reasonably permits" standard – factors to be considered. The Court further clarified that whether the work reasonably permits the use of a seat is a fact-specific inquiry to be determined objectively based on the totality of the circumstances. Numerous factors, such as the frequency and duration of tasks, as well as the feasibility and practicability of providing seating, may play a role in the determination.

The Court acknowledged that an employer's "business judgment" is a relevant factor, despite the plaintiffs' arguments to the contrary, but the Court cautioned that the decision cannot be based on an employer's "mere preference." The physical layout of the space is also a relevant factor, but the reasonableness of accommodating a seat in the physical layout remains the ultimate touchstone. The existence of physical differences among employees is *not* a relevant factor, according to the Court; the wage order requires a seat "when the nature of the *work* reasonably permits it, not when the nature of the *worker* does." (Emphasis in original.)

Burden of proof. Finally, the Court explained that if an employer argues there is no suitable seat available, the burden is on the employer to prove unavailability; it is not the employee's burden to show that suitable seating *is* available. On this point, the Court cited the "unambiguous" statement in the wage order that employees "*shall be provided* with suitable seats" when the nature of the work reasonably permits seated work. (Emphasis added.)

Conclusion

The *Kilby* decision provides some helpful guidance for employers and employees on the suitable seating issues, even though its "totality of circumstances" guidance is somewhat abstract and devoid of nuts-and-bolts practical advice on how to apply the seating rules in real-life work settings. Although the Court by no means accepted all of the arguments made by the plaintiffs and their *amici*, its decision leaves the door open for a liberal interpretation of the seating requirements in pending and future litigation. Therefore, *Kilby* is likely to embolden employees and their counsel in prosecuting seating claims before the courts.

In light of this decision, employers should examine their existing policies and practices on allowing or disallowing employees to work while seated. To reduce the risks of litigation, employers should consider making any necessary changes to conform to the principles enunciated by the Court, as best those principles can be gleaned.

If you have any questions about the application of *Kilby* to your work environment, please contact us.

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