APRIL 18, 2016 | LABOR & EMPLOYMENT INTERSECTIONS

Article: California Supreme Court Ruling on Suitable Seating: Legal and Ergonomics Perspectives

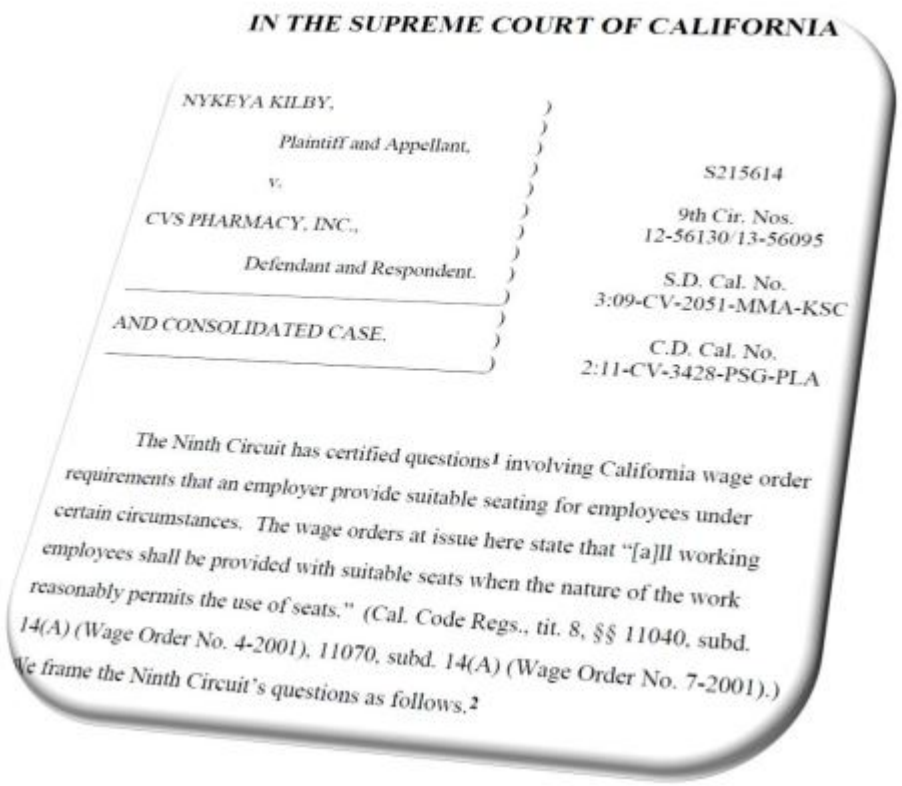
By Andrew J. Sommer, Esq. and Brandy Farris Ware, PhD, CPE, CSSBB

A recent California Supreme Court ruling provides crucial new guidance on how courts should weigh the evidence in so-called "suitable seating" cases, which employee litigants are bringing under the state requirement that employers provide seats to workers where the nature of their work "reasonably permits" the use of seating.

This is a key emerging issue for the Golden State's business community, with a new cottage industry of lawsuits stemming from a state appellate court decision several years ago allowing "suitable seating" litigation under the California Private Attorney General Act (PAGA). The ruling encouraged new lawsuits because penalties as well as attorney's fees and costs may be awarded under PAGA.

The California Supreme Court handed down an opinion April 4, 2016 in response to questions posed by two

law. Employers with locations in California are well-advised to evaluate their work environments in light of these latest developments and consider the need for workplace safety experts to assess their individual circumstances. Not only can such evaluations, based on the new Supreme Court guidance, help employers head off litigation (or at least reach a favorable outcome if sued), they also can lower other risk factors and costs like worker's compensation.



IN THE SUPREME COURT OF CALIFORNIA

NYKEYA KILBY,

Plaintiff and Appellant,

v.

CVS PHARMACY, INC.,

Defendant and Respondent.

AND CONSOLIDATED CASE.

S215614

9th Cir. Nos. 12-56130/13-56095

S.D. Cal. No. 3:09-CV-2051-MMA-KSC

C.D. Cal. No. 2:11-CV-3428-PSG-PLA

The Ninth Circuit has certified questions[1] involving California wage order requirements that an employer provide suitable seating for employees under certain circumstances. The wage orders at issue here state that "[a]ll working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats." (Cal. Code Regs., tit. 8, §§ 11040, subd. 14(A) (Wage Order No. 4-2001), 11070, subd. 14(A) (Wage Order No. 7-2001).) We frame the Ninth Circuit's questions as follows.[2]

The Court adopted a fact-based approach that depends not on the entire job, but on the specific task(s) a worker is performing when the question of seating arises. Accordingly, an expert ergonomics assessment of specific job tasks is critical for California employers. This can help determine not just if seating is reasonable and feasible, but whether it could create new ergonomic hazards or other problems associated with the task in question. These are key questions because the Court held that the "totality of the circumstances" must be evaluated.

The analysis below of California's suitable seating requirement explains how this issue came to the forefront in California, and details the High Court's ruling and the steps employers can take to steer clear of the litigation quagmire.

Origins of Suitable Seating Litigation

In 1911, California enacted legislation requiring employers to:

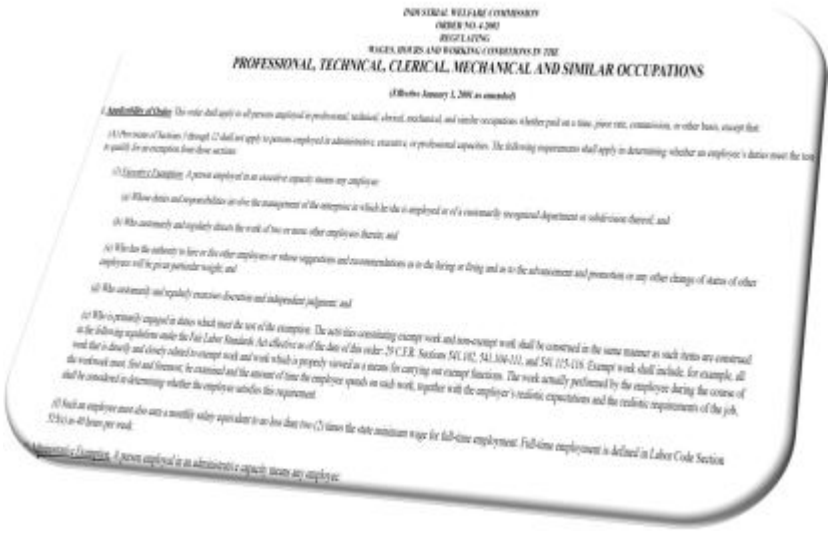
"provide suitable seating for all female employees" and to allow them "to use such seats when they are not engaged in the active duties of their employment."

Over time this provision was incorporated into the wage orders and, ultimately, the wage orders were made applicable to all employees, regardless of gender.

Presently, California's wage orders require employers to:

provide suitable seating for employees "when the nature of the work reasonably permits the use of seats."

(Wage Order 4-2001, 11070 Subd. 14(A); Wage Order 7-2001.) Litigation over suitable seating was minimal until 2010, when the California appellate court in *Bright v. 99 Cents Only Stores* authorized suitable seating lawsuits under the PAGA. The PAGA allows an employee to bring an action for civil penalties for violations of provisions of the Labor Code that do not provide for the recovery of a civil penalty. The prevailing plaintiff in a PAGA action may recover reasonable attorney's fees and costs. Accordingly, the use of PAGA as a vehicle for bringing collective actions for suitable seating violations has provided a substantial financial incentive for plaintiff's attorneys and resulted in a surge in litigation.


INDUSTRIAL WELFARE COMMISSION
ORDER NO. 4-2001
REGULATING
WAGES, HOURS AND WORKING CONDITIONS IN THE
PROFESSIONAL, TECHNICAL, CLERICAL, MECHANICAL AND SIMILAR OCCUPATIONS

As a result, questions have been raised regarding the meaning of the phrases "nature of the work," and "reasonably permits" in the suitable seating context.

California Supreme Court Weighs In

The Ninth Circuit federal Court of Appeals asked the California Supreme Court to answer certain questions about the meaning and application of California's suitable seating requirement. The Ninth Circuit asked for the analysis because it was hearing two appeals of suitable seating cases in federal district court – *Kilby v. CVS Pharmacy, Inc.* and *Henderson v. JPMorgan Chase Bank NA*. The California Supreme Court agreed to answer the Ninth Circuit's questions:

1. Does the phrase "nature of the work" refer to individual tasks performed throughout the workday, or to the entire range of an employee's duties performed during a given day or shift?
2. When determining whether the nature of the work "reasonably permits use of seat, what factors should courts consider?
3. If an employee has not provided any seat, must a plaintiff prove a suitable seat is available in order to show the employer has violated the seating provision?

On April 4, 2016, the California Supreme Court issued an opinion holding that:

the "nature of the work" refers to an employee's "tasks performed at a given location for which

a right to a suitable seat is claimed," rather than a "holistic" consideration of the entire range of an employee's duties anywhere on the job site during a complete shift, as defendants sought. If the tasks being performed at a given location reasonably permit sitting, and provision of a seat would not interfere with performance of any other tasks that may require standing, a seat is required.

The California Supreme Court, in answering the appellate court's second question, also called for evaluating the sum of many relevant factors in making the seating determination. Whether the nature of the work "reasonably permits" sitting is a question "to be determined objectively" based on "the totality of the circumstances." As the Court explained:

An employer's business judgment and the physical layout of the workplace are relevant but not dispositive factors. The inquiry focuses on the nature of the work, not an individual employee's characteristics.

Finally, the Court put the onus on employers to explain why they cannot provide suitable seating if the nature of work and totality of circumstances call for it.

While these answers do not provide a bright-line test on whether seats must be provided in any given situation, they do give employers and their attorneys a great deal of room to argue that seating is not required. They are also almost certainly going to give rise to even more lawsuits.

Emergence of a Fact-Specific Approach

According to the Supreme Court's ruling, the "nature of the work" element is dependent on the particular tasks performed at a given location where the employee at issue is located. While defendants in the two federal cases argued that the courts should take a "holistic" approach that considered all of the employee's tasks and sitting or standing throughout the work day, and weighed them to evaluate whether seating could reasonably be provided, the high court found that argument "sweeps too broadly" and does not consider the duration, frequency and location of various tasks undertaken by the employee, and whether the most common of them could feasibly be performed seated.

But the Court also found that the plaintiff's view that the employer should evaluate whether a single task, in isolation, may be feasibly performed seated was too narrow, and contrary to the reasonableness standard and the flexibility it provides.

Rejecting both sides' proposed approaches, the Court favored a highly fact- and circumstance- based assessment of working conditions. Courts must 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. The Supreme Court added:

Courts should look to the actual tasks performed, or reasonably expected to be performed, not to abstract characterizations, job titles, or descriptions that may or may not reflect the actual work performed.

This analysis, when applied by the courts that are hearing suitable seating complaints under the PAGA, should reduce the likelihood of class certification for groups of employees with the same or similar job titles. With the Court embracing individualized assessments of job duties, locations, task duration, etc., it becomes more difficult for plaintiffs to argue that as a large group, they all share the same circumstances and merit class status.

Importance of an Ergonomic Assessment

Ergonomic assessments have played an important role in the internal evaluation of whether seating is necessary given the nature of the work but also in defending against collective actions.

Suitable seating at its core relates to whether the nature of the work permits a seat. A simple answer to this question would be to provide seats for every task or in every work area. This approach, while it seems to satisfy the ruling, would not necessarily be the best option for the employee because the introduction of a seat in a work space may actually increase awkward postures, forces, and movements that would cause injury instead of providing relief from fatigue or decreasing the risk of injury. The best way to determine the appropriate use of a seat is to perform an ergonomic analysis.

Ergonomic analysis looks at the tasks that are being performed and the capabilities of the individuals performing those tasks to ensure that tasks are being performed in an efficient, consistent way that does not put undue stress on the body and cause injury. Ergonomic analysis can evaluate the nature of the tasks (large and small) and the work environment to determine if the tasks should be performed in a seated or a standing posture.

Ergonomic principles provide established criteria for seated and standing work. Through the application of ergonomics models, an ergonomist can evaluate the tasks, apply appropriate criteria, and evaluate if seated or standing work is recommended. Additionally, a certified professional ergonomist (CPE) can evaluate scenarios where the introduction of a seat may change work-related ergonomic risk factors (such as posture, frequency, and force) that may significantly impact the injury risk.

Nature of the Work

The California Supreme Court's ruling regarding the nature of work provides guidance consistent with ergonomic evaluation techniques that indicate consideration should be given to the duration, frequency, and location of the actual tasks. The evaluation of the *duration* of tasks may include not only the overall duration of the tasks that make up a substantial part of the work day, but also the duration of other significant tasks. The duration of a task along with information related to the presence of other risk factors is a consideration in whether a seat is recommended from an ergonomics perspective.

Along with the duration of tasks, the *frequency* of a task was also noted in the court ruling. Frequency may indicate the overall frequency of an activity or task, such as how often a transaction is occurring; however, there are other frequency considerations from an ergonomics perspective. Frequencies of awkward postures, forces, and manual handling activities have a direct impact on the risk of injury in the workplace, whether it is in a seated or standing position. An evaluation of the risk related to frequency using existing models is an important consideration to evaluate the implications of introducing a seat to tasks that are currently being performed while standing.

When it comes to evaluating the nature of the work being performed, the Court indicated that it was necessary to "focus on actual work done and tasks grouped by their location." The *location* of the work being performed is also a consideration in the ergonomic analysis. The location in which a task or tasks are being performed has a direct impact on the awkward postures, forces, and frequency required to complete a task.

From an ergonomics perspective, the physical layout of a workstation should be designed around the tasks being performed and the characteristics of the task (lifting, bagging, handling, assembling, moving, walking, reaching, etc.). The physical layout of the workstation can provide clues as to the function of the work environment.

An appropriate ergonomic evaluation of the tasks includes these items and documents the duration and frequency of tasks and risk factors, while taking into account the locations in which these tasks are being performed. A key component involves considering all of the individuals working within an area.

The location and physical layout of a workstation and the tasks of other individuals in the same area are important considerations when determining, from an ergonomic perspective, whether a task should be performed in a seated or standing position.

Reasonableness and Feasibility

In addition to the nature of the work, it is important to assess whether a seat can be used safely and effectively within the work environment. This evaluation relates to the reasonableness question in the California Supreme Court's opinion. A review of the tasks will yield guidance as to whether a task can be performed in a seated position; however, additional feasibility considerations are necessary. These may include whether a seat will interfere with other standing tasks, the frequency of transition from sitting to standing and the impact of quality and effectiveness of task performance.

An assessment of the introduction of a seat into the work area and whether it *interferes with other standing tasks* in near proximity may either confirm the use of seats or reveal additional considerations. One major consideration is the extent to which other tasks can be performed within the work area.

- Are employees able to walk around and effectively accomplish other tasks?
- Can employees safely exit the work area if needed?
- Are clearances maintained within the work area?

The ergonomic analysis may have indicated that some portion of the tasks should be performed from a standing position while others may be performed from a seated position. If a seat is provided, what is the *frequency of transitioning between sitting and standing?* The use of established ergonomic models to perform an analysis of the impact of these transitions between sitting and standing will indicate whether additional risk factors are introduced on the employee related to reaching, lifting, or pushing and pulling to accomplish work tasks.

Finally, the consideration of seated or standing work on the *impact of quality and effectiveness* of task performance is important from an ergonomics perspective. Any changes to a task, including changes in work area layout, task location, or the introduction of a seat (for a task that is currently performed while standing) could impact the quality and effectiveness of the tasks that are being performed.

Ergonomists who are cross-trained in industrial engineering techniques can use models to evaluate the impact of these proposed changes to ensure that quality of service and effectiveness are not compromised.

Focus Remains on "Totality of the Circumstances"

Lastly, any comprehensive assessment of the need to provide work seating must take into account the Court's ruling that all factors relevant to a specific job location come into play in making this decision. At its core this is not a rigid calculation using strict ratios of duration of different tasks and other quantitative factors, as the Court made clear in its opinion. This analysis begins by examining the relevant tasks, grouped by location, and whether they can be performed while seated or require standing.

The task-based assessment is balanced against considerations of feasibility. The Court's opinion noted that feasibility may include, for example, an assessment of whether providing a seat would unduly interfere with other standing tasks, whether the frequency of transition from sitting to standing may interfere with the work, or whether seated work would impact the quality and effectiveness of overall job performance. As the Court concluded, the weight given to any relevant factor "will depend upon the attendant circumstances."

Given the complexity of the suitable seating issue and the reality that more lawsuits are coming down the pike, California employers have their work cut out in terms of assessing the ergonomics of specific job tasks and the legal issues involved.

Learn More about California's Suitable Seating Requirements

On **Tuesday, May 3rd at 10:00 AM Pacific**, join Andrew J. Sommer (employment law partner at Conn Maciel Carey) and Brandy Ware (PhD Ergonomist and Principal at JFAssociates) for a **complimentary webinar** about the **legal and practical implications of California's "Suitable Seating" law and litigation landscape**.



This joint webinar by Conn Maciel Carey's Employment Law Practice and the leading ergonomics experts at JFAssociates will review:

1. The California legislation that mandates suitable seating;
2. The First wave of law suits invoking the suitable seating requirements;
3. The California Supreme Court's recent decision and what it means for the future of suitable seating cases; and
4. Practical and expert witness strategies to avoid and defend against suitable seating law suits.

Here is a link to the registration page with more information about this free webinar.