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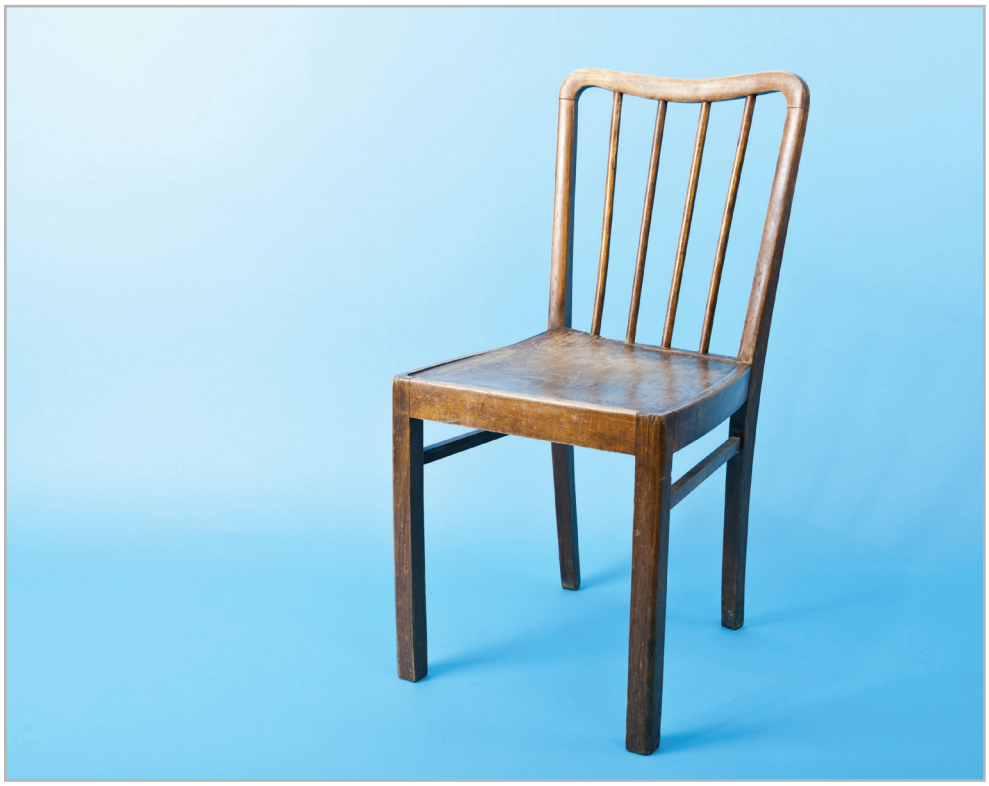

KILBY V. CVS PHARMACY: THE CALIFORNIA SUPREME COURT IN THE DRIVER'S SEAT CLARIFIES SEATING STANDARDS IN THE WORKPLACE

By Tritia M. Murata and Maya Harel

Most of the California Industrial Welfare Commission's industry and occupational wage orders contain a two-sentence provision requiring employers to provide employees with suitable seats "when the nature of the work reasonably permits the use of seats." This provision largely stayed out of the spotlight until a few years ago, when a flurry of class and representative action lawsuits were filed against employers in a variety of industries, alleging violations of the suitable-seating requirement and seeking to recover exorbitant civil penalties on behalf of aggrieved employees who were allegedly

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denied suitable seats. Tasked with resolving two appeals in class actions alleging violations of the suitable-seating requirement, and faced with a glaring lack of precedent on the subject, the Ninth Circuit sought guidance from the California Supreme Court on the meaning of the phrases "nature of the work" and "reasonably permits," as well as who bears the burden of proof in suitable-seating lawsuits. The California Supreme Court's long-awaited decision in *Kilby v. CVS Pharmacy, Inc.* answered the Ninth Circuit's questions, providing some direction regarding the extent of an employer's obligation to provide employees with suitable seats.

The *Kilby* decision makes clear that determining whether the nature of the work reasonably permits use of a seat requires a fact-intensive, multi factor approach that examines discrete workplaces and workstations and considers the totality of the circumstances. With an emphasis on practicality and reasonableness, the court endorsed a common-sense approach to suitable-seating cases, which should nicely complement the common-sense analysis that many employers already undertake when determining whether, when, and where it is feasible to provide seats to employees.

THE UNDERLYING CASES

Plaintiff Nykeya Kilby worked as a customer service representative for CVS Pharmacy ("CVS"), where her duties included operating a cash register, straightening and stocking shelves, organizing products by the sales counter, cleaning the register, gathering shopping baskets, and removing trash. Kilby was not provided a seat to use while performing her daily duties.

Plaintiff Kemah Henderson and three other former employee plaintiffs worked as bank tellers at JPMorgan Chase Bank ("Chase"). Their duties included a variety of tasks both at and away from their teller stations, including accepting customer deposits at their teller stations, cashing checks, handling withdrawals, escorting customers to safety deposit boxes, manning the drive-up teller window, and ensuring the proper functioning of the ATMs.

Kilby and Henderson each brought class actions against their former employers, alleging violations of the suitable-seating provision of the wage orders covering their employment (Wage Order Nos. 7-2001 and 4-2001, respectively), which provide:

A. All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats; and

B. 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.

In *Kilby v. CVS*, the district court denied class certification and granted summary judgment in favor of CVS, finding that an employee's "entire range of assigned duties" must be considered to determine whether the nature of the work permits the use of seats. In *Henderson v. Chase*, the district court denied class certification for lack of commonality, based on variations in duties performed, which differed depending on the shift or branch location and whether the employee was a lead or regular teller. The plaintiffs in both cases appealed.

THE NINTH CIRCUIT SEEKS GUIDANCE FROM THE CALIFORNIA SUPREME COURT

Without any controlling state or federal precedent to guide it, the Ninth Circuit certified three questions regarding California's suitable-seating requirements to the California Supreme Court:

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 a seat, what factors should courts consider?

If an employer 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?

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THE CALIFORNIA SUPREME COURT URGES COURTS TO CONTINUE TO ENFORCE THE SUITABLE-SEATING REQUIREMENT REASONABLY

The California Supreme Court's responses to the Ninth Circuit's questions emphasize the need to take a practical, reasonable, and realistic approach to resolving suitable-seating disputes. *Kilby* does not provide a bright-line test that can be uniformly applied to determine whether the nature of the work performed at any particular location reasonably permits the use of a seat. Instead, it confirms there is no such test. Rather, the determination requires a "totality of the circumstances," case-by-case approach.

Defining the "nature of the work." The defendants submitted that the "nature of the work" requires a holistic approach that considers an employee's job as a whole and looks to all of an employee's tasks and duties throughout a shift. The plaintiffs, on the other hand, argued that the analysis requires a task-by-task evaluation that considers whether a single task can be performed while seated. The court found that defendants' argument "sweeps too broadly" and plaintiffs' view "is too narrow."

The court criticized the plaintiffs' proposed approach as being inconsistent with the flexibility envisioned by the Labor Commissioner's long history of reasonably enforcing the suitable-seating requirement. The court instead adopted a middle ground, clarifying that when evaluating the "nature of the work," courts should look to the tasks and duties actually performed, or that are reasonably expected to be performed, at a particular work area. In other words, the analysis requires a comprehensive assessment by location, such as a cash register or a teller window, rather than by an entire shift. The court explained that when evaluating the tasks at a particular location, "[t]asks performed with more frequency or for a longer duration would be more germane to the seating inquiry than tasks performed briefly or infrequently." This approach is consistent with "[t]he [IWC's] reasonableness standard," which, with "its attendant flexibility, was intended to balance an employee's need for a seat with an employer's considerations of practicability and feasibility."

Clarifying "reasonably permits." The court was clear in stating that "[w]hether an employee is entitled to a seat under section 14(A) depends on the totality of the circumstances." To determine if the nature of the work "reasonably permits" the use of seats, courts must undertake "a qualitative assessment of all relevant factors," including, but not limited to:

- Task-based assessment. An assessment of the relevant tasks that are performed (or are reasonably expected to be performed) at the specific workspace, and the frequency and duration at which each task is performed.
- Feasibility. Considerations of feasibility, including, for example, 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, and whether seated work would impact the quality and effectiveness of overall job performance.
- Employer's business judgment. The employer's business judgment, based on objective standards, and taking into account the employer's evaluation of the quality and effectiveness of overall job performance, the employer's reasonable expectations regarding customer service, and the employer's role in setting job duties.
- Physical layout. The physical layout of the specific workspace, to the extent it informs the expectations of an employee's job duties.

In explaining this approach, the court further emphasized the need for balance between the employer's and employee's interests. "[R]easonableness remains the ultimate touchstone," the court emphasized.

Determining the burden. In examining the language of the suitable-seating requirement, the court found that "[a]n employer seeking to be excused from the requirement bears the burden of showing compliance is infeasible because no suitable-seating exists."

IMPLICATIONS FOR CALIFORNIA EMPLOYERS

With a conscious eye towards feasibility and practicability, the *Kilby* court's analysis of California's suitable-seating requirements falls in line with the common-sense approach many employers already take. Employers' preferences for standing or seated work

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are generally far from arbitrary. Rather, employers will often consider numerous factors, including space limitations, safety concerns, loss prevention concerns, the visual appeal of product displays and store layout, and customer preferences for speed and efficiency, among many other logistical and operational considerations, to inform their decisions. In light of the *Kilby* decision, employers should consider re-examining their seating practices and the tasks performed at work locations where seats are not provided to confirm they are able to articulate objective reasons for not providing seats.

In the context of class actions and PAGA representative lawsuits, the *Kilby* decision's "totality of the circumstances" approach to evaluating whether the nature of the work reasonably permits provision of a seat is not an approach that lends itself to resolution on a class or representative basis. The myriad factors necessary to consider in undertaking the "qualitative assessment" required to determine whether the nature of the work reasonably permits the use of a seat would, in many cases, be unmanageable to resolve on a class or representative basis. Although it remains to be seen how courts will apply *Kilby*'s guidance to the unique facts and circumstances presented in particular cases, it would not be surprising for plaintiffs in suitable-seating cases to find they are hard pressed to demonstrate how proceeding as a class or PAGA representative action is appropriate, given the multitude of individualized assessments necessary to resolve their claims.

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1 *Kilby v. CVS Pharmacy, Inc.*, No. S215614, 2016 WL 1296101, at *1 (Cal. Apr. 4, 2016).

2 Different industry and occupation orders regulate wages, hours, and working conditions in specific industries and occupations, and the majority of the orders contain suitable-seating requirements comparable to those of Wage Order Nos. 4-2001 and 7-2001. Because there is no direct private right of action for violations of the suitable-seating requirement, the suits of plaintiffs Kilby and Henderson alleged violations of the Labor Code Private Attorneys General Act of 2004 (PAGA, Cal. Lab. Code, § 2698, et seq.).

3 The Court cautioned that "an employer may not unreasonably design a workspace to further a preference for standing or to deny a seat that might otherwise be reasonably suited for contemplated tasks" to be performed at that workspace.
