Opinion Analysis: Kilby v. CVS Pharmacy, Inc.

In response to a request from the Ninth Circuit, the California Supreme Court provided definitive guidelines for interpretation of the "suitable seats" requirement of California's wage orders. Although not as frequent a subject of litigation as overtime and misclassification, the provision is the subject of several pending class actions, which should benefit from the new decision.

The "Suitable Seats" Requirement

All but two of the seventeen California Industrial Welfare Commission wage orders contain the following requirement: "(A) All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats. (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." (The requirement is stated a bit differently in Wage Order Nos. 14 and 16, although the "suitable seats when the nature of the work reasonably permits" language that is the subject of the SCOCA decision also appears in those wage orders.)

As the decision explains, the wage order requirement had its origins in concerns about the working conditions for women and children. Originally enacted by the California legislature in 1911, the requirement made its way into a wage order for the mercantile industry in 1919—six years after the Industrial Welfare Commission was established. Since then, the requirement has been the subject of a few Labor Commissioner opinion letters, but it has otherwise received little other official attention.

One prior reported decision ruled that employees could pursue claims for violation of the suitable seat requirement through the Private Attorney General Act under Labor Code section 2699, but it did not discuss the substance of the requirement.

Bright v. 99¢ Only Stores (2010). Another reported decision reversed the denial of class certification in a suitable seat lawsuit, but it likewise did not discuss the substance. *Hall v. Rite Aid Corp.* (2014).

Federal Court Class Actions that Led to the Decision

The Ninth Circuit asked SCOCA to interpret the suitable seat requirement because of questions raised in two class action appeals. *See Kilby v. CVS Pharm., Inc.* (9th Cir. 2013). In the *Kilby* case, the named plaintiff operated a cash register at a CVS store. The U.S. District Court for the Southern District of California denied class certification because the duties performed by cashiers varied widely. In the companion *Henderson* case, the U.S. District Court for the Central District of California denied certification of a class of Chase Bank tellers for similar reasons. Several similar cases remain pending.

Rule 8.548 of the California Rules of Court provides the mechanism for the Ninth Circuit and other federal courts of appeals, the U.S. Supreme Court, and the courts of last resort in other states and jurisdictions to obtain answers to questions about California law where the decision could determine the outcome of a matter pending in the requesting court and there is no controlling precedent.

The *Kilby* Decision

In a rarity for a judicial decision, SCOCA provided concise answers to the specific questions asked by the Ninth Circuit, which it framed and answered as follows:

> "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?"
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> "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 jobsite during a complete shift. 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 called for."

> “2. When determining whether the nature of the work ‘reasonably permits’ use of a seat, what factors should courts consider? Specifically, are an employer’s business judgment, the physical layout of the workplace, and the characteristics of a specific employee relevant factors?”
>
> “Whether the nature of the work reasonably permits sitting is a question to be determined objectively based on the totality of the circumstances. 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.”
>
> “3. 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?”
>
> “The nature of the work aside, if an employer argues there is no suitable seat available, the burden is on the employer to prove unavailability.”

Implications for Future Lawsuits

By rejecting what it called the “holistic” consideration of the entire range of an employee’s duties, and instead requiring an objective determination based on the totality of the circumstances, the California Supreme Court’s decision should make it easier to get classes certified in suitable seat cases. Courts that have previously denied class certification in suitable seat cases––like the two federal courts whose decisions are before the Ninth Circuit––focused on the wide range of duties of the employees before them. With this guidance from the California Supreme Court, they will now likely apply this broader objective determination based on the totality of the circumstances.

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Calvin House is an experienced California lawyer, with 24 civil jury trials and over 100 appellate matters. He has argued three cases in the California Supreme Court (County of Los Angeles v. Superior Court, 21 Cal.4th 292, 981 P.2d 68 (1999); City of Barstow v. Mojave Water Agency, 23 Cal.4th 1224, 5 P.3d 853 (2000) and County of Los Angeles v. Los Angeles County Emp. Relations Com., 56 Cal. 4th 905, 301 P.3d 1102 (2013).

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