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With a Win in *LaFace v. Ralphs Grocery*, Employers Are Now 6-0 in Suitable-Seating Cases

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After a three-week bench trial, the Los Angeles Superior Court has found in favor of Ralphs Grocery in the first suitable-seating case to come to trial after the California Supreme Court's decision in *Kilby v. CVS Pharmacy, Inc.*, 63 Cal. 4th 1 (2016). The court's decision in *LaFace v. Ralphs Grocery Co. et al.*, No. BC632679 (Mar. 20, 2020), is the sixth suitable-seating case decided on the merits in favor of employers, and its conclusions will be helpful to employers defending against various other suitable-seating cases now pending.

Background

Most Wage Orders in California have a suitable-seating provision reading as follows:

> 14. **Seats**.
>
> (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.

California Labor Code section 1198 provides that: "The maximum hours of work and the standard conditions of labor fixed by the commission shall be the maximum hours of work and the standard conditions of labor for employees. The employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the order is unlawful."

Following enactment of the California Labor Code Private Attorneys General Act of 2004 ("PAGA"), Cal. Lab. Code § 2698 *et seq.*, which allows private litigants to sue to recover civil penalties for violations of the state Labor Code, the plaintiffs' bar brought a number of suitable-seating lawsuits under PAGA against California retailers, arguing that under section 14 of Wage Order 7-2001, front-end cashiers, pharmacy workers, and bank tellers, among other employees, are entitled to seats while working.

In one of those cases, *Kilby v. CVS Pharmacy, Inc.*, the California Supreme Court considered the meaning of section 14 and enunciated several operative principles, including:

- The "nature of the work" under section 14(A) refers to work generally performed at a particular work station, and not specific work duties.
- A trial court should take several factors into consideration in deciding whether the nature of the work reasonably permits the use of a seat, including:
  - the frequency and duration each task is performed at the work station;
  - whether providing a seat would be feasible (that is, whether a seat would impact the quality and effectiveness of "overall job performance");
  - the physical constraints of the work station; and
  - the employer's reasonable business judgment that the work is best performed while standing, such as delivering excellent customer service.
- The plaintiff bears the burden of proving that the nature of the work reasonably permits the use of a seat, but if the plaintiff meets that burden, then the defendant bears the burden of showing that no suitable seating exists for the work.

The Supreme Court emphasized that "although the seating requirement was meant to protect workers, its implementation was not absolute," 63 Cal. 4th at 19, and that the reasonableness standard under section 14, with "its attendant flexibility, was intended to balance an employee's need for a seat with an employer's considerations of practicability and feasibility," *id.* at 18. "Whether an employee is entitled a seat under section 14(A) depends on the totality of the circumstances," *id.* at 19-20; to determine if the nature of the work "reasonably permits" the use of seats, a court must undertake "a qualitative assessment of all relevant factors," *id.* at 20.

Before *Kilby*, employers fared well in suitable-seating cases, winning summary judgment in *Hamilton v. San Francisco Hilton, Inc.*, San Francisco Super. Ct. No. 04-431310 (June 29, 2005); *Howard v. Advantage Sales & Marketing, Inc.*, Orange Super. Ct. No. 30-2011-00493843-CU-OE-CXC (June 21, 2013), *aff'd on appeal* (unpublished, May 23, 2014); and *Echavez v. Abercrombie & Fitch Co.*, U.S.D.C., C.D. Cal., No. CV 11-9754 GAF (PJWx) (Aug. 13, 2012) (as to section 14(A) claim only); and trials in *Garvey v. Kmart Corp.*, No. C 11-02575 WHA, 2012 U.S. Dist. LEXIS 178920 (N.D. Cal. Dec. 18, 2012), and *Allen v. AMC Entertainment, Inc.*, Alameda Super. Ct. No. RG11585502 (Aug. 11, 2014). *Indeed, to date plaintiffs have not won a single suitable-seating case on the merits.*

Nevertheless, the plaintiffs' bar viewed *Kilby* as improving their chances of winning suitable-seating cases, primarily because the state Supreme Court rejected the defense argument that "nature of the work" refers to the job as a whole, rather than just one part of it (such as the work performed at a particular work station when the employee works at more than one work stations). In the aftermath of *Kilby*, plaintiffs secured eight-figure settlements in several suitable-seating cases against high-profile retailers.

The Court's Decision in *LaFace*

Plaintiff Jill LaFace was a cashier at the Ralphs grocery store in Valencia. In her PAGA lawsuit against the company, she alleged that she and other Ralphs cashiers reasonably could perform the work of a

cashier while seated under section 14(A) of the Wage Order, and that the company also was required to provide seats during "lulls in operations" under section 14(B) of the Wage Order. The plaintiff sought civil penalties with respect to all Ralphs cashiers in California since 2015.

After a three-week bench trial, Los Angeles Superior Court Judge Patricia Nieto ruled for Ralphs, finding that the nature of the work of a Ralphs cashier does not reasonably permit the use of a seat. Judge Nieto found the evidence was overwhelming that "Ralphs cashiers continuously perform work that should or even must be performed while standing." Statement of Decision ("Decision") at 6.

> Ralphs cashiers are responsible for checking out customer orders while, first and foremost, providing excellent customer service.[] When cashiers check out customer orders, they are continuously moving and multi-tasking throughout the transaction.

Id. (citation to evidence omitted).

> [Cashiers] are scanning, reaching, pulling, pushing, bagging, handling items, accepting payment, moving in and around the checkstands, and exiting the checkstands, among other things. They sometimes use the telephone to make calls. They sometimes place items into customers' shopping carts. These activities, plus many others, require many types of physical movement that would be difficult or unsafe to perform seated.

Id. at 6-7. The plaintiff alleged that the nature of the work at the checkstand is static, not dynamic. Judge Nieto found otherwise:

> Even when standing in front of the scanner, Ralphs cashiers are not standing statically; they continue to engage in constant dynamic movement, including extended reaches, overhead reaches, pulling, pushing, twisting, lifting, and grabbing.

Id. at 7.

Judge Nieto relied heavily on the expert opinion of ergonomist Jeffrey Fernandez, Ph.D., who has testified in a number of suitable-seating cases. Dr. Fernandez visited 30 Ralphs stores to inspect the workstations and observe cashiers at work. He and his team reviewed 140 hours of videos of cashiers performing their work duties. Based on his work, Dr. Fernandez opined that the nature of the work of Ralphs cashiers does not reasonably permit the use of seats, and Judge Nieto credited his opinion. By contrast, Judge Nieto found that plaintiff's expert opinions either were wanting in merit in some respects or actually supported Ralphs' position in the case.

Judge Nieto also found that use of a seat at the checkstand would interfere with standing tasks and create a safety hazard for cashiers and customers; that a "sit/stand" option would not be feasible and would not offer the relief that plaintiff contended it would; that the configuration of the checkstand reasonably did not accommodate a seat and it would not be feasible to reconfigure the checkstand to fit a seat; and that Ralphs' business judgment that providing a seat would pose a safety hazard to cashiers and impair the quality, effectiveness and efficiency of cashier job performance.

Judge Nieto also found that even if the nature of work of a Ralphs cashier would permit the use of a seat, there is no suitable seat available for cashiers to use. Specifically, Judge Nieto noted that Dr. Fernandez reviewed 500 commercially available seats and found none of them to be suitable; that none of the seating options proffered by the plaintiff would work; and that neither a "butt rest" nor a resting bar or rail proposed by the plaintiff was feasible, either.

Finally, Judge Nieto also rejected the plaintiff's section 14(B) theory, noting that *Kilby* explained that section 14 applies only if there are "'lulls in operations' when an employee, while still on the job, is not then engaged in *any* duties." Decision at 25, quoting *Kilby*, 63 Cal. 4th at 19 (emphasis in original, citation omitted). Judge Nieto found that a Ralphs cashier is always busy with job duties and does not experience a lull in operations when he or she could sit.

Significance of *LaFace*

LaFace did not make any new law; Judge Nieto diligently applied *Kilby*, weighed the evidence and concluded that the nature of the work of a Ralphs cashier does not reasonably permit the use of a seat. The facts of the case carried the day.

But what Judge Nieto found about the nature of the work of a Ralphs cashier surely resonates with anyone who has patronized a grocery store. It is the same finding that the court made about Kmart cashiers in *Garvey v. Kmart Corp*., 2012 U.S. Dist. LEXIS 178920, at *35 (noting that Kmart front-end cashiers worked like "whirling dervishes"). And in light of the decision, it is hard to imagine how a different plaintiff could have presented a materially different factual scenario about the work of any grocery cashier.

Moreover, much of what Judge Nieto found about the Ralphs cashier position is applicable to a host of other retail cashier positions, including those at "big box" discount retailers, department stores, and drug stores.

Judge Nieto's decision in *LaFace* should strengthen the hand of employers in defending against suitable-seating cases and negotiating settlements with them, and give the plaintiffs' bar pause whether, after their sixth straight loss, suitable-seating cases in the retail context really are winnable.

Still, employers should thoughtfully consider whether those jobs for which they do not provide seats require standing, so that if they are sued over the issue, they can be confident of a successful outcome as in *LaFace*.

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