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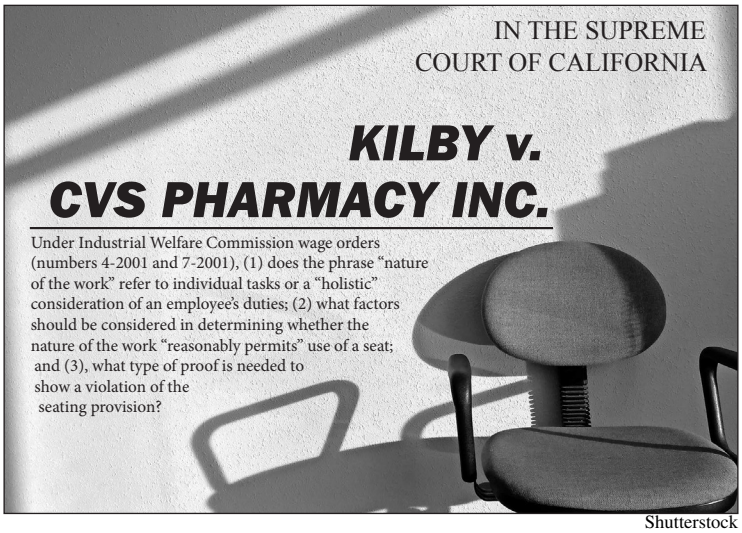
PERSPECTIVE

Seating ruling not as big as some say

By Katherine Forster



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Contrary to what some early commentators have suggested, the California Supreme Court's ruling in *Kilby v. CVS Pharmacy Inc.*, 2016 DJDAR 3230 (April 4, 2016), does not portend sweeping changes in workplace seating practices. The court repeatedly emphasized practicality and feasibility. Indeed, the analytical framework provided by the court all but invites the lower courts to reach results consistent, in many if not most instances, with existing industry practices and common sense.

At the outset, it is important to recognize that *Kilby* did not adopt the position taken by the plaintiff employees who brought the underlying lawsuits and other, similar lawsuits across the state. In fact, the court expressly rejected their position, which would have analyzed each job duty in isolation to determine whether it can be performed while seated.

Instead, the court announced a standard that looks to the totality of the circumstances in evaluating whether all of the duties done at a particular work location (e.g., at a workstation), taken together, reasonably permit the use of a seat. Although limited to duties performed at a particular location, this is otherwise remarkably similar to the "holistic" approach urged by the employer defendants, which would have considered all job duties performed throughout the day.

The announced standard also accounts for numerous factors that employers had cited as important and that plaintiffs in seating cases had sought to ignore. First, the reasonableness analysis is subject to an important limitation: "If 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*, then a seat is called for." Such interference may arise from, among other things, "the relationship between the standing and sitting tasks done there, the frequency and duration of those tasks with respect to each other, and the ... frequency of transition between sitting and standing."

In many real-world settings, it is exactly this sort of interplay that makes the provision of a seat unworkable. In rejecting the plaintiffs' contention that a seat is required whenever some isolated job duty could be performed while seated, the court made clear that common sense must prevail. A substantially more nuanced analysis is required that does not artificially isolate individual duties from their day-to-day operational context.

Second, the court shared the employer defendants' concern that seating could interfere with the "quality and effectiveness of overall job performance." The employer defendants had stressed that their business judgment must be considered as part of the analysis, since employees in many work settings cannot perform as effectively if seated.

As one example, in the retail context, employees are typically expected to help monitor for theft. Moreover, as the court acknowledged, "[p]roviding a certain level of customer service is an objective job duty that an employer may reasonably expect." Such duties, and others, may require standing. Plaintiffs had maintained that such performance concerns were irrelevant and, if considered at all, would undermine the remedial purpose of the seating regulation. But the court made clear that, while an employer may not *arbitrarily* define certain duties as requiring standing so as to avoid providing seats, an employer's reasonable expectations and business judgment are entitled to consideration as part of the analysis.

Third, the court confirmed that the physical layout of the workspace, another factor that plaintiffs had sought to exclude from the analysis, should be considered as well. Although an employer may not unreasonably design a workplace so as to further a preference for standing or to deny seating where it is otherwise reasonable, courts may consider the physical realities of the workspace in evaluating whether a seat is appropriate. To take another example from the retail context, designing checkout stands to improve customer service and prevent theft is far from arbitrary, and these are exactly the sort of common sense considerations that the court's analysis embraces.

In many instances, the analysis under the framework announced in *Kilby* is unlikely to differ materially from what an employer has already considered in determining whether to provide a seat. Employer preferences for standing are generally not derived from a conscious desire to deprive employees of a chair. Rather, such preferences are typically informed by workflow, logistical matters, safety considerations, performance and operational needs, space constraints, and the like. Indeed, nothing in the Supreme Court's opinion leads to the conclusion that longstanding industry norms developed over the years based on exactly these sorts of considerations are improper.

It certainly behooves employers to review their practices carefully to be sure they are in compliance, because the potential exposure in this type of litigation can be substantial. Some employers may in the near term opt to provide seats for the avoidance of doubt, even if a seating challenge would ultimately fail on the merits. But *Kilby* hardly mandates change across the board, and instead makes clear that common sense business and other considerations matter a great deal.

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