No. S215614

SUPREME COURT OF THE STATE OF CALIFORNIA

NYKEYA KILBY, individually and on behalf of all others similarly situated,

Plaintiff-Petitioner,

v.

CVS PHARMACY, INC.

Defendant-Respondent.

SUPREME COURT
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Questions Certified by Request of the
United States Court of Appeals for the Ninth Circuit
Case No. 12-56130

DEFENDANT-RESPONDENT CVS PHARMACY, INC.'S ANSWER BRIEF

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INTRODUCTION

This case raises far-reaching questions about when California employees are entitled to seats during their work period. Since 1919, the Industrial Welfare Commission (IWC) has included a "suitable seats" provision in various Wage Orders, and in 1976 applied it to all industries in California. As the IWC summarizes: "Seats are required where the job permits the use of seats, and employees who have to stand at work are to have a place nearby where they can sit when there are lulls in operations." To determine whether a job permits the use of seats, the Division of Labor Standards Enforcement (DLSE), which is responsible for enforcing the Wage Orders, considers the *totality of the circumstances* of an employee's work. Effectively, the DLSE uses a holistic analysis. Repeatedly, the IWC has endorsed this interpretation and enforcement approach.

For the majority of the past 90 years, only the State could enforce the seating provision. It did so sparingly, which was no accident and not for lack of funding. As the IWC made clear when it incorporated the seating provision into the 1976 Wage Orders, enforcement of the provision must be "flexible" and "reasonable" and has been so under the DLSE's oversight.

The Labor Code Private Attorneys General Act (PAGA) of 2004 gave employees for the first time the power to bring civil actions on the DLSE's behalf to enforce the labor laws in California. Rather than stepping into the shoes of the DLSE as the Legislature envisioned when enacting PAGA, Kilby and employees of other large box retailers and banks have used PAGA as an invitation to press their own liability theories that are inconsistent with the approach taken by the DLSE and IWC. Plaintiffs under PAGA are supposed to be proxies for the DLSE, not innovators in enforcement.

Indeed, several years after PAGA's passage, employees have brought numerous suitable seats claims premised on a fundamentally different vision of the seating provision than enforced by the DLSE or promulgated by the IWC. Like Kilby, these plaintiffs have asserted that whenever an employee is engaged in a task that can objectively be performed while seated, the employer must provide the employee with a seat for that task. Under this isolated duty approach, plaintiffs argue that employees in the retail environment are entitled to a seat while using a cash register, even if certain duties at the register require standing, the employer has a business reason for requiring them to stand while at the register, and it is unclear what type of seat, if any, would actually allow the employee to perform the job fully, safely, and efficiently. Countless jobs in various industries that have traditionally, and with good reason, required standing under DLSE's oversight and guidance would suddenly require a seat under this new interpretation.

Plaintiffs' proposed interpretation of the suitable seating provision is inconsistent with its plain language, its administrative history, and its interpretation by the lower courts that all support the totality of the circumstances approach. Further, the DLSE's interpretation is entitled to great deference because the IWC has essentially incorporated the DLSE's approach into the seating provision. Employers in diverse industries throughout California have significantly and reasonably relied upon the DLSE's interpretation of the seating provision, and a judicial departure from this interpretation would call into question whether employers received fair notice of what the provision requires.

The certified questions of how to interpret the seating provision are all guided by the totality of the circumstances test. First, "nature of the work" refers holistically to all of an employee's duties as reasonably defined and expected by the employer and as actually performed by the

employee, and should take into account, among other things, the disruptive transitions between standing-required and sitting-permitted duties, if any. Second, whether the work "reasonably permits" a seat depends upon all relevant factors, including the employer's business judgment for requiring standing, industry practices, the workplace layout, actual duties performed, and the effect of employees' physical characteristics. Third, plaintiff must prove there is a "suitable seat" that would permit him or her to fully perform the job while seated; otherwise, it cannot be said that the nature of the work reasonably permits a seat. Courts already apply a totality of the circumstances test in several employment contexts and can effectively do so in determining whether the "nature of the work reasonably permits the use of seats." By comparison, Kilby's isolated duty approach creates an unworkable test for employers and courts to follow that was never intended by the IWC, is not reflected in the provision's plain language, and would not be enforced by the DLSE in its own discretion.

STATEMENT OF THE CASE

A. Legal Framework

The IWC has promulgated 16 Wage Orders covering specific industries and has included the seating provision in each one.[1] (Cal. Code Regs., tit. 8, §§ 11010–11160.) These industries include: manufacturing; personal services; canning; professional, technical, clerical, and mechanical work; public housekeeping; mercantile work; transportation; amusement and recreation; broadcasting; motion pictures; agriculture; household work; construction, drilling, logging, and mining. (*Ibid.*) The Wage Order at issue is 7-2001, which applies to the mercantile industry. This industry alone spans a diverse range of retail and wholesale businesses that includes

[1] The language of the provision is slightly modified in Wage Order 14-2001, for agricultural occupations, and Wage Order 16-2001, for on-site occupations in the construction, drilling, logging, and mining industries.

the drug stores at issue here, retail stores more generally, gas stations, auction houses, florists, opticians, mail order houses, and rummage sales. (DLSE, Which IWC Order? Classifications (March 2013) p. 21, *available at* http://www.dir.ca.gov/dlse/WhichIWCOrderClassifications.pdf.) Thus, the seating provision affects the vast majority of California employees, both non-exempt and exempt, and employers, both big and small. Given the broad range of employment situations that the seating provision covers, the IWC has recognized that it must be "flexible" and "reasonable." (Plaintiff-Appellant's Request for Judicial Notice (RJN), Dkt. 10, Exh. 2, p. 16.[2])

The seating provision is contained in Section 14 of the Wage Orders, which states:

> (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.

(Cal. Code Regs., tit. 8, § 11070, subd. 14.) As summarized by the IWC, "[s]eats are required where the job permits the use of seats" under Section 14(A), and "employees who have to stand at work are to have a place nearby where they can sit when there are lulls in operations" under Section 14(B). (RJN, Exh. 1, p. 3.)

The seating provision has been included in Wage Orders since 1919 in various forms and was "established to cover situations where the work is usually performed in a sitting position with machines, tools or other

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[2] The briefs, excerpts, and motions for judicial notice filed in the Ninth Circuit are identified initially by docket number and are subsequently cited in short form as indicated.

equipment." (Supplemental Excerpts of Record (SER), Dkt. 30, at p. 252; Excerpts of Record (ER), Dkt. 29, at p. 52.) It "was not intended to cover those positions where the duties require employees to be on their feet." (SER at p. 252.) The Wage Orders also include mandatory rest periods, which provide employees who have to stand while working with regular opportunities to sit during their work period. (*Ibid.*; See Cal. Code Regs., tit. 8, § 11070, subd. 12.)

The DLSE is tasked with enforcing Wage Orders, and the IWC has found that the seating provision "has proved to be useful and workable as the [DLSE] has reasonably enforced it." (RJN, Exh. 2, p. 16.) But, with the passage of PAGA in 2004, employees may initiate private civil actions under PAGA, which effectively removed some of the DLSE's enforcement oversight.[3]

PAGA actions are intended to "supplement enforcement actions" and are brought on the DLSE's behalf. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 986 (*Arias*).) Individuals who successfully litigate a PAGA claim are entitled to 25 percent of the civil penalties recovered. (*Id.* at p. 981; *Kilby v. CVS Pharm. Inc.* (9th Cir. 2013) 739 F.3d 1192, 1196 (*Kilby*) [under Lab. Code, § 2699, subd. (f)(2), "the civil penalty is one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation"].) However, reflective of the fact that a PAGA action is brought in the agency's shoes, the remaining 75 percent of penalties go to the Labor and Workforce Development Agency. (*Arias*, *supra*, 46 Cal.4th at p. 981.)

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[3] This Court has not addressed whether a claim under the seating provision can be brought as a PAGA action, and litigants continue to dispute the issue, but it will be assumed for purposes of this appeal that PAGA applies. (See *Bright v. 99¢ Only Stores* (2010) 189 Cal.App.4th 1472, 1481 [concluding that PAGA's civil penalties are available for a violation of the suitable seats provision].)

Several years after PAGA's passage, a rash of suitable seats claims have been brought in state and federal court as putative class actions against a range of employers under Wage Order 7-2001 and parallel Wage Orders for other industries. (See Letter from Kilby's Counsel to the Court, dated Jan. 23, 2014, Exh. A [listing pending and closed seating cases].) A number of these cases, like this one, have involved retail-store cashiers. (See *ibid.*)

B. Factual Background

Kilby worked as a CVS cashier for eight months in 2008 before being terminated for abandoning her job. (Defendant-Appellee's Answering Brief (AB), Dkt. 14, p. 5 and record citations therein.) The duties Kilby performed included operating a cash register, straightening and stocking shelves, organizing candy and batteries in front of the sales counter, facing and stocking the tobacco section behind the sales counter, cleaning the register, vacuuming, gathering shopping carts and hand baskets, and handling trash. (*Id.* at pp. 5–6; *Kilby v. CVS Pharm., Inc.* (S.D. Cal. May 31, 2012, No. 09cv2051) 2012 WL 1969284, p. *2.) Kilby conceded that most of these tasks could not be performed while seated and that, although certain tasks at the cash register could be performed while seated, not all of them could. (AB at pp. 6–7; *Kilby v. CVS Pharm., Inc., supra*, 2012 WL 1969284, at p. *2.) For instance, cashiers must stand at the register area when they are gathering or helping lift merchandise to be purchased, retrieving locked or behind-the-counter merchandise for customers to purchase, scanning bulky or heavy items, and bagging merchandise. (*Kilby v. CVS Pharm., Inc., supra*, 2012 WL 1969284, at p. *5.)

CVS's top value, as stated in its employee training manual, is customer service. (AB at p. 7.) As Kilby was aware when hired, it is CVS's business judgment that cashiers provide better customer service by

standing, as opposed to sitting or leaning, including while operating a cash register. (*Id.* at p. 8.) CVS trains cashiers how to be most efficient at check out by scanning and bagging an item in one motion, and keeping aware of the number of customers in line and calling for an additional cashier when needed to avoid long customer lines. (*Id.* at pp. 8–9.) Moreover, CVS believes that a standing cashier will be better able to see customers approach, assist them as necessary, and observe attempts to shoplift. (*Id.* at p. 11.) Whenever there are no customers waiting to check-out, cashiers are expected to perform other tasks in the store such as stocking, straightening, and cleaning. (*Id.* at p. 9.)

CVS believes that standing and mobility are critical functions of the cashier position. (AB at p. 10.) The goal of providing excellent customer service requires employees to be at the ready to help customers and, in CVS's view, a standing cashier projects a sense of anticipation, attentiveness, and readiness to serve. (*Ibid.*) CVS also believes that a sitting cashier appears less welcoming, productive, and ready to serve its customers, and may appear lazy and disinterested. (*Ibid.*) In fact, CVS has received customer complaints when employees were sitting down—either with and without permission—from customers who did not feel that the seated employees were providing adequate customer service. (*Id.* at p. 11.)

C. Procedural History

Kilby brought this putative class action in the U.S. District Court for the Southern District of California on behalf of 17,000 current and former CVS cashiers alleging that CVS failed to provide a suitable seat for them at check-out stations in violation of Section 14(A). (*Kilby v. CVS Pharm., Inc., supra*, 2012 WL 1969284, at p. *1; *Kilby v. CVS Pharm., Inc.* (S.D. Cal. Apr. 4, 2012, No. 09cv2051) 2012 WL 1132854, *4.) Kilby did *not* allege that CVS failed to provide suitable seating for cashiers to use when not engaged in active work under Section 14(B). (*Kilby v. CVS Pharm.,*

Inc., supra, 2012 WL 1969284, at p. *3, fn. 3.) The court denied Kilby's motion for class certification under Federal Rule of Civil Procedure 23 and granted CVS's motion for summary judgment under Federal Rule of Civil Procedure 56. (*Id.* at *1 [summary judgment]; *Kilby v. CVS Pharm., Inc., supra*, 2012 WL 1132854, at p. *1 [class certification].)

With regard to the motion for class certification, the court found that Kilby failed to establish commonality in several respects. (*Kilby v. CVS Pharm., Inc., supra*, 2012 WL 1132854, at p. *4.) First, the evidence showed that cashiers' "job duties are inconsistent from day to day, shift to shift, or even from store to store." (*Id.* at p. *6.) Because the question of whether the nature of the work reasonably permitted the use of a seat would take into account all of these duties, the court found that it "would need to engage in an individualized, fact-intensive analysis to determine how each [cashier] spends his or her time." (*Ibid.*) Further, because each CVS store has unique check-out stations, "the changes necessary to accommodate a seat at one particular check-out station would not necessarily work at another register," and would "require an individualized analysis." (*Ibid.*) For the same reasons, the court found that Kilby failed to establish that common questions predominated over individual ones. (*Ibid.*) Separately, the court found that Kilby did not demonstrate the superiority of a class action because she could pursue a representative PAGA action individually. (*Ibid.*)

As part of the motion for class certification, Kilby submitted a report by an ergonomics expert who opined, without support, that seats could be installed in California CVS check-out stations with low-cost modifications. (*Kilby v. CVS Pharm., Inc., supra*, 2012 WL 1132854, at p. *3.) The district court struck this conclusion after finding that the expert conducted only two site visits to stores outside the state and did not account for

variations at different stores; did not substantiate that proposed seats could be physically installed; and did not provide a cost analysis. (*Ibid.*)

With regard to the motion for summary judgment, the district court found that the nature of Kilby's work did not reasonably permit the use of a seat under the relevant circumstances. (*Kilby v. CVS Pharm., Inc., supra*, 2012 WL 1969284, at p. *7.) The court first addressed the threshold dispute at issue here: whether the "nature of the work" is properly understood as referring to the employee's job duties taken together or a single duty in isolation. (*Id.* at p. *3.) Based on the plain language and structure of Section 14, the court concluded that it requires a holistic consideration of all duties. (*Id.* at pp. *4–5.) In addition, the court determined that CVS's business judgment was relevant to whether the nature of the work reasonably permitted the use of a seat because a cashier's job is not just to complete transactions, but also to fulfill CVS's customer service expectations and goals. (*Id.* at p. *6.) Because the majority of Kilby's duties could not be performed while seated, including certain duties while operating the cash register, and CVS had legitimate business reasons for requiring Kilby to stand while performing her duties at the cash register and elsewhere, the court determined that the nature of her work did not reasonably permit the use of a seat for purposes of Section 14(A). (*Id.* at pp. *6–7.)

Kilby appealed to the Ninth Circuit Court of Appeals, which requested supplemental briefing as to whether the court should certify questions to this Court on how to interpret Section 14. (See Dkt. 36–38.) Following briefing and oral argument, the Ninth Circuit certified three main questions about the interpretation of "nature of the work," "reasonably permits," and "suitable seats," as used in the section. (*Kilby, supra*, 739 F.3d 1192, 1193–1194.)

The court noted the tremendous potential impact of these questions. Given the ubiquity of the suitable seats provision throughout all of the industry Wage Orders—and not just the two Wage Orders at issue in the companion cases that were certified—Section 14's interpretation "could have a dramatic impact on public policy in California as well as a direct impact on countless citizens of [the] state, both as employers and employees." (*Kilby, supra*, 739 F.3d 1192, 1196.) Depending on how the provision is defined, "liability could be imposed upon a large number of employers throughout California," and "thousands," or hundreds of thousands, "of employees [could] be entitled to seats" while performing their work. (*Ibid.*) The Ninth Circuit concluded that the "consequences of a particular interpretation," and the ripple effect of imposing liability in these cases, "would most appropriately be considered and weighed" by this Court. (*Ibid.*)

CERTIFIED QUESTIONS

1. Does the phrase "nature of the work" refer to an individual task or duty that an employee performs during the course of his or her workday, or should courts construe "nature of the work" holistically and evaluate the entire range of an employee's duties?
    a. If the courts should construe "nature of the work" holistically, should the courts consider the entire range of an employee's duties if more than half of an employee's time is spent performing tasks that reasonably allow the use of a seat?
2. When determining whether the nature of the work "reasonably permits" the use of a seat, should courts consider any or all of the following: the employer's business judgment as to whether the employee should stand, the physical layout of the workplace, or the physical characteristics of the employee?

3. If an employer has not provided any seat, does a plaintiff need to prove what would constitute "suitable seats" to show the employer has violated Section 14(a)?

ARGUMENT

The certified questions examine what it means for the "nature of the work" to "reasonably permit" the use of a "suitable seat." While the questions address each of these phrases individually, they are best understood as part of a totality of the circumstances test or holistic approach, as explained by the DLSE and adopted by the district court in this case. Under this test, the "nature of the work" refers to all duties performed and "reasonably permits" depends upon all relevant circumstances, including the feasibility of a "suitable seat" that would allow the employee to fully, safely, and efficiently perform the work. This approach is supported by the plain language of the seating provision, the IWC and DLSE's longstanding articulation and enforcement of the provision, and the provision's administrative history.

Although the certified questions do not specifically call for the articulation of an overall test in applying the seating provision, without one the Court's interpretation would fail to provide a cohesive approach for trial courts to follow. By adopting the DLSE's totality of the circumstances test, the Court will provide the necessary guidance in this case and others. Indeed, courts are already accustomed to totality of the circumstances tests in several civil and criminal contexts, and specifically in the employment context. (See, e.g., *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 541 [describing that "a trial court must review and base its summary judgment determination on the totality of evidence in the record" relating to the alleged employment discrimination]; *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1036 ["in determining whether an employee has been subjected to treatment that materially affects the terms and conditions of

employment, it is appropriate to consider the totality of the circumstances"]; *Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 337 ["'the totality of the circumstances' must be examined to determine whether the parties' conduct, considered in the context of surrounding circumstances, gave rise to an implied-in-fact contract limiting the employer's termination rights"]; see also *Shin v. Ahn* (2007) 42 Cal.4th 482, 499–500 [to determine the reasonableness of a golfer's conduct, "the trier of fact will have to consider both the nature of the game and the totality of circumstances surrounding" the conduct].)

Kilby's novel approach ignores several important factors by focusing exclusively on whether a single duty, in isolation, objectively allows for the use of a seat—not, as the provision requires, whether it is reasonable to use a seat under the particular circumstances of the job. Especially because Kilby is bringing her PAGA action as a proxy for the DLSE, there is no basis for rejecting the DLSE's well-supported totality of the circumstances approach.

I. THE PHRASE "NATURE OF THE WORK" REFERS HOLISTICALLY TO THE FULL RANGE OF AN EMPLOYEE'S DUTIES RATHER THAN AN ISOLATED DUTY FOR DETERMINING WHETHER THE WORK REASONABLY PERMITS THE USE OF A SEAT.

A. By its plain language and context, the phrase "nature of the work" refers holistically to the full range of an employee's duties.

The phrase "nature of the work" appears twice in Section 14. Subsection (A) addresses when "the *nature of the work* reasonably permits the use of seats." (Emphasis added.) Subsection (B) addresses when "the *nature of the work* requires standing." (Emphasis added.) Although the Wage Order does not define the term "work" or the phrase "nature of the work," the ordinary sense of these words, and the contextual clues in Section 14, compel the holistic approach.

To start, the word "work" is commonly used to mean one's job in general. When people ask "how's work?" or say that they "left work" or "went back to work" they are referring to a job as a whole, not an individual task or duty. This Court has often used "work" in this sense. (See, e.g., *People v. Harris* (2013) 57 Cal.4th 804, 816, 820 [describing someone coming "home from work" and a mother going "back to work" after staying home with her children]; *People v. Bacon* (2010) 50 Cal.4th 1082, 1090, 1094 [describing that someone "left work at 5:28 p.m." and that someone else had "taken Wednesday and Thursday off from work"]; See also *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal.4th 1094, 1103 [the terms of Wage Orders "are to be given their plain and commonsense meaning"].) Although the word "work" can alternatively refer to an isolated task, dictionaries define it in the employment context to mean a person's overall job. (Black's Law Dict. (9th ed. 2009) p. 1742 ["Physical and mental exertion to attain an end, esp. as controlled by and for the benefit of an employer; labor."]; Merriam-Webster's Collegiate Dict. (11th ed. 2003) p. 1443 [explaining that "work" is synonymous with "employment" and "occupation" and "mean[s] a specific sustained activity engaged in esp. in earning one's living"]; see also *In re De La O* (1963) 59 Cal.2d 128, 153 ["Words used in a statute are ordinarily to be construed according to the context."].)

Similarly, the IWC uses the term "work" throughout the Wage Order to refer to an employee's performance of his or her job in general. For example, "hours worked" is defined as all the time that an employee is "suffered or permitted to work." (Cal. Code Regs., tit. 8, § 11070, subd. 2(G).) A "day's work" for purposes of overtime provisions is "eight hours of labor." (*Id.* at subd. 3(A)(1).) The Wage Order also refers to when an employee is "required to report for work." (*Id.* at subd. 5.) And, employers

must post a copy of the Wage Order in an area frequented by employees, unless the "location of work" makes it impractical. (*Id.* at subd. 22.)

Although Kilby attempts to define "work" as "duty," the IWC uses the two terms as separate concepts in the Wage Order, and in Section 14 specifically. Section 14 provides that:

> (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.

(Cal. Code Regs., tit. 8, § 11070, subd. 14 [emphasis added].) The use of these two different terms indicates that the IWC did not view them as synonymous. (*Las Virgenes Mun. Wat. Dist. v. Dorgelo* (1984) 154 Cal.App.3d 481, 486 ["we apply the rule of construction that when different terms are used it is presumed that different meanings are intended"].) Further, the Wage Order does not refer to any singular "duty" of an employee, but only to the employee's "duties" as a whole. It is clear from the context of Section 14 that the IWC could have used the singular term "duty" if it intended that meaning.

Another contextual clue that "work" refers to all duties is the IWC's use of the clause "nature of." The "nature" of something refers to "the inherent character or basic constitution of a . . . thing" or its "essence." (Merriam-Webster's Collegiate Dict. (11th ed. 2003), *supra*, p. 826.) "Nature of the work" implies that the essence of the work must be distilled or generalized. That makes sense if work is comprised of many duties, but not if work refers to a single duty. There is no need to determine the

essence of a particular task or duty—it is what it is. For example, one of Kilby's job duties was to "operate a cash register." (*Kilby v. CVS Pharm., Inc., supra*, 2012 WL 1969284, at p. *2.) The "nature of" this duty is operating a cash register. The phrase "nature of" is superfluous in this context. (See *Brinker Rest. Corp. v. Superior Court*, 53 Cal.4th 1004, 1029 [each word should be given effect].) But, to determine whether all of Kilby's duties would reasonably permit the use of a seat, it becomes necessary to distill the "nature of the work." Among other things, Kilby was required to "operate a cash register," "greet each customer," "price merchandise," stock shelves," "answer the telephone," and "react to potential shoplifters." (*Kilby v. CVS Pharm., Inc., supra*, 2012 WL 1969284, at p. *2.) As the district court found, the nature, or the essence, of all of these duties together does not permit the use of a seat. (*Id.* at pp. *5–7.)

Kilby's attempt to equate the terms "work" and "duty" ignores these common meanings and contextual clues. First, Kilby focuses on the word "when." (Petitioner's Opening Brief (OB) pp. 19–21.) Kilby argues that, by requiring employers to provide suitable seats "when the nature of the work" reasonably permits the use of seats, the IWC intended that employers provide seating throughout the work period whenever an individual duty could reasonably be accomplished while seated. (*Ibid.*) In support of her argument, Kilby defines "when" as "at or during the time that," or "at any or every time that." (*Id.* at p. 20.) But the same dictionary also defines "when" as "in the event that" or "if." (Merriam-Webster's Collegiate Dict. (11th ed. 2003), *supra*, p. 1424.) Read in context, it becomes clear that the word "when" as used in Section 14(A) is conditional—"employees shall be provided with suitable seats [if or in the event that] the nature of the work reasonably permits the use of seats."

Kilby next suggests that the IWC would have used the same test that it uses in the Wage Orders for overtime exemptions if it had meant "nature of the work" to refer to all duties rather than each duty individually. (OB at pp. 22–23.) Employees qualify for exemptions if they are "primarily" engaged in duties that meet the exemption test. (*Id.* at p. 23.) According to Kilby, the IWC could have included "primarily" if it intended the "nature of the work" to be a comparative assessment of standing-required and sitting-permitted duties. (*Ibid.*) But this phrasing contains a quantitative test that, as discussed below, neither Kilby nor CVS believes the IWC intended. (See *post*, section I-E; OB at pp. 30–33.)

The plain language of Section 14 and the DLSE's guidance has led federal district courts to uniformly adopt the holistic approach and reject an isolated duty approach. For example, in *Echavez v. Abercrombie & Fitch Co.*, the court rejected plaintiff's assertion that the "nature of the work" "appl[ies] to discrete tasks, rather than her job as a whole," and looked to "the entirety of the duties and responsibilities of a particular job." (*Echavez v. Abercrombie & Fitch Co.* (C.D. Cal. Aug. 13, 2013, No. 2:11-cv-09754) 2013 WL 7162011, *5 [citing other cases that have interpreted the suitable seats provision].) The *Echavez* court explained that the text of Section 14 itself supports the holistic approach, as well as the opinions of the DLSE and all but one of the courts to consider the issue. (*Id.* at pp. *5–6.) Similarly, in *Tseng v. Nordstrom, Inc.*, the court adopted a "totality of the circumstances" test, based on the plain text of the Wage Order and the guidance of the DLSE and other courts. (*Tseng v. Nordstrom, Inc.* (C.D. Cal. Mar. 25, 2013, No. 11-8471) 2013 WL 5486768, *3.) Here, too, the district court relied upon the plain language of Section 14 to adopt the holistic approach over Kilby's. (*Kilby v. CVS Pharm., Inc., supra*, 2012 WL 1969284, at pp. *4–5.)

B. Defining work as all duties is the only logical way to explain the interplay of subsections (A) and (B).

As courts that have interpreted Section 14 have recognized, the interplay between subsections (A) and (B) is central to the meaning of the seats requirement. (*Echavez*, *supra*, 2013 WL 7162011, at p. *6; *Kilby v. CVS Pharm., Inc.*, *supra*, 2012 WL 1969284, at pp. *4–5.) If "nature of the work" refers to isolated duties, as Kilby contends, then subsections (A) and (B) together create overlapping and conflicting requirements. "[A] single employee could fall under the ambit of both sections during the course of a single shift based on which job duty she was performing at the time." (*Kilby v. CVS Pharm., Inc.*, *supra*, 2012 WL 1969284, at p. *5.) For each duty that could reasonably permit sitting, the employer would have to provide a seat during that duty under (A), but would not have to provide a seat under (B). And, if there were multiple duties that required standing (as with Kilby), the employer would be redundantly subject to subsection (B) for each such duty for the same employee. This illogical and confounding result cannot have been intended. (*Brinker*, *supra*, 53 Cal.4th 1004, 1029 [reading all sentences in a Wage Order for their "combined effect," but "giving full effect to each"]; *Lockheed Info. Mgmt. Servs. Co. v. City of Inglewood*, 17 Cal.4th 170, 184 [avoiding an "illogical" statutory interpretation]; *Echavez*, *supra*, 2013 WL 7162011, at p. *5 ["There is nothing to suggest that the Wage Order was intended to create such an unworkable rule for employers."].)

Separately, if "nature of the work" referred to an individual duty, the actual meaning of Section 14(B) would become nonsensical. Its effect would be: "When employees are not engaged in the active duties of their employment and the nature of [a duty] requires standing," seats must be provided near the work area for sitting "when it does not interfere with the performance of their duties." This reduces Section 14(B) to a nonsensical

standard that employers could not reasonably be expected to parse and follow. For this reason alone, Kilby's interpretation must be avoided. (*Lockheed, supra*, 17 Cal.4th 170, 184 [courts shall avoid an "illogical" statutory interpretation]; *People v. Victor* (1965) 62 Cal.2d 280, 300–301 [in construing a phrase within a statute, "[a] primary source of definition is the context of the questioned language" and the court "must construe [the] legislation so as to harmonize its provisions and give force and effect to every phrase thereof"].)

The interplay between subsections (A) and (B) also raises another dispute between the parties: whether Section 14 establishes an either/or requirement for employers to provide suitable seats, or whether both requirements apply simultaneously. The Court need not resolve this issue to answer the certified questions, but may decide to do so because it sheds light on the IWC's purpose and how to interpret Section 14.

There are two main indications that the IWC intended subsections (A) and (B) to be mutually exclusive. First, the lack of a linking phrase, such as "and" or "also," between the subsections indicates that they are mutually exclusive. (See 1A Sutherland, Statutory Construction (6th ed. 2002) § 21:14 ["Where two or more requirements are provided in a section and it is the legislative intent that all of the requirements must be fulfilled in order to comply with the statute, the conjunctive 'and' should be used."]; *Kilby v. CVS Pharm., Inc., supra*, 2012 WL 1969284, at p. *4.) Notably, the original seating provision contained two subsections, but explicitly stated that the second requirement "shall also apply" to certain employers. (ER 52; OB at p. 26.) That the IWC dropped this language from the current version indicates that it meant to decouple the requirements, not that it meant to have the linking language read into the current Wage Order by implication.

The second indication that the subsections are mutually exclusive is their parallel structure in addressing two different types of work, with (A) addressing work that permits sitting and (B) addressing work that requires standing. As the district court noted here, the dichotomous structure of Section 14 "attempts to strike a balance between the employee's needs and the requirements of the job." (*Kilby v. CVS Pharm., Inc., supra*, 2012 WL 1969284, at p. *4.)

This raises an important point: even under CVS's and the DLSE's holistic/totality of the circumstances interpretation, employees are entitled to a suitable seat, either under subsection (A) or (B). Thus, contrary to Kilby's suggestion, CVS's and the DLSE's interpretation adheres to the rule that employment laws are read broadly in favor of protecting employees because it in no way detracts from the mandate to provide seats for some portion of employees' shifts. (See OB at p. 29.) Kilby's interpretation purports to favor employees—but does so at the cost of ignoring the statutory context.

C. The DLSE and IWC have interpreted the phrase "nature of the work" to mean the full range of duties.

The IWC and DLSE have consistently endorsed the holistic/totality of the circumstances approach. Recently, the DLSE submitted an amicus brief reaffirming its interpretation of the phrase "nature of the work" in *Garvey v. Kmart Corp.*, which is the only "suitable seats" case to go to trial thus far and involved retail-store cashiers, as here. (*Garvey v. Kmart Corp.* (N.D. Cal. Dec. 18, 2012, No. C 11-02575) 2012 WL 6599534, *1; see also *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571 [DLSE "interpretations that arise in the course of case-specific adjudications" are "persuasive as precedents in similar subsequent cases"].) The federal district court directly solicited the DLSE's view on how to interpret Section 14. (Defendant-Appellee's Motion for Judicial Notice

(MJN), Dkt. 15, Exh. A, p. 1.) The DLSE responded that courts should apply Section 14 under "a reasonableness standard that would fully consider all existing conditions." (*Id.* at pp. 4–5.) In describing how it would specifically determine the nature of the work, the DLSE discussed the duties of the employee holistically, rather than individually. (*Id.* at p. 4.) The DLSE would look to "the employee's job functions," "the actual duties and work performed," and "the job duties intended or expected of employees by their employers." (*Ibid.*)

The DLSE's amicus brief in *Garvey* is consistent with the guidance previously issued by both the DLSE and the IWC. In the mid-1980s, both agencies were asked for guidance as to whether Section 14 applied to mercantile salespersons. (SER 234, 251–54.) The agencies looked at a salesperson's job as a whole and found that it required him or her to be "mobile" and able to "move freely throughout the store to answer questions and assist customers [with] their purchases." (*Id.* 252, 254.) In their analysis, neither agency discussed the discrete duties of a salesperson, but considered instead whether the job duties as a whole reasonably permitted sitting. (*Ibid.*)

These interpretations are also consistent with the way in which the DLSE has defined "nature of the work" for purposes of the only other Wage Order section in which it appears, Section 11(C). Section 11(C) concerns "on-duty meal periods" and provides that on-duty meals are permitted "when the nature of the work prevents an employee from being relieved of all duty." (Cal. Code Regs., tit. 8, § 11070, subd. 11.) In clarifying what type of work would qualify for the on-duty exception, the DLSE focused on types of "jobs" as a whole rather than the particular duties that might prevent a break. (MJN, Exh. C, pp. 1–2 [answering the question "[w]hat are the basic requirements for meal periods under California law?"].) For example, when an employee is solely responsible

for an establishment, the "nature of the work" would prevent the employee from being relieved of all duties: a sole worker in a coffee kiosk, a sole worker in an all-night convenience store, or a security guard stationed alone at a remote site. (*Ibid.*) These examples upend Kilby's theory that the nature of the work is assessed by the particular duty that the employee is performing at a given time. (OB at p. 22.)

The IWC's and DLSE's interpretation of "nature of the work" specifically, and articulation of a totality of the circumstances test for Section 14 more generally, should be accorded significant deference. When interpreting Wage Order provisions, the Court pays "consideration and respect" to the DLSE's interpretation. (*Brinker*, *supra*, 53 Cal.4th 1004, 1029, fn. 8.) The Court accords a higher level of deference where, as here, the agency has maintained a consistent and long-standing interpretation. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 13.) This heightened deference recognizes "the reality that the administrative agency—by virtue of the necessity of performing its administrative functions—creates a body of de facto law in the interstices of statutory law, which is relied on by the business community and the general public to order their affairs." (*Id.* at pp. 21–22 (conc. opn. of Mosk, J.).)

For decades, businesses throughout California have significantly relied upon the DLSE's interpretation of the suitable seats provision—both its explicit statements in its opinion letters and its implicit statements in its enforcement choices—and have done so especially because the DLSE was solely in charge of enforcement of Section 14. Throughout the mercantile-retail industry at issue here, employers have required cashiers and salespersons to stand and have not been subject to enforcement actions by the DLSE for suitable seating concerns. (See, e.g., *Garvey*, *supra*, 2012

WL 6599534, at p. *13 [noting that all "big box" stores require cashiers to stand].)

The United States Supreme Court has recognized the significance of an agency's longstanding enforcement—or non-enforcement—decisions. "While it may be 'possible for an entire industry to be in violation of the [law] for a long time without the [agency] noticing,' the more plausible hypothesis is that the Department did not think the industry's practice was unlawful." (*Christopher v. SmithKline Beecham Corp.* (2012) 132 S.Ct. 2156, 2168 [citation omitted].) The Supreme Court has acknowledged that an agency's enforcement decisions are informed by many factors. (*Ibid.*) However, the Court concluded that the only "plausible" explanation for a "lengthy period of conspicuous inaction" is acquiescence. (*Ibid.*) A judicial departure from an agency's historical interpretation and acquiescence would make "the potential for unfair surprise . . . acute" for employers. (*Ibid.*; *Tidewater Marine*, *supra*, 14 Cal.4th 557, 569 [discussing that one of the main purposes of the agency rule making process is to give "notice of the law's requirements so that [the entities that the rule affects] can conform their conduct accordingly"].)

Additionally, the DLSE's interpretation should be accorded heightened deference because this lawsuit is being brought in the agency's shoes under PAGA. (*Arias*, *supra*, 46 Cal.4th 969, 986 ["An employee plaintiff suing, as here, under the Labor Code Private Attorneys General Act of 2004, does so as the proxy or agent of the state's labor law enforcement agencies."].) PAGA actions are meant to "supplement enforcement actions"—not to enforce an interpretation of the Wage Order that was never intended by the IWC and that would not have been prosecuted by the DLSE. (*Id.* at pp. 980, 986 [PAGA was enacted to "supplement" enforcement but "with the understanding that labor law enforcement agencies were to retain primacy over private enforcement

efforts"].) A reviewing court must "not superimpose its own policy judgment" in applying a Wage Order (*Martinez v. Combs* (2010) 49 Cal.4th 35, 61), and the same should hold true for a plaintiff in a PAGA action.

The IWC has repeatedly signaled the importance of the DLSE's discretion in enforcing the seating provision. When the IWC expanded the reach of the seating provision in 1976, it made clear that the provision "has proved to be useful and workable as the [DLSE] has reasonably enforced it." (RJN, Exh. 2, p. 16.) The IWC assured employers that the language of the expanded suitable seats provision, which is the same today, was "more flexible and more subject to administrative judgment as to what is reasonable" than prior versions. (*Ibid.*) The IWC's comments reflect that it was "sensitive to the practical implications of one interpretation over another," and that it expanded the seating provision on the assumption that the DLSE's interpretation would be applied. (*Yamaha Corp. of America*, *supra*, 19 Cal.4th 1, 13 [recognizing that an agency's interpretation of its own statute should be accorded deference because of its sensitivity to the effect of different interpretations].) In effect, the IWC codified the DLSE's interpretation into the provision. Private plaintiffs who serve as proxies for the DLSE should not be allowed to flout the DLSE's administrative judgment when standing in its shoes under PAGA. The way to prevent this is through deference to the DLSE's overall totality of the circumstances test and its holistic interpretation of "nature of the work."

D. Extrinsic aids support interpreting "nature of the work" to refer to the full range of duties.

Although it is unnecessary to resort to them, extrinsic aids further support the holistic interpretation, starting with the administrative history. (See *Murphy*, *supra*, 40 Cal.4th 1094, 1104–1105 [if the language of the statute is ambiguous or susceptible of more than one interpretation, the court may look to extrinsic sources].) The California Legislature enacted a

seating requirement in 1911 as part of a statute limiting the hours that women could work. (See *In re Miller* (1912) 162 Cal. 687, 691–692.) The statute required that employers in certain industries "shall provide suitable seats for all female employees, and shall permit them to use such seats when they are not engaged in the active duties of their employment." (*Id.* at p. 692.) After the IWC was established by the Legislature in 1913 to regulate the conditions of employment for women and children, it incorporated a similar seating requirement in its 1919 "sanitary order" that governed "mercantile establishments."[4] (ER 52, 75.)

In Section 23(a) of the sanitary order, the IWC required that at least one seat be provided for every two women employed and that women "shall be permitted to use the seats at all times when not engaged in the active duties of their occupation." (ER 52, 75.) This requirement is similar to the current requirement in Section 14(B), which requires "an adequate number of suitable seats" for employees to use when "not engaged in the active duties of their employment." (Cal. Code Regs., tit. 8, § 11070, subd. 14.) The 1919 order required in subsection (b) that seats be provided during work for a limited range of factory-type occupations:

> *In any room where manufacturing, altering, repairing, finishing, cleaning or laundering is carried on, the following provision shall also apply:*
>
> (b) As far as, and to whatever extent, in the judgment of the Commission, the nature of the work permits . . . seats shall be

[4] The seating requirements in the statute and later in the sanitary order were born out of a time when the view of women in the workplace was archaic, at best. (See *Miller*, *supra*, 162 Cal. 687, 695 [rejecting a claim that the 1911 statute containing the seating requirement was discriminatory because "[t]he application of these laws exclusively to women is justified on the ground that they are less robust in physical organization and structure than men, that they have the burden of child-bearing, and, consequently, that the health and strength of posterity and of the public in general is presumed to be enhanced by preserving and protecting women from exertion which men might bear without detriment to the general welfare"].)

> provided at work tables or machines for each and every woman or minor employed . . . .

(ER 52, 75.)

This original order sheds light on several aspects of the current suitable seats provision. First, the original intention was not to provide seats on a duty-by-duty basis. Most workers were only entitled to use seats when "not engaged in the active duties of their employment." Seats were only required during active work time for employees who were "in a room" where workers performed factory-type labor and where the "nature of the work" permitted the use of a seat. This leads to a second point: as the IWC and DLSE have recognized, the suitable seats requirement "was originally established to cover situations where the work is usually performed in a sitting position with machines, tools or other equipment." (SER 252, 254.) Customer service was not an issue as it is in the retail context here. The 1919 order "was not intended to cover those positions where the duties require employees to be on their feet, such as salespersons," who "[h]istorically and traditionally . . . have been expected to be in a position to greet customers [and] move freely throughout the store." (*Id.* at 252.) Third, the determination of whether the "nature of the work" permitted the use of seats was left solely to the judgment and discretion of the agency.

Over several decades, the IWC altered the language of the seating provision but retained the initial intent of requiring seats during work only if the work permitted. (ER 52–53.) In 1968, the IWC enacted a seating provision that largely corresponds to the current version, but was still only for female employees. (*Id.* at 54, 104.) A few years later, several portions of the Wage Orders were invalidated on the ground that their limited application to women constituted sex discrimination. (*Indus. Welfare Comm'n. v. Superior Court of Kern County* (1980) 27 Cal.3d 690, 700.)

In response, the IWC made the provision gender neutral in 1976 and instituted for the first time the reasonableness standard that Section 14 contains today. (ER 54, 107.) Under subsection (a), all employees were to be provided with suitable seats when the nature of the work "reasonably" permitted. (*Ibid.* [emphasis added].) Under subsection (b), employees whose work required standing were to be provided suitable seats within a "reasonable" proximity to the work area. (*Ibid.* [emphasis added].) The IWC also summarized that the suitability of a seat depends on the nature of the "job" as a whole, which either permits seats or requires standing. (RJN, Exh. 1, p. 3.) The IWC has not substantively changed the provision since, except to loosen the requirements under Section 14(B) to apply only "when it does not interfere with the performance of [employees'] duties." (ER 55–56, 111, 115.)

As the legislative history demonstrates, the IWC did not intend the seats provision as the main mechanism for addressing prolonged standing. Rather, the meal and rest breaks now contained in separate sections of the Wage Orders were meant to do so. The DLSE acknowledged as much in a 1986 opinion letter, stating that "[m]any positions do require employees to be standing for long periods of time" and "some employees are required to perform relatively laborious work, which has resulted in the establishment of mandatory rest periods." (SER 252.) CVS's reading of the seat provision does not gut the intended protections against prolonged standing, contrary to Kilby's suggestion, because employees either (1) are entitled to a suitable seat during their work if Section 14(A) applies or (2) are entitled to a suitable seat when they are not actively engaged in their duties if Section 14(B) applies. (See *ante*, section II-B.) In either situation, employees are entitled to mandatory meal and rest breaks, which allow employees to sit (if desired) on a regular basis.

Along these lines, concerns about the health risks of standing raised by Kilby are unhelpful in interpreting the seats provision. As discussed, employees have regular opportunities to sit during their shift without Kilby's isolated duty approach. Further, although Kilby cites studies about the health risks of continual standing, those concerns are counterbalanced by other studies demonstrating that prolonged sitting is bad for health.[5] The IWC has already made its determination on the proper balance between sitting and standing by recognizing that some jobs require extended standing and providing for seats during lulls, if any, and breaks.

E. The "nature of the work" must take into account, among other things, the employer's expectations of what duties will be performed.

The analysis of the "nature of the work" must also take into consideration the employer's legitimate expectations for what duties will be performed. The Wage Orders are meant to address the conditions of employment, not interfere with the employer's prerogative as to the duties that it requires of its employees. As the DLSE has recognized, "an employee's job duties are defined by the employer in an employment relationship." (MJN, Exh. A, p. 4.) If there is a genuine dispute over whether such duties are actually required, courts can engage in the necessary fact-finding. (*Compare ibid.* [discussing an "objective evaluation" of the required duties, based on the employer's expectations and the actual duties performed], *with* OB at p. 27 [suggesting that employers could avoid Section 14(A) "simply by adding one or more

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[5] (See Steve Lohr, *Taking a Stand for Office Ergonomics*, N.Y. Times, Dec. 1, 2012, *available at* http://www.nytimes.com/2012/12/02/business/stand-up-desks-gaining-favor-in-the-workplace.html [discussing studies finding that "the health hazards of sitting for long stretches are significant even for people who are quite active when they're not sitting down"]; Neville Owen, et al., *Too much sitting: a novel and important predictor of chronic disease risk?* (2009) 43 Br J Sports Med 81-83, *available at* http://bjsm.bmj.com/content/43/2/81 [noting that significant adverse health effects may result from sitting during periods of non-exercise].)

standing-only tasks to every employee's job description"].) On the other hand, substituting the court's judgment or an employee's judgment for an employer's would turn the employment relationship on its head. (See *post*, section II-A.) If courts do not consider the employer's expectations, then plaintiffs who are not performing the job to the employer's expectations could argue that they are entitled to a seat based on the way they *want* to perform their job, not the way they were hired to perform it. As stated by the DLSE, the "nature of an employee's work" should be determined based on "the duties intended or expected of employees by their employers and the actual duties and work performed by employees." (MJN, Exh. A, p. 4.)

II. "NATURE OF THE WORK" MUST ACKNOWLEDGE DISRUPTIVE TRANSITIONS BETWEEN DUTIES AND, THUS, CANNOT BE REDUCED TO A MERE QUANTITATIVE TEST OF THE TOTAL TIME SPENT ON SITTING-PERMITTED DUTIES.

The parties agree that certified Question 1(a) proposes an unsuitable quantitative test. (OB at p. 30.) From CVS's perspective, a quantitative test artificially ignores the fact that sitting-permitted tasks are often intermixed with standing-required tasks, and it fails to account for whether the transitions between these tasks reasonably permit the use of seats.

The extent to which employees pivot between duties was demonstrated in the *Garvey* suitable seats case, which involved retail store cashiers, as here. After a bench trial, the district court found that:

> In sum, most of the tasks done by a Kmart cashier could be done while seated but some tasks can only be done while standing. Standing tasks include processing heavy, large, and/or awkward items; scanning items in a customer's cart with the hand scanner; looking inside closed items in a customer's cart; straightening the checkout lane when customers are not present; and retrieving additional change for the cash register. While these are a minority of the time, they nonetheless occur so frequently when the checkout lane is busy that cashiers must be standing many times over the

> course of an hour. Put differently, even if seating were allowed, cashiers would be up (and down) frequently to perform the tasks that require standing.

(*Garvey*, *supra*, 2012 WL 6599534, at p. *7.) *Garvey* illustrates that the nature of the work might not permit sitting even if *most* of the tasks could be done while seated.

Kilby concedes that this is true. In her own words, "it may not be reasonable to provide workstation seating to an employee whose work requires her to alternate rapidly among brief, discrete tasks, only some of which could be performed while seated, if allowing her to sit during those fleeting or ephemeral seating-permitted tasks would yield constant workflow disruptions or physically prevent her from performing her other assigned tasks." (OB at p. 30.) Although Kilby attempts to cabin her concession to instances where seating-permitted tasks are "fleeting," the logic behind it applies much more broadly. As *Garvey* illustrates, the transitions between duties can be disruptive even if most of the work could be performed while seated. Kilby fails to explain how her duty-by-duty approach would take these disruptive transitions into account.

Instead, Kilby picks the other extreme, where employees have few or no disruptive transitions, to support her approach. (OB at pp. 31–32.) Kilby poses three hypothetical jobs where employees spend an extended period of time on a sitting-permitted task, and then spend an extended period of time on a standing-required task. (*Ibid.*) Kilby points out that simply measuring the time spent on each task would be a poor proxy for whether the employees could reasonably use a seat. (*Ibid.*) CVS agrees. The holistic approach—as adopted by the DLSE, applied by the district court here, and advocated by CVS—is not quantitative, but rather takes into consideration the totality of the circumstances.

The totality of the circumstances/holistic approach and Kilby's isolated duty approach may lead to the same result in some cases, but for different reasons. Under the former approach, courts must consider all duties holistically, plus transitions between duties, plus the remaining relevant factors such as the employer's business reasons for having employees stand, the layout of the workplace, and the feasibility of a suitable seat, as discussed below. For example, the hypothetical security guard, Jake, who watches security monitors in a secure room for four hours and then patrols for five hours may be entitled to a seat while watching the monitors. (OB at p. 31.) Under the holistic approach, it would depend on whether there are disruptive standing-required tasks mixed in while Jake watches the monitors and whether the employer has a legitimate business reason for requiring the guard to stand, along with any other relevant circumstances. Similarly, Sandy at the amusement park may be entitled to a seat while operating the ticket booth window. (*Ibid.*) But under the holistic approach, it would depend in part on how much Sandy needs to lean over the booth to collect money, whether a seat could be safely and practically introduced into the ticket booth, and whether the employer has legitimate reasons for requiring standing (such as a better view for monitoring anyone sneaking into the park, or projecting a more efficient and attentive image to customers). The same factors are relevant to whether the bookstore workers are entitled to a seat while assigned to the customer information counter. (*Ibid.*) The holistic test does not necessarily preclude the use of a seat during a work period. However, it only permits it if the totality of the circumstances reasonably allows the use of a seat.

In this case, the totality of the circumstances would not allow Kilby to use a seat at the cashier stand, as the district court found. To begin, even though Kilby spent a majority of time at the cash register, it was undisputed that a number of her duties at the cash register could not be performed

while seated, and many of her duties were standing-required duties to be performed whenever there were no customers at the cash register. (*Kilby v. CVS Pharm., Inc., supra*, 2012 WL 1969284, at pp. *2, 6.) Thus, unlike the hypotheticals she presents, Kilby did not have long uninterrupted stretches of an isolated sitting-permitted duty. Moreover, just as the DLSE would, the district court also considered CVS's business judgment that standing at the cash register projects attentiveness and efficiency. (*Id.* at p. *6.) As the uncontroverted evidence showed, CVS received customer complaints when employees used a seat during their active duties. (SER 217–23, 229–30.) Taken together, these factors established that the nature of Kilby's work required standing. (*Kilby v. CVS Pharm., Inc., supra*, 2012 WL 1969284, at p. *6.)

III. THE PHRASE "REASONABLY PERMITS" IS THE TOUCHSTONE OF THE SEATING REQUIREMENT AND, AS THE DLSE HAS EXPLAINED, TAKES INTO ACCOUNT THE TOTALITY OF THE CIRCUMSTANCES, INCLUDING THE EMPLOYER'S BUSINESS JUDGMENT FOR REQUIRING STANDING.

The phrase "reasonably permits" is the touchstone of Section 14(A) and cannot be divorced from "nature of the work." The DLSE has explained that "a reasonableness standard" governs the entire evaluation of whether the "nature of the work reasonably permits the use of seats." (MJN, Exh. A, p. 3.) Similarly, one of the only published California Court of Appeal cases to address Section 14 (no published cases have interpreted) has recognized that Section 14 is "framed as an affirmative standard of reasonable conduct." (*Home Depot U.S.A., Inc. v. Superior Court* (2010) 191 Cal.App.4th 210, 221–222.) Further, the IWC has emphasized that Section 14 was intended to be "subject to administrative judgment as to what is reasonable" and "the [DLSE] has reasonably enforced it." (RJN, Exh. 2, p. 16.)

In certified Question 2, the Ninth Circuit identified factors that could help a court determine whether the nature of the work "reasonably permits" the use of a seat. These include the employer's business judgment, the physical layout of the workplace, and the physical characteristics of the employee. The DLSE specifically recognized these first two factors in describing its totality of the circumstances test. (MJN, Exh. A, p. 4.) While this list is not exhaustive, each of the specific factors listed by the Ninth Circuit should be applied by courts.

A. Courts already defer to business judgment in other employment contexts and objectively evaluate the legitimacy of the employer's business judgment without second-guessing it.

There are several concerns that may lead an employer to require standing, such as customer service and efficiency. These concerns can be evaluated on an objective basis as to whether they are legitimate or pretextual and, while not controlling, must be accorded deference to the extent that they are a part of the employee's job. Otherwise, the suitable seats provision could effectively override the employer's role in defining the job. As demonstrated above, the seats provision was intended to allow for sitting if reasonable under the current specifications of the job, not to change the nature of almost every job in every industry to permit sitting in part or in whole.

Customer service concerns are intuitive and documented. In this case, as discussed, CVS put into evidence that stores received customer complaints when employees were sitting down because the customers did not feel that the employees were providing adequate customer service. (SER 217–23, 229–30.) The district court in *Garvey* similarly found that customers may have negative reactions to seated cashiers. (*Garvey*, *supra*, 2012 WL 6599534, at p. *13.) The court explained that sitting affects customer service and efficiency—both in actuality and perception. (*Ibid.*)

Perception is as important as reality when it comes to customer service. As the *Garvey* court explained, a customer's perception helps determine whether that customer will return to the employer's store, or go to a competitor's store. (*Garvey*, *supra*, 2012 WL 6599534, at p. *13.) Sitting projects a less ready-to-assist attitude and may "telegraph a message to [customers] in line"—who themselves are standing—"that the convenience of the store and its employees comes first." (*Ibid.*) And, in the particular context of a retail store, the impression left by the cashier is crucial because "[t]he cashier is the last representative encountered by customers as they leave the store." (*Ibid.*) Kilby's suggestion that employers must prove that sitting reduces efficiency and customer service flatly disregards the power of perception. (OB at p. 35 & fn. 11.)

Further, Kilby's suggestion that courts should ignore an employer's subjective business judgment for requiring standing is out of step with well-settled rules in employment law. (See OB at p. 37.) Courts can, and already do, objectively evaluate whether employers' subjective concerns are legitimate. In the discrimination context, courts evaluate whether an employer's stated reasons for its actions are legitimate or pretextual. (*Guz*, *supra*, 24 Cal.4th 317, 354–366.) Similarly, courts consider whether an employer had an honest reason to terminate an employee under the good cause standard. (*Cotran v. Rollins Hudig Hall Int'l, Inc.* (1998) 17 Cal.4th 93, 100.) In doing so, however, "[c]are must be taken . . . not to interfere with the legitimate exercise of managerial discretion." (*Ibid.*) "*Although the [fact finder] must assess the legitimacy of the employer's decision . . . , it should not be thrust into a managerial role.*" (*Id.* at p. 101 [emphasis in original]; see also *Guz, supra*, 24 Cal.4th 317, 358 [the employer's "true reasons need not necessarily have been wise or correct"].)

Thus, contrary to Kilby's assertion, courts should not superimpose their own judgment for the subjective concerns of employers. Rather,

courts must consider an employer's subjective concerns as part of the totality of the circumstances test as long as they are objectively legitimate. Kilby hypothesizes that an office receptionist could be forced to stand based on an employer's subjective preference, but a court could decline to consider this preference if it was untethered from any legitimate business purposes. (OB at p. 35.) By contrast, CVS presented customer service concerns that the district court recognized as legitimate. Indeed, this Court has recognized that employers have an interest in "operating [their] business efficiently and profitably," and CVS's customer service concerns are tied to both of these ends. (*Cotran, supra,* 17 Cal.4th 93, 100.)

Additionally, courts are required to take an employer's judgment into consideration in determining an employee's "essential job functions" for purposes of accommodating a disability under the Americans with Disabilities Act ("ADA") or the California Fair Employment and Housing Act. (42 U.S.C. § 12111(8) ["consideration shall be given to the employer's judgment as to what functions of a job are essential"]; Cal. Gov't Code § 12926(f)(2)(A); *Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 746.) By taking the employer's judgment out of the equation, Kilby's interpretation of Section 14 could entitle able-bodied employees to seats under Section 14 where disabled employees are not entitled to them under disability laws. This absurd result cannot be what the IWC intended. As the DLSE has affirmed, business judgment must be considered "in determining the overall appropriateness of seating." (MJN, Exh. A, p. 4.)

B. The physical layout of the workplace and physical characteristics of the employee are relevant circumstances as to whether the work reasonably permits seating.

The existing physical layout of the workplace is another factor that helps inform whether sitting would be "reasonably permitted." In this case,

the evidence showed that each CVS store has its own cashier stand configurations, and multiple configurations within the same store, all of which would raise distinct issues of whether, and how, seats could be introduced. (SER 334–423; AB at pp. 43–45 [detailing the unique features of the cashier stands, the amount of workspace in each, and each stand's proximity to items that cashiers need to retrieve during check out], 54–56 [detailing how the differences in each cashier stand configuration affects the way that cashiers perform check-out duties].) Further, simply adding a seat to the existing workspace can introduce safety issues. (See *Garvey, supra*, 2012 WL 6599534, at pp. *8–9.) For instance, the seat could become an unsteady obstacle in an already cramped space. (*Id.* at p. *8.)

Space constraints and safety issues are all the more relevant because California employers are required to comply with Cal-OSHA and the ADA. These laws obligate employers to make specific amounts of space available for entering and exiting work areas and to keep work areas free of obstruction. (See, e.g., Cal. Code of Regs., tit. 8, sub. 7, grp. 1, art. 4 § 3272 [requiring 24 inches egress], § 3273 [requiring floors be free of obstructions]; 5 U.S.C. § 36.304(a) [requiring removal of barriers to access within public accommodations]; ADA Accessibility Guidelines, § 207.1 [egress].) Injecting seats into cashier stands could create violations of these laws. Avoiding such problems may require elaborate and expensive redesigns of each unique workspace.

Kilby suggests that the cost of modifications is irrelevant because employers were on notice to build workstations that accommodate seats. (OB at p. 39.) However, the history of enforcement of the seats provision compels the opposite conclusion. As Kilby points out, the seats provision has existed for more than 90 years, and early seat provisions specified the type of seating required at work tables and subjected "new installations" to the approval of the Commission. (*Ibid.*; ER 53.) Although Kilby draws the

conclusion that employers such as CVS thereby knew they were required to provide workstation seating, the "conspicuous inaction" of the DLSE to enforce the provision with regard to retail cashiers signals instead that the DLSE "did not think the industry's practice was unlawful." (*Christopher*, *supra*, 132 S.Ct. 2156, 2168.) Employers had no reason to break from the industry standard of requiring standing at registers. Perhaps recognizing the role that its enforcement decisions has played in shaping these industry practices, the DLSE has stated that the "reasonableness" test must consider the "existing conditions" of the "physical layout of the workplace" and the "existing or historical industry or business practices." (MJN, Exh. A, pp. 3–5.)

Similarly, the use of seats would not be "reasonably permitted" if different employees required different types of seats. The physical differences among employees must be taken into consideration to determine whether employees could uniformly perform their duties with a standardized type and size of seat. In certain workplaces, the physical differences among employees may make more of a difference in whether they could perform their duties with the same type of seat. For example, in the retail context here, some employees may be able to perform some checkout duties while seated, while other employees would not be able to do so. (See, e.g., AB at pp. 56–57 and record citations therein [describing a shorter employee's concerns that she would have difficulty reaching customers' items if she used a seat, and a larger employee's concerns that he already felt like "a bull in a china shop" and would not be able to maneuver in the cashier stand if there was a seat at the register].) These factors are part of the totality of the circumstances governing whether the work reasonably permits the use of a seat.

C. Even if an employee's work *can* be performed while seated, the operative question is whether it is *reasonable* to do so under the totality of the circumstances.

The inclusion of the word "reasonably" in Section 14(A) raises an important overarching point. Just because an employee's work could be performed while seated does not mean a seat is required. The IWC has recognized that the suitable seat provision is workable because the DLSE has "reasonably enforced it" and that the requirement must be "flexible" to address the wide range of work places that it covers. (RJN, Exh. 2, p. 16.) In order to give effect to the word "reasonably," courts must consider whether it would be reasonable under the totality of the circumstances to permit an employee to sit, not simply whether the employee could feasibly perform her duties while seated.

IV. PLAINTIFFS MUST IDENTIFY THE TYPE OF "SUITABLE SEAT" THAT THEY COULD USE TO PERFORM THEIR JOB FULLY TO SHOW THAT THE "NATURE OF THE WORK REASONABLY PERMITS THE USE OF SEATS"

Finally, as part of the inquiry into whether the nature of the work "reasonably permits" the use of seats under Section 14(A), a plaintiff must identify what type of "suitable seat" would allow the plaintiff to do her job fully, safely, and efficiently—to the extent such an option exists. Under California Evidence Code, section 500, "a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief." The existence of a suitable seat is essential to a claim under Section 14(A): if an employee could perform her job while seated in theory only, and it is unclear that a seat exists that could actually allow her to do so, then it cannot be concluded that the work "reasonably permits" the use of a seat.

This truth is illustrated by the evidence put forth at the *Garvey* bench trial and at the class certification stage in this case. In *Garvey*, class

counsel conceded that simply adding a seat or stool to the existing cashier stall "would not work" because it "would be an obstacle course in moving back and forth from the cash register to the bagging area" that "would inevitably lead to stumbles." (*Garvey*, *supra*, 2012 WL 6599534, at p. *8.) "In acknowledgement of this problem, class counsel propose[d] to redesign the cashier stand so that a stool could slide out from and back under the main processing counter." (*Ibid.*) The trial court exhaustively detailed the safety and efficiency problems that various reconfigurations of the workspace and configurations of stools would create. (*Id.* at pp. *8–10.) Ultimately, the court concluded that the proposed seating arrangements were "too unsafe, too inefficient, and too inconvenient to customers and cashiers" and "would unreasonably interfere with Kmart's legitimate interest in providing quick and efficient customer service." (*Id.* at p. *10.)

In this case, the district court rejected Kilby's assertion that seats could be installed in CVS cashier stands "with low cost modifications." (*Kilby v. CVS Pharm., Inc.*, *supra*, 2012 WL 1132854, at p. *3.) Kilby proffered a report by an ergonomic expert who conducted site visits at two Oklahoma stores that were *not* encompassed in the California class and opined generally that a seat could be added at CVS stores throughout California. (*Id.* at pp. *2–3.) The court declined to consider this conclusion because the expert did not evaluate the workspaces in any individual California stores, did not consider the feasibility of "physically implementing" the seats, and did not provide any cost analysis. (*Id.* at p. *3.) In fact, the evidence showed that there was no one-size-fits-all "suitable seat," if any: the cashier stands at different stores—and even within the same store—vary significantly in size and configuration. (SER 334–423.)

Kilby proposes shifting the burden of identifying "suitable seats" to employers on the unfounded proposition that they have exclusive

"information and resources to identify a seat that qualifies as 'suitable.'" (OB at p. 42.) This proposition is belied by the fact that both she and the plaintiffs in *Garvey* retained ergonomic experts and were able to inspect the layout of cashier stands at defendants' stores. The inability of plaintiffs' experts to identify suitable seats was not due to a lack of available information, but a lack of feasible options. Their inability to do so highlights the prejudice and fundamental unfairness of finding an employer in violation of Section 14(A) before establishing that a suitable seat exists, as Kilby would have courts do.

CONCLUSION

For these reasons, the Court should answer the certified questions as follows. The overall evaluation of whether the nature of the work reasonably permits the use of a seat depends upon the totality of the circumstances. More specifically:

1. The phrase "nature of the work" refers holistically to the entire range of an employee's duties, including the employer's expectations for what duties will be performed, as well as the duties actually performed. Courts should consider the frequency and disruption of transitions between sitting-permitted and standing-required duties. Because these transitions affect the nature of the work, courts must consider the entire range of duties regardless of the percentage of time that an employee spends performing sitting-permitted tasks.

2. When determining whether the nature of the work "reasonably permits" the use of a seat, courts should consider all relevant circumstances, which include but are not limited to the employer's business judgment as to whether the employee should stand, the existing or historical industry or business practices, the physical layout of the workplace, the physical characteristics of the employee, the actual duties performed, and

safety and accessibility concerns in adding a seat. Plaintiffs and courts cannot superimpose their own judgment for that of the employer, as long as the employer's subjective reasons for requiring standing are legitimate.

3. As part of proving a violation of Section 14(A), plaintiff must prove the feasibility of a "suitable seat" that would permit him or her to fully perform the job while seated; otherwise, it cannot be said that the nature of the work reasonably permits the use of a seat.

Respectfully submitted,

Dated: June 11, 2014

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CERTIFICATION OF COMPLIANCE

Pursuant to Rule 8.204(c)(1), California Rules of Court, the undersigned herby certifies that Defendant-Respondent's Answer Brief contains 12,482 words, excluding tables and this certificate, according to the word count generated by the computer program used to produce this brief.

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ADDENDUM OF UNPUBLISHED CASES

PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.1115(C)

- *Echavez v. Abercrombie & Fitch Co.*, 2013 WL 7162011 (C.D. Cal. Aug. 13, 2013, No. 11-cv-09754)
- *Garvey v. Kmart Corp.*, 2012 WL 6599534 (N.D. Cal. Dec. 18, 2012, No. C 11-02575)
- *Kilby v. CVS Pharm., Inc.*, 2012 WL 1132854 (S.D. Cal. Apr. 4, 2012, No. 09cv2051)
- *Kilby v. CVS Pharm., Inc.*, 2012 WL 1969284 (S.D. Cal. May 31, 2012, No. 09cv2051)
- *Tseng v. Nordstrom, Inc.*, 2013 WL 5486768 (C.D. Cal. Mar. 25, 2013, No. 11-8471)

2013 WL 7162011
Only the Westlaw citation is currently available.
United States District Court,
C.D. California.

Amber ECHAVEZ
v.
ABERCROMBIE AND FITCH CO. INC., et al.

No. CV 11–9754 GAF (PJWx). | Aug. 13, 2013.

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Opinion

ORDER RE: MOTION FOR SUMMARY JUDGMENT & MOTION TO STRIKE

GARY ALLEN FEESS, Judge.

***1** Stephen Montes, Deputy Clerk.

I.

INTRODUCTION

In this lawsuit, Plaintiff Amber Echavez, a former non-exempt retail sales employee for clothing retailer Defendant Abercrombie & Fitch Stores, Inc. ("Abercrombie"),[1] asserts that Abercrombie violated Industrial Welfare Commission ("IWC") Wage Order 7–2001 § 14 ("Section 14") Subsections (A) and (B) by failing to provide employees with suitable seating. Cal.Code Regs. Tit. 8 § 11070(14). This regulation requires that workers be provided with seating when the nature of the work permits, and that, seating during rest breaks be provided for workers whose job must be performed while standing. Although she never requested use of a seat or complained about a lack of seating, she now claims that Abercrombie failed to provide her with seating as mandated by both Section 14(A) and (B), (FAC ¶¶ 8–10), which she contends constitutes a violation of Cal. Labor Code § 1198. Accordingly, she brings this representative action pursuant to California's Private Attorneys General Act of 2004 ("PAGA"), Cal. Lab.Code §§ 2698 *et seq.*

Abercrombie now moves for summary judgment. (Docket No. 59, [Mot. for Summary Judgment ("MSJ Mem.")].) Abercrombie argues that: (1) Sections14(A) and (B) are mutually exclusive, and thus Plaintiff can only claim a violation of one of them; (2) Plaintiff's job does not reasonably permit the use of seating and therefore requires standing; and (3) Abercrombie provided adequate seating during Plaintiff's breaks thus meeting the strictures of Section 14(B) and complying with the Wage Order. Plaintiff opposes summary judgment arguing that both Sections 14(A) and (B) apply to her because the two subsections are duty, not job, specific. Plaintiff believes that depending on what duty she is performing, she can be covered by either Subsection (A) or (B). Plaintiff further argues that regardless of which subsection applies, Abercrombie violated both.

Abercrombie's motion is persuasive in a number of respects. A reasonable construction of the Wage Order suggests that an employer must either provide seating during the performance of an employee's duties where the work permits, or provide seating during rest breaks for employees who cannot sit while on duty. Furthermore, the undisputed facts demonstrate that Plaintiff's job did not reasonably permit the use of seating, and thus Plaintiff can only assert a claim under Subsection (B). With respect to Subsection (B), the Court agrees that it requires seating during break or rest periods, as asserted by Abercrombie, but that the material facts are in dispute as to the existence of suitable seating in reasonable proximity to the work area. Accordingly, Abercrombie's motion for summary judgment is **GRANTED** with respect to the Subsection (A) claim, but **DENIED** with respect to the Subsection (B) claim.

Because the Court denies summary judgment in part, the Court must consider the alternative motion to strike Plaintiff's representative allegations. (Docket No. 60, [Mot. to Strike ("Strike Mem.")].) Abercrombie contends

that due process and case management concerns prevent Plaintiff from representing such a diverse group of employees. The motion is both untimely and incorrect on the law and is, therefore, **DENIED.**

II.

BACKGROUND

*2 The Court sets forth the material facts of this action below. The majority of these facts are not in dispute or are without substantial controversy. To the extent there are disputes of material fact, the Court will address them in Section III.A, *supra* . That said, however, the Court notes that the central disputes of this action are not so much with regard to facts as they are to pure questions of law, namely how to interpret and apply Section 14.

A. BACKGROUND FACTS

Plaintiff Amber Echavez was formerly employed by Abercrombie as a "Model"-a term Abercrombie uses to describe its retail sales floor staff-from August 2008 until May 4, 2011 and again from January 30, 2012 until January 30, 2013. (Docket No. 68–4 [Plaintiff's Statement of Genuine Disputes of Fact ("P–SDF")] at P–SDFs 1, 26–32.)[2] During the relevant time period, Plaintiff worked a total of 144 shifts. (P–SDF 35.)

B. PLAINTIFF'S DUTIES

The "primary and overarching responsibilities [of] a Model [a]re to: (i) represent the Abercrombie brand and project the Abercrombie image and style to customers[,] (ii) provide excellent customer service ... [,] and (iii) keep the store up to standard-i.e. clean the store and maintain clothing as necessary." (P–SDF 36; Docket No. 59–2, [Declaration of Daren S. Garcia ("Garcia Decl.")], Ex. 1 [Deposition of Amber Echavez ("Echavez Depo.")] at 47:16–48:4.)[3]

During business hours, Plaintiff was typically "zoned" to a specific area of the store where she "was expected to engage and assist the customers." (P–SDFs 37–38, 40.) If at some point there were no customers in Plaintiff's zone, Plaintiff "was supposed to move around her zone, from table to table and wall shelf to wall shelf, folding and standardizing clothing, picking up any trash in her zone, and depositing it in the trash can." (P–SDF 39.) When Plaintiff was zoned to the front of the store, "she was required to approach customers within 15 seconds of their entering the store, greet them, and deliver the appropriate tag line." (P–SDF 40.)

Roughly 20 percent of Plaintiff's shifts were opening shifts that required the performance of pre-opening duties for two hours before the store opened and then her regular duties after opening. (P–SDFs 43–44.) Plaintiff's pre-opening duties included cleaning, organizing clothing displays, replacing purchased clothing with clothing from the stockroom, placing clothing in its proper location, and physically opening the store. (P–SDF 44.)

Over half of Plaintiff's shifts were closing shifts, wherein she worked two hours until closing and then two hours after closing. (P–SDFs 46–49.) Plaintiff's duties after the store closed ranged from folding clothing, organizing clothing, ensuring garments have the proper size stickers, emptying trash, restocking bags, and putting out new clothing and marketing material. (P–SDFs 50–51.)

C. SITTING OR STANDING?

*3 The Court sets forth here the facts regarding whether and when Abercrombie Models were permitted to use seats. Many of these facts are disputed. To the extent these facts are both in dispute and material, the Court will address those disputes in Section III.A, supra.

Abercrombie asserts that "Models are required to clean, fold clothing, and keep their assigned area of the store up to Abercrombie's high standards, which requires Models to constantly move throughout their zone." (P–SDF 22.) Abercrombie also asserts that "[s]eated Models would be unable to effectively maintain the presentation of the store." (P–SDF 23.) To support this fact, Abercrombie relies heavily on the declaration of Chad Moorefield, who during the relevant time period was the Director of Stores, who asserts the Models' duties require constant movement and considers standing to be a requirement of the position. (Docket No. 59–4, [Declaration of Chad Moorefield ("Moorefield Decl.")] ¶¶ 21, 24.) It is undisputed that the active aspects of Plaintiff's duties required her to be standing and that Plaintiff was trained to perform her duties while standing. (P–SDF 61, Echavez Depo. at 127:3–5.) However, Plaintiff puts forth numerous quotes from her deposition, among other things, that indicates that she could perform and actually did perform a number of her duties while seated. (P–SDF 22.) For example, Plaintiff testified that she sat on the floor while folding merchandise during closing shifts. (Docket No. 69, [Declaration of Stephen M. Harris ("Harris Decl.")], Ex. 4 [Plaintiff's Echavez Depo.] at

49:10–23, 50:1–5.) Plaintiff also believes that she could have done many of the cashier duties while seated, as well as a handful of other duties including greeting and working in the dressing room. (*Id.* at 141:10–142:2, 155:4–156:2.) While Plaintiff believes that a number of her duties could have been performed while seated, she asserts that no more than 40% of any shift could have been performed while seated. (P–SDFs 36, 66, 68, 120.)

Regarding when Models are permitted to use seats, Plaintiff puts forth evidence that it was the informal policy of Abercrombie to permit Models to use seats only while on an authorized break. (P–SDFs 113–115; Docket No. 73–1 [Reply Separate Statement of Disputed Facts ("R–SDF")] at R–SDF 1; Harris Decl., Ex. 1 [Deposition of Robert Nava, Jr. ("Nava Depo.")] at 26:3–10; Harris Decl., Ex. 29 [Deposition of Stephanie Rosemarie Charles ("Charles Depo.")] at 16:8–20:13; Harris Decl., Ex. 30 [Deposition of Christopher Todd Smith ("Smith Depo.")] at 19:12–23.)[4] Abercrombie disputes this fact insofar as it argues that the use of seats is not limited to "authorized" breaks. (R–SDF 1; Nava Depo. 25:23–26:10, 31:9–17.) Plaintiff also provides deposition testimony from a district manager indicating that it is Abercrombie's "preference that Models leave the store on their breaks and use the seating in front of the store during their breaks as to not interfere with business happening in the stockroom." (Charles Depo. at 16:13–18.) The Parties agree that there were at least two chairs set up in the stockroom. (R–SDF 7; Harris Decl., Exs. 5–6.) There were also a few leather lounge chairs on the sales floor and seating located outside the store. (Echavez Depo. at 69:7–11 at 70:11–15.) Regarding the leather lounge chairs, Plaintiff testified that they were not for Model use while the store was open, unless the Model was on break, and in any event food was not to be consumed while in those chairs. (Harris Decl., Ex. 4 [Plaintiff's Echavez Depo.] at 178:18–179:7.)

III.

DISCUSSION

A. MOTION FOR SUMMARY JUDGMENT

1. LEGAL STANDARD

*4 Summary judgment is proper where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(a). Thus, when addressing a motion for summary judgment, the Court must decide whether there exists "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby,* Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial, which it can meet by presenting evidence establishing the absence of a genuine issue or by "pointing out to the district court ... that there is an absence of evidence" supporting a fact for which the non-moving party bears the burden of proof. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). To defeat summary judgment, the non-moving party must put forth "affirmative evidence" that shows "that there is a genuine issue for trial." *Anderson,* 477 U.S. at 256–57. This evidence must be admissible. See Fed.R.Civ.P. 56(c), (e). The non-moving party cannot prevail by "simply show[ing] that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Rather, the non-moving party must show that evidence in the record could lead a rational trier of fact to find in its favor. *Id.* at 587. In reviewing the record, the Court must believe the non-moving party's evidence, and must draw all justifiable inferences in its favor. *Anderson,* 477 U.S. at 255.

2. APPLICATION

a. PA GA & Section 14

California's Private Attorneys General Act, Cal. Lab.Code § 2698 *et seq.,* permits an "aggrieved employee" to institute an action "on behalf of himself or herself and other current or former employees" to collect civil penalties for a violation of any provision of the California Labor Code. Cal. Lab.Code. § 2699(a). California Labor Code section 1198 prohibits an employer from employing any individual under labor conditions prohibited by an applicable wage order. See Cal. Lab.Code § 1198; *Bright v. 99 Cents Only Stores,* 189 Cal.App.4th 1472, 118 Cal.Rptr.3d 723, 726–28 (Ct.App.2010); *Home Depot U.S.A., Inc. v. Superior Court,* 191 Cal.App.4th 210, 120 Cal.Rptr.3d 166, 171–74 (Ct.App.2010). PAGA penalties are available for violations of Wage Order 7–2001 § 14. *Bright,* 118 Cal.Rptr.3d at 728–30; *Home Depot,* 120 Cal.Rptr.3d at 174–77. The pertinent language reads as follows:

> (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.

***5** Cal.Code Regs. Tit. 8 § 11070(14).

b. Construction of Section 14

The parties raise a threshold issue regarding the proper construction of Section 14. Abercrombie argues that Subsections (A) and (B) are "mutually exclusive" and that an employee is covered by one or the other but never both subsections. (MSJ Mem. at 1.) Plaintiff insists that "Sections 14(A) and 14(B) are not mutually exclusive." (Docket No. 68, [Opp. to MSJ Mem. ("MSJ Opp.")] at 8 .) Plaintiff asserts that the Court should liberally interpret the phrase "nature of the work" to apply to discrete tasks, rather than her job as a whole. (MSJ Opp. at 6, citing *Richee v. Toys'R'Us* Case No. BC457688, (Cal. Sup.Ct. Los Angeles Jan. 9, 2013) (*"Richee"*); Docket No. 70, [Plaintiff's Request for Judicial Notice ("P–RJN")], Ex. 13 [*Richee*].)

The text of the regulation, the Department of Labor Standards Enforcement ("DLSE") and those courts that have considered the issue have adopted Abercrombie's interpretation of Section 14. Read as a whole, the phrase "the nature of the work" suggests the entirety of the duties and responsibilities of a particular job. The job—"the nature of the work"—either "permits the use of seats" or "requires standing", but it cannot do both. As one court in this Circuit recently held, "Section 14 establishes a dichotomous approach for employers to follow, based on the 'nature of the work' involved." *Kilby v. CVS Pharm., Inc.,* 2012 WL 1969284, at *4, 2012 U.S. Dist. LEXIS 76507, at *13 (S.D.Cal. May 31, 2012); see also *Gallardo v. AT & T Mobility, LLC,* 2013 U.S. Dist. LEXIS 46028, at *13–15 (N.D.Cal. Mar. 29, 2013); *Aguirre v. DSW, Inc.,* 2012 U .S. Dist. LEXIS 62984, at *33–35 (C.D.Cal. Jan. 19, 2012). Plaintiff argues that an employee's work falls within the scope of Subsections (A) or (B) depending upon what task they are performing at any given moment during the day. There is nothing to suggest that the Wage Order was intended to create such an unworkable rule for employers. Had such an approach been intended, it is reasonable to assume that the IWC would have chosen the phrase "job duties" to the phrase "nature of the work."

The courts that have considered the question have reached this conclusion. Thus, the *Kilby* court concluded, "The IWC clearly felt it necessary to delineate between the overall 'nature of the work' an employee does and the 'duties' that work may encompass." 2012 U.S. Dist. LEXIS 76507 at * 14. Moreover, the DLSE itself has indicated the importance of apply a reasonableness approach to this issue in a recent amicus brief submitted in *Garvey v. Kmart Corporation,* Case No. 11–2575 WHA (N.D.Cal. Dec. 7, 2012). (P–RJN, Ex. 6 [DLSE Amicus] at 3–4.) The DLSE's brief first noted that the construction of the Wage Order must be governed principally by its text:

> For purposes of enforcement, DLSE's interpretation of Section 14 is determined by the language in the Wage Order promulgated under the IWC's independent statutory authority. The language itself sets the legal standard for employers with respect to the provision of suitable seating.

***6** (*Id.*) The DLSE then announced that "[i]f called upon to enforce Section 14, DLSE would apply a reasonableness standard that would fully consider all existing conditions regarding the nature of the work performed by employees." (*Id.* at 3.) These words suggest that the DLSE would take a holistic rather than a piecemeal approach to a determination of the "nature of the work" as that phrase is used in the Wage Order. The Court joins the weight of this authority and respectfully disagrees with *Richee.*[5]

Principles of statutory interpretation also support the Court's construction of Section 14. As is commonly held, "we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *Boise Cascade Corp. v. United States* EPA, 942 F.2d 1427, 1432 (9th Cir.1991). Additionally, "when possible, we interpret statutes so as to preclude absurd results." *Andreiu v. Ashcroft,* 253 F.3d 477, 482 (9th Cir.2001) (en banc). Taken together, the two sections provide for different treatment for different groups of employees. Subsection (A) obligates employers to provide seating while an employee is on duty where to do so would not interfere with the ability of the employee to perform her duties. Subsection (B) provides for those employees who do not get the benefit of Subsection (A)—that is, for employees who are required to stand during the performance of their duties, the employer must provide seating during breaks. The argument that both sections apply to all employees fails to take this distinction into

account and would render limitations in subsection (B) meaningless. See *guirre,* 2012 U.S. Dist. LEXIS 62984 at *34 (emphasis in original).

Accordingly, the Court interprets the phrase "nature of the work" in Section 14 to mean that, holistically speaking, the nature of the work either: (1) "reasonably permits the use of seats" or (2) "requires standing." Plaintiff, therefore, can only have a claim under Subsection (A) or Subsection (B), but not both.

c. The Nature of Plaintiff's Job

The next issue the Court must address is the nature of Plaintiff's job: whether it reasonably permits the use of a seat or requires standing.

Employing the holistic approach, common sense indicates that if the predominant activities of Plaintiff's job require standing, then the nature of her work requires standing. And the predominant activities of Plaintiff's job reasonably permit sitting, then the nature of her work reasonably permits sitting. See *Kilby,* 2012 U.S. Dist. LEXIS 76507 at * 19 ("If ... the majority of an employee's assigned duties must physically be performed while standing, and the employer expects and trains the employee to stand while doing so, the 'nature of the work' requires standing."); *Gallardo,* 2013 U.S. Dist. LEXIS 46028 at * 14–15 ("The evidence may show, as it did in *Kilby,* that the majority of [the employees'] duties require them to stand, but that evidence is not presently before the Court and could not be considered on a motion to dismiss."); *Aguirre,* 2012 U.S. Dist. LEXIS 62984 at *34 ("[B]ecause Plaintiff has pleaded somewhat categorically that her job requires standing, she cannot plausibly allege that Defendants have violated subsection (A) ...."); see also *Garvey v. Kmart Corp.,* 2012 U.S. Dist. LEXIS 51705, at *9–12 (N.D.Cal. Apr. 12, 2012) (denying summary judgment on the basis that there was a genuine dispute of material fact as to whether Kmart's cashiers could perform their primary job functions while seated; estimates of time spent behind a cash register were as high as 90 percent).

*7 Generally speaking, the nature of a Model's work is a fact intensive inquiry. Plaintiff, as an example, carried on many different duties throughout various shifts. Furthermore, the Parties strenuously disagree regarding whether determining the nature of the work is a purely objective inquiry or whether the Court should take into account the employer's reasonable business determination of how the job should be performed. (MSJ Mem. at 3, 18–23; MSJ Opp. at 11–14.) Even so, Plaintiff affirmatively represents that "based on an analysis of Model's job duties, they can perform their work seated, or have access to a seat when not actively performing their job duties up to 40% of their time." (MSJ Opp. at 11 n. 11, 14.) In other words, ***at least*** 60% of a Model's job requires standing. On the basis of that representation, The Court has no trouble determining that the nature of a Model's job requires standing. Given Plaintiff's representation, the Court need not determine how much if any deference to give Abercrombie's business judgment or, for that matter, the opinion of their ergonomic expert. (See Docket No. 59–5.)

On the basis of Plaintiff's representation that no more than 40% of a Model's job could be performed seated, the Court finds that the nature of Plaintiff's work requires standing. Accordingly, as a matter of law, Plaintiff's claim under Section 14(A) must fail, and Plaintiff can only assert a claim pursuant to Section 14(B).

d. Subsection (B)

Now that the Court has determined that as a matter of law the nature of Plaintiff's work required standing, the only remaining issue is whether Abercrombie provided suitable seating in conformity with Section 14(B). Although the parties have not provided extensive briefing on the issue, resolution of this issue requires the Court to consider the meaning of "not engaged in the active duties of their employment" as that phrase is used in Subsection (B). Abercrombie contends that Echavez admits "that numerous suitable seats were available for her use during breaks in and directly outside each of the stores where she worked" and that this admission resolves the issue in its favor. (MSJ Mem. at 23.) Plaintiff argues that "[m]aking chairs available for use solely on breaks is not [in] compliance with Section 14(B)," and in any event there was no suitable seating "on or near the retail sales floor for employee use." (MSJ Opp. at 15 n. 15.)

The question is this: where, as in this case, the "nature of the work" requires standing, can the employer be in violation of Section 14 if it provides seating for those employees during their break periods. Abercrombie argues that "[a]s a matter of law, seating made available to employees for use during breaks located off of the sales floor satisfies Section 14(B)'s requirements." (Reply at 16.) Abercrombie cites *Kilby* and *Garvey v. Kmart Corp.,* 2012 WL 6599534, 2012 U.S. Dist. LEXIS 178920 (N.D.Cal. Dec. 18, 2012) (*"Garvey II"*) in support of its position. But those cases do not reach the issue presented here. Rather, in *Kilby,* where the employer presented evidence that it provided seats for its employees during their break periods, Plaintiff employee did not challenge CVS's compliance with subsection (B). *Kilby,* 2012 U.S.

Dist. LEXIS 76507 at * 9 n. 3. That Plaintiff in *Kilby* may have conceded the issue is not controlling here. *Garvey II* made no finding whatsoever regarding compliance with Subsection (B) because, like *Kilby,* it concerned only Section 14(A). *Garvey II,* 2012 U.S. Dist. LEXIS 178920 at *2–3. Plainly, neither case addressed the employer's obligation under Section 14(B), and, more particularly, whether "not engaged in the active duties of their employment" is a long-winded way of saying "on a break." The Court is therefore left to decide the question without any controlling precedent or even useful guidance from other district court decisions.

***8** To conclude that the words mean something other than "on a break" or "during a rest period" would be inconsistent with the "nature of the work" analysis discussed above. If the nature of the work permits seating during non-break periods, then seating should be provided under Section 14(A). But the Court, along with many others, has concluded that, properly construed, Section 14(A) only applies to jobs that do not require standing. Accordingly, Section 14(B) applies only to jobs that do require standing and therefore could only apply when the employee is on break.

The final question is whether there is any material issue of fact for trial as to whether "an adequate number of seats" was made available within "reasonable proximity to the work area" in the stores where Echavez was assigned. Abercrombie cites to Echavez's admission that "that numerous suitable seats were available for her use during breaks in and directly outside each of the stores where she worked." (Mem. at 23.) The so-called admissions are not sufficient to establish the adequacy of available, adequate seating in the various stores. The Court's review of the deposition transcript indicates that she denied the presence of adequate seating in the back room. (E.g., Docket 59–2 [Garcia Decl., Ex. 1—Echavez Depos.], at 69–70.) Moreover, the Court doubts that the presence of work tables which might be adequate to support a person's weight or step stools would constitute "suitable seats" for use by employees on their breaks. (*Id.* at 74–75, 101.) A box would almost certainly not be suitable even though employees might sit on it. (*Id.* at 101.) In the Court's view, the suitability of such "seating" raises a question of fact for trial. Likewise, while there were chairs on the sales floors of most stores (see SUF ¶ 113), whether a chair that is part of the sales decor in a public area is "suitable seating" for employees on break also presents a question of fact for trial. And the fact that employees might have left the premises during a break does not absolve Abercrombie of the responsibility of providing adequate seating during an employee's break.

In short, although the Court has resolved most issues in Abercrombie's favor, the final question—whether Abercrombie has in fact complied with its obligation under Section 14(B)—cannot be resolved on this record. Accordingly, Abercrombie's motion as to Plaintiff's Subsection (B) claim is **DENIED.**

3. CONCLUSION

For the reasons set forth above, the Court finds that as a matter of law Plaintiff's claim pursuant to Section 14(A) fails, but Plaintiff's claim pursuant to Section 14(B) survives. Accordingly, Abercrombie's motion for summary judgment is **GRANTED in part** and **DENIED in part.**

B. MOTION TO STRIKE

1. LEGAL STANDARD

Rule 12(f) of the Federal Rules of Civil Procedure provides that "[t]he court may strike from any pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed.R.Civ.P. 12(f). The Ninth Circuit has held that " '[i]mmaterial' matter is that which has no essential or important relationship to the claim for relief" and that "[i]mpertinent matter consists of statements that do not pertain, and are not necessary, to the issues in question." *Fantasy, Inc. v. Fogerty,* 984 F.2d 1524, 1527 (9th Cir.1993) (internal citations omitted), rev'd on other grounds, 510 U.S. 517, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994). "[T]he function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Sidney–Vinstein v. A.H. Robins* Co., 697 F.2d 880, 885 (9th Cir.1983).

***9** "Motions to strike are generally regarded with disfavor because of the limited importance of pleading in federal practice, and because they are often used as a delaying tactic." *Neilson v. Union Bank of Cal., N.A.,* 290 F.Supp.2d 1101, 1152 (C.D.Cal.2003). Accordingly, "courts often require a showing of prejudice by the moving party before granting the requested relief." *Quintana v. Baca,* 233 F.R.D. 562, 564 (C.D.Cal.2005) (internal quotations omitted). In considering a Rule 12(f) motion, "the Court views the pleadings in the light most favorable to the non-moving party, and resolves any doubt as to the relevance of the challenged allegations in favor of [the pleading party]. This is particularly true if the moving party fails to demonstrate prejudice ." *Id.* (internal citation omitted). Many courts find that a motion

to strike "should be denied unless the matter has no logical connection to the controversy at issue *and may* prejudice one or more of the parties to the suit." *Rivers v. County of Marin,* 2006 U.S. Dist. LEXIS 12496 at *6 (N.D.Cal. Mar. 6, 2006) (emphasis in original); *New York City Emples. Ret. Sys. v. Berry,* 667 F.Supp.2d 1121, 1128 (N.D.Cal.2009). In the end, the decision to grant or deny the motion is vested within the sound discretion of the trial court. *Neilson,* 290 F.Supp.2d at 1152.

2. APPLICATION

Abercrombie seeks to strike Plaintiff's "representative allegations" because it argues that Plaintiff is required to "prove labor code violations with respect to each and *every* individual she seeks to represent"-something it believes that she is unable to do given the varying nature of a Model's duties. (Strike Mem. at 1, emphasis in original.) Abercrombie submits over 100 declarations from Models in an effort to establish the varying duties and experiences. (Docket Nos. 60–2 through 60–12.) Plaintiff opposes Abercrombie's motion on both procedural and substantive grounds, arguing that Abercrombie's motion is untimely and incorrect on the law. (Docket No. 67, [Opp. to Strike Mem. ("Strike Opp.")].)

a. Timeliness

Abercrombie's motion, made 16 months after filing its answer and based on extrinsic evidence the majority of which has been in Abercrombie's possession for at least nine months, is untimely. (See Docket No. 60–2 (Deposition of Amber Echavez occurring November 20, 2012); Docket Nos. 60–2 through 60–12 (Declarations of Abercrombie employees dating as far back as June of 2012).)

Abercrombie cites three district court cases in this Circuit for the proposition that the Court can grant an untimely motion to strike where the court deems it proper to do so. (Strike Mem. at 3, citing *Corr. USA v. Dawe,* 504 F.Supp.2d 924 (E.D.Cal.2007), *Cedars–Sinai Med. Ctr. v. United Healthcare Ins. Co.,* 2010 WL 1875556, 2010 U.S. Dist. LEXIS 55150 (C.D.Cal. May 7, 2010), and *Lopez v. County of Tulare,* 2012 WL 33244, 2012 U.S. Dist. LEXIS 1833 (E.D.Cal. Jan. 6, 2012).) The Court is more persuaded by *Culinary & Service Employees Union, Local 555 v. Hawaii Employee Ben. Admin., Inc.,* 688 F.2d 1228 (9th Cir.1982), a case in which the Ninth Circuit held that the district court was in error striking material from a pleading following an untimely motion to strike, though the court purported to act in its own discretion. *Id.* at 1232; see also *Winnemem Wintu Tribe v. United States Forest Serv.,* 2013 U.S. Dist. LEXIS 46311, at *10 (E .D.Cal. Mar. 29, 2013) ("[T]his court reads *Culinary* as binding to the extent it requires a motion to strike to precede the filing of a responsive pleading to be timely.") Abercrombie's inexplicable delay in filing its belated motion to strike warrants denial.

b. The Merits

***10** Even if the Court were to consider the motion on its merits, Abercrombie's argument that "due process and trial manageability concerns preclude representative treatment" is unpersuasive. (Strike Mem. at 22.) Abercrombie insists that Plaintiff must prove that each of the individuals she seeks to recover on behalf of has suffered a labor code violation. (*Id.* at 1.) While that is true, it is no basis for striking Plaintiff's allegations.

First, the Court reminds Abercrombie of the permissible grounds for striking material from a pleading: the matter must be redundant, immaterial, impertinent, or scandalous. Fed. R. Civ. Proc. 12(f). Abercrombie's arguments are more an attack on the substance of the PAGA claim than an assertion that Plaintiff's representative allegations are redundant, immaterial, impertinent, or scandalous.

Moreover, Abercrombie fails to recognize that Plaintiff ***is not bringing a class action.*** Plaintiff's claim, as it stands now, is simply a representative PAGA claim which is ***not*** a class action but rather a ***law enforcement action.*** See *McKenzie v. Fed. Express Corp.,* 765 F.Supp.2d 1222, 1234 (C.D.Cal.2011). For that reason, "PAGA plaintiffs neither represent the rights of a class nor recover damages," rather "a PAGA claim is a private law enforcement action designed to further the reach of the [Labor & Workforce Development Agency]." *Cardenas v. McLane,* 2011 U.S. Dist. LEXIS 13126, at *8–9 (C.D.Cal. Jan. 31, 2011). While Abercrombie cites two decisions from this Circuit denying PAGA class certification motions, (Strike Mem. at 21–22, citing *Henderson v. JP Morgan Chase Bank,* Case No. CV 11–3428 PSG (C.D.Cal. March 4, 2013) and *Kilby v. CVS Pharm.,* Inc., 2012 WL 1132854, 2012 U.S. Dist. LEXIS 47855 (S.D.Cal. Apr. 4, 2012) (*"Kilby II"*)), these cases are entirely distinguishable because Plaintiff is ***not*** seeking to certify a class.[6] Accordingly, issues surrounding certification are not before the Court.

And third, the differences among Models employed by Abercrombie does not require striking the representative allegations. Abercrombie relies heavily on the assertions that "a plaintiff cannot recover on behalf of individuals

whom the plaintiff has not proven suffered a violation of the Labor Code by the defendant." *Cardenas,* 2011 U.S. Dist. LEXIS 13126 at * 10. But this amounts to an argument that the allegations should be stricken because Plaintiff may have a difficult time proving them at trial. That is not a ground for a motion to strike.

Judge Gutierrez of this District recently addressed the very due process and manageability concerns Abercrombie cites and put those concerns to rest.

> Defendants argue that if Plaintiff's PAGA claim does not automatically fail because the Court did not certify the class under Rule 23, the PAGA claim cannot be tried on a representative basis without impinging on Defendants' due process rights. However, the Court sees no reason for concern because Plaintiff must still prove Labor Code violations with respect to each and every individual on whose behalf Plaintiff seeks to recover civil penalties. Since Plaintiff's recovery of civil penalties is limited by the requirements of proving the case, the Court disagrees with Defendants and finds that permitting the PAGA claims to go forward does not circumvent the bounds of due process.

***11** *Alcantar v. Hobart Serv.,* 2013 U.S. Dist. LEXIS 5443, at *8 (C . D.Cal. Jan. 14, 2013) (internal quotations and citations omitted). The Court is persuaded by *Alcantar,* especially as elaborated most recently in Judge Gutierrez's July 10, 2013 order in *Henderson:*

> Defendant contends that Plaintiffs' maintenance of a PAGA action would infringe on its due process right to confront and cross-examine witnesses because Plaintiffs have not and cannot present a viable plan for proving the violations as to each and every member of the representative class.
>
> ....
>
> .... The Court simply sees no reason why Defendant will not have an opportunity to cross-examine and confront any witnesses Plaintiff calls at trial. Further, that Plaintiffs have not presented a viable plan for proving violations as to all employees does not mean that the due process rights of Defendant or any absent employee would be violated by permitting Plaintiffs to proceed; it merely means that Plaintiffs may ultimately be unable to prove their case.

Henderson, Case No. CV 11–3428 PSG, at *9–10 (C.D.Cal. July 10, 2013). Furthermore, as another court in this district recently held, "[t]o hold that a PAGA action could not be maintained because the individual assessments regarding whether a violation had occurred would make the claim unmanageable at trial would obliterate" the very purpose of PAGA because "every PAGA action in some way requires some individualized assessment regarding whether a Labor Code violation has occurred." *Plaisted v. Dress Barn, Inc.,* 2012 U.S. Dist. LEXIS 135599, at *9–10 (C.D.Cal. Sept. 20, 2012); *see also Henderson,* Case No. CV 11–3428 PSG, at *8–9 (C.D .Cal. July 10, 2013) ("[T]hat it may ultimately be difficult or unmanageable for Plaintiffs to prove their case is not a reason for the Court to strike the PAGA allegations.... That Plaintiffs' PAGA claim may be difficult to prove does not render the allegations redundant, immaterial, impertinent, or scandalous within the meaning of Rule 12(f)....").

c. Conclusion

Because the Court finds Abercrombie's motion to strike both untimely and incorrect on the law, the Court **DENIES** Abercrombie's motion to strike.

III.

CONCLUSION

For the reasons set forth above, the Court **GRANTS in part** and **DENIES in part** Abercrombie's motion for summary judgment. Judgment is **GRANTED** as to Plaintiff's Section 14(A) claim only. Additionally, the Court **DENIES** Abercrombie's motion to strike.

IT IS SO ORDERED.

Footnotes

1 The parties earlier stipulated to the dismissal of non-employer defendants Abercrombie & Fitch Co. and Abercrombie & Fitch Trading Co. (Docket No. 53.)

2 The Court notes that "Abercrombie" operates retail stores under the brand names Abercrombie & Fitch and Hollister. (P–SDF 3.) Plaintiff worked at both brands. (P–SDFs 26, 28.)

3 Plaintiff disputes this fact insofar as she argues that some of Plaintiff's shift could involve tasks that could be performed while seated. Not only is this dispute unresponsive and argumentative, but Plaintiff's own deposition testimony amply confirms the fact. The Court will take this fact as undisputed.

4 Robert Nava was the designated person most qualified of Abercrombie & Fitch Stores, Inc. Stephanie Rosemarie Charles and Christopher Todd Smith were both, at the time of deposition, district managers.

5 Plaintiff's other citations, three California Superior Court decisions and one District Court opinion, are either not on point or unpersuasive. (MSJ Opp. at 10.) *Allen v. AMC Entertainment, Inc.,* Case No. RG11585502, 2013 WL 2382507 (Cal. Sup.Ct. Alameda Feb. 15, 2013) ("*Allen*"), (P–RJN, Ex. 16 [*Allen*]), in fact embraces the holistic approach and notes that courts generally interpret "nature of the work" by evaluating "the amount of time the position's job duties can be performed while sitting versus the time spent on duties that can only be performed while standing." *Allen* at *2. Plaintiff also cites *Hall v. Rite Aid Corp.,* Case No. 37–2009–00087938–CU–OECTL (Cal. Sup.Ct. San Diego Apr. 17, 2009) ("Hall") and *Murphy v. Target Corp.,* Case No. 09–1436 CAB (S.D.Cal. Oct. 1, 2012) (*"Murphy"*). (P–RJN, Exs. 14 [Hall], 17 [Murphy].) However, Hall fails to provide either a *text or logic based reason for a non-holistic approach, and Murphy actually appears to take a holistic approach.*

6 Additionally, Abercrombie's citation to California Superior Court case *Anderson v. Gap, Inc.,* Case No. BC461618 (Cal. Sup.Ct. Los Angeles Dec. 12, 2012) (Docket No. 60–14, [Defendants' Second Request for Judicial Notice ("D–RJN 2")], Exs. 4–5), is unpersuasive for multiple reasons. *Anderson* is a non-precedential state trial court decision where the judge did not even prepare a written ruling. The decision does not support itself with legal authority nor does it appear to be supported by legal authority. Furthermore, while the court did strike the plaintiff's representative allegations, state courts do not apply Federal Rule of Civil Procedure 12(f) or its strictures.

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United States District Court,
N.D. California.

Lisa GARVEY, individually and on behalf of others similarly situated, Plaintiff,
v.
KMART CORPORATION, Defendant.

No. C 11–02575 WHA. | Dec. 18, 2012.

Attorneys and Law Firms

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Opinion

FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER BENCH TRIAL

WILLIAM ALSUP, District Judge.

INTRODUCTION

*1 This is the first of the so-called "seating" cases to go to trial, a certified class action for recovery of penalties under California's Private Attorney General Act of 2004. Plaintiff alleges that that defendant has failed to provide suitable seats for checkout cashiers in violation of a California wage order. This order is the decision of the Court following a one-week bench trial.

SUMMARY

"All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats," according to the law in California. In this civil action, class counsel have failed to prove that the nature of the work reasonably permits the seating modification urged by counsel at trial. Possibly a different modification involving a lean-stool would be provable but this record does not support it.

PROCEDURAL HISTORY

Plaintiff commenced this action in California state court in April 2011, alleging that defendant Kmart Corporation failed to provide suitable seating for checkout cashiers in violation of California Labor Code Section 1198 and Section 14(A) of Industrial Welfare Commission Wage Order 7–2001, the latter of which provides: "All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats."

Plaintiff sought civil penalties under California Labor Code Private Attorney General Act Section 2698, as well as attorney's fees and costs. Defendant timely removed the action to our federal district court in May 2011.

Defendant moved for summary judgment in January 2012. Following stipulations by the parties, the briefing schedule was repeatedly extended to accommodate the parties' discovery needs. An April 2012 order denied the summary judgment motion, concluding that (1) the wage order did not require employees to affirmatively request a seat; (2) the wage order did apply to Kmart cashiers; but, (3) there was a genuine issue as to whether the work of Kmart cashiers reasonably permitted seats.

Plaintiff sought to represent a class of Kmart cashiers throughout California, approximately 5600 individuals from 100 stores (Dkt. No. 75). In July 2012, an order certified a narrower class of 71 cashiers limited to a single Kmart store in Tulare, where the named plaintiff worked (Dkt. No. 92). The class was specifically defined as: "All persons who, during the applicable statute of limitations, were employed as a Cashier for defendant at its Tulare Kmart store and were not provided with a seat while working the front-end cash registers." The class was limited to a single store because of potential problems of manageability with statewide certification. Certification of the narrower class, proper in and of itself, would illuminate, in the Court's judgment, the extent to which genuine individual issues might preclude statewide class certification. The possibility of certifying a broader class as to the rest of the Kmart stores in California remains open. At trial, no class manageability

issues arose and, indeed, it became apparent that class treatment for at least the Tulare store was entirely appropriate.

*2 In October 2012, plaintiff moved for sanctions on the basis of spoliation of evidence (Dkt. No. 126). Following oral argument, an order ruled that defendant had failed to preserve and failed to produce relevant evidence pertaining to cashiers' use of Kmart checkout registers (Dkt. No. 180). The order did not specify a sanction but concluded that defendant's destruction of evidence might warrant a burden shift depending on the parties' positions at trial on liability and damages. In the actual event, however, this faded away.

Two weeks before trial, defendant moved to decertify the class as a sanction for alleged discovery violations and on the grounds that plaintiff planned to call a statistically insufficient sample of class members (Dkt. No. 175). Following argument at the pretrial conference, this motion was denied (Dkt. No. 179).

Both sides initially listed an inordinate number of witnesses for trial. Plaintiff identified 79 witnesses; defendant identified 78 (Dkt.Nos.127–128). The parties subsequently retreated from these lists. The parties' joint proposed pretrial order winnowed plaintiff's and defendant's potential witnesses down to 20 and 14 individuals, respectively (Dkt. No. 166).

The trial commenced on Tuesday, November 13. During the trial, plaintiff called six live witnesses. Plaintiff also read in testimony from a deposition, and one witness' written testimony was admitted by stipulation. Defendant called only four live witnesses to the stand. Plaintiff elected not to put on a rebuttal case. The parties were each accorded 12 hours of time for witnesses at trial, with additional time for opening and closing statements (Dkt. No. 179). Due to the parties' concerns about the effects of the holidays on the parties' and witnesses' schedules, the Court also agreed to a flexible end date for the trial. The bench trial concluded on Tuesday, November 20, following closing arguments on the sixth day of testimony. Both sides finished the trial with substantial amounts of unused time.

During the trial, the undersigned judge requested that the California Labor Commissioner and the Secretary of the California Labor and Workforce Development Agency submit amicus briefs on the meaning of IWC Wage Order 7–2001 Section 14 as to five specified questions. Plaintiff and defendant both submitted comments to the amicus entities on the questions posed (Dkt. Nos.200, 203). On December 7, the California Labor Commissioner filed a short brief, but it did not specifically break out its discussion so as to answer all five questions (Dkt. No. 238).

During the trial, defendant timely moved for judgment under Federal Rule 52(c) (Dkt. No. 201). That motion is addressed by the instant order. Defendant also renewed its motion to decertify the class (Dkt.Nos.202). During the trial, however, no genuine commonality issues arose and therefore defendant's motion to decertify is **D ENIED.**

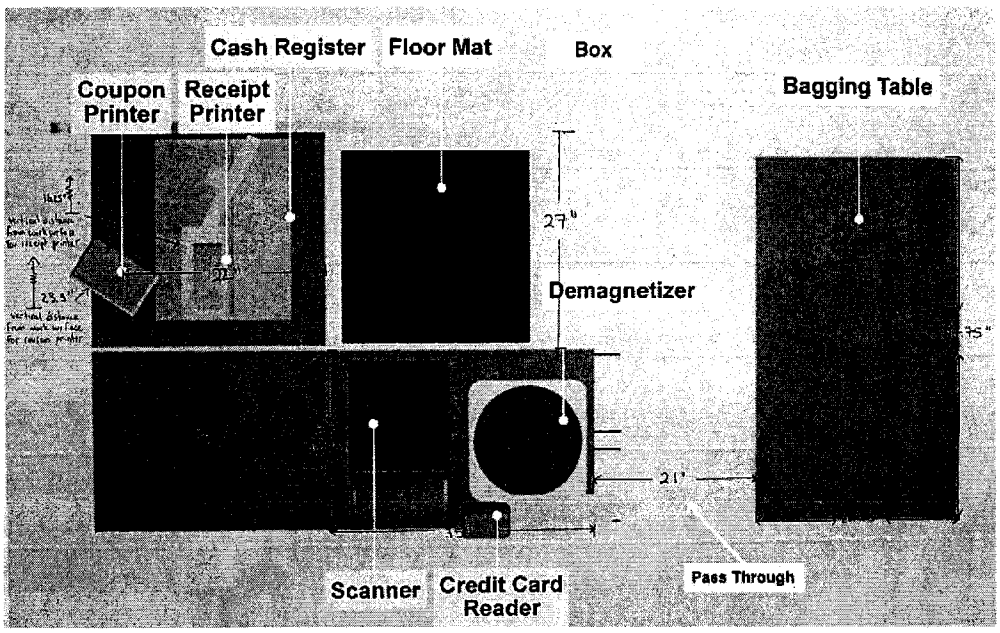
Following the close of evidence, both sides submitted lengthy proposed findings of fact and conclusions of law, followed by responses (Dkt.Nos.229, 234, 236–37). It is unnecessary for this order to sort through all of the proposals, for this order will find its own way through the evidence. Nor is it necessary to cite the record. Citations will only be provided that may assist the court of appeals. Any proposal in the parties' proposed findings of fact that has been expressly agreed to by the opposing side shall be deemed adopted. In the findings, the phrase "this order finds ..." is occasionally used to emphasize a point. The absence of this phrase, however, does not mean (and should not be construed to mean) that a statement is not a finding. All declarative statements set forth herein are factual findings.

STATEMENT OF FINDINGS OF FACT

*3 Here are the findings of fact most important to the outcome of the case.

ANATOMY OF A FRONT–END CHECKOUT STAND AT THE TULARE KMART

1. At issue in this class action are the seven "front-end" cashier stands located at the front of the Tulare store, adjacent to the customer entrance. The term "checkout stand" herein refers to all of the features described in the remaining paragraphs in this subsection. The following top view used at trial will assist the reader (with apologies to the reader for the illegibility of the handwritten material, most of which is too small to read in this reproduction but which is unnecessary for understanding this order). The "box" and the "pass-through" have been added by the Court in this image—those labels were not on the original of TX 216A.



Top View Scheme (TX 216A)

2. The checkout stands in question resemble checkout stands all of us have seen in modern times. Nonetheless, a detailed description now follows.

3. When a customer enters a Tulare Kmart checkout lane, he or she first encounters the receiving end of a 57–inch long checkout counter. The 57–inch surface serves as an assembly line for processing items from the receiving end where the items are placed by customers to the terminal end where the items are bagged by the cashier. The 57–inch counter is actually a cabinet with open interior space underneath, open to the cashier side. The cabinet measures 57 inches in length, 23 inches wide, and 36 inches in height. The receiving segment is about 22 inches long. The farthest point thereon, diagonally on the surface of the checkout counter from where the cashier usually stands is approximately 32 inches, meaning that the cashier must at times reach 32 inches to move along some items. There is no conveyor belt.

4. The rest of the 57–inch long cabinet is primarily covered with built-in equipment used in completing the transaction. Next after the receiving end is a flat scanner surface for scanning the bar codes on merchandise. Rising above the counter at a vertical right angle to the flat scanner is another scanner at the customer edge of the counter that catches codes on the sides of packages. One or the other scanner will usually read the bar codes.

5. Next is a built-in flat demagnetizer pad that rises only slightly above the surface of the counter. When objects are placed on the demagnetizer, various types of security tags used to prevent theft are deactivated.

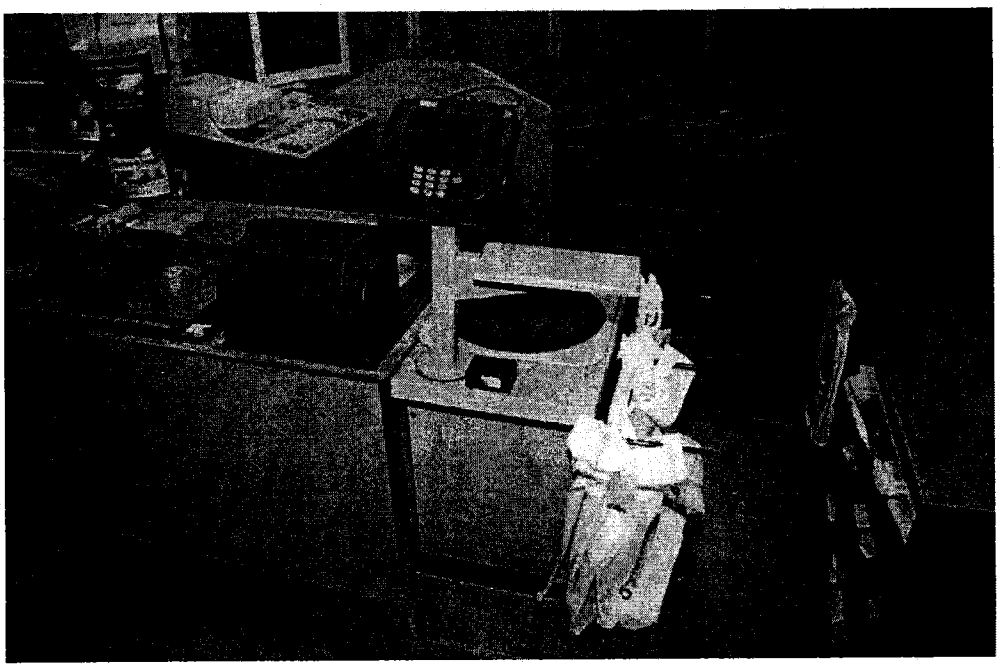
6. Situated between the demagnetizer and the scanner—but higher up at a customer-friendly height and on the customer side of the counter—are the credit-card reader and check-writing pad. The check writing pad is in a fixed position along the side edge of the checkout lane. The credit card reader includes a pin pad for inputting information (and is sometimes called a pin pad).

7. The items usually pass quickly from the receiving end to the terminal end of the counter, passing by the scanner, then the demagnetizer, and are then dropped into bags conveniently hanging from prongs at the finish line of the counter, all often in a single sweep of motion by the cashier, at least for the lighter weight objects. Then, the bags are placed by the cashier on the separate bagging table or in the customer's basket or handed to the customer.

*4 8. On the exit side, the bagging table is set away from the main processing counter by a "pass-through" wide enough to allow passage by the cashier to and from the customer lane. The surface of the bagging table measures 47.75 inches long by 28.25 inches wide. Its long direction runs at a right angle to

the long direction of the main processing counter. The surface of the bagging table is 31.75 inches above the floor, a few inches lower than the main processing counter. Underneath the surface of the bagging table are open cabinets that hold several sizes of plastic bags.

9. The following photograph (TX 15–64) also illustrates the layout:

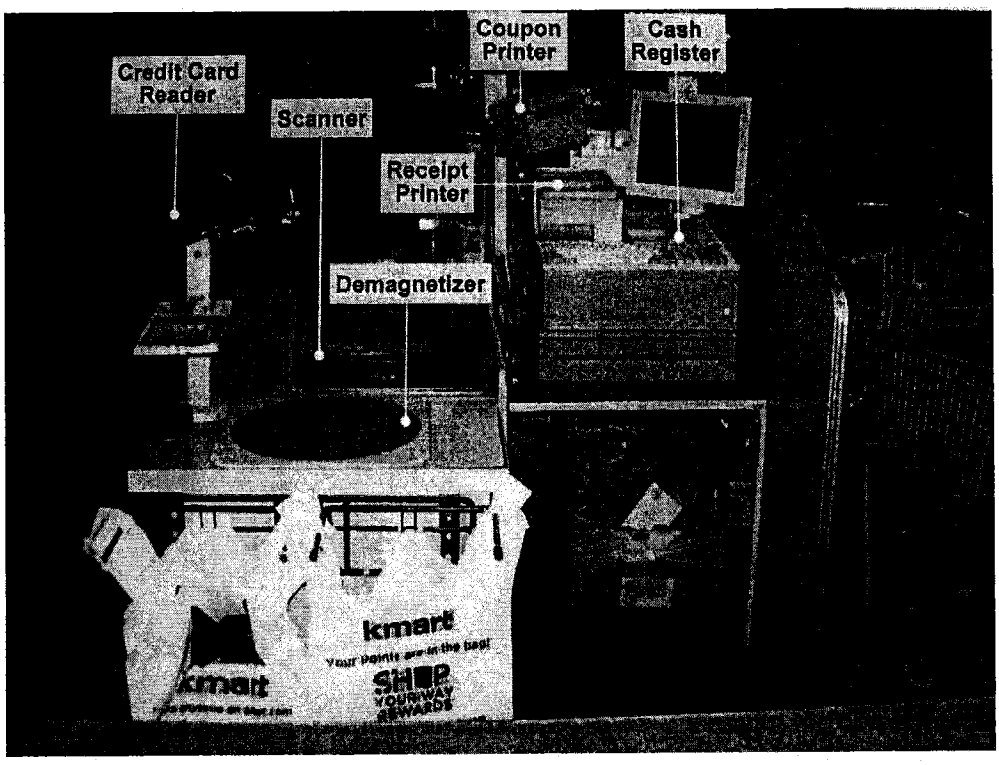


Photograph from Customer Side of Counter (TX 15-64)

10. As illustrated in the photograph above, the "pass-through" is between the bagging table and the checkout counter. It is a 21–inch wide gap space that provides the cashier with access to and from the checkout lane. Part of this space is occupied by four metal prongs which support the plastic bags most frequently used by cashiers for bagging items, that is, the bags that usually terminate the sweep of the item from start to finish, as the item is dropped into a bag (hanging on the prongs) and then moved to the bagging table.

11. Underneath the surface of the 57–inch long checkout counter cabinet, accessible to the cashier, is a cabinet space. The bottom of the scanner protrudes downward 5.5 inches into this open space from the top of the checkout counter. This space also contains a bin with an open bag that is used for trash.

12. Yet a third surface holds the cash register and affiliated items. This third feature is another cabinet protruding horizontally from the main counter at a right angle in an L-shaped configuration with the long side of the L being the main processing counter, and the cash register cabinet being the short side. The cash register sits on top of an open cabinet, 36 inches above the floor, that is, the bottom of the cash register is 36 inches above the floor. From the cashier's perspective, the cash register cabinet is to the right of the checkout counter cabinet, and is flush with the receiving side of the checkout counter cabinet (the side first encountered by a customer entering the checkout lane). The following photograph (TX 216B) illustrates:



Photograph Looking Over Bagging Table Toward Main Counter and Cash Register (TX 216B)

13. At the bottom of the cash register is a till for cash. At the top of the register is a keyboard, an elevated touch-screen display monitor, and a receipt printer. The bottom of the receipt printer is 16.25 inches above the top of the cabinet surface that supports the cash register.

14. On the left side of the cash register is a coupon printer. The coupon printer is elevated and separate from the cash register. The bottom of the coupon printer is 23.5 inches above the surface of the cabinet that supports the cash register, and 22 inches back from the front of the cabinet where the cashier stands.

15. Underneath the cabinet that supports the cash register is an open space. Within this space there is a bin containing an open plastic bag. Cashiers use this bin for discarded clothes hangers and items that customers choose not to purchase. So there are two bins: this one for returns (under the register) and one for trash (under the scanners).

*5 16. Other notable features of the checkout stand are the hand scanner and the anti-fatigue mat. The hand scanner is usually stored on the top of the cabinet supporting the checkout register, next to the base of the register and on its left side. The cashier can pick up the hand scanner and, depending on the circumstances, either lean and reach over the surface of the checkout counter, or else walk through the pass-through aisle and manually scan items in the customer's cart. These items may be on the surface of the checkout counter, or in a customer's shopping cart. The anti-fatigue mat is a flat pad on the floor in the corner formed by the cabinet under the cash register and the checkout counter cabinet. This is where the cashier does most of the work. This area is called the "box."

THE TYPICAL CHECKOUT PROCESS AT A FRONT–END CHECKOUT STAND

17. The assembly-line processing of merchandise will now be explained in more detail. Upon arrival at the checkout stand, the cashier logs in to the cash register computer. The cashier puts cash in the till as necessary, and opens the first two plastic bags, leaving them hanging on the metal prongs. Then, the cashier turns on the light in the checkout lane to signal to customers that the checkout lane is open. The cashier is required to stand for all of these duties.

18. The cashier greets customers as they arrive at the front of the checkout lane. Customers then typically place merchandise for purchase on the checkout counter at the receiving end of the counter. The cashier manually takes an

item and drags it over the surface of the scanner, one at a time. If the scan is successful, the register will make a beeping sound. The flat scanner tries to read bar codes on the bottom. The vertical scanner tries to read bar codes on the sides. If the cashier doesn't hear a beep, the cashier repeats the scanning motion until the register recognizes the item. This is usually done in a sweeping motion with one or both arms.

19. Once the item is scanned, the cashier touches the item momentarily to the surface of the demagnetizer to deactivate any security devices. Certain items, such as dog food and containers of water, do not use such devices and do not need to be demagnetized.

20. Once the item is scanned and any security tags are deactivated, the cashier places the item in a plastic bag supported by the metal prongs at the end of the checkout counter. When filled, bags are transferred over to the bagging table or handed to the customer.

21. For large, heavy, or awkwardly-shaped items, the cashier has three options. One is to manually move the item from the receiving end over the checkout counter, over the scanner and demagnetizer, and then bag it. Alternatively, the cashier can reach over to scan the item with the hand scanner while it is still in the cart. This is a long reach. When the bar code is not reachable in this way, the cashier can walk through the pass-through (between the bagging table and the checkout counter) to scan the item in the customer's cart using the hand scanner.

*6 22. In rare cases, very large items are brought to the checkout lane on flatbed carts by other Kmart employees. The item can be scanned with the hand scanner, or the bar code can be torn off the item and scanned in the checkout stand. Large, heavy, or awkward items are not always bagged. When they are, the cashier may place them on the bagging table and use largersized bags underneath the table to bag the item.

23. Some items of clothing require additional procedures. More expensive articles of clothing use a special, reusable "gator clip" security tag. The cashier will remove the gator clip security tag using a handheld detaching device at the checkout stand, and then fold the article before putting it in a bag. If the merchandise is an article of clothing with a hanger, the cashier will ask the customer if they want to keep the hanger. If the customer does not want the hanger, the cashier will drop it into the bag under the cash register.

24. During the checkout process, the cashier asks if the customer is a member of the Kmart loyalty program. If so, the cashier asks for the customer's phone number and keys it into the keyboard on the cash register. If the customer is not a member, the cashier asks if they would like to become one. If so, the cashier uses the cash register to input the customer's information and sign them up.

25. During the checkout process, the cashier follows standard processing procedures known as "BOB" and "LISA." "BOB" stands for "bottom of the basket," and refers to the requirement that a cashier look in both the bottom and the top of all customers' shopping carts prior to completing the checkout transaction. "LISA" stands for "look inside always," and refers to the requirement that a cashier look inside of a closed item for purchase, such as a backpack or a cooler, that could contain other items. Both procedures are intended to insure that all of the items that a customer brings to the checkout lane are scanned and purchased. BOB and LISA are "anti-shrink" precautions.

26. If a customer purchases certain restricted items, such as alcohol, the cash register will automatically pause the transaction. The cashier will ask the customer for identification. In order to complete the scanning process for that item, the cashier will enter customer information into the cash register using the touch screen panel.

27. If the cashier is unable to scan an item or there is a price discrepancy, the cashier will step away from the checkout stand to place an phone call to the appropriate department in the store. There is one such phone for all seven cashiers. Upon returning to the checkout stand, the cashier can enter updated information into the register, or use the register to process and print out a rain check for the customer.

28. When the transaction is complete, the cashier asks the customer if they would like to use a Sears credit card to pay for the purchases. If the customer does not have a Sears credit card, the cashier asks if the customer would like to sign up for one. If the customer signs up for a Sears credit card, the customer enters information using the credit card reader, and the cashier enters information using the cash register touch screen.

*7 29. Otherwise, the customer can pay for the transaction using a credit card or debit card in the credit card reader, by check, or with cash. The cashier often has to assist the customer in pushing the right buttons on the reader.

30. If the cashier does not have sufficient change for a cash transaction, the cashier will leave the checkout stand briefly to get additional change from a service desk in another section of the store.

31. At the end of the transaction, the cashier may also leave the check stand to make a phone call requesting another employee to help the customer move a heavy cart or carry a heavy item out to the parking lot.

32. A typical cashier's shift is four and a half hours. At approximately the two-hour mark, the cashier gets a paid fifteen-minute break. During this break, cashiers usually go to the employee break room, which contains space for sitting and eating, or to the public restaurant in the Tulare store. Cashiers are otherwise required to stand while working.

33. In sum, most of the tasks done by a Kmart cashier could be done while seated but some tasks can only be done while standing. Standing tasks include processing heavy, large, and/or awkward items; scanning items in a customer's cart with the hand scanner; looking inside closed items in a customer's cart; straightening the checkout lane when customers are not present; and retrieving additional change for the cash register. While these are a minority of the time, they nonetheless occur so frequently when the checkout lane is busy that cashiers must be standing many times over the course of an hour. Put differently, even if seating were allowed, cashiers would be up (and down) frequently to perform the tasks that require standing.

ANALYSIS AND CONCLUSIONS OF LAW

34. The public policy of the State of California is that "[a]ll working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats," as set forth in Section 14 of Wage Order 7–2001 issued by the Industrial Welfare Commission, which provision has the full force of law. Neither the Commission nor the California Labor Commissioner (DLSE), charged with enforcement of the wage order, has previously interpreted Section 14 as it might apply to the case in hand.

35. It does not matter that sedentary work has its own health problems. The welfare balance between standing and sitting has been decided by the Commission. The Court will not and should not be drawn into a debate over whether it is a wise or unwise policy.

36. Although the Court requested an amicus brief from the DLSE on five questions, its brief addressed more general considerations and did not answer the five questions. Nonetheless, this order will attempt to follow the general guidance of DLSE and consider the nature of the work and all of the facts and circumstances as set forth in the trial record. The Court is much obliged to the DLSE for its amicus brief.

*8 37. This civil action does not present any issue under any of the disability laws or parental leave laws. Section 14 covers able-bodied class members and the extent to which they are entitled to seating.

DESIGN AND SAFETY

38. Class counsel concede that some physical cashier tasks require standing and further concede that the suitable seating is not possible in the standard Kmart cashier stall. So, even class counsel acknowledge that simply adding seats to the Tulare store would not work. In a moment, this order will evaluate the proposed re-configuration urged by class counsel, but first it is instructive to see why seating would be impractical and unsafe, with or without the reconfiguration urged by class counsel.

39. If a stool were introduced in the "box" area occupied by the cashier—which area measures only 27 inches by 35 inches—the stool would be an obstacle course in moving back and forth from the cash register to the bagging area with respect to those tasks that concededly would have to be done while standing. The Court concludes and finds that this would inevitably lead to stumbles as the cashier hustled from one end of the box to the other. It would be unsafe.

40. In acknowledgment of this problem, class counsel propose to redesign the cashier stand so that a stool could slide out from and back under the main processing counter. The standard Kmart stall design now uses that space for trash disposal, using a bin resting on an elevated bottom shelf a few inches off the main floor. In other words, the shelf now in use is raised from the floor and would block the stool from sliding under the counter. So the raised bottom shelf would have to be torn out so that the stool could slide along the floor and under the counter. Also, this would facilitate making room to bring the legs of the cashier under the counter. The trash bin

there now would have to go elsewhere. According to class counsel, it would go inside the bagging table, displacing the less-frequently-used-size bags, more about which later.

41. While this redesign would leave room to store the stool under the main counter—and would leave enough room for the knees and thighs of the cashier to go under the countertop—there would be a stool-movement problem due to the fatigue mat. The legs of the stool would catch on the fatigue mat and would, in the Court's judgment, not slide smoothly in and out of the under-counter area. In this regard, neither side presented evidence on this practical question, but this order is confident from ordinary experience that the fatigue mat and the legs of the stool would be an unhappy match.

42. The fatigue mat is needed at all events because of the standing required by the job. If wheels were added to the bottom of the legs, this movement problem would be mitigated, but then the risk of an unstable landing on the stool would be aggravated, especially since class counsel also propose a swivel seat. By landing, this order means the repositioning in going from a standing position to a seated position while managing to land one's rear end squarely on the stool seat. Such repositioning would have to be frequent.

*9 43. There would be two movable features of the proposed stool—leg wheels and a seat swivel—and the cashier would need to look carefully for the dead center of the stool each time to make a safe landing. There would be frequent ups and frequent downs even if most of the work could be done while seated. Since the stool would almost always be behind the cashier and out of view, the temptation would be to sit without looking carefully and this temptation would lead to accidents. Again, no evidence was presented by either side at trial on how a swivel stool with wheels would actually work in practice, with or without a fatigue mat.

44. No stool was brought in, much less one with wheels and a swivel seat.

45. While class counsel built a plyboard mock-up of the stall itself before trial, class counsel withdrew it as an exhibit before trial started. Defense counsel then subpoenaed the mockup but never used it at trial. It simply remained in the well of the courtroom like a stranded whale on a beach. It was never used by either side to illustrate anything.

46. The Court would be exceedingly reluctant to order Kmart to use a seating system that poses a safety hazard. Put differently, as to the proposed design modification, plaintiff has the burden to prove that "suitable seating" exists. Suitable seating must mean safe seating. Class counsel have failed to prove this aspect of their case.

47. Staying with the proposed design modification by class counsel, there is a further, separate problem. Class counsel propose to (i) move the bagging table to be flush with the end of the main processing counter and (ii) to shorten the length of the bagging table. The idea is to bring the bagging table within the long arms reach of a cashier, if seated as proposed by class counsel. As explained at closing argument, it would look like this:

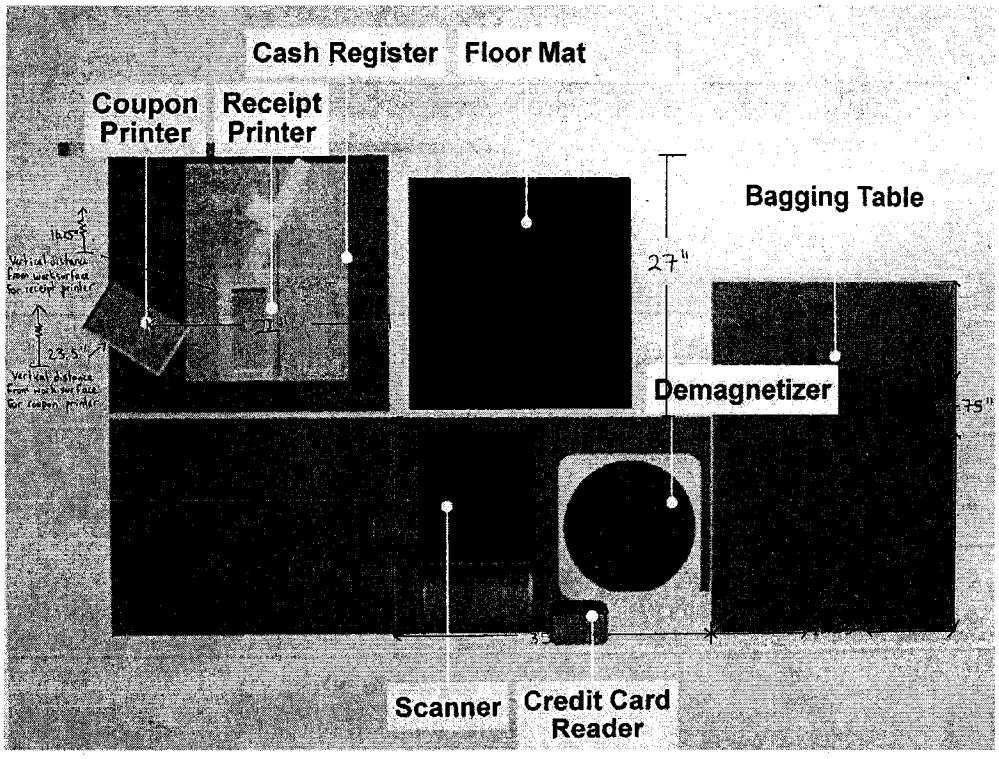


Figure 1: Modification by Moving the Bagging Table

48. This diagram is not a trial exhibit but is the Court's modification of TX 216A to reflect the proposed modification as described by class counsel during closing argument. Note well that it would eliminate the pass-through, would shrink the overall footprint, and would lop off part of the bagging table.

49. As stated, the advantage of this modification is that it would reduce the reach required of a seated cashier so that the cashier could remain seated and, with a long reach, still touch the bagging table to deposit the lighter weight items in bags.

50. The main problem with this modification, however, is that it would eliminate the pass-through. The pass-through is an important feature allowing swift passage of the cashier to and from the customer lane to scan items and to assist with larger items in the cart (and also to verify that there are no items left in the bottom of the basket). Without the pass-through, the cashier would need to walk all the way around the bagging table. This would be less convenient for the cashier and lengthen the checkout time and thus be less convenient for customers. Although each one-way passage would be only five or so extra seconds, the extra time per customer would accumulate to a material overall inconvenience imposed on the checkout process for all customers and a material overall inconvenience imposed on the cashiers themselves. The whole point of the pass-through is to avoid this very delay.

***10** 51. To mitigate this problem, class counsel would reduce the size of the bagging table, as stated. In this way, there would be less of a "around-Robin Hood's barn" route. This would reduce some of the delay, but most of the delay would remain. And, this would reduce the surface space available for bagging. Moreover, it would frustrate class counsel's idea to move the trash bin under the bagging table (recall that class counsel proposed to move the bin to under the bagging table in order to make room for the stool under the main processing counter). This frustration would occur because the open space under the bagging table accessible to the cashier would be shrunk due to (i) the shorter length of the bagging table and (ii) the fact that most of the cashier-facing side of the bagging table would become blocked by the main processing counter (*see* figure above).

52. Finally, eliminating the pass-through would also destroy the convenient location where the most frequently-used bags now hang. Where these bags (and the larger bags displaced by the relocated trash bin) would go is a mystery.

53. To this, class counsel also say that the pass-through is unnecessary because a system of mirrors would be erected to spy on the bottom of baskets to carry out BOB. That is, the cashiers could remain seated and glance at well-positioned mirrors to check the bottoms of baskets for merchandise. How this would actually work was never demonstrated. Class counsel asked one or two witnesses about the use of mirrors in Europe but even this was sketchy evidence. It remains totally unclear the extent to which a reliable mirror system could be deployed in the Tulare store. Class counsel's mirror theory fails as mere theory and not proven as usable and effective in the Kmart setting. It bears stating that a mirror could not possibly relieve cashiers from having to use the pass-through for other tasks such as scanning a large box in a shopping cart with the hand scanner.

54. In sum, this order rejects the proposed modification by class counsel as too unsafe, too inefficient, and too inconvenient to customers and cashiers. Adoption of the proposed modifications would unreasonably interfere with Kmart's legitimate interest in providing quick and efficient customer service so as to compete with other big box stores.

THE GRABAU POLICY DIRECTIVE

55. As "seating" lawsuits were being filed against its competitors, a Kmart HR official, Aimee Grabau, adopted a "policy" that any cashier in California Kmarts would be allowed to use a seat at the cashier stall if he or she asked for one. This was a tactical defensive measure against the eventual day that Kmart would also be sued. It was a secret policy in the sense that cashiers were never notified of this new policy. The policy was never reduced to a memo or email, or if it was, those were destroyed. The only extant documentation of the policy was a slide in a PowerPoint presentation (TX 389). In pretrial proceedings, Kmart asserted the policy as a defense, but the Court ruled that Section 14 was not conditioned on an affirmative request by the employee, rejecting Kmart's line of defense based on this policy.

*11 56. In a complete turnabout at trial, Kmart counsel then argued that the policy was inadmissible altogether, claiming that it was a "subsequent remedial measure" under Rule 407. This too was rejected. Kmart wanted the benefit of the secret policy when it thought it might be a defense, but when that lost, it wanted to deep-six the policy altogether to prevent its use against Kmart. No one, by the way, was ever given a chair at the Tulare store under this secret policy or anywhere else in California, with the sole exception of a store in Sonoma where one cashier possibly was allowed to sit.

57. After all of Kmart's machinations, it would be poetic justice to hold Kmart to the full implications of its so-called policy, namely to hold that providing a seat in the existing configuration would be safe and practical. This would, however, not be actual justice, nor actual safety. Even class counsel have conceded that a chair (or stool) cannot be safely used with the existing configuration. And, after hearing all the evidence, the Court agrees on this point. Despite severe misgivings about the way Kmart has tried to manipulate the proceedings, the just answer remains that the proposal by class counsel is just not safe and workable.

LEAN–STOOLS

58. In view of evidence concerning how some chains in the United Kingdom and Europe operate with seated cashiers, and in view of the broader industrial welfare themes argued at trial by both sides, this order will now go further and consider more elaborate, revised configurations for cashier stands. No such specific configuration was actually placed in evidence or subjected to any test runs, so this analysis is necessarily limited to more general considerations. In the Court's view, the best case for a plaintiff class would involve a form of lean-stool. As a part of this analysis, this order finds that the term "seats" in Section 14 includes "lean-stools." Rigid lean-stools allow an individual to place most of their weight on a supported seat, while remaining in a more upright, leaning position. This was the alternative recommendation by plaintiff's ergonomics expert to WalMart (when he was acting as a business consultant rather than a litigation expert), though WalMart rejected the concept.

59. The most likely practical alternative would involve a lean-stool permanently affixed to the floor (with its height adjustable to the individual cashier). Its slim profile would provide more space to walk back and forth between the register and the bagging table (than would the movable stool proposed by class counsel). To accommodate the lean-stool and extra walking space, a larger overall footprint would probably be necessary. At Tulare, this would require tearing out the existing stalls and replacing them with the larger configurations. This would cost several hundred thousand dollars at Tulare and reduce the number of lanes from seven

to six (unless extra space was deducted from an adjacent merchandise area).

*12 60. The advantage of this expansion would be that the cashier could lean-sit against the lean-stool and take some weight off their legs while still doing most of the work as efficiently as now. The pass-through could stay where it is. The bagging table could stay where it is. The cashiers would not *sit.* They would *lean,* almost in a standing position. Their feet would be on the floor. The stool would be positioned so as to allow the cashier to lean for routine processing and to stand quickly for the tasks that require standing.

61. It would still be necessary, however, for cashiers to stand during the following operations: (1) processing heavy and bulky items; (2) stepping through the pass-through and then into the customer lane to check the bottom of the basket and/or to scan a large item left in the shopping cart; (3) to deposit filled bags on the bagging table or in the cart; (4) to assist customers with the pin pad; (5) to stretch for items near the receiving end of the counter for incoming merchandise. Although these tasks take up a minority of the time at the work station, they happen so regularly during each hour that cashiers would be up and down frequently even in such a configuration. Put differently, even if standing is required only for ten percent of the tasks, that ten percent occurs so often during each hour that it will result in repetitive rising and sitting (leaning) by the employee. A lean-stool, when used by a cashier, would keep the cashier poised to stand so as to maintain efficiency and the appearance of efficiency. The lean-stool would have to be close enough to where the cashiers now stand to allow convenient reach, yet there would need to be adequate clearance to avoid an obstacle-course problem as the cashier moved from, to take one example, the pass-through to the cash register.

62. The fact that Kmart would have to invest some money in reconfiguring the stands would not be a showstopper, for the reconstruction expenses for the Tulare store would be reasonable—in the same ballpark as the fees paid to its ergonomics expert in our trial. Section 14 requires seating so long as the work reasonably permits. The reconfiguration expense and extra space would likely be nominal in relation to the interests involved.

63. It bears repeating that class counsel placed little evidence supporting such a lean-stool configuration into evidence and the foregoing is only a generalized notion by the trial judge after hearing all of the evidence. Although the Court views some variant of a lean-stool as the best case for the plaintiff class, this concept was so weakly developed at trial that this order will not find that the work reasonably permits the use of lean-stools, at least on this record.

64. To be very clear, this order does *not* approve or order lean-stools but only notes that, after hearing all the evidence, lean-stools seem to be the only possible candidate for seating that plausibly would be consistent with the job requirements—a proposition not yet proven by counsel. Before even requiring such seating, the Court would insist on hearing the views of cashiers, the ergonomics experts, safety experts, and Kmart management. This would have to be in a trial involving a different class. The trial on this class at the Tulare store is over and finished.

CUSTOMER SERVICE

*13 65. We now come to one of Kmart's main arguments at trial, namely that its cashiers should be required to stand in order to project a ready-to-assist attitude to the customers waiting in line, all of whom are already standing.

66. If an employer has a reasonable basis for requiring employees to stand rather than sit, then this order holds that such a reasonable basis must be considered in deciding whether the employees' duties reasonably permit them to be seated. This is what the DLSE states in its amicus brief (Dkt. No. 238 at 4). Where an employer denies seating simply out of cheapness to avoid the cost of chairs, such a rationale would be unreasonable, but where an employer requires its employee to stand for good customer service and relations (with appropriate rest breaks), then this should be permitted so long as the rationale is genuine and grounded in reason.

67. In this case, Kmart has proven—and this order so finds—that it has a genuine customer-service rationale for requiring its cashiers to stand. When customers are in a long line, they too are standing. They are waiting. Their attention is focused on the progress of the line and particularly on the cashier, for it is the cashier whose efficiency signals how long the wait will be. As frustrations mount, the customers may regret that they chose one lane over another. The longer the wait, the more likely customers will become irritated and, next time, will try a competitor's store. Kmart has every right to be concerned with the efficiency—and the appearance of efficiency—of its checkout service.

68. To supply efficiency—and the appearance of efficiency—Kmart requires its cashiers to stand (as do all the other big box competitors). Even plaintiff's seating expert admitted in the Walmart context that, from a customer-relations viewpoint, it is better for cashiers to stand than to be seated (TX 378 at 1). There *is* a reasonable connection between this requirement and Kmart's legitimate policy to supply efficient service and the appearance of efficient service. When checkout lanes are busy, the cashiers work like whirling dervishes. This can be seen on the video images in evidence (TX 218). Kmart cashiers reach right, they reach left, they twist, heels lift off the mat as they reach, they scoot through the pass-through, they return to the register, they dispense coupons, they assist the customer with the pin pad, and they load the carts. This choreography can be more efficiently done while standing than while seated. And, of perhaps more importance, it appears more efficient and customer-friendly to the patrons waiting their turn.

69. If, by contrast, the cashier were fully seated with their thighs under the counter as proposed by class counsel, it would project less of a ready-to-assist attitude. Each time the cashier were to rise or sit, the adjustment exercise itself would telegraph a message to those in line, namely a message that the convenience of the store and its employees comes first. For example, the extra time of rising to check a shopping cart in the customer lane and then returning, perhaps adjusting the seat or stool in the process and then re-aligning their thighs under the counter, would grate on those waiting in line or so Kmart could reasonably conclude. Without the pass-through this would be exacerbated. In order to avoid inconveniencing a seated cashier, moreover, customers might themselves feel obliged to move larger and bulkier merchandise along the counter, a task Kmart wants its cashiers to do in the interest of good customer service. The cashier is the last representative encountered by customers as they leave the store. Kmart wants to leave the best possible pro-customer impression, the market being competitive, in order to reap the benefit of repeat business.

***14** 70. This order finds and concludes that it is reasonable for Kmart to require its cashiers to stand while processing customers out the door so as to maximize the efficiency of the process and to project to its customers an attitude of efficiency and readiness to assist customers.

71. This rationale, however, would not justify requiring a cashier to stand at a stall when the customer lane is empty. For example, on a slow day, when the lane is empty and the bins are empty, the candy racks are already straightened, and the cashier has run out of immediate tasks, there would be little point in requiring cashiers to stand (as opposed to resting on a lean-stool) while waiting for a customer to arrive. Both sides agree, however, that this rarely occurs (*see* Dkt. No. 245).

72. This rationale might (or might not) be compatible with the judicious use of lean-stools. Possibly, cashiers could use lean-stools while processing a routine customer with only light-weight merchandise in circumstances where there was no one else in line and there was less need to project speed and efficiency, at least so long as the cashier stood for tasks like using the pass-through to check the bottom of the basket. The trial record did not develop this aspect, namely the extent to which lean stools would be compatible with a "ready-to-assist" perception. If and when we litigate the next store, counsel are invited to present more thorough evidence on this issue.

CONCLUSION

As for the Tulare store, this litigation is over and ready for appeal. As for the Tulare class certified, there is no just reason to delay until the other stores are possibly litigated. A Rule 54(b) judgment will be entered and we may all benefit from the views of the court of appeals.

As for all other Kmart stores in California, counsel could not agree as to whether the result in this trial should not control (Kmart counsel particularly refused to agree), so we must proceed to consider certification of classes covering one or more other stores in California and then to try those cases. One obstacle to further certification will possibly be that the only named plaintiff has now had her case resolved. Arguably, she should not be a representative on behalf of cashiers at other stores. Assuming this could somehow be overcome, at follow-on trial(s), both sides are invited to present more complete evidence on a lean-stool alternative as described above (or variations thereon), in addition to any other evidence counsel wishes to present. New expert reports may also be presented. A case management conference will be held on **JANUARY 10, 2013, AT 3:00 P. M.** to set a schedule and to address the extent to which discovery will be re-opened. Please do not ask to stay this case pending appeal. Useful work can be done before the next trial even if the trial itself turns out to be after the decision by the court of appeals on the Tulare store.

IT IS SO ORDERED.

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Opinion

ORDER AFFIRMING TENTATIVE RULINGS;

DENYING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION;

GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO STRIKE

MICHAEL M. ANELLO, District Judge.

***1** Plaintiff Nykeya Kilby brings this putative class action to recover penalties pursuant to the California Labor Code Private Attorney General Act of 2004 ("PAGA") against Defendant CVS Pharmacy, Inc., her former employer. The parties appeared before the Court on April 2, 2012, for hearing on Plaintiff's motion for class certification and CVS's related motion to strike. For the reasons set forth below, the Court **AFFIRMS** its previously issued tentative rulings, **DENIES** Plaintiff's motion for class certification, and **GRANTS IN PART** and **DENIES IN PART** CVS's motion to strike.

BACKGROUND

California Labor Code § 1198 prohibits the employment of any individual in the mercantile industry under labor conditions proscribed by Industrial Welfare Commission ("IWC") Wage Order 7–2001, which applies to retailers such as CVS. *See* Cal. Lab.Code § 1198; *Bright v. 99 Cents Only Stores,* 189 Cal.App.4th 1472, 118 Cal.Rptr.3d 723, 726–28 (2010); *Home Depot U.S.A., Inc. v. Superior Court,* 191 Cal.App.4th 210, 120 Cal.Rptr.3d 166, 171–74 (2010). Section 14 of Wage Order 7–2001 provides:

> (A) All working employees shall be provided with suitable seats when the nature of 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.

Plaintiff Nykeya Kilby is a resident of Chula Vista, California, and a former employee of CVS, where she worked as a "Customer Service Representative" (also referred to by the parties as a "Clerk/Cashier") for approximately eight months. Plaintiff seeks civil penalties against CVS based on CVS's alleged violation of Section 14 of Wage Order 7–2001. Specifically, Plaintiff alleges that CVS fails to provide its Clerk/Cashiers with suitable seats while operating cash registers at the front end, or retail, section of CVS stores, contrary to Section 14(A). According to Plaintiff, this in turn violates California Labor Code § 1198. Because Section 1198 does not contain its own civil penalty provision, Plaintiff states that she is entitled to recover the "default" penalties set forth in Section 2699(f) of PAGA.

According to Plaintiff, the nature of cashier work at CVS reasonably permits the use of seats because: (a) CVS places its cash registers at fixed locations within its stores; (b) operating a cash register requires the Clerk/Cashier to remain in reasonably close proximity to the cash register; (c) many of the tasks the Clerk/Cashier performs, including scanning merchandise, receiving payment, making change, and waiting for customers, could be performed from a seated position; and (d) the cash register stations at CVS could accommodate the placement of a seat or stool of some kind. FAC ¶ 14. Plaintiff seeks to represent a proposed class of former and current CVS Clerk/Cashiers who operated front end cash registers and were not provided suitable seats while doing so. Plaintiff estimates the class to be comprised of thousands of

individuals, and alleges that the following common questions of fact and law make this action suitable for class treatment: (1) whether CVS is subject to the requirements of Section 14(A) of the Wage Order; (2) whether the job of a Clerk/Cashier at CVS reasonably permits the use of a seat; and (3) the amount of penalties that should be awarded under PAGA. FAC ¶ 9. Plaintiff moves to certify the following class pursuant to Federal Rule of Civil Procedure 23:

> *2 All persons who, at any time since June 9, 2008, were employed by CVS as Clerk/Cashiers in California and were not provided with a seat while they operated a front-end cash register.

CVS'S MOTION TO STRIKE

In support of her class certification motion, Plaintiff submits the "Pre–Certification Report" of Professor Steven Johnson. Professor Johnson's report provides an expert opinion on "whether some or many of the person's tasks performed at the cash register counter could be performed effectively and efficiently" while seated. CVS moves to strike the report pursuant to Federal Rule of Evidence 702, arguing that it is based on inadequate and irrelevant data, suspect observations, and erroneous assumptions. [1] Before addressing the merits of Plaintiff's certification motion, the Court must consider CVS's challenge under *Daubert v. Merill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), to Professor Johnson's expert report. [2]

1. Legal Standard

Federal Rule of Evidence 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

See also United States v. Finley, 301 F.3d 1000, 1007 (9th Cir.2002). Before admitting expert testimony, the trial court must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592–93; *see also Ellis*, 657 F.3d at 982 ("Under *Daubert*, the trial court must act as a 'gatekeeper' to exclude junk science that does not meet Federal Rule of Evidence 702's reliability standards by making a preliminary determination that the expert's testimony is reliable"). On a motion for class certification, it is not necessary that expert testimony resolve factual disputes going to the merits of plaintiff's claims; instead, the testimony must be relevant in assessing "whether there was a common pattern and practice that could affect the class as a whole." *Ellis*, 657 F.3d at 983.

To survive scrutiny under Rule 702, Professor Johnson's report must be (1) based upon sufficient facts or data, (2) be the product of reliable principles and methods, and (3) he must have applied the principles and methods reliably to the facts of the case.

2. Analysis

Professor Johnson opines that: (1) a majority of the tasks that Clerk/Cashiers perform at the front-end register at a CVS retail store can be performed while seated, (2) that Clerk/Cashiers would benefit ergonomically from using a seat, and (3) that seats can be installed with low-cost modifications to provide adequate leg room. Professor Johnson's education and professional qualifications are sufficient to lend him the required credibility and expertise to opine on ergonomic matters. This credibility and expertise, and his specialized knowledge of ergonomic principles, combined with the research methodology he employed in this case, is sufficient to support his conclusions (1) that Clerk/Cashiers can perform the majority of their tasks behind the cash register seated, and (2) that they would benefit ergonomically from using a seat.

*3 However, his conclusion (3) that seats can be installed with low cost modifications is not supported by sufficient facts or data. He conducted only two site inspections, of CVS stores in Tulsa, Oklahoma. Even if these stores were identical in configuration to at least one California store, the inspections do not provide a sufficient basis for the

general conclusion that seats can be installed behind the cash registers with "low cost" modifications at CVS stores throughout California, with sufficient leg room for the Clerk/Cashier to perform his or her duties in a seated position. Professor Johnson states in his report that he based this conclusion only on "the evaluation of the tasks performed and the geometry of the cash register counters." *Johnson Report* ¶ 46. He admitted in deposition that he did not take any measurements in the CVS stores, he did not engage in any detailed investigation of the variations in available leg room at the individual stores, he did not consult with a contractor about physically implementing such modifications, and he provides no cost analysis. As such, Professor Johnson's conclusion regarding the low cost of modifications appears to be based on speculation and conjecture, rather than sufficient facts and data.

3. Conclusion

In *Daubert,* 509 U.S. at 596, the Supreme Court recognized that "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." Professor Johnson's report, generally, is "shaky" evidence, the product of less than 40 hours of work and bare personal observation. However, the majority of the report withstands scrutiny under Rule 702. Thus, the Court **AFFIRMS** its tentative ruling, **DENIES** CVS's motion to strike **IN PART,** and declines to strike paragraphs 1 through 45, and 47, of the Johnson Report. The Court **GRANTS** the motion **IN PART,** and **STRIKES** the following statement from paragraph 46 of the report: "it is my opinion that a seat could be easily incorporated with a low-cost modification to provide leg room."

PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

After engaging in pre-certification discovery, Plaintiff filed her motion for class certification on October 3, 2011. As explained above, Plaintiff asserts that CVS violated Section 14(A) of Wage Order 7–2001 by not providing seats to Clerk/Cashiers while they operated a front-end register, and seeks to certify a class of "[a]ll persons who, at any time since June 9, 2008, were employed by CVS as Clerk/Cashiers in California and were not provided with a seat while they operated a front-end cash register."

1. Legal Standard

Federal Rule of Civil Procedure 23 governs the certification of a class. *See* FED. R. CIV. P. 23. A plaintiff seeking class certification must affirmatively show the class meets the requirements of Rule 23. *Wal–Mart Stores, Inc. v. Dukes,* —— U.S. ——, ——, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011). To obtain certification, a plaintiff bears the burden of proving that the class meets all four requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy. *Ellis v. Costco Wholesale Corp.,* 657 F.3d 970 979–80 (9th Cir.2011). If these prerequisites are met, the Court must then decide whether the class action is maintainable under Rule 23(b). This case involves Rule 23(b)(3), which authorizes certification when "questions of law or fact common to class members predominate over any questions affecting only individual class members," and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3).

***4** The Court is required to perform a "rigorous analysis," which may require it "to probe behind the pleadings before coming to rest on the certification question." *Dukes,* 131 S.Ct. at 2551. " '[T]he merits of the class members' substantive claims are often highly relevant when determining whether to certify a class. More importantly, it is not correct to say a district court may consider the merits to the extent that they overlap with class certification issues; rather, a district court must consider the merits if they overlap with Rule 23(a) requirements." *Ellis,* 657 F.3d.at 981. Nonetheless, the district court does not conduct a mini-trial to determine if the class "could actually prevail on the merits of their claims." *Id.* at 983 n. 8; *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union, AFL–CIO v. ConocoPhillips Co.,* 593 F.3d 802, 808 (9th Cir.2010) (citation omitted) (court may inquire into substance of case to apply the Rule 23 factors, however, "[t]he court may not go so far ... as to judge the validity of these claims.").

Here, the Court must determine: (1) whether Plaintiff has shown common questions of law or fact sufficient to meet her burden under Rule 23(a), (2) whether Plaintiff has shown that these common questions predominate over individual questions under Rule 23(b) (3); and (3) whether Plaintiff has shown that a class action is the superior method of litigating her claim.

2. Analysis

a) ***Rule 23(a)***

Plaintiff does not satisfy each of the four required elements of Rule 23(a). While she arguably satisfies the numerosity requirement based on her class definition (the proposed class is approximately 17,000 employees), as well as the adequate representation requirement (she worked for CVS, her counsel are experienced with class action, and they do not appear to have any disqualifying conflicts), and even if the Court construes her claim as "typical" of other purported class members, Plaintiff does not satisfy the commonality requirement.

In order to determine whether CVS's statewide policy of not providing Clerk/Cashiers a seat while operating a front-end cash register violates Section 14(A) of Wage Order 7–2001, the Court must inquire as to: (1) the **"nature of the work"** performed by Clerk/Cashiers at CVS; (2) whether the nature of the work **"reasonably permits"** a seat to be used while the work is performed; and, if so, (3) what is a **"suitable seat."** The history of labor regulations and their enforcement in California suggests these questions do not have answers common across Plaintiff's proposed class of more than 17,000 CVS Clerk/Cashiers.

The IWC was authorized to regulate the wages, hours, and working conditions of various classes of workers to protect their health and welfare, *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 700–701, 166 Cal.Rptr. 331, 613 P.2d 579, and when it was first created it could only regulate the working conditions of women and children (it expanded its coverage to men in 1973). Originally, employers faced criminal charges for failing to comply with the minimum labor requirements set forth in the IWC's Wage Orders. To impose criminal penalties and to prosecute violators necessarily required an individualized inquiry as to whether the nature of a certain employee's work reasonably permitted the aggrieved employee to use a seat suited to the conditions of the job and the particularities of the employee. Otherwise, the state would never have been able to meet its burden of proof at a criminal trial.

***5** The California Supreme Court, as early as 1912, opined on the need to regulate working conditions of women and the constitutionality of such regulations. In *Ex Parte Miller,* the employer was remanded to the custody of the Riverside Sheriff to serve a term of incarceration for violating "the provisions of the act of March 22, 1911, forbidding the employment of women in certain establishments for more than 8 hours in one day, or more than 48 hours in one week. Stats.1911, 437. The specific charge is that on June 12, 1911, he employed and thereupon required Emma Hunt, a female, to work during that day for nine hours in the Glenwood Hotel as an employee therein." *Id.* The employer challenged the constitutionality of the regulation, which notably included a requirement that female employees be given "suitable seats," as an overreaching exercise of the state's police power. The court rejected the argument, found the regulation constitutional, and in so doing, explained:

> [I]t has been recognized that some occupations followed by women, though less arduous than those generally followed by men, may have such a tendency to injure their health, if unduly prolonged, that laws may be enacted restricting their time of labor therein to 10 hours a day. The application of these laws exclusively to women is justified on the ground that they are less robust in physical organization and structure than men, that they have the burden of childbearing, and, consequently, that the health and strength of posterity and of the public in general is presumed to be enhanced by preserving and protecting women from exertion which men might bear without detriment to the general welfare.

Ex parte Miller, 162 Cal. 687, 695, 124 P. 427 (1912). The *Miller* case illustrates the history and purpose of labor regulations, their enforcement, and the penalties for violating them. The regulations set forth standard, minimum working condition requirements. They were enforced by the state for health and safety purposes—people could be fatally injured, and the state feared women might simply collapse if forced to stand when they could reasonably sit and still perform their job. Determining a violation, and proving it in a court of law, required individualized inquiries and evidence sufficient to meet a high burden of proof. Employers who were found guilty were fined criminally, or even went to jail.

As discussed in further detail below, the California Legislature has deputized individuals as private attorneys general in order to promote continued enforcement of Labor Code violations throughout the state, in a time when it has become infeasible for the various branches of state government to do so, including the police. That the

enforcement of these violations has become a civil matter does not change the nature of the task. Otherwise, CVS could be held liable based on the generally known fact that its Clerk/Cashiers sometimes operate cash registers, when they do so they stand, and generally speaking, an individual can operate a cash register from a seated position. This cannot be what the IWC intended when it promulgated Section 14(A), in light of the history and purpose of these regulations. More pointed inquiries are necessary.

*6 For example, CVS offers proof that Clerk/Cashiers' job duties are inconsistent from day to day, shift to shift, or even from store to store, which suggests the Court would need to engage in an individualized, fact-intensive analysis to determine how each Clerk/Cashier spends his or her time to decide whether "the nature of the work" done by that employee "reasonably permits" the use of a "suitable seat." In addition, the common question of whether modifications to existing CVS stores would "reasonably permit" the use of a seat does not generate common answers. CVS offers credible declaration testimony that each CVS store is unique in size, layout, and configuration; there are different check-out station styles at various stores and different configurations within those check-out stations; the changes necessary to accommodate a seat at one particular check-out station would not necessarily work at another register, and so on. Such modifications necessarily require an individualized analysis that is inappropriate for class wide resolution.

As the Supreme Court recently noted: "What matters to class certification ... is not the raising of common questions—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Dukes,* 131 S.Ct. at 2551 (internal quotations and citations omitted). This is just such a case, and as a result, Plaintiff cannot satisfy the commonality requirement of Rule 23(a).

b) *Rule 23(b)(3)*

Plaintiff seeks class certification under Rule 23(b)(3). A class action may be maintained under Rule 23(b)(3) if two tests are met: first, if "questions of law or fact common to class members predominate over any questions affecting only individual members," and, second, if "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3). The predominance requirement is a more rigorous requirement than the Rule 23(a)(3) commonality prerequisite. The "main concern in the predominance inquiry ... [is] the balance between individual and common issues." *In re Wells Fargo Home Mortg. Overtime Pay Litig.,* 571 F.3d 953, 959 (9th Cir.2009). As noted above, Plaintiff has not shown the common questions she asserts are capable of common resolution. If she cannot meet the less stringent commonality requirement of Rule 23(a), she certainly cannot meet the predominance requirement of Rule 23(b)(3).

Even if Plaintiff could meet the requirements of commonality and predominance, she must also demonstrate that a class action would be a superior method of resolving this controversy. A class action may be superior "[w]here classwide litigation of common issues will reduce litigation costs and promote greater efficiency." *Valentino v. Carter–Wallace, Inc.,* 97 F.3d 1227, 1234 (9th Cir.1996). It is also superior when no "realistic alternative exists." *Id.* at 1234–35. Here, that is not the case. Plaintiff may pursue her PAGA claim as a non-class representative action. *Arias v. Superior Court,* 46 Cal.4th 969, 95 Cal.Rptr.3d 588, 209 P.3d 923 (2009) (holding that an employee may bring a representative action against an employer for civil penalties under PAGA and need not satisfy class action requirements to do so).

3. Conclusion

*7 In sum, Plaintiff fails to satisfy the commonality requirement of Rule 23(a), as well as the predominance and superiority requirements of Rule 23(b)(3). Accordingly, the Court **AFFIRMS** its tentative ruling and **DENIES** Plaintiff's motion for class certification.

IT IS SO ORDERED.

Footnotes

1 In its reply brief in support of the motion to strike, CVS asks the Court to "disregard" a supplementary affidavit [Doc. No. 95] provided by Professor Johnson, filed by Plaintiff on November 11, 2011. *Def. Reply ISO Motion to Strike,* Doc. No. 107. According to CVS, "[t]hrough this declaration, Johnson seeks to offer [untimely] additional expert testimony not included in the Johnson Report" in violation of the Court's scheduling order regulating discovery. *Id.* at 2–3, 95 Cal.Rptr.3d 588, 209 P.3d 923. The Court found

good cause to disregard the affidavit when considering the merits of the pending motions. During the April 2, 2012 hearing, defense counsel requested the Court consider striking the affidavit. The Court declines to do so.

2 While courts in this Circuit have previously concluded that expert testimony is admissible in evaluating class certification without conducting a rigorous *Daubert* analysis, the Supreme Court in *Wal–Mart Stores, Inc. v. Dukes,* —— U.S. ——, ——, 131 S.Ct. 2541, 2554, 180 L.Ed.2d 374 (2011), expressed "doubt that this is so." After *Dukes,* the Ninth Circuit approved the application of *Daubert* to expert testimony presented in support of or opposition to a motion for class certification. *Ellis v. Costco Wholesale Corp.,* 657 F.3d 970, 982 (9th Cir.2011).

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Nykeya KILBY, Plaintiff,
v.
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Opinion

ORDER GRANTING DEFENDANT CVS PHARMACY, INC.'S MOTION FOR SUMMARY JUDGMENT

MICHAEL M. ANELLO, District Judge.

*1 Plaintiff Nykeya Kilby seeks to recover penalties pursuant to the California Labor Code Private Attorney General Act of 2004 ("PAGA") against her former employer, Defendant CVS Pharmacy, Inc. This action is currently before the Court on CVS's motion for summary judgment. After considering the oral arguments of counsel and all pertinent matters of record, the Court **GRANTS** CVS's motion.

PLAINTIFF'S PAGA CLAIM

Plaintiff Nykeya Kilby is a resident of Chula Vista, California, and a former employee of CVS, where she worked as a Customer Service Representative ("Clerk/Cashier" hereafter) for approximately eight months. Plaintiff seeks civil penalties against CVS for allegedly violating California Labor Code § 1198, which makes it illegal to employ a person under conditions of labor prohibited by an applicable Industrial Welfare Commission ("IWC") Wage Order. [1] *See* First Amended Complaint ("FAC"), Doc. No. 6. Specifically, Plaintiff alleges that CVS violated a condition of labor by failing to provide its Clerk/Cashiers with suitable seats, contrary to Wage Order 7–2001, § 14(A). Section 14 of Wage Order 7–2001 states:

> (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.

Cal.Code Regs. Tit. 8 § 11070(14) ("Section 14"). According to Plaintiff, the nature of Clerk/Cashier work at CVS reasonably permits the use of seats because: (a) CVS places its cash registers at fixed locations within its stores; (b) operating a cash register requires the employee to remain in reasonably close proximity to the cash register; (c) many of the tasks the employee performs while stationed at a cash register, including scanning merchandise, receiving payment, making change, and waiting for customers, could be performed from a seated position; and (d) the cash register stations at CVS could accommodate the placement of a seat or stool of some kind. FAC ¶ 14.

RELEVANT FACTUAL BACKGROUND

The following material facts are not reasonably in dispute. CVS operates approximately 850 retail pharmacy stores in California. CVS is committed to providing excellent service to its customers. Plaintiff joined CVS as a Clerk/Cashier in March 2008. When interviewing for the job, Plaintiff's interviewer explained the expectation that she stand while working, including while operating the cash register. Once hired, Plaintiff viewed training videos which reinforced the expectation that Clerk/Cashiers are expected to do a variety of work while standing.

According to CVS's Clerk/Cashier job description, the essential functions of the job include:

*2 • operate a cash register including cash transactions, checks, charges

• follow company policies and procedures regarding cash register performance

• request additional help when needed to increase customer satisfaction

• greet each customer using the eye's, hi's and help at all times and assist customers with their questions, problems and complaints

• price merchandise utilizing price guns

• store cleanliness: break area and rest rooms; vacuum; dust/face; clean windows; rubbish removal; exterior maintenance; sweeping

• stock shelves

• complete price changes: document counts, utilize price guns

• answer the telephone using the appropriate greeting

• process photofinishing orders

• maintain check-out area: fill register supplies, bags; wipe counter tops; fill cigarettes

• issue rainchecks when requested

• react to potential shoplifters following company guidelines maintain customer/patient confidentiality

Marginal functions of the job include:

• maintain card department: order, stock, inventory, signing

• maintain cosmetic department/units: clean, stock, set displays, sign, prepare returns (UPP system)

• reset departments/endcaps following POGs

• display and sign weekly, promotional and seasonal merchandise

• prepare damages: document counts and item numbers, seal trays

• in-store signing, including: shelves, displays, dump baskets, windows, ceiling

• assist Pharmacy personnel when needed

• complete minor in-store repairs i.e., carriage poles, change light bulbs

• work out reserve stock

• assist customers with large purchases (taking out to vehicle)

• unload and load trays/cases–35 pound maximum to a height of 4 feet

• move trays/cases from one location to another

The tasks actually performed by any particular Clerk/Cashier vary from store to store, and from shift to shift. During her tenure at CVS, Plaintiff performed a number of the job functions listed above, including operating a cash register, straightening and stocking shelves, organizing candy and batteries in front of the sales counter, stocking the tobacco section behind the sales counter, cleaning the register, vacuuming, gathering shopping carts and hand baskets, and handling trash. Plaintiff did not perform any of these tasks while seated. According to Plaintiff, many of these tasks could not be performed while seated, including certain duties while operating the cash register. Plaintiff typically worked four or five days per week, during the 5:00 p.m. to closing shift. CVS terminated Plaintiff for job abandonment on October 2008.

MOTION FOR SUMMARY JUDGMENT

CVS moves for summary judgment, arguing that Plaintiff cannot prevail on her claim as a matter of law because Section 14(A) does not apply to the Clerk/Cashier position at CVS stores. Specifically, CVS contends the nature of the work performed by a Clerk/Cashier does not reasonably permit the use of a seat. In addition, CVS asserts its business judgment that Clerk/Cashiers should stand while working in order to provide satisfactory customer service is entitled to deference.[2] Plaintiff opposes the motion, arguing that there is a triable issue of fact as to whether the nature of the work performed by a Clerk/Cashier reasonably permits the use of a seat.

1. Legal Standard

*3 Summary judgment is appropriate only where the record, read in the light most favorable to the non-moving party, indicates that "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see Celotex Corp. v. Catrett,* 477 U.S. 317, 323–24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Material facts are those necessary to the proof or defense of a claim, as determined by reference to substantive law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A factual issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* In deciding a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

The burden initially is on the moving party to demonstrate an absence of a genuine issue of material fact. *Celotex,* 477 U.S. at 323. If, and only if, the moving party meets its burden, then the non-moving party must produce enough evidence to rebut the moving party's claim and create a genuine issue of material fact. *Id.* at 322–23. If the non-moving party meets this burden, then the motion will be denied. *Nissan Fire & Marine Ins. Co. v. Fritz Co., Inc.,* 210 F.3d 1099, 1103 (9th Cir.2000). The moving party's burden may also be met by showing that there is an absence of evidence to support the non-moving party's case. *Fairbank v. Wunderman Cato Johnson,* 212 F.3d 528, 531 (9th Cir.2000). Once the moving party has met its initial burden, Rule 56 requires the non-moving party to go beyond the pleadings and identify facts which show a genuine issue for trial.

2. Analysis

As a threshold matter, CVS argues that Plaintiff cannot prevail on her claim as a matter of law because Section 14(A) does not apply to the Clerk/Cashier position at CVS stores. According to CVS, if the "nature of the work" requires standing, subsection (B) applies .[3] If the "nature of the work" reasonably permits the use of seats, subsection (A) applies. CVS argues that the phrase "nature of the work" should be considered holistically. Thus, to determine whether it must comply with subsection (A) or (B), an employer must consider the nature of an employee's job as a whole, factoring in the myriad duties that an employee may perform during a shift, to determine whether the "nature of the work" generally requires standing, or reasonably permits the use of seats.

Plaintiff rejects CVS's interpretation of Section 14, arguing that the phrase "nature of the work" is properly understood as referring to any particular duty that an employee performs during the course of her work. In this case, Plaintiff asserts that the job duty at issue, operating a cash register, is of such a nature that an employee could perform the work while seated.

The parties insist, and the Court agrees, that their different interpretations of the phrase "nature of the work" are critical to the outcome of this case. If the Court accepts Plaintiff's interpretation, her claim may succeed if she is able to demonstrate that Clerk/Cashiers can operate a cash register while seated. If the Court adopts CVS's holistic approach, Plaintiff's claim is foreclosed because Clerk/Cashiers are expected to, are trained to, and in fact must stand to perform most of their other job duties.

*4 Because "IWC wage orders are 'quasi-legislative regulations' that must be construed 'in accordance with the ordinary principles of statutory interpretation,' " the Court first considers the text of Section 14 itself. *Campbell v. PricewaterhouseCoopers, LLP,* 642 F.3d 820, 825 (9th Cir.2011) (citations omitted). "Statutory interpretation begins with the text of the statute. The statute's words must be assigned their 'usual and ordinary meanings' and evaluated in context. If this plain meaning is unambiguous, the inquiry ends there and we need not consider further interpretive aids (e.g., drafting history). The plain meaning governs." *Campbell,* 642 F.3d at 826 (citations omitted).

Subsection (A) provides: "All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats." The Ninth Circuit recently held in *Campbell v. PricewaterhouseCoopers, supra,* that the IWC's use of "highly inclusive" language such as the word 'all' "frames its application in terms of individual employees," giving effect to the IWC's intention that wage orders regulate the working conditions of all employees, while being enforceable against employers for a single violation against any individual employee. However, while it begins with "highly inclusive" language, subsection (A) is not unqualified. Later language within the text of the subsection serves to limit its application to only those instances when "the nature of the work reasonably permits the use of seats." This qualification necessarily means that no individual employee is excluded from its provision—unless that employee is performing a certain type of job, i.e., a job that cannot be performed while seated. This is a relatively straight forward idea. No employee or group of employees

should be singled out and forced to do their work while standing, if the work can be done while seated. Subsection (A) protects the needs of the employee by ensuring uniformity in its application.

In direct contrast to subsection (A), subsection (B) is limited to only those instances when "the nature of the work requires standing." Subsection (B) does not contain "highly inclusive" language such as 'all' employees. It conditions the use of a seat on the employee "not being engaged in the active duties of their employment." Later language further limits an employee's use of a seat to only those times "when it does not interfere with the performance of their duties." Thus, while subsection (A) concerns only the needs of the employee, subsection (B) attempts to strike a balance between the employee's needs and the requirements of the job.

In addition, the structure of Section 14 is noteworthy. Section 14 contains no conjunction or disjunctive between subsections (A) and (B), and each subsection is comprised of a single sentence. In such instances of statutory construction, "[e]ach clause is distinct and ends with a period, strongly suggesting that each may be understood completely without reading any further." *Jama v. Immigration & Customs Enforcement,* 543 U.S. 335, 125 S.Ct. 694, 701, 160 L.Ed.2d 708 (2005). When both subsections are given full and independent effect, Section 14 establishes a dichotomous approach for employers to follow, based on the "nature of the work" involved. The subsections are mutually exclusive.

5** This statutory construction is at odds with Plaintiff's suggestion that the "nature of the work" can be defined in terms of any one of a number of included job duties, because then a single employee could fall under the ambit of both sections during the course of a single shift based on which job duty she was performing at the time. If the IWC had intended for an employee to be protected by both subsections simultaneously, it could have easily placed a linking adverb between the two subsections. It also could have chosen to use different terminology. Subsection (B) provides that "[w]hen employees are not engaged in the ***active duties of their employment *and* the ***nature of the work*** requires standing," the employer must provide suitable seats in reasonable proximity to the work area for employees to use "when it does not interfere with the performance of their ***duties.***" (emphasis added). The IWC clearly felt it necessary to delineate between the overall "nature of the work" an employee does and the "duties" that work may encompass. Thus, Plaintiff's assertion that the Court should interpret the "nature of the work" in this case to be limited in scope to the single duty of operating a cash register is without merit. Rather, operating a cash register is more properly considered a "duty" of employment as a Clerk/Cashier.

Based on the language and structure of Section 14, the "nature of the work" performed by an employee must be considered in light of that individual's entire range of assigned duties in order to determine whether the work permits the use of a seat or requires standing. Here, there is no dispute that many of the duties performed by Clerk/Cashiers at CVS require the employee to stand while performing them, i.e., stocking shelves, assisting customers with locating items in areas of the store away from the cash registers, sweeping or other cleaning, retrieving items from high shelves, fetching photographs and cigarettes from other parts of the store, and so on.

Furthermore, CVS asserts that if there is any doubt that the nature of Plaintiff's work required her to stand, the Court should defer to CVS's business judgment about its expectations of Plaintiff's job. CVS expects its Clerk/Cashiers to perform their work while standing, and trains them to do so. Plaintiff argues that CVS cannot be allowed to use its "business judgment" to portray a job in such a way that it can avoid a Wage Order's requirements as to when an employer must provide suitable seats. CVS replies that an employer's legitimate business expectations for a job are relevant when defining the "nature of the work" of that job, such that if CVS hires employees to stand while working a cash register because CVS wants to project a certain image, then those employees would not be performing their job if they were seated. The "nature of the work" is not just to complete transactions, but also to project CVS's desired image of an attentive employee.

***6** It is quite obvious that a company's "business judgment" plays a role in defining the contours of a job and its incumbent duties. Thus, it stands to reason that courts should consider an employer's "business judgment" when attempting to discern the nature of an employee's work. While the Court does not find that CVS's business judgment in this respect is necessarily entitled to deference, CVS's expectation of its Clerk/Cashiers is undoubtedly relevant to understanding the nature of a Clerk/Cashier's work. Here, CVS presents undisputed evidence that it expects Clerk/Cashiers to perform the majority of their job duties while standing, and consistent with this expectation, Plaintiff was trained to perform her duties while standing. [4]

For example, during her training Plaintiff watched a video entitled "This Is What We're All About." *See Weil Decl'n ISO MSJ,* Ex. D. The video provides new applicants with an overview of the Clerk/Cashier position, while making clear that "as a potential CVS employee of all the things we're going to ask you to do, providing great customer service is most important." *Id.* at 64. In describing the duties of a Clerk/Cashier, the video provides:

> And whether you're working days, nights, weekends or holiday, there's always something to do. Not all of it is glamorous. There are deliveries to take care of, shelves and displays to be cleaned or straightened, vacuuming and trash that needs to be taken care of. Sometimes you're going to be doing some lifting and sometimes you're going to get dirty. It's just part of keeping the store clean. And in our business everyone works the cash registers. After all, from a customer service standpoint it's one of the key areas of your store. We'll need you to help pick up in the parking lot. Other times you'll need to clean the restroom. We're known for maintaining stores that are well run, neat and clean and that's how we do it. It's hard work behind the scenes and sometimes you will be on your feet for long periods of time, but these are things that need to be done all the time.

Id. CVS informs its employees from the start that they are expected to place a premium on customer service. In order to provide the best service possible, CVS employees are trained to be ready to perform any one of a multitude of job duties that require being on their feet. Plaintiff's own experience bore out this aspect of her position as a Clerk/Cashier. Plaintiff testified that she was informed during her interview that she would perform her duties while standing, including while operating the cash register. Plaintiff further stated that she stood while performing all of her job duties, and many of those duties could not be performed while seated.[5] *Weil Decl'n,* Ex. A., p. 44–46; 48.

By its plain terms, subsection (B) applies when the nature of the work "requires standing." If, as here, the majority of an employee's assigned duties must physically be performed while standing, and the employer expects and trains the employee to stand while doing so, the "nature of the work" requires standing. Thus, based on the plain language of Section 14, and in light of the undisputed facts of this case, subsection (B) is applicable to the Clerk/Cashier position at CVS stores. Subsection (A) is not.

*7 Having determined that Section 14(A) of Wage Order 7–2001 does not regulate the working conditions of Clerk/Cashiers at CVS, the Court finds that summary judgment in favor of CVS is appropriate.

CONCLUSION

Based on the foregoing, the Court **GRANTS** Defendant CVS Pharmacy, Inc.'s motion for summary judgment. This Order disposes of Plaintiff's single PAGA claim. The Clerk of Court is instructed to enter judgment in favor of CVS and terminate the case.

IT IS SO ORDERED.

Footnotes

1 Because Section 1198 does not contain its own civil penalty provision, Plaintiff seeks to recover the "default" penalties set forth in Section 2699(f) of PAGA.

2 CVS also argues that Plaintiff's claim fails because she never requested a seat while working and because PAGA is unconstitutional. Because it resolves CVS's motion on the dispositive issue of whether Section 14(A) applies to the Clerk/Cashier position, the Court declines to rule on the merits of these two assertions. However, the Court notes that, to date, only one court has read a requirement into Section 14(A) that an employee affirmatively request a seat, *Green v. Bank of Am. N.A.,* No. CV 11–45751–R (C.D.Cal.), and constitutional challenges to PAGA have been uniformly rejected by other courts. *See, e.g., Echavez v. Abercrombie and Fitch Co., Inc.,* No. CV 11–9754 GAF (PJWx) (C.D. Cal. Mar. 12, 8 2012) (rejecting *Green* court's reasoning regarding requirement that employee request a seat; collecting and analyzing relevant cases regarding constitutionality of PAGA).

3 Although its compliance with Section 14(B) is not at issue in this case, CVS states for the record that it complies with subsection (B) by providing seats for its employees in the employee break room for use during an employee's rest break or meal break, when the employee is not actively engaged in his or her work duties.

4 Recently, another court considered this issue. In *Garvey v. Kmart Corp.*, 2012 U.S. Dist. LEXIS 51705 * 11 (N.D.Cal. Apr. 12, 2012), Kart argued that "it would be unreasonable to provide seats because [Kmart] m has a legitimate business purpose in making its cashiers project a "ready to serve" image by standin." The court found that issues of material fact precluded summary judgment because Kmart s store manager testified during his deposition that the cashiers could provide good customer service while seated. *Id*. The court relied on evidence that operating the cash register was the cashier's primary job unless they were putting away returned items, as well as a manager's estimate that approximately 90 percent of a cashier's work would be performed behind the cash register.

5 The Court notes that according to Plaintiff, she could have performed some of her duties while seated and would have performed those duties better than while standing. *Weil Decl'n,* Ex A., p. 42. When asked why she thought she could have performed her job duties better while seated, Plaintiff responded "[b]ecause it would give me relief from standing for so long." *Id.* at 43. Clearly, Plaintiff would have preferred to sit while working. However, Plaintiff's personal preference on the matter is not helpful in determining whether the nature of her work reasonably permitted her to sit.

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United States District Court,
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Jessika TSENG
v.
NORDSTROM, INC.

No. CV 11–8471–CAS
(MRWx). | March 25, 2013.

Attorneys and Law Firms

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Opinion

Proceedings: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (filed January 7, 2013) [Dkt. No. 65]

CHRISTINA A. SNYDER, Judge.

***1** Catherine Jeang, Deputy Clerk.

Sheri Kleeger, Court Reporter / Recorder.

I. INTRODUCTION & BACKGROUND

On September 9, 2011, plaintiff Jessika Tseng filed a complaint in the Los Angeles County Superior Court against defendant Nordstrom, Inc. ("Nordstrom"). Plaintiff was employed by Nordstrom as a cosmetics counter salesperson from August 2008 until May 31, 2011, at several locations in California. Compl. ¶ 6. Plaintiff alleges that Nordstrom violated California Labor Code § 1198 and Industrial Welfare Commission Order No. 7–2001, § 14(A), by failing to provide suitable seats to cosmetics counter salespeople throughout California.

Plaintiff originally filed this case as a representative action on behalf of herself and other cosmetics counter salespeople under the California Private Attorney General Act of 2004, California Labor Code § 2698 *et seq.*, ("PAGA"). On October 13, 2011, defendant removed the case to this Court on the basis of diversity of citizenship pursuant to 28 U.S.C. § 1332(a) and the Class Action Fairness Act ("CAFA"), 28 U.S.C. §§ 1332(d), 1453, and 1711–1715. Dkt. No. 1. Because this Court had found previously that Federal Rule of Civil Procedure 23 "automatically applies in all civil actions and proceedings" in federal court, including PAGA actions, the Court granted plaintiff leave to file a First Amended Complaint ("FAC") complying with Rule 23.[1] Dkt. No. 47. The Court also denied defendant's motion for judgment on the pleadings on the basis of the purported unconstitutionality of PAGA.

On January 7, 2013, defendant filed a motion for summary judgment. Dkt. No. 65. Plaintiff filed an opposition on February 11, 2013, and defendant replied on March 11, 2013. Dkt. Nos. 110, 115. The Court held a hearing on March 25, 2013. After carefully considering the parties' arguments, the Court finds and concludes as follows.

II. LEGAL STANDARD

Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). The moving party bears the initial burden of identifying relevant portions of the record that demonstrate the absence of a fact or facts necessary for one or more essential elements of each claim upon which the moving party seeks judgment. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986).

If the moving party meets its initial burden, the opposing party must then set out specific facts showing a genuine issue for trial in order to defeat the motion. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986); *see also*Fed.R.Civ.P. 56(c), (e). The nonmoving party must not simply rely on the pleadings and must do more than make "conclusory allegations [in] an affidavit." *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 888 (1990); *see also Celotex,* 477 U.S. at 324. Summary judgment must be granted for the moving party if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322;*see also Abromson v. Am. Pac. Corp.,* 114 F.3d 898, 902 (9th Cir.1997).

***2** In light of the facts presented by the nonmoving party, along with any undisputed facts, the Court must decide whether the moving party is entitled to judgment as a matter of law. *See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n,* 809 F.2d 626, 631 & n .3 (9th Cir.1987). When deciding a

motion for summary judgment, "the inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted); *Valley Nat'l Bank of Ariz. v. A.E. Rouse & Co.*, 121 F.3d 1332, 1335 (9th Cir.1997). Summary judgment for the moving party is proper when a rational trier of fact would not be able to find for the nonmoving party on the claims at issue. *See Matsushita*, 475 U.S. at 587.

IV. DISCUSSION

A. Plaintiff's Request to Defer Ruling on Defendant's Motion

Plaintiff requests that the Court defer ruling on defendant's motion for summary judgment until after the Court hears plaintiff's motion for class certification, which is scheduled to be heard on July 29, 2013. Opp'n at 12. The Court denies plaintiff's request. As the Ninth Circuit has held, a district court may consider a motion for summary judgment before a motion for class certification. *See Wright v. Schock*, 742 F.2d 541, 544 (9th Cir.1984). Although members of the proposed class would be free to file identical claims against Nordstrom if the Court in fact grants defendant's motion, delaying hearing this motion until after class certification serves primarily to protect a defendant's interests, not plaintiff's. Accordingly, plaintiff's request is denied.

B. Suitable Seating Claim

1. Applicable Law

Section 1198 of the California Labor Code grants the Industrial Welfare Commission the authority to fix "the maximum hours of work and the standard conditions of labor for employees" and makes it unlawful for an employer to violate any orders of the Commission. PAGA, in turn, permits an "aggrieved employee" to "bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations." *Arias v. Superior Court*, 46 Cal.4th 969, 980 (2009) (citing Cal. Labor Code § 2699(a)).

At issue here is Industrial Welfare Commission Order No. 7–2001 ("Wage Order 7–2001"), which applies to "any industry, business, or establishment operated for the purpose of purchasing, selling, or distributing goods or commodities at wholesale or retail." *See*8 Cal.Code. Regs. § 11070(2)(H) (codifying Wage Order 7–2001). Plaintiff's sole claim is that defendant violated section 14(A) of this Wage Order, which sets forth certain requirements related to seating:

> (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.

***3** *Id.* § 11070(14).[2]

Plaintiff's claim is focused on the first requirement of section 14: that employees be provided with suitable seats when their work reasonably permits the use of seats. When interpreting the provisions of this Wage Order, the Court is mindful that "wage orders are quasi-legislative regulations that must be construed in accordance with the ordinary principles of statutory interpretation."*Campbell v. Pricewaterhouse Coopers, LLP*, 642 F.3d 820, 825 (9th Cir.2011) (citations omitted). Based on the plain text of section 14, therefore, the issue is whether defendant has demonstrated, as a matter of law, that the nature of plaintiff's work does not reasonably permit sitting. *See Echavez v. Abercrombie & Fitch Co, Inc.*, CV 11–9751, 2012 WL 2861348, at *8 (C.D.Cal. Mar. 12, 2012) (finding that " § 14 requires that employers of all types must provide adequate seating for use by their employees when reasonably permitted by the nature of the employees' work"); *Garvey v. Kmart Corp.*, CV 11–02575, 2012 WL 1231803, at *3 (N.D.Cal. Apr. 12, 2012) (framing the legal issue as "whether the work of Kmart cashiers reasonably permitted the use of seats"); *Kilby v. CVS Pharmacy, Inc.*, 09CV2051, 2012 WL 1969284 (S.D.Cal. May 31, 2012) ("Based on the language and structure of Section 14, the 'nature of the work' performed by an employee must be considered in light of that individual's entire range of assigned duties in order to determine whether the work permits the use of a seat or requires standing.").

Application of this broad reasonableness standard is further supported by an amicus brief filed by the California Department of Industrial Relations, Division of Labor Standards and Enforcement ("DLSE") in the *Garvey* case.[3] *See* Def.'s Request for Judicial Notice Ex. 5, Amicus Brief of the California Labor Commissioner in *Garvey v. Kmart Corp.* (N.D.Cal. Dec. 7, 2012) (stating that the "DLSE

would apply a reasonableness standard that would fully consider all existing conditions regarding the nature of the work performed by employees"). According to DLSE, factors relevant to this determination include "the physical layout of the workplace and the employee's job functions," and an "objective evaluation" of the work expected of employees and the work actually performed by them, based upon input from employees and the employer. *Id.*

Existing or historical industry or business practices are also relevant under this totality of the circumstances test. However, in DSLE's view, an employer's business judgment is but one input into this objective evaluation and is not controlling. *Id.* While the opinion of the DLSE is not binding upon this Court, the agency does offer a "body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Brinker Rest. Corp. v. Superior Court,* 53 Cal.4th 1004, 1029 n. 11 (2012). The Court finds that it is appropriate to consider this guidance here. *See Garvey v. Kmart Corp.,* CV 11–02575, 2012 WL 6599534 (N.D.Cal. Dec. 18, 2012) (*Kmart II*) (concluding that the court would "attempt to follow the general guidance of DLSE and consider the nature of the work and all of the facts and circumstances as set forth in the trial record").

***4** Defendant's argument that its reasonable business judgment "controls" with respect to whether or not the nature of an employee's work reasonably allows for sitting reaches too far. *See* Mot. at 17. Defendant's reasonable business judgment is relevant as to whether the work of a given job permits the use of a seat, but this is but one factor in the "totality of the circumstances" inquiry set forth in section 14(A) of the Wage Order. The work actually performed by employees, based on the employee's testimony or other evidence, is also relevant to determining whether the work allows for sitting. At its core, the seating rule is mandatory and the inquiry for gauging compliance is objective; an employer cannot subjectively define a certain type of work as necessitating standing in order to escape the plain mandate of the Wage Order. *Cf. Campbell,* 642 F.3d at 825 (holding that the ordinary principles of statutory interpretation apply to interpretation of the Wage Order). None of defendant's cited authorities support its assertion to the contrary, as the test is not whether defendant acted "arbitrarily and capriciously" in choosing the employment policies that it did or whether its stated rationales are merely "pretextual."[4] Accordingly, a showing of good faith business reasons behind a no-sitting policy is insufficient, in isolation, to defeat a claim that defendant violated the Wage Order.

2. The Parties' Evidence and Factual Contentions

In support of its motion for summary judgment, defendant contends that the following material facts are undisputed. Defendant focuses on three principal reasons that its cosmetics counter employees cannot reasonably be seated in order to effectively perform their job duties, based on the following evidence.

(a) Customer Service

Defendant is a department store retailer whose company philosophy and brand identity is based upon a commitment to offer its customers exceptional service. Def.'s Statement of Uncontroverted Facts and Conclusions of Law ("DSUF") 1. As such, defendant expects all of its employees, including its cosmetics counter employees, to provide excellent customer service at all times. DSUF 2*o*4. Indeed, customer service and selling cosmetics are the most important job duties of cosmetics counter employees. DSUF 3. Put simply, defendant maintains that it is undisputed that retail sales employees at its stores cannot provide excellent customer service or adequately perform their job as salespersons while seated. DSUF 5.

Defendant offers a number reasons why the evidence conclusively demonstrates that sitting is not compatible with a retail sales employee's duty to provide great customer service. For one, defendant expects its employees to promptly greet and approach customers who enter the department, as set forth in its "Selling is Service" training guide. DSUF 7. Defendant's "Coaching Guides" reiterate a similar theme: cosmetics sales employees are expected to "[g]reet customers immediately with a smile and make eye contact." Cummings Decl. ¶ 14, Ex. C. Moreover, once a cosmetics counter employee greets a customer, they are expected to "demonstrate enthusiasm for selling" and deliver a one-on-one experience, neither of which can be accomplished while seated. DSUF 10. This includes walking the customer around the cosmetics counter and applying samples when desired. After the customer has made their purchasing decisions, defendant expects employees to walk the customer to the cash register (or "cash wrap") and ring up the sale. DSUF 11. The employee then must walk around the counter and directly hand the package to the customer, or walk the package to the customer's car upon request. DSUF 12*o*18.

***5** Employees have additional responsibilities when they are not helping a customer, all of which require her or him to be

standing and mobile. These include restocking merchandise and refilling displays; ensuring maximum merchandise representation and aesthetic display; and cleaning the cosmetics counter area. DSUF 19o21. None of this work can be effectively performed while seated, in defendant's view. DSUF 22. In further support of its factual contentions, defendant notes that its cosmetics sales employees agree that sitting at any time on the sales floor reduces their ability to make sales and commissions. DSUF 27o28. Moreover, an independent consultant has performed a "job analysis" for defendant's cosmetics employees. She determined that "walking" and "standing" and related activities occur "frequently," but that "sitting" is "seldom" required. DSUF 23. And defendant also notes its many customer service studies, which show that good customer service is essential to defendant's continued sales success. DSUF 24o26.

Presenting her own declarations and other evidence, plaintiff disputes that the nature of the work as a cosmetics counter employee requires standing the majority of the time. Plaintiff notes the essential job functions of a cosmetics counter employee, which neither party disputes: sales, financial transactions, stock, documentation, clean-up, telephone work, customer service, and teamwork. *See* Decl. of Eileen Salus, Ex. A; *see also* Depo. of Nora Cummings 50:10–53:6; 55:21–56:1; 59:24–60:13; 63:18–20 (describing essential tasks as contacting personal books; writing thank you cards; making telephone calls for merchandise checks at other stores and customer contact; using cash registers for financial transactions; restocking merchandise). Plaintiff then testifies that she spent the majority of her time working at the cash register, writing thank you notes, making calls to her personal book, and stocking the shelves—all tasks that could have been completed while sitting. Depo. of Jessika Tseng 39:19–20; 41:24–42:2; 92:19–94:11; Decl. of Jessika Tseng ¶ 2. Other former cosmetics counter employees who worked at defendant's stores agree, based upon their experience as salespersons. *See, e.g.* Decl. of Allison Brilmyer ¶¶ 4–6; Decl. of Vanessa Curiale ¶¶ 4–6; Decl. of Saima Vakil ¶ 7. In plaintiff's view, disputed issues of fact as to whether these tasks may be accomplished while seated is alone sufficient to deny defendant's motion.

Moreover, plaintiff points to the evidence in the record that cosmetics counter employees could still offer exceptional customer service while seated, and she argues that disputed issues of material fact on this crucial issue alone preclude summary adjudication in defendant's favor. This includes plaintiff's own testimony and the testimony of other former cosmetics counter employees that they could have quickly and easily stood from a seated position to greet customers who approached the counter had they been provided with a high stool or similar seating option. *See, e.g.,* Tseng Decl. ¶ 3. As such, even if seats were available to them on the sales floor, plaintiff contends that cosmetics counter employees could still accomplish their primary goal of providing great service to customers who enter the store.

***6** And considering defendant's other "fundamentals" of great customer service, plaintiff notes the factual disputes in the record as to how many of these daily tasks could be completed while seated. *See* Cummings Decl. Ex. A (describing, *inter alia,* greeting and approaching customers immediately, having strong product knowledge, being fashion experts, walking the shopping bag around the corner, and building relationships with their customers). This is particularly true with regards to a salesperson's duty to regularly contact customers by phone and email, tasks which plaintiff maintains could easily be completed while seated. *See id.* 136:15–137:13; 137:17–138:5. Plaintiff also notes that defendant's independent study does not confirm that employees could not provide great customer service while sitting. In plaintiff's view, it is not surprising that the consultant frequently observed defendant's employees "walking" and "standing," when no seats were ever provided to them. *See* Cummings Depo. 96:23–97:22; 131:1–17.

Conversely, plaintiff disputes whether standing leads to great customer service. For one, plaintiff notes a number of documented instances in the record where customers have complained about employees who are standing and yet inattentive. *See* Cummings Decl. Ex. D; Cummings Depo. 129:15–130:22. Additionally, plaintiff offers testimony from a number of former employees, including herself, that standing all day made cosmetics counter employees tired. *See, e.g.,* Tseng Depo. 122:6–123:2; Loomis Decl. ¶ 6. And as defendant's witness testified, tired salespeople sell less than those who are well-rested. Cummings Depo. 147:4–20.

(b) Theft Deterrence

Defendant also maintains that cosmetics sales employees must be standing and mobile in order to engage in customers in a manner that will deter potential theft. DSUF 29o30. Defendant trains its employees that excellent customer service-pwhich requires them to be standing and mobile—is the best theft deterrent. *See* Decl. of Debby Taylor ¶¶ 3o5; Ex. A ("Prevent shrinkage by providing.....Outstanding Customer Service!!!"). It is self-evident, in defendant's view,

that people who are being watched are less likely to commit theft, so employees must constantly be moving around throughout the store to accomplish this task. If plaintiff had been seated at her cosmetics counter during her employment, defendant maintains that she would not have been able to see a substantial portion of the sales floor and could not have deterred potential theft as effectively. *See, e.g.,* Decl. of Kristal Vasquez Ex. A (graphical depiction of the cosmetics counter layout where plaintiff was employed).

As with defendant's customer service rationale, plaintiff maintains that disputed issues of material fact exist as to whether cosmetics salespeople could not be seated while still preventing theft. For one, plaintiff notes the variety of other loss prevention techniques that defendant employs, and therefore maintains that the degree to which cosmetics counter employees must be standing to accomplish this overarching goal is disputed. *See* Depo. of Debby Taylor 30:6–10; 31:10–12; 32:21–33:12; 33:13–15; 34:16–35:3; Decl. of Debby Taylor Ex. A. More importantly, plaintiff maintains, if employees can in fact provide great customer service while seated, then they should also be able to effectively police and deter possible theft while seated, given the nexus between these two job requirements.

(c) Customer and Employee Safety

*7 Defendant also maintains that it prohibits the use of chairs or seats in the cosmetics area to reduce the risk of injury to salespeople or customers. DSUF 31. Defendant's cosmetics counter areas are often busy and congested, as there are usually multiple employees scheduled to work behind a single counter. *See* DSUF 12*o*13; Tseng Depo. 58:18o21, 62:13o23. In addition, the cash wraps are located within a back counter space that would not permit employees to pass safely if a seat were provided. DSUF 31o32. In support of this contention, defendant notes the numerous instances where cosmetics employees have tripped on items left behind the cosmetics counters or cash wrap counters, although none of these items were chairs or other seating fixtures. *See* DSUF 32; Salus Decl. ¶¶ 10o19, Exs. CoE, H, I (incident reports). Accordingly, defendant instructs its employees not to place or leave objects on the floor that might be a trip hazard, which includes stools or other seating. Taylor Decl. ¶¶ 20o24. In fact, when plaintiff attempted to use a stool behind the counter area, she was immediately asked to remove it. Tseng Depo. 110:22o111:2. Defendant's policy is this regard is enforced by "safety auditors" that it sends into its stores, who are tasked with ensuring that there is "no storage on [the] floor and inside of [cosmetic] bays." Salus Decl. ¶¶ 23–24, Ex. L and M.

In opposition, plaintiff notes the disputed evidence in the record as to whether there is adequate space for a stool to fit safely behind defendant's cosmetics counters, based upon the testimony of a number of former employees. *See, e.g.,* Covington Decl. ¶ 8; Brilmeyer Decl. ¶ 8; Vakhil Decl. ¶ 9; Figueroa Decl. ¶ 8; Tseng Decl. ¶ 6. Furthermore, defendant offers chairs for customer use and does not deem these to be an unreasonable safety risk when used properly. Cummings Depo. 81:2–81:6; 140:14–141:24; Salus Depo. 49:19–51:25. Plaintiff also notes that defendant has never studied whether the provision of seats would increase or decrease injury, formally or informally, as defendant has never provided seats behind the cosmetics counter. Salus Depo. 35:24–36:25; 38:4–15. And there would be no safety risk to customers of stools that are placed behind the cosmetics counter, plaintiff maintains, as customers are not allowed in this area. Tseng Depo. 83:10–16; Salus Depo. 91:25–92:23. Finally, plaintiff offers evidence that providing seats would actually improve the health and safety of defendant's employees, for employees testify that continued standing can cause pain or various injuries. *See, e.g.,* Costello Decl. ¶ 5; Tseng Decl. ¶ 4. As defendant's National Risk Control Manager testifies, standing during their shifts can make salespeople tired, and tired persons are more likely to injure themselves. Salus Depo. 72:20–73:6; 73:20–74:13; 95:22–96:25.

3. Defendant's Evidentiary Objections

Defendant objects to the sixteen declarants and their declarations that plaintiff submits in support of her opposition to defendant's motion, on the grounds that plaintiff failed to properly disclose these declarations to defendant.[5] Federal Rule of Civil Procedure 26 requires parties to disclose the names and contact information of individuals "likely to have discoverable information," and thereafter supplement these disclosures as necessary. The duty to supplement also applies to a party's responses to discovery requests. *See*Fed.R.Civ.P. 26(e). If a party does not provide information initially or timely update this information in accordance with Rule 26(a) or (e), "the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed.R.Civ.P. 37(c). However, preclusion of the evidence is not required, particularly where preclusion of the evidence would result in dismissal of a claim. In that situation, a district court is required "to consider whether the claimed noncompliance involved willfulness, fault, or bad faith." *R & R Sails, Inc. v. Ins. Co. of Pennsylvania,* 673 F.3d 1240,

1247 (9th Cir.2012). Whether preclusion is dispositive of an issue or not, a court may consider lesser sanctions, including whether a continuance of the motion would cure any prejudice to the defendant. *See id.*

***8** Defendant claims that plaintiff did not disclose these potential witnesses, or the declarations they executed on plaintiff's behalf, until February 12, 2013. Declaration of Dominic Messiha ¶ 5.[6] Furthermore, five of these declarations were signed in 2012, and therefore plaintiff had ample opportunity to amend its disclosures and responses to defendant's discovery requests. Defendant argues that this late-disclosure caused it "significant[ ] prejudice," since defendant did not have the benefit of this information for discovery or to draft its motion for summary judgment, and only now is defendant able address these declarations in its reply. Moreover, even if the Court declines to exclude these declarations under Rule 37(c), defendant argues that these declarations are largely irrelevant, comprised of legal conclusions, hearsay, opinion, and unsupported conjecture, or are not based on personal knowledge.

The Court concludes, in its discretion, that the sixteen declarations at issue may be properly considered on this motion. First, at the hearing, defendant did not request that the Court defer ruling on this motion to provide defendant with additional time to address plaintiff's recently disclosed evidence. Moreover, the Court fails to see how defendant suffered any prejudice. Because fact discovery remains ongoing until September 27, 2013, defendant will have ample time to conduct further discovery related to these new witnesses. Both parties are admonished to comply with their disclosure obligations.

Some of defendant's more specific objections have merit, but the majority of these objections go to the weight of the evidence and do not mandate outright exclusion. Defendant is correct that the most relevant evidence is that which describes the nature of plaintiff's work, not the work of other cosmetics counter employees, at the particular Nordstrom's stores where plaintiff worked. This includes both the tasks plaintiff was required to perform and the physical space in which these tasks were performed. However, to the extent that plaintiff's evidence demonstrates that cosmetics counter employees at other Nordstrom's stores had similar or identical duties, or that the physical layout of the cosmetics counters was similar, this evidence bears some relevance to plaintiff's case here. Similar to plaintiff, defendant also offers the declarations of a number of cosmetic counter employees in support of its contentions. Furthermore, the Court rejects defendant's argument that plaintiff's or other declarant's testimony about whether the nature of their work permitted seating, based on their experience actually performing the work, is irrelevant. As much as Nordstrom's is entitled to present its view as to why standing is required based upon the nature of the cosmetics salesperson's work, plaintiff may offer her view as to why standing is not required, based upon the tasks she actually performed at her j ob. Plaintiff's, defendant's, and third-party percipient witnesses' observations, based on their personal knowledge and experience, are all relevant to this determination. Ultimately, however, the subjective beliefs of the parties do not inform the outcome of this motion.[7]

4. Analysis

***9** Defendant argues that summary judgment should be granted in its favor for three principal reasons. First, defendant argues that, as a general matter, the nature of retail sales work does not reasonably permit an employee to sit. Second, according to defendant, the undisputed evidence in this case supports a finding that defendant's cosmetics employees must be standing and mobile to adequately perform their job duties. In particular, defendant expects employees to be standing to provide "excellent customer service"; employees who are standing help "deter theft"; and prohibiting seats on the sales floor helps avoid employee and customer injuries. Third, even assuming plaintiff could sit while performing some of her job tasks, defendant contends that the proper inquiry is whether the nature of plaintiff's work as a whole reasonably permits her to sit.

In opposition, plaintiff argues summary adjudication of her claim is inappropriate for three principal reasons. First, retail sales work is not exempt from the requirements of section 14(A) of the Wage Order, plaintiff contends, because the Order does not create any such exceptions. Second, plaintiff notes that disputed issues of fact pervade the record as to whether the nature of plaintiff's work permits the use of seats. Third, defendant's reasonable business judgment does not control, plaintiff avers, and even if considered, disputed issues of fact exist as to whether any of defendant's rationales are sufficient to demonstrate that seating was not required.

After considering the parties' arguments and evidence, the Court concludes that disputed issues of material fact pervade the fundamental issue in this case: namely, whether the nature of plaintiff's work as a cosmetics counter employee

reasonably permitted the use of a seat. This totality of the circumstances inquiry under the admittedly broad mandate of the Wage Order is not readily susceptible to resolution on summary judgment. Among other details, section 14(A) is silent as to "what portion of the work may be accomplished in a seated position such that an employer is required to provide its employees with seats," or how to weigh the various forms of evidence an employer and employee may present. *Murphy v. Target Corp.*, No. 09–cv–1436, at 3–4 (S.D.Cal.2012) (Order Denying Defendant's Motion for Summary Judgment). Contrary to defendant's argument, the business judgment rule does not serve as a "tiebreaker" in such a situation, particularly where the reasonableness of that judgment is itself in dispute.

Despite the factual inquiries mandated under section 14(A), defendant contends that DSLE and IWC opinion letters from 1986 and 1987, respectively, interpret this section of the Wage Order to not apply to salespersons in the mercantile industry. *See* Def.'s RJN Ex. 3, DLSE Opinion Letter 12.05.1986 (stating that this section "was not intended to cover positions where the duties require employees to be on their feet" and that "[h]istorically and traditionally, salespersons have been expected to be in a position to greet customers and move freely throughout the store to answer questions and assist customer with their purchases"); Ex. 2 (IWC Opinion Letter 01.13.1987). While these opinions are entitled to deference, the Court notes that these opinions were rendered over thirty years ago, and fail to address the precise factual situation at issue in this case. *See Garvey,* 2012 WL 1231803, at *2;*Echavez,* 2012 WL 2861348, at *8. The fact-intensive nature of the inquiry is further confirmed by more recent guidance from the DLSE, discussed previously, which defendant cites to extensively. *See* Def.'s RJN Ex. 5. As such, the weight of these opinion letters alone is insufficient to overcome the numerous triable issues of fact in the record.

***10** Moreover, defendant has not demonstrated as a matter of law that its employees could not reasonably be provided with seating on the sales floor while still performing their duties, as defendant's reasonable business judgment is but one input into the section 14(A) inquiry. First, as described in detail above, plaintiff offers evidence that defendant's employees could potentially be seated while still providing excellent customer service. In light of the conflicts in the record as to whether a salesperson could effectively greet and assist new customers who entered the store, for example, the Court cannot decide as a matter of law that providing some sort of seat in the cosmetics sales area would be unreasonable. While defendant offers evidence that employees who are standing provide excellent customer service, plaintiff offers evidence that employees who are seated could also provide excellent service to customers, aligned with the multiple dimensions of customer service that defendant identifies. Nothing in defendant's evidence demonstrates as a matter of law that its cosmetics counter employees could not walk customers through the store, to the cash wrap, and to their cars, while still having a seat available to these employees while they performed tasks like emailing and calling customers. For this reason alone, summary adjudication is not warranted.

Second, genuine disputes of material fact exist as to whether providing seating would impede loss protection. Again, defendant presents evidence that having employees stand assists in preventing theft, but plaintiff offers evidence that employees could potentially deter theft from a seated position. Third, genuine disputes of material fact exist as to whether employees could safely work behind and around the cosmetics counter if some sort of seating was made available to cosmetics counter employees. Plaintiff's testimony is that she could have still performed her job duties safely if a seat were made available to her at any of the three stores where she worked; defendant's witnesses testify that a seat could not be reasonably and safely provided. The Court is unable to resolve these factual disputes without weighing the evidence submitted by the parties, which the Court cannot do on this motion.

Accordingly, in light of the totality of the evidence in the record, the Court denies defendant's motion for summary judgment. Disputed issues of material fact exist as to whether the nature of plaintiff's work as a cosmetics counter employee reasonably allowed for the use of a seat, such that defendant had a duty under California law to provide her one.

C. Constitutionality of PAGA

Defendant's final argument is one the Court has already considered and rejected in this case: that PAGA is unconstitutional as applied to defendant here. As the Court noted in its prior order denying defendant's motion for judgment on the pleadings, "constitutional challenges to PAGA have been uniformly rejected." Dkt. No. 47 (citing *Kilby,* 2012 WL 1969284, at *2 n. 2). Defendant offers no sound reason for the Court to revisit this conclusion on this motion, and therefore the Court declines to do so.

***11** Defendant's new constitutional argument—that as a matter of law, "retroactive" application of section 14(A) of the Wage Order would violate its Due Process rights—is also unavailing. The Wage Order itself has been in existence since 1976. *See Echavez,* 2012 WL 2861348, at *8. Therefore, citation to DLSE and IWC Opinion letters from 1986 and 1987, which are not controlling legal interpretations of the seating requirement in any event, does not change the analysis on this motion. Accordingly, defendant's motion for summary judgment on this basis is denied.

V. CONCLUSION

In accordance with the foregoing, defendant's motion for summary judgment is hereby DENIED.

IT IS SO ORDERED.

Footnotes

1 *See Fields v. QSP, Inc.,* CV 12–1238–CAS (PJWx), 2012 WL 2049528, *4 (C.D. Cal. June 4, 2012).

2 Two California Courts of Appeal and a number of federal district courts have rejected the argument that "an employer's failure to comply with the seating requirement in Wage Order 7–2001 is not unlawful under section 1198 because the seating requirement is expressed in affirmative—rather than prohibitory—terms." *Home Depot U.S.A., Inc. v. Superior Court,* 191 Cal.App. 4th 210, 218 (2010). *See Kilby v. CVS Pharm., Inc.,* No. 09–cv–2051, 2010 WL 3339464, at *3, 2010 U.S. Dist. Lexis 86515, at *7 (S.D.Cal. Aug. 23, 2010); *Bright v. 99cents Only Stores,* 189 Cal.App. 4th 1472, 1477, 118 Cal.Rptr.3d 723, 726 (2010) (holding that "section 1198 renders unlawful violations of the suitable seating provision of Wage Order No. 7, subdivision 14").

3 "The DLSE is the state agency empowered to enforce California's labor laws, including IWC wage orders." *Brinker Rest. Corp. v. Superior Court,* 53 Cal.4th 1004, 1029 n. 11 (2012).

4 For example, defendant cites to *Jones v. Walgreen Co.,* 679 F.3d 9 (1st Cir.2012), where the First Circuit affirmed a grant of summary judgment in favor of an employer on a plaintiff's disability discrimination claim. As the court noted in *Jones,* "the applicable statutory and regulatory framework accords a significant degree of deference to an employer's own business judgment regarding which functions are essential to a given position." *Id.* at 14. Because *Jones* arose under federal law, this is plainly not the same "statutory and regulatory framework" at issue in this case, and therefore no "significant" deference is owed to defendant's business judgment as to which functions are essential to plaintiff's former job. However, as discussed previously, defendant's business judgment as to the essential functions of plaintiff's former job is clearly a relevant consideration in the totality of the circumstances test set forth in section 14(A). *See id.* (noting that under federal law, "a court may look to the employer's judgment as to which functions are essential; written job descriptions prepared before advertising or interviewing applicants for the job; the work experience of past incumbents in the job; and the current work experience of incumbents in similar jobs") (citations and alterations omitted).

5 Plaintiff submitted her response to these evidentiary objections on March 21, 2013. Dkt. No. 118.

6 In response, plaintiff notes that defendant did not disclose some of its potential witnesses until December 28, 2012 and January 7, 2013, shortly before filing its motion for summary judgment. *See* Pl.'s Opp'n to Mot. to Strike and Response to Evidentiary Objections at 3.

7 The Court also overrules defendant's objection to plaintiff's declaration on the grounds that she contradicts statements made at her deposition. Any claimed inconsistencies between a party's deposition testimony and affidavit "must be clear and unambiguous to justify striking the affidavit." *Van Asdale v. Int'l Game Tech.,* 577 F.3d 989, 999 (9th Cir.2009). Having reviewed the relevant exhibits, the Court finds no such inconsistency here; plaintiff may permissibly elaborate on or explain previous testimony without contradicting it.

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ANSWER BRIEF OF RESPONDENT CVS PHARMACY, INC.

ADDENDUM OF UNPUBLISHED CASES PURSUANT TO RULE 8.1115(C)

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I am employed in the county from which the mailing occurred. On the date indicated above, I placed the sealed envelope(s) for collection and mailing at this firm's office business address indicated above. I am readily familiar with this firm's practice for the collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, the firm's correspondence would be deposited with the United States Postal Service on this same date with postage thereon fully prepaid in the ordinary course of business.

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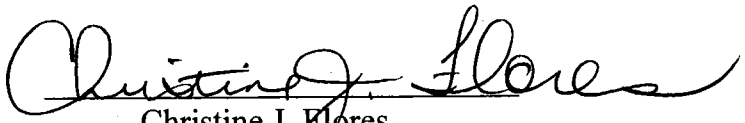

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