Case No. S215614

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

NYKEYA KILBY,
Plaintiff/Appellant

v.

CVS PHARMACY, INC.,
Defendant/Respondent

And Companion Case

On Certified Questions from the United States Court of Appeals for the Ninth Circuit Pursuant to California Rules of Court, Rule 8.548
Ninth Circuit Case Nos. 12-56130 and 13-56095

AMICUS CURIAE BRIEF OF DIVISION OF LABOR STANDARDS ENFORCEMENT, DEPARTMENT OF INDUSTRIAL RELATIONS, STATE OF CALIFORNIA

ROBERT N. VILLALOVOS (#152255)
DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations,
State of California
2031 Howe Avenue, Suite 100
Sacramento, CA 95825
Telephone: (916) 263-2918
Fax: (916) 263-2920

Attorney for Amicus Curiae, DIVISION OF LABOR STANDARDS ENFORCEMENT through its Chief, JULIE A. SU, LABOR COMMISSIONER FOR THE STATE OF CALIFORNIA

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I. INTRODUCTION.

This Court invited the Division of Labor Standards Enforcement (DLSE) to file an amicus curiae brief expressing its views on certified questions of law concerning Section 14 of California Wage Orders 4-2001 and 7-2001 (Cal. Code Regs., tit. 8, §§ 11040, subd. 14(A), 11070, subd. 14(A)). That section in each Wage Order provides:

> (A) All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.
>
> (B) When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties.

The specific questions posed by the Court are:

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)?

In this response, DLSE does not address the specific facts of the

pending cases, and instead provides general responses to the specified legal issues. The same Section 14 seating standard exists in both Wage Orders at issue in these cases, and in most of the various other wage orders promulgated by the Industrial Welfare Commission. The myriad of industries and occupations covered by those orders requires flexibility in their application. Such flexibility further promotes and effectuates the purpose of the seating standards, which is the protection of employee welfare. DLSE also recognizes the impact of these standards on businesses in this State and that there may be a desire for more specific tests to determine compliance. The seating requirements should be applied in focused fashion, using an objective, common sense test.

In summary, DLSE's responses to the questions are:

1. The inquiry regarding the "nature of the work" must be flexible and, where appropriate, evaluate those particular duties or tasks of an employee where the seating standard may apply. The language, history, and policy of the seating requirement do not support an across-the-board rule and this inquiry should instead attempt to aggregate employees' duties, as a whole, performed during a workday.

    a. The seating standards neither express nor support a specific numeric test such as where "more than half" of employees' time is spent performing tasks that reasonably allow for use of a seat.

2. In determining whether the nature of the work "reasonably permits" seating, various facts and conditions, including the physical layout of the workplace, and information from both the employer and employee regarding duties or tasks which give rise to application of the requirement must be objectively assessed and applied in a reasonable and practical manner. An employer's

business judgment is a factor for consideration, but, where the nature of the work otherwise reasonably permits seating, the employer's business judgment does not control nor should it be given deferential weight. The physical characteristics of an employee will typically not be a relevant factor.

3. As to what constitutes "suitable seating," an employee who makes a showing of failure to provide any seating in conditions which give rise to the requirement, establishes a claim without the further burden of proving what is "suitable seating." In the practical context of a claim, the suitability of seating can be raised as an affirmative defense to a claim that no seating was provided; or alternatively, public policy considerations should place the burden upon the employer to establish compliance with the suitable seating requirement.

DLSE will first briefly discuss the regulatory framework and general application of the seating requirement, before explaining its response to each question.

II. REGULATORY FRAMEWORK OF THE SEATING REQUIREMENT.

A. Regulation of Employment Under Wage Orders.

The Industrial Welfare Commission (IWC), created in 1913, has established substantive standards for wages, hours, and working conditions in California through orders regulating various occupations and industries. (*Industrial Welfare Commission v. Superior Court* (1980) 27 Cal.3d 690, 700; Cal. Labor Code §§ 1173, 1185, 1198.) The IWC's orders are regulations having the full force and effect of law (Cal. Labor Code §§ 1173, 1185; *Murphy v. Kenneth Cole Prods., Inc.* (2007) 40 Cal.4th 1094,

1102, fn. 4.) with the same dignity as statutes. (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1027.)

The same seating standard language is contained in fourteen of the sixteen industry and occupational wage orders. Working conditions are subject to the requirements of occupational orders if the employer is not covered by an industry order specific to the employer's business. At issue here are Wage Order 7, governing the mercantile industry (Cal. Code Regs. tit. 8, § 11070, subd. 2(H)), and Wage Order 4, an occupational order regulating professional, technical, clerical, mechanical and similar occupations (Cal. Code Regs. tit. 8, § 11040). The other orders with identical seating language are 1 [manufacturing], 2 [personal services], 3 [canning, freezing and preserving], 5 [public housekeeping], 6 [laundry, linen supply, drying cleaning and dyeing], 8 [industries handling products after harvest], 9 [transportation], 10 [amusement and recreation], 11 [broadcasting], 12 [motion picture], 13 [preparing agricultural products for market, on the farm], and 15 [household occupations]. (Cal. Code Regs. tit. 8, §§ 11010, 11020, 11030, 11050, 11060, 11080, 11090, 11100, 11110, 11120, 11130, 11150.) The exceptions with differently-worded seating standards are Wage Orders 14-2001 [agricultural occupations] and 16-2001 [certain on-site occupations in the construction, drilling, logging, and mining industries]. (Cal. Code Regs. tit. 8, §§ 11140, 11160.) There is no seating requirement in Wage Order 17, which applies to "miscellaneous employees" not otherwise covered under any of the other 16 wage orders. (Cal. Code Regs. tit. 8, §§ 11170.)

DLSE, headed by the Labor Commissioner, is an agency separate from the IWC empowered to enforce California's labor laws, including IWC wage orders. (Cal. Labor Code §§ 61, 90.5, 95(a), 1193.5; *Brinker Rest. Corp. v. Superior Court*, *supra*, 53 Cal.4th at p. 1029, n. 11.)

B. The Adoption of the Modern Seating Standard.

The modern wording of the seating standard was essentially adopted in 1976. (See, ER 106-107 [Wage Order 7].)[1] In the IWC's Statement of Findings regarding with the adoption of this version in most of the wage orders, the commission stated:

> The testimony at public hearings made it clear that some kinds of workplaces would be covered by the new orders that were not covered by previous orders, and the Commission has made its requirement more flexible and more subject to administrative judgment as to what is reasonable. It continues to find that humane consideration for the welfare of employees requires that they be allowed to sit at their work or between operations when it is feasible for them to do so. (RJN, Exh. 2, at p. 16.; see also, ER 115, 181 [Letter from IWC Executive Officer, M. Miller, May 4, 1982 re: Order 7-80 stating continued rationale.)

This regulatory language, and this statement of policy, still guide implementation of the seating standards. It is also noteworthy that the IWC made a decision to include the same standard in each of those 14 respective industries and occupations, fully recognizing the varied types of jobs subject to each order.

C. The Seating Requirement Is An Obligatory Standard Based On A Reasonable Standard Of Conduct.

The few judicial opinions addressing the current seating provision have recognized the obligatory, objective nature of the requirement. While Section 14 "… is framed as an affirmative standard of reasonable conduct,

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[1] Except as otherwise stated, the record references to "ER" and "SER" are to the Excerpts of Record and Supplemental Excerpts of Record, respectively, filed in *Kilby v. CVS Pharmacy, Inc.*, Case No. 12-56130. The record reference to "RJN" is to Appellant's Request for Judicial Notice filed in the Ninth Circuit case, *Kilby v. CVS Pharmacy, Inc.*, Case No. 12-56130, Docket No. 10-1.

it clearly prohibits employers from failing to provide suitable seating to employees under the conditions specified in the wage order." (*Home Depot U.S.A., Inc. v. Superior Court* (2010) 191 Cal.App.4th 210, 221-222 [analogizing Section 14 to other statutory standards of reasonable conduct]; see also, *Bright v. 99 Cents Only Stores* (2010) 189 Cal.App.4th 1472, 1479 [suitable seating provision is not permissive, it is part of an order which states what an employer shall do].) Thus, at the outset and in view of the express language and broad application, the issue for employers is not *whether* the seating requirement applies, but rather *when* it may apply to covered employees. That inquiry will be governed by an objective standard of reasonability.

With the foregoing general principles in mind, we now turn to the Court's specific questions concerning the proper interpretation of the orders.

III. QUESTION 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. The Language Of The Seating Requirement Requires Consideration Of Individual Or Specific Tasks, As Appropriate, In Evaluating "When Nature Of The Work Reasonably Permits" Seating And That Interpretation Promotes And Achieves The Protective Purposes For This Working Condition.

The interpretation of a regulation, like a statute, is a question of law, the ultimate resolution of which rests with the courts. (*Culligan Water Conditioning v. State Bd. of Equalization* (1976) 17 Cal.3d 86, 93; *Monzon v. Schaefer Ambulance Service, Inc.* (1990) 224 Cal.App.3d 16, 30.) In ascertaining the intent of lawmakers so as to effectuate the law:

> [T]he statutory language itself is the most reliable indicator, so we start with the statute's words, assigning them their usual and ordinary meanings, and construing them in context. If the words themselves are not ambiguous, we presume the Legislature meant what it said, and the statute's plain meaning governs. On the other hand, if the language allows more than one reasonable construction, we may look to such aids as the legislative history of the measure and maxims of statutory construction. In cases of uncertain meaning, we may also consider the consequences of a particular interpretation, including its impact on public policy.

(*Martinez v. Combs* (2010) 49 Cal.4th 35, 51, quoting *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1190.)

Section 14 requires interpretation of what constitutes the "nature of the work" for purposes of determining the employer's obligation to provide seating for employees. In the realm of employment, "work" has been long recognized as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer." (*Alvarez v. IBP, Inc.* (9th Cir. 2003) 339 F.3d 894, 902 aff'd (2005) 546 U.S. 21, citing *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123* (1944) 321 U.S. 590, 598.)[2] Since

[2] This Court has found differences between definitional and coverage language in the IWC Wage Orders and the federal Fair Labor Standards Act (FLSA), in 29 U.S.C. § 201 et seq. (*Martinez v. Combs, supra,* 49 Cal.4th at p. 68.) While neither has specifically defined the word "work", the U.S. Supreme Court's definition in *Tenn. Coal, Iron & R. Co.* is consistent with the ordinary meaning of the word. (See, *Tenn. Coal, Iron & R. Co., supra,* at 598.) It means "activity in which one exerts strength or faculties to do or perform something: 1. *a* **:** sustained physical or mental effort to overcome obstacles and achieve an objective or result *b* **:** the labor, task, or duty that is one's accustomed means of livelihood *c* **:** a specific task, duty, function, or assignment often being a part or phase of some larger activity (*Merriam-Webster.com*. Merriam-Webster, n.d. Web. 7 Oct. 2015, <http://www.merriam-webster.com/dictionary/work>). Another dictionary provides that it means "[p]hysical and mental exertion to attain an end, esp. as controlled by and for the benefit of an employer; labor." (*Black's Law*

"work" includes all aspects of physical or mental exertion required or controlled by the employer, the activities which are actually performed during the course of the workday must be evaluated. The word "work" in the context of employment does not connote an *exclusive* evaluation of an employee's entire range of duties, as a whole, from which an overall description or assessment of an employee's job is to be made.

The word "nature" in the context of evaluating an employee's "work" requires inquiry into its inherent character or essence, or alternatively, as evaluating the kind or class of work, as in the fundamental or essential characteristics among specific duties or tasks.[3] Particularly given the purpose of determining seating requirements, this inquiry as to the 'nature" of the work can reasonably involve evaluation of the several duties or tasks which may be performed by an employee.

Section 14 also fundamentally requires that "employees shall be provided with suitable seats *when* the nature of the work reasonably permits . . . ." The adverb "when" establishes a temporal aspect to the application of the requirement, and reasonably contemplates that the nature of one's work in the employment context can change during a period of time, and may range from static to varied. Some employees work in more fixed conditions or a limited work station and have few differing duties or tasks

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Dictionary, 9th Ed. 2009). As discussed shortly, however, the DLSE's experience reveals that enforcement of wage and hour requirements is more dependent on actual practices and less dependent on abstract descriptions of duties or tasks.

[3] The word "nature" has several meanings which include: 1 ***a*****:** the inherent character or basic constitution of a person or thing **:** essence ***b*****:** disposition, temperament … 3**:** a kind or class usually distinguished by fundamental or essential characteristics <documents of a confidential *nature*> <acts of a ceremonial *nature*> ("Nature." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 27 Sept. 2015, <http://www.merriam-webster.com/dictionary/nature>).

during the workday. In such cases, the employees' tasks may also constitute the nature of the work for purposes of Section 14. On the other hand, for workers who perform more varied duties or tasks, the time they spend performing any one task could also be a factor for purposes of determining the nature of work and whether the seating requirement would apply when performing that task. DLSE recognizes that duties of employees can vary substantially within an industry or occupation, as well as within a specific business. Some employees may have only a few or very limited duties within a workday, others may have several or numerous duties throughout a workday, and perhaps most employees (whether in an industry/occupation or within a business) have a varied range of duties which fall between the two extremes.

DLSE's long enforcement history teaches the danger of applying a standard pertaining to an employee's duties based upon characterizations in the abstract, or reliance upon job titles or job descriptions which may or may not reflect actual work performed by employees. The latter discrepancies can occur regardless of any intent by the employer to evade a requirement imposed by law. A common example is in cases regarding overtime requirements, where employees are ostensibly exempt under the executive, administrative, or professional exemption based on job descriptions of exempt work, but in practice the employees fall outside of the exemption due to their actual performance of non-exempt duties more than fifty percent of their work time. (See, e.g., Cal. Code Regs., tit. 8, §§ 11040, subd. 2(N), 11070, subd. 2(K).) The employment universe is inherently dynamic and the actual work being performed can change, with no bright line indicating when a particular overall job would fall into the requirements of Section 14.

Undoubtedly, employers define and regulate (in a private sense) the duties or tasks of an employee. DLSE agrees that the employer defines

specific tasks and duties for an employee, and an employer's view of the work performed by its employees is relevant in determining the "nature of the work." The considerations of an employer in determining work generally, and duties specifically, are therefore relevant to determining the nature of work performed by employees. However, the judgment of the employer is not dispositive and must take into account the requirements imposed by law, since statutorily-required minimum standards for wages, hours, and working conditions, cannot be undercut by an employer. When construing the wage orders, "in light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection." (*Martinez v. Combs, supra,* 49 Cal.4th at p. 60, citing *Industrial Welfare Com. v. Superior Court, supra*, 27 Cal.3d at p. 702.)

The employer parties and employer groups express concern that an inquiry into individual or specific tasks under Section 14 will require them to restructure their businesses at potentially great cost. DLSE submits that the seating issue can be more limited to particular duties or tasks where the "nature of the work" giving rise to the seating requirement can be evaluated. Even where performance of other duties during the workday may be relevant to the duties or tasks directly in issue, the inquiry is typically more appropriately focused on particular duties or tasks from which the seating requirement arises. The evaluation of the work and the duties of employees, for purposes of the seating requirement, requires an objective evaluation because the inquiry must primarily focus on the facts and conditions of specific work duties and tasks, and whether those may be performed while seated. The language in the section does not necessarily require a microscopic examination of an employee's work throughout the

workday in all cases. The parties appear to concede that some duties or tasks require standing or moving around.

Employees' claims for seating will generally arise in reference to specific job duties and tasks, rather than as an unqualified general request referring to the job as whole. Instead of viewing enforcement of the seating obligation as, from the outset, uniformly *requiring* a tedious review of each employee's duties or tasks throughout a workday, an interpretation of "nature of the work" which is primarily focused on the duties or tasks that give rise to the obligation is not only a more legally confined inquiry, but a practical one and less burdensome. And while this inquiry during the preliminary evaluation of the nature of the work is distinguishable from the subsequent determination whether the nature of the work "reasonably permits" seating (see discussion of Question 2, infra), it is still applied in light of the objective, reasonable conduct standards imposed by Section 14. (*Home Depot U.S.A., Inc. v. Superior Court*, *supra*, 191 Cal.App.4th at pp. 221-222.)

DLSE has interpreted the phrase "nature of the work" analogously in other contexts. Most wage orders mandate that the employer provide a duty free meal period, but provide for an "on-duty" meal period "when the nature of the work prevents an employee from being relieved of all duty.…" (See, e.g., Wage Order 7, Section 11(C) [Cal. Code Regs. tit. 8, § 11070, subd. 11(C)].) DLSE has had occasion to consider the "nature of work" in this provision of the wage orders. (See Dept. Industrial Relations, DLSE Opinion Letter No. 2009.06.09 (June 9, 2009), http://www.dir.ca.gov/dlse/opinions/2009-06-09.pdf, [meal periods for fuel carriers; reviews DLSE opinion letters regarding nature of work for on-duty meal periods, pp. 6-7].) The agency opinion letters reveal an inquiry based on a general view of the employee's duty in the context of the business, as well as specific duties or tasks of the employee, and have identified (non-

exhaustive) factors for considering whether the nature of the work prevented an off-duty meal period. (*Ibid.*)

Accordingly, DLSE maintains that the "nature of the work" is focused on an assessment of the duties and tasks which give rise to the seating obligation, and particular facts will determine the objective scope of the inquiry for purposes of applying the seating requirement.

B. An Exclusively "Holistic" Approach To The "Nature Of Work" Of An Employee Is Less Consistent With The Language Of The Seating Requirement And Contrary To The Regulatory Purpose, And Limits Its Application Or Overlooks Types Of Work Where Seating Could Be Reasonably Permitted.

A "holistic" approach which exclusively views the *entire range* of an employee's duties, as a whole, would likely prove inadequate and unworkable for an employee who performs a single core task for several hours in a fixed or defined area, where the nature of that work reasonably allows for seating, and who also performs tasks for a significant part of the workday requiring movement or mobility in several locations. Such an approach would render ineffective an affirmative obligation which mandates seating for employees where appropriate. Unless an employee works in a limited work station and has few differing duties or tasks during the workday, a global assessment of the "nature of the work" would not provide an inquiry necessary for effective enforcement of the Section 14(A) requirement, even though that standard expresses an affirmative protection for all employees covered under an industry order.

Similarly, an approach which holistically views the totality of circumstances based on an employee's duties primarily defined by the employer exercising business judgments or applying industry-wide practices would not appropriately capture the essence or purpose of the seating requirement. Courts have also recognized that industry custom or

practice does not govern the applicability of laws. (See, e.g., *C.E. Buggy, Inc. v. Occup. Safety & Health App. Bd*. (1989) 261 Cal.App.3d 1150, 1156-57 [common industry practice designed for convenience of employers does not control interpretation of employee safety regulation].) This type of holistic approach could limit application of the seating requirement and reduce its effectiveness, due to the inherent countervailing/opposing considerations pitting business judgments of employers directly against the welfare of the employee. Such an approach could have the unintended effect of allowing result-oriented analysis and over-generalized characterizations of an employee's work during the course of a workday.

While some briefs filed in the course of this litigation have characterized DLSE's prior interpretation of the seating requirement as requiring a holistic approach, an examination of DLSE's statements demonstrates that those parties have not fully understood DLSE's approach.[4] In a 2012 amicus brief filed in *Garvey v. Kmart Corporation* by the Labor Commissioner on behalf of DLSE and the Labor and Workforce Development Agency, the agency provided a short discussion of its general enforcement approach. DLSE stated that "[i]f called upon to enforce Section 14, the DLSE would apply a reasonableness standard that would fully consider all existing conditions regarding the nature of the work performed by employees." And, "[i]n the absence of any language in Section 14 deferring to specific considerations regarding either the nature of the work or the reasonableness of suitable seating, DLSE would consider all available facts and conditions, including but not limited to the physical

[4] Some federal district courts have also interpreted DLSE's stated approach as suggesting use of and support for a holistic inquiry. (See e.g., *Eschavez v. Abercrombie and Fitch Co., Inc.* (C.D. Cal. August 13, 2013, No. CV 11-9754) 2013 WL 7162011, p. 6.)

layout of the workplace and the employee's job functions, to determine compliance with Section 14 requirements." (See SER-Chase 28-33 [Amicus Brief of California Labor Commissioner, *Garvey v. Kmart Corp.* (N.D. Cal. 12/7/2012), 2012 WL 10691472].[5]) Notably, DLSE's brief did not address the focus of this inquiry – whether the "nature of the work" was exclusively holistic or could focus on different, specific tasks. The brief does not purport to address the distinction at the heart of the Court's Question 1.

Nor is an often-cited 1986 advisory letter issued by then-Chief Deputy Labor Commissioner insightful in responding to Question 1. That letter stated that the seating requirement was not intended to cover those positions where the duties require employees to be on their feet, such as floor sales persons in the mercantile industry. (SER 252; see also SER 254 [following letter from then-executive officer of IWC].) These statements addressed an abstract question regarding application of the seating requirement to floor salespersons in Wage Order 7. The statements are neither determinations based on evaluation of specified facts (i.e., the actual duties of an employee) nor can their reasoning be read as stating a rule applicable more generally. (*Yamaha Corp. of America v. State Bd. Of Equalization* (1998) 19 Cal.4th 1, 7 [an agency's interpretation of a statute or regulation is contextual and its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation].) Basing application of the seating requirement on summary and global conclusions about a salesperson's "position," either in the abstract or by alluding to performance of *any* duties requiring some time on one's feet or requiring *any* mobility, would improperly dilute the

[5] The record reference to "SER-Chase" refers to Respondent JPMorgan Chase Bank's Supplemental Excerpt of Record, filed in the Ninth Circuit, *Henderson v. JPMorgan Chase Bank, N.A.*, Case No. 13-56095.

seating requirement and frustrate the intended protection of the regulatory language which must be applied. A reading of the 1986 letter as this type of blanket conclusion would render the mandated tests for seating in Wage Order 7 irrelevant as to salespersons generally and could not be supported. While historical or traditional understanding of an employee's general work can assist in identifying types of work which are likely performed by a contemporary employee, enforcement of an existing standard must also examine the actual duties or tasks performed by an employee. Only then can the applicability and compliance with the seating requirements provided in Section 14 be determined.

In conclusion, DLSE maintains that the determination for "nature of the work" does not preclude, but rather can justify, inquiry into individual duties or tasks which might arise during the course of an employee's workday. At the same time, it must be recognized that it is the *nature of the work that gives rise to the issue of seating* which determines the scope of inquiry in a particular case. Accordingly, where duties and tasks may be more varied, or where any one task occupies a significant amount of time relative to other duties, this may warrant an appropriate closer examination of the pertinent individual duty or task.

IV. <u>QUESTION 1.a.</u>: 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?

For the reasons discussed above, the seating standards provide a flexible, objective requirement. Section 14 neither expresses nor supports a specific numeric test, such as whether "more than half" of employees' time is spent performing tasks that reasonably allow for use of a seat. Where the IWC has intended a time-based standard it has done so expressly. For

instance, in determining whether an employee performing executive, administrative, and professional work qualifies for an exemption to overtime compensation, the "duties" test requires that an employee "primarily" engage in specified duties constituting exempt work. (See, e.g., Cal. Code Regs., tit. 8, §§ 11040, subd. 1(A)(1)(e), (2)(f), and (3)(b).) The Wage Orders define "primarily" to mean "more than one-half of the employees work time" for purposes of the exemption. (See, e.gl, Cal. Code Regs., tit. 8, §§ 11040, subd. 2(N).)[6] The conspicuous absence of "primarily" or any other standard pertaining to time spent doing work in Section 14 indicates that, instead, the seating inquiry is governed by a standard of reasonableness.

V. QUESTION 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?

Various facts and conditions, including the physical layout of the work place, and information from both the employer and employee regarding duties or tasks which give rise to application of the requirement, must be objectively assessed and applied in a reasonable and practical manner. An employer's business judgment is a factor, but does not does not control nor necessarily have deferential weight where the nature of the work otherwise reasonably permits seating. The physical characteristics of an employee will typically not be a relevant factor.

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[6] In 1999, the Legislature codified this test in Labor Code section 515, subdivision (e). (Stats. 1999, ch. 134, § 9.)

A. An Employer's Business Judgment That An Employee Should Stand While Performing Assigned Tasks Is A Relevant Factor, But Should Not Alone Control Or Be Afforded Deference So As To Nullify Or Subvert Section 14's Remedial Protection.

DLSE again acknowledges the significant extent to which the employer defines the terms and conditions of employment. An employer's business judgment largely determines the nature of work of the employee both generally, as well as duties or tasks specifically. As also discussed above, however, the promulgation of a minimum working condition standard is intended to afford workplace protections to all employees covered under the requirement. The minimum labor standards constitute an exercise of the state's authority to regulate employment consistent with state policy. (*Martinez v. Combs, supra,* 49 Cal.4th at p. 60, citing *Industrial Welfare Com. v. Superior Court, supra,* 27 Cal.3d at p. 702.) Moreover, neither DLSE nor the courts can substitute their judgment for the standards issued by the IWC. "Because of the quasi-legislative nature of the IWC's authority, the judiciary has recognized that its review of the commission's wage orders is properly circumscribed.... 'A reviewing court does not superimpose its own policy judgment upon a quasi-legislative agency in the absence of an arbitrary decision.'" (*Martinez v. Combs, supra,* 49 Cal.4th 35, 61, quoting *Rivera v. Division of Industrial Welfare* (1968) 265 Cal.App.2d 576, 594.) Courts have noted that Section 14 "is framed as an affirmative standard of reasonable conduct" and "it clearly prohibits employers from failing to provide suitable seating to employees under the conditions specified in the wage order." (*Home Depot U.S.A., Inc. v. Superior Court, supra,* 191 Cal.App.4th at pp. 221-222.)

There is also nothing in the regulatory language or in expressions of regulatory intent pertaining to the wage orders at issue that support

complete deference to industry-wide practice. Where the IWC has seen fit to incorporate consideration of industry-wide practices, it has done so expressly. Wage Order 16 applies to certain on-site occupations in the construction, drilling, logging and mining industries; the seating requirement states: "Where practicable and consistent with applicable industry-wide standards, all working employees shall be provided with suitable seats when the nature of the process and the work performed reasonably permits the use of seats. This section shall not exceed regulations promulgated by the Occupational Safety and Health Standards Board." (Wage Order 16-2001, Sec. 14 [Cal. Code Regs., tit. 8, § 11160, subd. 14]; see also, Wage Order 14, Section 14 [Cal Code Regs., tit 8, § 11140, subd. 14] [applicable to agricultural occupations and requires suitable seating when working on or at a machine.])

Considering an employer's business judgment and industry practice will properly inform the enforcement agency, trier of fact, or reviewing court whether the nature of the work reasonably permits the use of seats. That inquiry will be guided by an overall standard of reasonableness. (*Home Depot U.S.A., Inc. v. Superior Court*, *supra*, 191 Cal.App.4th at pp. 221-222.) An employer policy which simply requires one to stand when it is otherwise reasonable to provide seating for the employee given the nature of the work would require more justification. What additional or other reasons would be sufficient must be evaluated on a case-by-case basis.

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B. The Physical Layout Of The Workplace Should Be Considered In The Context Of The Duties Or Tasks Performed At Locations Where The Employee Performs Work Activities Which Give Rise To Compliance With The Seating Requirement.

The physical layout of the workplace would also be a factor to consider when determining whether seating is reasonably permitted in view of the nature of the work, including the duties and tasks, performed by the employee. It will relate to an employee's position or positions when performing tasks, as well as whether, given the layout of the work area and the amount of space, a seat can be reasonably provided.

The physical layout must be objectively viewed, taking into account the work of the employee performed at the location or workspace. DLSE views the seating standard as a workplace condition aimed at the welfare of employees performing work and not an "engineering" or technically-based standard. Similarly, DLSE does not view the seating standard as incorporating or supplanting any applicable safety and health standard under the jurisdiction of other agencies such as those charged with enforcing health and safety laws. While facts regarding technical aspects of workplace configurations or studies may be relevant to determining whether suitable seating can be provided, the application of the standard is essentially one of overall reasonableness applied to particular facts.

C. The Physical Characteristics Of The Employee Are Generally Not A Consideration For Purposes Of Determining Compliance With A Generally Applicable Working Condition Standard For Seating.

Section 14(A)'s coverage of "[a]ll working employees" reflects an intent that the standard applies generally to all employees (although it can be enforced as to individual employees). The IWC's authority to exercise

authority to establish minimum standards relates generally to the welfare of employees. (*Industrial Welfare Commission v. Superior Court, supra*, 27 Cal.3d at p. 728.) It reflects the state's "broad authority, under its police powers, to prescribe minimum standards of employer conduct found necessary to protect the welfare of employees, even when other health and safety standards are not directly implicated." (*Id.*, at p. 728, fn. 15.) The exercise of such authority in the regulatory language, together with the IWC's expression of intent when it issued the 1976 wage orders to provide flexibility for application of the seating requirement under different working conditions (see *ante* at p. 5 [1976 findings]) manifests an intent that all employees are protected under a seating standard for the *general welfare* of employees with respect to all work they perform. Further, Section 14's test is directed at objective examination of *the nature of the work* performed when determining whether suitable seating is reasonably permitted. There is no language in the standard or regulatory history alluding to an individual employee's physical characteristics as being within the scope of that inquiry.

Other laws that apply to employment, including laws prohibiting discrimination based on certain physical characteristics and those providing protections for persons with disabilities, may require seating accommodation for individual employees. However, such laws are independent of the seating requirement contained in the wage orders.

Thus, the physical characteristics of the employee would generally not be a relevant factor when determining whether the nature of the work "reasonably permits" the use of a seat.[7]

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[7] Given the myriad of industries, occupations, and tasks to which the Section 14 applies, DLSE cannot categorically opine that the characteristics of employees will never be relevant. There may be atypical situations where the physical characteristics of the employees are relevant to an

VI. QUESTION 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)?

A party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he or she is asserting. (Evid. Code, § 500.) Substantive law, and not the law of evidence, determines which facts are essential to a party's claim or defense. (Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2015) ¶ 8:3632, citing Evid. Code § 500, Comment, *Searle v. Allstate Life Ins. Co.* (1985) 38 Cal.3d 425, 437.) "Where, under the substantive law, a fact is essential to the plaintiff's claim for relief, the burden of pleading and proof of that fact is on the plaintiff." (1 Witkin, Cal. Evid. 5th (2012) Burden of Proof and Presumptions, § 8, p. 178.)

Section 14(A) imposes a substantive obligation on employers to make suitable seats available to employees when the nature of work reasonably permits the use of seats. The failure to provide any seat would as a logical and legal matter, violate the "suitable seat" requirement in Section 14(A) upon providing evidence that no seats were provided by the employer and that the other standards were met. Evidence that no seats were provided is sufficient to establish the nonexistence of an essential fact (that element of the seating requirement) from which relief can be determined. (*Home Depot U.S.A., Inc. v. Superior Court, supra*, 191 Cal.Appt.4th at p. 221 ["[t]he seating requirement of Wage Order 7–2001, though framed as an affirmative standard of reasonable conduct, clearly

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inquiry into the nature of the work itself. Such cases would, obviously, be exceptions.

prohibits employers from failing to provide suitable seating to employees under the conditions specified in the wage order"].)[8]

Even if the requirement that the seats be "suitable" is viewed as an additional element of employee' claims, strong public policy considerations justify the application of a burden of proof informed by the remedial and protective purposes of the seating requirement. (See, *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727, citing *Anderson v. Mt. Clemens Pottery Co.* (1945) 328 U.S. 680, 687, superseded by statute on other grounds as stated in *Integrity Staffing Solutions, Inc. v. Busk* (2014) 135 S.Ct. 513, 516.) "In determining whether the normal allocation of the burden of proof should be altered, the courts consider a number of factors: the knowledge of the parties concerning the particular fact, the availability of the evidence to the parties, the most desirable result in terms of public policy in the absence of proof of the particular fact, and the probability of the existence or nonexistence of the fact." (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 660-661.)

In *Anderson,* the U.S. Supreme Court examined the policy behind employee protection statutes, and then shifted the burden to an employer to prove the amount of a wage claim if there was a failure of its statutory obligation to keep proper records of wages, hours, and other working conditions pursuant to the federal Fair Labor Standards Act. *(Anderson v. Mt. Clemens Pottery Co., supra,* 328 U.S. at pp. 687-88.) California courts have extended this burden-shifting for the protection of employees seeking to enforce their rights under California's wage and hour laws, imposing a similar obligation on employers to maintain records of time worked, relying

[8] The Court inquired about, and DLSE is responding to, the situation where employees allege that no seat was provided. DLSE does not intend this response to address allegations that seating was provided, but that it was unsuitable.

on the public policy considerations provided in *Anderson*. (*Hernandez v. Mendoza, supra,* 199 Cal.App.3d at p. 727; *Eicher v. Advanced Business Integrators, Inc.* (2007) 151 Cal.App.4th 1363, 1377.) DLSE's enforcement experience since *Hernandez* has shown allocation of the burden of proof to be a practical and fair procedural tool and it incentivizes employers to comply with the requirements at the outset of an employee's work.

The same considerations referenced in *Anderson* apply to the seating requirement contained in the wage orders. Requiring an employee to prove what constitutes suitable seating creates an improper hurdle for employees who are the intended beneficiaries of the working condition standard. Such a hurdle would also reward an employer's failure to provide suitable seating and would frustrate the remedial purposes of the seating requirement. Assuming an employee shows seating is reasonable given the nature of the work, an employer will be motivated to provide suitable seating.

Thus, in the situation posed by the Court in this Question 3 (the lack of any seating), the burden of proof as to the violation of the seating standard should require an employee to prove: (1) that the nature of the work reasonably permits the use of seats, and (2) that the employer failed to provide seating for the employee to use while performing such work. Providing evidence that the employer failed to provide any seats would then shift the burden to the employer to come forward with evidence that seats were provided, and if suitability is at issue, evidence on that point.

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VII. CONCLUSION.

For the foregoing reasons, DLSE respectfully requests the Court issue an Opinion consistent with DLSE's views.

Respectfully submitted,

DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California

Dated: October 19, 2015

ROBERT N. VILLALOVOS
Attorney for Amici Curiae

CERTIFICATION OF WORD COUNT

Pursuant to Rule 8.520(c) of the California Rules of Court, I certify that the foregoing brief was produced on a computer in 13-point type. The word count, including footnotes, as calculated by the word processing program used to generate this brief is 7,015.

Dated: October 19, 2015

ROBERT N. VILLALOVOS
Attorney for Amici Curiae

PROOF OF SERVICE

(C.C.P. 1013)

CASE NAME: ***Nykeya Kilby v. CVS Pharmacy, Inc. and Companion Case***
CASE NO: **S215614**

I, David Spicer, hereby certify that I am employed in the County of Sacramento, over 18 years of age, not a party to the within action, and that I am employed at and my business address is: DIVISION OF LABOR STANDARDS ENFORCEMENT, Legal Unit, 2031 Howe Avenue, Suite 100, Sacramento, California 95825.

On October 19, 2015 I served the following document:

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A	Michael David Weil Orrick Herrington & Sutcliffe LLP 405 Howard Street The Orrick Building San Francisco, CA 94105-2669 Kevin J. McInerney 18124 Wedge Parkway, Suite 503 Reno, NV 89511 Carrie A. Gonell John A. Hayashi Morgan, Lewis & Bockius LLP 5 Park Plaza, Suite 1750 Irvine, CA 92614 Molly Dwyer, Clerk of the Court Office of the Clerk U.S. Court of Appeals for the Ninth Circuit P.O. Box 193939 San Francisco, CA 94119-3939 Barbara A. Jones AARP Foundation Litigation 200 S. Los Robles, Suite 400 Pasadena, CA 91101 Melvin Radowitz AARP 601 E Street, NW Washington, D.C. 20049

Michael Rubin
Connie K. Chan
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, CA 94108

Katherine Melanie Forster
Munger Tolles and Olson LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071

Miles E. Locker
Locker Folberg LLP
235 Montgomery Street, Suite 835
San Francisco, CA 94104

David Faustman
Fox Rothschild LLP
1800 Century Park East Suite 300
Los Angeles, CA 90067

Theodore J. Boutrous
Gibson Dunn and Crutcher LLP
333 South Grand Avenue
Los Angeles, CA 90731

Leslie L. Abbott
Paul Hastings Janofsky and Walker LLP
515 South Flower Street, 25th Floor
Los Angeles, CA 90071

Guylyn R. Cummins
Sheppard Mullin Richter and Hampton LLP
501 West Broadway, 19th Floor
San Diego, CA 92101

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 19, 2015 at Sacramento, California.

_____

David Spicer
Assistant to Robert
Villalovos