



Are seating cases the next wave in California wage and hour class actions?

Several prominent retailers have faced litigation from cashiers who want on-the-job seating

BY JOEL GROSSMAN, ESQ.

All of us have been to supermarkets, drugstores and department stores where the cashiers stand at their checkout stations. But could this be a violation of law? Should the employer be obligated to provide seating for its cashiers? Recently this claim was tried in federal court in San Francisco and the judge ruled that seating was not required for a group of Kmart cashiers. The ruling, however, was not definitive, and the case is worth considering.

At the center of the case is a California administrative regulation, which states: "All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats." The regulation clearly invites litigation, as who is to say whether, in the case of a cashier at a grocery store or drugstore, the "nature of the work" would "reasonably" permit the cashier to use a seat? This ambiguity has led to several lawsuits in California against prominent retailers such as CVS Pharmacy and Kmart.

In *Garvey v. Kmart Corporation* in 2012, the trial court certified a class of all cashiers in one Kmart store in Tulare, Calif. The opinion provided diagrams of a cashier's work station and described the work station and specific activities

at great length. The court found that "most of the tasks done by a Kmart cashier could be done while seated, but some tasks can only be done while standing... even if seating were allowed, cashiers would be up (and down) frequently to perform the tasks that require standing."

During the trial, counsel for the employee class acknowledged that simply providing chairs or stools to the cashiers would not provide "suitable seating" in the standard Kmart cashier work station. Rather, the plaintiff class proposed a reconfiguration of the work station so that seating could be provided. The court examined this proposal and rejected it, stating that: "the proposal by class counsel is just not safe and workable." Having rejected plaintiff class' proposed reconfiguration of the work station, however, the court did not simply dismiss the claim. The court went on to describe what it called a "lean-stool," which would permit the cashiers to lean, but not sit. The court felt that the lean-stool would allow the cashiers to take some weight off their legs while still working efficiently. The cashiers would also move from a leaning to a standing position to perform those tasks that required standing.

Wholly apart from the physical configuration of the work station, Kmart argued that the nature of the work did not reasonably permit seating because of customer service. Specifically, Kmart argued 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." The court accepted this argument, and held as follows: "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."

Although Kmart won the case dealing with one particular store, and had its "good customer service" rationale endorsed by the court, there is little doubt that litigation in this area will continue. One federal district court judge's ruling, of course, is not binding on other courts, and it may be some time before an appellate court weighs in on this issue. Stay tuned.

Joel M. Grossman is a mediator and arbitrator with alternative dispute resolution provider JAMS. His practice focuses on employment, entertainment and other business disputes. He can be reached at jgrossman@jamsadr.com.