No. 12-56130

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

CVS PHARMACY, INC.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
S.D. Cal. Case No. 09-CV-2051 MMA (KSC), The Hon. Michael M. Anello

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INTRODUCTION

The parties fundamentally disagree about what the California Industrial Welfare Commission meant when it mandated in Wage Order 7-2001 §14(A) that "All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats."

Plaintiff construes this language, consistent with its regulatory history and purpose, to mean that covered employers must provide functionally appropriate ("suitable") seating to each of their employees during the periods of time ("when") those employees are engaged in job tasks whose essential functions ("nature of the work") are such that the employee could perform those tasks while seated, consistent with the comfort-and-health-protection goals of the Wage Order ("reasonably permits the use of seats").

This is a common sense, objective standard. It focuses on the core attributes of the employees' assigned tasks, and recognizes that most employees perform a mix of tasks, some of which may permit seating and some of which may not. While seating may not be required for tasks of such brief duration that having a seat would not further the Wage Order's purposes, Section 14(A) guarantees suitable seating to every employee performing fixed-location tasks for any appreciable period of time that can physically be performed while seated – like

plaintiff Kilby, who spent more than 90% of her time operating a CVS front-end cash register.

CVS asserts that under plaintiff's construction, "every worksite would be cluttered with chairs at every potential workstation," and employees would have to be provided with "some type of portable seating device that they would carry for use during any 'brief' or 'intermittent' portions of the job that allowed for sitting." CVS Answering Br. ("Ans. Br.") 26. Not so. Section 14(A) requires suitable seating only when the nature of the work "reasonably" permits the use of seats; and in determining whether seating for a particular task is "reasonable," courts may consider the duration and frequency of a particular task. While seating may not be required for fleeting or ephemeral tasks, or where seating would physically prevent the worker from performing an assigned task, those are not the circumstances of this case. *See* Plaintiff's Opening Brief ("AOB") 21, 42-43.

The district court's construction of §14 would effectively eliminate the protections of the IWC's suitable seating provision for every covered employee whose assigned tasks are not entirely seating-permitting. The district court concluded that §14 requires a "holistic" assessment of an employee's "entire range of assigned duties" to determine whether the employee's "job as a whole" or "[job] position" either "generally requires standing" (in which case the court would apply

§14(B) to the entire job position) or "reasonably permits the use of seats" (in which case the court would apply §14(A)). ER6-7, 9; *see* Ans. Br. 12, 14, 17-18. That "job as a whole" standard, though, offers no meaningful guidance to courts and litigants trying to determine when seating is required for workers who perform a mix of job tasks. Neither the district court nor CVS ever explains how many seating tasks, or what proportion of seating tasks, or how much time performing seating tasks, is required before a job position as a whole "reasonably permits the use of seats." And, while the district court refers to "many" or the "majority" of the tasks assigned, ER9-10, by granting summary judgment on the facts of this case the court's ruling has the practical effect of allowing California retail employers to deprive their workers of seating simply by assigning a handful of tasks that require standing (or that the employer *describes* as requiring standing, such as "greet customers from a standing position"), even if the workers' other assigned tasks consume a significant portion or even the vast majority of the work day, as here.

Plaintiff's principal duty as a CVS Clerk/Cashier was to operate a cash register. ER697, 847-60. She devoted approximately 90% of her work time to that duty. ER697. Because she also performed some job tasks that required standing or movement, the district court held that her "job as a whole," viewed

"holistically," did not reasonably permit the use of seats. ER6, 9-11. That construction of §14 is contrary to its plain language and to the IWC's intent.

ARGUMENT

I. The District Court Improperly Granted Summary Judgment to CVS.

A. The District Court's Construction of §14(A) Was Legally Erroneous.

Plaintiff alleged that CVS breached its legal obligations by failing to provide suitable seating to its Clerk/Cashiers "while they operated a front-end cash register." ER786 (Pl.'s Class Cert. Mot.); *see* ER1056-57 (Complaint). The district court acknowledged that "generally speaking, an individual can operate a cash register from a seated position," ER20, and plaintiff presented considerable evidence "demonstrat[ing] that Clerk/Cashiers can operate a cash register while seated." ER7; *see* ER697, 701-84, 847-60. Nonetheless, the district court granted summary judgment to CVS, holding that plaintiff was not entitled to a seat while operating a cash register because some of her *other* job duties, which occupied only a small percentage of her total work time, required standing or movement. *See* ER9.

CVS defends the district court's job-as-a-whole analysis, which focused on the number of assigned tasks that CVS defined as requiring standing. Ans. Br. 5-

6, 34 n.11; *see* ER4, 6-7, 9-11. However, a simple example illustrates the logical flaw in that analysis.

Consider two similarly situated bookstore employees. Mary works at the bookstore two days a week and is always assigned to the checkout/customer information counter. Tom works five days a week. On two days, he is assigned to that same checkout/customer information counter as Mary, and performs the same tasks. On the three other days, he is assigned exclusively ambulatory tasks, such as re-shelving books, pulling mail-ordered books from the shelves and delivering them to the shipping department, and patrolling the store to assist customers and watch for shoplifters. Under the construction proposed by CVS and adopted by the district court, Mary would be entitled to be seated at the checkout counter (unless the bookstore owner had defined the job as "checking out books and answering questions *while standing*"), while Tom would not be entitled to be seated when performing the identical tasks for the identical time periods. Because Tom worked at the checkout counter only 40% of his total work time, and performed only two of his tasks at the checkout counter (checking out books and answering customer questions) and more than two tasks (depending on how narrowly the bookstore owner defined those tasks) while stocking, running, and patrolling, the "majority" of his "entire range of assigned duties" would not

reasonably permit the use of seats under the district court's standard. That makes no sense. *See Bright v. 99¢ Only Stores*, 189 Cal.App.4th 1472, 1478 (2010) (courts should "avoid any construction that would produce absurd consequences") (quoting *Flannery v. Prentice*, 26 Cal.4th 572, 578 (2001)); *see also* AOB 38 (example of seamstress who spends nearly all of her work time performing a single task of "sewing," but could not sit because three of her four employer-defined tasks required movement); AOB 42-43 (example of office receptionist who could not sit because the employer described the job as "answering the telephone while standing," "greeting visitors while standing," and "using a computer while standing"). *See generally* AOB 14-45.[1/]

B. Plaintiff's Construction Is Fully Supported by the Plain Language, Purpose, and History of §14(A).

Section 14(A) guarantees employees the right to suitable seating whenever the essential attributes of "a specific task, duty, function, or assignment" can reasonably be accomplished while seated. *See* AOB 21 (quoting *Merriam-*

[1/] The IWC presumably intended the similar or identical seating provisions in 16 of its 17 industry-specific Wage Orders to be similarly construed, *see Hoitt v. Dep't of Rehabilitation*, 207 Cal.App.4th 513, 523-24 (2012), and there is no reason why these provisions should be construed differently for cash register operators than, for example, seamstresses, receptionists, or security guards who spend the first half of their shift patrolling and the second half watching video monitors.

Webster's Collegiate Dictionary (11th ed. 2003)). This plain meaning construction, which is consistent with the Supreme Court's repeated instruction to construe the Wage Orders "liberally . . . with an eye to promoting [worker] protection," *Indus. Welfare Comm'n v. Superior Court*, 27 Cal.3d 690, 702 (1980), is the only construction supported by the Wage Order's language (AOB 19-31, 40-43), history (AOB 31-36, 43-44), and purpose (AOB at 36-39, 44-45).

1. The Plain Language of §14(A) Guarantees Seats Based on the Nature of the "Work" Being Performed.

CVS contends that, notwithstanding the usual dictionary definition of "work," the IWC must have intended "work" in the context of §14(A) to mean the employee's "entire range of assigned duties" considered "as a whole." *See* Ans. Br. 14, 25. CVS never explains *why* the IWC would have intended a job involving mixed duties to be characterized as all-seating or all-standing, though, particularly given the worker-comfort-and-welfare purpose of the suitable seats provision.

CVS begins by asserting that the IWC intended §14(A) and §14(B) to be "mutually exclusive." *See* Ans. Br. 13-17. Even if that were true, those subsections are just as "mutually exclusive" under plaintiff's "task-by-task" construction as under CVS's "job as a whole" construction. *See* AOB 26-27. Under plaintiff's construction, §14(A) guarantees suitable seating whenever an employee is engaged in a particular job duty that can reasonably be performed

while seated; while §14(B) guarantees seating nearby for the employee's use during "lulls in operation" whenever an employee is assigned to a job duty that requires standing. *See* Plaintiff's Request for Judicial Notice, Dkt. Nos. 10-1, 10-2 ("RJN"), Ex. 1 at 3 (1976 Summary of Basic Provisions, explaining that §14(B) guarantees seating during operation "lulls" and not only during breaks); RJN Ex. 2 at 16 (1976 Statement of Findings, explaining the IWC's finding "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").

The two subsections of §14, read together, reflect the IWC's understanding that an employee's duties may include some that require standing (when §14(B) applies) and others that reasonably permit the use of seats (when §14(A) applies). Nothing about the structure of §14 indicates that §14(A) requires workplace seating only for the rare employee whose "entire range of assigned duties" can all be performed while seated – a construction that would enable employers to avoid providing any workstation seating simply by adding one or more standing-only tasks to every employee's job description. Even a factory seamstress performs some duties that require standing or movement. *See* AOB 38.

CVS next contends that the phrase "nature of the work" must refer to "the entirety of an employee's work functions" considered in the aggregate "rather than

any individual task or duty" because otherwise the phrase "nature of" would be surplusage. Ans. Br. 19-22. CVS does not dispute, however, that "nature" means "essence" or "inherent character," not "entirety" or "aggregation." *Id*. 20; *see* AOB 28, 41-42. There is nothing superfluous about focusing on the "inherent character" or "essential attributes" of an employee's job functions in determining when seating must be provided (as contrasted with, for example, allowing the employer's characterization of those job functions as requiring standing to be determinative).[2/]

CVS argues the IWC could not have intended "work" to mean "duties" in §14(A) because the IWC used both terms together in §14(B). But as plaintiff has shown, legislative bodies commonly use different terms to convey the same meaning, for reasons of grammar, diction, or clarity. AOB 30-31; *see also Brinker Rest. Corp. v. Superior Court*, 53 Cal.4th 1004, 1030 (2012) (word selection can reflect idiomatic choice rather than semantic distinction); *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal.4th 1094, 1104 n.6 (2007) (noting that the California Legislature and the IWC frequently used "pay," "compensation," and "wages" as

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[2/] Whatever an Oregon court's interpretation may be of the nature of criminal "proceedings," or a Maine court's interpretation may be of the nature of an "injury" for purposes of worker's compensation, *see* Ans. Br. 20-21, has no bearing on the IWC's intent in Wage Order 7-2001 §14.

synonyms). Moreover, §14(B) refers to the "duties of their *employment*." (Emphasis added). Thus, to the extent CVS interprets "work" to mean "job as a whole" (i.e., "employment"), the same canon CVS relies on would also require attributing different meaning to "work" and "employment" – which completely undercuts CVS's construction.

Plaintiff has shown why the IWC's use of the words "work" and "duties" in §14(A) and (B) provides clarity, and fits the structure and purpose of §14 as a matter of syntax and grammar. *See* AOB 28-30. CVS ignores this showing, except to suggest that the IWC sought to distinguish work time in §14(A) from break time in §14(B). Ans. Br. 16. But that is not a permissible construction given the Wage Order's regulatory history and purpose (which for 90 years has consistently focused on having seats available during work time, not break time). *See supra* at 9; AOB 29-30; RJN Ex. 1 at 3; RJN Ex. 2 at 16; ER56-57, 181 (1982 letter from the IWC Administrator explaining that "[t]he intent of the Commission, long established in the record, is that the requirement to provide seats applies to employees at work during their working time, not during meal and rest periods"). Moreover, if the IWC had intended §14(B) to apply only during break time, the final phrase in §14(B) ("when it does not interfere with the performance of their duties") would make no sense.

In short, CVS offers no textual reason to abandon the plain meaning of the term "work" in favor of a contrary meaning that is not supported by the context or purpose of §14. Had the IWC intended the meaning that CVS proposes, it could easily have made that intent clear, for example, by drafting §14(A) to provide: "All working employees shall be provided with suitable seats when the nature of the job as a whole reasonably permits the use of seats" or "when the entire range of assigned duties of employment considered as a whole reasonably permits the use of seats." The IWC instead used the simple term "work," whose plain meaning is synonymous with the terms "task," "duty," "[job] function," and "assignment." Because CVS's interpretation "lacks any textual basis in the [W]age [O]rder," it must be rejected. *Brinker*, 53 Cal.4th at 1038.

Beyond the plain, unambiguous meaning of the term "work" itself, plaintiff's task-based construction finds additional support in the IWC's use of the temporal limiter word "when," and in the IWC's use of the term "work" in other provisions of the Wage Order. *See* AOB 22-23, 23-26.

Section 14(A) directs employers to provide suitable seats "when," meaning "'at or during the time that,'" an employee is engaged in a task that reasonably permits the use of seats. AOB 22-23 (quoting *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003)). CVS argues that the IWC must have intended a

secondary meaning of "when," meaning not "at the time that" but "if." Ans. Br. 22-23. It may be that §14(A) would be less inconsistent with CVS's position if it required suitable seats "if the nature of the work reasonably permits the use of seats" (rather than "when the nature of the work reasonably permits the use of seats"). But such a construction would leave employers directionless as to *when* they must provide seats to employees whose "job as a whole" permits the use of seats, since under the district court's construction, even those jobs may involve some tasks that require standing. Meanwhile, substituting "if" for "when" would not make §14(A) inconsistent with plaintiff's construction – just less precise. Further, if the IWC intended "when" to mean "if" in §14(A), then presumably it also intended "when" to mean "if" both times it used "when" in §14(B) – except that §14(B) makes little sense with that substitution, because §14(B) is temporally focused on the particular times "[w]hen employees are not engaged in the active duties of their employment" and "when it [proximate seating] does not interfere with the performance of their duties." For these reasons, although CVS argues that the IWC intended an alternative meaning of "when," it fails to explain why the IWC would have intended that secondary meaning rather than the more common and far more precise primary temporal meaning.

The IWC's use of the phrase "nature of the work" in Wage Order 7-2001 §11(C) to describe the limited circumstances under which an employee may take an "on duty" meal period further supports plaintiff's construction of that same phrase in §14(A). *See* AOB 23-24. Section 11(C) provides that "[a]n 'on duty' meal period shall be permitted *only when the nature of the work prevents an employee from being relieved of all duty* … ." (Emphasis added). Logically, this provision allows an on-duty meal period only during those shifts when the "nature of the work" duties being performed *at the time of the meal period* prevent the employee from being relieved of all duty. CVS cites examples of a solo worker employed in a coffee kiosk or a security guard working at a remote site. *See* Ans. Br. 24; CVS's Motion for Judicial Notice, Dkt. No. 15-1 ("MJN"), Ex. C. But those examples do not support CVS's "holistic" construction because they do not involve workers with mixed duties who could sometimes be relieved of duty for an off-site meal period.

Finally, other provisions of the Wage Order demonstrate that when the IWC intended to weigh an employee's "entire range" of assigned duties, it knew how to make that intent clear. Section 1(A)(1), for example, creates an exemption for any employee who, among other requirements, "*customarily* and *regularly* directs the work of two or more other employees therein," "*customarily* and *regularly*

exercises discretion and independent judgment," and "is *primarily* engaged in duties which meet the test of the exemption." Wage Order 7-2001, §1(A)(1)(b), (d), (e) (emphases added). No such weighing requirement appears in §14. In addition, §1(A)(1)(e) requires courts to compare the time an employee devotes to "exempt work" versus "non-exempt work" in determining whether the employee is "primarily engaged in duties which meet the test of the exemption." This comparison would only make sense if "work" referred to the particular duties performed at any given time, rather than to the employee's "job as a whole." The IWC presumably intended "work" to have the same meaning in §1 as in §14(A). *See People v. Dillon*, 34 Cal.3d 441, 468 (1983). Consequently, just as §1 contemplates a single employee having both non-exempt work and exempt work, §14 contemplates a single employee having both sitting-permitting work and standing-requiring work. Unlike §1, however, §14 does *not* include any requirement that an employee be "primarily," "customarily," or "regularly" engaged in sitting-permitting work for the mandatory seating provision to apply.

CVS concedes that "the IWC did not include any language indicating the percentage of time an employee must be performing seated tasks under Section 14(A)." Ans. Br. 25. Although CVS contends that this omission is "irrelevant," it never explains why. *Id*. "When one part of a statute contains a term or provision,

the omission of that term or provision from another part of the statute indicates the Legislature intended to convey a different meaning." *Cornette v. Dep't of Transp.*, 26 Cal.4th 63, 73 (2001). The IWC's omission of the words "primarily," "customarily," "regularly," or any other comparable term from §14(A) therefore strongly evidences the IWC's intent *not* to require the availability of seating to depend on an analysis of an employee's job tasks in the aggregate, further undermining CVS's and the district court's construction of §14(A).

2. The Regulatory History of §14(A) Fully Supports Plaintiff's Construction.

The prior versions of the IWC's suitable seating provision fully support plaintiff's textual analysis as well. *See* AOB 31-36. The earliest version of the Wage Order, enacted in 1919, mandated that "[a]s far as, and to whatever extent … the nature of the work permits, … [s]eats shall be provided at work tables or machines," and shall also be provided in all workrooms for workers to use "when not engaged in the active duties of their occupation." ER52, 75. This language reflects the IWC's longstanding intent to guarantee seating at any workstation where an employee can reasonably perform her assigned tasks while seated and also to provide nearby seating for employees to use during lulls in their standing-requiring tasks. Although this language has been simplified over time, CVS has not cited *any* evidence (for example, in any Statement as to Basis or other

contemporary account) that the IWC ever intended any of its amendments to limit, rather than expand or clarify, the protective scope of §14. If the IWC had intended to change the focus of this worker-protection regulation from a task-by-task assessment to an either/or "job as a whole" assessment, surely it would have given some written explanation (and justification) for such a significant change.

CVS does not dispute the prior meaning of §14, but argues that legislative amendments are usually intended to make substantive modifications. *See* Ans. Br. 29-30. This general presumption, however, can be overcome by "'consideration of the surrounding circumstances" which may include "the application of the relevant principles of logic and statutory construction." *Bldg. Profit Corp. v. Mortg. & Realty Trust*, 36 Cal.App.4th 683, 691 (1995) (citation omitted); *see United States v. Wilson*, 503 U.S. 329, 336 (1992) (finding the general presumption overcome by fact that inferring an intent to change would lead to absurd results); *W. Sec. Bank v. Superior Court*, 15 Cal.4th 232, 243 (1997) ("[C]onsideration of the surrounding circumstances can indicate that the Legislature made material changes in statutory language in an effort only to clarify a statute's true meaning."). Here, the IWC has explained its intent to extend the seating provision to employees in "some kinds of work places . . . that were not covered by previous orders," not to cut back on longstanding regulatory protections. *See* RJN Ex. 2 at 16; ER104,

107. In fact, the IWC reiterated in its 1976 Statement of Findings that 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 Ex. 2 at 16; ER104, 107.

Unable to point to anything in the regulatory history to support its position, CVS quotes selectively from an amicus brief submitted by the DLSE in the recent district court *Kmart* case (where, notably, the district court *denied* summary judgment to the employer). *See* Ans. Br. 27-28; MJN Ex. A. As the DLSE itself pointed out in that amicus brief, however, ultimate responsibility for construing §14 lies with the courts, not the DLSE, which played no role in drafting the Wage Orders and has never issued any interpretative regulations or guidelines regarding §14. MJN Ex. A at 3.

The DLSE amicus brief describes in general terms its understanding of what the IWC (an entirely separate agency that no longer exists) intended in §14. However, that general understanding supports plaintiff's construction. For example, the DLSE notes that: "the language of Section 14 itself must control," *id.* at 6; effective enforcement requires consideration of "the underlying remedial purpose of the seating requirement," *id.*; "the regulatory standard to be applied is a reasonableness standard," which is necessarily an "objective standard," *id.* at 5;

"[a] prevailing custom or industry practice does not indicate or determine compliance with differing legislatively-established requirements or interpretations of law," *id.* at 6 n.2; and an employer's business judgment "cannot control or otherwise provide a basis for defeating the remedial purpose of the regulation," *id.* at 5-6. These statements all support plaintiff's construction.

CVS next cites two informal letters from the mid-1980s, one from DLSE and one from the IWC, but neither involved a job similar to plaintiff's. Those non-binding, non-precedential letters described salespeople whose entire job was to "greet customers" and "move freely throughout the store to answer questions and assist customers in their purchases," not to spend significant periods of time working in a stationary location like plaintiff when operating the CVS cash registers. SER252, 254. There is no indication that any of those salespeople's duties involved stationary work; and of course, plaintiff has never contended that CVS was required to provide her a seat when performing any job function *other than* operating a cash register. *See* ER786, 1056-57.

In short, there is no evidence of any IWC intent to depart from the fundamental guarantees of the original 1919 enactment or from the plain meaning of the text as currently written. While the language of §14 has changed over time, its basic premise has remained unaltered.

3. The Worker-Protection Purposes of §14 Are Far Better Served By Providing Seats to All Working Employees Who Perform Prolonged, Stationary Tasks.

Finally, the IWC's goals of promoting worker "comfort, health, safety, and welfare" are far better served by plaintiff's construction than by CVS's. *See Indus. Welfare Comm'n*, 27 Cal.3d at 701; AOB 36; Wage Order 7-2001 §17 (allowing exemptions from Wage Order provisions only if the employer can establish that providing seats to eligible employees "would not materially affect the[ir] welfare or comfort" and would work an undue hardship on the employer). CVS does not dispute that §14 was designed to promote worker comfort and welfare. While it questions the medical efficacy of providing workplace seating, Ans. Br. 30 & n.8, it ignores plaintiff's point that requiring employers to provide employees with seating does not mean that those employees must remain seated at all times. AOB 19 n.5. Having suitable seating available simply means the employee can choose when to sit and when to stand – which is the best way to promote worker health. *See* AOB 11 n.3, 47-48 n.11; ER52, 75. Besides, "the wisdom or utility of legislation is for legislatures, not courts [or employers], to decide." *Bd. of Trustees of W. Conference of Teamsters Pension Trust Fund v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396, 1402-03 (9th Cir. 1984) (citing *Ferguson v. Skrupa*, 372 U.S. 726, 730-31 (1963)).

C. CVS's Reliance on its "Business Judgment" is Contrary to the IWC's Intent.

CVS argues that even under a task-based analysis, plaintiff should not be entitled to sit while operating a cash register because CVS "expect[s]" and "train[s]" its employees to stand at all times, and because "CVS believes that a sitting Clerk/Cashier may appear lazy, disinterested, disaffected, and not ready to serve its customers." Ans. Br. 10, 12; *see id.* 6-12, 34 & n.11 (citing ER11), 37-38. CVS argument is twice flawed. First, there is no textual or other support for inserting an employer's "business judgment" into the §14(A) analysis. Second, even if an employer's reasonable business judgment *were* relevant to assessing the "nature of [an employee's] work," CVS cites *no* admissible evidence to substantiate the reasonableness of its "belie[f]" that standing is a prerequisite to providing "excellent customer service," or that sitting necessarily conveys laziness or disinterest. *See* Ans. Br. 6-12; *see also* AOB 42 n.10; ER904-05, 930-31.[3/]

[3/] In support of its "belie[f]" that its Clerk/Cashiers must stand while operating a cash register in order to provide "excellent customer service," CVS cites the unsubstantiated, personal opinions of management. *See* Ans. Br. 9-11. CVS admitted, however, that CVS has never studied whether there is a relationship between seated Clerk/Cashiers and checkout speed or customer satisfaction, *see* SER212-13; and although CVS claimed to have received customer complaints about seated employees, it could only recall three complaints in the past three years and could not confirm that any of them actually involved a Clerk/Cashier working at one of its 850 retail stores in California, *see* SER217-23; ER681.

CVS contends that employers should be able to decide for themselves, without second-guessing from the courts, whether requiring their employees to stand at all times is good for business. If the IWC intended that to be the test, though, it could have written §14 differently – for example by using the term "job description" rather than "work," or adding "in the judgment of the employer" after "when." There also would have been no need for the IWC to create an exemption procedure in §17, because any employer could effectively opt out of the seating requirement under CVS's construction by simply declaring that all employees must stand in order to promote morale, impress customers, show self-discipline, etc. *See* AOB 42-43.

To support its reliance on "business judgment," CVS cites cases arising under the Americans with Disabilities Act and California Fair Employment and Housing Act. *See* Ans. Br. 31-32. But those statutes expressly provide for consideration of an "employer's judgment" as part of the relevant analysis. *See* 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) ("Evidence of whether a particular [job] function is essential includes . . . [t]he employer's judgment as to which functions are essential."). Section 14 contains no such reference to employer judgment.

The IWC's use of the mandatory term "shall," its insertion of the phrase "nature of" before "work," and its use of the adverb "reasonably" all reflect the IWC's intent to create a mandatory, objective standard – which would be inconsistent with deferring to subjective "business judgment." *See* AOB 39-45. CVS offers no contrary authority, arguing only that "reasonably" modifies only "permits," not "nature of the work." *See* Ans. Br. 35-36; *id.* 20 & n.7. But the Wage Order requires the provision of suitable seats whenever "the nature of the work *reasonably* permits." Nothing in this language suggests that an employer's *subjective* opinion can determine whether the "nature of the work reasonably permits" an employee to work from a seated position.

CVS also does not cite any regulatory history in support of its "business judgment" argument. While it refers to the DLSE's recent amicus brief in *Kmart*, the DLSE concluded that an employer's views on the nature of an employee's work "would *not* be controlling," because §14(A) requires application of an objective standard of reasonableness and is therefore "unlike other areas of regulation in which specific statutory provisions, regulatory language, or judicial decisions expressly defer to an employer's business decision or judgment." MJN Ex. A at 5 (emphasis added).

For 90 years, it has been clear that whether the nature of an employee's work reasonably permits the use of seats is a judgment to be made by the IWC or the courts, not by the employer. *See* AOB 43-44; ER52, 75; RJN Ex. 2 at 16. This approach is fully consistent with the worker comfort and health purposes of the Wage Order. Just as the meal and rest break provisions of the Wage Orders would lose all force if an employer could circumvent them simply by "expecting" and "training" its employees to work without such breaks and by asserting a "belief" that employees perform better without breaks, so does §14(A) not permit employers to evade the mandatory seating requirement simply by "expect[ing]" and "train[ing]" their employees to stand while working, and by asserting their unsubstantiated belief that standing employees offer better customer service. *See* Ans. Br. 6-12; ER9-11.

Plaintiff introduced evidence in the district court that retail cashiers elsewhere competently perform their checkout functions while seated. *See* ER1018, 1020. Thirty CVS Clerk/Cashiers also submitted declarations stating that the essential checkout functions at CVS can reasonably be performed while seated. *See* ER 701-84. While CVS may contend, as a matter of its unsupported "business judgment," that its Clerk/Cashiers should be governed by a different standard than all other competing retail stores' employees, §14 does not allow

CVS to opt out of the Wage Order's uniformly applicable standards simply by stating that, in its judgment, standing employees provide better customer service. The district court should not have deferred to CVS's "business judgment" that Clerk/Cashiers cannot reasonably perform their checkout functions while seated because they would appear "lazy" rather than "attentive."[4/]

D. At a Minimum, Genuine Issues of Material Fact Precluded the Entry of Summary Judgment to CVS.

Even under CVS's ill-defined "holistic" assessment of the "job as a whole," summary judgment was improper, given the evidence that: 1) plaintiff spent approximately 90% of her working time performing front-end cashier duties, AOB 46; and 2) the nature of a CVS Clerk/Cashier's work at front-end cash registers, which consists primarily of scanning and bagging merchandise and processing

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[4/] CVS argues that the district court did not actually "defer" to its business judgment, but simply considered that to be a "relevant" factor. It is impossible to tell, however, what weight CVS contends *should* be given to an employer's business judgment or when that business judgment should be outcome determinative. What is clear is that the district court must have given enormous deference to CVS's assertions, because otherwise there can be no explanation for granting summary judgment when: 1) seven Clerk/Cashiers testified that they actually had used seats while performing checkout duties, *see* ER710, 730, 740, 745-46, 769-70, 775, 783; 2) sixteen other Clerk/Cashiers testified that they believed they could perform their checkout duties while seated, *see* ER705-06, 715-16, 718-19, 721-22, 724-25, 727, 733-34, 736, 738, 743, 749, 751-52, 766, 773, 778, 780; and 3) an ergonomics expert opined that the nature of a Clerk/Cashier's checkout duties can be performed while seated, as is done throughout much of Europe, *see* ER26, 1021-33.

payment, can reasonably be performed while seated, AOB 46-48. CVS's *preference* for standing employees, based on an unsubstantiated assertion that its customers respond more favorably to employees who stand, should not have been sufficient to obtain summary judgment – under any standard. *See* AOB 45-49.

II. The District Court's Denial of Class Certification Rested upon Its Improper Construction of §14.

While the ultimate decision to grant or deny class certification is generally left to the district court's discretion, a denial of class certification premised on legal error constitutes a "per se abuse of discretion." *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1091 (9th Cir. 2010) (citing *Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807, 817 (9th Cir. 1997)); *see* AOB 51. Here, the district court's finding of no commonality rested upon the same fundamental misinterpretation of §14(A) that requires reversal of its summary judgment ruling.

The central issue in this case is whether the nature of a CVS Clerk/Cashier's checkout work reasonably permits the use of seats. Resolution of that issue will dispose of all class members' claims because: 1) all CVS Clerk/Cashiers perform the same duties when assigned to front-end cash registers, *see* ER907-08; 2) the class is limited to Clerk/Cashiers who actually performed checkout duties, *see* ER786; and 3) whether the nature of a Clerk/Cashier's checkout work permits the

use of a seat does not depend on what tasks Clerk/Cashiers perform when *not* assigned to a cash register, *see* AOB 53. Secondary issues that are also common to the class include: 1) what tasks CVS's Clerk/Cashiers typically perform when assigned to a front-end register; and 2) how frequently and for how long Clerk/Cashiers typically leave the cash-register area to retrieve controlled merchandise, scan unusually large merchandise, or perform other standing-requiring checkout tasks.

CVS admits that it has a uniform policy and practice of not providing Clerk/Cashiers with seats while assigned to the cash register, ER920-21, but it contends that several additional issues require individualized analysis: 1) the "nature of the work" performed by CVS Clerk/Cashiers, Ans. Br. 49; 2) the "space constraints" at different stores, *id.* at 52-56; 3) the personal "characteristics" of its Clerk/Cashiers, *id.* at 56-57; 4) what constitutes a "suitable seat," *id.* at 57-59; 5) its Clerk/Cashiers' desire for a seat, *id.* at 60; and 6) modifications required for different stores to comply with §14(A), *id.* at 61-62. Even if CVS were correct that some of these issues required individualized assessment, the district court's class certification ruling would have to be remanded for consideration under the correct legal standard. But CVS is not correct.

First, the "nature of the work" performed by class members – the essential attributes of a checkout cashier's job function – are uniform classwide, and only vary between individuals if the Court accepts CVS's improper construction of §14(A) as requiring a weighing of each employee's daily job assignments in the aggregate (i.e., including non-checkout functions). While the amount of time Clerk/Cashiers are assigned to CVS cash registers may vary, CVS maintains transactional records establishing which employee processed each cash register transaction and when each of those transactions occurred. *See* ER681, 692, 839-40, 896. Thus, even if the fact-finder concludes that suitable seating is required only for Clerk/Cashiers who performed checkout functions for a certain minimum number of transactions or time period, classwide evidence will enable plaintiffs to establish which class members meet that standard.

CVS's other arguments also similarly rest on a misinterpretation of law. The "space constraints" at different CVS stores (such as different cash register types and configurations) are not relevant to whether the "nature of" the class members' checkout functions reasonably permits the use of seats. Neither are any potential workstation "modifications" relevant to the nature of the underlying work. While consideration of the physical layout of a workstation might be appropriate in cases arising under §14(*B*) (which asks whether suitable seats have

been provided "in reasonable proximity to the work area" and whether employees are able to use such seats without "interfer[ing] with the performance of their duties"), nothing in §14(*A*) allows an employer to defend against a seating claim by arguing that the "nature of the work" would reasonably permit the use of a seat *but for* the fact that the employer bought or built workstations that do not accommodate seats.

An employee's right to suitable seating under §14(A) turns on the "nature of the work" performed by the employee at a particular time, not on how the employer has chosen to configure its workstations. Just as an employer cannot override the mandatory requirements of §14 by drafting a job description requiring its employees to stand, neither can it evade its legal obligations by designing a noncompliant workstation that precludes the use of suitable seating. While CVS may have to consider, upon a finding of liability, what modifications are required to provide Clerk/Cashiers with seats at the checkout counter, and while the district court may have discretion to consider appropriately documented cost-of-compliance issues in determining the proper amount of PAGA penalties under Labor Code §2699(e), the need to make such modifications in the future is not germane to the underlying merits of the class members' claims.

Differences among Clerk/Cashiers' "girth, arm length, and age" also do not affect whether the nature of their assigned work "reasonably permits the use of seats." Ans. Br. 57. Section 14 conditions an employee's right to a suitable seat on the nature of the "work," not on the employee's personal characteristics. Section 14(A) also imposes no requirement that individual employees must first ask for seating before becoming entitled to seating. *Cf. Brinker*, 53 Cal.4th at 1034 (Wage Order merely requires employer to make meal period available, but does not require employer to ensure employee takes it).[5/]

Finally, differences in what constitutes a "suitable" seat are not relevant to class certification. After all, CVS failed to provide its Clerk/Cashiers with *any* seats, let alone "suitable" seats. Liability under §14(A) depends on whether the employer provided a seat "when the nature of the work reasonably permit[ted] the use of seats," and if so, whether the seat provided was "suitable." Only the first inquiry is at issue here, and the district court on remand need not determine what constitutes a "suitable seat[]" in order to find CVS liable under §14(A).

CVS does not contest numerosity, ascertainability, or typicality. *See* ER681, 692, 839-40, 896; Ans. Br. 47. The other elements of a class certification

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[5/] Although a panel of this Court rejected the employee-request defense in *Green v. Bank of America*, 2013 WL 521792 (9th Cir. Feb. 13, 2013), *see* AOB 14 n.4, that decision has not been published.

ruling are satisfied as well. Common issues abound, and predominate over any individualized issues related to the calculation of penalties. AOB 49-50. Classwide adjudication is superior to individual adjudication, given the high costs of litigation, the uniform nature of CVS's policies, the relatively small potential penalties for each plaintiff, and the manageability of trial. AOB 58-59. Although CVS urges the Court to affirm the district court's finding of no superiority, CVS offers no basis for doing so. *See* Ans. Br. 47 & n.17.

For all these reasons, the district court's denial of class certification should be reversed, and this Court should direct the trial court on remand either to certify the proposed class or, at a minimum, to reconsider the appropriateness of certification under the proper legal standard.

CONCLUSION

For the foregoing reasons and those set forth in plaintiff's opening brief, the Court should reverse the district court's May 31, 2012 Summary Judgment Order and April 4, 2012 Class Certification Order, and remand for further proceedings.

Dated: March 4, 2013

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CERTIFICATE OF COMPLIANCE
(Fed. R. App. P. 32(a)(7)(C))

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Reply Brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,891 words.

DATED: March 4, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 4, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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