

Hospitality Labor and Employment Law Blog

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The First "Suitable Seating" Trial In California Results In A Victory For The Employer - And Guidance For Plaintiffs For Future Cases

By [Michael Kun](#)

As we have written before in this [space](#), the latest wave of class actions in California is one alleging that employers have not complied with obscure requirements requiring the provision of "suitable seating" to employees – and that employees are entitled to significant penalties as a result.

The "suitable seating" provisions are buried so deep in Wage Orders that most plaintiffs' attorneys were not even aware of them until recently. Importantly, they do not require *all* employers to provide seats to *all* employees. Instead, they provide that employers shall provide "suitable seats when the nature of the work reasonably permits the use of seats."

Because the "suitable seating" provisions were so obscure, there is scant case law or other analysis for employers to refer to in determining whether, when and how to provide seats to particular employees. Among other things, the most important phrases in the provisions – "suitable seats" and "nature of the work" – are nowhere defined. While those terms would seem to suggest that an employer's goals and expectations must be taken into consideration – including efficiency, effectiveness and the image the employer wishes to project – plaintiffs' counsel have not unexpectedly argued that such issues are irrelevant. They have argued that if a job can be done while seated, a seat must be provided.

The first "suitable seating" case has finally gone to trial in United States District Court for the Northern District of California. The decision issued after a bench trial in [Garvey v. Kmart Corporation](#) is a victory for Kmart Corporation on claims that it unlawfully failed to provide seats to its cashiers at one of its California stores. The decision sheds some light on the scope and meaning of the "suitable seating" provisions. But it also may provide some guidance to plaintiffs' counsel on arguments to make in future cases.

Addressing the "suitable seating" issue at Kmart's Tulare, California store, the court rejected plaintiffs' counsel's arguments that Kmart was required to redesign its cashier and bagging areas in order to provide seats. Importantly, the court recognized that Kmart has a "genuine customer-service rationale for requiring its cashiers to stand": "Kmart has every right to be concerned with efficiency – and the appearance of efficiency – of its checkout service." That concern is one likely shared by many employers.

In reaching its decision, the court expressed concern not only about safety, but also about the cashiers' ability to project a "ready-to-assist attitude": "Each time the cashier were to rise or sit, the adjustment exercise itself would telegraph a message to those in line, namely a message that the convenience of employees comes first." The court further explained, "In order to avoid inconveniencing a seated cashier, moreover, customers might themselves feel obligated to move larger and bulkier

merchandise along the counter, a task Kmart wants its cashiers to do in the interest of good customer service.”

While recognizing that image, customer service and efficiency goals must all be taken into consideration in determining whether seating must be provided, the court then appeared to provide some guidance to plaintiffs. The court addressed the possibility that these issues could be addressed through the use of “lean-stools.” Acknowledging that the use of “lean-stools” had not been developed at trial, the court invited arguments about them at the trial of “suitable seating” claims for the next Kmart store. Thus, while expressly refusing to decide whether Kmart employees should have been provide “lean-stools,” the court may have provided plaintiffs’ counsel with an important argument to make in future trials.

And, as a result, employers in California – particularly in the hospitality and retail industries – should now be expected to address whether they could or should be providing “lean-stools” to employees whom they expect to stand during their jobs.

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