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Fact-Based Seating Test Leaves Class Cert. Prospects Murky

By **Vin Gurrieri**

Law360, New York (April 7, 2016, 10:20 PM ET) -- The California Supreme Court's recent clarification that employers and courts should use a fact-specific approach to determine whether workers must be given seats is far from the uniform test some had hoped for, and attorneys say it creates uncertainty over what it will take to win class certification in seating cases.

The California high court took up the issue at the request of the Ninth Circuit as part of two appeals that were brought on behalf of CVS Pharmacy Inc. cashiers and JPMorgan Chase & Co. tellers, whose bids for class certification in cases accusing the employers of not providing enough seating were rejected.

The state court's April 4 ruling in the closely watched case held that employers must evaluate individual tasks performed by workers to see if a seat might be appropriate.

Morrison & Foerster LLP partner Tritia M. Murata said the ruling requires courts "to take a practical, common-sense approach to suitable seating cases," but said it didn't "provide a bright-line test that can be uniformly applied to determine whether the nature of the work performed at any particular location reasonably permits the use of a seat."

The Ninth Circuit had sought the state court's guidance on the correct interpretation of wage orders promulgated by the state Industrial Welfare Commission, which require that all employees "be provided with suitable seats when the nature of the work reasonably permits the use of seats."

According to the ruling, the "nature of the work" element of the rule should be dependent on particular tasks at a given location where an employee claims a seat is warranted.

The court also said a seat is called for when the tasks being performed at that location reasonably permit sitting, and sitting wouldn't interfere with performance of any other tasks that may require standing.

Furthermore, it found that a look into whether that work reasonably permits sitting should be objectively determined based on a totality of circumstances that takes into account the physical layout of the workplace and the employer's business judgment, but not the employee's individual physical characteristics.

If an employer argues there's no suitable seat available, the burden is on the employer to prove unavailability, the court also found.

Michael Rubin of Altshuler Berzon LLP, who represents the employees in the CVS and JPMorgan cases, told Law360 that the ruling will allow the underlying cases to proceed on a classwide or representative basis, and make it easier in general for employees to be awarded certification in seating cases, although fewer of those may be filed as employers improve compliance with seating requirements.

Rubin pointed out that the state high court rejected the primary ground used by employers opposing certification, the so-called holistic approach in which employers are required to look at every task an employee performs to determine if seating is appropriate.

“The Supreme Court said no, you don’t have to look at the entire set of tasks an employee performs,” Rubin said. “You look only at tasks performed at workstations.”

But Timothy J. Long of Orrick Herrington & Sutcliffe LLP, an attorney for CVS, said the ruling was a win for employers because the court embraced the notion that the “totality of the circumstances” surrounding a worker’s job needed to be analyzed to make a seating determination, even if the court wasn’t comfortable with the term “holistic approach.”

“For a court to have to assess a number of different factors as opposed to just one makes it much more difficult to get those types of cases certified than if you just have a single issue,” Long said. “The ruling makes it more difficult to certify cases than if the court had adopted what the plaintiffs were saying.”

Michael D. Mandel of McGuireWoods LLP said the California high court tried to find a middle ground between the parties’ positions.

“The ruling provides some guidance for courts, but doesn’t provide real, practical bright-line tests,” Mandel said.

Attorneys on both sides of the bar meanwhile had varying thoughts on what effect the California high court’s ruling may have on employees' prospects for class certification in seating cases.

Mayer Brown LLP appellate partner Donald M. Falk, who often argues cases before California state appellate courts, believes that employers will “really have to break down” tasks to decide if seating is appropriate and can be reasonably made available for each task as a result of the ruling.

But while Falk said the ruling won’t result in a huge change to court practices, it might make it easier to find a common threshold where seating may be provided.

“It may be a little easier to certify a class, which makes a difference in litigation,” Falk said, adding that the state high court’s ruling was “a little more friendly for plaintiffs, but not dramatically so.”

Meanwhile, Carney Shegerian of Los Angeles-based plaintiffs firm Shegerian & Associates Inc. said the ruling “makes class certification almost a given,” adding that he believes employers won’t fight against that notion because of the potential costs associated with having to litigate thousands of individual seating suits.

But Julie E. Patterson, a management-side attorney in Bryan Cave LLP’s Irvine, California, office, said the state high court’s ruling actually benefits employers because determining whether seating is appropriate will require a look at employees’ particular duties and the facts and circumstances of each situation.

“I think it’ll make it easier to defeat class certification,” Patterson said. “Different employees may have different experiences in terms of standing or sitting.”

Morrison & Foerster’s Murata, like Patterson, believes class certification will be harder for plaintiffs to achieve, saying the “totality of the circumstances,” case-by-case approach proffered by the California high court is “not an approach that lends itself to resolution on a classwide basis.”

“The ‘qualitative assessment’ required to determine whether the nature of the work reasonably permits the use of a seat ... would, in many cases, be unmanageable to resolve on a class or representative basis,” Murata said.

The workers are represented by Michael Rubin and Connie K. Chan of Altshuler Berzon LLP, James T. Hannink and Zachariah P. Dostart of Dostart Hannink & Coveney LLP, James F. Clapp of Clapp Legal APC, Matthew Righetti of Righetti Glugoski PC and Kevin Joseph McInerney.

CVS is represented by Timothy J. Long and Michael D. Weil of Orrick Herrington & Sutcliffe LLP. Chase is represented by Carrie A. Gonell and John D. Hayashi of Morgan Lewis & Bockius LLP.

The cases are Kilby v. CVS Pharmacy Inc. and Henderson et al. v. JPMorgan Chase Bank NA, case number S215614, in the Supreme Court of the State of California.

The federal cases are Kilby v. CVS Pharmacy Inc., case number 12-56130, and Kemah Henderson et al. v. JPMorgan Chase Bank, case 13-56095, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Mark Lebetkin and Brian Baresch.

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