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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LISA GARVEY, individually and on
behalf of all others similarly situated,

No. C 11-02575 WHA

Plaintiff,

v.

**ORDER DENYING MOTION
FOR SUMMARY JUDGMENT
AND VACATING HEARINGS
SCHEDULED FOR APRIL 19**

KMART CORPORATION,

Defendant.

INTRODUCTION

In this proposed class action, defendant moves for summary judgment on all claims. For the reasons stated below, the motion is **DENIED**. The hearings scheduled for April 19 are **VACATED**.

STATEMENT

Plaintiff Lisa Garvey claims that defendant Kmart Corporation violated California Wage Order 7-2001(14)(A) by not providing seats to its cashiers. Garvey pursues this PAGA claim as a class action, seeking to represent similarly situated Kmart employees in California. Kmart has approximately 100 retail stores in California. Garvey worked as a seasonal checkout service associate (cashier) in the Tulare Kmart store for approximately two months in 2010.

Kmart moves for summary judgment on all claims. This order follows full briefing. The parties have stipulated that Garvey will file her motion for class certification after a ruling on this motion for summary judgment.

1 ANALYSIS

2 Summary judgment is proper when the “pleadings, depositions, answers to
3 interrogatories, and admissions on file, together with the affidavits, show that there is no genuine
4 issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”
5 FRCP 56(c). An issue is genuine only if there is sufficient evidence for a reasonable fact-finder
6 to find for the non-moving party, and material only if the fact may affect the outcome of the case.
7 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986).

8 California Labor Code Section 1198 prohibits an employer from employing any
9 individual under labor conditions prohibited by an applicable wage order, including California
10 Industrial Welfare Commission Wage Order 7-2001. IWC Wage Order 7-2001 Section 14
11 states:

12 14. Seats

13 (A) All working employees shall be
14 provided with suitable seats when the nature
15 of the work reasonably permits the use of
16 seats.

17 (B) When employees are not engaged in the
18 active duties of their employment and the
19 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.

20 CAL. CODE REGS. TIT. 8 § 11070(14). California’s Private Attorneys General Act of 2004
21 permits an “aggrieved employee” to institute an action “on behalf of himself or herself and other
22 current or former employees” to collect civil penalties for a violation of any provision of the
23 California Labor Code. CAL. LAB. CODE § 2699(a).

24 **1. SECTION 14 DOES NOT EXCLUDE RETAIL SALESPERSONS FROM PROTECTION.**

25 As indicated in the plain language of the regulation, Section 14(A) covers *all* position
26 where the nature of the work reasonably permits the use of seats, regardless of whether the
27 employee is classified as “retail salesperson.” Kmart, however, argues that contrary to its plain
28 language, Section 14(A) was intended to specifically exclude “retail salespersons in the

1 mercantile industry” like Garvey. This order disagrees. The plain language of the regulation
2 does not restrict aggrieved employees to non-salespersons; instead, it expressly covers “*all*
3 working employees . . . when the nature of the work reasonably permits the use of seats.”

4 In support of its interpretation, Kmart cites a 1986 advisory letter issued by then-Chief
5 Deputy Labor Commissioner, stating:

6 [Section 14] was originally established to cover
7 situations where the work is usually performed in a
8 sitting position with machinery, tools or other
9 equipment. It was not intended to cover those
10 positions where the duties require employees to be
11 on their feet, *such as sales persons in the mercantile*
12 *industry.*

13 Historically and traditionally, sales persons have
14 been expected to be in a position to greet customers,
15 move freely throughout the store to answer
16 questions and assist customers in their purchases.

17 (Dkt. No. 52 [Request for Judicial Notice] Exh. D) (emphasis added). This statement was
18 affirmed shortly thereafter by the then-executive officer of the IWC, who wrote (RJN Exh. F):

19 Section 14(A) of Order 7-80 specifically states that
20 “all working employees shall be provided with
21 suitable seats when the ‘nature of the work’
22 reasonably permits the use of seat,” the key being
23 the “nature of the work.” The nature of work for
24 salespersons is such that it requires them to be
25 mobile and as [the Chief Deputy Labor
26 Commissioner] states, to be in a position to greet
27 customers and move freely throughout the store.

28 Kmart argues that these statements support its interpretation that Section 14(A) specifically
excludes “retail salespersons.” Kmart’s interpretation is unpersuasive. There is no inconsistency
between the above-quoted statements and the plain language of the Section 14. The agencies’
statements do not carve out an exception for “retail salespersons.” Instead, they merely note that
in the late 1980s, when the statements were issued, the nature of the work for salespersons did
not reasonably permit the use of seats *because* salespersons “have been expected to be in a
position to greet customers, move freely throughout the store to answer questions and assist
customers in their purchases.” A quarter of a century later, the job description for “retail
salespersons” may have changed and may not be uniform among all retailers today. Thus, there
is no exception in Section 14 for employees labeled as “retail salespersons.” The plain language

1 of the statute, “all working employees . . . when the nature of the work reasonably permits,”
2 controls.

3 **2. SECTION 14 DOES NOT REQUIRE EMPLOYEES TO**
4 **MAKE A REQUEST BEFORE SEATS ARE PROVIDED.**

5 California state courts have interpreted the word “provide” in the Labor Code to mean “to
6 supply or make available.” *See, e.g., In re Lamps Plus Overtime Cases*, 125 Cal. Rptr. 3d 590,
7 602 (Cal. App. 2011). Not satisfied with this definition, Kmart requests that an additional
8 requirement be tacked onto the word “provide.” It argues that the phrase “[a]ll working
9 employees shall be provided with suitable seats” should be interpreted to mean that an employee
10 must request a seat *before* an employer is required to supply or make available seating. Thus,
11 under Kmart’s interpretation, Garvey would not be an aggrieved party because she never
12 requested a seat.

13 This order disagrees with Kmart’s interpretation that a request is needed before the
14 employer has an affirmative duty to provide seating. Nothing in the language of Section 14
15 suggests such a requirement. Instead, the regulation states that all working employees *shall* be
16 provided with suitable seats. This mandatory language suggests the employer has an affirmative
17 obligation to provide seats before any condition, such as a request by the employee. This
18 understanding was recently adopted by another district court. *See Echavez v. Abercrombie &*
19 *Fitch Co. Inc., et al.*, Case No. CV-11-9754 GAF (C.D. Cal. Mar. 12, 2012) (Feess, J.); *but see*
20 *Green v. Bank of America*, Case No. 11-CV-04571 (C.D. Cal. Aug. 10, 2011) (Real, J.)

21 The meal-and-rest-break decisions cited by Kmart only stand for the proposition that
22 “provide” has been interpreted to mean that “employers need not ensure meal breaks are actually
23 taken, but need only make them available.” *See, e.g., Brinker Rest. Corp v. Superior Court*, 80
24 Cal. Rptr. 3d 781, 787 (Cal. App. 2008). This is consistent with the above interpretation that an
25 employer still has an affirmative obligation to supply or make available seating. Moreover,
26 many other labor code regulations under the same work order would be made nonsensical if
27 “shall be provided” were interpreted to “make available *only upon request*,” such as providing
28 mandatory uniforms, providing shelter at night for eating meals, and providing change rooms for
occupations that require a change of clothing. As a matter of statutory interpretation, in order to

1 interpret the phrase “shall be provided” consistently across the different labor code regulations,
2 the phrase should not include the condition that the employee must first make a request. To sum
3 up, there is no requirement that an employee request seating in order for Section 14 to apply.

4 There is a genuine dispute of material fact as to whether Kmart had a policy of making
5 seats available to its cashiers. While it may be true that Kmart had a written policy stating that
6 requests for seats should be honored, none of the Kmart managers (other than Kmart’s corporate
7 designee) deposed knew about this policy before this litigation (Richardson Dep. at 22–24; Blake
8 Dep. at 35–36, 43; Johnson Dep. at 66). None of the cashiers who submitted their declaration
9 was told about this policy. In fact, Garvey has submitted evidence that requests for seats were
10 denied by managers (*see, e.g.*, Righetti Decl. Exh. 3a ¶¶ 4, 5).

11 **3. DISPUTED AS TO WHETHER THE WORK OF K MART**
12 **CASHIERS REASONABLY PERMITTED SEATS.**

13 There are genuine disputes of material fact as to whether the work of Kmart cashiers
14 reasonably permitted the use of seats. Unsurprisingly, there is evidence that manning the cash
15 register was a cashier’s primary job and cashiers were expected to be there unless they were
16 putting away returns (Blake Dep. at 22–23). A district manager estimated that on the low end,
17 approximately 90 percent of a cashier’s work time would typically be spent behind the cash
18 register (Richardson Dep. at 18). A store manager estimated that approximately 70 percent of a
19 cashier’s time was spent behind the register (Blake Dep. at 23–24).

20 While it is undisputed that the cashier position required some movement even while
21 behind the cash register — such as stretching, bending, scanning, processing transactions,
22 removing security tags, bagging, etc. — it *is* disputed whether these movements could have been
23 efficiently performed while seated. In addition to her own declaration, Garvey submits the
24 declarations of fourteen other cashiers (who have worked across Kmart stores in California) who
25 all declare that their primary job functions could have been completed while seated (*see, e.g.*,
26 Righetti Decl. Exhs. 3a–n, Exh. 10).

27 Kmart objects to all these declarations on the ground that they are “unfounded,
28 speculative and cookie-cutter assertions.” It is true that these cashiers did not have firsthand
experience about operating their cashier’s station while seated. But that is because they were not

1 offered seats by Kmart. This does not make their declarations unduly speculative. The cashiers
2 all had firsthand knowledge about their job functions and could reasonably predict how sitting
3 would have affected their performance.

4 Garvey also submits the declaration of an expert, Dr. Steven Johnson, a professional
5 engineer, certified professional ergonomist, and professor at the University of Arkansas, who
6 opined that the essential functions of a cashier reasonably permit the use of a seat if the cash
7 register station undergoes minor modifications (Johnson Decl. ¶ 20). For example, he opined
8 that these minor modifications would include relocating the storage area underneath a register to
9 allow for leg room, adding an adjustable seat and footrest, and moving shelves closer to the
10 cashier (*Id.* ¶ 31–36). He offered the following opinion (*Id.* ¶ 37):

11 From my analysis of the tasks performed at the cash
12 register counters, it is evident that the primary tasks
13 can be performed using a seat with modifications.
14 This could occur with no reduction in the efficiency
15 of the tasks performed. For those task that cannot
16 easily be performed sitting (e.g., due to the size,
17 weight, or awkwardness of the item) the cashier
would simply stand to perform the task. From my
observations, all of the horizontal reaches would be
within reach with an appropriately designed counter
(e.g., providing leg room under the counter).
Twisting would not be extensive due to the use of a
swivel stool and the geometry of the work area.

18 In opposition, Kmart argues that these modifications would be too extensive to be
19 reasonable. This is an argument for trial. Viewed in the light most favorable to Garvey, this
20 order cannot hold that these modifications would be unreasonable as a matter of law. Kmart also
21 argues that Dr. Johnson’s opinion is unreliable because he relied on photographs, shop drawings,
22 and measurements instead of visiting the California stores. Although Kmart may be correct that
23 it is better practice to conduct an onsite visit, there is no evidence that relying on photographs,
24 shop drawings, and measurements is unreliable methodology under Rule 702 (Dkt. No. 66).

25 Kmart has its own expert who opined that based on a videotape analysis of cashiers in
26 one Kmart store where stools were placed into the cashier’s station, providing seats for cashiers
27 would reduce speed and efficiency. These conclusions, however, remain disputed and cannot
28 serve the basis for granting summary judgment.

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Kmart also argues that it would be unreasonable to provide seats because it has a legitimate business purpose in making its cashiers project a “ready to serve” image by standing. Its own store manager, however, testified that a Kmart cashier can provide a friendly and courteous image while seated (Blake Dep. at 67–68). Moreover, it may be reasonable for a store to tolerate some loss of customer service or efficacy by providing seats to its cashiers. It is inappropriate, on these facts, to decide how much loss of customer service is or is not reasonable as a matter of law.

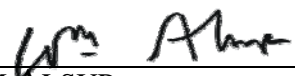
To sum up, there are genuine disputes of material fact as to whether the nature of a Kmart cashier’s work reasonably permits the use of a seat. This precludes summary judgment.

CONCLUSION

For the reasons stated above, the motion for summary judgment is **DENIED**. The hearings scheduled for April 19 are **VACATED**. Defendant’s motion to expedite briefing is **DENIED AS MOOT** (Dkt. No. 62). Defendant shall re-notice or withdraw its *Daubert* motions (Dkt. Nos. 63, 66).

IT IS SO ORDERED.

Dated: April 12, 2012.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE