CALIFORNIA

STANDING UP TO SIT DOWN

ERICKSEN ARBUTHNOT

Facts

Meda (plaintiff) was a sales associate from November 8, 2016 to April 18, 2017 assisting customers at the parts counter, operating a cash register, cleaning the store, moving merchandise and stocking shelves. She estimated 40% of her duties were at the cash register, which she claimed could be accomplished while seated. The employer (defendant) had a policy that required two counter-height raised chairs suitable for the register and the policy was to make one available "for any employee that needed or desired to use one." This policy was not accompanied by any training or incorporation into the handbook. The chairs were located near the manager's station which was accessible to cashiers, but not visible from the cash registers. This plaintiff had previously used one of the chairs as a disability accommodation for a foot injury, but did not believe they were generally available without an accommodation. On the issue of communications, the employee had never requested a chair, nor was she told she was allowed or prohibited from using them.

The PAGA Pleadings

After resigning, plaintiff filed a complaint with a single cause of action of violation of the Private Attorney Generals Act (PAGA) on behalf of herself and other similarly situated employees. PAGA was added to the Labor Code at sections 2698 to 2699.8 in 2003 creating a new private right of action. Under PAGA, if the California Labor and Workforce Development Agency (LWDA) were entitled to recover a "civil penalty," said penalty could then be recovered by an "aggrieved employee on behalf of himself or herself and other current or former employees..." Section 2698(g) allows the prevailing employee to recover attorneys fees and costs. However, the penalties recovered are subject to reductions under subsection (i), with 75% going back to the LWDA and 25% to the aggrieved employees.

Plaintiff's singularly focus was "Wage Order 7," or California Code of Regulations, Title 8, section 11070, applicable to the mercantile industry, which stated:

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

GABRIEL ULLRICH

916.483.5181
gullrich@ericksenarbuthnot.com

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

If the specific regulation does not provide for a specified penalty, PAGA contains a default penalty at subsection (f) of $100 for each aggrieved employee per pay period for the initial violation and two hundred dollars $200 for each aggrieved employee per pay period for each subsequent violation.

Summary Judgment Proceedings

The employer moved for summary judgment on the basis there was no violation, as there was seating available. Plaintiff opposed the motion, asserting primarily that the seats were only for those with a disability accommodation and employees were not informed they could use the seating. The trial court granted summary judgment on the basis there were chairs available.

Court of Appeal's Decision

The Court of Appeal reversed and engaged analysis interpreting the Wage Order requirement "employees shall be provided with suitable seats..." Turning to the dictionary, the Court noted "'provide' generally means 'make available to'" and "'Available,' in turn, typically means 'present or ready for immediate use.'" (Id. at 18.) The Court determined there was a triable issue of fact as to whether seats were "provided," because (1.) they were not placed at the cashier workstation nor in "the immediate vicinity" of the workstations, (2.) the employee was not advised seats were available and (3.) the chairs were placed outside the manager's office and "employees might feel uncomfortable taking a chair from the manager's area." (Id. at 26.)

Overall, there are several takeaways from the Meda decision. First, the Court of Appeal's surprising declination to take a take a simpler approach that an employee must simply ask for a seat before claiming to be denied one. Without this straightforward decree, grey areas will often develop and summary judgment in this context could be a remote possibility, creating a fertile ground for further PAGA litigation on various Wage Order provisions. Second, since PAGA cases expand exposure across the entire range of "current and former employees," coupled with attorneys fees for prevailing plaintiffs, updating handbooks with an eye toward governing wage orders is a sound preventative measure idea. Third, in the mercantile industry, it may further be sensible to consider posting jobsite information on seat availability and/or obtaining signature from employees that that they are aware of the specific policy's provision. Finally, from a broader standpoint, Meda represents the ongoing judicial tendency to create unpredictable and complex regulation of California employers: denying an employer summary judgment for violating a seating requirement when seating was provided, supported by a policy and the employee never raised the issue informally on the jobsite. Against this heightened scrutiny, employers must remain the proverbial "one step ahead" on regulatory and statutory changes.

Gabriel Ullrich is a Senior Associate in the Firm's Sacramento office. He can be reached at (916) 483-5181 or gullrich@ericksenarbuthnot.com.