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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JAMES R. HOWARD, Plaintiff and Appellant, v. ADVANTAGE SALES & MARKETING LLC, Defendant and Respondent.	G048808 (Super. Ct. No. 30-2011-00493843) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gail Andrea Andler, Judge. Affirmed. Request for judicial notice. Granted.

Schwartz Law and Jeffrey M. Schwartz for Plaintiff and Appellant.

Paul Hastings, Paul Grossman, Paul W. Cane, Jr., Leslie L. Abbott and Lisa M. Fike for Defendant and Respondent.

* * *

INTRODUCTION

Plaintiff James R. Howard appeals from the summary judgment entered against him and in favor of his employer, defendant Advantage Sales & Marketing LLC (Advantage). Howard seeks civil penalties against Advantage under the Labor Code Private Attorneys General Act of 2004 (Lab. Code, § 2698 et seq.). Howard's lawsuit was based on Advantage's alleged failure to provide seating to Howard and other similarly situated employees, in violation of Industrial Welfare Commission (IWC) wage order No. 7-2001 (Cal. Code Regs., tit. 8, § 11070) (the wage order).[1]

We affirm. The undisputed material facts establish Howard's work as an event specialist demonstrating products in grocery stores required that he stand while engaged in his active work duties. The undisputed material facts also establish Advantage provided Howard with suitable seating within reasonable proximity to his work area for his use when he was not engaged in active duties of his employment, within the meaning of the wage order. Summary judgment was therefore properly granted.

UNDISPUTED FACTS

Howard was employed by Advantage as an event specialist. He was required to attract and engage with store customers to attempt to persuade them to purchase the products he demonstrated. Howard had to stand to perform all or substantially all of his event specialist job duties, which he typically performed while standing behind a demonstration table or cart. Howard testified at his deposition that

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[1] The IWC "was the state agency empowered to formulate regulations (known as wage orders) governing minimum wages, maximum hours, and overtime pay" and other conditions of employment in California. (*Heyen v. Safeway Inc.* (2013) 216 Cal.App.4th 795, 816 & fn. 2.) "The IWC promulgated 15 wage orders, applying to separate industries, which each follow a similar format." (*Id.* at p. 816, fn. 2.)

"[a]nything that you're doing to help the customer, you're going to be standing on your feet because it shows respect." Howard also testified, "the expectation was that event specialists should never be idle except for when they're on meal and rest breaks" and if an event was less busy, he was expected to "walk around" to seek customers. He stated if there were not many customers, he would remain "actively engaged in other duties to 'try to keep the area clean,' 'replenish the [product]' and keep displays 'neatly arranged.'" Howard testified he thought he should be able to sit down while cutting up sample cookies and fruits.

Howard received three breaks each shift: one 30-minute meal period and two 10-minute rest breaks. He usually took his breaks in the break room located inside the store; he testified he was always able to find a seat there when he wanted one. Advantage employees were permitted access to in-store seating in break rooms or in restaurants and/or coffee shops, during rest and meal periods.

Howard was not permitted to leave his demonstration cart or table without maintaining visual contact with it, unless he had secured and locked up the supplies. When he would take meal and rest breaks, or if he needed to purchase more product for demonstration, Howard would put everything away and lock the cart before leaving.

Howard's demonstration area within the store changed each shift, based on the product he was demonstrating. He had to try to avoid blocking aisles and shelves; space in his demonstration area was typically limited. During his employment, Howard never requested a seat or complained to Advantage that he needed one.

PROCEDURAL HISTORY

Howard filed a first amended complaint against Advantage as a representative action on his own behalf and on behalf of other current or former event specialists employed by Advantage. Howard asserted a single claim for violation of the

wage order's seating requirement pursuant to subdivision 14(A) and (B) of the wage order and Labor Code section 1198, and sought civil penalties under Labor Code section 2699.

Advantage filed a motion for summary judgment or, in the alternative, for summary adjudication, on the ground Howard's claim for violation of subdivision 14(A) of the wage order failed as a matter of law because the nature of his work required standing. The motion was also brought on the ground Howard's claim for violation of subdivision 14(B) of the wage order failed because Advantage provided an adequate number of suitable seats in reasonable proximity to Howard's work area. Advantage argued subdivision 14(B) of the wage order did not entitle Howard to the individual seat he sought, and Howard's claim also failed under subdivision 14(A) and (B) because he never requested a seat.

The trial court granted the motion for summary judgment, explaining in part that Howard had withdrawn subdivision 14(A) as a basis for his claim for violation of the wage order, and sought relief solely under subdivision 14(B) of the wage order. The trial court stated in its minute order: "Electing to proceed under [subdivision] 14([B]) is an admission that the work requires standing. Under [subdivision] 14([B]) the ability to have a seat when the work requires standing is limited to when it would not interfere with the performance of their duties. The defendant was more persuasive that the court should look to the job as a whole, and not try and parse the work duties between those that are capable of being done sitting down or standing up. Defendant also makes the more persuasive case that the requirement that sitting not interfere with the performance of their duties usually is limited to when the employee is on a rest or meal break. As to whether the employer provided seating within a reasonable proximity to the work area, the evidence based on plaintiff's deposition testimony is that the seating for meal and rest breaks [was] provided in break rooms and other facilities on the premises

where plaintiff was assigned. Thus, there does not appear to be a triable issue of fact of whether the employer made seating available in reasonable proximity to the work area under these circumstances. [¶] Since the gravamen of plaintiff's claim is that there needs to be a seat at his station so he can sit when he believes that some duties could be done sitting, or there is a lull in customer traffic and/or that seating should be merely a few feet away, plaintiff is not entitled to relief under [subdivision] 14(B)."

Judgment was entered in favor of Advantage. Howard appealed.

Advantage has filed a request that this court take judicial notice of (1) court orders from *Echavez v. Abercrombie and Fitch Co.* (C.D.Cal., Aug. 13, 2013, No. CV 11-9754 GAF (PJWx)) 2013 U.S.Dist. Lexis 184971 and *Echavez v. Abercrombie and Fitch Co.* (C.D.Cal., Sept. 24, 2013, No. CV 11-9754 GAF (PJWx)); and (2) certain official records of the IWC. Howard did not oppose Advantage's request. We grant Advantage's request and take judicial notice of the specified court orders from *Echavez v. Abercrombie & Fitch Co.*, pursuant to Evidence Code sections 452, subdivision (d)(2) and 459, subdivision (a). We also take judicial notice of the IWC official records as constituting "[o]fficial acts of the . . . executive . . . departments of the United States and of any state of the United States" (Evid. Code, § 452, subd. (c); see *id.*, § 459, subd. (a).)

DISCUSSION

I.

BURDENS OF PROOF AND STANDARD OF REVIEW

"'A trial court properly grants a motion for summary judgment only if no issues of triable fact appear and the moving party is entitled to judgment as a matter of law. [Citations.] The moving party bears the burden of showing the court that the plaintiff "has not established, and cannot reasonably expect to establish, a prima facie case . . . ." [Citation.]' [Citation.] '[O]nce a moving defendant has "shown that one or

more elements of the cause of action, even if not separately pleaded, cannot be established," the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff "may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . ." [Citations.]' [Citation.]" (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 274.)

"In reviewing a trial court's grant of summary judgment, we apply the following rules: '"[W]e take the facts from the record that was before the trial court when it ruled on that motion"' and '"""review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained."""' [Citation.] In addition, we '"liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party."""' (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1039.)

II.

APPLICABLE RULES OF STATUTORY INTERPRETATION

As our analysis of the trial court's order granting summary judgment depends on the proper interpretation of the wage order, we next review the applicable rules of statutory interpretation.

In *Martinez v. Combs* (2010) 49 Cal.4th 35, 51, the California Supreme Court stated: "'[O]ur fundamental task in construing a statute is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute.' [Citation.] In this search for what the Legislature meant, '[t]he statutory language itself is the most reliable indicator, so we start with the statute's words, assigning them their usual and ordinary meanings, and construing them in context. If the words themselves are not ambiguous, we presume the Legislature meant what it said, and the statute's plain meaning governs.

On the other hand, if the language allows more than one reasonable construction, we may look to such aids as the legislative history of the measure and maxims of statutory construction. In cases of uncertain meaning, we may also consider the consequences of a particular interpretation, including its impact on public policy.'"

"[T]he IWC's wage orders are entitled to 'extraordinary deference, both in upholding their validity and in enforcing their specific terms.' [Citation.] When a wage order's validity and application are conceded and the question is only one of interpretation, the usual rules of statutory interpretation apply. [Citations.] . . . [T]he meal and rest period requirements we must construe 'have long been viewed as part of the remedial worker protection framework.' [Citation.] Accordingly, the relevant wage order provisions must be interpreted in the manner that best effectuates that protective intent. [Citations.]" (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1027.)

III.

THE WAGE ORDER AND ITS SEATING REQUIREMENT

"In accordance with its power under [Labor Code] section 1198,[2] the [IWC] adopted [a precursor to] wage order No. 7-2001 in 1979 as one of 'a series of industry-wide "wage orders," prescribing the minimum wages, maximum hours, and standard conditions of employment for employees in this state.' [Citation.] The [IWC]

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[2] Labor Code section 1198 provides: "The maximum hours of work and the standard conditions of labor fixed by the commission shall be the maximum hours of work and the standard conditions of labor for employees. The employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the order is unlawful." Allegations that an employer failed to provide seating for employees in violation of an IWC wage order constitutes a violation of section 1198. (*Home Depot U.S.A., Inc. v. Superior Court* (2010) 191 Cal.App.4th 210, 218.)

was 'vested with broad statutory authority to investigate "the comfort, health, safety, and welfare" of the California employees under its aegis [citation] and to establish . . . "[t]he standard conditions of labor demanded by the health and welfare of [such employees] . . ." [citation.]' [Citation.] '"[I]n light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection." [Citation.]' [Citation.]" (*Bright v. 99¢ Only Stores* (2010) 189 Cal.App.4th 1472, 1478, fn. omitted.)

The current version of the wage order applicable in this case, "[w]age order No. 7-2001, which is applicable to the mercantile industry, contains provisions regulating working hours, minimum wages, and other matters, including seating. [Citation.]" (*Home Depot U.S.A., Inc. v. Superior Court*, *supra*, 191 Cal.App.4th at p. 218.) Subdivision 14 of the wage order is entitled "Seats" and states: "(A) All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats. [¶] (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."

IV.

THE TRIAL COURT PROPERLY GRANTED ADVANTAGE'S MOTION FOR SUMMARY JUDGMENT BECAUSE NO TRIABLE ISSUE OF FACT EXISTS SHOWING ADVANTAGE VIOLATED SUBDIVISION 14(B) OF THE WAGE ORDER.

The trial court concluded that no triable issue of fact existed as to Howard's claim for violation of subdivision 14(B) of the wage order because it was undisputed that when Howard was not engaged in his active duties of employment (which the court

interpreted as the equivalent of his being on a rest or meal period), he had access to an adequate number of suitable seats in reasonable proximity to his work area. It was also undisputed he was permitted to use those seats when doing so would not interfere with the performance of his duties. For the reasons we will explain, the trial court properly interpreted subdivision 14(B) of the wage order in granting Advantage's motion for summary judgment.

A.

No Published Case Has Interpreted or Applied Subdivision 14(B) of the Wage Order; Kilby v. CVS Pharmacy, Inc. *(9th Cir. 2013) 739 F.3d 1192, 1193, Addressed Significant Consequences That Might Arise from a Misinterpretation of Subdivision 14(A) of the Wage Order; the Meaning of "Nature of the Work" in Subdivision 14(A) and (B).*

No published California or federal case has analyzed the proper interpretation of subdivision 14(B) of the wage order even though similar language contained in the wage order at subdivision 14(B) existed in prior wage orders for several decades. A panel of the Ninth Circuit Court of Appeals in *Kilby v. CVS Pharmacy, Inc.* (9th Cir. 2013) 739 F.3d 1192, 1193 (*Kilby*), recently requested that the California Supreme Court exercise its discretion to decide certain certified questions related to the proper interpretation of subdivision 14(A) of the wage order, including the following question: "Does the phrase 'nature of the work' refer to an individual task or duty that an employee performs during the course of his or her workday, or should the courts construe 'nature of the work' holistically and evaluate the entire range of an employee's duties?" The court further asked, "[i]f the courts should construe 'nature of the work' holistically, should the courts consider the entire range of an employee's duties if more than half of an employee's time is spent performing tasks that reasonably allow the use of a seat?" (*Kilby*, *supra*, at pp. 1193-1194.) On March 12, 2014, the California Supreme Court granted that request. (*Kilby v. CVS Pharmacy, Inc.* (Mar. 12, 2014, S215614) 2014 Cal.

Lexis 1608.) Although Howard's claim is now solely based on subdivision 14(B) of the wage order, and subdivision 14(A) is not at issue in this appeal, the phrase "nature of the work" appears in subdivision 14(A) and (B) of the wage order. Therefore, the *Kilby* court's discussion is relevant to the issue presented in this appeal.

In *Kilby*, the court explained that the wage order does not include a definition of the phrase "nature of the work" as that phrase appears in subdivision 14 of the wage order. (*Kilby*, *supra*, 739 F.3d at p. 1195.) The court also observed that federal district courts that have addressed this issue (in unpublished decisions) have "adopted a holistic approach," meaning that those courts have determined the nature of an employee's work requires standing if a majority of an employee's assigned duties must physically be performed by standing. (*Ibid.*) The *Kilby* court declined to adopt that or any other definition for the term "nature of the work," explaining: "Even though the holistic approach and the individual task approach would produce drastically different results, the text of the regulation precludes neither. Because 'the language allows more than one reasonable construction, we may look to such aids as the legislative history of the measure and maxims of statutory construction.' [Citation.] 'In cases of uncertain meaning, we may also consider the consequences of a particular interpretation, including its impact on public policy.' [Citation.] 'We are hesitant, however, to speculate about *which* general maxims of statutory construction the [California Supreme Court] would use to interpret [these Wage Orders] and what result that court would reach.'" (*Id.* at p. 1196.)

The *Kilby* court noted that "[s]ection 14 could have a dramatic impact on public policy in California as well as a direct impact on countless citizens of that state, both as employers and employees. Even a conservative estimate would put the potential penalties in these cases in the tens of millions of dollars. *See* Cal. Lab. Code § 2699(f)(2) ('If, at the time of the alleged violation, the person employs one or more employees, the

civil penalty is one hundred dollars ($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.'); [citations]. [¶] Such liability could be imposed upon a large number of employers throughout California, depending on the interpretation given to Section 14. Indeed, in addition to the three employers now before this panel facing potential penalties for violating Section 14, numerous actions have been brought against other employers in California state courts based on the same claim. [Citation.] Moreover, were Section 14 given an interpretation that imposed liability on these employers, it would also mean thousands of California's employees would be entitled to seats. These 'consequences of a particular interpretation,' [citation], would most appropriately be considered and weighed by California's highest court." (*Kilby*, *supra*, 739 F.3d at p. 1196.)

The court further stated, "[i]n sum, we do not think it is appropriate to substitute our judgment for that of the California Supreme Court in interpreting California Wage Orders that could have far-reaching effects on California's citizens and businesses. Instead, '[i]n a case such as this one that raises a new and substantial issue of state law in an arena that will have broad application, the spirit of comity and federalism cause us to seek certification.'" (*Kilby*, *supra*, 739 F.3d at pp. 1196-1197.)

B.

The Trial Court's Interpretation and Application of Subdivision 14(B) of the Wage Order

The trial court provided a detailed analysis of its interpretation of subdivision 14 of the wage order in a minute order. The court interpreted subdivision 14(A) and (B) of the wage order to be mutually exclusive of each other—subdivision 14(A) applied if the "nature of the work" permitted sitting and subdivision 14(B), as relevant here, applied if "the nature of the work" required standing.

Consistent with the approach of federal district courts cited in *Kilby*, *supra*, 739 F3d 1192, the trial court concluded that the phrase "nature of the work" must be determined holistically, not by parsing duties of a job to find which ones can be done while sitting as opposed to standing. The trial court explained, "[t]he moving evidence, based on plaintiff's deposition, shows that a majority of the duties performed by plaintiff requires standing: greeting, stocking, cleaning, and walking the store. However plaintiff is arguing that during portions of the work day there are lulls in customer activity which would allow the employee to sit and therefore a seat should be provided during those periods; however, this approach would be parsing out duties and activities instead of approaching the issue from examining the nature of the work, as required by the language of the work order. In determining the nature of the work, the focus is properly on the nature of the job 'as a whole[,'] factoring in the myriad range of duties that an employee may perform during a shift, in order to determine whether the nature of the work requires standing or reasonably permits the use of a seat. [¶] In addition, defendant's interpretation of the part of the rule that allows sitting only 'when it does not interfere with the performance of the employees duties,' appears correct. The court agrees that the phrase means sitting is allowed when plaintiff goes on breaks, and that is why breaks are required under the code. To adopt an alternative view would bring the court back to parsing when some duties can be done sitting or standing, which goes to the nature of the work."

In its minute order, the trial court further explained: "While [subdivision] 14(B) does reference active duty in the first part of the section, when read together it appears to support defendant's position. It states that 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. 'Active duties' appears to be when performing their duties, rather than as plaintiff suggests references employees inactive while on duty. Employees would be actively engaged in their duties during the time that plaintiff claims they could be doing work that can be done sitting down, but since the nature of their work as a whole requires standing, they are not entitled to a seat under the statute, until they are off duty on breaks. [¶] There is no material dispute of fact as to whether defendant provided seating in reasonable proximity to the work area and when it does not appear to interfere with the performance of their duties. Plaintiff admits he used rest break rooms or other seats available at the premises in which he was working. [¶] Since the gravamen of plaintiff's claim is that there needs to be a seat at his station so he can sit when he thinks he can and/or that plaintiff should just have to walk a few feet to a seat when he is on his break, the court grants the motion for summary judgment as there is no triable issue of material fact and under 14([B]); plaintiff is not entitled to [a] seat at his station under these circumstances and the ability to use seats in break[] rooms or elsewhere on the premises where he works is in reasonable proximity."

C.

Howard's Cause of Action for Violation of the Wage Order Is Based Only on Subdivision 14(B), Not Subdivision 14(A), as the Nature of the Work Requires Standing.

As discussed *ante*, the trial court concluded that subdivision 14(A) and (B) of the wage order are "mutually exclusive" in that "if the nature of the work permits sitting, then (A) applies. If the nature of the work requires standing, then (B) applies." The court concluded, "[h]ere, plaintiff has withdrawn his claim under section (A), and is therefore conceding that the nature of the work does not permit sitting. In essence, therefore, plaintiff has to admit that the nature of plaintiff's work is standing, in order to seek relief under (B)." (Underscoring omitted.)

In his opening brief, Howard does not challenge the trial court's interpretation of subdivision 14(A) and (B) of the wage order as mutually exclusive of each other, or the court's conclusion that Howard abandoned subdivision 14(A) as part of his claim. In his separate statement of undisputed material facts in support of his opposition to the motion for summary judgment, Howard asserted it was undisputed that "[t]he nature of Howard's work requires standing" and that he "needed to stand while interacting with customers." Howard argues on appeal that his claim, only to the extent it was based on a violation of subdivision 14(B) of the wage order, should have survived summary judgment.

D.

Undisputed Evidence Showed Advantage Provided Howard Suitable Seats Placed in Reasonable Proximity to Howard's Work Area for His Use When He Was Not Performing Active Duties.

Pursuant to subdivision 14(B) of the wage order, Advantage was required to provide an adequate number of suitable seats placed in reasonable proximity to Howard's work area for his use when he was not engaged in his active duties. Undisputed evidence showed Howard was provided seats in the break room located inside the store, he was always able to find a seat when he wanted one, and he used those seats when he was on a rest or meal period. Howard does not argue the seats in and of themselves were not suitable. He does not contend he was ever unable to use them during his rest and meal periods; to the contrary, he testified he did use those seats during breaks.

Howard argues the trial court erred by concluding that there was no triable issue of material fact as to whether Advantage provided seating in reasonable proximity to his work area. It is undisputed Howard set up his demonstration table at different locations within the store, depending on the product he was promoting, but was always

provided access to seating in a break room located within the store. Thus, Howard was not required to go outside or offsite to find a place to sit down. Howard has not provided evidence or legal authority supporting his argument that the seating provided was not within reasonable proximity to his work area, within the meaning of the wage order.

Howard contends the term "active duties" in subdivision 14(B) of the wage order should be interpreted as referring to his duties of "persuad[ing] customers to purchase a product by attracting shoppers, offering them samples, and engaging them in the product's attributes such as taste, nutritional value or ease of preparation." He contends he also had "*passive* duties," which included "cutting up cookies, spearing them, cutting up fruits, and maintaining his demonstration table." He asserts, "[i]f customers are present, he needs to stand while doing so in order to convey a ready-to-serve attitude. However, there are lulls in activity, when no customers are available to interact with. During those lulls, when he cannot actively engage in his essential purpose or *active* duties, Howard can perform his non-essential, *passive* duties, seated, without interfering with his performance of those duties."

In other words, Howard argues duties that require standing be characterized as "active duties," and duties he believes could be performed sitting should be characterized as "passive duties." The wage order does not support Howard's interpretation. The wage order does not define the term "active duties" and the wage order never refers to "passive duties." We agree with the trial court that the term "active duties" reasonably refers to the time when an employee is on duty as opposed to on a rest or meal period. Although not actively performing their work duties, employees on rest or meal periods still have duties to their employers, such as to comply with workplace rules while on breaks. The wage order requires Advantage to allow Howard to be seated in provided seats to the extent he is on such a break from his active duties.

Our interpretation is consistent with an opinion letter, dated January 13, 1987, issued by the executive officer of the IWC, in collaboration with California's Department of Industrial Relations, Division of Labor Standards Enforcement (DLSE),[3] to provide "additional comments" on the seating requirement contained in subdivision 14 of IWC wage order No. 7-80 (a precursor to the wage order). (Dept. of Industrial Relations, DLSE Opn. Letter No. 1987.01.13 (Jan. 13, 1987).) The opinion letter explains that "[t]he basic requirement for seats has been in the IWC orders since the earliest 'Sanitary Regulations,' and as [DLSE official Al Reyff] stated, this section was originally intended for work usually performed in a sitting position, e.g., typing." (*Ibid.*) The opinion letter continues: "Section 14 (A) of Order 7-80 specifically states that 'all working employees shall be provided with suitable seats when the "nature of the work" reasonably permits the use of seats,' the key being the 'nature of the work.' The nature of work for salespersons is such that it requires them to be mobile and as Mr. Reyff states, to be in a position to greet customers and move freely throughout the store. [¶] Section 14 (B) of Order 7-80 refers to employees who are not engaged in active duties of their employment, and if the 'nature of the work requires standing,' (e.g. saleswork) an adequate number of seats shall be provided, and employees shall be permitted to use the seats 'when it does not interfere with the performance of their duties,' *i.e., during their rest periods*." (*Ibid.*, italics added.)

In his opening brief, Howard also argues that subdivision 14(B) of the wage order should be interpreted to require Advantage to provide a seat within immediate proximity of his work station so that he could sit down during lulls in customer traffic so

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[3] "'The DLSE "is the state agency empowered to enforce California's labor laws, including IWC wage orders."' [Citation.] The DLSE's opinion letters, '"""while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."""'" (*Brinker Restaurant Corp. v. Superior Court*, *supra*, 53 Cal.4th at p. 1029, fn. 11.)

as to not interfere with his duties within the meaning of the wage order. As discussed *ante*, the nature of the job requires that Howard stand. Therefore, Howard, sitting while actively working, would necessarily interfere with his duties. The wage order only requires that seats be available when an employee whose job requires standing is not performing his active duties, e.g., while the employee is on a break. Howard's interpretation of subdivision 14 of the wage order necessarily invites this court to rewrite his job description to convert his event specialist position from one that requires him to stand to one that allows him to sit when he perceives a sufficient lull in customer traffic. Nothing in the wage order supports this interpretation.

We note this opinion only interprets the minimum seating conditions required under the wage order. Nothing in this opinion limits any right by an employee to seek a reasonable accommodation under the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.) or the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.).

E.

The Trial Court's Interpretation of the Wage Order Does Not Render Other Portions of the Wage Order as "Meaningless Surplusage."

In his opening brief, Howard also argues, "since all employees, whether their work requires standing or not, are already entitled to sit while on break, the IWC Order is now meaningless surplusage." Not so. Subdivision 12 of the wage order requires employers to provide rest periods, but does not address the provision of seating during rest periods. Subdivision 12 provides: "(A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major

fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages. [¶] (B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided." It is undisputed Howard was provided rest periods in compliance with this subdivision.

Subdivision 13 of the wage order, which addresses "Change Rooms and Resting Facilities," states: "(A) Employers shall provide suitable lockers, closets, or equivalent for the safekeeping of employees' outer clothing during working hours, and when required, for their work clothing during non-working hours. When the occupation requires a change of clothing, change rooms or equivalent space shall be provided in order that employees may change their clothing in reasonable privacy and comfort. These rooms or spaces may be adjacent to but shall be separate from toilet rooms and shall be kept clean. [¶] NOTE: This section shall not apply to change rooms and storage facilities regulated by the Occupational Safety and Health Standards Board. [¶] (B) Suitable resting facilities shall be provided in an area separate from the toilet rooms and shall be available to employees during work hours."

It is subdivision 14 that addresses minimum requirements for the provision of suitable seating for employees by employers. Thus, interpreting subdivision 14(B) to require the provision of seating during rest periods for employees whose duties must be performed standing neither conflicts with subdivisions 12 and 13 of the wage order providing for rest periods and rest facilities, respectively, nor relegates subdivision 14 to "meaningless surplusage," as Howard argues.

DISPOSITION

The judgment is affirmed. Respondent shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.