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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

ANNA HERNANDEZ, individually and as an
aggrieved employee pursuant to the Private
Attorneys General Act ("PAGA"), and on
behalf of the State of California and other
aggrieved employees,

Plaintiff.

vs.

OLD NAVY, LLC, a Delaware Limited
Liability Company.

Defendant.

CASE NO.: CGC-22-598893

**PLAINTIFF'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
SETTLEMENT APPROVAL**

Date: January 30, 2024

Time: 9:30 a.m.

Dept.: 302 (Law and Motion)

Judge: Hon. Richard B. Ulmer

Complaint Filed: March 25, 2022

1 **I. INTRODUCTION**

2 California’s seating law dates back to 1911 in the State’s Sanitary Laws. It was
3 enforceable by State agents and no private right of action existed. As the seminal case of *Kilby v.*
4 *CVS Pharmacy, Inc.* notes, it was enforced by detailed regulations into the 1920s. Then for
5 reasons lost to history, it went unenforced for nearly a century. *Kilby v. CVS Pharmacy, Inc.*
6 (2016) 63 Cal. 4th 1, 11.

7 Although unenforced by the Labor Commissioner (the head of the Labor Workforce’s
8 enforcement arm, the DLSE), the seating law had continued to be revised. The current version, in
9 effect since 1976, is found as Wage Order Section 14.¹ Subsection 14(A) affirmatively requires
10 employers to provide suitable seats to all employees when the nature of their tasks (such as a
11 cashier or bank teller) arguably permits the reasonable use of a seat. Subsection 14(B) is
12 complementary and states that even if the job is a standing one, a suitable seat must be provided
13 nearby for use when lulls in the work or customer flow occur.

14 Obviously, the seating law enacted 110 years ago did not have the benefit of the opinions
15 of ergonomists, cardiologists, or orthopedic specialists. It emerged from common sense, common
16 human experience, and the reality that standing particularly in one location for an entire shift
17 caused fatigue and discomfort. Ironically, those same basic considerations are at play today
18 where there is a graying of America’s workforce, and we sadly see people of advanced years
19 working as Wal-Mart greeters or at McDonald’s. During the relevant statutory period in the
20 instant case, Old Navy has had approximately 16,623 nonexempt employees working at its retail
21 stores in California. Plaintiffs contend that while many may be youthful and in their physical
22 prime, others may be considerably older with the accumulated physical limitations that come

23 _____
24 ¹ “(A) All working employees shall be provided with suitable seats when the nature of the work
25 reasonably permits the use of seats. (B) When employees are not engaged in the active duties
26 of their employment and the nature of the work requires standing, an adequate number of
27 suitable seats shall be placed in reasonable proximity to the work area and employees shall be
28 permitted to use such seats when it does not interfere with the performance of their duties.” In
Ex Parte Miller, 162 Cal.687, 695 (1912), an employer who had been incarcerated for failing
to provide a seat unsuccessfully challenged the constitutionality of the seating law.

1 with the passage of decades. Sadly, one of the named Plaintiffs in this case, Lebrado Madrazo,
2 suffered a fatal heart attack during the pendency of this case. The surviving Plaintiff of this case
3 has worked at Old Navy between 2014 and 2020. She is 70 years of age.

4 Of course, the Wage Order does not require that the employee use the seat provided. It
5 rather simply provides an option for the employee to use a seat if he or she chooses to. A full
6 analysis of the Supreme Court in *Kilby* also shows that a seat is not given to Mary the cashier or
7 Joe the cashier. Rather, a seat is provided to the workstation where tasks commonly performed
8 there can reasonably and feasibly be done while seated. So, the seat goes to the location and an
9 employee who performs the tasks is able to utilize the seat even if he or she is at that location for
10 a limited period of time as opposed to an entire shift.

11 Plaintiff alleges that because the seating law went unenforced for nearly a century, the
12 norm in the American workplace has been to have hourly workers stand to perform all their
13 tasks. As a result, even the furniture provided in such retail establishments such as stores and
14 banks has been designed for standing as opposed to seated cashiers. With the culture having been
15 to only have standing employees, Plaintiff's counsel believes it is necessary to actually have four
16 elements come together to fully permit the use of a seated posture. First, it is obviously necessary
17 to have, as the Wage Order clearly states, a "suitable" seat provided. The workstation itself
18 (whether it be a bank teller counter or a checkout counter in a store) must be compatible with the
19 use of a seat. For example, if the counter precludes the use or provides absolutely no kneeroom
20 the employee would have to position the seat too far away from the work area and lean forward
21 toward the work tools causing a potentially hazardous strain on the back and requiring excessive
22 reach with the arms and shoulders. Finally, to counteract the long tradition of standing only, the
23 employees have to be given clear plain language instructions so that they really can use the new
24 seats.

25 **II. ENFORCEMENT UNDER PAGA**

26 With the passage of PAGA in 2003, the violation of a Wage Order became enforceable
27 by employees through a representative action. Starting in 2009, the undersigned, along with
28 Matthew Righetti, Esq. of San Francisco and James Clapp of San Diego, began filing the first

1 seating cases under PAGA. Since there were no trial court decisions addressing the
2 interpretations of the Wage Order, let alone appellate ones, we wound up having to litigate every
3 aspect of this new genre. As every California judge knows, PAGA is a muddled piece of
4 legislation. This may be due to the fact that the LWDA, rather than assisting in its drafting, chose
5 to oppose the very creation of PAGA. Certainly, one of the earliest visible shortcomings from the
6 workers' vantage was the lack of any provision for injunctive relief. It provides for penalties but
7 75% goes to the LWDA and the balance is divided among so many that the check going to an
8 individual worker is likely received as insulting. The penalties serve as a possible deterrent but
9 the workers most likely could be left standing.² At the risk of sounding unkind, the LWDA
10 doesn't support PAGA cases unless a court specifically asks for the agency's opinion and too
11 many Plaintiff's attorneys take their PAGA fees and move on.

12 Naturally, it is difficult for even zealous Plaintiff lawyers to secure injunctive or
13 "forward-looking relief" absent any statutory support. Early attempts to use other statutory
14 provisions ran into cases holding that a PAGA Plaintiff had no individual stake or standing. And
15 American industry viewed standing as the norm and sitting as "lazy" and possibly even
16 perceived by customers as disrespectful.

17 **III.THIS SETTLEMENT PROVIDES FOR MEANINGFUL AND SIGNIFICANT** 18 **FORWARD-LOOKING RELIEF**

19 The undersigned counsel sued Old Navy in 2017 for alleged failure to provide suitable
20 seats. *Alvarado v. Old Navy, LLC.*, San Francisco Superior Case No. CGC-17-562773. Old Navy
21 denied Plaintiff's allegations. That case was settled in 2019, the Court approved the settlement
22 and entered judgment on its order approving the settlement, and Old Navy paid \$6,148,174.00 in
23 civil penalties.

24 On March 25, 2022, Plaintiff filed the instant action against Old Navy for the same
25

26 ² The Supreme Court has noted the Wage Orders are remedial and their enactment was to
27 promote the health, comfort, and welfare of California workers. *Kilby v. CVS Pharmacy, Inc.*
28 63 Cal.4th 1, 559.

1 alleged violation for failure to provide suitable seats. Old Navy denies that it failed to comply
2 with California's suitable seating requirements and engaged in any wrongdoing as to the
3 Plaintiff, the PAGA Settlement Employees, or any other person. Old Navy maintains that it has
4 been providing two seats to each of its California retail stores designated specifically for
5 nonexempt employees to use on the sales floor if they wish to sit while effectively and efficiently
6 performing their job duties. The Parties reached this Settlement to avoid the risks, extensive
7 delays caused by trial and appeals, potential manageability issues, and the uncertainty that the
8 case can be proven at trial and affirmed on appeal.

9 In addition to the monetary relief, this Settlement consists of very important non-
10 monetary relief. First, the Wage Order requires "suitable" seats. Plaintiff asserted the Black Bow
11 folding stools (See **Exhibit 1** to the Declaration of Kevin J. McInerney) that Old Navy provided
12 to each of its stores in California were unsuitable for cashier work. The Black Bow folding stools
13 do not height adjust to accommodate persons of different stature, and this was an obvious
14 shortcoming for thousands of employees of varying heights. Another is that the seat pan did not
15 swivel. A seat that does not swivel causes a worker to overextend reach which over time can
16 have adverse physical consequences. Old Navy denies that the seats it provides to its nonexempt
17 employees for use in California retail stores are not "suitable". As part of this Settlement, the
18 Parties have agreed to engage a mutually agreed upon ergonomist to assess the type of additional
19 suitable seating, including with respect to adjustable height and swivel, that Old Navy should
20 provide for nonexempt employees' use at its retail stores in California. (See Section I., Paragraph
21 18 of the Settlement Agreement). The cost of a supplemental suitable seat, not to exceed \$200
22 per seat, for each of the Old Navy retail stores in California will come from the non-reversionary
23 maximum settlement fund of \$6,500,000 (defined as the Gross Settlement Amount). The Parties
24 have already communicated with ergonomist consultants to find appropriate candidates for the
25 new seats.

26 The second significant aspect of non-monetary relief relates to the workstation, which
27 may include the checkout counter or cashwrap. Plaintiff maintains that retail employers whether
28 banks, grocery stores, or other, were historically hostile to sitting employees regardless of

1 whether they might be older, pregnant, or otherwise unfit to stand during a shift.³ It is not
2 surprising that manufacturers of checkout counters have until recently produced models that are
3 incompatible with a seated worker. Plaintiff contends that the incompatibility arises from the
4 placement of shelves under the counter. Those shelves, often just particle board, eliminate
5 kneeroom. Absent kneeroom, Plaintiff contends the seated worker cannot be close enough to the
6 POS and other work tools without bending forward and engaging in overly extended reaches. So,
7 Plaintiff maintains there are actually four components to make seating feasible: 1) the tasks
8 performed must reasonably be able to be performed while seated; 2) a suitable seat; 3) a
9 workstation that is or can be modified to be compatible with a seated posture; and 4) clear
10 guidance to the employees when they are able to use the seat.

11 This is not rocket science. It is all just common sense and our common experience. And
12 even while the unanimous decision in *Kilby* at 17 made it pretty clear that an incompatible
13 workstation design could not justify the denial of otherwise feasible seating, all employers and
14 some judges have reacted to cutting away some particle board shelf as akin to taking a chainsaw
15 to the Ark of the Covenant.

16 Both from the prior *Alvarado* lawsuit and in this case, Plaintiff's counsel found through
17 discovery that each Old Navy retail store in California has one ADA cashwrap designed to
18 accommodate an employee who uses a wheelchair or needs to sit due to a medical
19 accommodation. This unit is wider, and the shelving is offset to one side leaving full kneeroom
20 (See **Exhibit 2** to the Declaration of Kevin J. McInerney). Because of this knowledge, Plaintiff's
21 counsel were able to negotiate a provision that a cashier who wished to sit could use that ADA
22 station so long as it is not needed by an employee who requires a wheelchair or who must sit due
23

24
25 ³ Even among fit employees, standing has been shown to require 110% more energy expenditure
26 than sitting. Most ergonomists recommend a mix of standing and sitting. (Saeidifard, F.,
27 Medina-Inojosa, J. R., Supervia, M., Olson, T. P., Somers, V. K., Erwin, P. J., & Lopez-
Jimenez, F. (2018). Differences of energy expenditure while sitting versus standing: A
systematic review and meta-analysis. *European Journal of Preventive Cardiology*, 25(5), 522–
538.)

1 to a medical accommodation.

2 The third and most important aspect of the non-monetary relief is that Old Navy store
3 employees would receive the following plain language written notice of when a seat can be used.
4 That will be posted in the breakroom and at or around the cashwraps visible to all store
5 employees:

6
7 **“NOTICE: EMPLOYEES MAY SIT**

8 Old Navy provides seats for all employees to use if they wish to do so:

9 ***Sitting While You Work***

10 You may sit while doing tasks, including tasks at the cashwraps, that, at times, may be
11 performed seated. Examples: interacting with customers, scanning, taking payment,
12 removing sensors, bagging items, reticketing, etc. The ADA cashwrap has knee room
13 underneath; you may use the ADA cashwrap while working seated so long as it is not
needed by an employee who requires a wheelchair or who must sit due to a medical
accommodation.

14 ***Sitting When There is No Work to Do***

15 You may sit when there is no work to be done, such as when there is a temporary lull in
16 customers at the cashwrap or fitting room and there aren't other duties that you should be
doing. Old Navy will make seats available to be used in or near work areas.

17 If you're not able to use or find a seat (because, for example, available seats are already
in use), please promptly notify your manager or contact HR.

18 Employees who work while seated must still provide good customer service and meet
19 company efficiency standards.”

20
21 Plaintiff believes this is really significant. After the *Kilby* decision many employers
22 promulgated “suitable seating policies”. The problem is that most of these were more confusing
23 than informative. For example, many parroted the language of the Wage Order stating a seat
24 could be used “when the nature of the work reasonably permits”. Of course, scores of lawyers
25 had argued for six years prior to *Kilby* about what this meant and at least four trial courts got it
26 wrong. So, with a long translation and a culture of standing, these “seating policies” did more
27 harm than good. Plaintiff alleges that Old Navy’s suitable seating policy was confusing for
28 hourly employees even if well-intentioned. Old Navy denies that its suitable seating policy was

1 confusing.

2 Plaintiff believes that the new notice, by using simple words and providing examples of
3 when seats can be used, makes things clear for all the hourly workers.

4 It is always difficult to value forward-looking relief, but it appears that here current and
5 future Old Navy employees will really be able to sit. The proposed Settlement was brokered by
6 Louis Marlin, Esq., an experienced mediator. Plaintiff's Mediation Brief set out the same
7 demands for non-monetary relief as were obtained here, and the real end goal of PAGA is to
8 obtain greater compliance with our labor laws and straight monetary settlements may fail to
9 accomplish that. For this reason, Plaintiff maintains that a valid argument exists here that the
10 value of the non-monetary relief equals or exceeds that of the monetary component.

11 **IV. THE PROPOSED SETTLEMENT'S MONETARY COMPONENTS MEET THE**
12 **CRITERIA FOR APPROVAL**

13 The standard for PAGA settlements was set forth in *Kullar v. Foot Locker Retail, Inc.*
14 168 Cal.App.4th 116.

15 The proposed Settlement creates a non-reversionary Gross Settlement Amount of
16 \$6,500,000 (Section I., Paragraph 5). The Gross Settlement Amount was calculated based on Old
17 Navy's records which show that there are 322,392 pay periods worked by PAGA Settlement
18 Employees between January 18, 2021, through July 29, 2023. PAGA Settlement Employees
19 consist of all current and former non-exempt employees who worked in an Old Navy retail store
20 in California during the PAGA Period, which is defined as the time period from January 8, 2021,
21 through the date the Court grants Plaintiff's motion for approval of the Settlement. Of those
22 322,392 pay periods, 211,326 pay periods include at least one register transaction (Section
23 14(A)) at the cashwrap. These pay periods were valued at \$30.76 per pay period for settlement
24 purposes. Further, 111,066 of the 322,392 pay periods do not include any register transactions at
25 the cashwrap. These pay periods were valued at \$7.69 per pay period for settlement purposes.
26 This differentiation is caused by the fact that while the Black Bow folding stool was viewed by
27 the Plaintiff as unsuitable for a cashier to use, it would have been suitable for a non-cashier
28 person to use during a lull.

1 The Court is left with complete discretion in the award of Plaintiff's Attorneys' Fees
2 (Section III., Paragraph 3(b)), the reimbursement of Plaintiff's Litigation Costs (Section III.,
3 Paragraph 3(b)), the Ergonomist Fees (Section III., Paragraph 3(e)), the Seating Costs (Section
4 III., Paragraph 3(f)), the Administration Costs (Section III., Paragraph 3(c)), and the award of
5 Plaintiff's Incentive Award to the named Plaintiff (Section III., Paragraph 3(d)), Assuming all
6 requested amounts were awarded, the net PAGA Payment, will be \$3,619,136.50. Under Labor
7 Code Section 2699(j), the LWDA will receive 75% or \$2,714,352.37 and the PAGA Settlement
8 Employees will receive 25% or \$904,784.13. PAGA Settlement Employees will not be required
9 to submit a claim form to receive payment from the Settlement. Instead, PAGA Settlement
10 Employees will automatically receive their Individual PAGA Payments.

11 Under Section 2699(l)(2), the Plaintiff is required to submit a copy of any proposed
12 settlement to the LWDA at the same time it is submitted to the Court. A copy of the Settlement
13 Agreement is attached to the Declaration of Kevin J. McNerney as **Exhibit 3**.

14 This Settlement proposes an allocation of the monetary proceeds between those
15 California retail store nonexempt employees who performed cashier duties and those who did
16 not. Essentially, the nonexempt employees who performed cashier duties will receive an
17 allocation four times that of those nonexempt employees who did not. The reason for this is
18 simple. It has been the contention of the Plaintiff that the seat (Black Bow) provided by Old
19 Navy for use at its registers is and was unsuitable, which Old Navy denies. Plaintiff contends that
20 the cashiers did not have a true option to use the seat provided. On the other hand, the Black
21 Bow has arguably been suitable for other employees to use during lulls which occur during slow
22 periods of work or customer flow. Accordingly, while the Plaintiff would have argued all
23 cashiers were denied a suitable seat under Section 14(A), the same argument would not have
24 been made as to all store nonexempt employees under Section 14(B).

25 The 25% of the penalties that go to the employees are not meant to compensate them in
26 any way. *Arias v. Superior Court*, (2009) 46 Cal.4th 969. Rather, this portion of the recovery is
27 intended solely as an incentive or bounty for having PAGA. (*Baumann v. Chase Inv. Services*
28 *Corp.*, (2014) 747 F.3d 1117).

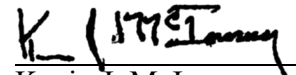
1 The initial 2003 version of PAGA provided 100% of the collected penalties would go to
2 the State. It was not until some Legislators belatedly realized that no employee would undertake
3 to sue a major company with no upside that PAGA was quickly amended to create the 25%
4 incentive. While some courts ruled that the 25% should go to the named Plaintiff who undertook
5 the risk and work, the current norm is that the 25% is to be spread among all the aggrieved
6 employees. However, courts have looked at the gross dollar per pay period of a proposed
7 settlement to compare with other seating case settlements.

8 **V. CONCLUSION**

9 Plaintiff respectfully requests that the Court approve the Settlement.

10
11 Dated: January 4, 2024

Respectfully submitted,

12 
13 Kevin J. McInerney
14 Attorney for Plaintiff