UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 11-8471-CAS (MRWx)	Date	March 25, 2013
Title	JESSIKA TSENG V. NORDSTROM, INC.		

Present: The Honorable	CHRISTINA A. SNYDER	
CATHERINE JEANG	SHERI KLEEGER	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants
Steven Tindall	Julie Dunn Dominic Messiha

Proceedings: **DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** (filed January 7, 2013) [Dkt. No. 65]

I. INTRODUCTION & BACKGROUND

On September 9, 2011, plaintiff Jessika Tseng filed a complaint in the Los Angeles County Superior Court against defendant Nordstrom, Inc. ("Nordstrom"). Plaintiff was employed by Nordstrom as a cosmetics counter salesperson from August 2008 until May 31, 2011, at several locations in California. Compl. ¶ 6. Plaintiff alleges that Nordstrom violated California Labor Code § 1198 and Industrial Welfare Commission Order No. 7-2001, § 14(A), by failing to provide suitable seats to cosmetics counter salespeople throughout California.

Plaintiff originally filed this case as a representative action on behalf of herself and other cosmetics counter salespeople under the California Private Attorney General Act of 2004, California Labor Code § 2698 et seq., ("PAGA"). On October 13, 2011, defendant removed the case to this Court on the basis of diversity of citizenship pursuant to 28 U.S.C. § 1332(a) and the Class Action Fairness Act ("CAFA"), 28 U.S.C. §§ 1332(d), 1453, and 1711–1715. Dkt. No. 1. Because this Court had found previously that Federal Rule of Civil Procedure 23 "automatically applies in all civil actions and proceedings" in federal court, including PAGA actions, the Court granted plaintiff leave to file a First Amended Complaint ("FAC") complying with Rule 23.[1] Dkt. No. 47. The Court

[1] See Fields v. QSP, Inc., CV 12-1238-CAS (PJWx), 2012 WL 2049528, *4 (C.D. Cal. June 4, 2012).

also denied defendant's motion for judgment on the pleadings on the basis of the purported unconstitutionality of PAGA.

On January 7, 2013, defendant filed a motion for summary judgment. Dkt. No. 65. Plaintiff filed an opposition on February 11, 2013, and defendant replied on March 11, 2013. Dkt. Nos. 110, 115. The Court held a hearing on March 25, 2013. After carefully considering the parties' arguments, the Court finds and concludes as follows.

II. LEGAL STANDARD

Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of identifying relevant portions of the record that demonstrate the absence of a fact or facts necessary for one or more essential elements of each claim upon which the moving party seeks judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

If the moving party meets its initial burden, the opposing party must then set out specific facts showing a genuine issue for trial in order to defeat the motion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); see also Fed. R. Civ. P. 56(c), (e). The nonmoving party must not simply rely on the pleadings and must do more than make "conclusory allegations [in] an affidavit." Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888 (1990); see also Celotex, 477 U.S. at 324. Summary judgment must be granted for the moving party if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322; see also Abromson v. Am. Pac. Corp., 114 F.3d 898, 902 (9th Cir. 1997).

In light of the facts presented by the nonmoving party, along with any undisputed facts, the Court must decide whether the moving party is entitled to judgment as a matter of law. See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 631 & n.3 (9th Cir. 1987). When deciding a motion for summary judgment, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citation omitted); Valley Nat'l Bank of Ariz. v. A.E. Rouse & Co., 121 F.3d 1332, 1335 (9th Cir. 1997). Summary judgment for the moving party is proper

when a rational trier of fact would not be able to find for the nonmoving party on the claims at issue. See Matsushita, 475 U.S. at 587.

IV. DISCUSSION

A. Plaintiff's Request to Defer Ruling on Defendant's Motion

Plaintiff requests that the Court defer ruling on defendant's motion for summary judgment until after the Court hears plaintiff's motion for class certification, which is scheduled to be heard on July 29, 2013. Opp'n at 12. The Court denies plaintiff's request. As the Ninth Circuit has held, a district court may consider a motion for summary judgment before a motion for class certification. See Wright v. Schock, 742 F.2d 541, 544 (9th Cir. 1984). Although members of the proposed class would be free to file identical claims against Nordstrom if the Court in fact grants defendant's motion, delaying hearing this motion until after class certification serves primarily to protect a defendant's interests, not plaintiff's. Accordingly, plaintiff's request is denied.

B. Suitable Seating Claim

1. Applicable Law

Section 1198 of the California Labor Code grants the Industrial Welfare Commission the authority to fix "the maximum hours of work and the standard conditions of labor for employees" and makes it unlawful for an employer to violate any orders of the Commission. PAGA, in turn, permits an "aggrieved employee" to "bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations." Arias v. Superior Court, 46 Cal. 4th 969, 980 (2009) (citing Cal. Labor Code § 2699(a)).

At issue here is Industrial Welfare Commission Order No. 7-2001 ("Wage Order 7-2001"), which applies to "any industry, business, or establishment operated for the purpose of purchasing, selling, or distributing goods or commodities at wholesale or retail." See 8 Cal. Code. Regs. § 11070(2)(H) (codifying Wage Order 7-2001). Plaintiff's sole claim is that defendant violated section 14(A) of this Wage Order, which sets forth certain requirements related to seating:

> (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.

Id. § 11070(14).[2]

Plaintiff's claim is focused on the first requirement of section 14: that employees be provided with suitable seats when their work reasonably permits the use of seats. When interpreting the provisions of this Wage Order, the Court is mindful that "wage orders are quasi-legislative regulations that must be construed in accordance with the ordinary principles of statutory interpretation." Campbell v. Pricewaterhouse Coopers, LLP, 642 F.3d 820, 825 (9th Cir. 2011) (citations omitted). Based on the plain text of section 14, therefore, the issue is whether defendant has demonstrated, as a matter of law, that the nature of plaintiff's work does not reasonably permit sitting. See Echavez v. Abercrombie & Fitch Co, Inc., CV 11-9751, 2012 WL 2861348, at *8 (C.D. Cal. Mar. 12, 2012) (finding that "§ 14 requires that employers of all types must provide adequate seating for use by their employees when reasonably permitted by the nature of the employees' work"); Garvey v. Kmart Corp., CV 11-02575, 2012 WL 1231803, at *3 (N.D. Cal. Apr. 12, 2012) (framing the legal issue as "whether the work of Kmart cashiers reasonably permitted the use of seats"); Kilby v. CVS Pharmacy, Inc.,

[2] Two California Courts of Appeal and a number of federal district courts have rejected the argument that "an employer's failure to comply with the seating requirement in Wage Order 7-2001 is not unlawful under section 1198 because the seating requirement is expressed in affirmative—rather than prohibitory—terms." Home Depot U.S.A., Inc. v. Superior Court, 191 Cal. App. 4th 210, 218 (2010). See Kilby v. CVS Pharm., Inc., No. 09-cv-2051, 2010 WL 3339464, at *3, 2010 U.S.Dist. Lexis 86515, at *7 (S.D.Cal. Aug. 23, 2010); Bright v. 99cents Only Stores, 189 Cal. App. 4th 1472, 1477, 118 Cal. Rptr. 3d 723, 726 (2010) (holding that "section 1198 renders unlawful violations of the suitable seating provision of Wage Order No. 7, subdivision 14").

09CV2051, 2012 WL 1969284 (S.D. Cal. May 31, 2012) ("Based on the language and structure of Section 14, the 'nature of the work' performed by an employee must be considered in light of that individual's entire range of assigned duties in order to determine whether the work permits the use of a seat or requires standing.").

Application of this broad reasonableness standard is further supported by an amicus brief filed by the California Department of Industrial Relations, Division of Labor Standards and Enforcement ("DLSE") in the Garvey case.[3] See Def.'s Request for Judicial Notice Ex. 5, Amicus Brief of the California Labor Commissioner in Garvey v. Kmart Corp. (N.D. Cal. Dec. 7, 2012) (stating that the "DLSE would apply a reasonableness standard that would fully consider all existing conditions regarding the nature of the work performed by employees"). According to DLSE, factors relevant to this determination include "the physical layout of the workplace and the employee's job functions," and an "objective evaluation" of the work expected of employees and the work actually performed by them, based upon input from employees and the employer. Id.

Existing or historical industry or business practices are also relevant under this totality of the circumstances test. However, in DSLE's view, an employer's business judgment is but one input into this objective evaluation and is not controlling. Id. While the opinion of the DLSE is not binding upon this Court, the agency does offer a "body of experience and informed judgment to which courts and litigants may properly resort for guidance." Brinker Rest. Corp. v. Superior Court, 53 Cal. 4th 1004, 1029 n. 11 (2012). The Court finds that it is appropriate to consider this guidance here. See Garvey v. Kmart Corp., CV 11-02575, 2012 WL 6599534 (N.D. Cal. Dec. 18, 2012) (Kmart II) (concluding that the court would "attempt to follow the general guidance of DLSE and consider the nature of the work and all of the facts and circumstances as set forth in the trial record").

Defendant's argument that its reasonable business judgment "controls" with respect to whether or not the nature of an employee's work reasonably allows for sitting

[3] "The DLSE is the state agency empowered to enforce California's labor laws, including IWC wage orders." Brinker Rest. Corp. v. Superior Court, 53 Cal. 4th 1004, 1029 n. 11 (2012).

reaches too far. See Mot. at 17. Defendant's reasonable business judgment is relevant as to whether the work of a given job permits the use of a seat, but this is but one factor in the "totality of the circumstances" inquiry set forth in section 14(A) of the Wage Order. The work actually performed by employees, based on the employee's testimony or other evidence, is also relevant to determining whether the work allows for sitting. At its core, the seating rule is mandatory and the inquiry for gauging compliance is objective; an employer cannot subjectively define a certain type of work as necessitating standing in order to escape the plain mandate of the Wage Order. Cf. Campbell, 642 F.3d at 825 (holding that the ordinary principles of statutory interpretation apply to interpretation of the Wage Order). None of defendant's cited authorities support its assertion to the contrary, as the test is not whether defendant acted "arbitrarily and capriciously" in choosing the employment policies that it did or whether its stated rationales are merely "pretextual."[4] Accordingly, a showing of good faith business reasons behind a no-sitting policy is insufficient, in isolation, to defeat a claim that defendant violated the Wage Order.

[4] For example, defendant cites to Jones v. Walgreen Co., 679 F.3d 9 (1st Cir. 2012), where the First Circuit affirmed a grant of summary judgment in favor of an employer on a plaintiff's disability discrimination claim. As the court noted in Jones, "the applicable statutory and regulatory framework accords a significant degree of deference to an employer's own business judgment regarding which functions are essential to a given position." Id. at 14. Because Jones arose under federal law, this is plainly not the same "statutory and regulatory framework" at issue in this case, and therefore no "significant" deference is owed to defendant's business judgment as to which functions are essential to plaintiff's former job. However, as discussed previously, defendant's business judgment as to the essential functions of plaintiff's former job is clearly a relevant consideration in the totality of the circumstances test set forth in section 14(A). See id. (noting that under federal law, "a court may look to the employer's judgment as to which functions are essential; written job descriptions prepared before advertising or interviewing applicants for the job; the work experience of past incumbents in the job; and the current work experience of incumbents in similar jobs") (citations and alterations omitted).

2. The Parties' Evidence and Factual Contentions

In support of its motion for summary judgment, defendant contends that the following material facts are undisputed. Defendant focuses on three principal reasons that its cosmetics counter employees cannot reasonably be seated in order to effectively perform their job duties, based on the following evidence.

(a) Customer Service

Defendant is a department store retailer whose company philosophy and brand identity is based upon a commitment to offer its customers exceptional service. Def.'s Statement of Uncontroverted Facts and Conclusions of Law ("DSUF") 1. As such, defendant expects all of its employees, including its cosmetics counter employees, to provide excellent customer service at all times. DSUF 2–4. Indeed, customer service and selling cosmetics are the most important job duties of cosmetics counter employees. DSUF 3. Put simply, defendant maintains that it is undisputed that retail sales employees at its stores cannot provide excellent customer service or adequately perform their job as salespersons while seated. DSUF 5.

Defendant offers a number reasons why the evidence conclusively demonstrates that sitting is not compatible with a retail sales employee's duty to provide great customer service. For one, defendant expects its employees to promptly greet and approach customers who enter the department, as set forth in its "Selling is Service" training guide. DSUF 7. Defendant's "Coaching Guides" reiterate a similar theme: cosmetics sales employees are expected to "[g]reet customers immediately with a smile and make eye contact." Cummings Decl. ¶ 14, Ex. C. Moreover, once a cosmetics counter employee greets a customer, they are expected to "demonstrate enthusiasm for selling" and deliver a one-on-one experience, neither of which can be accomplished while seated. DSUF 10. This includes walking the customer around the cosmetics counter and applying samples when desired. After the customer has made their purchasing decisions, defendant expects employees to walk the customer to the cash register (or "cash wrap") and ring up the sale. DSUF 11. The employee then must walk around the counter and directly hand the package to the customer, or walk the package to the customer's car upon request. DSUF 12–18.

Employees have additional responsibilities when they are not helping a customer,

all of which require her or him to be standing and mobile. These include restocking merchandise and refilling displays; ensuring maximum merchandise representation and aesthetic display; and cleaning the cosmetics counter area. DSUF 19–21. None of this work can be effectively performed while seated, in defendant's view. DSUF 22. In further support of its factual contentions, defendant notes that its cosmetics sales employees agree that sitting at any time on the sales floor reduces their ability to make sales and commissions. DSUF 27–28. Moreover, an independent consultant has performed a "job analysis" for defendant's cosmetics employees. She determined that "walking" and "standing" and related activities occur "frequently," but that "sitting" is "seldom" required. DSUF 23. And defendant also notes its many customer service studies, which show that good customer service is essential to defendant's continued sales success. DSUF 24–26.

Presenting her own declarations and other evidence, plaintiff disputes that the nature of the work as a cosmetics counter employee requires standing the majority of the time. Plaintiff notes the essential job functions of a cosmetics counter employee, which neither party disputes: sales, financial transactions, stock, documentation, clean-up, telephone work, customer service, and teamwork. See Decl. of Eileen Salus, Ex. A; see also Depo. of Nora Cummings 50:10–53:6; 55:21–56:1; 59:24–60:13; 63:18–20 (describing essential tasks as contacting personal books; writing thank you cards; making telephone calls for merchandise checks at other stores and customer contact; using cash registers for financial transactions; restocking merchandise). Plaintiff then testifies that she spent the majority of her time working at the cash register, writing thank you notes, making calls to her personal book, and stocking the shelves—all tasks that could have been completed while sitting. Depo. of Jessika Tseng 39:19–20; 41:24–42:2; 92:19–94:11; Decl. of Jessika Tseng ¶ 2. Other former cosmetics counter employees who worked at defendant's stores agree, based upon their experience as salespersons. See, e.g. Decl. of Allison Brilmyer ¶¶ 4–6; Decl. of Vanessa Curiale ¶¶ 4–6; Decl. of Saima Vakil ¶ 7. In plaintiff's view, disputed issues of fact as to whether these tasks may be accomplished while seated is alone sufficient to deny defendant's motion.

Moreover, plaintiff points to the evidence in the record that cosmetics counter employees could still offer exceptional customer service while seated, and she argues that disputed issues of material fact on this crucial issue alone preclude summary adjudication in defendant's favor. This includes plaintiff's own testimony and the testimony of other former cosmetics counter employees that they could have quickly and easily stood from a

seated position to greet customers who approached the counter had they been provided with a high stool or similar seating option. See, e.g., Tseng Decl. ¶ 3. As such, even if seats were available to them on the sales floor, plaintiff contends that cosmetics counter employees could still accomplish their primary goal of providing great service to customers who enter the store.

And considering defendant's other "fundamentals" of great customer service, plaintiff notes the factual disputes in the record as to how many of these daily tasks could be completed while seated. See Cummings Decl. Ex. A (describing, *inter alia*, greeting and approaching customers immediately, having strong product knowledge, being fashion experts, walking the shopping bag around the corner, and building relationships with their customers). This is particularly true with regards to a salesperson's duty to regularly contact customers by phone and email, tasks which plaintiff maintains could easily be completed while seated. See id. 136:15–137:13; 137:17–138:5. Plaintiff also notes that defendant's independent study does not confirm that employees could not provide great customer service while sitting. In plaintiff's view, it is not surprising that the consultant frequently observed defendant's employees "walking" and "standing," when no seats were ever provided to them. See Cummings Depo. 96:23–97:22; 131:1–17.

Conversely, plaintiff disputes whether standing leads to great customer service. For one, plaintiff notes a number of documented instances in the record where customers have complained about employees who are standing and yet inattentive. See Cummings Decl. Ex. D; Cummings Depo. 129:15–130:22. Additionally, plaintiff offers testimony from a number of former employees, including herself, that standing all day made cosmetics counter employees tired. See, e.g., Tseng Depo. 122:6–123:2; Loomis Decl. ¶ 6. And as defendant's witness testified, tired salespeople sell less than those who are well-rested. Cummings Depo. 147:4–20.

(b) Theft Deterrence

Defendant also maintains that cosmetics sales employees must be standing and mobile in order to engage in customers in a manner that will deter potential theft. DSUF 29–30. Defendant trains its employees that excellent customer service—which requires them to be standing and mobile—is the best theft deterrent. See Decl. of Debby Taylor ¶¶ 3–5; Ex. A ("Prevent shrinkage by providing.....Outstanding Customer Service!!!").

It is self-evident, in defendant's view, that people who are being watched are less likely to commit theft, so employees must constantly be moving around throughout the store to accomplish this task. If plaintiff had been seated at her cosmetics counter during her employment, defendant maintains that she would not have been able to see a substantial portion of the sales floor and could not have deterred potential theft as effectively. See, e.g., Decl. of Kristal Vasquez Ex. A (graphical depiction of the cosmetics counter layout where plaintiff was employed).

As with defendant's customer service rationale, plaintiff maintains that disputed issues of material fact exist as to whether cosmetics salespeople could not be seated while still preventing theft. For one, plaintiff notes the variety of other loss prevention techniques that defendant employs, and therefore maintains that the degree to which cosmetics counter employees must be standing to accomplish this overarching goal is disputed. See Depo. of Debby Taylor 30:6–10; 31:10–12; 32:21–33:12; 33:13–15; 34:16–35:3; Decl. of Debby Taylor Ex. A. More importantly, plaintiff maintains, if employees can in fact provide great customer service while seated, then they should also be able to effectively police and deter possible theft while seated, given the nexus between these two job requirements.

(c) Customer and Employee Safety

Defendant also maintains that it prohibits the use of chairs or seats in the cosmetics area to reduce the risk of injury to salespeople or customers. DSUF 31. Defendant's cosmetics counter areas are often busy and congested, as there are usually multiple employees scheduled to work behind a single counter. See DSUF 12–13; Tseng Depo. 58:18–21, 62:13–23. In addition, the cash wraps are located within a back counter space that would not permit employees to pass safely if a seat were provided. DSUF 31–32. In support of this contention, defendant notes the numerous instances where cosmetics employees have tripped on items left behind the cosmetics counters or cash wrap counters, although none of these items were chairs or other seating fixtures. See DSUF 32; Salus Decl. ¶¶ 10–19, Exs. C–E, H, I (incident reports). Accordingly, defendant instructs its employees not to place or leave objects on the floor that might be a trip hazard, which includes stools or other seating. Taylor Decl. ¶¶ 20–24. In fact, when plaintiff attempted to use a stool behind the counter area, she was immediately asked to remove it. Tseng Depo. 110:22–111:2. Defendant's policy is this regard is enforced by "safety auditors" that it sends into its stores, who are tasked with ensuring that there is

"no storage on [the] floor and inside of [cosmetic] bays." Salus Decl. ¶¶ 23–24, Ex. L and M.

In opposition, plaintiff notes the disputed evidence in the record as to whether there is adequate space for a stool to fit safely behind defendant's cosmetics counters, based upon the testimony of a number of former employees. See, e.g., Covington Decl. ¶ 8; Brilmeyer Decl. ¶ 8; Vakhil Decl. ¶ 9; Figueroa Decl. ¶ 8; Tseng Decl. ¶ 6. Furthermore, defendant offers chairs for customer use and does not deem these to be an unreasonable safety risk when used properly. Cummings Depo. 81:2–81:6; 140:14–141:24; Salus Depo. 49:19–51:25. Plaintiff also notes that defendant has never studied whether the provision of seats would increase or decrease injury, formally or informally, as defendant has never provided seats behind the cosmetics counter. Salus Depo. 35:24–36:25; 38:4–15. And there would be no safety risk to customers of stools that are placed behind the cosmetics counter, plaintiff maintains, as customers are not allowed in this area. Tseng Depo. 83:10–16; Salus Depo. 91:25–92:23. Finally, plaintiff offers evidence that providing seats would actually improve the health and safety of defendant's employees, for employees testify that continued standing can cause pain or various injuries. See, e.g., Costello Decl. ¶ 5; Tseng Decl. ¶ 4. As defendant's National Risk Control Manager testifies, standing during their shifts can make salespeople tired, and tired persons are more likely to injure themselves. Salus Depo. 72:20–73:6; 73:20–74:13; 95:22–96:25.

3. Defendant's Evidentiary Objections

Defendant objects to the sixteen declarants and their declarations that plaintiff submits in support of her opposition to defendant's motion, on the grounds that plaintiff failed to properly disclose these declarations to defendant.[5] Federal Rule of Civil Procedure 26 requires parties to disclose the names and contact information of individuals "likely to have discoverable information," and thereafter supplement these disclosures as necessary. The duty to supplement also applies to a party's responses to discovery requests. See Fed. R. Civ. P. 26(e). If a party does not provide information initially or timely update this information in accordance with Rule 26(a) or (e), "the party

[5] Plaintiff submitted her response to these evidentiary objections on March 21, 2013. Dkt. No. 118.

is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c). However, preclusion of the evidence is not required, particularly where preclusion of the evidence would result in dismissal of a claim. In that situation, a district court is required "to consider whether the claimed noncompliance involved willfulness, fault, or bad faith." R & R Sails, Inc. v. Ins. Co. of Pennsylvania, 673 F.3d 1240, 1247 (9th Cir. 2012). Whether preclusion is dispositive of an issue or not, a court may consider lesser sanctions, including whether a continuance of the motion would cure any prejudice to the defendant. See id.

Defendant claims that plaintiff did not disclose these potential witnesses, or the declarations they executed on plaintiff's behalf, until February 12, 2013. Declaration of Dominic Messiha ¶ 5.[6] Furthermore, five of these declarations were signed in 2012, and therefore plaintiff had ample opportunity to amend its disclosures and responses to defendant's discovery requests. Defendant argues that this late-disclosure caused it "significant[] prejudice," since defendant did not have the benefit of this information for discovery or to draft its motion for summary judgment, and only now is defendant able address these declarations in its reply. Moreover, even if the Court declines to exclude these declarations under Rule 37(c), defendant argues that these declarations are largely irrelevant, comprised of legal conclusions, hearsay, opinion, and unsupported conjecture, or are not based on personal knowledge.

The Court concludes, in its discretion, that the sixteen declarations at issue may be properly considered on this motion. First, at the hearing, defendant did not request that the Court defer ruling on this motion to provide defendant with additional time to address plaintiff's recently disclosed evidence. Moreover, the Court fails to see how defendant suffered any prejudice. Because fact discovery remains ongoing until September 27, 2013, defendant will have ample time to conduct further discovery related to these new witnesses. Both parties are admonished to comply with their disclosure obligations.

[6] In response, plaintiff notes that defendant did not disclose some of its potential witnesses until December 28, 2012 and January 7, 2013, shortly before filing its motion for summary judgment. See Pl.'s Opp'n to Mot. to Strike and Response to Evidentiary Objections at 3.

Some of defendant's more specific objections have merit, but the majority of these objections go to the weight of the evidence and do not mandate outright exclusion. Defendant is correct that the most relevant evidence is that which describes the nature of plaintiff's work, not the work of other cosmetics counter employees, at the particular Nordstrom's stores where plaintiff worked. This includes both the tasks plaintiff was required to perform and the physical space in which these tasks were performed. However, to the extent that plaintiff's evidence demonstrates that cosmetics counter employees at other Nordstrom's stores had similar or identical duties, or that the physical layout of the cosmetics counters was similar, this evidence bears some relevance to plaintiff's case here. Similar to plaintiff, defendant also offers the declarations of a number of cosmetic counter employees in support of its contentions.

Furthermore, the Court rejects defendant's argument that plaintiff's or other declarant's testimony about whether the nature of their work permitted seating, based on their experience actually performing the work, is irrelevant. As much as Nordstrom's is entitled to present its view as to why standing is required based upon the nature of the cosmetics salesperson's work, plaintiff may offer her view as to why standing is not required, based upon the tasks she actually performed at her job. Plaintiff's, defendant's, and third-party percipient witnesses' observations, based on their personal knowledge and experience, are all relevant to this determination. Ultimately, however, the subjective beliefs of the parties do not inform the outcome of this motion.[7]

4. Analysis

Defendant argues that summary judgment should be granted in its favor for three principal reasons. First, defendant argues that, as a general matter, the nature of retail sales work does not reasonably permit an employee to sit. Second, according to

[7] The Court also overrules defendant's objection to plaintiff's declaration on the grounds that she contradicts statements made at her deposition. Any claimed inconsistencies between a party's deposition testimony and affidavit "must be clear and unambiguous to justify striking the affidavit." Van Asdale v. Int'l Game Tech., 577 F.3d 989, 999 (9th Cir. 2009). Having reviewed the relevant exhibits, the Court finds no such inconsistency here; plaintiff may permissibly elaborate on or explain previous testimony without contradicting it.

defendant, the undisputed evidence in this case supports a finding that defendant's cosmetics employees must be standing and mobile to adequately perform their job duties. In particular, defendant expects employees to be standing to provide "excellent customer service"; employees who are standing help "deter theft"; and prohibiting seats on the sales floor helps avoid employee and customer injuries. Third, even assuming plaintiff could sit while performing some of her job tasks, defendant contends that the proper inquiry is whether the nature of plaintiff's work as a whole reasonably permits her to sit.

In opposition, plaintiff argues summary adjudication of her claim is inappropriate for three principal reasons. First, retail sales work is not exempt from the requirements of section 14(A) of the Wage Order, plaintiff contends, because the Order does not create any such exceptions. Second, plaintiff notes that disputed issues of fact pervade the record as to whether the nature of plaintiff's work permits the use of seats. Third, defendant's reasonable business judgment does not control, plaintiff avers, and even if considered, disputed issues of fact exist as to whether any of defendant's rationales are sufficient to demonstrate that seating was not required.

After considering the parties' arguments and evidence, the Court concludes that disputed issues of material fact pervade the fundamental issue in this case: namely, whether the nature of plaintiff's work as a cosmetics counter employee reasonably permitted the use of a seat. This totality of the circumstances inquiry under the admittedly broad mandate of the Wage Order is not readily susceptible to resolution on summary judgment. Among other details, section 14(A) is silent as to "what portion of the work may be accomplished in a seated position such that an employer is required to provide its employees with seats," or how to weigh the various forms of evidence an employer and employee may present. Murphy v. Target Corp., No. 09-cv-1436, at 3–4 (S.D. Cal. 2012) (Order Denying Defendant's Motion for Summary Judgment). Contrary to defendant's argument, the business judgment rule does not serve as a "tiebreaker" in such a situation, particularly where the reasonableness of that judgment is itself in dispute.

Despite the factual inquiries mandated under section 14(A), defendant contends that DSLE and IWC opinion letters from 1986 and 1987, respectively, interpret this section of the Wage Order to not apply to salespersons in the mercantile industry. See Def.'s RJN Ex. 3, DLSE Opinion Letter 12.05.1986 (stating that this section "was not intended to cover positions where the duties require employees to be on their feet" and

that "[h]istorically and traditionally, salespersons have been expected to be in a position to greet customers and move freely throughout the store to answer questions and assist customer with their purchases"); Ex. 2 (IWC Opinion Letter 01.13.1987). While these opinions are entitled to deference, the Court notes that these opinions were rendered over thirty years ago, and fail to address the precise factual situation at issue in this case. See Garvey, 2012 WL 1231803, at *2; Echavez, 2012 WL 2861348, at *8. The fact-intensive nature of the inquiry is further confirmed by more recent guidance from the DLSE, discussed previously, which defendant cites to extensively. See Def.'s RJN Ex. 5. As such, the weight of these opinion letters alone is insufficient to overcome the numerous triable issues of fact in the record.

Moreover, defendant has not demonstrated as a matter of law that its employees could not reasonably be provided with seating on the sales floor while still performing their duties, as defendant's reasonable business judgment is but one input into the section 14(A) inquiry. First, as described in detail above, plaintiff offers evidence that defendant's employees could potentially be seated while still providing excellent customer service. In light of the conflicts in the record as to whether a salesperson could effectively greet and assist new customers who entered the store, for example, the Court cannot decide as a matter of law that providing some sort of seat in the cosmetics sales area would be unreasonable. While defendant offers evidence that employees who are standing provide excellent customer service, plaintiff offers evidence that employees who are seated could also provide excellent service to customers, aligned with the multiple dimensions of customer service that defendant identifies. Nothing in defendant's evidence demonstrates as a matter of law that its cosmetics counter employees could not walk customers through the store, to the cash wrap, and to their cars, while still having a seat available to these employees while they performed tasks like emailing and calling customers. For this reason alone, summary adjudication is not warranted.

Second, genuine disputes of material fact exist as to whether providing seating would impede loss protection. Again, defendant presents evidence that having employees stand assists in preventing theft, but plaintiff offers evidence that employees could potentially deter theft from a seated position. Third, genuine disputes of material fact exist as to whether employees could safely work behind and around the cosmetics counter if some sort of seating was made available to cosmetics counter employees. Plaintiff's testimony is that she could have still performed her job duties safely if a seat were made available to her at any of the three stores where she worked; defendant's witnesses testify

that a seat could not be reasonably and safely provided. The Court is unable to resolve these factual disputes without weighing the evidence submitted by the parties, which the Court cannot do on this motion.

Accordingly, in light of the totality of the evidence in the record, the Court denies defendant's motion for summary judgment. Disputed issues of material fact exist as to whether the nature of plaintiff's work as a cosmetics counter employee reasonably allowed for the use of a seat, such that defendant had a duty under California law to provide her one.

C. Constitutionality of PAGA

Defendant's final argument is one the Court has already considered and rejected in this case: that PAGA is unconstitutional as applied to defendant here. As the Court noted in its prior order denying defendant's motion for judgment on the pleadings, "constitutional challenges to PAGA have been uniformly rejected." Dkt. No. 47 (citing Kilby, 2012 WL 1969284, at *2 n. 2). Defendant offers no sound reason for the Court to revisit this conclusion on this motion, and therefore the Court declines to do so.

Defendant's new constitutional argument—that as a matter of law, "retroactive" application of section 14(A) of the Wage Order would violate its Due Process rights—is also unavailing. The Wage Order itself has been in existence since 1976. See Echavez, 2012 WL 2861348, at *8. Therefore, citation to DLSE and IWC Opinion letters from 1986 and 1987, which are not controlling legal interpretations of the seating requirement in any event, does not change the analysis on this motion. Accordingly, defendant's motion for summary judgment on this basis is denied.

V. CONCLUSION

In accordance with the foregoing, defendant's motion for summary judgment is hereby DENIED.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 11-8471-CAS (MRWx)	Date	March 25, 2013
Title	JESSIKA TSENG V. NORDSTROM, INC.		

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