

From: Don Drinko
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Gallagher Sharp Shop Talk: Workers' Compensation

This week, we will be taking a look at a case recently decided by the Second District Court of Appeals in California, one involving the application of its Labor Code and the requirement that California workers be provided "suitable seating."

In *Bright v. 99¢ Only Stores* (2010), 189 Cal. App. 4th 1472, an employee brought suit seeking class action status and for civil penalties alleging that the employer failed to provide its employees "suitable seating" as required by a California regulation. In California, the Labor Code established the "Private Attorneys General Act of 2004," which allows employees to bring suit against their employer and seeks civil penalties for a failure to comply with the employment regulations, some of which are rather stringent. The regulation in question in *Bright* states, in part, that "[a]ll working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats." The regulation also requires that an adequate number of seats be provided. At the trial court level, the employer moved to dismiss, arguing that civil penalties were not available for this type of violation, and the trial court agreed, prompting an appeal.

The Second District Court of Appeals reversed, finding that an employee may pursue civil penalties for violating the "suitable seating" requirement based upon the plain meaning of the regulation. The court also found that the employer could be liable for civil damages of \$100 for each aggrieved employee per pay period for the initial violation, and \$200 for each employee for each subsequent violation of the "suitable seating" provision. Considering the size of the workforce of many large retailers, it is easy to see that millions of dollars could be at stake, if the employer is found liable for failing to provide "suitable seating." Interestingly, the regulation does not seem to define "suitable seating" and the court's opinion did not discuss this issue as it was not determinative of the motion to dismiss. However, *Bright* alleged that the employer did not provide its cashiers with any seats, therefore, it may amount to a violation regardless of how one would define "suitable." On February 16, 2011, the Supreme Court of California denied further review.

This case may be of a type that exists only in California. However, this case demonstrates how even seemingly innocuous regulations can have a serious economic effect. Ohio does impose "specific safety requirements" in the Administrative Code, but these regulations do not govern "suitable seating," or at least not yet.

Finally, I would like to thank all of those that attended Gallagher Sharp's 27th Annual Spring Seminar this past Friday, June 3. If you would like to attend next year's event, please drop me a line. If you have any specific questions, or would like to discuss this or any other workers' compensation issues, you can contact me or Adam Sadowski from our Toledo office.

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