



# Employment Law Bulletin

September 2018

**Want to appeal a decision by the Labor Commissioner? Think again.**

Last month, California law firm Danko Meredith, PC (Danko) learned the hard way that appealing an award to a former employee by the Labor Commissioner can be very risky and extraordinarily costly. In a decision called *Nishiki v. Danko Meredith APC*, the First District Court of Appeal reminded employers of their obligations under California law when an employee resigns without notice. Specifically, the Labor Code requires employers to pay all wages within 72 hours of the resignation. If an employer fails to do so, the employee's wages continue as a penalty for up to 30 days until the wages are paid (a.k.a. waiting time penalties). In *Nishiki*, the Court addressed the timeliness of the final paycheck and the associated waiting time penalties under this rule as well as whether an employee can recover attorney's fees on appeal.

## **The Facts**

Taryn Nishiki (Nishiki) was employed as an office manager and paralegal by Danko. On the evening of Friday, November 14, Nishiki resigned from her position by sending out an email to the firm's partners after the firm has closed for business. The following Tuesday, Danko mailed Nishiki her final paycheck. Unfortunately, the check contained a clerical error in that it had the correct amount of wages listed in numbers, but the wrong amount reflected in written format. The written amount reflected an underpayment of \$80. Nishiki was unable to cash the check as a result of the error and informed Danko of the situation on November 26. Instead of immediately fixing the problem, Danko told Nishiki that they could not confirm her inability to cash the check. When Nishiki again reiterated that she was not able to cash the check and had no way to confirm her inability to do so, Danko gave her the option of returning the original check for a replacement or keeping the original and getting a second check for \$80. Nishiki mailed the original check back and received a replacement check on December 5.

### **The Labor Commissioner's Decision**

Nishiki subsequently filed a complaint with the Labor Commissioner demanding \$7,500 in unpaid wages and penalties, which included claims for unpaid vacation, missed rest breaks, and waiting time penalties. The Labor Commissioner ultimately denied Nishiki's claims for unpaid vacation and rest breaks but awarded \$4,250 in waiting time penalties for the 17 days Nishiki had to wait to get the corrected final paycheck. Danko appealed the decision. In hindsight, this strategy was ill considered considering that Section 98.2 of the Labor Code allows for an award of attorney's fees against the party who appeals a decision by the Labor Commissioner if that party is unsuccessful in the appeal. Under that section, an employee must only recover an amount greater than zero to be deemed the successful party on appeal, making the employer's threshold for success low and the riskiness of the employer's appeal high.

### **The Appeal**

In considering Nishiki's claims, the Court of Appeal reduced the waiting time penalties to \$2,250 (only 9 days instead of 17), but it granted Nishiki's request for attorney's fees under Labor Code section 98.2(c) in the amount of **\$86,160 plus costs!** As for the reduction in waiting time penalties, the court found that the clerical error did not amount to a willful withholding of final pay. However, the firm was in violation of the law when it did not immediately fix the problematic check after receiving notice of the problem from Nishiki, so waiting time penalties were ordered from the date of notice until the corrected check was mailed.

### **The Take Aways**

So what are the take aways from *Nishiki*? First, any clerical errors related to the method of payment should be fixed immediately upon notice of the error in order to avoid waiting time penalties. Second and just as important, employers should think very carefully before appealing a Labor Commissioner award, the end result could easily end up costing tens of thousands more than the original award!

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