

# Management Alert



## Delay in Correcting Paycheck Clerical Error Leads to Large Fee Award

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**Seyfarth Synopsis:** An employer did not incur waiting time penalties for inadvertently misstating the amount of pay on a final paycheck, but was liable for its delay in correcting the error. And, by taking an appeal from a Labor Commission award, the employer incurred liability for large attorney's fees even though the employee succeeded on only one small claim.

### The Facts

Taryn Nishiki was an office manager and paralegal at a law firm. She resigned via email at 6:38 p.m. on Friday, November 14. On Tuesday, November 18, the firm mailed her final paycheck. The numerical information on the check was right, but the spelling of the number understated the amount by \$80. Eight days later, on Wednesday, November 26, Nishiki reported she could not cash the check, because of this inconsistency. The firm responded that it could not confirm the error because no check had been refused or returned. The next Monday, December 1, the firm told Nishiki she could either return the check to the office for a replacement check, or she could keep the check and the firm would issue her a second check for \$80. Nishiki mailed the check back, and the firm mailed her a corrected check on Friday, December 5—21 days after her notice of resignation.

### The Labor Commissioner's Decision

Nishiki filed a complaint with the Labor Commissioner for unpaid vacation wages, rest period premiums, and waiting time penalties in the amount of \$7,500. The hearing officer denied the claim for unpaid vacation wages and rest premiums, but found the firm liable for \$4,250 in waiting time penalties for the seventeen days that elapsed between its mailing of the first check and its mailing of the corrected check.

### The Trial Court Decision

The law firm appealed the Labor Commissioner's decision to the Superior Court. The trial court awarded Nishiki seventeen days of waiting time penalties. She then moved for attorney's fees under Labor Code section 98.2(c), which the court awarded in the amount of \$86,160. The law firm appealed from the judgment.

## The Appellate Court Decision

On August 1, 2018, the Court of Appeal reduced the waiting time penalties to \$2,250 for nine days, but affirmed the fee award in full. *Nishiki v. Danko Meredith, APC*.

The Court of Appeal determined that the 72 hours that Labor Code section 202 allows to pay wages upon notice of a resignation did not begin to run when Nishiki sent her resignation email after business hours on Friday. The Court of Appeal reasoned that holding the firm liable for failing to tender final pay within 72 hours would contravene the statute's clear intent to provide an employer with a reasonable time to pay an employee who quits with no prior notice, because a literal reading of the statute would only have given the firm one business day to pay Nishiki. The Court of Appeal had no need to decide exactly when the 72-hour period began, however, since the original check was timely whether the period started the day after receipt of the resignation email (Saturday) or the next business day (Monday).

Further, the Court of Appeal concluded that the firm did not willfully withhold wages when it tendered the first check, because there was no evidence that the firm knew of the inconsistency on the check created by the clerical error. But, because the firm failed to immediately correct the error upon being notified, the Court of Appeal determined that wages were willfully withheld from the day the firm had notice of the error to the day it mailed a corrected check.

As to attorney's fees, the Court of Appeal rejected the firm's argument that the award should be reduced to reflect only the claims on which Nishiki prevailed. The Court of Appeal reasoned that Labor Code section 98.2(c) is not a prevailing-party fee provision, but rather is a one-way fee-shifting provision, designed to discourage employer appeals from Labor Commissioner awards: the employee may recover fees if the court awards *any* amount greater than zero. Consequently, the Court of Appeal affirmed the full fee award of \$86,160 for all the hours Nishiki's attorney had worked, and also upheld the trial court's application of a 1.5 multiplier. Nishiki was also entitled to recover her costs on appeal.

## What *Nishiki* Means for Employers

Although employers now know that they need not worry about being forced into "untimely" payment of final wages by strategically timed surprise resignations, they should make every effort to pay those wages within 72 hours, as it remains an open question exactly when the 72-hour clock begins to run.

More significantly, employers should be aware that appealing a Labor Commissioner award is fraught with financial risk, and can create liability far greater than that created by the award itself. This grim reality should factor into any analysis of whether to appeal a matter that has been wrongly decided in favor of an employee.

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**Seyfarth Shaw LLP Management Alert | August 9, 2018**

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