

Case No. S

518 821

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

Anthony Kirby et al.,

Plaintiffs, Appellant and Petitioners

vs.

Immoos Fire Protection, Inc.,

Defendant and Respondents

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CLERK SUPREME COURT

Petition for Review of a Decision of the Court of Appeal,
Third Appellate District Case No. C062306

REQUEST FOR JUDICIAL NOTICE

LAW OFFICES OF ELLYN MOSCOWITZ, P.C.

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**ATTORNEYS FOR PLAINTIFFS, APPELLANTS AND PETITIONERS
ANTHONY KIRBY AND RICK LEECH, JR.**

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ANTHONY KIRBY AND RICK LEECH, JR.

INTRODUCTION

Pursuant to Rule 8.252 of the California Rules of Court and California Evidence Code sections 452 and 459, Petitioners Anthony Kirby and Rick Leech (“Petitioners”) respectfully request that this Court take judicial notice of the following documents:

Exhibit A: *California Court Empowers Employers to Collect*

Attorney’s Fees From Unsuccessful Claimants for Unpaid Wages or Missed Breaks, VENABLE LLP LAB. & EMP.

ALERT, Aug. 2010, *available at*

[http://www.venable.com/files/Publication/b01a758e-811b-4b13-81c3-](http://www.venable.com/files/Publication/b01a758e-811b-4b13-81c3-3695db91e8ea/Presentation/PublicationAttachment/d978b1b5-6ec3-41f2-b0bd-4332bf8d05b4/L-E_Alert_California_8-10.pdf)

[3695db91e8ea/Presentation/PublicationAttachment/d978b1b5-6ec3-41f2-b0bd-4332bf8d05b4/L-](http://www.venable.com/files/Publication/b01a758e-811b-4b13-81c3-3695db91e8ea/Presentation/PublicationAttachment/d978b1b5-6ec3-41f2-b0bd-4332bf8d05b4/L-E_Alert_California_8-10.pdf)

[E_Alert_California_8-10.pdf](http://www.venable.com/files/Publication/b01a758e-811b-4b13-81c3-3695db91e8ea/Presentation/PublicationAttachment/d978b1b5-6ec3-41f2-b0bd-4332bf8d05b4/L-E_Alert_California_8-10.pdf)

Exhibit B: *Wage & Hour Update: Court Awards Attorney Fees To*

Prevailing Employer In Wage Claim Lawsuit, BARKER

OLMSTED & BARNIER, APLC LEGAL UPDATE, Aug. 2010,

available at [http://www.barkerolmsted.com/news/legal-](http://www.barkerolmsted.com/news/legal-updates/newsletter0185.php)

[updates/newsletter0185.php](http://www.barkerolmsted.com/news/legal-updates/newsletter0185.php)

Exhibit C: Posting of Robin E. Weideman, Attorneys’ Fees Properly

Awarded to Prevailing Employer in Wage Case, to

<http://www.callaborlaw.com/archives/283216-print.html>

(Aug. 3, 2010 7:38 PM).

Exhibit D: Kathy Robertson, *Employees Ordered to Pay Attorney’s*

Fees, SACTO. BUS. JOURNAL, Jul. 29, 2010, *available at*

<http://sacramento.bizjournals.com/sacramento/stories/2010/07/26/daily66.html>

Exhibit E: Posting of Garrett V. Jensen, Employees May Be Liable for an Employer's Attorneys' Fees Incurred in Successfully Defending Meal, to <http://www.wzllp.com/blog/?post=16> (Aug. 10, 2010 3:09).

Exhibit F: Posting of Robert Nudleman, Prevailing Employer in Meal/Rest Break Suit Entitled to Attorneys' Fees, to <http://blog.griegolaw.com/2010/07/28/prevailing-employer-in-mealrest-break-suit-entitled-to-attorneys-fees/> (Jul. 28, 2010).

Exhibit G: *Recovery of Attorney's Fees in Wage Claims: California Court of Appeal Strengthens Prevailing Employers' Claims for Attorney's Fees In Actions For Unpaid Wages And Benefits*, SEYFARTH SHAW LLP ONE MINUTE MEMO, Aug. 5, 2010, available at http://www.seyfarth.com/index.cfm/fuseaction/publications.publications_detail/object_id/c5a4a669-ef20-4472-bce2-4c269df46ca1/RecoveryofAttorneysFeesinWageClaimsCaliforniaCourtofAppealStrengthensPrevailingEmployersClaimsforAttorneysFeesinActionsforUnpaidWagesandBenefits.cfm

Exhibit H: Special Fee Shifting Provisions: Third District Romps Around The Labor Code's Bases For Recovery Of Attorney's Fees,

<http://www.calattorneysfees.com/2010/07/special-fee-shifting-provisions-third-district-romps-around-the-labor-codes-bases-for-recovery-of-attorneys-fees.html> (Jul.27, 2010 10:24 PM).

Exhibit I: Court of Appeal Affirms Section 218.5 Attorney Fee Award to Defendant,

http://cawageandhourlaw.blogspot.com/2010/07/court-of-appeal-affirms-section-2185.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+cawageandhourlaw+%28California+Wage+and+Hour+Law+for+Employees%29 (Aug. 10, 2010 9:52 AM).

True and correct copies of Exhibits A-I are attached. (See Declaration of Ellyn Moscovitz).

ARGUMENT

I. THIS COURT SHOULD JUDICIALLY NOTICE EXHIBITS A-I, NEWS AND LEGAL INDUSTRY ARTICLES REPORTING ON EMPOWERING EMPLOYERS TO COLLECT ATTORNEY'S FEES FROM EMPLOYEES.

Petitioners request that this Court take judicial notice of Exhibits A-I. These exhibits should be judicially noticed under California Evidence Code, §452 (h).

Exhibits A, B, and G are newsletters issued by counsel for employers relevant to this case in that they demonstrate that the Court of Appeal's decision is now in the employers' arsenal to be used against workers who seek redress for violations of Section 226.7.

Exhibits C, E, and F are blogs written by employers' attorneys after the Court of Appeal's decision, relevant to this case in that they show positive developments for employers, providing a precedent for an award of attorney's fees in actions for *meal* periods.

Exhibit D is an article in a business journal, regarding the same precedential developments in actions for *meal* periods.

Exhibits H and I are blogs written by practitioners in the attorney's fees and wage and hour fields, regarding the impact of the Court of Appeal's decision on their fields of expertise.

Judicial notice of Exhibits A-I is appropriate and may be considered by this Court for persuasive value. (*Seelig v. Infinity Broadcasting Corp., et al.* 97 Cal. App.4th 798, 808, (2002) fn. 5 [“[D]efendants ask this court to take judicial notice of news articles... [w]e grant the request, exercising our discretion to judicially notice matters that were subject to discretionary judicial notice”]; *Hurvitz v. Hoefflin, et al.* 84 Cal. App .4th 1232, 1235 (2000) fn. 1 [Court can take judicial notice of the content of what has been reported in news articles]. These exhibits are paramount to understand the impact that the Court of Appeal's decision has had on the wage and hour arena, and the misinterpretation of California's public policy concerning

workers and minimum labor standards, such as rest periods and meal periods.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court take judicial notice of Exhibits A-I.

Dated: August 26, 2010.

Respectfully submitted,

LAW OFFICES OF
ELLYN MOSCOWITZ, P.C.

A handwritten signature in cursive script, appearing to read "Ellyn Moscovitz", is written over a horizontal line.

Ellyn Moscovitz

Jennifer Lai

Attorneys for Petitioners

DECLARATION OF ELLYN MOSCOWITZ

I, Ellyn Moscowitz, declare as follows:

1. I am an attorney licensed to practice before this Court. I am an attorney of record for Petitioners Anthony Kirby and Rick Leech, in the above-captioned action. I have personal knowledge of the facts stated herein, and if called as a witness I would testify competently thereto.
2. I make this declaration in support of the attached Request for Judicial Notice.
3. Attached as Exhibit A is a true and correct copy of *California Court Empowers Employers to Collect Attorney's Fees From Unsuccessful Claimants for Unpaid Wages or Missed Breaks*, VENABLE LLP LAB. & EMP. ALERT, Aug. 2010, available at http://www.venable.com/files/Publication/b01a758e-811b-4b13-81c3-3695db91e8ea/Presentation/PublicationAttachment/d978b1b5-6ec3-41f2-b0bd-4332bf8d05b4/L-E_Alert_California_8-10.pdf
4. Attached as Exhibit B is a true and correct copy of *Wage & Hour Update: Court Awards Attorney Fees To Prevailing Employer In Wage Claim Lawsuit*, BARKER OLMSTED & BARNIER, APLC LEGAL UPDATE, Aug. 2010, available at <http://www.barkerolmsted.com/news/legal-updates/newsletter0185.php>
5. Attached as Exhibit C is a true and correct copy of Posting of Robin E. Weideman, Attorneys' Fees Properly Awarded to

Prevailing Employer in Wage Case, to
<http://www.callaborlaw.com/archives/283216-print.html> (Aug. 3,
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6. Attached as Exhibit D is a true and correct copy of Kathy Robertson, *Employees Ordered to Pay Attorney's Fees*, SACTO. BUS. JOURNAL, Jul. 29, 2010, available at
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<http://www.wzllp.com/blog/?post=16> (Aug. 10, 2010 3:09).

8. Attached as Exhibit F is a true and correct copy of Posting of Robert Nudleman, *Prevailing Employer in Meal/Rest Break Suit Entitled to Attorneys' Fees*, to
<http://blog.griegolaw.com/2010/07/28/prevailing-employer-in-mealrest-break-suit-entitled-to-attorneys-fees/> (Jul. 28, 2010).

9. Attached as Exhibit G is a true and correct copy of *Recovery of Attorney's Fees in Wage Claims: California Court of Appeal Strengthens Prevailing Employers' Claims for Attorney's Fees In Actions For Unpaid Wages And Benefits*, SEYFARTH SHAW LLP ONE MINUTE MEMO, Aug. 5, 2010, available at
http://www.seyfarth.com/index.cfm/fuseaction/publications.publications_detail/object_id/c5a4a669-ef20-4472-bce2-4c269df46ca1/RecoveryofAttorneysFeesinWageClaimsCaliforniaCo

urtofAppealStrengthensPrevailingEmployersClaimsforAttorneysFees
inActionsforUnpaidWagesandBenefits.cfm

10. Attached as Exhibit H is a true and correct copy of Special Fee Shifting Provisions: Third District Romps Around The Labor Code's Bases For Recovery Of Attorney's Fees,

<http://www.calattorneysfees.com/2010/07/special-fee-shifting-provisions-third-district-romps-around-the-labor-codes-bases-for-recovery-of-attorneys-fees.html> (Jul.27, 2010 10:24 PM).

11. Attached as Exhibit I is a true and correct copy of Court of Appeal Affirms Section 218.5 Attorney Fee Award to Defendant, [http://cawageandhourlaw.blogspot.com/2010/07/court-of-appeal-affirms-section-](http://cawageandhourlaw.blogspot.com/2010/07/court-of-appeal-affirms-section-2185.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+cawageandhourlaw+%28California+Wage+and+Hour+Law+for+Employees%29)

[2185.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+cawageandhourlaw+%28California+Wage+and+Hour+Law+for+Employees%29](http://cawageandhourlaw.blogspot.com/2010/07/court-of-appeal-affirms-section-2185.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+cawageandhourlaw+%28California+Wage+and+Hour+Law+for+Employees%29) (Aug. 10, 2010 9:52 AM).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed in Oakland, California, on August 26, 2010.



Ellyn Moscovitz

EXHIBIT A



Please contact any of the attorneys in our Labor and Employment if you have any questions regarding Alert.

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California Court Empowers Employers To Collect Attorneys' Fees From Unsuccessful Claimants For Unpaid Wages or Missed Breaks

In California, employees have been able to assert claims for unpaid wages without any consequences for an unsuccessful – or even frivolous – claim. Employees often extracted settlements from employers who knew that they would have to spend more money fighting a claim than paying it outright. Worse yet, if an employer lost, not only would it have to pay the judgment, it would be required to pay its own lawyer, as well as the employee's lawyer. This menu of bad choices frequently resulted in the payment of money to undeserving former employee claimants.

A recent decision by the California Court of Appeal has dramatically changed this landscape and created a gateway for employers to recover attorneys' fees from employees who do not prevail on claims for unpaid wages. In *Kirby v. Immoos Fire Protection, Inc.* (Cal. Ct. of Appeal July 27, 2010), the Court held that an employer is entitled to its attorneys' fees when it prevails on a claim for missed breaks or unpaid wages (other than minimum wage or overtime). This development should make an employee think twice before filing such a claim.

Factual Background

The plaintiffs in *Kirby* were two former employees who sued their employer for failure to pay all wages at each pay period and at discharge, failure to pay overtime wages, and failure to provide rest periods. Plaintiffs moved for class certification, which the trial court denied. In the subsequent month, plaintiffs dismissed the entire action with prejudice against all parties. Following dismissal, the employer moved to recover its attorneys' fees from plaintiffs under Cal. Labor Code § 218.5. The trial court granted the employer's motion for attorneys' fees and awarded it \$49,846.05. Plaintiffs appealed.

Fee-Shifting Under Cal. Labor Code 218.5

At issue in *Kirby* was Cal. Labor Code § 218.5's fee-shifting provision, which provides that in an "action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the court shall award reasonable attorneys' fees and costs to the prevailing party. . . ." Section 218.5, however, contains a carve-out exception for "an action for which attorneys' fees are recoverable under Section 1194". Section 1194 is a unilateral fee-shifting provision that entitles only employees to recover attorneys' fees and costs against employers. Thus, § 218.5 does not apply to claims for unpaid overtime wages and a failure to pay the minimum wage.

The central issue on appeal was whether the employer's attorneys' fees were recoverable under § 218.5. The court held that the employer may recover attorneys' fees for successfully defending against individual causes of action alleging nonpayment of wages, fringe benefits, or contributions to health, welfare and pension funds under the fee-shifting provisions of § 218.5. Even if a complaint also alleges failure to pay minimum wage and unpaid overtime wages under § 1194, an employer that prevails on other causes of action for nonpayment of regular wages is still entitled to its attorneys' fees. The court expressly found that this entitled employers to attorneys' fees for prevailing on causes of action for missed meal breaks or rest breaks.

Future Implications for Employers

California employers are no longer subject to claims for unpaid wages and missed breaks without any firepower of their own. Most importantly, employees no longer get a "free whack" to see if their claim for allegedly unpaid wages will force a settlement, because employees no longer have nothing to lose by filing such a claim. Now, employers can credibly threaten to obtain a sizable judgment against employees that should cause them to abandon frivolous or weak wage claims. Although many such awards may not ultimately become collectible in full, the prospect of such a recovery materially swings the balance of power in disputes over unpaid wages and missed breaks and gives employers important leverage that they should use wisely.

For any questions regarding how this case may affect your business, or to learn more about labor and employment claims applicable under Cal. Labor Code §§ 218.5 and 1194, please contact partner Daniel Chammas or associate Christin Kim of Venable's Labor and Employment group in Los Angeles.

If you have friends or colleagues who would find this alert useful, please invite them to subscribe at www.Venable.com/subscriptioncenter.

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EXHIBIT B

Wage & Hour Update: Court Awards Attorney Fees To Prevailing Employer In Wage Claim Lawsuit

Litigation can be a losing proposition even for employers with strong defenses, what with legal fees and other costs. Many employment laws entitle the winning employee to recover fees, but do not provide the same remedy for winning employers. But there are a few exceptions. A recent California appellate court case titled *Kirby v. Immoos* examined one such exception in the context of a Labor Code claim for wages.

Anthony Kirby and Rick Leech, Jr. sued their employer, Immoos Fire Protection, Inc. for violating various California labor laws as well as the unfair competition law (Cal. Bus. & Prof. Code, § 17200 et seq.). Immoos successfully defended against allegations of labor law violations brought by two former employees. The court subsequently awarded \$49,846.05 in attorney's fees to Immoos for its defense of causes of action for failure to pay

wages due and failure to provide rest periods. The court awarded fees under Labor Code section 218.5.

So far so good, but the employees appealed. They argued that the employer was not entitled to collect attorney fees, because they had also sued under other Labor Code sections barring employer attorney fees, and those sections, they argued, trumped Section 218.5.

When Can An Employer Recover Attorney Fees?

Generally, a party may recover attorney's fees only when a statute or agreement of the parties provides for fee shifting. Typically in the employment context there are no written agreements calling for attorney fees in the event of a legal dispute. For the most part, attorney fees are awarded in lawsuits involving statutes that provide for an award of fees.

For example, the Fair Employment and Housing Act (FEHA) provides that the prevailing employee may recover attorney fees. The California Labor Code also provides that prevailing employees may recover attorney fees. Labor Code Section 1194 permits the winning employee to recover attorney fees for

overtime and minimum wage claims. However, that section does not allow a prevailing employer to recover fees.

For the most part, winning employers don't recover attorney fees, but there are exceptions. Labor Code Section 218.5 provides for fee shifting in favor of the party that prevails on a claim for unpaid wages and specified benefits. Unlike overtime/minimum wage claims under Section 1194, which allows only employees to recover attorney fees, Section 218.5 allows the winning employee or employer to recover fees.

Immoos relied on Section 218.5 when it applied for recovery of its fees. It argued that the employees had made unsuccessful claims for unpaid wages and rest period penalties, and Section 218.5, rather than 1194 applied.

Attempting to avoid the attorney fees, the employees argued that while their lawsuit sought unpaid wages, it also sought overtime pay. They argued that therefore the attorney fee rules in Section 1194 should cover all claims in the case.

The appellate court rejected the employees' argument. It ruled that Section 1194 applies only



Generally, a party may recover attorney's fees only when a statute or agreement of the parties provides for fee shifting.



(Continued from page 2)

able to document infractions. An employee will be hard pressed to refute the record at the EDD hearing.

Wage and Hour Update: Employer Beats Hyper-technical Wage Statement Class Action



The California Labor Code is very specific about what information must be included on an employee's wage statement (paystub) must be included on an employee's wage statement (paystub).

The California Labor Code is very specific about what information must be included on an employee's wage statement (paystub). Employee-side attorneys often sue employers over technical violations of this rule. For example, an employer is required to list the "total hours worked" during the pay period—but is it sufficient to list the total regular hours and the total overtime hours, or must the employer also list the total combined hours? Such issues are grist for the employment law litigation mill. A California court recently addressed this issue in a case titled *Morgan v. United Retail*.

Lawyers Seek A Payday Off Of Employee Paystubs

(Continued from page 3)
to causes of action for minimum wage and overtime. If an employee loses on a minimum wage or overtime cause of action, the employer cannot recover fees. However, if the employee loses on an unpaid wage or rest period claim, the employer can in fact recover its fees from the employee.

Some accounting was in order to determine exactly how much fees should be awarded to the

Mr. Morgan was employed by United Retail as a non-exempt co-manager from about October to November 2005. During this time, United Retail issued to each non-exempt California employee a weekly itemized wage statement that included information regarding the employee's hours worked, wages earned, rates of pay, deductions from pay, and other similar topics.

For employees who did not work any overtime hours during the pay period, their wage statements listed the total regular hours worked by the employee, which equaled the total number of hours worked.

For employees who worked overtime hours during the pay period,

their wage statements separately listed the total regular hours worked and the total overtime hours worked by the employee. However, the statements did not add the regular and overtime hours together and list the sum of those hours in a separate line.

Morgan filed a class action complaint against United Retail for violation of various wage and hour laws, including a statutory claim for violation of section 226. Morgan alleged that United Retail's wage statements failed to comply with the requirements of section 226 because the statements showed regular hours worked, but did not add the two together to show the total hours worked by the employee.

(Continued on page 5)

employer. The employer could not recover its expenses for the time the attorneys spent defending the minimum wage and overtime claims. The attorneys would have to account for the time spent defending the unpaid wage and rest period claim.

Practical Tips:

Although the case is good news for employers, as a practical matter, employers cannot count on col-

lecting attorney fees from former employees. Many employees are not in a financial position to reimburse the employer for such fees. Nevertheless, few employees want to face the prospect of a judgment lien on property and the black mark on credit. This may be sufficient to dissuade some employees from making unmeritorious wage claims.



EXHIBIT C



Posted at 7:38 PM on August 3, 2010 by Cal Labor Law

Attorneys' Fees Properly Awarded to Prevailing Employer in Wage Case

By Robin E. Weideman

In Kirby v. Immoos Fire, a California court held that attorneys' fees were properly awarded to an employer who prevailed in a putative class action alleging missed rest breaks. The court relied on the bilateral fee-shifting provision of Labor Code section 218.5, which provides that the prevailing party in an action alleging violations of certain provisions of the Labor Code is entitled to recover its attorneys' fees. Section 218.5's fee-shifting provision excludes actions alleging claims for unpaid minimum wages or overtime wages covered by Labor Code section 1194 (which has a unilateral fee shifting provision allowing only a prevailing plaintiff to recover attorneys' fees). In this case, the plaintiff alleged (among other things) a claim for unpaid overtime wages, as well as a claim for missed rest periods. The court held that the employer could not recover its fees incurred in defending the overtime claim, but could recover its fees incurred in defending the rest period claim.

This case presents a positive development for employers by providing precedent for an award of attorneys' fees in actions alleging meal and rest period violations should the employer prevail.

EXHIBIT D

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Sacramento Business Journal - July 29, 2010
[/sacramento/stories/2010/07/26/daily66.html](#)

SACRAMENTO BUSINESS JOURNAL

ESTABLISHED 1945

Thursday, July 29, 2010

Employees ordered to pay attorney's fees

Sacramento Business Journal - by [Kathy Robertson](#) Staff writer

A California appeals court has ruled that an employer that defeats a claim for alleged missed rest periods can get its attorney's fees paid by the workers who filed the losing lawsuit.

The Third Appellate District Court of Appeal ruled Tuesday in Kirby v. Immooss Fire Protection Inc. In 2007, Anthony Kirby and another former employee sued the Wilton fire company for alleged unfair competition and labor law violations.

The plaintiffs also requested class certification on behalf of other employees like them. When the trial court denied class status, the plaintiffs dismissed the case — but the trial court awarded attorney's fees on three of the causes of action.

Kirby appealed the ruling. The appeals court reversed award of attorney's fees on two of the causes of action but sent the matter back to the trial court to award attorney's fees on a complaint that Immooss failed to provide Kirby with rest periods.

A proliferation of lawsuits are being filed in California alleging violations of labor law related to employee meal and rest periods, Sacramento attorney Bob Rediger said in an e-mail. Many are brought as class actions, and plaintiffs' attorneys sue for one hour of straight time pay for each employee for each alleged missed meal or rest period. The lawsuits seek wages for four years for each employee — and attorney's fees.

"In Kirby v. Immooss Fire Protection Inc., the court held that an employer that defeats a claim for alleged missed rest breaks ... may obtain an award of attorney's fees against the unsuccessful employees who brought the action," Rediger said. "The Kirby court's decision should also apply to successful employers who prevail against a claim for alleged missed meal periods."

Ellyn Moscowitz, an Oakland lawyer who represents Kirby, said Thursday she plans to file a petition for hearing by the state Supreme Court.

"We got most of it reversed," she said. "We think they are flat out wrong on state law that deals with wages."

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EXHIBIT E

Employees May Be Liable for an Employer's Attorneys' Fees Incurred in Successfully Defending Meal

August 9, 2010

By: Garrett V. Jensen

The 3rd District Court of Appeals recently held in *Kirby v. Immoos Fire Protection* that Labor Code Section 218.5 provides for fee shifting in favor of the party that prevails on a claim for unpaid wages and specified benefits; however, it does not allow employers to recover fees in any action for minimum wages or overtime compensation. Immoos was allowed to recover for defense of Kirby's sixth cause of action for failure to provide rest periods, but not for Kirby's first (unfair practices act) and seventh (violation of Labor Code section 2810--entry into contracts by parties who knew that the contract failed to provide sufficient funds for payment of all required wages) causes of action.

Labor Code Section 218.5 provides: "In any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the court shall award attorney's fees and costs to the prevailing party if any party to the action requests attorney's fees and costs upon the initiation of the action....[paragraph] This section does not apply to any action for which attorney's fees are recoverable under Section 1194."

Plaintiff cited to *Murphy v. Kenneth Cole Productions*, a 2007 California Supreme Court case which held that the additional hour of compensation for a missed rest break constituted a wage, in support of his argument that any unpaid wage is less than the statutorily mandated wages and therefore subject to section 1194. The 3rd District Court of Appeals disagreed in examining the *Murphy* Court's description of the remedy of the remedial hour of compensation as premium pay. Thus, as an addition to regular pay, the remedy was not one for failure to pay the minimum wage and would not be subject to section 1194.

The *Kirby* decision illustrates that an employee may be liable for the attorneys' fees an employer incurs in defending against claims for missed meal and rest breaks if the employee does not prevail on those claims. In light of *Kirby*, employers should continue to keep accurate records of what transpired.

Posted by: on: Aug 10, 2010 @ 03:09

EXHIBIT F

Prevailing Employer in Meal/Rest Break Suit Entitled to Attorneys' Fees

July 28, 2010 by Rob

In 2000, the California legislature added some teeth to California's meal and rest break laws. Prior to 2000 employers were required to give employees meal and rest breaks, but there was no penalty if the employer refused to allow employees to take their legally mandated breaks. In 2000 the legislature enacted California Labor Code Section 226.7 which requires employers to pay an additional hour's pay for each day in which a meal and/or rest break is not provided.

The California Supreme Court later decided that the additional hour's pay is a "wage" and not a "penalty." See *Murphy v. Kenneth Cole*. Since that time we have since a proliferation of suits alleging a violation of Labor Code Section 226.7. If court filings are to be believed there is hardly an employee in California that is allowed to take the required meal and rest breaks. I rarely see an overtime case filed that does not include a missed meal and/or rest break claim.

When the court first decided *Murphy* I recall thinking about how it would affect the attorneys' fees provisions in the Labor Code. Under Labor Code Section 1194 the prevailing employee is entitled to recover his/her attorneys' fees in an action for unpaid minimum wage or overtime. The employer can never recover its attorneys' fees in an unpaid minimum wage or overtime case. Labor Code Section 218.5, however, allows the "prevailing party" to recover attorneys' fees in any action for nonpayment of wages other than minimum wages or overtime.

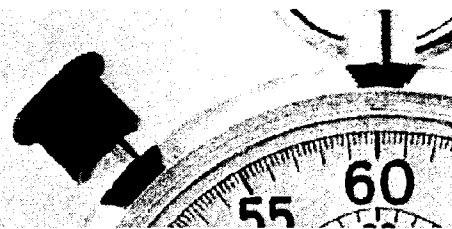
Based on *Murphy* and the language of Labor Code Sections 218.5 and 1194, I theorized that an employer that successfully defeats a claims for unpaid meal and/or rest breaks would be entitled to recover its attorneys' fees. In the common unpaid overtime case where the employee "throws in" a claim for missed meals/rest breaks I believe the employee is at risk of having to pay a portion of the employer's attorneys' fees even if the employee prevails on the unpaid overtime claim unless the employee also prevails on the missed meal/rest break claim.

Well, the Third Appellate District agrees. In *Kirby v. Immoos Fire Protection* (10 C.D.O.S. 9451), the court came to the same conclusion I did: because a claim for missed meal/rest breaks is a claim for "wages" other than minimum wage and overtime, an employee who does not prevail on those claims is liable for the employer's attorneys' fees incurred in defending against those claims.

Attorneys representing employees in unpaid overtime and minimum wage cases need to carefully consider whether to include the unpaid meal/rest break claim. Considering the fact that employers are not required to force employees to take rest breaks (whether this is true with regard to meal breaks remains to be seen) or to track the rest breaks (which is not the true with regard to meal breaks) means prevailing on a rest break case may be difficult. Good attorneys will carefully interview their clients, and hopefully other percipient witnesses, before deciding to add the rest/meal breaks claim as a matter of course.

Employers should not treat this as a license to violate the law. To the contrary. Although you may be able to offset a judgment against you by the amount awarded to you in attorneys' fees, actually collecting an award of attorneys' fees is usually problematic at best. The best policy is to know the law, follow the law, and ensure you have accurate records reflecting what occurred. But you already knew that!

EXHIBIT G



One Minute Memo®

Recovery of Attorney's Fees in Wage Claims: California Court of Appeal Strengthens Prevailing Employers' Claims For Attorney's Fees In Actions For Unpaid Wages And Benefits

Under California law, a party may recover attorney's fees only when a statute or agreement of the parties specifically provides for fee-shifting. California Labor Code Section 218.5 is a fee-shifting statute generally providing for the recovery of attorney's fees by the prevailing party (either employee or employer) in actions for unpaid wages and employment benefits. Labor Code Section 1194 also provides for an award of attorney's fees in actions for unpaid overtime or minimum wages, but only to the prevailing employee.

On July 27, 2010, in *Kirby v. Immoos Fire Protection, Inc.*, the California Court of Appeal ruled on the following issue: May a prevailing employer recover attorney's fees under Section 218.5 when the lawsuit includes both claims for unpaid minimum or overtime wages, and other wage claims? The Court of Appeal affirmed the trial court's award of attorney's fees to the employer under Section 218.5, holding that the inclusion of a claim for unpaid minimum or overtime wages does not preclude recovery of attorney's fees by a prevailing employer for separate causes of action otherwise subject to Section 218.5.

Anthony Kirby filed a class action against his former employer, Immoos Fire Protection, Inc., for various Labor Code violations as well as violation of the Unfair Practices Act (Business and Professions Code Section 17200 *et seq.*) Kirby dismissed the case after the trial court denied class certification. The trial court subsequently awarded attorney's fees to Immoos in part for its defense of Kirby's cause of action for failure to authorize and permit rest periods.

In reaching its decision, the Court of Appeal harmonized Labor Code Sections 218.5 and 1194. Section 218.5 includes an express exception to its provision allowing an award of attorney's fees to prevailing employers: "This Section does not apply to any action for which attorney's fees are recoverable under Section 1194." Section 1194 provides that employees—but not employers—who prevail in an "action" to recover unpaid minimum wages or overtime may also recover their reasonable attorney's fees. Arguing that an "action" refers to an entire case, Kirby asserted that Immoos could not recover fees because his complaint included causes of action for unpaid minimum and overtime wages. The Court of Appeal disagreed, holding that Kirby's approach would lead to absurd results as it "would allow the exception of Section 1194's unilateral fee-shifting to eviscerate the rule of Section 218.5." Moreover, plaintiffs would be able to insulate claims against employers from otherwise applicable fee-shifting provisions by simply adding a cause of action for unpaid minimum or overtime wages.

The court also rejected Kirby's characterization of his cause of action for failure to provide rest periods as one for unpaid minimum wages. Kirby alleged that he was owed an additional hour of wages per day per missed rest period under Labor Code Section 226.7. According to Kirby, any unpaid wage is necessarily less than statutorily mandated wages and therefore

subject to Section 1194. The Court of Appeal disagreed. If Kirby's claim for failure to provide rest periods had succeeded, he would have been entitled to an *additional wage* "at the employee's rate of compensation" under Labor Code Section 226.7. The "employee's rate of compensation" refers to the contractual rate of compensation, not the legal minimum wage. Thus, Kirby's claim was not one based on any failure to pay the minimum wage, and Section 1194 did not apply.

Although the Court of Appeal affirmed the trial court's award of attorney's fees to Immoos for prevailing on the rest period cause of action, the court reversed the trial court's award of attorney's fees to Immoos for prevailing on Kirby's Labor Code Section 2810 and Unfair Practices Act causes of action. The Court of Appeal remanded the case back to the trial court to determine the reasonable amount of fees to award to Immoos for prevailing on the rest break cause of action only.

What Kirby Means For Employers

While *Kirby* will not halt the filing of class actions for unpaid wages and benefits, it will cause attorneys to think twice about filing marginal complaints for wage claims subject to the bilateral fee-shifting provision of Section 218.5. *Kirby* also gives employers additional leverage in negotiating settlements of wage and hour class actions where the prospect of success in certifying the class or on the merits is in question.

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EXHIBIT H

CALIFORNIA ATTORNEY'S FEES

July 27, 2010

Special Fee Shifting Provisions: Third District Romps Around The Labor Code's Bases For Recovery of Attorney's Fees

Third Appellate District Remands So Trial Court Can Determine Reasonable Fees for Employer Who Successfully Defended Against Alleged Failure to Provide Rest Periods.

The next case is all about entitlement to attorney's fees under the Labor Code. *Kirby v. Immoos Fire Protection, Inc.*, No. Co62306 (3rd District July 27, 2010) (published).

On appeal, plaintiff/employee Kirby *first* challenged an award of fees under Labor Code section 218.5, a bilateral fee-shifting provision subject to a carve-out that is unilateral in favor of employees for any action for which fees are recoverable under section 1194. "Section 218.5 provides for fee shifting in favor of the party that prevails on a claim for unpaid wages and specified benefits. . . . This section does not apply to any action for which attorney's fees are recoverable under Section 1194." Section 1194 relates to actions for minimum wages or overtime compensation. Therefore, the question was whether the ambiguous word "action" applied to the entire lawsuit, or just to claims for minimum wages or overtime compensation. The latter, said the Court. Thus, if a cause of action is part of a larger lawsuit, for which the employer could recover for other causes of action under section 218.5, a prevailing employer can still do so – only the individual causes of action for minimum wages or overtime compensation result in unilateral fee shifting in favor of the employee.

Second, Kirby argued that the unilateral fee-shifting provision in section 1194 barred recovery to the successful employer who defended against an alleged failure to provide rest periods. Kirby analogized failure to provide rest periods to a claim of failure to provide minimum wages. One who is denied a rest period isn't being paid minimum wage for her time. Nope, said the Court, the failure is to provide a rest period, not to provide a minimum wage.

Third, the Court held that section 2810 is a unilateral fee-shifting statute that disallows an award of fees to defendant employers. By providing that "[a]n employee . . . may recover costs and reasonable attorney's fees" upon prevailing, section 2810 does not authorize fee shifting in favor of employers." Section 2810 provides (in part) that a person may not enter into a labor contract with a construction contractor, knowing that the contract does not include funds sufficient to allow the contractor to comply with all applicable local, state, and federal laws or regulations governing the labor or services to be provided.

Fourth, the Court explained that it is settled that the Unfair Practices Act does not provide for an award of attorney's fees to any party.

Fifth, the Court determined that defendant/respondent Immoos could only recover for the successful defense against the alleged wrongfully denied rest periods, requiring a remand and determination of reasonable fees.

And the winner on appeal? None. It's a mixed decision. Each party bears its own costs and attorney's fees on appeal.

Posted at 10:24 PM in [Cases: Special Fee Shifting Statutes](#) | [Permalink](#)

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EXHIBIT I

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THE CALIFORNIA WAGE AND HOUR LAW BLOG

WRITTEN BY LOS ANGELES, CALIFORNIA MEDIATOR AND ATTORNEY
STEVEN G. PEARL

TUESDAY, AUGUST 10, 2010

Court of Appeal Affirms Section 218.5 Attorney Fee Award to Defendant

The First District Court of Appeal has affirmed an award of attorney fees to a defendant under Labor Code section 218.5. [Kirby v. Immoos Fire Protection, Inc.](#) (July 27, 2010) --- Cal.App.4th ---.

The plaintiffs filed a putative class action for violation of the Unfair Competition Law ("UCL") and California wage and hour laws. After the court denied class certification, the plaintiffs settled with a number of defendants and dismissed the action with prejudice as to the remaining defendant, Immoos.

Immoos moved for attorney fees under Labor Code section 218.5. The Court awarded Immoos its fees incurred in defending plaintiffs' causes of action for violation of the UCL, rest period requirements, and Labor Code section 2810.

The Court of Appeal reversed the award of attorney fees on the UCL cause of action. Kim Kralowec has a good discussion of the UCL issue on her blog, the UCL Practitioner.

The Court also reversed on the 2810 cause of action. For those not familiar with it, section 2810 provides in pertinent part:

(a) A person or entity may not enter into a contract or agreement for labor or services with a construction, farm labor, garment, janitorial, or security guard contractor, where the person or entity knows or should know that the contract or agreement does not include funds sufficient to allow the contractor to comply with all applicable local, state, and federal laws or regulations governing the labor or services to be provided.

Immoos was not a defendant on the 2810 cause of action, and the Court of

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Appeal held that it could not recover attorney fees on this cause of action.

The most interesting issue is on the plaintiff's rest period claim and the relationship between Labor Code sections 218.5 and 1194. The Court put this issue as follows:

[Plaintiff] contends the trial court erred in awarding any attorney's fees to [defendant] because some of the causes of action were subject to the unilateral fee shifting provision in favor of plaintiffs provided by section 1194. [Plaintiff] points out that section 218.5 includes an express exception to its bilateral fee-shifting provision, which states: "This section does not apply to any *action* for which attorney's fees are recoverable under Section 1194." (Italics added) Arguing that an "action" refers to an entire case, [plaintiff] concludes that the inclusion of causes of action subject to section 1194 bars [defendant's] recovery of any attorney's fees in this case. We disagree.

Slip op. at 3.


The Court first noted that 218.5(b) codifies the holding in Earley v. Superior Court (2000) 79 Cal.App.4th 1420. Earley held that 1194 controls in an action for unpaid overtime compensation, and 218.5 does not allow a successful defendant to recover its fees in such an action.

After reviewing the legislative history, the Court then held that the section 1194 exception to section 218.5 applies "only to causes of action for unpaid minimum and overtime wages." Slip op. at 6.

We harmonize sections 218.5 and 1194 by holding that section 218.5 applies to causes of action alleging nonpayment of wages, fringe benefits, or contributions to health, welfare and pension funds. If, in the same case, a plaintiff adds a cause of action for nonpayment of minimum wages or overtime, a defendant cannot recover attorney's fees for work in defending against the minimum wage or overtime claims. Nonetheless, the addition of a claim for unpaid minimum wages or overtime does not preclude recovery by a prevailing defendant for a cause of action unrelated to the minimum wage or overtime claim so long as a statute or contract provides for fee shifting in favor of the defendant.

Slip op. at 6.

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LABELS: ATTORNEY FEES, BUSINESS AND PROFESSIONS CODE SECTION 17200, REST BREAKS

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ABOUT ME



STEVEN G. PEARL ENCINO, CALIFORNIA

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Pearl is an attorney and mediator in Los Angeles, California. He is a co-author of California Wage and Hour Law and Litigation, published by California's leading legal publisher, Continuing Education of the Bar (CEB).

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Laura McHugh
555 Capitol Mall, Suite 1240
Sacramento, CA 95814

Honorable Loren E. McMaster
Sacramento Superior Court
720 Ninth Street
Sacramento, CA 95814

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Maria Anderson