How Good Decisions Can Go Wrong: Lawful Conduct Can Lead to Lawsuits

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Authorities and Citations for Hypothetical Scenarios

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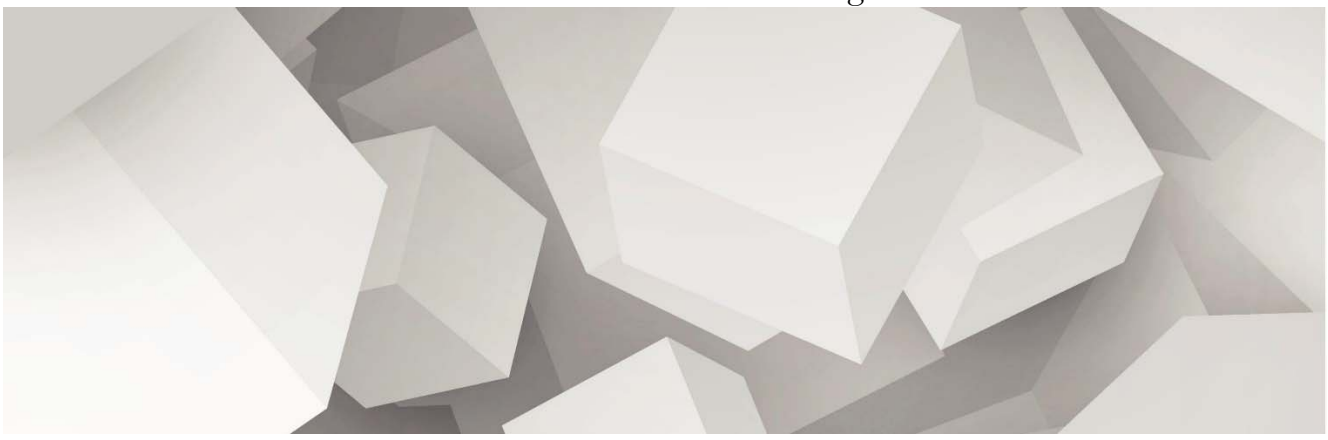

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1. Disability Accommodations

a. The "Temporary Accommodation" That Becomes Permanent

Hypo #1

FEHA does not require an employer to transform a temporary accommodation into a permanent job assignment to accommodate a disabled employee. (*Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1224, citing *Watkins v. Ameripride Services* (9th Cir. 2004) 375 F.3d 821, 828). Federal courts of appeals have similarly held that an employer who has created a light-duty temporary assignment is not required to "transform that accommodation into a permanent position once it is informed the employee's disability has become permanent." (*Raine*, 135 Cal.App.4th at 1224.)

"The question presented, however, is not whether assigning Raine to the front desk on a permanent basis imposes an undue hardship, but whether the accommodation requested is reasonable and thus required in the first place. An employer has no duty to accommodate a disabled employee by making a temporary accommodation permanent if doing so would require the employer to create a new position just for the employee." (*Id*. at 1227.)

b. Failure To Communicate About An Accommodation

Hypo #2

"The [School] District failed to meet its initial [summary judgment] burden regarding the issue of the interactive process because it failed to present evidence showing that it had engaged in an ongoing dialogue regarding requested accommodations." Employee alleged that the District transferred her to a kindergarten position without considering or discussing her request for a second grade assignment. (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 959 [181 Cal.Rptr.3d 553, 568], as modified on denial of reh'g (Dec. 23, 2014).)

"The District offered no evidence to show it discussed with the employee the second grade assignment she sought or provided any explanation why it could not grant her request as a reasonable accommodation. To the contrary, the evidence show[ed] the District simply assigned Swanson to teach kindergarten and failed to engage in any further discussion with her." (*Id*. at 972.)

2. HR Investigations

a. Failing To Investigate In Response To An Employee's Request

Hypo #3

See Gov. Code 12940(k): “It is an unlawful employment practice . . . for an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.

See 2 Cal. Code Regs § 11023(b): “(b) Employers have an affirmative duty to create a workplace environment that is free from employment practices prohibited by the Act. In addition to distributing the Department's publication on sexual harassment or an alternative writing that complies with Government Code section 12950, an employer shall develop and distribute to its employees a harassment, discrimination, and retaliation prevention policy that:
(4) Creates a complaint process to ensure that complaints receive:
(C) Impartial and timely investigations by qualified personnel;
(7) Indicates that when an employer receives allegations of misconduct, it will conduct a fair, timely, and thorough investigation that provides all parties appropriate due process and reaches reasonable conclusions based on the evidence collected.”

“It is rarely appropriate for an employer to fail to take steps to look into a complaint simply because an employee asks the employer to keep the complaint confidential.” If the complaint involves minor allegations, the complainant can be coached as to how to handle the situation, however the employer should follow up to assure this has occurred and the harassment has stopped. If the allegations are more serious, it is not acceptable to have the complainant handle the matter alone. (DFEH Harassment Prevention Guide for California Employers, p. 8.)

(But see *Torres v. Pisano* (2d Cir. 1997) 116 F.3d 625, 639 [“associate director did not breach his duty to remedy racial and sexual harassment by honoring employee’s request to keep the matter confidential and to refrain from taking action until a later date, precluding university’s liability” for conduct that created a hostile work environment. However, “there is a point at which harassment becomes so severe that a reasonable employer simply cannot stand by, even if requested to do so by a terrified employee.”])

b. Failure To Interview The Accused

Hypo #4

Failing to interview the accused was among several facts that permitted an inference of actual malice to defeat the conditional privilege against a defamation claim. (*King v. U.S. Bank Nat’l Ass’n* (2020) 52 Cal.App.5th 728.)

3. Employee Resignations/Terminations

a. Unaccepted Resignation

Hypo #5

Employer was under no duty to allow employee to rescind her resignation after it had accepted the resignation by processing the necessary paperwork. “A resignation is an offer which may be withdrawn *prior* to its acceptance.” (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1165, citing *Mahoney v. Board of Trustees* (1985) 168 Cal.App.3d 789, 799.) “[A]n employee has a right to rescind a resignation unilaterally (like any contract offer) only *prior to its acceptance*. (*Ibid*., citing *Ulrich v. City and County of San Francisco* (9th Cir. 2002) 308 F.3d 968, 975.)

b. Company Data on Personal Devices

Hypo #6

“Courts have refused to permit ‘self-help’ discovery which is otherwise violative of ownership or privacy interests and unjustified by any exception to the jurisdiction of the courts to administer the orderly resolution of disputes.” (*Pillsbury, Madison & Sutro v. Schectman* (1997) 55 Cal.App.4th 1279, 1289.)

Order of contempt affirmed for failure to surrender all documents misappropriated from employer in violation of court order. (*Conn v. Superior Court* (1987) 196 Cal.App.3d 774.)

See Pen. Code § 502(a) – (c): “(a) It is the intent of the Legislature in enacting this section to expand the degree of protection afforded to individuals, businesses, and governmental agencies from tampering, interference, damage, and unauthorized access to lawfully created computer data and computer systems.
(c) Except as provided in subdivision (h), any person who commits any of the following acts is guilty of a public offense:
(2) Knowingly accesses and without permission takes, copies, or makes use of any data from a computer, computer system, or computer network, or takes or copies any supporting documentation, whether existing or residing internal or external to a computer, computer system, or computer network.
(3) Knowingly and without permission uses or causes to be used computer services.
(7) Knowingly and without permission accesses or causes to be accessed any computer, computer system, or computer network.”

See Lab. Code § 2860: “Everything which an employee acquires by virtue of his employment, except the compensation which is due to him from his employer, belongs to the employer, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment.”

4. Wage and Hour

a. Generous Bonuses Not Properly Reflected on Wage Statement

Hypo #7

(See *Magadia v. Wal-Mart Assocs., Inc.* (N.D. Cal. 2018) 319 F.Supp.3d 1180 [Appeal pending before the Ninth Circuit, argued Nov. 19, 2020; $100 Million judgment for PAGA penalties and penalties under Labor Code sec. 226(e).])

b. "Accommodating" Requests For/Or To Alter Rest Periods

Hypo #8

One rest break should fall on either side of the meal break. DLSE has stated that placing both rest breaks before the meal break, and none after, "would not comport with the Wage Order requirement that rest breaks . . . shall be in the middle of each work period." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1032, citing DLSE Opn. Letter No. 2001.09.17, at p. 4.)

An employer cannot allow employees to combine the 10-minute rest period with their lunch at the end of the 5-hour period, and then provide another 10 minute rest period in the afternoon. "In order to comply with the Wage Order, the morning rest period must precede the meal period." (DLSE Opinion Letter No. 2001.09.17, at p. 3.)

c. Not Maintaining Records of Meal Periods

Hypo #9

See Lab. Code § 1174: "Every person employing labor in this state shall: (d) Keep, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments."

"It is the employer's responsibility to keep accurate records of the time that employees work. If the employer fails to maintain accurate time records, the employee's credible testimony or other credible evidence concerning his hours worked is sufficient to prove a wage claim. The burden of proof is then on the employer to show that the hours claimed by the employee were not worked. Time records must be kept whether it is customary in the area or industry." (DLSE Policies and Interpretations Manual § 41.1.1.)

“Employers covered by Industrial Welfare Commission (IWC) Wage Order No. 5-2001 (Cal. Code Regs. Tit. 8, § 11050) have an obligation both to relieve their employees for at least one meal period of shifts over five hours and to record having done so (*Id*., subd. 7(A)(3) [‘Meal periods . . . shall also be recorded.’]) (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1053 (conc. opn. of Werdegar, J.).)

“Time records showing noncompliant meal periods raise a rebuttable presumption of meal period violations . . . at summary judgment.” (*Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, 61.) “The rebuttable presumption does not require employers to police meal periods. Instead, it requires employers to give employees a mechanism for recording their meal periods and to ensure that employees use the mechanism properly.” (*Id*. at 77.)

See Wage Order No. 4-2001: “7(a) Every employer shall keep accurate information with respect to each employee including the following:
(3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.”