

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

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## The “Temporary Accommodation” That Becomes Permanent

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### Hypo #1: The “Temporary Accommodation” That Becomes Permanent

An employee requests an accommodation of a reduced schedule (coming to work late one day a week and leaving early two other days). Although the schedule imposes considerable hardship on other employees, the employer agrees because the employee's medical support suggests the employee's limitations are temporary. The HR email agreeing to the "temporary" reduced work schedule does not state any anticipated time limit to the new schedule. This schedule then goes on for many months with the limitations being extended repeatedly by the employee's doctor. Now, six months later, the other employees are complaining about increased workload. When the employer announces the temporary schedule will have to end, the employee protests that the schedule must continue. The employee argues that the fact that the schedule was in place for six months means that the accommodation is both reasonable and necessary.

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## The “Temporary Accommodation” That Becomes Permanent

*Raine v. City of Burbank* (2006)  
135 Cal.App.4th 1215, 1224

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### Hypo #2: Failure to Communicate About An Accommodation

An employer engages in the interactive process with an employee who requested an accommodation. The employer fails to communicate with the employee regarding the steps taken internally in an attempt to accommodate. After an internal assessment of alternatives, the employer rejects the employee's preferred or requested accommodation and proposes a different but still reasonable accommodation- one that imposes less burden on the employer. Two weeks after the initial request, the employer advises the employee in writing of its decision.

Having received no updates, the employee feels that the employer did nothing to evaluate the requested accommodation and instead summarily rejected it. The employee then seeks an attorney to address the employee's concerns.

## Failure to Communicate About An Accommodation

◇ *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)

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Failing to  
Investigate in  
Response to an  
Employee's  
Request





### Hypo #3: Failing to Investigate in Response to an Employee's Request

An employee raises a concern to her HR manager and reports offensive conduct by a supervisor. The employee wants her complaint to remain confidential, and requests that HR not pursue an investigation regarding the matter. The HR manager agrees and does not investigate the complaint, although she does make notes of the nature of the complaint and the alleged perpetrator. Eight - months to a year later, a different employee complains about the same co-worker, and reports conduct similar to the first complaint (which was never investigated).

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### Failing to Investigate in Response to an Employee's Request

Gov. Code 12940(k)

2 Cal. Code Regs § 11023(b)

DFEH Harassment Prevention Guide for California Employers, p. 8

*Torres v. Pisano* (2d Cir. 1997) 116 F.3d 625, 639

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#### Hypo #4: Failure to Interview the Accused

An employee lodges a complaint about a co-worker and HR promptly investigates the complaint. The investigation reveals considerable evidentiary support for the complaint but some of the witnesses have possible biases or motives to be hostile to the accused. The accused person has an otherwise good record. After speaking to the "accused" employee's supervisor, who himself spoke to the accused about the incident, the HR investigator does not interview the accused during the investigation process. The accused person is terminated and sues for defamation and wrongful termination.

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## Failure to Interview the Accused

*King v. U.S. Bank Nat'l Ass'n*  
(2020) 52 Cal.App.5th 728

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Failing to  
Accept a  
Resignation



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## Hypo #5: Unaccepted Resignation

An employee resigns from his or her job and gives a 30 day notice by email. Due to the long notice, the supervisor hesitates to accept the resignation immediately. The supervisor wants the resigning employee to stay for a period of time to train a coworker. The employee then sends an email after two weeks, "withdrawing my resignation." Management wants the employee out. Can the employee withdraw the resignation?

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## Unaccepted Resignation

*Mahoney v. Board of Trustees* (1985) 168 Cal.App.3d 789, 799

*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1165

*Ulrich v. City and County of San Francisco* (9th Cir. 2002) 308 F.3d 968, 975

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### Hypo #6: Company Data on Personal Devices

An employer permits an employee to use a personal device to conduct the employer's business. There is no agreement in writing with the employee to provide the device to be "scrubbed" in the event of a termination or resignation. The employee is then terminated under adverse conditions and refuses to provide the device.

## Company Data on Personal Devices

*Pillsbury, Madison & Sutro v. Schectman*  
(1997) 55 Cal.App.4th 1279, 1289

*Conn v. Superior Court* (1987) 196  
Cal.App.3d 774

Pen. Code § 502(a) – (c)

Lab. Code § 2860

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Generous  
Bonuses Not  
Properly  
Reflected On  
Wage Statement

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## Hypo #7: Generous Bonuses Not Properly Reflected On Wage Statement

An employer pays employees a quarterly bonus and properly includes the bonus when calculating the employee's regular rate of pay for overtime purposes. When the employee works overtime his or her paystub lists the overtime payment as "overtime/incentive." The paystub does not specify how many hours the employee worked or the employee's hourly rate.

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## Generous Bonuses Not Properly Reflected On Wage Statement

*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.]

Lab. Code § 226(e)

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“Accommodating”  
Requests For/Or  
To Alter Rest  
Periods



Hypo #8: “Accommodating” Requests For/Or  
To Alter Rest Periods

An employer allows employees to take short  
rest breaks or to skip rest breaks, and then add  
the time onto the meal break.

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## “Accommodating” Requests For/Or To Alter Rest Periods

*Brinker Restaurant Corp.  
v. Superior Court* (2012)  
53 Cal.4th 1004, 1032,  
citing DLSE Opn. Letter  
No. 2001.09.17, at p. 4

DLSE Opinion Letter  
No. 2001.09.17, at p. 3

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Not  
Maintaining  
Records of  
Meal Periods



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## Hypo #9: Not Maintaining Records of Meal Periods

An employer does not keep records of when employees take their meal because it trusts employees to fill in a sheet at each worksite documenting when the employee takes a meal period. Many employees just ignore the sheet. Supervisors will testify that employees always or almost always took timely meal periods- some supervisors will testify they actually told employees to leave their work stations if the employee was "due" for a meal period. However, some employees then claim that they were not allowed to take meal breaks.

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## Not Maintaining Records of Meal Periods

Lab. Code § 1174

DLSE Policies and  
Interpretations Manual  
§ 41.1.1

Cal. Code Regs. Tit. 8,  
§ 11050

*Brinker Restaurant Corp.  
v. Superior Court* (2012)  
53 Cal.4th 1004, 1053  
(conc. opn. of  
Werdegar, J.)

*Donohue v. AMN  
Services, LLC* (2021) 11  
Cal.5th 58, 61

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thank you

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