

Balancing HR, Employment Law & Labor Law in Your Daily Supervisory Life

A panel discussion by CIS & LGPI Employment & Labor Law Experts

CIS: Pre-Loss Attorney Katie Kammer & H₂R Senior Consultant Sharon Harris

LGPI: Senior Labor Law Attorney Pierre Robert & HR Consultant Ruth Mattox

Moderator: H₂R Program Manager Steve Norman

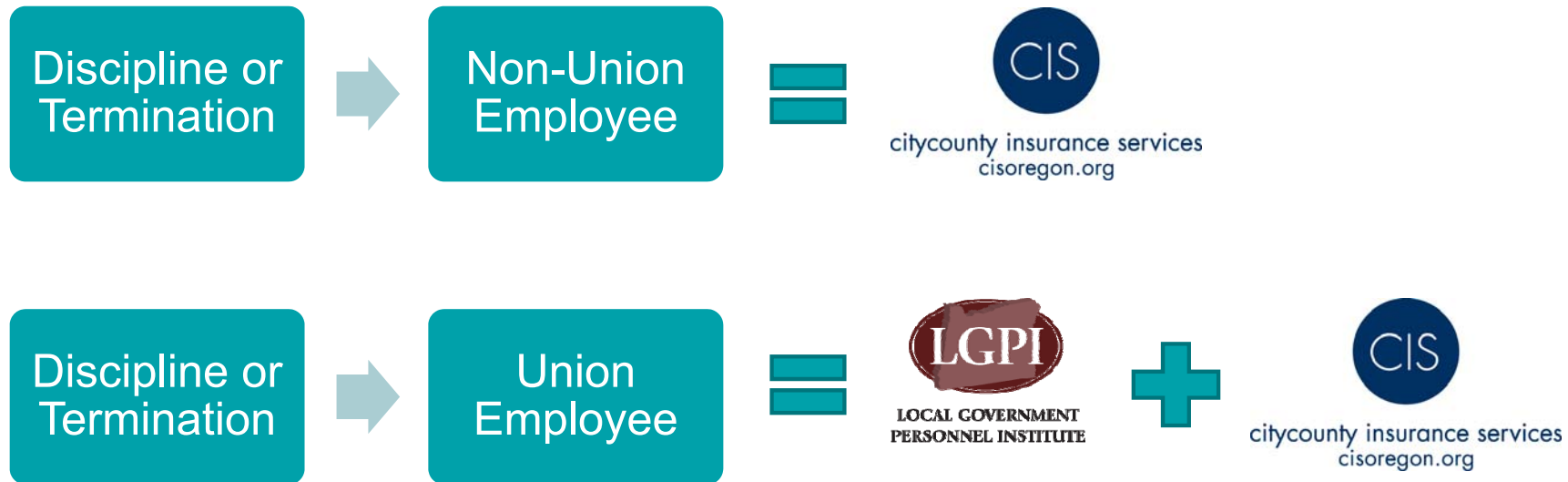


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WHO TO CALL FOR EMPLOYMENT ISSUES?



Agenda

- Introduction
- Oregon's PECBA – The 10,000 Foot View
- Federal & Oregon Employment Law Overview
- The Scenario & Discussion – Checking Out a Situation in the Library
 - Background
 - Discussion
 - The Outcome - Choose Your Own Adventure
- The Rest of the Story – What Really Happened
- Conclusion



Scenario Overview

- Library employee has Multiple Sclerosis (MS)
- Has requested and received some job accommodations
- Attendance has deteriorated over the years
- Last month, there were discrepancies between his timesheet and building access times





Oregon's Public Employee Collective Bargaining Act - The View from 10,000 Feet

Pierre Robert, JD, CLRP, Sr. Labor Law Attorney
Local Government Personnel Institute



The Basic Purpose

- It is the purpose of the PECBA to:
 - Provide a uniform basis for recognizing the right of public employees to join organizations of their own choice, and to be represented by them in their relations with public employers.
 - Obligate public employers, public employee unions to negotiate with each other with willingness to resolve grievances and disputes relating to employment relations and to sign written agreements resulting there from.



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The Basic Rights

- The PECBA establishes specific rights and principles:
 - The right to organize on the part of all non-elected, nonsupervisory and non-confidential public employees virtually everywhere in Oregon public employment.



The Basic Rights

- The principle of an exclusive representative who represents all of the employees in a given bargaining unit and establishes the procedures for selecting that representative.



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The Basic Rules

- It requires that collective bargaining take place on a defined range of issues called “employment relations” more commonly referred to as “mandatory subjects of bargaining”.



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The Basic Rules

- It creates for most public employees a right to strike. Occupations that may not strike are:
 - Police
 - Firefighters
 - Guards at correctional or mental institutions
 - Parole and probation officers for adult offenders
 - Public transit workers
 - Deputy district attorneys
 - Emergency telephone workers
- For these occupations, compulsory, binding interest arbitration is required.



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The Basic Rules

- It provides for a dispute resolution process that includes mediation, optional fact finding, “final offers,” and a 30-day “cooling-off” period before any strike can be legal.



The Basic Rules

- It provides for enforcement of the Act and for enforcement of written agreements between employers and employees by a state agency called the Employment Relations Board.



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The Basic Rules

- If a provision of a collective bargaining agreement is inconsistent with or contrary to:
 - A state or a federal law
 - A past practice in the workplace
 - A public employer's established policies
- Which authority has precedence?



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The Basic Rules

General Answer:

1. State or federal law (including agency rules)
2. The Collective Bargaining Agreement
3. The Employer's established policies - absent a specific agreement that policy has precedence

The Basic Rules

- Inconsistencies between CBA's and Past Practice:
 - The presumption is that CBA's have precedence, but exceptions can occur based on circumstance.



The Public Employer's Central Obligations

1. “Meet and confer” (bargain) in good faith with the exclusive representative.



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The Public Employer's Central Obligations

1. “Meet and confer” (bargain) in good faith with the exclusive representative.

- But what does “good faith” mean?



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The Public Employer's Central Obligations

1. “Meet and confer” (bargain) in good faith with the exclusive representative.
 - Answer: Bargain with a sincere willingness to come to agreement.



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The Public Employer's Central Obligations

1. “Meet and confer” (bargain) in good faith with the exclusive representative.

- What doesn't “good faith” mean?



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The Public Employer's Central Obligations

1. “Meet and confer” (bargain) in good faith with the exclusive representative.
 - Answer: It does not require that either party agree to particular proposals or make concessions.



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The Public Employer's Central Obligations

1. “Meet and confer” (bargain) in good faith with the exclusive representative.
 - In other words, to “bargain in good faith” is to:
 1. Commit to a process of discussion...
 2. ...with the right attitude!



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The Public Employer's Central Obligations

1. “Meet and confer” (bargain) in good faith with the exclusive representative.
2. Agree to put agreements so bargained into writing and sign them; and...



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The Public Employer's Central Obligations

1. “Meet and confer” (bargain) in good faith with the exclusive representative.
2. Agree to put agreements so bargained into writing and sign them; and...
3. Obey those agreements.



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Conduct Public Employers Must Avoid

- Unfair Labor Practices of employers and unions in hand-out.



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The Scope of Bargaining

There are three types of bargaining subjects under the PECBA:

1. Mandatory: matters that employers must bargain with the Union – unless waived.
2. Permissive: matters that employers may bargain voluntarily – but do not have to; and
3. Prohibited: matters that employers and unions may not bargain. Agreements on such are unenforceable.



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The Scope of Bargaining, or...

- “What policies or practices may we implement unilaterally – and which ones must we bargain? See lists of both in handout.



The Scope of Bargaining, or...

- Example:
 - Is the subject of due process safeguards for employees being investigated and disciplined by a public employer a mandatory or permissive subject of bargaining?



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The Scope of Bargaining, or...

- Thank you. See me with your Questions!



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Employment Law Overview

Katie Kammer, CIS Pre-Loss Attorney



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How do we know what to do?

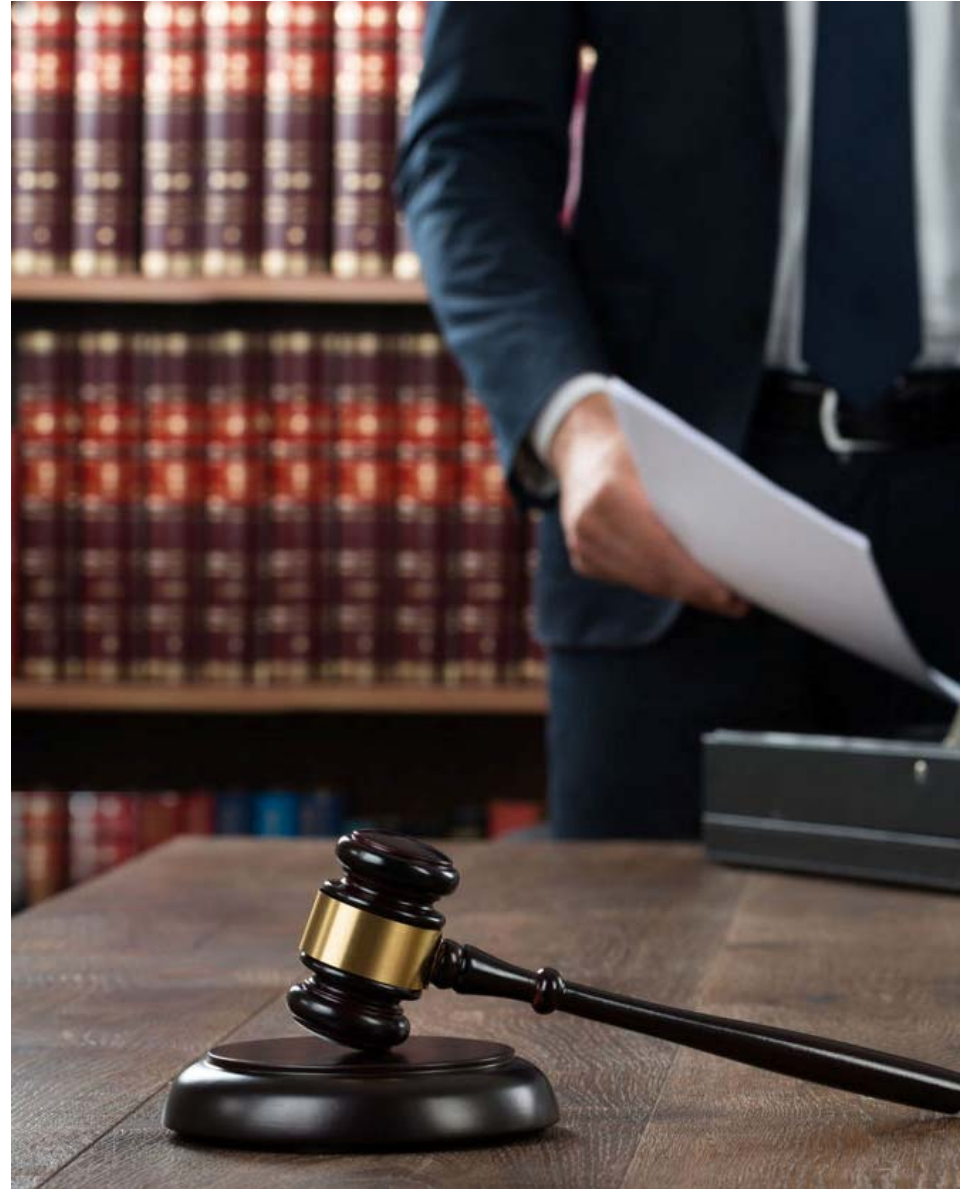
- The Laws
 - Federal and state statutes and regulations
- Employment Policies
 - Employee handbook and other department-specific policies that may exist.
- Past Practices
 - How have other employees been treated in similar circumstances?



Applicable Laws



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The Laws Implicated

- Americans with Disabilities Act (Title I) (15+ employees)
- Oregon Disability Discrimination Law (§ ORS 659A.103-145) (6+ employees)
 - Define who is a qualified individual with a disability
 - Prohibit discrimination and retaliation against those with disabilities or who are regarded as disabled
 - Require employers to give reasonable accommodations to qualified individuals with disabilities unless it creates an undue hardship



The Laws Implicated - Disability

- Practically speaking...
 - When an employee asks for a modification to a policy or working condition because of a health condition, the employer must consider whether:
 - The employee is a qualified individual with a disability
 - Physical or mental impairment that substantially limits one or more of the major life activities of the employee
 - Can the employee perform the essential functions of the job with or without reasonable accommodation
 - Whether the accommodation requested is reasonable or creates an undue hardship



The Law Implicated - Disability

- The Interactive Process
 - Back and forth between employer and employee
 - Can request documentation from health care provider
 - Employer doesn't have to provide exact accommodation that is requested



The Law Implicated - Disability

- “Undue Hardship” means an action requiring significant difficulty or expense
- Factors to consider:
 - The nature and cost of the accommodation
 - The other financial resources of the employer
 - The number of employees



The Law Implicated - Disability

- If the employer denies the request, that's not the end
 - Consider other options
 - Document assessment and reasoning



The Law Implicated - Disability

In most cases, ADA and Oregon disability law do not require an employer to overlook misconduct or rescind discipline as an accommodation.

MISCONDUCT



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The Law Implicated - Disability

Confidentiality Under the ADA

- Information obtained regarding the medical condition must be:
 - Collected and maintained on separate forms and in separate medical files
 - Treated as a confidential medical record, with a few exceptions



The Law Implicated

- The United States Constitution

- Entitles employees with a property interest in their jobs to certain due process rights prior to loss of pay (suspension or demotion) or termination.
 - Oral or written notice of the charges against him/her,
 - An explanation of the employer's evidence, and
 - An opportunity to be heard in response to the proposed action.



The Law Implicated – Due Process

- Practically speaking...
 - Which employees get due process?
 - Employees represented by a union
 - Employees who are not represented but where employer's policies provide for “just cause” termination or discipline
 - But what about probationary, at-will, and “red flag” employees?
 - Recommend mini-due process



The Law Implicated – Due Process

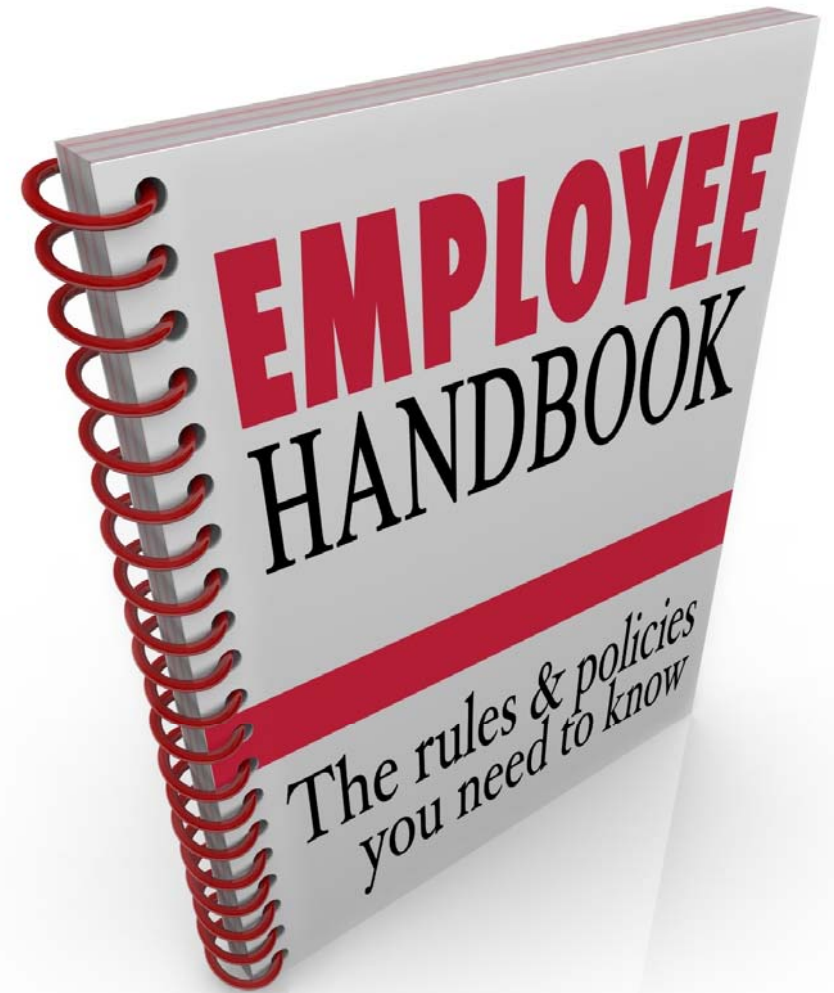
- The Steps: Before reaching the final conclusion, employer should give:
 - Written Notice of
 - The allegations of misconduct
 - The policies violated
 - The discipline that is contemplated
 - Opportunity to be Heard
 - Give the employee adequate time to prepare before and adequate time to respond
 - Not a formal hearing



Applicable Policies



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The Policies Implicated

- Look in the Employee Handbook and Collective Bargaining Agreement for:
 - Attendance-related policies
 - Call-in procedures
 - PTO, Vacation, Sick Leave, and other Leave of Absence policies
 - Conduct-related policies
 - What conduct is prohibited
 - Disciplinary process – is progressive discipline required?
 - Accommodation policies



Other Factors



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Relevant Past Practices

- Are other employees allowed to engage in similar conduct without consequences?
- Has anyone else been disciplined for this conduct? If so, what type of discipline was issued?
 - Want to remain consistent to avoid claims of discrimination



One More Thing - Perspectives

- Keep these perspectives in mind when evaluating any employment situation:
 - Supervisor/Management
 - HR
 - Union
 - Employment & Labor Attorneys



Scenario & Discussion

Checking Out a Situation in the Library



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Discussion Format

- We have a situation
- Facts presented in parts chronologically
- Panel discussion
- Audience will have a chance to ask questions at each part
- The last part (the Outcome) will be chosen by the audience



Background – The Employee

- John Smith
- Has worked for the City of Millville for 12 years
- Library Technician
- Hourly non-exempt employee
- Member of Benevolent Organization Of Knowledge Specialists union Local 331.88
- Has been on bargaining team for last two negotiations



Background – Key Players

- Current supervisor: Matt Salmon, employed just over one year
- Prior supervisor: Marvin Dewey, for Smith's first 11 years
- Current HR Representative: Rachel Phelps, employed just over one year
- BOOKS Local 331.88 Field Agent: Margaret Edwards



Applicable Laws

Today's scenario will involve the following laws:

- ADA & Oregon Disability Discrimination Law
- Due Process under the US Constitution
- PECBA

Assume the City complied with all requirements under FLSA, FMLA, OFLA, and Oregon's Sick Leave law.



Scene One

Disability & Accommodation



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Requests for Accommodation

- Five years ago, Smith was diagnosed with Multiple Sclerosis (MS)
- Requested & received the following accommodations related to his MS:
 - Ergonomic desk and chair to relieve discomfort in his legs (5 years ago)
 - Permission to perform all duties while seated at his desk (4 years ago)
 - Schedule change to work four 10-hour days per week (<1 year ago)

*Note: No union rep was involved in any of the accommodation request discussions



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Scene One

Panel Discussion

Characters in this Scene:
John Smith - Employee



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Questions from the Audience

Characters in this Scene:

John Smith - Employee



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Break



Scene Two

Performance Issue



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Smith's Historical Job Performance

- Quality & timeliness of work has been acceptable at all times.
- His attendance for the first six years was acceptable. He scheduled time off in advance and always had enough accrued time to cover his time off.



Smith's Historical Job Performance

- Attendance deteriorated in last six years.
 - Called in timely on day of absence, but inconsistent about scheduling in advance even when he knew of the need for time off
 - Usually had accrued time off to cover absences, but not always
 - Some absences were due to MS, but not all
- Supervisor Dewey was frustrated by Smith's attendance, but never discussed it with Smith, or even HR, because of a massive project cataloging library books.



Time Discrepancy

- About a month ago
 - Salmon began noticing Smith was not regularly at work at his scheduled times. Salmon's and Smith's schedules are different, but overlap a few hours each day.
 - Another employee reported seeing Smith on a bus at a time he was supposed to be at work.
 - Smith had not called Salmon at any time during the month to indicate he would be late or absent to work.



Time Discrepancy *(cont'd)*

- Salmon had IT pull Smith's building and computer access logs.
 - Several times, building access was hours after he was supposed to start, but always at least 15 minutes before Salmon's shift started.
- Smith's signed timesheet for the month indicated he worked his full shift on all workdays.
- The total difference between the timesheet and access logs was 40 hours for the month.



What Happened Next?

- Salmon met with HR Rep. Rachel Phelps to ask for recommendations on how he should move forward to address this issue.



Scene Two

Panel Discussion

Characters in this Scene:

John Smith - Employee

Marvin Dewey – Former Supervisor

Matt Salmon – Current Supervisor

Rachel Phelps – HR Representative



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Questions from the Audience

Characters in this Scene:

John Smith - Employee

Marvin Dewey – Former Supervisor

Matt Salmon – Current Supervisor

Rachel Phelps – HR Representative



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Next Step . . .

- As recommended by your labor & Pre-Loss attorneys, you met with Smith to discuss the time discrepancy.
- As required by law and your CBA, you notified Smith he may be subject to disciplinary action, up to and including termination.



What did Smith say?

- He indicated that his memory was “shot” and he couldn’t remember exactly when he had worked during the month.
- He did not request an accommodation of any kind.



Scene Three

Choose Your Own Adventure



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What Would You Do?

- A. Take no action against Smith
- B. Give him some level of discipline, according to your discipline policy & CBA
- C. Terminate him



Scene Three

Panel Discussion

Characters in this Scene:

John Smith - Employee

Matt Salmon – Current Supervisor

Rachel Phelps – HR Representative

Margaret Edwards – BOOKS Field Agent



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Questions from the Audience

Characters in this Scene:

John Smith - Employee

Matt Salmon – Current Supervisor

Rachel Phelps – HR Representative

Margaret Edwards – BOOKS Field Agent



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The Rest of the Story . . .

Zinter v. Portland State University

- Zinter was terminated for violating PSU's policy prohibiting inaccurate time-reporting.
- Before terminating, PSU had thoroughly investigated the issue and conducted two pre-dismissal hearings with Zinter.
- Zinter sued for violations of the ADA, wrongful discharge, and invasion of privacy.



The Rest of the Story . . .

Zinter v. Portland State University

- PSU asked the court to dismiss Zinter's claims without trial because there was no evidence to support them (motion for summary judgment).
- The US District Court for Oregon granted PSU's motion.
- On appeal, the Ninth Circuit affirmed the District Court's decision.
- In other words... PSU won!



Tips and Takeaways

Remember, sometimes even when you win, you lose... So follow best practices to minimize risk of lawsuit in the first place.

- Research employee issues
- Know your entity's policies and CBA provisions
- Engage in an interactive process
- Be consistent
- Provide due process, when necessary

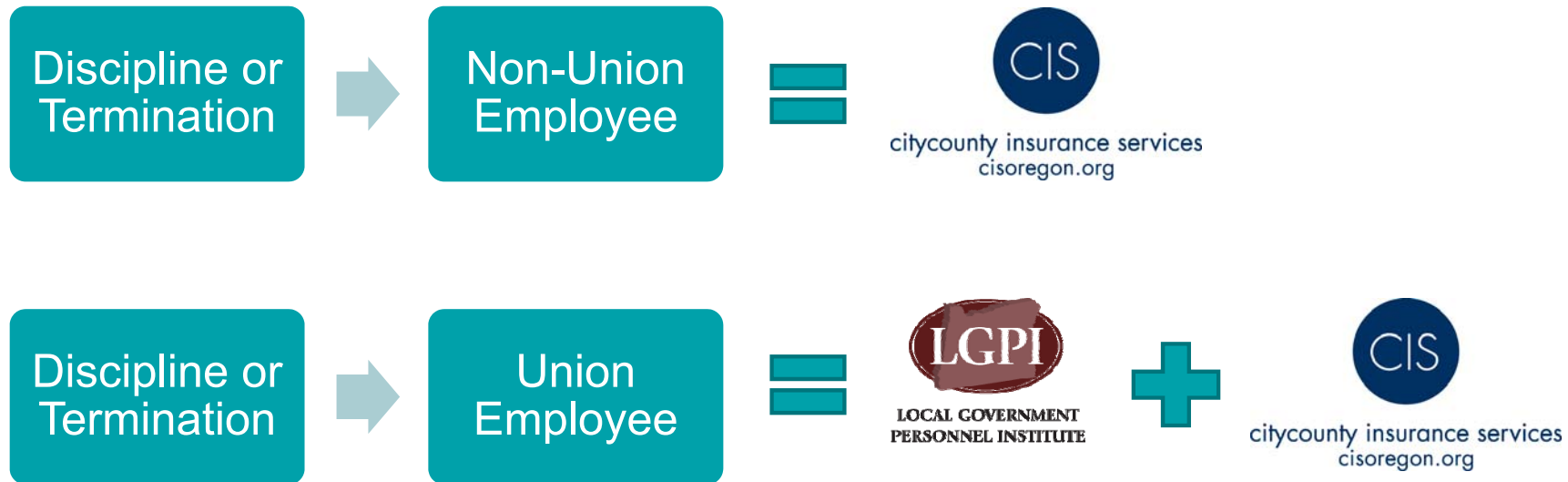


final
thoughts



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WHO TO CALL FOR EMPLOYMENT ISSUES?



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