The Employer's Guide to Employment Resolutions

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Outline

Resolutions related to:

1. Thoughtful Decisions
2. BOLI-EEOC
3. Disability Law and Accommodations
4. Harassment Prevention
5. Marijuana in the Workplace
6. Employee Handbook Update
7. Email Content
8. Unemployment Benefits
9. Call CIS

Resolution #1

We will continue to make thoughtful termination decisions, and base those decisions on the top reasons, not ALL reasons.

Resolution # 1: Key Takeaways

- Remember: The burden will be on your organization to prove that an employee was fired for legitimate, non-discriminatory reasons.
- Pick the "cleanest", most truthful, and most reasonable reasons for the terminations you can find.
- Avoid terminating an employee's employment for every possible reason with the hope that one of the reasons "will stick."

Resolution # 1: Key Takeaways

- An employee who repeatedly comes late to work may not necessarily be engaging in "unethical conduct"!
- "Insubordination" is an overused and misused basis for a termination. Look for policy violations, or violations of previous disciplinary notices, instead.

Resolution #2

We will put a little extra effort into the responses to BOLI or EEOC complaints that we write.

BOLI

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Resolution #2

Ways in which an employer gives inconsistent or varying reasons for a termination via documentation:

1. Notice of termination to employee.
2. Response to request for information from Oregon Department of Employment (unemployment).
3. Response to BOLI/EEOC complaint.
4. Responses given during litigation.

Resolution #2

If BOLI or the EEOC issues a finding in favor of the employee, this is a BIG PROBLEM for employers.

- Federal courts have **no discretion** to exclude an EEOC reasonable cause determination, not "even a cursory one."
- What about the dismissals? ***Not admissible!***

Resolution #2

In essence, the Ninth Circuit has guaranteed the parties the right, in any employment discrimination case in which there has been an EEOC reasonable cause determination, to conduct a "trial within a trial" over the validity of the EEOC's investigation and conclusions.

Resolution # 2: Practical Steps

- Make sure the reason for the termination in the BOLI/EEOC response is the same as your other documentation.

KEY TAKE AWAY

- Consider your response your organization's first "oral argument," but this isn't the time to be Perry Mason, Denny Crane, Ally McBeal, Judge Judy or any of your other favorite TV or movie lawyers.

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Resolution # 2: Practical Steps

- Make your response one the organization can be proud of.
  - Avoid grammar errors, spelling mistakes, and typos.
  - Make it easy for the investigator to locate exhibits and information.
- If your organization can't afford to hire an attorney to write or review the response, call CIS for guidance.

KEY TAKE AWAY

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Resolution #3

We will be mindful of our obligations under disability law . . .

. . . But we will make thoughtful decisions about accommodation requests when presented with bad information.

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Resolution #3

Weaving v. City of Hillsboro

- A subordinate complained about Weaving's alleged bullying in 2009, and the City placed Weaving on paid administrative leave.
- The City fired Weaving, finding that he had "fostered a hostile work environment for his subordinates and peers," and was "tyrannical, unapproachable, non-communicative, belittling, demeaning, threatening, intimidating, arrogant and vindictive."
  - Weaving, per the Police Department, "does not possess adequate emotional intelligence to successfully work in a team environment, much less lead a team of police officers."

Resolution #3

Weaving v. City of Hillsboro

- Weaving sued under the ADA, claiming that the City fired him after he disclosed his ADHD diagnosis.
- At trial, the jury found in favor of Weaving, and awarded him more than $500,000.
- The 9th Circuit reversed the jury verdict. It did so based on a finding that Weaving's inability to get along with others as a result of his difficult personality did not qualify as an ADA-protected disability.

Resolution # 3: Key Takeaways

Weaving v. City of Hillsboro

- Blaming boorish behavior on a physical or mental impairment does not necessarily buy protection under the ADA.
- The *Weaving* case does not mean that persons with ADHD will never have "disabilities" under the ADA, or that weak "emotional intelligence" need never be accommodated in appropriate circumstances.

Resolution #4

We will remember our obligation to protect employees from sexual, racial or other forms of harassment by non-employees (vendors, elected officials, members of the public, etc.)

Resolution #4: Third-Party Harassment

- When the alleged harasser is a **non-employee**, an employer is legally responsible when the employer:
  - Knew or should have known about the harassment; and
  - Failed to take prompt, remedial action to stop the harassment.
- "[BOLI] will consider the extent of the employer's control and any legal responsibility the employer may have with respect to the conduct of such non-employees."

Resolution #4: Third-Party Harassment

Piety et al. v. City of Sweet Home

- Lawsuit filed by African-American husband and Caucasian wife (park hosts employed by city).
- Plaintiffs called the police and their employer "numerous" times during employment regarding race discrimination/ harassment from visitors to park (non-City employees).
- Court: "The City may be held liable for harassment on the part of a private individual where the City either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct."
  - Defense verdict in 2014. (U.S. District Ct. Oregon Case No. 11-cv-6303)

Resolution #4: Third-Party Harassment

EEOC v. Fred Meyer (2014)

- Lawsuit filed by EEOC on behalf of seven workers employed in Oak Grove, Oregon store settled for $487,500.
- Per the EEOC, Fred Meyer knew a customer repeatedly made lewd comments to female employees at a store, and was aware of multiple incidents when this customer touched, grabbed and cornered employees, yet failed to take action to stop the harassment (even after it was captured on video).
- In 2005, the company settled a prior sexual harassment case at the same store for $485,000.

http://www.eeoc.gov/eeoc/newsroom/release/5-5-14a.cfm

Resolution #5

We, as an organization, will decide <u>now</u> how best to address our employees' legal use of marijuana after July 1, 2015.

Oregon's Marijuana Law

Can we fire someone for the sole reason that they use marijuana?

Answer: Probably.

Firing a Marijuana User – Consider:

- What do your policies state on the subject of employee drug and alcohol use?
  - If "zero tolerance," then probably OK.
  - If "not impaired," then probably not.
  - Reporting arrests or convictions for marijuana possession?
- Is it "just cause" under applicable CBAs?
- Is there a basis to terminate because of federal regulation/law?

Employers May Prohibit Employees From:

1. Coming to work impaired
2. Coming to work with any detectable amounts of marijuana in their system, even if they aren't impaired;
3. Smoking marijuana on organization property or in organization vehicles;
4. Bringing marijuana (in any form), marijuana brownies or other marijuana-contained items on work premises;

Employers May Prohibit Employees From:

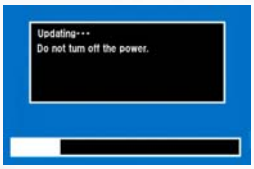
5. Serving items prepared with marijuana to co-workers or members of the public while on work time, or on work premises or property;
6. Bringing marijuana-related equipment or any devices marketed for use or designed specifically for use in ingesting, inhaling or otherwise introducing marijuana (among other drugs), such as pipes, bongs, smoking masks, roach clips, and or other drug paraphernalia; and

Employers May Prohibit Employees From:

7. Bringing marijuana paraphernalia to the work place or on work premises, including any equipment, products or materials of any kind which are marketed for use or designed for use in planting, propagating, cultivating, growing, or manufacturing marijuana, including live or dried marijuana plants.

Resolution #6

We will update our handbook if it hasn't been "refreshed" in the last two or three years.



Resolution # 6

Top Errors in Employee Handbooks

1. Making misstatements about the law.
2. Quoting from laws that don't apply to the organization because of its size.
3. Making a public statement about employment law issues that shouldn't be put in writing.

Resolution #6

Sharp v. Wheeler County, Oregon (2014)

- Plaintiff's position eliminated due to budget cuts. She applied for another position but did not receive it.
- Court granted summary judgment in favor of county on plaintiff's claim that she had a contract for employment with the County via their personnel policies.

Resolution #6

Sharp v. Wheeler County, Oregon (2014)

- Wheeler County's policies, however, had the right kind of disclaimers:
  - "This handbook...is also not an employment contract and is not intended to create contractual obligations of any kind."
  - Employee Acknowledgement signed by employee stated that the County could change or revise policies at any time; plus "I understand and acknowledge that this policy handbook is not a contract of employment or a legal document."

Resolution # 6

Marini v. Costco Wholesale Corp.
(U.S. D.C. Conn. 12/14)

- Plaintiff was fired because, he said, he had Tourette's Syndrome.
- Plaintiff missed the statute of limitations for an ADA lawsuit, so he filed a breach of contract action based on the employer's handbook.
- Defendant: Personnel manual doesn't create a contract. Also, employee is wrong – our policies are better than the law!

Resolution # 6

Marini v. Costco Wholesale Corp.
(U.S. D.C. Conn. 12/14)

- Court: Breach of contract action would go to jury.
- Employee handbook was, in the court's words, "progressive" and praised the employer's "super anti-harassment policy."
- BUT: Employee handbook – called an "Employment Agreement" – did not have the standard "This handbook does not create contract rights" language.

Resolution # 6

O'Connor v. Ortega (U.S. Supreme Court 1987)

- Doctor employed by a state hospital was put on paid administrative leave during an investigation into misconduct (sexual harassment, improperly obtaining a computer for personal use and inappropriately disciplining an employee).
- As part of the investigation, hospital searched the doctor's office and seized several personal items for use during disciplinary hearings.

Resolution # 6

O'Connor v. Ortega (U.S. Supreme Court 1987)

- Doctor sued hospital based on, among other theories, breach of Constitutional privacy rights. Issue: Did the doctor have a "reasonable expectation of privacy" in his office space and in the equipment and office furniture provided by the hospital?
- Hospital, per the Court, had not established any "regulation or policy discouraging employees . . . from storing personal papers and effects in their desks or file cabinets."

Resolution # 6

O'Connor v. Ortega (U.S. Supreme Court 1987)

- **Key Takeaway (Option 1):** Employers need to have a policy against storing personal items in desks, cabinets and other office furniture provided to employees.
- **Key Takeaway (Option 2):** Instruct your employees that they have ***no right to privacy*** in any furniture, electronic equipment, supplies, etc. provided by your organization – they could be searched at any time, with or without notice.

HOLD ON A MINUTE!

Why isn't Tamara talking about changes to the law that went into effect January 1, 2015, and that require us to write new policies?

Resolution # 6

Remember to be on the lookout for CIS' Sample Handbook (2015 edition)!

Resolution # 7

We will think and pause before we hit "send" on that email message.

Alternatively:

Remember that what we say in an email can and will be used against us!

Resolution # 7

Things not to say in emails.

- "Do we have enough now to take action? Please?" (*Hartman v. The Dow Chemical Co.*, U.S. D.C. Michigan 2014)
- "Thanks a bunch (and sorry - I'll be glad when they're not ours! Actually, that's not true, but I do feel like I've been behind the curve ball all summer.)" (CIS member email)

Resolution #7: Key Takeaways

- Email, in general, is not confidential. YOUR email is definitely not confidential.
- What has your organization done lately to remind employees that if they can't say something nice via email, they shouldn't say it at all?
- Encourage supervisors to establish appropriate email etiquette, and to promptly correct email messages that cross the line.

Resolution # 8

We will not automatically appeal every award of unemployment benefits to our former employees.

Resolution # 8

- Stop looking at unemployment as a win-or-lose proposition.
- An employee who receives unemployment is less likely to sue you.
- If you don't appeal the award, that can't be used against you. But your appeal can and will be used against you.
  - Findings and conclusions by the Department or the ALJ are inadmissible during a lawsuit; but the evidence (including your sworn testimony) is admissible.

Resolution # 8

Remember: An employer now faces potential financial penalties from the State if it does not respond to a request for information, or if it chooses to be less than honest.

- One of the pages requires your employee to state that the information provided is "true" (he or she is signing it under oath).

Resolution # 8: Key Takeaways

KEY TAKE AWAY

- Do not promise to departing employees in severance agreements or otherwise that your organization "won't contest" an employee's application for unemployment.
- Choose your battles in the unemployment world wisely.
- Have counsel (or CIS) involved if you do choose to contest an unemployment application.

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Resolution #9

I will call CIS when I need help, and NOT think the following, when I do:

- CIS will think our organization is falling apart.
- I call CIS too much – Tamara must be really sick of hearing from me.
- Our organization looks really stupid!
- How am I ever going to explain this?

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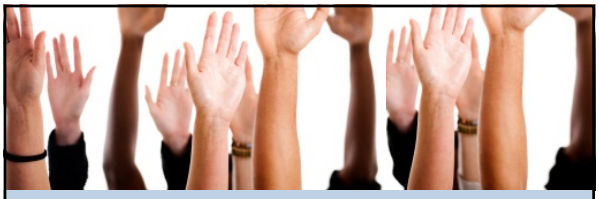

Questions?

No one is dumb who is curious.
The people who don't ask questions
remain clueless throughout their lives.

- Neil deGrasse Tyson

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Want more "fun" with employee relations?

- February 25-27 - *CIS Annual Conference (www.cisoregon.org/cisconference)*
- March 26: "A Conversation about Early Return to Work" - webinar presented by Sharon Harris & Moira Przybylowski.
- April/May - *CIS' Spring Supervisor Training* - "Documentation Boot Camp" coming to:
  - Albany, Bend, Gresham, Medford, North Bend, Pendleton, Seaside, and The Dalles

This webinar, past webinars and other training available on learn.cisoregon.org

Thank you for listening!

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