


Hits, Errors  
and Strikeouts

A Year in the Employment Law Life of  
(Some) CIS Members



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AGENDA


1. The “Errors” and “Strikeouts”

a) The names will be changed/not used to protect the innocent!

b) Remember: we can all learn from these situations.

2. The “Hits”

3. Questions and/or the fun game of “Stump the Lawyer”



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The “Errors” &  
the “Strikeouts”





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Error #1

Paid Administrative Leave . . .  
. . . is not necessarily your  
PAL!

  
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Error #1: Paid Admin Leave

Top Errors with Paid Admin Leave

1. Not telling the employee *why* they are being placed on leave.
2. Leaving an employee on paid administrative leave for too long (even if it makes things easier for *you*).

  
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The Ninth Circuit's Take re: PAL



The Ninth Circuit has yet to consider whether a paid administrative leave violates Title VII's discrimination or retaliation provisions.



In a First Amendment retaliation case, the Ninth Circuit held that "under *some* circumstances, placement on administrative leave *can* constitute an adverse employment action."

  
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## Bottom Line re: Paid Leave



**Policy**

Employers may continue to place employees on paid administrative leave, pending an investigation into misconduct.

This is especially true where the misconduct involves unsafe behavior (threats to the employee or others), theft, or where approved in advance via a CBA.



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## Bottom Line re: Paid Leave



**PAID LEAVE**

BUT . . . employers must be vigilant in ensuring that the leave doesn't last too long unless there are valid, nondiscriminatory reasons to continue the leave.

Make sure the notice of paid leave includes: (1) The reason for the leave; and (2) Language that can't be misinterpreted as to its purpose.



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## Strikeout #1

Allowing an employee to resign might be a kind gesture on an employer's part . . .

But it also can have unintended, and unwanted, consequences.



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## Strikeout #1: The Facts

- Employer realized that it made a mistake when it hired this department head.
- The department head's supervisor "counseled" this employee on several mistakes he made.
- Employer wanted to "end the employment relationship" three months into the job (and several thousands of \$\$ later).



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## Strikeout #1: The Mistakes

- The "multiple counseling sessions" were never documented.
- The department head had never been publicly criticized by the supervisor.
- The department head felt bad about convincing this employee to come to his organization. Let's allow him to resign!



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*Resign or Get Fired?*

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## Strikeout #1: Lessons Learned



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- In this litigious era, being nice to a "bad" employee won't necessarily help your organization.
- A "resignation" isn't necessarily the last word.

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## Strikeout #1: Lessons Learned

- Consider getting a release from the employee when he/she resigns. *This will cost you some money.*
  - The release can include language about how best to address the issue in the future.
  - The release buys some degree of post-termination “silence.”



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## Error #2

If you want your employee's bad behavior to stop, you need to do something about it (and document your efforts).



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## Error #2: Letting Things Slide



#1 CIS Member

How “creepy” do things have to get before we deal with the creep?

#2 CIS Member

Don't you do that again, bad employee! (We *really* mean it this time.)



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## Error #2: Lessons Learned

Situations with chronic, “bad” employees are fixable, and it’s never too late to fix.



- But you may have to be patient a little while longer...



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## Error #2: Lessons Learned



Address the problem as soon as you recognize the problem.

- Don’t let intervening events steal your thunder.



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## Error #2: Lessons Learned

“One-sided” notes are good, but you can do better.

- Remember: We (and your attorney) will need proof that is stronger than just your word.



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## Error #2: Lessons Learned

Remember:  
Your good employees want to know  
how to do things better.



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## Strikeout #2

Sometimes, being nice is NOT  
the best approach for dealing  
with employee issues.



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## Strikeout #2

- Employee was hired through a nonprofit organization that places blind employees in job opportunities.
- Employee was hired by this CIS member to be a receptionist.
- She's 67 years old and uses a motorized scooter to move about.



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## Strikeout #2

This CIS member calls Pre-Loss because they have "safety concerns" regarding this employee. Among other observations:

- Employee "runs into" a file cabinet located near the receptionist area.
- She sometimes walks into the wrong offices.
- She struggles to sit up, from either her chair or her scooter.
- One day, her walker fell over and she asked an employee to help lift her.
- She lost her balance and ended up placing her walker on her foot in an effort to remain upright.



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## Strikeout #2

Meanwhile, co-workers are "helping" this employee with various tasks, including:

- Putting the employee's socks on;
- Getting her water;
- Walking to a nearby store to purchase food; and
- Leaving their stations to wait with her until a bus or other transportation picks her up.



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## Strikeout #2 – The Big Issues

- Employee isn't doing her work, and she was caught sleeping at her desk.
  - Her supervisors, meanwhile, can't agree amongst themselves whether she should be disciplined for performance issues.
- Employer: "Can we legally tell her that in order for her to keep working here, she needs to hire a companion to help her?"



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## Strikeout #2 – The Big Issues

- Employer wants to talk to the employee about retirement, even though she's never brought it up. She has, in fact, refused to discuss Medicare eligibility.
- Employer is generally uncomfortable addressing whether this employee is "qualified" to perform her job.
- A co-worker filed a WC claim because of an injury she sustained helping this employee.



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## Strikeout #2: Lessons Learned

- Employees with disabilities can only rely on "disability" as an excuse for non-performance or bad performance so long.
  - Performance issues need to be addressed when they are spotted, or soon thereafter.
- The key test is whether the employee is "qualified." If we're removing essential functions, the employee is not "qualified."



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## Strikeout #2: Lessons Learned

- Your other employees can be negatively impacted by your "kindness" (*i.e.*, tolerance) of another employee's situation.
- Patience is always a virtue when it comes to working with employees who have a medical condition.
  - But the law gives employers "tools" to manage these situations, and employers shouldn't hesitate to use them.



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Error #3

“He’s a probationary employee.  
We didn’t think this would  
go sideways.”



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Error #3: The Facts

- Probationary employee, a mechanic, filed a workers’ compensation claim almost six months after being hired.
- Employee moved to this city from California.
- Employee had been told at the time of hire that he had six months (length of probationary period) to apply for and obtain a CDL.



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Error #3: The Facts

- Shortly after filing the WC claim, employee presented a note to his supervisor from his doctor regarding his limitations. He told his boss that he couldn’t do the physical component of the CDL test.
- Per the employee’s doctor, it would be another two weeks before the employee was restored to full duty.



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### Error #3: The facts

- At the end of July 2015, employee's boss asked him about the CDL. The employee said he hadn't been able to because of his back injury, but that he would likely be able to in approximately two weeks.
- The supervisor "promptly escorted" the employee to human resources (the attorney's language, not mine.)



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### Error #3: The Facts

- The employee tells HR the same story he told his supervisor. He asked for more time to obtain his CDL so he could complete the physical after he recovered from his injury.
- "Without engaging in any interactive process, [the City] refused [the employee's] request and summarily terminated him that day. . ."



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### Error #3: The problems/lessons learned

- A six-month legitimate deadline that got trumped by an intervening protected event.
- Employee had an accepted WC claim that required him to work light duty at the time of his termination. (Timing)
- No written documentation that any effort had been made to talk to the employee regarding his CDL before the WC claim.



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### Error #3: The problems/lessons learned

- Supervisor's thoughtful concern about not setting a precedent of extending the defined probationary period isn't a concern here.
- Supervisor (and HR) apparently concluded that employee wasn't "disabled," so they didn't have to talk to him about "reasonable accommodations."



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### Error #3: The problems/lessons learned

- Likely jury response to this story: "You couldn't have given him another **two weeks?**" (How is that fair?)
- City didn't consult with CIS' Pre-Loss because they were firing a probationary employee. \$5,000 deductible will apply.



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Bring on the hits!

CIS Members Work Very Well With  
Their Employees



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## "Hit" #1

**The City of Monument:  
"Patience will be the Winning Virtue"**



*Photo by Gary Halvorson, Oregon State Archives. Rock formations along Highway 402 east of Monument.*

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## Chapter 1: Introduction

- City has four employees and a population of 130.
- Employee in question worked five hours per week at a City dump.
- She had been hired in October 2013.
- She goes to a City Council meeting in March 2014 to formally complain about alleged sexual harassment from a City Councilor and members of the community. All the events were several months old. "I am afraid to go to work," she said.



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## Chapter 2: The City's First Frustration Point

- The City had a good harassment policy in place that instructed employees on how to complain.
- The employee had acknowledged in writing receiving this policy before her complaint.
- In this City, frequent and in-person contact between the Councilors and the employees is common.
- "Why didn't she come to us before?"



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### Chapter 3: The Initial Response

Given the nature of the allegations and complaint, the City:

- Informed the employee that an investigator had been hired; and
- Offered to place the employee on paid leave pending the investigation and because of her expressed “safety” concerns.

This was the right thing to do!



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### Chapter 4: “We’ll sue you, City”

April 2014: Attorney announces that she represents the employee.

- Claims there’s a “videotape” of a citizen exposing himself to the employee, and “recordings” of the City Councilor and citizens coming onto her property and threatening her.
- There were also “several police reports.”
- “I am confident that you as a woman of influence can direct the situation to calm down before someone gets hurt or worse.”



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### Chapter 5: The Investigation

The Investigator’s conclusions:

- It “appears more likely than not” that the City Councilor made “inappropriate comments and gestures” towards the employee, but that these incidents occurred while he was acting as a citizen of the City of Monument, and not as an elected official.
  - **The Councilor denied all of this.**
- No evidence that anyone had brought these issues to anyone’s attention until many months after they occurred.



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## Chapter 6: Now what do we do?

- Council President, with the Council's blessing, specifically instructed the Councilor in question to not have further contact with the employee.
- City issued a statement during a Council meeting reaffirming its commitment to providing a workplace free of discrimination, harassment and retaliation.



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## Chapter 6: Now what do we do?

- The City also passed a resolution "Reaffirming a policy against discrimination, harassment and retaliation for City employees and volunteers."
- The City provided training to its employees, and arranged for the employee to report to the Public Works Director, as opposed to the Council.



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## Chapter 6: Now what do we do?

- In the meantime, the employee refused to return to work.
- CIS advised her attorney that she would be expected to return to work in mid-June 2014. She had no paid leave available to cover any additional absences.
- The City wrote to employee about her return to work, lack of accrued paid leave, and reminded her about the City's attendance policy.



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## Frustration Point #2

- In response to the City's letter about return to work, the employee's attorney made a demand:

**\$250,000!!!**

- Things were quiet until December 2014 when the City received the employee's complaint (filed with BOLI and the EEOC).



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## Chapter 7: Working in a Retaliation "World"

Employee's situation at work became frustrating.

- Erratic attendance, failed to call in
- Said she couldn't open the dump's main door due to a medical condition
- Received a mid-range annual evaluation and a verbal warning in January 2015
- Received a written reprimand.



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## Chapter 8: Finally, some good news

- April 2015 – Employee quits.
- October 2015 – BOLI announces there is "insufficient evidence" of any unlawful conduct and ends its investigation.



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## Conclusions: The Key Takeaways



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- The City acted promptly. This event was investigated and resolved within five months.
- The City took steps to ensure the harassment ended. The employee never complained about harassment again.

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## Conclusions: The Key Takeaways

- The City sent the proper (albeit unwanted) message about returning to work after the investigation.
- The City properly disciplined when the facts warranted it. These were documented, provable situations.
- The City didn't fire the employee out of frustration.



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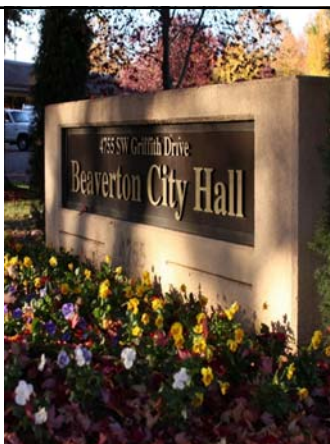
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## The City of Beaverton



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### Hit #2: The Facts

- Long-term employee suffered from bipolar disorder.
- City accommodated her medical condition by allowing her to work from home, and work reduced hours.
- She eventually took FMLA/OFLA leave starting in August 2013.



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### Hit #2: The Facts

- From August 2013 until her return to work in February 2014, City had four different RTW dates. She also switched from protected leave under OFLA/FMLA to City's policy on unpaid leave for medical conditions (one year).
- Employee had three immediate supervisors during this time period, each with different goals and definitions of "good management."



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### Hit #2: The Facts

- We advised the City to start thinking about "undue hardship" issues, e.g., delays to comprehensive plan, success at filling employee's position with a temp.



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## Hit #2: The Facts

- Employee finally returned to work in February 2014 with reduced schedule. But was violating City's call-in procedure on a regular basis, and still wasn't doing her work.
- Employee's supervisor (#2) declined to work with employee upon her return. When employee complained about "hostility" from this supervisor, supervisor sent an email that didn't read like an apology.



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## Hit #2: The Facts

- Employee also reported she was feeling "pressured" to return to work.
- Finally released to work full-time, no restrictions, April 1, 2014.
- May 16, 2014, City gives employee a disciplinary notice for failing to properly use the call-in procedure, and for taking time off that wasn't protected or covered by PTO.
- After the first couple of weeks, employee stopped working full weeks.



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## Hit #2: Frustration Point

- August 2014 – City prepares a chart at my request that describes employee's absences. Unfortunately, the chart won't necessarily support a termination.
- City eventually concludes that employee has too many unexcused absences and attendance violations per policy. Notice of proposed termination is sent.
- In response, employee says she needs time to find an attorney and to adjust to new medications.



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## Hit #2: The Facts

- Employee contended that she wasn't getting enough "senior planner" work to do. She said she never got feedback on her work.
- Employee fired at the end of August 2014.
- Attorney files a TCA notice in February 2015.
- Employee files a BOLI/EEOC complaint in June 2015.



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## Hit #2: Lessons Learned

- City's patience and willingness to work through the protected leaves with the employee made their termination decision defensible.
- City's termination decision had nothing to do with her protected absences – this was provable.
- City's view that predictable attendance was an essential function of the position was the right one. But it won't work for all positions.



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## Hit #2: The Good News

- BOLI investigation ended due to employee's "insufficient evidence" in October 2015.
- We haven't heard from employee's attorney since February 2015.



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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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## STUMP THE LAWYER



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Thank You!

### Contact Information

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