

## 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 & H<sub>2</sub>R Senior Consultant Sharon Harris  
LGPI: Senior Labor Law Attorney Pierre Robert & HR Consultant Ruth Mattox  
Moderator: H<sub>2</sub>R Program Manager Steve Norman




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## WHO TO CALL FOR EMPLOYMENT ISSUES?




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## 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




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### 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




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### 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




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### 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.




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## 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.




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### 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




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## 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.




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### 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.

Policy




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## 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?




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## 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




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## 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




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### 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




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### 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




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### The Law Implicated - Disability

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




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## 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.

**DISCONTINUED**




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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




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## 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.




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## 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




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## 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




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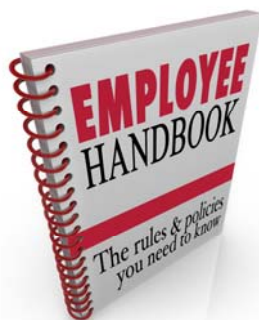
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## Applicable Policies




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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




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## 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




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### One More Thing - Perspectives

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




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### 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




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### 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




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### 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




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### 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.




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## 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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## 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.




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### 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.




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### 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.




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### 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.




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### What Happened Next?

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




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## 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.




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## 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.




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## 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




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## 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.




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## 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!




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## 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




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## WHO TO CALL FOR EMPLOYMENT ISSUES?




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CONTACT OUR H<sub>2</sub>R and PRE-LOSS STAFF FOR ASSISTANCE



Kurt  
Chapman  
503-763-  
3842



Sharon  
Harris  
503-763-  
3843



Janie McColister  
503-763-3892



Kirk Mylander  
503-763-3812



Tamara  
Jones  
503-763-  
3845



Katie  
Kammer  
503-763-  
3860



Steve  
Norman  
503-763-  
3890



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