
HIRING TO FIRING: What Can *Up In The Air* Teach Us About the “Best” Way to Terminate an Employee?**SPECIAL GUEST: BARRY THRUTCHLEY****SEPTEMBER 13, 2022****[Tracey Diamond]**

Welcome to Hiring to Firing The Podcast. I'm Tracey Diamond a labor and employment attorney with the law firm of Troutman Pepper. Today my colleague Brian Ellixson and I welcome our guest Barry Thutchley. Barry is VP of HR at Puratos Corporation, which is one of my favorite clients because it is an international company in the bakery, patisserie and chocolate markets. It literally doesn't get better than that. Welcome and thanks so much for joining us Barry.

[Barry Thutchley]

Thanks Tracey. It's great to be with you guys today.

[Tracey Diamond]

Before we turn to our topic, Barry why don't you tell us a little bit about the Puratos workforce and your role with the company?

[Barry Thutchley]

Yeah, happy to. So, Puratos is a privately held company. We're based out of Brussels, Belgium. We operate in over 80 countries around the world. We've been around for over 100 years and like you said, we provide ingredients and other innovations that supply the baked goods, patisserie and chocolate categories around the world. So, we're headquartered in Pennsauken, New Jersey. Here in the US. We have just under 700 employees that span multiple manufacturing and distribution locations throughout the US. As the head of HR, I get to lead a team every day whose mission is really just to do everything we can to create a distinctive and what we call a magical employee experience at Puratos. That really helps everybody reach their fullest potential. So, that's a little bit about Puratos.

[Tracey Diamond]

Thanks so much. And I have to say, you know, whenever I come to visit your offices there's always some kind of delicious pastry or bread product out there waiting to be eaten, so, it's a lot of fun to work for the company.

[Barry Thutchley]

It could be a real big distraction when you're trying to get work done with all that great bread and chocolate being produced.

[Tracey Diamond]

I'll bet. I'll bet. So, today we have not always the funnest topic, right. We're gonna talk about the "Right way to let an employee go" and we're going to focus on the movie *Up In The Air*, which was a 2009 movie starring George Clooney and Anna Kendrick. George Clooney played the character Ryan Bingham, a human resources consultant who travels the country conducting company layoffs on behalf of various employers, that I guess are too afraid or uncomfortable to do it themselves. Anna Kendrick plays a young, ambitious new hire who

promotes cutting costs by conducting layoffs via video conferencing. The two characters travel the country together, firing people from various companies as they go. We're gonna listen to two clips now. The first one is a clip of George Clooney laying off an employee of one of his clients:

This is not an assessment of your productivity. You gotta try not to take this personally. I want you to review this packet. Take it seriously. I think you're gonna find a lot of good answers in here.

I'm sure this is gonna be very helpful, a packet. Thank you. A packet.

Anybody who built an empire or changed the world sat where you are right now and it's because they set there, they were able to do it. That's the truth. I'm gonna need your key card. Great. Okay, now. I want you to take the day. Go get together your personal things and then tomorrow, you're gonna get yourself some exercise. You go out for a jog, you give yourself some routines and pretty soon you find your legs.

How do I get in touch with you?

Don't worry. We'll be in touch with you soon. This is just the beginning. I'll never see Steve again.

So much for being in touch, right. So, before we get into that piece of it, I also want to play our second clip, which was Anna Kendrick's character now, pretty much using almost the same words to let somebody else go.

Just remember, don't apologies or tell them how hard this is for you. Today's one of the worst days they're ever gonna have in their life. How we feel doesn't even compare. Just keep it professional, you'll be fine.

What's all this? What's going on?

Well, Mr. Samuels, I wish I were here with better news. However, your position here at Wortheimer's is no longer available.

What are you talking about?

You've been let go.

Just like that? Who are you?

My name is Ms. Keener and I'm here today to talk about your options.

I worked for this company for 17 years and they send a fourth grader to can me.

It's perfectly normal to be upset. However, the sooner you can tell yourself that greater opportunities are waiting for you.

Opportunities. I'm 57 years old.

Anybody who ever built an empire or changed the world sat where you are now. And it's because they sat there that they were able to do it. There's a packet in front of you. I want you to take some time and review it. All the answers you are looking for are inside those pages. The sooner you trust the process, the sooner the next step of your life will unveil itself. I need you to go back to your office now and start putting together your personal things. Mr. Samuels, that's all we can discuss now. Mr. Samuels. Mr. Samuels. Mr. Samuels.

Okay. Well. I can tell you that I for one have a pit in my stomach just listening to that, it's so cringey right. Barry, what do you think? Compare and contrast these two forms of letting people go.

[Barry Thrutchley]

Yeah, well, sometimes I find it hard to critique George Clooney. He seems to do everything beautifully on the silver screen. But I think even in this case, there's a lot to learn. I think it's a fascinating movie and I think these two clips do a really good job of bringing out some really important, you know, themes and lessons, whether you're an HR professional, whether you're a leader who may be put in the position to have to carry out these kinds of really sensitive and crucial conversations. But, you know, as I listen to those two clips a couple things jump out to me. Number one, tone really matters in these kinds of conversations.

[Tracey Diamond]

So true, yeah.

[Barry Thrutchley]

Yeah, I mean, I think, even though I may pick apart a few of the words or maybe some of the dismissiveness that Clooney came through with, ultimately, he had a bit of a comforting tone. Came through a little bit more like he was listening and reacting to some of the questions. In contrast, I think Anna Kendrick's character here was clearly, you know, following the script. And I think that's kind of what this movie kind of lays out is that ultimately these kinds of conversations, they need to have a level of empathy. You know, they need to have a level of listening and responding and understanding and yet, being very clear about the message and you know, the boundaries. So, I think there's a lot to learn from these two contrasting approaches.

[Tracey Diamond]

Yeah, Anna Kendrick's character certainly is showing her inexperience, you know, I always kind of revert in my head to these gender norms, right. You know, she's a younger female, which I wonder how that plays out if she was a younger male whether it would come off quite as intensely awkward. It's so hard to know that, of course. What's your advice to your team or to people that you mentor who are just starting out in the HR world that may be entering their first uncomfortable conversation where they have to let somebody go?

[Barry Thrutchley]

It's really difficult terrain to cross as a new employee, as an inexperienced manager. My advice is, there's no such thing as over preparing for these kinds of conversations. You just don't know which direction they're gonna take you in. So it's really important to go into these

discussions with a degree of compassion and empathy and understanding. You may not be able to relate to what they're going through, maybe because you've not been on the other side of this kind of conversation. What's important is there's got to be a human connection here. I mean these kinds of separation conversations are probably the most human thing, as an employee, you'll ever find yourself dealing with. And doing everything you can to preserve the authenticity, the transparency, the honesty to an extent I think is a really important thing for people to bring in to these kinds of conversations.

[Tracey Diamond]

Brian, I'd like to bring you into the conversation. Let's talk for a minute about the legal sort of parameters of employee terminations. What do you tell your clients that they should be on the lookout for when they're preparing to let go either a single employee or a group of employees?

[Brian Ellixson]

Well, it's interesting to hear Barry say, you don't want it to be scripted. And I think to a certain extent that's true. You want to be, prepare what you're gonna say. Rehearse it, rehearse, rehearse it. Be prepared. And stick to the reason for the termination. The last thing you want to do is equivocate or start injecting your own personal opinion into it. When you start creating those inconsistencies, that's where the challenges down the road when it comes to litigation, that's when they start sprouting up. Also, to go on what Barry said about being empathetic, you want to be empathetic in terms of make it a private meeting outside of the view of other employees. But you still don't want to add your own opinion to it later.

[Tracey Diamond]

And why is that? Why is that important?

[Brian Ellixson]

Especially down the road in litigation, I can't tell you how many cases we've had where you want the reason for the termination to be consistent with what is in the paper record. We've had tons of cases where you get the complaint and they say that during the termination meeting, the manager offered their own opinion saying they disagreed with the company or if it was up to me, I would of done it differently.

[Tracey Diamond]

Sure, I totally understand where that's coming from. Because first of all, having inconsistent explanations, if you have more than one person explaining to the employee why, the why, right? And the HR person says one thing but the manager says another. That is gonna make it super hard to win summary judgment on a litigation. So there's that piece of it right. But there's also the sort of, you feel bad when you're giving this information but if you start really sort of telling the employee that I'm so sorry, this is really unfair, that could potentially be evidence that's used against you in litigation as well, right?

[Brian Ellixson]

And I think that's important because you want to come across as objective and fair. When it starts feeling like personal attack or that the process or the reason for the termination was unfair, that's when people hold a grudge and that's when they're more likely to start looking for reasons why it was related to some other factor such as their age or gender.

[Tracey Diamond]

That's a good point. Yeah, people feel like they're being treated unfairly, then they're more likely to want to sort of lash out at the company. You know, I remember as a young lawyer just starting out in labor and employment, giving advice on the legal pieces of the, the legal compliance parts of terminations and then going in-house and actually having to give the information to the person being terminated. And they're very different feelings, right? It really changed my sort of feeling about what you said before Barry about tone and empathy and it just viscerally gives that better understanding of the awkwardness of, and the uncomfortableness of being in that room. But the legal compliance part is certain really important. Brian, are there special considerations for a single employee termination versus a group termination that clients should be thinking about when they're making decisions about who to let go?

[Brian Ellixson]

To address the latter in terms of group terminations, you have a federal statute called the Worker Adjustment and Retraining Notification Act or, it's better known as WARN. And what WARN is, is it requires employers with 100 or more employees to provide over 60 days' notice in advance of plant closings and mass layoffs. And then, individual states have their own min WARN acts with different requirements and differing notification requirements and differing triggering requirements. So employers, if you're going to be laying off a substantial number of employees, you really need to check your compliance in both the federal and state WARN notifications. In terms of your methodology when you're laying off a substantial number of people, you want to make sure that you're using objective criteria. Because the more subjective criteria you're gonna use the more, there's a question of whether or not it was fair. And then finally, you have an Older Workers' Benefits Protection Act where if you're gonna offer a severance package as part of the lay off and you're asking more than one employee to waive their age discrimination claims under the federal statute, you have your entirely different set of requirements where you have to give them extended time to consider the agreement. After they enter into the agreement, time to revoke it and say I don't want to enter into this anymore. And you have to disclose some aspects of the methodology, including what employees were considered, what employees were chosen, what employees weren't chosen and the ages for those employees.

[Tracey Diamond]

It's not as simple as what Trump used to say on the show *Apprentice*, just yelling you're fired and that's the end of it. This sounds like there's a lot that goes into the behind the scenes decision-making process. One of the things that I find can sometimes be very difficult when defending a case in a litigation is clients that are reluctant to name who the actual decision-maker was. That decision-makers don't want to sort of step up and take responsibility for the decision. And that could be very difficult in a litigation. Brian, why is that difficult in a litigation?

[Brian Ellixson]

In your single plaintiff employment discrimination cases, sometimes you get the benefit of if the decision-maker is in the same protected class. For example, if it's an age discrimination claim and you're able to point to a single decision-maker who is older than the person who was terminated, you have a nice strong legal presumption that this person of the same age or older than you isn't going to discriminate against another person because of their age. When

they're able to point to multiple decision-makers, it kind of muddies the waters and makes summary judgment incredibly difficult.

[Tracey Diamond]

Or if a client can't point to anybody as being the actual person who made the decision, it can sometimes go to this issue of whether or not there is a legitimate business reason for the decision or was there a pretext here that the company's kind of making things up after the fact, right?

[Brian Ellixson]

That's a great point.

[Tracey Diamond]

Barry, in the clips that we were listening to, particularly in the last clip, the employee actually broke down and started crying. Ugh, right? How should a person who's communicating the decision, how should they react to something like that, where the employee just got this terrible news and is reacting in a very emotional way.

[Barry Thrutchley]

I can tell you what not to do. I mean, don't look down and say where's my script for this moment, you know.

[Tracey Diamond]

Right.

[Barry Thrutchley]

Yeah, you want to come in. You want to be prepared. I mean, you think about the obvious things, you know. These are very difficult to predict conversations you know. We tend to talk about hey make sure you've got, a private space. Have a box of tissues available. You know. Just honor and acknowledge the gravity of the conversation and sometimes a little silence is okay. You know it can make it awkward, but sometimes people just need space. You know and they don't need someone to try to come up with all these reasons why they should look at the situation differently. You know, that was one of the things in this movie that really kind of rubbed me the wrong way is, is these scripts really just tried to reframe the situation and the decision. And here's all the positive things you should take out of this and I think there's some caution in doing that. I get the intent, but I think sometimes it can come across as a bit, you know, dismissive or condescending.

[Tracey Diamond]

Right.

[Barry Thrutchley]

Sometimes I found, the best way to you know, help an employee through their emotions is to give them time, to give them space. In some cases, give them a little privacy. You know, do you need some time, I'm happy to step out. But to just kind of honor the moment a bit and not get too stuck in procedure or process or some of the things that we saw Anna Kendrick's character you know, fumble through.

[Tracey Diamond]

Yeah, it's an interesting balance because on the other hand, you don't want the conversation to go on and on because that's where things can kind of slide downhill. You do want to make it clear that this is not a discussion that where we're gonna debate whether or not you should be terminated, that the decision has been made and is final so let's discuss what that looks like, right, in terms of going forward rather than debate whether or not it should be happening. Because unfortunately, we're past that point at this point. So, I find that they tend to be, these conversations usually do tend to be kind of brief, and you do want to make them brief, while also honoring the moment as Barry said. So I want to ask you guys an important question. You know, this movie is more than a decade old now and it aired at a time when video conferencing was not nearly as widespread as it is today. I mean certainly COVID has just in the last two years, has very much changed how we use technology to communicate with each other. And I know both of you spend your entire days, as do I, jumping from one Teams or Zoom call to another. Barry, you know, what are your thoughts on conducting these types of sensitive employee conversations via Zoom or Teams as opposed to in-person?

[Barry Thrutchley]

You know, it's funny. I remember watching this movie when it first came out. I think most of us in the HR world, you know, at the time, had kind of heard about this movie and kind of flocked to it to kind of see how true a picture it presented of high-volume terminations and people who fall into those roles. Honestly, I came out of it at the time thinking it was a parody. That, of course there is no way any organization would ever, you know, put streamlining and efficiency and cost-savings so much further ahead of doing what's right for their people.

[Tracey Diamond]

And I think it was a parody at the time. Right, it was

[Barry Thrutchley]

I think so.

[Tracey Diamond]

It was crazy extreme, right?

[Barry Thrutchley]

I think so. And here we are in 2022 and for a lot of reasons, right, I mean the world has been revolutionized by technology and there's been so many positive contributions to how work gets done and yet we're all so familiar with the downside of technology. Where it's appropriate and really sometimes where it's not. And for me, I think what this movie continues to reinforce, it's the reason why it's a case study in a lot of business school right now, is that we are learning that the workplace is really quickly becoming a human-centered environment for companies. And it has to be. Not business-centered, not policy-centered, not profit-centered. And your people practices have to be engineered and have to be designed around the various need states that employees have, right. Whether it's the need to be valued, the need to be heard, the need for autonomy, the need for purpose. And, you know, I look at, I look at this entire theme here around the proper way to carry out a termination decision. And my personal view is that using technology and doing it remotely should be avoided at all costs. Now, I totally understand that in a global economy, in a global world and virtual and hybrid complexities to where and how work gets done, that's not always

practical, right. And so, for our organization, we do everything we can. We bend over backwards, you know, to be there with an employee to convey this decision. When that's not possible, you know, are there certain practices that I think absolutely need to be considered, I think there are. I think you gotta schedule these things in advance to consider the element of surprise which, you know, there's some tradeoffs there as you talk to people. Do I pull them into a room in a Zoom meeting at the last minute, you know, or is that too abrupt, I need to schedule something in advance but possibly tip them off. There's this concept, and we've dealt with this directly when we had to do this over Zoom, is you never quite know what the persons working environment is gonna be on the other side of the Zoom meeting. You know, will they have other people in the room? Will their family be there? You know, it's not uncommon for children with COVID, being at home. And so, doing everything you can to be sensitive to their environment before the conversation occurs to make sure they're in a distraction-free setting and really one that doesn't diminish the dignity of the moment, right. Which you're obviously trying to preserve, you know, given the decision that's being communicated.

[Tracey Diamond]

I would imagine there would be some practical considerations too, in terms of turning off internet access, you know, making sure that you're retrieving company property and that sort of thing when you're not actually physically present with the employee when you're delivering this news.

[Barry Thrutchley]

That's right, yeah. And I think it's important to have all of that, kind of preplanned, you know, working closely with your IT department, managers who may be not in the same facility but maybe in close proximity. And then I think as you have the conversation, there's certain logistical practicalities that may have to enter into the conversation that you don't always have to worry about when you're in the room with the person. So it's important to make sure those things are either highlighted or at least you make yourself available after the notification meeting so that those kinds of questions, how do I return my things, you know, what do I do with my T&E reports. All of the day-to-day things that sometimes just get cut-off you know immediately and that need to be addressed.

[Tracey Diamond]

Thankfully this doesn't happen very often, but I do get questions a lot from clients about concerns that a particular employee who's being let go, particularly if it's for misconduct, may be volatile and there may be a sort of a concern about safety during the conversation. When you have a situation like that, you know, Brian and Barry, do you have ideas about best practices on how to maintain safety in the workplace and maintaining the dignity of the employee that you're letting go?

[Barry Thrutchley]

I think you can't underestimate the importance of planning for the safety and security of not only the meeting, but really all of your employees wherever these meetings occur. If you have reason to believe that the person you're letting go is potentially volatile or emotional or just based on the nature of their misconduct, without a doubt you want to assess the security requirements that go with that. Whether it's having someone on site, obviously not in the room but maybe accessible to the room, you know, is a common practice. You know, certainly the positioning of yourself in the room, you know, it's not uncommon to make sure

that you're the closest one to the door in a notification meeting that could potentially get heated or potentially physical. You never want the person to be between you and the door.

[Tracey Diamond]

Sure.

[Barry Thutchley]

So, pretty common thing to be thinking about. Certainly you want to be thinking about the protection, the precautions, the physical security or yourself and the people in the building.

[Tracey Diamond]

And also, for those employees that you have an inkling may be litigious, always a good idea for the workplace violence or safety reasons as well as a potential litigation, to have a witness in the room so that there's more than one person who can attest to what actually, you know, who said what while the conversation took place. Alright, well you know Barry, I really appreciate you joining us today for what is a conversation about a very difficult topic and we really appreciate your time. Before we go, I want to remind our listeners about our great blog, [HiringtoFiring.law](#) which is your go-to resource for information about cutting edge human resources issues across the country and also if you like our podcast, please let us a review on your podcast platform of choice. We are available on all the major ones, so please let us know what you think. Also, be sure to subscribe to this podcast. Thanks again for listening.

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