
Hiring to Firing - “Crashing and Burning: What Companies Can Learn From the Apple TV+ Series *WeCrashed*”**Hosts: Tracey Diamond and Evan Gibbs****Guests: Allison Snyder, Director of Organizational Effectiveness, Fulton Bank****Tracey Diamond:**

Welcome to *Hiring to Firing*, the podcast. I'm Tracey Diamond, labor and employment attorney at Troutman Pepper. And I'm here with my co-host, Evan Gibbs. Together, we tackle all employment and HR issues from hiring to firing. And today, we have a special guest: Allison Snyder, director of organizational effectiveness at Fulton Bank. Allison, so glad to have you join us today.

Allison Snyder:

Thank you, Tracey and Evan. Just to let you know, I am a regular listener to your podcast, so I am really excited to be with you today. Just to tell you a little bit about my company. It's Fulton Bank. It's a regional bank headquartered in Lancaster, Pennsylvania with over 3,300 employees and we've been serving individuals and businesses since 1882. In addition to Pennsylvania, we are located in Virginia, Maryland, Delaware, and New Jersey. And what makes Fulton Bank special, beyond our long history, is our company culture. We share this common purpose to change lives for the better. My role, specifically, is to lead several HR teams that individually have unique roles. They do learning and development, HR business partnerships, office of change management, and employee relations. But collectively, we are organizational effectiveness and our goal is to deliver thoughtful solutions to enable our employees for success.

Tracey Diamond:

I've known Allison for many years and I've had the pleasure of watching your career trajectory, and I know that you really live and breathe these concepts and it's not just speaking them. We're really thrilled to have you here and I think it's a particular discussion that we're having today because today, we're going to talk about the Apple TV mini-series called *WeCrashed*, which is a show that follows the real life story of the rise and fall of the company WeWork. WeWork was founded by Israeli billionaire Adam Neumann with the assistance — and sometimes despite the so-called assistance — of his wife, Rebekah. IMDb describes the show as, "Chronicling the greed-filled rise and inevitable fall of WeWork, one of the world's most valuable startups, and the narcissist whose chaotic love made it all possible." There are many takeaways from this story in terms of professionalism in the workplace, mixing family dynamics with work, et cetera. But to get us started, I would like to drill down to a particular scene where Adam's wife, Rebekah Neumann, makes certain termination decisions based on her feelings about whether the person is getting in her way, creating so called bad energy. Let's listen to a clip.

Rebekah:

Hi, I need you to start off boarding Jeff Winitsky.

Employee:

Off boarding.

Rebekah:

We're firing him immediately.

Employee:

Why?

Rebekah:

Bad energy.

Employee:

Bad energy. Got it.

Rebekah:

Thank you.

Tracey Diamond:

And here is another example.

Employee:

I wish I had more information for you, but it came from above.

Jeff:

No, no, tell me. Explain to me what bad energy means.

Employee:

Okay, let's just take a breath.

Jeff:

I'm trying to just do my job and you come to me with bad...

Employee:

I know. It is very frustrating.

Tracey Diamond:

Let's start with the concept of employment-at-will. Evan, do you want to get us rolling here by explaining what employment-at-will really means?

Evan Gibbs:

Yeah, sure, Tracey. It comes up with clients somewhat frequently, depending on I think their experience with this concept. And honestly, at-will employment, it's exactly what it sounds like. It's if someone is at-will, they can be fired for any reason. That's not illegal. It's not unlawful. When you're making your decisions to terminate somebody, there's not a statute that says you have to employ them for a certain period of time or you can only terminate them for these certain specific reasons. But you still have to be careful because the context really matters and you have to make sure you're not running afoul of any kind of statute. The general exception to at-will employment, and we see these less often frankly these days, but if you've got an employment contract that says you will be employed for one year with the company and if you're terminated before, then you're entitled to severance or something like that. Those are less common and typically, even built into most employment agreements is the concept of at-will employment.

The issue is just whether or not somebody may be entitled to severance under the agreement or something like that. But at-will employment is the general rule pretty much everywhere and in almost every situation, so that's what the concept is. And we get the client question of, they call and say, "Well, it's employment-at-will, so I can fire them for any reason at any time no matter what. Right?" And it's like, "Well, yes, but also no. Yes, but also let's talk about it and make sure that we're not running to file some other statute intentionally or unintentionally."

Tracey Diamond:

And it goes both ways. Employees also get to leave for any reason, resign from employment for any reason. It's very hard to hold an employee to a job if they're not interested in working there. I also want to note that employment-at-will is not in every state. I know for example, in Montana, there is no employment-at-will in the state of Montana. And certainly, in many foreign countries, the concept of employment-at-will doesn't exist. But in the majority of our country, for employees that don't have an employment contract, they are employed at-will. Like Evan said, we often get complaints that, "Well, okay, the employee's at-will. Why can't we just fire them for any reason?" And there are some limitations about that. So in the clips we just listened to, Rebekah Neumann uses the excuse of employees having bad energy. Allison, why might that not be such a good idea?

Allison Snyder:

It's funny. When I was watching this scene, it actually made me think more about what I hear more commonly said and "they're not the right fit." And I say that with quotes because that really could mean so many things. And where I see the biggest risk with that language is because, "They're not like me," right? There's something to that nature. So that bad energy or not the right fit is, "They're just not like me." Which to me, that ends up crossing into other things. It could be race or gender or sexual orientation.

In addition, by looking at the HR professional's face in that particular scene, I also assume there was no performance issues that were ever previously discussed with this employee. So I will say, if it came to me with something like that, unless it was an act of maybe misconduct, I don't generally go right to a termination. I don't know how I would probably defend bad energy if the termination was contested. But I also have found, similar to both of you, that many people always go to the, "Well, it's at-will, right?" That's the blanket reason for termination. And

what I've always shared with managers, is it doesn't necessarily make it the right thing to do as our company and how we believe. But it also certainly doesn't protect you from the cost and time you may need to defend your decision if that employee feels ultimately that termination wasn't lawful.

Tracey Diamond:

I'm really glad you brought up this idea of good fit because I do hear that a lot in our cases. It comes up where an employer will say to the employee, "You're terminated because you're not a good fit." Often, what the employer means is, "You're not fitting the expectations of this role or you don't have the skills or background for this role." But it's many times used as a euphemism for some kind of protected category. And like you said, Allison, often it'll be someone who doesn't look like the person who's making that decision. So, "You're not a good fit." The employee at least thinks or contends means that, "You're firing me because I don't look like you." And that's a big problem.

Evan Gibbs:

And this is always... To sort of play this out, or at least the way that I encounter this a lot, is when you have that conversation with whomever it is that's making the decision to fire or discipline somebody. And that's the reason that they present you with and you give them the advice that, "Well, we may want to rethink this decision. Or we may want to go back to the drawing board and sort of think this through." It's really, a lot of times, frustrating for managers. And I bet you have both heard this a million times, but the managers always say, "But I've been dealing with this for six months. I've been dealing with this for a year. And I've put up with this for so long. I can't handle it anymore and they're not a good fit and I want them out tomorrow." That is always a tough expectation to manage.

And I'm sure, Allison, in your organization, your managers are trained a little better than a lot of the people that I've dealt with in the past. When managers aren't trained to manage employees effectively — manage performance effectively, in particular — it can be a really frustrating process for them. And we always ask, of course, for specific examples. "Okay, they've got bad energy." Well, give me some examples. And a lot of times, it comes down to, "Well, I just don't like this person. I don't like them." That's not an unlawful reason to fire somebody. It's not illegal to fire somebody because you don't like them. But if they say that it's for some other reason later on in the lawsuit, then it's just going to be hard to prove that it really was just a perfectly legal personality conflict. It just makes it really difficult. But it's really frustrating, I've found, for managers who just want to move forward and manage performance one way or the other.

Tracey Diamond:

Allison, how do you handle that? Where you have managers that come to you and there's no documentation in the file and they're saying, "I want this person gone yesterday."

Allison Snyder:

I haven't really had too many people in the last probably five years or so that would just say, "I don't like this person." So they're better trained at least, to know that-will not fly with someone

in human resources at my company, luckily. But if someone doesn't have the proper documentation, then I would say it depends. It depends on how serious the situation is. We have a progressive disciplinary process. Expectations are going to be that you would at least go through some level. There are times where it's appropriate to skip those levels. So depending on how serious the situation would be, I would say "It depends." But many times, I would not recommend termination if someone just said, "I've been dealing with this for six months and I've done nothing." That's not usually acceptable.

Tracey Diamond:

I'm somewhat sympathetic to the managers because they're the ones who have to deal with the people. And I know what that feels like, where you have to give bad news to an employee and then continue to work with that employee. It's an awkward conversation to have and it's always that fear that the employee's going to just hate you, but not change their behavior. And now, you're sort of stuck dealing with them after you've had this conversation. Do you have any tips or suggestions on how best to present the bad news when you're the one on the frontline having to manage the employee?

Allison Snyder:

Yeah, I look at these... When I talk to a manager, I do feel for them in those situations, especially if they're less experienced. So I do refer to them as we probably had missed opportunities and I try to make these teachable moments and look for what those opportunities are. So I go that route. I show empathy to them, with them, right? Because I do understand that the situation is difficult, but then I need to show them what the risks are where we were not affected. We weren't doing our job as a company to either set the clearest of expectations / measure what the difference was and how does that feel for that person to be surprised in that regards with a termination? So I think it's really about educating and also trying to put them in the shoes of that employee. How would they be thinking about this situation? Nobody has told them it's a problem.

Tracey Diamond:

I once had a supervisor tell me that the best practice is when people terminate themselves because they are perfectly aware along the way of where their pitfalls are and they realize themselves if they're not a good fit — here we go again with a good fit — for that job. Much safer if the employee thinks they're not a good fit than if the employer thinks the employee's not a good fit.

Allison Snyder:

I'm a big fan of that because nobody wants to do poorly in their job. They don't show up coming to work saying, "How can I mess things up for my company?" Very rarely are you going to have that individual. So I think that by being able to give more regular feedback with that employee and having those conversations, most will take that opportunity to leave so that they're not being told. That's a much better option for that employee and, of course, for us as a company.

Tracey Diamond:

Evan, I have a question for you about pretext. In the show, Rebekah is using the term bad energy when she tells HR to let a couple of people go. But really, she's letting go of anyone who's getting in her way. And this is particularly obvious in a scene with Rebekah where she ousts Elishia Kennedy as the chief branding officer and then takes over the position for herself. Can you go over for us the concept of pretext and where an employer says the reason is one thing and the employee is able to establish that's not the true reason for the termination? And why that's a problem for our employers?

Evan Gibbs:

In the cases where we are defending the discrimination claim, whether it's gender, race, whatever, the plaintiff first tends to show, of course, that there's a *prima facie* case. And I don't know if I'm saying that right. People are sometimes surprised that despite the fact that lawyers have to learn all this Latin in law school, I've never taken a Latin course and I feel like every Latin word that I use, I feel like everybody says it a little differently.

Tracey Diamond:

You know what? I feel like half the time when I speak English, I'm mispronouncing something. So I'm with you.

Evan Gibbs:

I have a lot of those words that I've only read it and then I say it out loud and then somebody's like, "That's not how you say that. You're pronouncing that completely wrong." Anyway, I'm sorry. A total distraction. But no, the plaintiff first has to prove that Latin word, the *prima facie* case. They have to present some kind of evidence that there is discrimination. And maybe it's showing that the plaintiff was treated differently than somebody else in a different category. A female complaining about discrimination as to a male employee. So they have to present that piece of evidence first — whatever that evidence is. And then the burden comes back to the employer to show that no, there was in fact a legitimate business reason justifying whatever the decision that was made. And then once that is out there, once the employer or the company has shown that, then the burden goes back to the plaintiff to bring forward evidence that the legitimate business reason was in fact just pretext for discrimination.

Obviously, if you just think about this from a common sense perspective, that's a pretty difficult burden to show unless you've got some kind of evidence that is inconsistent with the legitimate business reason. So if somebody says, "Well, I terminated this person because of consistent tardiness." But then you have an email where that manager made the decision, maybe they emailed a coworker and said, "I really don't like this person. We're like oil and water and we just don't mix well." That might be a situation where the employee could get that email in discovery and say, "Hey judge or jury, here's the real reason. They said that it was because I was consistently tardy, but that's not true. It was because this person didn't like me and they didn't say it in the email, but he didn't like me because I'm a female. He didn't like working with females." Something like that.

And I actually had that come up in a case one time. This was years ago, and like I said, the pretext is usually pretty hard to find. But one of the things the plaintiff used as pretext was a

comment that a supervisor made that he pointed to a secretary during one of their meetings at this particular company and told her, "That's really the type of job that you should be working. The job you have currently is just not really a fit for you." And so that, not only is likely direct evidence of discrimination where you're have the burden shifting sort of framework, but something like that could also be used as pretext in a different situation. So that's the sort of thing that folks are looking for and they're talking about the pretext.

So it's really important that we, as the employment lawyers and then of course the folks in the HR department or organizational effectiveness department in a company, it's really important that we sort of get to the truth of the matter as quickly as possible to understand, "Are you really telling us the truth about why we're terminating this person?" And most of the time, the reason they tell us, that's exactly the reason they're not hiding anything. In my experience, 99% of the time, the stated reason is the real reason. But there is that 1%. And so it's important to know out of the gate, if there's any kind of evidence of pretext that we're going to come across. "Are there any text messages or emails where you talked bad about this person to someone else?" Questions like that, I think get out in front of that issue.

Tracey Diamond:

And that real reason better be the real reason that you use a year from now, two years from now, three years from now when you're at the EEOC, and then you're in litigation. Because if your reason changes over time, that — in and of itself — is going to be very hard to get the case dismissed a summary judgment, even if there's no evidence, at least at the forefront, that the real reason was discriminatory. Just the inconsistency in the facts right there are going to make it very hard to get rid of the case before trial. And trials are expensive.

Evan Gibbs:

And with the trial, another consideration is that the burden changes at trial. The framework for the question changes at trial. It's no longer this three-step analysis like we have at the summary judgment stage, which is much more favorable to the company. The burden actually gets easier for the plaintiffs. If you look at the pattern jury instructions for discrimination cases, it's easier for them to prove a trial. And so if you've got some evidence of pretext out there that gets a plaintiff past summary judgment, then you can bet that it's going to make it even harder to win a trial. Because if that evidence is good enough to get past summary judgment in front of a federal or state judge, then I think it's fair to say that most juries are going to look quite unfavorably upon that. And they don't have quite as difficult a burden to win at trial.

Tracey Diamond:

Yeah. At the very least, it's questionable what a jury's going to decide. You never know how a jury's going to decide, so you can't get... And no guarantees there. Allison, you said something before that I wanted to come back to. I thought it was really interesting about, I call it labels, right? Good fit, I think of as a label versus the specific examples that are leading the manager to decide that that person is not a good fit. What do you do in your conversations with the managers to help parse that out, to get to those specific examples?

Allison Snyder:

I will ask them. I want to almost hear it in a story. I want them to walk me through it. What is the situation that's going on? What are they doing specifically and what are the results of that? And then I'm able to hear more about what is causing them concerns with this employee. Is fit actually connected to performance? Many times, it is and they just don't know how to call it out. So in those cases, it's much easier. In cases where people aren't just getting along, I can still find ways of trying to get out of them, "But what is that ultimately doing to performance of your team then?" But it becomes less personal and then it becomes more about what is causing a performance concern from this employee, which is why they should no longer work here anymore? So to me, it's really getting the story and walking them through.

Tracey Diamond:

All right. You've gone through that analysis, you've talked to your managers, you've worked through the issues, you've encouraged them to document the actual performance concerns and not the labels like "good fit," and now we're at termination. We just had a podcast not long ago when we talked about the movie *Up in the Air* and the "best way to terminate an employee." Do you have, in your own sort of best practices, in terms of approaching termination decisions and also communicating those termination decisions?

Allison Snyder:

Once I've had the manager walk me through, I actually listen to things like intent and impact of that performance. I want to find out from them, "Was this a one-time issue? Was this repetitive? Were we really clear with expectations upfront?" And then I also am going to check if did they follow our established process for progressive disciplinary action? I mentioned that before. Did they have, as you said, the documentation? Now, I learned early in my career about the importance of documentation, but to me, documentation is worth nothing if it was never discussed with the employee. So if it's just padding a file, it's not really a great source. If, for some reason, they didn't actually go with those guidelines, I do want to see does it fall in some other acceptable reason to skip steps, like a violation of code of conduct for example. The other thing I do check out before I would do a termination and to prepare for one is making sure the manager actually agrees with the decision.

Sometimes it's someone else, like their leader above them, that is suggesting this termination and the manager seems maybe resistant or concerned. And regardless of how I feel, if I agree with the termination, I just can't have that manager not agree with it right there. If they don't think it was fair or they share it with other people afterwards, it could be really bad if they did it with the employee when they terminate. It's just as bad though, when they do it afterwards, when they're talking to people. That could open up so many risks: legal, engagement of team, our reputation, the manager's reputation.

So those are all things that I want to button up before we would do a termination. As far as a best practice, I think it's always being very prepared. If I have someone who's never done it before, I'll practice with them. I want to make sure they have the right language. I want to make sure that somebody else is there to be a witness, either right in the room or if they have to be on the phone, but somebody else to be there so we don't have a "he said, she said" later on. And also, keep it short. Come right out, tell them the "why," and then talk through next

steps, and then try to move them on as quickly as possible. To me, that is the ideal situation for a termination.

Tracey Diamond:

I agree with all those things. You mentioned progressive discipline. Yeah, I want to talk about that for a second because there's sometimes some confusion over progressive discipline in a non-union environment versus progressive discipline in a union environment. Evan, do you want to talk about that a bit?

Evan Gibbs:

In a unionized environment, the collective bargaining agreement is typically going to have certain steps that have to be completed before you can move to another step. And so there's got to be a verbal warning, then a written warning, maybe a second written warning. There's all these steps and it's contractual. The company has to follow those steps. There's typically an exception. Somebody, I don't know, gets somebody else hurt at work through a safety violation or something like that, but there's really serious stuff. Or they shoot somebody, something really bad that you can fire them immediately of course. But generally, you're contractually obligated to follow that process and if you don't-

Tracey Diamond:

Sure hope they could fire them immediately if they shot somebody.

Evan Gibbs:

Yeah, I don't know. I don't know. Some of the union reps I've dealt with over the years, I think they may say, "No, no, no, no. You're going to need to grieve that. That's a grievance."

Tracey Diamond:

Sad, but true.

Evan Gibbs:

Yeah, that's right. So if it's not contractually mandated in the CBA, then progressive discipline. I've never seen any kind of statute that requires anything like that. You can go straight from doing great to firing somebody without any kind of steps with a progressive discipline. There are very few situations where we recommend not going through progressive discipline, just in terms of you start at the lowest level with what I was talking about a minute ago, that you see in the contracts, verbal warning, communication to the employee, then something that's written, maybe it's something like a written warning, and then you go to something more formal, like maybe a performance improvement plan. And you go through all those steps before you get to the termination. And number one, I think really, truly the clients that I work with, the goal of that process is for the employee to manage their performance and get back on the right track.

Because like you said, Allison, I've never had a situation where I felt like the employee was just trying to do a terrible job. Folks generally, they want to do good. They want to succeed and perform well and grow their career. That's what the process really allows folks to do. But

sometimes, unfortunately, it just doesn't work out despite everybody's best intentions and efforts. But the progressive discipline policy really gives them a chance to identify the problems, get better, and if not, we've got a clear record of exactly what both sides have done throughout the process before we get to a point where it's just not workable and we have to terminate.

Tracey Diamond:

Getting back to the idea, though, of employment-at-will. If you're in a non-union environment, even with a progressive discipline policy, you want to make sure your policy gives management enough discretion to depart from progressive discipline when and if they feel it's necessary to do that. With the union environment, you're really kind of stuck — absent some kind of egregious activity harkening back to our *Squid Games*, shooting of employees. Okay, last question for you, Allison. Actually, before I get that, I do want to make one other comment, which is that a long time ago, I heard you give a presentation and it was something about employee discipline.

You told the group that you always presented as explaining to employees that you're trying to give them an opportunity to succeed. You're having a difficult conversation with them because you want to give them every opportunity to succeed and if they don't hear this, then they aren't aware of the issues that they have. That was a while ago, and that always stuck with me watching the way you manage folks. I do think that you kind of live that mantra of really looking for all opportunities to ensure success of employees. Sometimes, it's just not possible and employees have to be moved on. Right? As an HR person, how do you manage management teams effectively to avoid legal issues and to make sure that your own personal compliance filters down to your teams?

Allison Snyder:

I think training is a great start. So making sure that you have some type of leadership development, not only for legal issues. That, to me, is if you're doing your job right, you won't have the legal issues. It's really on how to be an effective manager. You will find engaged employees rarely pursue legal actions, right? They trust the intent of their manager. They trust their company. So having some type of review of your data on a regular basis: look at your turnover, your retention, your engagement, exit interviews, new hire surveys. If you keep listening to the voice of your employees, you're going to start uncovering issues with the effectiveness of your manager, and then you can address them because it really all starts with the manager. Another tool that we have used in my company, I've used this for years, is a climate assessment. I might get an indicator that there's something going on in an area, or they might be a really an amazing area. They have really high engagement.

Having an employee relations professional or an HR professional meet one-on-one with individuals on a team, just learn about their experience, feel, "How's morale? Are you getting the support you need?" And then you start to learn what is going well and areas to improve. And if you do that, you can actually then provide consultations to that manager on some best practices. So the more you equip that manager, the better chance you're going to have clear expectations for your employees. That's really what they want. They want to be successful. And the more trusting relationship you have, again, you're not going to find yourself in these legal concerns.

I will also say though, by doing the climate assessment, once in a while we do uncover something. So we might find something that could be a potential legal issue by us being proactive and looking for those things, as opposed to waiting for someone to either do a whistleblower complaint or leave and then all of a sudden, we get papers from their attorney. The more you can do proactively, I think it's going to minimize your legal issues. And ultimately, you're just going to be a better employer.

Tracey Diamond:

Provided that once you get the bad information, that you act on it and fix it. Right? If you're going to find out about it, you better do something about it.

Allison Snyder:

There's no doubt. We have something called Employee Experience Council, and we review every comment that comes in from our engagement surveys, our exits, and our new hires, and then we look for things that we can address. If you survey people or you ask questions of people and then you do nothing with it, it's almost worse.

Tracey Diamond:

For sure. Well, that pretty much wraps up our episode of *Hiring to Firing*, the podcast. We want to thank Allison Snyder for joining us today. And thank you, as always to my co-host, Evan Gibbs. Please be sure to listen to our other episodes and subscribe to our podcast. You can find it, we're on most major platforms. And also take a look at our blog, hiringtofiring.law. We welcome your feedback. Thanks again.

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