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***Hiring to Firing Podcast – “Workplace Whistleblowing Complaints and Netflix’s Monster: The Jeffrey Dahmer Story”***

**Hosts: Tracey Diamond and Evan Gibbs**

**Guests: Josh Burnette, General Counsel for North America, DS Smith**

**Evan Gibbs:**

Welcome to *Hiring to Firing*, the podcast. I'm Evan Gibbs, and with me is my co-host Tracey Diamond, and we're both partners at Troutman Pepper in the firm's Labor and Employment Practice Group, and I think that together we've handled pretty much every employment issue from hiring to firing, and hence the name of our podcast.

**Tracey Diamond:**

Today we're very excited to have our first on camera recording of our podcast.

**Evan Gibbs:**

And we're also happy to welcome today's guest, Josh Burnette, who's general counsel for North America at DS Smith here in Atlanta. Josh, why don't you tell us about DS Smith and your role with the company?

**Josh Burnette:**

Absolutely. First and foremost, thank you for having me today. Excited to be here for the first video recording. Hopefully it won't be the last, but we'll see how it goes. As far as DS Smith is concerned, DS Smith is a large multinational integrated manufacturer of paper and container board products, so in effect cardboard containers, but we like to think of our business as a bit more sexy than that, so we specialize in producing sustainably minded products that we sell to a variety of customers, including e-commerce customers, FMCG, which stands for fast moving consumer good customers, industrial customers and the like. And we're based in London, traded on the London Stock Exchange, are a FTSE 100 company there and have our US headquarters here in Atlanta.

**Evan Gibbs:**

Thanks, Josh. And for those of you watching or listening, if you look on the bottom of your cardboard boxes, there's usually a stamp on the bottom that shows where that box came from, and I pay very close attention now to look and see which ones have the DS Smith logo on the bottom. A little bit of insight there into-

**Tracey Diamond:**

I'm going to have to look for that.

**Josh Burnette:**

That's right. We trained Evan well. We trained Evan well.

**Evan Gibbs:**

That's right. It's always got that little stamp on the bottom. Have you always worked in-house or what's your career trajectory been like?

**Josh Burnette:**

I have not always worked, although I think my path to my in-house roles was a bit conventional with a few twists and turns here. Out of law school, I actually worked at a large law firm here in Atlanta, did that for approximately four years, was an M&A associate, general corporate law, some corporate finance work. I really got comfortable taking on a variety of additional matters because I joined shortly before the Great Recession in the 2008, 2009 downturn.

And so as we all know, in big law, the name of the game is trying to fill as much time as you can, bill as much time as you can, engage in as many profitable matters as you can. And when there was just not a whole lot of general corporate or M&A activity in those two years, I learned to get very comfortable taking on a variety of different matters from ERISA matters to some different litigation matters that had extreme touchpoints with corporate law, did some investigatory work, and it really gave me a solid foundation for the comfort level that you need going in-house and handling a variety of different subject matters.

After about four years, I had a couple opportunities to examine in-house roles that had been presented to me, and I wound up joining a company by the name of Southwire Company out in Carrollton, Georgia. So just west of Atlanta. Southwire is one of the largest electrical wire and cable manufacturers in the world. I worked my way from General Corporate Counsel there to VP and Associate General Counsel, and actually in the two years prior to joining DS Smith, I was in a completely non-legal role. They had asked me to engage in a role in the commercial side of things, and so I took on a VP of M&A integration role, which is what I was doing when I got the opportunity to join DS Smith.

And there was actually a point in time where I thought I may never see the legal side again. I was really enjoying what I did, but when I was presented with the opportunity to join DS Smith, it was very compelling. It would've been the first legal role in-house that they had ever had, was shortly after they entered the US market, and lo and behold, here I am. So I've been there for nearly five years and it's been a fun and interesting ride. During that time, I also served as an interim HR director for about two months while we searched for a full-time replacement.

**Evan Gibbs:**

That was the, I'm sure, the most fun part of your career that you've had.

**Tracey Diamond:**

You've had a lot of hats on.

**Josh Burnette:**

I will tell you this, I gained a newfound respect and appreciation for HR practitioners and professionals everywhere. It is truly a very interesting role, but they're very demanding roles.

**Evan Gibbs:**

Tough job dealing with people. I mean, it can be really challenging.

**Josh Burnette:**

Never a dull moment.

**Tracey Diamond:**

When you have a lot of balls in the air like an HR person often does, sometimes things will get missed and you'll just have employees that are complaining and it's a lot of noise and it's hard to get through that noise to see what's real, which I think brings us to the today's topic.

**Evan Gibbs:**

Yeah, that's a really great segue. The focus of today's podcast just happens to be on the risks around companies failing to timely and sometimes appropriately investigate workplace complaints. We're talking about whistleblower complaints and then those relating to discrimination and harassment, maybe even sexual harassment, whistleblower types, complaints. There's a lot of different types of whistleblower or claims like that out there. And so we will go through some of those different types of claims that we come across, and as usual, we're going to use a show to illustrate some of the concepts that we're going to discuss today.

Tracy and Josh aren't super thrilled about my choice for the show today, the show of today as a film we're going to show, *Dahmer - Monster* from Netflix, has been out for a little while. It's been out for several months, and a lot of folks have watched that. I watched it. If you don't know, the show documents the life and crimes of the serial killer, Jeffrey Dahmer, primarily from the early 90s. We'll go ahead and as usual, we'll listen to our first clip from the show.

**Glenda Cleveland:**

Can you send an officer to the Oxford Apartments?

**Emergency Dispatcher:**

What's the emergency?

**Glenda Cleveland:**

Well, I think it's a fight going on next door and somebody is either being hurt or killed.

**Emergency Dispatcher:**

Can you go make sure?

**Glenda Cleveland:**

What? No, I can't. I said I think somebody is being killed. I ain't going next door.

**Emergency Dispatcher:**

We'll send a car over.

**Glenda Cleveland:**

Wait, you're not even going to ask me the apartment number.

**Emergency Dispatcher:**

I said we'd send somebody.

**Glenda Cleveland:**

Y'all always say you going to send somebody, and nobody ever shows. I done called y'all like 50 times.

**Emergency Dispatcher:**

I need you to lower your voice, and if you keep calling us all the time, how are we going to know when it's an emergency? 911 is a resource, okay.

**Glenda Cleveland:**

I am saying somebody is being killed. Do you get that?

**Evan Gibbs:**

As disturbing as the clip was, I think it does really highlight the issue that we see sometimes of people within an organization ignoring complaints that are received or heard by employees. I know this is of course an extreme example, but Tracey, what are some of the legal risks in a situation where an employee within an organization is making complaints and is just being ignored?

**Tracey Diamond:**

There's several, right? First of all, if there's a real concern that the employee's bringing to the company's attention and the company doesn't do anything about it, then there's the risk of liability for not having handled the issue that's being complained about. There's also the concern where the whistleblower themselves is bringing that complaint and has a reasonable belief of a violation of the law and then gets somehow retaliated against experiences, some form of adverse employment action and could bring a whistleblower claim. So there's the underlying complaint, maybe it's discrimination or harassment or some other wrongful conduct, and then there's the potential for a whistleblower complaint on top of that.

**Evan Gibbs:**

I wanted to bring this issue up, Josh. You were mentioning when you had your sort of interim HR role. I know what I've heard from clients a lot of times is a lot, of course depends on the size of the organization, but typically in a large organization, there may be a lot of complaints that are bubbling up through the system to the HR department or to maybe just frontline supervisors. So I'm curious if you guys have seen that and the volume of complaints and whether that turns down the volume on them for the people who maybe receive them. I'm just curious if you all have had any experience with it.

**Josh Burnette:**

So that's a great question, and you touched on this. With any large size organization, you really do expect to have a baseline number of complaints come through your whistleblower channel. We call ours the Speak Up Channel, and you hope to receive, again, a baseline number of complaints because what that tells you, even if many of them are not actionable or substantiated, it tells you that there's a confidence present in your employee base within that particular channel, and it gives them a forum that they oftentimes don't think they have within their line management to access. And so we do see a fair number of complaints come through our lines that we maintain at DS Smith. Again, we think that's a healthy sign of the business and where our employees are relative to trusting that medium. Fortunately, I've never experienced a situation anywhere remotely close to what we see in the clip, but-

**Evan Gibbs:**

Thankfully.

**Tracey Diamond:**

Thankfully.

**Josh Burnette:**

I hope I never do, but I have experienced a bit of the detrimental impact that a failure to act or really a failure to act promptly can have on the complaint or the matter complaint of itself.

**Tracey Diamond:**

I have a couple of questions for you. You're talking about your Speak Up line. Is that a hotline? 'Cause I know sometimes companies don't know what type of avenues they should be offering to employees.

**Josh Burnette:**

And that's important. First and foremost, Tracey, it's very important to communicate out what those avenues are. And we look at our system as having three prongs, which I can touch on in a moment. But to answer your immediate question, our hotline is the primary avenue through which we seek to have employees register their complaints. It's maintained and managed by an outside third party.

**Tracey Diamond:**

Oh, really?

**Josh Burnette:**

It is a telephone system so that those employees, particularly we're a manufacturing company, so we want to ensure that those employees that are less connected or that don't have email access within the company, that they've got a mechanism that they can use to access that hotline. So we do use telephone, but we also inform others that do have the more ready

electronic access that they can contact us via email anytime and instruct them to, if not using the Speak Up hotline, to email our company secretary function or internal legal counsel.

**Tracey Diamond:**

I know we always recommend having alternative ways to communicate complaints, really important.

**Evan Gibbs:**

And I really like the concept of being run by a third party because I have, another issue I was going to touch on was sometimes I've had situations in the past where a complaint is raised and because of the working relationship between maybe a supervisor and a subordinate, the supervisor said, "Well, this person just complains all the time. I'm not hearing any more of this," and writes off what may be very legitimate complaints. Whereas if it's going through a third party and then going from that third party to the right channels, maybe that's a better way to make sure the company's getting the complaints and handling them right.

**Tracey Diamond:**

And I think you're hitting on a really important issue because we all have heard of the employee that's the complainer. How do you get through that noise and figure out what's a real complaint and what is just a run-of-the-mill I'm complaining because of all sorts of things that really don't rise to the level of a legal complaint or even a viable workplace complaint. You just have the person complaining all the time about everything.

**Evan Gibbs:**

And that's one of the things from, we don't have it in the clip that we showed, but in the show, they discussed that Dahmer's neighbor, and that's the lady who made the call in this clip we just watched, that she had called police, I can't remember exactly how many times. It was like two or three dozen times. She had called so many times, and the insinuation was that, "Oh, she calls all the time. And so this is Glenda. We're not going to take her seriously." And so I think there is that very real issue that the show highlights for us.

**Tracey Diamond:**

Isn't Glenda the good witch?

**Evan Gibbs:**

I think so. I think that's right.

**Josh Burnette:**

She certainly was in this case.

**Evan Gibbs:**

Yeah, that's right. Yes. I think that really brings us right into our next clip, and it's not actually from the show, but I thought this one was really great because it's an actual 911 call that was

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placed by Glenda Cleveland. And again, as I mentioned, that's Jeffrey Dahmer's next-door neighbor. So here's a clip of that call.

**Glenda Cleveland:**

Okay. Hi dear, I'm on 25th and State and there's this young man. He is buck-naked and he has been beaten up. He is very bruised up. He can't stand. He has no clothes on. He is really hurt. And I, you know, ain't got no coat on. But I just seen him. He needs some help.

**Emergency Dispatcher:**

Where is he at?

**Glenda Cleveland:**

25th and State, the corner of 25th and State.

**Evan Gibbs:**

So on the show, after making this call, police respond to the location from where Glenda called and they found a young boy. He was 14 years old and he was naked on the street and was acting very unusual. He had visible wounds, was acting very strangely. Jeffrey Dahmer then appeared on the street and told the police officers who responded that this was his boyfriend who was drunk, that they'd had a domestic dispute. And the officers just totally bought into Dahmer's story and they actually escorted the child back to Dahmer's apartment where minutes later, Dahmer later confessed that he killed the boy.

**Tracey Diamond:**

This is awful.

**Evan Gibbs:**

Yeah, I mean, it's horrible from start to finish the facts of the case and the story it tells. But this clip highlights a couple of things I think in particular. And first it shows I think the problem with companies that don't thoroughly investigate complaints. And second, I think it also really highlights that companies sometimes don't respond timely and they don't respond appropriately, even if let's say an investigation is conducted, they respond, but they may not do the right thing in response to the investigation. I'm curious what your thoughts are on that or what your experience are on those two issues.

**Josh Burnette:**

Yeah, so I'll tell you, I mentioned a moment ago the three pillars that our, and I think really any successful whistleblower program rests on, and one, we talked about it earlier, there's an awareness within the employee base. In this case we see it with the neighbor. She's got the conduit of the 911 system to levy her complaint. So there's a general awareness within the employment base to access management and to register their complaint.

Secondly, there is a confidence in the fact that they can register that complaint and have it actioned on. And that is an absolute foundational understanding that has to be present within any successful system. And then Evan, to highlight this point, there's a responsiveness that absolutely has to be emphasized by the respondents in this case. So in the capacity of a corporation, it's the inside legal counsel or whomever is monitoring that hotline that has to take immediate and prompt action.

And we see in this case, and you talked about the perils of failing to respond, of failing to timely respond. And so really the confidence that your employee base and anybody accessing that conduit is going to have in that resource is going to be directly impacted by the level at which and the promptness with which you respond to your complaints.

**Evan Gibbs:**

Yeah, I think that's absolutely right. And I've seen in my career a variety of reasons that complaints haven't been acted on appropriately. I mean, sometimes there will be an investigation that's conducted that's really an appropriate investigation, it's timely, it's done correctly. And then whomever it is that does the investigation, a lot of times they don't have the power to maybe do anything about it. And they really are just a fact-checker and they do the investigation, then they take it to the decision maker and say, "Here's what I found. We've got to do something about this."

And then oftentimes, for example, if you've got a really high performing salesperson who is alleged to have retaliated against somebody or done something to somebody else within the organization, and maybe that's substantiated, well then, an executive in charge of that person says, "This particular salesperson is so valuable to the organization"

**Tracey Diamond:**

We cannot live without them.

**Evan Gibbs:**

Yeah. "We cannot live without them." Or maybe it's an executive or a founder of a company. That's another issue that I've seen come up more recently are individuals who help found the company or maybe the actual owner of a company. What do you do in those situations? Have y'all ever dealt with that? Where it's someone where it's an indispensable type person?

**Tracey Diamond:**

Comes up all the time in my practice, and there are avenues of corrective action short of termination for that high performing person who the investigation is showing either acted inappropriately or committed some form of misconduct. So often I'll talk to my clients about that, whether it's training, whether it's a warning, a performance improvement plan, some kind of monitoring. Sometimes it's a matter of just separating out the complainer from the harasser along with the training and corrective action for the... I'm saying the harasser, but sort of the wrong doer 'cause it's not just harassment that we're talking about today.



**Josh Burnette:**

Absolutely. And we've seen that as well, or I've at least seen it in my experience over the years where the subject of the complaint is a high-profile person within the company. But I think as executives, as managers of that conduit, you have to treat every complaint, regardless of the subject, with the utmost care, utmost seriousness, and utmost integrity. Otherwise, the integrity of the entire system fails. And you have to understand that a failure to act, a failure to treat it with the seriousness that the allegation requires can ultimately result in an erosion in the confidence of the medium itself. And in the worst situations, I think can have an erosion within your employee base of all company policy. And ultimately as an executive, even if you're a founder of the company, you understand the value and the importance of the person that was the subject of the complaint. You have to understand that the negative impact on the overall culture of your company, it could just be profound with any failure to treat those sorts of complaints seriously.

**Evan Gibbs:**

And they're also the legal risk. There are also the non-legal ones like impacts to morale because I think it's really common sense that employees talk about this stuff. At least as outside lawyers, we come in and it's all very siloed, at least when I usually get involved, things have become siloed and here's the complaining party and here's the respondent, the harasser or whatever, the bad actor, and it siloed. But in reality, a lot of times it's a group that's those two and there's eight other people and they're in office together and they're talking about it and other people have seen it. There's always witnesses. And then if the company doesn't-

**Tracey Diamond:**

For every complainer, there's eight that want to complain but don't feel comfortable speaking up.

**Evan Gibbs:**

Exactly. And so if one person finally comes forward and complains and there's nothing done, I have seen it. It can spread rapidly and it's just like there's almost a complete loss of faith almost overnight.

**Tracey Diamond:**

What do you do about that complainer that is just complaining and there really is no substance to that complaint? How do you handle the other side of this?

**Josh Burnette:**

I think that's a great question. And what we strive to do is truly train our employees on appropriate use of the whistle blowing or Speak Up line. And there's a fine line in doing that, and you walk on tenuous ground in doing that because the last thing we want to do is suppress otherwise rightful complaints coming through. But we also want the medium treated with respect and understood within the employee base as far as what are the appropriate complaints that should be coming through this hotline.

And you have to understand that as inside counsel, you're going to get complaints that should typically just be raised through line management, and there are going to sometimes be complaints by those "serial complainers." And I think in those cases it does warrant a discussion with those individuals about what the proper use looks like while thanking them for their efforts, for the desire to raise complaints to that level. But it's a fine line that you have to walk in a balance that you have to strike so that you are not otherwise suppressing the content that you really need to come through.

**Tracey Diamond:**

It is a fine line and it's a hard line to practice. Right. It's easier to talk about it than to put it into practice, for sure.

**Evan Gibbs:**

And there's also a very real legal risk as well. What if someone is a serial complainer and it becomes a problem to where you're really taking up a lot of resources. If you call us, we're typically going to say, "Well, you can't discipline them." Of course, it depends on the nature of the complaint.

**Tracey Diamond:**

If they're trying to get someone fired, maybe you can't discipline them, but it depends on the facts.

**Evan Gibbs:**

That's right. Yeah. It depends on the facts. But in a lot of situations, our advice is going to be, "We'll, you can't fire them. We can get creative and think of other things to do, but we can't just fire them because then we may have a retaliation complaint." So it's always a delicate situation.

**Tracey Diamond:**

And often we'll get the call of, "We want to fire someone."

**Evan Gibbs:**

Yeah, that's right.

**Tracey Diamond:**

This person is complaining all the time. We want them gone yesterday.

**Evan Gibbs:**

That's right. Yes, the call is typically, "We've been dealing with this for months and we're going to fire them tomorrow. Can you just affirm our decision?" Well, hold on-

**Tracey Diamond:**

Never mind the great performance evaluation we gave them six months ago.

**Evan Gibbs:**

Yes, that's always the case. Well, they've been a stellar perform... Well, they've been a bad performer, but we didn't want to have the difficult conversation when we were doing performance reviews. And so we've always given them meets or exceeds expectations, and so they of course think they're the golden child. Yeah.

**Josh Burnette:**

Well, I do think that is where our role as counsel really comes into play and where our skillset has to be exercised to the utmost because we are called upon to be objective fact finders, to be as dispassionate about it as possible. And part of that is understanding the landscape that you're playing within. And if it involves a serial complainer, you may, using your objectivity, determine that well, after looking into the complaint to the extent that you should, that it's just not worth further investigating. But that situation to me is very different from the situation we saw in the first clip where the lady is saying, "I've called you 54 some odd times and nobody has ever checked on this." That is a very different situation than the serial complainant.

**Evan Gibbs:**

We've been there 54 times.

**Josh Burnette:**

Just [inaudible 00:21:39]-

**Evan Gibbs:**

We've checked this thoroughly Ma-am.

**Josh Burnette:**

Exactly.

**Evan Gibbs:**

Yeah.

**Tracey Diamond:**

Well, that's one thing we get-

**Evan Gibbs:**

If only that had been [inaudible 00:21:43]-

**Tracey Diamond:**

A complain about what someone had for lunch. This woman was complaining that she thinks people are being killed next door. And sadly, it's a real-life story that happened and the police ignored it.

**Evan Gibbs:**

And I'm curious, hopefully this doesn't happen often in the workplace, but I'm curious if complaints, not that people are being killed, but serious complaints of sexual harassment and things like that, and people say, "I know Jim or whomever, this person-

**Tracey Diamond:**

He would never do that.

**Evan Gibbs:**

He would never do that. I was watching, I know this is tangential, but I've been following this Murdoch murder case, and some of the folks who knew the defendant really well say, "There's no way he could ever do that. And I knew him really well", and I've heard that in these investigations. "I know so-and-so, there's no way he's a family man. He wouldn't do something like this."

**Josh Burnette:**

Right. Well, again, Evan, I think that illustrates the inherent bias that can often be present within investigators. And again, going to that point that I made, that it's critical for us to ensure that we are as objective as possible and as thorough as possible. And don't let things like inherent biases really play a role, because that's where you can find yourself in trouble and find yourself again, negatively impacting the integrity of the entire process.

**Tracey Diamond:**

That's a really good point, Josh, because ultimately that boy who was found was brought back to Dahmer and was killed. So another issue here that these clips illustrate is the importance of making sure that there is an unconscious bias in your investigation procedure. In this example with Dahmer, it was a homosexual boy that was found. Dahmer used as an excuse that it was his boyfriend, and the police just handed him back over to Dahmer.

**Evan Gibbs:**

That's an excellent point. I think there were two levels of bias there because the young man, he was of Laotian descent. And so I think, in my opinion, I think the race of the caller, Glenda, was Black. The victim in the situation is an Asian boy. And then you've got a white man who comes into the situation and tells two white men, "Hey, there's nothing to see here. This is my boyfriend." And they automatically discount all of the other very objective evidence present in front of their eyes and then escort the kid back to his apartment.

**Tracey Diamond:**

Completely horrifying and such a good example of what you were just saying in terms of the importance of making sure that there's no unconscious bias in your investigation process.

**Josh Burnette:**

Absolutely. And what we saw there and as history has shown us, it said that Dahmer was always very cooperative, or at least was in this case, very cooperative, very respectful with the police.

**Tracey Diamond:**

Clean cut.

**Josh Burnette:**

Absolutely. And they were inclined to believe him for that reason, despite the fact that they see this badly beaten boy in front of him that they basically hand back over to him. So just so many missteps-

**Tracey Diamond:**

Awful.

**Josh Burnette:**

And such bad judgment, despite the fact that you've got very objective facts in front of you that say, "Hey, we need to look into this further." And at the very least, take those initial steps, getting this kid help, that should have been done but weren't.

**Evan Gibbs:**

That's right. And I think just the last point I'll tie on here is, of course, I think we've said on many from maybe every episode of our podcast is training.

**Tracey Diamond:**

Training, training, training.

**Evan Gibbs:**

We can't emphasize the value of training. And I know that people within our organization who have normal jobs, they're like, "Oh my God, another HR or whatever training, leadership, training, whatever we call-

**Tracey Diamond:**

Cue the eye roll.

**Evan Gibbs:**

Yeah, exactly. Exactly. I think it's really helpful. There are some really, I think, great vendors out there that have training that's interesting, and it's engaging, and it doesn't have to just be a lawyer type person or an HR person from company saying, "Here's what discrimination is." I mean, there's some really good training programs out that I think are really valuable. If anyone watching or listening is thinking about that, there are some great options out there.

**Josh Burnette:**

Well, look-

**Evan Gibbs:**

Not just harassment, right? Code of conduct, training, training about ethics, conflicts of interest, and all of that.

**Josh Burnette:**

And I'll say this as I've been sitting here chatting with you all, it's not lost on me that what we are doing here is actually a great opportunity and a great format to use to train employees to take, in this case very morbid, difficult clips and content, and apply real world application from a corporate perspective, using that as an explanatory tool. I think it's a great creative way to do that.

**Evan Gibbs:**

That's right.

**Josh Burnette:**

Absolutely.

**Evan Gibbs:**

Well, listeners, viewers, feel free to take this idea and run with it and create your own training program within your organization.

**Tracey Diamond:**

Or call us.

**Evan Gibbs:**

Yeah. Or yeah, call us. We'll record it for you. Yeah, come in here and we'll do it for you. I think it's been a great discussion. We really appreciate you joining us today, Josh.

**Josh Burnette:**

Thanks for having me, guys. Thank you.

**Evan Gibbs:**

Yeah, thank you so much. And listeners, viewers. Now, viewers, first time we've said that, thanks so much for joining us for this installment of our podcast and be sure to subscribe. We're on all the major platforms, and please leave us a review or even shoot us an email to let us know what you think.

**Tracey Diamond:**

And also check out our blog, [Hiringtofiring.law](http://Hiringtofiring.law). Thank you.

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