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Water Cooler Talk: Termination Lessons From ‘WeCrashed’

WRITTEN BY

Evan Gibbs | Tracey E. Diamond

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The TV drama miniseries “WeCrashed” follows the rise and fall of what was once one of the most valuable startups, WeWork Inc., founded by Adam Neumann with the assistance — and occasional hindrance — of his wife, Rebekah.

The series is a lesson on professionalism in the workplace. One of the more laughable scenes is when Rebekah makes termination decisions based on her feelings:

Rebekah: Hi, I need you to start off boarding Jeff Winitzky.

Employee: Off boarding.

Rebekah: We’re firing him immediately.

Employee: Why?

Rebekah: Bad energy.

Employee: Bad energy. Got it.

Most employers understand that it is not a best practice to terminate someone for having bad energy even if the employee is at will — meaning they may be terminated at any time for any reason. In New York City, just cause rules already are in place to protect fast food workers, and recent legislation proposed by the New York City Council^[1] would expand those protections to all employees in the city.

In New Jersey, amendments to the state’s mass layoff law, effective in April, will require mandatory severance as well as notice of a mass layoff, termination or transfer of operations.

Even where employees are at will, it is important for the employer to be able to articulate a legitimate business reason for terminating a worker in order to fend off a discrimination or retaliation lawsuit if the employee is in a protected class or engages in protected activity.

The scene above brings to light some important takeaways for employers, including:

- **The need for leadership training:** Oftentimes, the root of the issue is performance-related, but managers are not equipped or comfortable communicating improvements needed.
- **Documentation is key:** Established processes, like progressive discipline, require that detailed steps are followed to prove the employee had multiple opportunities for corrective measures. However, employers should clearly reserve the right to skip or bypass any particular step and go right to termination should the circumstances warrant.
- **Listen to employees:** Actively review engagement surveys, exit interviews, new-hire feedback, etc., to look for things to address — and fix them.

Q&A

We spoke with Allison Snyder, director of organizational effectiveness at Fulton Bank, about the dangers employers face with these types of firings.

Tracey Diamond: Let's first explain at-will employment.

Evan Gibbs: It's exactly what it sounds like. Someone can be fired for any reason. It's not illegal. Clients will say, "It's employment-at-will, so I can fire them at any time, right?" And it's like: Well — yes, and no. Yes, but let's make sure we're not running afoul of some other statute, intentionally or unintentionally.

Tracey: In the show, Rebekah uses the idea of employees having bad energy as an excuse to fire them. Allison, why might that not be such a good idea?

Allison Snyder: Where I see the biggest risk with language like "they're not the right fit" is because it really means, "they're not like me." It could be race or gender or sexual orientation. In that scene, you can tell there were no performance issues. If someone came to me with something like that, I wouldn't go right to termination. I don't know how I would defend "bad energy" if the termination was contested.

Evan: When managers aren't trained to manage employees effectively, it can be a

frustrating process for them. We ask for specific examples, but a lot of times it comes down to: "I just don't like this person." 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 in a lawsuit, then that's a problem.

Tracey: Allison, when a manager comes to you with no documentation and says, "I want this person terminated," how do you handle it?

Allison: We have a progressive disciplinary process, so there is an expectation that you would go through multiple steps. There are instances where it's appropriate to skip those steps. However, I would not recommend termination if someone said, "I've been dealing with this for six months, but I haven't done anything." That's not acceptable.

Tracey: Do you have any tips or suggestions on how best to present the bad news when you're the one on the front line having to manage the employee?

Allison: I try to make these teachable moments. I understand the situation is difficult, but I need to show them what the risks are. We're not doing our job as a company if we don't set clear expectations with our employees. How do you think the terminated employee feels if he had no idea there was a problem?

Tracey: Evan, can you review the concept of pretext, where an employer says the reason for the firing is one thing and the employee is able to establish that's not the true reason for the termination?

Evan: In cases where we are defending a discrimination claim, the plaintiff first shows that there's a prima facie case. Then, the employer must show there was in fact a legitimate business reason justifying the decision. Once that's done, the burden goes back to the plaintiff to bring evidence that the legitimate business reason was in fact pretext for discrimination. In my experience, 99% of the time, the stated reason is the real reason. But there is that 1%. And it's important to know if there's any evidence of pretext.

Tracey: Allison, how do you get those specific examples that are leading the manager to decide the person is not a good fit?

Allison: I want them to really walk me through it; tell me the whole story. And many times, I'm able to figure out the issue is connected to performance.

Tracey: Do you have any best practices on how to approach and communicate termination decisions?

Allison: It's best to be prepared. If someone's never done it before, I'll practice with them. I want somebody there as a witness, so we don't have a "he said, she said" situation. Keep it short. Come right out, tell them the reason why, talk through next steps, and then move them on as quickly as possible.

Tracey: Evan, can you talk about progressive discipline a bit?

Evan: There are few situations where we don't recommend going through progressive discipline, which typically involves a verbal warning, a communication to the employee, then a written warning, a performance plan. Generally, it is a good idea to go through all those steps before you get to termination. The process is really meant to get the employee back on track, but if there isn't improvement, now we have a clear record of what both sides have done.

Tracey: Allison, as a human resources person, how do you manage management teams effectively to avoid legal issues and to make sure your own personal compliance filters down to your teams?

Allison: Training and leadership development for managers is a great start. Regularly reviewing your turnover, retention, engagement and exit interviews to uncover any potential issues also is important. Another tool is a climate assessment, where you meet with individuals on a team to learn what's working and what's not. The more you do proactively, the more you can minimize your legal risk and ultimately become a better employer.

Conclusion

Firing someone because of bad energy may be legal, but it's not a good idea. Employers should focus on employees' professional development and communicate clearly where employees are falling short before going to termination, absent egregious conduct. Notably, it can help prevent future legal risks in case things don't work out.

Tracey Diamond and Evan Gibbs are partners at Troutman Pepper. Diamond and Gibbs are the hosts of the [Hiring to Firing Podcast](#).

[1] <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=5958217&GUID=44D72CEC-FE82-4A43-BA31-4BB15FBC15EB#:~:text=Summary%3A,in%20discharging%20or%20disciplining%20employees.>

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