

# HR Mixtape: Episode with Shari Simpson featuring Leah Stiegler, Principal Employment Attorney at Woods Rogers

**Speaker:** You're listening to the HR Mixtape Your podcast with the perfect mix of practical advice, thought-provoking interviews, and stories that just hit different so that work doesn't have to feel, well, like work. Now, your host, Shari Simpson.

**Shari Simpson:** Joining me today is Leah Stiegler, a principal employment attorney at Woods Rogers. She is the witty voice behind the YouTube series, What's the Tea in L&E? Leah breaks down complex workplace issues like NIL rights and non-compete rules with humor and legal smarts, bringing real stories from the front lines of HR law.

**Shari Simpson:** Leah, thank you so much for jumping on the podcast with me today.

**Leah Stiegler:** Thank you so much. I'm so glad to be here.

**Shari Simpson:** So I thought it would be great if you could start with a little bit about your background and the work that you do right now before we get into the questions.

**Leah Stiegler:** Awesome. Well, I'm a management side employment lawyer with law firm Woods Rogers. I'm physically based in Virginia, but we work all over, jumping on a flight to LA tomorrow morning. What we do is we kind of advise clients from an employment perspective throughout the entire life cycle of an employee, from recruitment advice all the way through terminations and any legal issues that could come up, as well as post-termination or even if a current employee sues, stepping in to defend companies in employment-based lawsuits.

**Shari Simpson:** I feel like for those listening, they're either BFFs with their employment lawyer or they're their worst enemy. And in some cases, I have always been lucky. I've always been BFFs with the employment lawyers I've worked with. So I haven't met one yet that I didn't like. So I'm glad for the work that you do and the support that you provide to the HR community. We are talking about toxic workplaces today. And I love if you could start with kind of your definition of toxic workplaces and the angle that we're going to talk about it today from.

**Leah Stiegler:** Well, I've heard all sorts of definitions of toxic workplaces, from this workplace has toxic positivity, to these managers are toxic. So I'll give it to you from two approaches. So one is, what is a legally toxic work environment? Because I think too often people throw that term around, this workplace is toxic, and whatever. But a legally actionable work environment, or a toxic work environment that is actually legally actionable, is one in which there is sort of, a pervasive or severe harassment on the basis of some sort of protected class, like someone's race or someone's gender, sort of that hostile environment standard. But I really think when most people are referring to this environment as toxic, it's because of generally a culture of distrust. And I think it goes in the form of distrust of coworkers, distrust of management, probably more so management than coworkers, and then even a distrust of, let's say, an HR department if it's a company that has HR.

**Shari Simpson:** Do you feel like there are early warning signs that you've seen that you can help us understand that we might be heading in that direction of actually a legal situation when it comes to the toxic workplace?

**Leah Stiegler:** Yeah, I will say probably one of the biggest signs is high turnover. And I know a lot of that is industry-specific, but I will say just anecdotally from the clients that, like you said, some HR professionals love their employment lawyers, but it is a love-hate relationship because we are not the cheapest friends. But we are super cool because nothing is offensive to us. I'll keep that in mind, right? We've seen it all in the workplace, just like HR has. But high turnover rates for sure. And I know in some cases, there's not a lot a company can do about it. But if you have employees that are

frequently leaving, then you really have to look at your management style, you've got to look at what are you doing in terms of retention, in terms of pay, and really in terms of that environment. Why aren't people leaving? Are you doing exit surveys? Is this a management problem? Is it a culture problem? Is it a work hours problem? Is it a benefits problem? Whatever it may be. I'll say that's definitely a warning sign. And the other one, even outside of clients that are facing frequently faced lawsuits, would be clients that just have really inconsistent practices, right? Or they don't have formal progressive discipline, or they don't have a process where every termination has to be approved by HR or at least another manager. And it's just you've got one department doing this, another department doing this, managers making inconsistent promises. And those inconsistencies are what lead employees to think, hey, this is not fair. That person's getting a better benefit than I am. Or they got two strikes before they were out, and I'm getting one. And there's a perception of unfairness. And it must be because of my gender, my race, whatever it may be. So I would say that would be the other warning sign: inconsistent practices.

**Shari Simpson:** What are some of the legal consequences that you've seen for organizations that have gotten sued, have gone down that road? Because I feel like we don't really talk about that enough. We know it's like possible. Like you've been in it, you've experienced it. What are some things that employers could run into?

**Leah Stiegler:** Yeah, well, I'll show you. I'll explain maybe how a typical, let's say, discrimination lawsuit works out or plays out in court. And so all it takes is a disgruntled employee who has a perception that they've been wronged, right? Because lawsuits are not always filed based on the facts. They're filed based on someone's perception of their facts. And so someone just has to go to a courthouse, they don't even need a lawyer for this, okay? And they can file a lawsuit saying, look, I was terminated inappropriately because of my gender. Let's use that as an example. And then once they file that, the employer doesn't get to just say, no, no, no, you know, this isn't true. Here's all the evidence and dismiss it. No, it actually comes into play where you've got to go through depositions, you've got to exchange documents, you've got

to pay your lovely lawyers like me, and then eventually the company has to produce a defense. And they get to come in and say, it wasn't because of your gender, it was because you're a poor performer, or you engaged in misconduct. And they have a burden of production. So there's a higher standard on the employer to produce evidence to support their defense. And in that burden of production, they have to be able to say they have to produce whether it's documents like, you know, write ups or testimony from managers and HR. But that's not the end of the end of the story. The burden shifts back to the employee who gets to say, liar and point to the employer and say, no, no, no. If this was really about me engaging in misconduct, then what about these comparators? And they get to point to, let's say, another employee who is of a different race or a different gender who maybe received more lenient discipline for engaging in the same misconduct. Or if it's for something like performance, some of the biggest problems I see with employers are they, employees able to really prove that lying standard. And by saying, you know, we're saying it's about poor performance, but you know, you didn't follow your policy, your progressive discipline policies. Or you don't have any write-ups saying I was a poor performer. In fact, look at my annual reviews. They are exceeds expectations. I walk on water in this workplace. And those are the ways that legally an employee can overcome sort of this burden that the employer has. And then the court will say, if an employee is able to point out those sort of holes, let's say, in the employer's argument, then the courts send the case to a jury. And the jury gets to decide who's more credible.

**Shari Simpson:** How does that play out when you consider some of the changes that HR has been trying to make in our relationship as we work with employees? And specifically, I'm thinking about those scenarios where I've sat down with employees who have had performance issues. We've done maybe a performance improvement plan or haven't. And we're just having like a very honest conversation of like, hey, clearly this isn't the right company for you anymore. But it's not a scenario where I'm going to give severance. Right. So I don't have that kind of legal protection of them signing that document. Are we putting ourselves in danger with that approach or is there a way to approach that that doesn't put us in danger legally?

**Leah Stiegler:** Yeah, that's hard. I mean, I guess any clients will always say like, hey, we're going to terminate someone. But do we have to go ahead? And I'm like, well, you can do whatever you want. I can never tell you that it's risk-free in a sense. But you can certainly handle a termination or performance discussion in the way that provides you the best defense that if you were to face a claim, you have the ability to say, we followed our policies to a, to a, we gave this person as much notice as possible. And like you said, I mean, sometimes really, the best terminations are the ones where the managers and HR have been working with someone, resetting those expectations, having multiple conversations, documenting them, that the next time the person, let's say, is absent or tardy or engages in some misconduct, they basically walk into your office and they're like, yep, I know, I did it, I'm gone, let me pack my things, right? That doesn't always happen. And then I think from an actual handling of the termination discussion, I think it is key to give your reason for termination. Transparency in my world is really important. And I think that's because when people are shocked about a termination and you don't give them a reason, I will say too many lawsuits I have, the employers just say, Nope, you're at will, we don't have to give you a reason. And sure, that's totally fine, that's accurate legally, but it's not a best practice in my world because that person is going to say, well, I'm going to have to file a lawsuit to get to the reason, right? Especially when I'm filing unemployment, I have to say, I don't know why I was let go, right? So I really think transparency during the termination discussion, setting those expectations, having multiple conversations over time. Handling it with empathy. And I think really good HR professionals do approach these things with empathy. Like you said, whether it's looking at a severance or looking at, let's help you transition out, you know, we'll be a reference for you. We won't fight your request for unemployment and all that.

**Shari Simpson:** Well, and you bring up such a good point. I'm thinking about specifically, you know, states that have at-will employment that you can, like you said, terminate for any reason and you don't have to share it. But that's not the conversation we're having as to whether you can or cannot do that. It's when you get to the point when that lawsuit has been filed, can you defend your choice? And are you setting yourself up in a way to make that easier? So I really love that suggestion.

**Leah Stiegler:** Oh, go ahead. Going back to where the burden shifts and the employee can say, hey, no, you're lying, right? Your real motive is unlawful discrimination. Another thing an employee can point to is inconsistent reasons for the termination. And so if the company is not teed up exactly in their termination paperwork in terms of exactly what their reason is for terminating somebody and making that clear and everybody's on board ahead of time, then oftentimes what I see is, you know, when it comes to maybe the EEOC process, the company gives us one reason for why they terminated them, and then we get into depositions and the HR person's being deposed, the managers are being deposed, and the plant manager's being deposed, and they all have totally different reasons because no one was ever really on board. They just know they didn't like this person. They were done with them. And those inconsistent reasons are another thing that the court will rely on to say, we're going to let a jury decide because you guys just don't seem credible. You don't even have your ducks in a row for terminating someone's employment, making them lose their income and their identity, reputation, all of that. This is going to a jury to decide. And so you really, I think it's important to be transparent in those termination discussions.

**Shari Simpson:** You gave an example there that I wanted to ask about. Have you ever run into a scenario where somebody has termed somebody and the term reason that they have used or shared is you're not a good culture fit? And how did that come to life? Like, I just I can just imagine that conversation. It can't be good, right?

**Leah Stiegler:** Right, right. I actually wrote an article with one of my colleagues a couple of months ago on how you know, how you should handle

a termination discussion like a breakup, like a relationship breakup, a romantic breakup. Because can you imagine being on a date with somebody and having gone out with them for a while or maybe even married or something? You're just like, you're just not a good culture fit, right? I'm not feeling this vibe anymore. Wrong vibe. I really think it's important to have, you know, the problem with that term culture fit is that can mean a lot of different things. And whether someone is a good fit culturally is definitely subjective. And I'll give you an example of we had, we had a case where an employee sued for race discrimination. It was a black male. He was a black male engineer and he sued a predominantly white male engineering company. Right. And they just happened to be predominantly white male. And they had said that you're just not a good fit. And so he's really what they, what they meant, right. Was that they, that he wasn't performing to their expectations, engaging with clients, the way they wanted him to and all that. But he took that as well. Why am I not a good fit? And he's looking at all these sort of this good old boys white male golf centric club and feeling like he is the outlier and his made him very distinct in looking at a picture of the group of employees that were remaining as they were all white male and he was the only black male and he was being told he wasn't a good fit. And so even though they really wanted to say it was about performance and whatnot, they used that term, you're not a good cultural fit or fit for our culture. And that led left him to wonder in what way he wasn't a good fit. And so again, I think this comes back to setting those expectations over time and being really clear and hard about what your expectations are and why someone may not be meeting them instead of like beating around the bush with these weird, vague terms like, yeah, your vibes aren't good here.

**Shari Simpson:** What other mistakes are HR making in the documentation process and or the way that we're advising managers on how to handle situations?

**Leah Stiegler:** You know, and that's a really good question because I think it kind of varies. I will say, I'll give you an example through a client that I've worked with over the last few years. They recently had a change in senior leadership and the new CEO that came on board put a lot more weight into

HR and a lot gave HR a lot more power and freedom. And I really appreciated that change. Before, I would say they probably had a more toxic culture. They had managers in 800 employees, managers in all different departments doing all different things. Some of them just get pissed off and terminate someone here. Other ones never hold people accountable for their attendance and all that. And you just had all sorts of things happening. New HR, I mean, same HR team, but new manager comes in, new CEO comes in and says, you know what? Let's clean this up. We need fairness across the board. We need cleaned up employment policies, management training, all this stuff that I love. There's music to my ears, probably music to your ears. And they've started to do management trainings every year on all the key laws from how to handle harassment, complaints and workplace, everything from workplace violence to wage and hour questions, medical leave and disability accommodations, all of that. Plus, they've instituted a progressive discipline policy where every written warning has to be approved by HR and goes into an employee's formal file. Any request for termination, you have to demonstrate three written warnings, two of which must have been previously approved by HR, and HR must get approval then from the CEO as well. So there are multiple levels of approval, and all ducks are in a row. And they generally call legal counsel when handling any terminations as well. And I think their documentation, going back to your question, is spot on. And they haven't been sued in this past year, but if they were, I mean, it would be a lawyer's dream to be like, here, let me put my witnesses on the witness stand. Let me put this manager on. Here are three exhibits showing written performance write-ups and emails following that. Then, let me show this request to HR, which meets the handbook policy, which says this is exactly what they're going to do. Then, here's HR's write-up and HR's memo to the CEO. It's a dream. I mean, I've got a whole booklet then of supporting documentation, whereas most of the times when we're dealing with defending employment claims, it's like, do you guys have anything to support it other than the manager just saying they're not a good performer? Like anything in writing, like a text message, give me something.

**Shari Simpson:** For sure. How have you coached people on handling the stickiness? And if you've been in HR a while, you've definitely encountered this



where you have an employee who is definitely having performance issues, you're having the performance conversation, and then they experience something where they need to take FMLA or they need to take leave. And so you're in this position as an HR professional where you need to honor the FMLA request. And you also need to not forget that there's a performance concern at the same time. And sometimes in my experience that I've run into the conversations where I've said, hey, great, let's handle your FMLA stuff. And when you get back, we'll have the conversation about performance. But I was lucky in that I felt like the employee I was working with at the time was an easier employee to work through this issue with. I'm sure that's not always the case. I'm sure it's not always the case that the medical situation is as dominant as the employee would like. And I'm being judicious in what I'm saying, because I don't want to ever assume that somebody doesn't need the help that they need. And I've run into those scenarios before where something feels fishy. So how do we handle that in HR to make sure that we are handling both those scenarios and protecting ourselves legally?

**Leah Stiegler:** Yeah, and this is a really great question. And oddly enough, I have this issue going on right now. It started with working with HR on an employee who had a significant number of performance problems in the fall related to both attendance and getting their supervision and documentation notes done. They're basically a school counselor. During this performance management process, we refer to it as that, in terms of they put the employee on a performance improvement plan. The minute they raised that, hey, we're going to put you on a performance improvement plan, the next day the employee turned around and said, I need medical leave. I need some time off. I'm dealing with depression, anxiety, all that. So, I said, let's do exactly what you said, right? Let's go approach this on two separate paths, almost, because even though we potentially have some suspicion that this may be an attempt to put some distance between the performance issues and us trying to actually address those, or a potential termination, or maybe they're gonna look for another job during this time, right? That's all suspect. But at the same time, they're FMLA eligible, and the law is very clear with FMLA, right? If someone's FMLA eligible, they're still employed, and then it's not like we can get out of giving someone FMLA just because they're not performing to

expectations or their timing is suspect. You've gotta move forward on that front. And so, a couple of things. I would either say you do exactly what you did, which is, okay, as you know, we're still working on these performance management issues, and we can revisit these expectations when you return. And then you don't bother them when they're really on FMLA, because you could run into an FMLA interference claim. Or you kind of advance it and say, before you go out, here's the, you know, here are our expectations when you return. These are the issues we're facing and that we want, we need improvement on for your employment to continue here. Either one is okay as long as you have documentation internally between management, HR or managers before the employee requested the FMLA showing that you were trying to address a performance problem. And that's going to come into play because let's say you wait until the person comes back from FMLA and their performance is not improved, or you have to then go forward and give them that performance write-up or disciplinary action or whatnot, then that's going to look retaliatory to them, right? And they're going to have a timing claim of saying like, the minute I took FMLA and the minute I returned from it, I was written up or demoted or what it may be. And your only defense to that is going to be, it wasn't because you took FMLA, which is the standard for FMLA retaliation, it was because you were not performing right, and that was already in the works before you requested FMLA. So you can prove that these two things are not causally related in court when you can show that these were in the works ahead of time. which is why contemporaneous documentation and contemporaneously getting on performance issues early on is key for managers. Because the last thing you want is a manager that's complaining to HR about performance issues, never writes it up, never takes the step to engage in formal disciplines, just complaining about the person. Then they request FMLA, and then the manager says, and on top of that, they're not going months oh heck no they're gone let's terminate them when they come back and it's like no sorry this is on you now okay because now this looks retaliatory.

**Shari Simpson:** As we wrap up our discussion, which I feel like Leah, I'd love to have you on again, because your wealth of knowledge, I have a plethora of legal questions that I think our audience would love to tackle. But in specific to

toxicity, what are your suggestions on dealing with the, I'm going to use air quotes here, but the brilliant jerk, right? The employee or the manager who consistently meets their KPIs is just a rock star in that perspective, but they're just a terrible personality, they're hard to work with, they yell at their employees. What's, yeah, what is your advice there?

**Leah Stiegler:** Yeah, I think the key is to realize, for a company to really wonder what, to really redefine brilliance, because I oftentimes have noticed that those types of managers, even though they may be substantively on point, let's say when it comes to a manufacturing process, or when it comes to research and development, they may not actually be that profitable. Because if they have significant turnover underneath them, we all know in the HR world, it costs a lot more for a company to terminate somebody, post for rehire, rehire somebody and train them up. I mean, and you're usually, it usually costs 150% of the previous person's pay just to do all that. So they may not be that profitable from that standpoint. Plus, let's talk about if you were to impose your legal fees for fighting employment claims on that person. And so I've had a couple of different approaches. One of them is really working with clients. I had had one manufacturing client where they faced three different employment lawsuits over a period of two years. And they ended up, you know, it all came down to the exact same manager was the problem for each one. And so we ended up working with them on like, let's strip this person of the actual management responsibilities, and they need to delegate these. And instead, they're going to be focusing on product and project management. Now there's some overlap. And that gets really complicated and sometimes that doesn't always work out. But I also just recently had one for another company where they do research and development and they ended up taking the head of the laboratory and putting him on contract and having him work from home on just, you know, the actual product and stripped him of management responsibilities. And then they keep that genius and brilliance, but it's separate and apart from the personnel and the culture.

**Shari Simpson:** Well, and I haven't thought of that last example that you've just shared. So I think that's a really creative approach, especially if you have

somebody where, again, quote unquote, you see them as a brilliant person, but they don't align with your values. They're not the right vibe, whatever it is, but you don't want to lose them. So all really, really good advice. This has been a great conversation. I'm so glad you were able to jump on the podcast and spend a few minutes with me. Fantastic, fantastic time with you.

**Leah Stiegler:** Yeah, thank you so much for having me and happy to be coming back sometime.