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Rich Meneghello (00:00)
Welcome to The FP5: Five Things for Your 9-to-5. We help employers make sense of the fast-moving world of workplace law and compliance by breaking topics down into five parts. I'm Rich Meneghello, Chief Content Officer here at Fisher Phillips.

One thing we all can relate to is we've all had jobs, we've all been in the workplace, and we've probably either heard about or maybe have experienced behavior in the workplace that's so outrageous that either people get fired or we wonder, "why didn't that person get fired?" So in this episode, we're gonna unpack this interesting legal concept about times that employers can act and when they can't act, when employee complaints seem like they've gone too far.

And we have the perfect person to join us this week, Josh Nadreau. He's the Regional Managing Partner in our Boston office and also the Vice Chair of our Labor Relations Group. Josh, thank you so much for joining me on this, what's gonna be a really fun episode, I think.

Josh Nadreau (01:03)
Thanks, Rich. First time, long time.

Rich Meneghello (01:05)
Before we get to the legal stuff, Josh, right out of the gate, what's the wildest story you've ever heard about an employee termination that you're able to share on a public podcast?

Josh Nadreau (01:15)
This one is easy. A few years ago, I litigated an employer labor arbitration case involving an employee who had been caught intentionally clogging toilets, not once, not twice, but three times in the employer's facility and was terminated. My favorite part about that case is the arbitrator's decision where she engaged with the Grievant over he didn't know what he could put in the toilets or not, and the line is, "Everyone who's graduated from kindergarten knows what belongs in a toilet and what doesn't."

Rich Meneghello (01:50)
That's a real sh-- story. And my producer Evan is either going to bleep that out or edit this entire line right out of there. Yeah, for those who don't know employment law attorneys, I would recommend getting to know one, going out to a cocktail party or getting a couple glasses of wine in them and asking them for their favorite stories, cause I have ten off the top of my head that are wild, but I would only tell if I've had a drink or two in me.

Josh Nadreau (02:18)
No shortage of fun facts in this business.

Rich Meneghello (02:20)
Absolutely.

Okay, so let's dive into the five things that we need to know about when an employer can and can't fire an employee for going rogue. So there's this thing called "protected concerted activity." Sorry for hitting people with a legal term right out the gate, but we need to discuss it. It applies to more employers than you might think. Josh, can you give us a basic framework here? What does “concerted activity” mean, and when can one employee's complaint cross the line from being just an individual gripe into something that is protected by the law?

Josh Nadreau (03:00)
Yeah, as simple as you can get, concerted means more than one. But because it's a legal concept, of course, there are some caveats. Generally it will involve employees acting together, but one employee speaking on behalf of other employees or trying to engage other employees can also be protected. And so component one, is it concerted? And then component two, is it protected? Courts have, and the NLRB have, looked at this, you know, the statute uses the phrase “mutual aid or protection” but that really means any activity that's aimed at helping employees as employees. For example, you know: addressing pay, scheduling, safety, treatment by management. The focus is really on whether the employee is acting to improve or protect workplace interests or conditions.

Rich Meneghello (03:44)
Okay, gotcha. A lot of employers might hear that and hear the word NLRA, National Labor Relations Act, hear that you're the Vice Chair of our Labor Relations Group and immediately think, “I don't have to worry about this. We're not a unionized shop.” But this rule can apply beyond unionized workshops, right?

Josh Nadreau (04:01)
Yes, that is a very common misconception that the National Labor Relations Act only applies if you have unions. It doesn't. It applies everywhere just like other employment statutes do, like the Fair Labor Standards Act or Title VII of the Civil Rights Act. It's broadly applicable. It's just enforced by an agency that mostly works with unionized employers.

Rich Meneghello (04:21)
Okay. And you mentioned briefly something about how concerted obviously means more than one, but yet there's a caveat. So you're saying there's sometimes when one employee complaining about something, that can be interpreted as concerted activity?

Josh Nadreau (04:35)
Yes. for example, if that employee is complaining on behalf of a group, but there's also a concept called inherently concerted activity. And so that deals with topics such as wages, changes to work schedule or job security, which the NLRB and courts have said are so uniquely tied to working conditions that we don't need to contemplate whether or not there's group action or not.

Rich Meneghello (04:58)
Wow, okay. So labor lawyers have good job security based on how weird this area of law is, it sounds like.

Josh Nadreau (05:06)
There are a lot of nuances for sure.

Rich Meneghello (05:08)
That's a very lawyerly answer, Josh. I appreciate that.

Okay, so the second thing, protected activity has limits, and employers really need to know where to draw the line. So even if an employee is engaged in what might be considered protected concerted activity, acting on behalf of others for a legitimate purpose, that doesn't mean they have a free pass to engage in misconduct. But let's help folks start to figure out where to draw that line.

Josh, there was an interesting case out of West Virginia a few years ago that you told me about that I think can help employers understand this a little bit better. How about you give us a little story time and tell us about that?

Josh Nadreau (05:54)
Yeah, that's the case of *Constellium* and the facts are pretty straightforward. The employer changed an overtime system. Employees then had to put names on posted signup sheets, and they would be disciplined if they, you know, put their name on the sheet and then declined the overtime. There were a number of internal employee protests, I think there were some grievances filed, even, you know, to the extent that folks were boycotting the signup system entirely. A number of employees started referring to these signup sheets as the "whore board."

And the employer caught wind of it. One employee wrote the "whore board" phrase on these sheets. He admitted to doing it and the employer fired him. And I think you know, those facts, if I told the average, you know, HR professional, I think most would agree, hey, that this is not acceptable workplace conduct. So that's where this case gets interesting and it really kind of underscores the counter intuitiveness of protected concerted activity.

Rich Meneghello (06:49)
Yeah, that to me, like if I'm new in HR, I hear something like that, I think, "Yeah, of course I can fire that person." I wouldn't think to look to case law or the NLRB to potentially step in the way, but obviously we're talking about it, which means something screwy here happened. What happened in that case?

Josh Nadreau (07:06)
Well, both the Board and the DC Circuit found that the firing was unlawful because they tied the conduct to protected concerted activity. But the key takeaway really wasn't so much that profanity should be tolerated, it was that the employer had historically tolerated profanity in the workplace. So the board and the reviewing court looked at this through a inconsistency lens, right? That it was the message that was being conveyed, not the words used to convey the message. And they were being selective in the enforcement.

Rich Meneghello (07:40)
So that sounds like that also plays a role into it too, not just what the person says, but what the employer has done in the past.

Josh Nadreau (07:47)
Absolutely. If the board establishes that employers have tolerated harassing or insensitive or offensive conduct in the past, and the only thing that's different in this case is that that language was connected to something that is otherwise protected concerted activity, the board's gonna find that that's an unfair labor practice.

Rich Meneghello (08:11)
Well that leads us to our third thing. And in fact, Josh, let me go a little bit off the board here. I want to turn that into the third thing. It sounds like what you're saying here is that just having a good policy about, you know, no vulgarity, no whatever won't be worth much if it's not enforced consistently. So I want to talk about here about consistency

as the third thing now, because that appears to be an important factor. What should employers be looking at then before they approve a termination, when there might be some protected concerted activity going on?

Josh Nadreau (08:43)
Yeah, the first answer that comes to mind is “how have we handled similar instances of misconduct in the past, ideally ones that are not connected to protected concerted activity?” Because that's the test that the board at least typically will look at. “Are we treating similar misconduct the same regardless of the underlying content of the message?”

Rich Meneghello (09:05)
Gotcha. I know back when I was a litigator and also providing advice on a day-to-day basis to employers, they would call me up and say, “Hey, we want to fire somebody.” And I sort of had a thing I would run through. And one of them obviously, like you said, was like, “Well, okay, have you fired somebody else in the past for the same thing?” What are some other questions that you would ask an employer if they called you up and said that, whether I mean we're focusing on protected concerted activity concerns, but just generally, what are what are some of the questions that you like to ask employers to gauge the riskiness of a potential termination?

Josh Nadreau (09:37)
Yeah, I'd like to get a sense of what else is going on in the workplace. Is there, you know, from the labor perspective, is there ongoing organizing activity? Has this employee been subjected to discipline for misconduct in the past, whether or not it was related to any sort of protected concern? You know, very rarely do you want a green light determination for someone who has no history of discipline, even in an at-will employment state, it's much simpler in the long term for an employer to establish, you know, through progressive discipline or otherwise, that there was a record of employee misconduct. I wanna see do the various decision makers give me a clear and consistent reason for the termination? If I ask HR why and then I speak to the manager and get a different answer, that's a green light, or, that's a red light for me. I wanna see documentation either for that employee's past discipline or others. It's one thing to say that we've acted consistently, it's another to prove it to some neutral decision maker down the road.

Rich Meneghello (10:36)
Totally. Yeah. I mean, I remember that one being a big one for me is that they would say, “Yeah, this this guy's been a problem forever.” And I would ask to see the record of it, and there'd be nothing, not even emails or texts. And in fact, there might be even annual evaluations that said he was doing just fine. And as you know, especially in this era where everything is documented, to not have any sort of documentation, I think really ends up looking pretty suspicious.

Josh Nadreau (11:02)
A hundred percent. I mean I spend a lot of time trying to advise employers to make sure they are documenting issues that they have in real time because like you, Rich, I've had so many conversations where, you know, the way they describe this employee would you know, you wonder why they've been employed for ten years and then you ask for, you know, any evidence of discussions and “Oh well, it was never recorded or we never wrote it down.” That's functionally useless, particularly if you're litigating a case over whether or not someone was terminated for protected concerted activity.

Rich Meneghello (11:35)

Like I like that term, “functionally useless.” I'm gonna save that for my potential memoirs one day, I think. I love that.

You're listening to the FP5. I'm Rich Meneghello, and we're here with Josh Nadreau. Josh is the Regional Managing Partner at our Boston office and also the Vice Chair of our firm's Labor Relations Group. Just a quick reminder, we've got a great selection of insights about employee misconduct and protected concerted activity in this episode show notes. So if you want to dive deeper, go for it.

Do you have a totally outrageous story about how someone did or didn't get fired at your workplace at some point in your life? We want to hear about it. We might even include it on a later episode of the FP 5 podcast, and we'll keep your story anonymous, so your stories are safe with us. There's a link in the show notes where you can leave us a voicemail and tell us about the wildest termination that you ever heard about.

All right, Josh. So the fourth thing we want to talk about: when employee criticism goes public, employers have to resist the urge to immediately react and fire somebody. So, like it's one thing we know if an employee complains directly to HR, but it's another when they go out on Slack or Teams or posts on social media or even stream their termination meeting for thousands of people to see in these “watch me get fired” videos that have been popular in the last few years.

Going public though doesn't necessarily mean the employee loses their legal protection. And Josh, you told me about another case that you wanted to talk about, a more recent one that sort of highlights this. So story time again, tell us about the *Atlassian* case.

Josh Nadreau (13:20)
Yeah, *Atlassian* is what I kind of view as a classic protected concerted activity dispute. The conduct that was particularly at issue in the case had to do with a Slack post made by an employee who not only addressed some of the restructuring concerns, but also stated, you know, “Just dialing in from my MBA team's headquarters to yell at the people whose careers I've just pummeled. What you doing?” Or WYD. This was on a Slack communication immediately following some sort of town hall meeting where the owner of the company who also was a co-owner of the Utah Jazz had announced a restructuring.

Rich Meneghello (13:58)
Wow, okay. And that got this person in trouble, assumedly.

Josh Nadreau (14:02)
Yeah, it did. Like all good NLRB cases, someone got in trouble for something. And the issue in the case, right, you know, the employer was trying to argue this didn’t have anything to do with work, right? You're speaking you know, you're making what they deemed as a joke about the fact that the owner of the company co-owned the Utah Jazz and tried to kind of separate it from what was clearly in my mind, a concern over job restructuring, right? She's, the joke itself references, you know, employees' careers, right? Restructuring, job losses, all sort of the quintessential elements of protected concerted activity.

Rich Meneghello (14:46)
Hm. Okay. Now, what ended up happening with this one? Where did it end up? Why is it that we're hearing about it now?

Josh Nadreau (14:53)
An Administrative Law Judge with the National Labor Relations Board found that this conduct was indeed protected concerted activity and issued a decision a couple months ago. That decision has now been appealed to the National Labor Relations Board, which is the five-member board in Washington that ultimately decides and interprets the National Labor Relations Act.

Rich Meneghello (15:14)
Okay, so the one thing I want to dive in a little deeper about this case, Josh, is that this seemed to go a little bit different than the *Constellium* case, right? This wasn't just an employee complaining internally to their HR manager. It wasn't just them writing something down, this reached beyond just an initial interaction, right? It was put on Slack. And so for those of us with a messaging system like Slack or Teams, or those of us who also can imagine an employee doing a gripe online, right? On LinkedIn, let's say, or Glassdoor or TikTok or Instagram or something like that. How does that change the calculus at all when it comes to what an employer can and can't do about an employee's criticism of the company?

Josh Nadreau (15:59)
It's important to remember that the channel of the communication is not particularly important in the assessment of whether or not something is protected and concerted. The NLRA was enacted in 1935, and to sort of paraphrase Joe Pesci from *With Honors*, right? The beauty in it is its ability to adapt over time. The same statute is now interpreted to apply to Slack messages, emails, as it was to, you know, writing on a message board in a 1940s manufacturing environment, right? It's broad enough to cover both concepts.

Rich Meneghello (16:34)
It's always fun to think about people coming up with statutes and not realizing a hundred years later that there'd be things that have no concept of that connects what they're talking about. So are there times when an employee posts something online and it goes public where an employer can step in and justifiably terminate somebody or discipline them?

Josh Nadreau (16:57)
There may be. And there's sort of two ways to look at that. One is whether or not the conduct itself, even if it is protected, loses protection of the statute. That is an area where the Board has not done a great job over the years of articulating, you know, what is permissible and what isn't. And we can talk about that a little bit later.

The other area would be: are there conflicts with state statutes that prohibit, you know, surreptitious recordings? Many states have laws that say you cannot record unless both, you can't secretly record unless both parties give their consent, even though the Board has found that such statutes may not absolve an employer from unfair labor practice liability, even if the recording itself is unlawful.

Rich Meneghello (17:48)
Wow, okay. And I know that one of the articles we have on our show notes talked about these “watch me get fired” kinds of videos. And they did the article does also talk about employers might have legitimate concerns about that person sharing confidential info or trade secret or client information. So that's something if somebody blasts out into the universe, I'm assuming an employer can feel a little bit more confident about disciplining that person, but still, obviously, call your labor lawyer.

Josh Nadreau (18:19)
Yes, the board has consistently held that there are legitimate things that employers are allowed to protect, you know, speaking of like a software company, right? A source code, any sort of, you know, non-public product information, trade secrets, genuinely private personal information that may be part of the conversation for some reason. Those are things that are likely to be considered protected. But more broad statements, you know, "you can't share anything quote 'confidential'" is more susceptible to challenge.

Rich Meneghello (18:49)
All right, and that's a perfect segue, Josh, to our fifth and final point. And that is we've been talking a lot about what employers shouldn't do, but this doesn't mean that employers have absolutely no right to step in and potentially discipline employees for what they do. They don't have to tolerate everything that an employee could ever do. Where's the line drawn? Where are some things that employers should look at? Where can they legitimately step in and discipline or terminate? What has the Board said about that?

Josh Nadreau (19:25)
I think as a general takeaway, the more narrow work rules are, the more likely they are to be upheld, right? "You cannot harass or discriminate against people" versus "you need to be civil in the workplace," right? That's a kind of a good comparison.

Rich Meneghello (19:41)
Yeah, yeah.

Josh Nadreau (19:42)
You know, "you are prohibited from sharing our trade secrets" versus "you cannot share any confidential information," right? making sure you define confidential information in a way that allows you to sort of invoke those legitimate property rights over information that an employer has is going to go a long way. Avoid, you know, blanket rules that say, you know, "you cannot disparage," some policies I've seen just say, you know, you cannot disparage, you know, your colleagues, right? That type of rule is ripe for NLRB enforcement because employees do have a statutory right to say that management is unfair, dishonest, incompetent, or just making bad decisions. And it's not that far of a stretch to think that employee might read that and say, "I can't complain about my boss," which is clearly a protected right.

And then, you know, like we s we talked about at the top, right? Enforce the policies that you have, right? If you have a history of condoning people using, you know, offensive language on the shop floor or in Slack, and all of a sudden someone connects that type of offensive language to something that's arguably PCA, you're going to be in a much worse position trying to enforce that policy than you would be if you had consistently written up or discharged people who use that language.

Rich Meneghello (20:56)
Yeah. I love the fact that you brought it full circle, Josh. Just as we as we end the substantive part of our show, you do what any good guest does by bringing it full circle and we appreciate it. For that you might get an invite back to another episode of the FP 5.

Josh Nadreau (21:11)

Well, this has been a blast. I hope I do get invited and really enjoyed the time.

Rich Meneghello (21:23)
Well, but before we let you go, Josh, we do a special thing on every show where before we let our guests go, we like to ask five questions about them so we and the audience get to know them a little bit better. Are you ready?

Josh Nadreau (21:35)
I'm ready.

Rich Meneghello (21:36)
What's a job that you had before becoming a lawyer that taught you something that you still use to this day?

Josh Nadreau (21:42)
I go back to my first job as a server and a cook at Dairy Queen. It really taught me a lot about interacting with other people in various stages of emotional unrest.

Rich Meneghello (21:53)
And probably intoxication.

Josh Nadreau (21:56)
Absolutely.

Rich Meneghello (21:57)
Yeah. Second question coffee, tea, or neither?

Josh Nadreau (22:01)
Coffee, a hundred percent, probably too much of it.

Rich Meneghello (22:04)
Okay. All right. Third, what's the best piece of career advice you've ever received from anybody?

Josh Nadreau (22:10)
Early in my career as a litigator, a senior partner basically told me, you know, there's a motion that can fix just about anything. So it's much more important that you acknowledge mistakes and fix them versus try to hide them, because they will come back to haunt you.

Rich Meneghello (22:25)
Love it. Yeah, totally right. That's a hard one for people to learn, but it's amazing how successful it is when you implement that one, I know.

Fourth question: beach or mountains?

Josh Nadreau (22:35)
Mountains. I don't like sand. It's coarse and rough and irritating and it gets everywhere.

Rich Meneghello (22:42)
For those of you watching this, I would love somebody to drop a comment if they caught that reference, because I certainly did. And fifth, what's one thing people are usually surprised to learn about you?

Josh Nadreau (22:53)
I have worked as the mascot for the New England Revolution and the Pittsburgh Pirates.

Rich Meneghello (22:59)
Wow. Pirates? I didn't know that one.

Josh Nadreau (23:03)
Yeah, I have a multi-sport mascot career in my past.

Rich Meneghello (23:08)
You know, the one thing about being a sports mascot is nobody can really verify it, right? Because you don't take your head off.

Josh Nadreau (23:14)
I've got some pictures with the head off just to prove it.

Rich Meneghello (23:17)
When did you live in Pittsburgh?

Josh Nadreau (23:18)
So I actually didn't live in Pittsburgh. I was an intern for them in their Baseball Operations department in Bradenton, Florida, where they have their spring training facility. And part of that is community relations as well.

Rich Meneghello (23:32)
Did you like it, being the mascot?

Josh Nadreau (23:35)
Uhh, it was fun. But donning a giant heavy parrot costume in South Florida is not *my* idea of fun. Particularly in the summer, but you make it work.

Rich Meneghello (23:47)
Alright, that's all the time we have for now. Josh, thank you so much for being on the show. Really appreciate it.

Josh Nadreau (23:52)
Thanks for having me, Rich. Really, really had a good time today.

Rich Meneghello (23:57)
And thank you out there for once again listening to the FP 5. Like I've said, we have several links to interesting insights that dive deeper into some of the topics that we talked about here on this episode, in the episode show notes. So go ahead and check those out. And until then, we'll see you next week.