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Myers Lives: Third Circuit Affirms Precedent Shift But Remands Finding of Protected Concerted Conduct in Light of Affirmative Defenses

Labor Relations Update on **July 1, 2025**

Despite the National Labor Relations Board's ("NLRB" or "Board") continuing lack of quorum, federal courts of appeal have been busy reviewing its decisions.

The latest appellate decision comes out of the Third Circuit. In *NLRB v. Miller Plastic Products Inc.*, No. 23-02857 (3rd Cir. June 23, 2025), the court reviewed an NLRB decision finding Miller Plastic Products violated the National Labor Relations Act (the "Act" or "NLRA") when it terminated an employee after he allegedly raised concerns about its COVID protocols and decision to remain open for business during the early months of the pandemic in an all-hands meeting and in other public ways with co-workers and managers.

There are two key aspects of the Third Circuit's ruling:

Third Circuit Affirmed the NLRB's Precedent Shift Concerning When Individual Conduct Is "Concerted" and "Protected" Under The Act

In 2023, in *Miller Plastic Products,* the NLRB overturned 2019 precedent issued during the Trump administration in *Alstate Maintenance*. Rather than adopting a checklist of specific factors to review when determining whether a single person's individual action could be considered "concerted' and protected under the Act, the *Miller Plastics* Board adopted a holistic approach based on the totality of the record evidence. The *Miller Plastics* standard was a standard borne out of *Myers I* (from 1986) andits progeny. The Third Circuit found it "clear…that concerted activity occurs when a lone employee acts "not solely . . . on behalf of the employee himself," but by "seek[ing] to initiate or to induce or to prepare for group action . . . [or by] bringing truly group complaints to the attention of management"' regarding terms and conditions of employment.

Employee's Conduct Protected, But Case Remanded in Light of Employer's Affirmative Defense

In applying the *Myers* et al. standard, the Third Circuit found the Board did not err in finding the employee's conduct was protected concerted activity for the purpose of mutual aid or protection under the NLRA when he spoke up about pandemic-safety measures and sought to bring "truly group complaints to the attention of management."

Despite the protected conduct's temporal proximity to the employee's termination (one day), however, the Third Circuit concluded the Board did not adequately considered testimony and evidence regarding the Company's affirmative defense under *Wright Line* – that it would have fired the employee absent his protected activity; namely, poor job performance. For example, the Board gave no weight to testimony that the employee received multiple warnings for talking and texting instead of working. Thus, without finding that the Company should prevail on its affirmative defense, the Third Circuit remanded the case to the Board for further review.

Takeaways

This decision is a mixed bag for employers. The Third Circuit's affirmance of the Biden Board's adoption of a broader standard to consider when a single employee's conduct is considered "concerted" could make more employee conduct "protected" by Section 7 of the Act. The Third Circuit's decision in this regard was not surprising. Helpfully, for employers, the court noted that "[t]he Act was intended as a shield and not as a sword that an employee could use to bludgeon an employer with individual (and perhaps petty) complaints that would otherwise be dismissed as "mere griping,"' even if done in the presence of other employees.

The decision also serves to reinforce the availability of an employer's affirmative defense in cases involving mixed motives for termination, and that all record evidence of legitimate business reasons for the adverse employment action must be considered.

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