

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

MEDCO HEALTH SOLUTIONS
OF LAS VEGAS, INC.

and

Cases 28-CA-22914
28-CA-22915

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION,
AFL-CIO, CLC, LOCAL 675

Pablo A. Godoy and Paul R. Irving, Esqs.,
for the General Counsel.

*Marc L. Zaken, Esq. (Edwards, Angell, Palmer &
Dodge, LLP)* of Stamford, Connecticut, for Respondent.

Michael D. Weiner, Esq. (Gilbert & Sackman)
of Los Angeles, California, for the Union.

DECISION

Statement of the Case

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Las Vegas, Nevada, on July 21-22, 2010. The first charge was filed by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC, Local 675 (the Union) on February 22, 2010, and the complaint was issued May 12, 2010. The complaint alleges that Medco Health Solutions of Las Vegas, Inc., (Medco) violated Section 8(a)(1) of the Act by maintaining an unlawful dress code rule, threatening an employee with unspecified reprisals because the employee engaged in concerted activity protected by the Act, and discriminatorily enforcing the dress code rule by prohibiting an employee from engaging in that activity. The complaint also alleges that Medco violated Section 8(a)(5) and (1) by changing its dress code without first allowing the Union an opportunity to bargain concerning the change. Medco filed a timely answer that admitted the allegations in the complaint concerning the service of the charges, interstate commerce and jurisdiction, labor organization status of the Union, supervisory and agency status, appropriate unit, and recognition and 9(a) status of the Union; Medco denied the substantive allegations in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union, and Medco, I make the following.

Findings of Fact

I. Jurisdiction

5 Medco, a corporation, is engaged in the sale and distribution of pharmaceutical products at its facility in Las Vegas, Nevada, where it annually sells and ships products valued in excess of \$50,000 directly to points located outside the State of Nevada. Medco admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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II. Alleged Unfair Labor Practices

A. Background

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Medco operates several facilities in the United States including a mail order pharmacy and call center in Las Vegas, Nevada. The pharmacy does not operate in a traditional manner in that consumers do not normally come to the facility, present their prescriptions, and then await the medications. Instead, the prescriptions are filled in a highly automated process and then mailed to the consumer. As a result, there is no face to face interaction between Medco's employees and the consumers. However, Medco does offer tours of the facility to existing and potential customers; these tours occur about once or twice a week. Employees at the facility are notified by means of a monitor of upcoming scheduled tours. The call center at the facility is separately operated on a 24/7 basis and is staffed by customer service representatives who talk by telephone to consumers about their prescriptions. The call center operation at the facility is not involved in this proceeding.

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Medco employs about 841 persons at the Las Vegas facility. This includes approximately 140 pharmacists of whom 69 are currently represented by the Union.¹ This recognition was a result of a stipulated election that the Union won and that ousted the Guild for Professional Pharmacists as the representative of the employees in the pharmacist unit; the Union was certified on August 11, 2009. The Guild, in turn, had early replaced the Union as the bargaining representative of the pharmacists. Medco and the Union began bargaining after the Union's certification; they used the Guild contract as a starting point and negotiated changes to that agreement and reached agreement on a collective-bargaining agreement on December 7. On December 14 the membership approved that contract. Except for wage rates and stock options, the contract was retroactive to September 1.

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The nonpharmacist pharmacy employees are also represented by the Union in a separate unit. This includes about 105 coverage review representatives and about 80-100 pharmacy technicians.

Medco has a dress code policy that explains:

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One of the primary objectives of this business is to create and maintain a professional workplace. Dress can influence business results in two ways –

¹ The recognized bargaining unit is:

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All full-time and part-time staff pharmacists employed by Medco at its pharmacy located at 6225 Annie Oakley Drive, Las Vegas, Nevada, 89120, excluding all other pharmacy employees, customer service personnel, confidential and administrative employees, inventory control clerks, managers, and guards and supervisors as defined in the Act.

(1) Our dress creates a perception by customers and potential customers as to how effective we will be in handling their business. In addition to seeing the technologies employed in our facility, customers get a visual snapshot of the employees. Neat, clean, conservative dress typically leaves a positive impression. Customers with a positive impression are more likely to either start doing business with us or continue to do business with us. Both of these events have a positive impact on business results.

(2) The clothing we choose to wear to work can sometimes create a distraction in the work place by causing other employees to become upset, laugh or stop what they are doing and stare or discuss the issue with other employees. Distractions can take people’s focus away from their jobs, thus creating the possibility of lost productivity or quality of service problems.

The dress code included the following rule:

Articles of clothing that contain phrases, words, statements, pictures, cartoons or drawings that are degrading, confrontational, slanderous, insulting or provocative are never appropriate.

During the relevant time period Thomas Shanahan was vice president/ general manager of for Medco in Las Vegas. As such he was responsible for overseeing the operations of the pharmacy. Michele Agnew is Medco’s human resources director at its Las Vegas facility.

B. WOW Allegations

Medco has a program that it calls “WOW.” WOW was implemented in the Las Vegas pharmacy on June 24, 2009, and thereafter in all other Medco facilities. Medco describes the WOW program as:

[A] movement focused on building trusting relationships by delivering platinum level service through each and every process, generating pleasant member surprises, and increases the level of satisfaction for our members.

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Every employee has the opportunity to participate in the WOW program and create a positive member experience by exceeding the member’s expectations and providing total patient care. By taking advantage of these opportunities you can increase the level of satisfaction and show our members that Service (sic) at Medco is a top priority. As employees perform at the WOW level we will use the Wall of WOW and the weekly WOW Ceremonies to show off your achievements. During the weekly ceremonies, the details of each employees (sic) WOW award will be presented in front of the achiever’s peers and management. They will be invited to come up and receive their award. The Wall of WOW will be updated weekly with member, client, management, peer compliments or details about the ways in which you positively impact our members. WOW profiles with your picture, describing your achievements will be shown on the monitor, and we will list individual names of people that consistently exhibit WOW behaviors; the list goes on and on.

Employees can qualify for a WOW in several ways. For example, someone may compliment an employee for the service that the employee provided; the compliment can come from a customer, peer or member of management. WOW’s may be rewarded for:

[E]xtraordinary steps and ownership of a complex situation, to successfully facilitate the resolution of a member issue or order [prescription] processing, resulting in improved member satisfaction or restoration of a member’s confidence [in Medco].

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WOW’s can arise from a “Safety Save,” “WOW What a Catch,” and “System/Process Improvement Recommendations.” While nominations for a WOW can come from several sources, management decides whether a WOW will be awarded.

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The WOW award levels are described as follows:

Breakdown of Award levels:

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- 1st – 5th WOW Award – White Belt
- 6th – 10th WOW Award – Yellow Belt
- 11th – 15th WOW Award – Orange Belt
- 16th – 20th WOW Award – Green Belt
- 21st – 30th WOW Award – Brown Belt
- 31st – WOW Award – Black Belt

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(Additional degrees of the Black Belt can be earned)

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Although the program describes awards as belts received by employees, in reality the employee receives a certificate and a lanyard of appropriate color that the employee may wear or display to others at the pharmacy; no monetary rewards are given under this program and the WOW awards are not used in personnel actions such as promotions or pay increases. Medco has a full-time employee who administers the WOW program.

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Medco has a large “Wall of WOW” in the cafeteria that displays recent WOW recipients and the reasons they received the WOW; it is approximately 20-feet long and concave in form, giving it a wave-like appearance. The wall of WOW is a stop on the tours that Medco gives of its facility. As mentioned above, the WOW awards are presented to employees at weekly ceremonies that take place in the cafeteria. These ceremonies last from 20 to 45 minutes, light refreshments are served, and employees are on paid time. Thomas Shanahan, Medco’s vice president/general manager and Medco’s highest ranking official at the pharmacy, presents the WOW awards to the employees. Shanahan was personally highly invested in the WOW program and was unaware of any discontent with the program.

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However, not all employees liked the WOW program. Michael Shore worked² in the coverage review department and was part of the pharmacy unit (not to be confused with the pharmacists unit). Shore was also vice chairman of the Union for that bargaining unit. Shore felt that he got paid to do his job and did not need a WOW to inspire his work performance. Other employees expressed similar sentiments about the WOW program to Shore. Marissa Osterman, a Medco employee and the Union’s unit chairperson, also received comments from employees about the WOW program. Employees said they thought it was a waste of money, that they were just doing their jobs, and that they did not want to get up in front of people during the ceremonies. At some point Osterman attended a Union Medco Council conference in Florida for local union officials from around country; the WOW program was a topic of discussion there. The union officials discussed the possibility of conducting a survey among employees about the WOW program and presenting the survey to Medco because the sense

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² Shore left Medco after his wife accepted employment outside Nevada.

was that there was general discontent among employees about the WOW program. A local union had produced a number of the T-shirts on the subject and made them available to local union officials. The T-shirts had a Steelworkers logo on the front and on the back it read, “I don’t need a WOW to do my job.” Osterman brought back a T-shirt back and gave it to Shore.

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On February 12, 2010, Shore wore the T-shirt to work. Employees reacted to the T-shirt by giving Shore a thumbs-up and a pat on the back, others commented that the WOW program was crap, and some asked if they could get the same T-shirt. Shanahan told Agnew that he had a report that Shore was wearing the T-shirt in the cafeteria; Shanahan was upset. Agnew told him to calm down and that they should talk to Shore. Shore was then summoned to the Shanahan’s office; Agnew requested that Osterman also be there. Agnew asked Shore to remove the smock he was wearing so they could see the T-shirt and Shore did so. Agnew and Shanahan expressed their disappointment that Shore was wearing the T-shirt and they defended the WOW program. Shore answered that the T-shirt expressed his opinion of the WOW program and that he felt that he should be able to wear it. Agnew and Shanahan said that the T-shirt was insulting and they expected him to remove the shirt. I now point to a difference in testimony among the witnesses. According to Shore, Shanahan said that if Shore wore the T-shirt again he no longer would be working at Medco. Agnew and Shanahan denied that anyone said that Shore could be fired or disciplined for wearing that shirt. However, Agnew admitted that Shanahan told Shore that Medco would continue the WOW program and that if Shore did not like it he did not have to work there; Shanahan conceded that he told Shore that if he could not support the WOW program that there was plenty of work out there and maybe Medco wasn’t the place for him. Based on my observation of the relative demeanor of the witnesses, I conclude that the testimony of Agnew and Shanahan is more likely than Shore’s testimony. Osterman then offered to provide Shore with another shirt, but Shore declined the offer. Shore went to his car, changed shirts, and returned to work. Agnew conceded at trial even if Shore wore the T-shirt only on days with no tours Medco still would have prohibited him from wearing it because it was insulting to Medco and therefore violated Medco’s dress code rule.

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Analysis

As the Board recently restated, employees have the right under the Act to wear prounion T-shirts at the workplace. *Stabilus, Inc.*, 355 NLRB No. 164, slip op. at 3 (2010), and cases cited therein. This holding of course applied not only to prounion T-shirts but also to T-shirts with other messages that may be protected under the Act. I first examine whether Shore’s wearing of the T-shirt was concerted activity under the Act. The T-shirt bore the Union’s logo and Shore was a union official. Shore openly displayed the shirt and its message to fellow employees. Medco knew all of this. It therefore must have been clear to Medco that the message on the T-shirt was connected to the Union and designed to enlist employee support for the message. I therefore reject Medco’s argument that Shore’s activity was not concerted. I next examine whether the message on the T-shirt pertained to a term or condition of employment. On the one hand, the WOW program was unconnected to discipline and not used for wage increases or promotions. However, employees are expected to participate and buy into the program. High level management officials are involved in the award ceremonies. The award ceremonies are held regularly and last for substantial periods of time while the participating employees are relieved of their work duties, remain on paid time, are served light refreshments. These factors, in combination, make the WOW program a term and condition of employment. In its brief Medco cites *New River Industries v. NLRB*, 945 F.2d 1290 (4th Cir. 1991). In that case the employer gave employees free ice cream cones to celebrate an agreement the employer had reached with a supplier. Two employees wrote a letter belittling the free ice cream cones. The Court held that the ice cream cones given on that occasion did not amount to a term and

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condition of employment. But the WOW program as I have already described is more substantial than a one-time offer of free ice cream. Medco also cites *Southwestern Bell Telephone*, 200 NLRB 667(1972), and similar cases. In that case employees wore apparel proclaiming, “Ma Bell is a Cheap Mother.” However, no thinly veiled obscenity is contained in the message on the T-shirt in this case. Medco relies on *Noah’s New York Bagels*, 324 NLRB 266, 275 (1997). In that case the message was “If its [sic] not Union, its [sic] not Kosher.” The Board concluded that the message was mocking the employer’s kosher policy. But the employer’s kosher policy, by itself, cannot be construed as a term and condition of employment. Here, Shore’s message dealt with a condition of employment – the WOW program. The fact that Medco was proud of the WOW program does not deprive employees of the right under the Act to view it differently and protest it. Nor does the fact that Medco highlighted the WOW program to customers and potential customers in an effort to retain or gain business serve to deprive employees of the right to visibly challenge the program. Finally, Medco argues that it was privileged to forbid Shore from wearing the shirt in the presence of customers. But I need not decide that issue because Medco did not attempt to narrowly construct its a rule to that effect. Instead, it completely banned the display of the T-shirt. *USF Red Star*, 339 NLRB 389, 391 (2003). In this regard I note that Medco itself has formulated other dress code policies that apply when customers may be present at the facility.

In sum, I conclude that the T-shirt that Shore wore was a union supported protest of a working condition. By its nature Shore’s activity was designed to engender support among employees to protest the WOW program. As such, it was activity that was protected by the Act. I described above how Shanahan and Agnew instructed Shore to remove the T-shirt. By prohibiting employees from wearing clothing that display messages that protest working conditions, Medco violated Section 8(a)(1). *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

I have described above how Shanahan invited Shore to quit his employment at Medco because Shore displayed his dislike for the WOW program. An employer that responds to protected concerted protests of working conditions by telling employees they can leave if they do not like the conditions coerces employees within the meaning of Section 8(a)(1) of the Act. Inviting employees to quit their employment in such circumstances interferes with the free exercise of employees’ Section 7 right to protest working conditions. *Alton H. Piester, LLC*, 353 NLRB 369 (2008); *House Calls, Inc.*, 304 NLRB 311, 313 (1991); *Chinese Daily News*, 346 NLRB 906 (2006); *McDaniel Ford.*, 322 NLRB 956 fn. 1 (1997) (“It is well settled that an employer’s invitation to an employee to quit in response to their exercise of protected concerted activity is coercive, because it conveys to employees that . . . engaging in . . . concerted activities and their continued employment are not compatible, and implicitly threatens discharge of the employees involved.”) By inviting employees to quit their employment in response to their protest of working conditions, Medco violated Section 8(a)(1) of the Act.

I next examine the validity of Medco’s dress code rule that forbids employees from wearing clothing that contain phrases, words, statements, pictures, cartoons or drawings that are “confrontational, . . . insulting or provocative . . .” In *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board stated the following standards for determining whether an employer’s maintenance of a work rule violates Section 8(a)(1). If the rule explicitly restricts Section 7 activity, it is unlawful. *Id.* at 646. If the rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful if (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Id.* at 647. In applying these standards, the Board does not read particular phrases in isolation, and it does not presume improper interference with employee rights. *Id.* at 646. I have found above that

Medco applied its dress code rule forbidding “insulting” clothing to restrict activity that is protected by Section 7.³ By doing so Medco violated Section 8(a)(1). I now turn to the ordinary meaning of the words “confrontational” and “provocative” as it might apply to clothing and examine whether employees can reasonably understand those words to cover activity that is protected by the Act. A common definition of confront is “to face with hostility; oppose defiantly.”⁴ A common definition for “provoke” is “to stir or incite to action; arouse.”⁵ Indeed, “confront” and “provoke” to some degree may be synonyms.⁶ Section 7 of the Act allows employees to defiantly oppose employer workplace policies or conduct. Cannot employees defiantly oppose the discharge of a union steward, for example? It also allows employees to stir or incite other employees to action concerning employer workplace conduct. Cannot employees incite other employees to join in handbilling against an employer, or sign a petition protesting mandatory overtime? Employees likely feel they could be subject to discipline if they wore such clothing. Medco points to Agnew’s testimony that “provocative” meant “sexually provocative.” Medco can certainly ban the wearing of sexually provocative clothing without running afoul of the Act, but this is not what the rule says and there is no evidence that Medco communicated this meaning to employees. By maintaining overly broad work rules that prohibited employees from wearing clothing with messages that were provocative, insulting, or confrontational, Medco violated Section 8(a)(1).

C. Dress Code Changes

Effective January 1, 2010, Medco altered its dress code to require pharmacists to wear white lab coats that Medco provided to them. Before that time a practice had developed whereby pharmacists wore the lab coats only on days that tours were scheduled. Also effective January 1, Medco required all employees to dress in business casual attire on scheduled tour days. Prior to this time employees were allowed to dress in a more casual manner, including T-shirts, shorts, jeans, and sweatshirts on tour days.

Earlier, on November 19, 2009, Medco gave the William Webb, an employee and union chair of the pharmacists unit, a memorandum that read:

Effective January 1st, 2010, all Medco Pharmacists at the various operational sites throughout the country will be required to wear white lab coats as part of their day to day attire. This will ensure a professional, tour ready environment at all times. It will also help to present a professional image of all pharmacists while in Medco’s work environment and assist in Medco’s ongoing efforts to elevate the practice of pharmacy both internally and externally.

At this time, we will not be requiring a change in our current day to day casual attire other than white lab coats. All employees will be expected to dress in business casual attire on scheduled tour days. We are currently working with our Tour Manager to determine a process for ensuring notice of scheduled tours is provided to all employees.

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As a member of our professional workforce, your cooperation and assistance is vital to our continuing success as one of the premier employers in the healthcare industry.

³ I emphasize that it is the application of the rule to protected conduct, and not its facial invalidity, that makes this rule unlawful.

⁴ The American Heritage Dictionary of the English Language, New College Edition (1976).

⁵ Id.

⁶ Id.

Shanahan advised Webb to let him know by noon of the following day if the Union had any questions or concerns.⁷ The Union did not immediately raise any concerns so the next day, November 20, Medco issued the memorandum to its employees.

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After the meeting on November 19 Webb consulted with his superiors about what should be done concerning the revisions to the dress code. On December 9 the Union sent Medco a message that included the following:

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After discussion with local union and international staff representatives we have determined that your unilateral changes in the dress code are a mandatory subject of bargaining. The labor committee would like to meet with you next week to bargain over the issue.

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That same day Medco replied in pertinent part:

We would be happy to sit down with you again to discuss the upcoming change in the Company's current dress code policy, however, we do not believe this is a mandatory subject for bargaining. I will schedule a meeting for tomorrow[.]

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Medco and the Union met on December 10 to discuss the dress code changes. Medco made it clear that it was not there to bargain with the Union. The Union raised the issue of the uneven temperatures at the facility and that parts become very hot in the summertime. Medco conceded that it was difficult to keep certain areas cool and indicated that would make short-sleeve lab coats available to the pharmacists. The Union also asked if an employee would be disciplined if the employee removed the lab coat because it was too hot. Medco indicated that it did not intend to become "white coat police." The Union continued to object to the dress code changes, but Medco remained adamant that the changes would be implemented. The Union ended the discussion at that point because no progress was being made.⁸ At this point the collective-bargaining agreement that Medco and the Union had reached on December 7 was not yet effective because it had not yet been ratified by the membership. On February 12, 2010, the Union filed a grievance concerning the dress code changes, but Medco denied the grievance on the basis that it was not timely filed.

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As explained more fully below, Medco argues that it was privileged to implement the revisions in the dress code under the terms of the contract it had with the Guild. The contract between the Guild and Medco expired September 1, 2009. That contract had a management-rights provision that read, in pertinent part:

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The promulgation and enforcement of rules and regulations not inconsistent with the provisions of this Agreement are vested in the Employer, provided that if the Guild deems any such rule or regulation to be inconsistent with the provisions of this

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⁷ The facts concerning this meeting are based on a composite of the credible testimony of Shanahan, Agnew, and Webb.

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⁸ The facts concerning the December 10 meeting are based on a composite of the credible portions of the testimony of Agnew, Shanahan, and Webb. Shanahan denied that he said that Medco was not there to bargain with the Union at the meeting. I do not credit this testimony because it is contradicted by Webb's testimony, Agnew's testimony and Webb's notes of the meeting. I also note that Agnew's message to the Union that preceded the meeting indicated that Medco felt that the dress code changes were not a bargainable subject.

agreement, it shall so notify the Employer. Within twenty-four (24) hours of notice to such effect, the Employer may withdraw the rule or regulation. Otherwise the Guild may submit it to settlement by the adjustment procedure of this Agreement but the rule or regulation shall remain in force pending such settlement.

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This provision was retained in the contract that Medco and the Union negotiated in December 2009 and apparently appeared in the contract between the Union and Medco that preceded the Guild contract.

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Analysis

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Dress codes applicable to employees represented by a labor organization are mandatory subjects of bargaining. *Yellow Enterprise Systems*, 342 NLRB 804, 827 (2004)(citing *Transportation Enterprises*, 240 NLRB 551, 560 (1979), *enfd. in relevant part*, 630 F.2d 421 (7th Cir. 1980). I have described above how on November 20, 2009, Medco announced changes to the dress code effective January 1, 2010, and applicable to employees in the pharmacists unit. I now conclude that on November 19, when Medco advised the Union of the impending changes, it presented the Union with a *fait accompli*; Medco had no intention of bargaining with the Union over the matter. I have also described how on December 9 Medco refused to bargain with the Union concerning those changes.

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Medco mounts several defenses to its conduct. First, Medco argues that the management's-right provision in the contract it has with the Union, described above, waives the Union's right to bargain concerning the dress code changes. But at the time Medco's obligation to bargain arose on November 19 that contract had not yet been agreed upon by the Union. Even on December 7 when Medco explicitly refused to bargain, the contract was not finalized because the membership had not yet ratified it. So at the time of the refusal to bargain there was no waiver by the Union. Nor does the fact that the contract was made retroactive to September 1, 2009, change that conclusion. This is because the mere retroactivity of the contract does not amount to a clear and unmistakable waiver of a preexisting obligation to bargain. Continuing, Medco argues that the Union agreed that it could follow the terms of the expired Guild contract, including the management's-right provision. I now examine the evidence concerning that assertion. According to Agnew, Medco and the Union met in August shortly after the Union was certified and during that meeting she testified that she said;

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"You know, look, you are – you, the USW, are the new representative. Whether you lay claim to when that happens, you know, you guys need to work that out, but we need to continue our business and you are the new representative, so we are going to work with you, we are working under the same terms and conditions of the contract," and that is what they used – that is what they used even as a basis for negotiations, is the current Guild, at that time, the current Guild contract, is what we were operating under.

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Agnew also later conceded that she did not remember what the Union's secretary-treasurer, Steve Campbell, said at the meeting. She also conceded that it was possible that all the Union said at this meeting was that Medco had a legal obligation to maintain the status quo following the expiration of the contract with the Guild. Shanahan testified that at this meeting:

[W]e did discuss, you know, that we would continue to follow (the Guild contract) until we subsequently bargained a new contract.

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Webb, who was also present at the meeting, could not recall what was said concerning this issue. David Campbell, the Union's secretary-treasurer and spokesperson at this meeting,

testified that he advised Medco that it was obligated to maintain the status quo; he did not recall anything being discussed concerning the Guild contract and denied that the Union ever agreed that the Guild contract should continue until the Union and Medco reached agreement on a new contract. I do not credit the testimony of Agnew and Shanahan on this issue. Their testimony was ambiguous and their demeanor was unconvincing. Moreover, Medco did not consider itself bound to the terms of the expired Guild contract. On September 3, 2009, Agnew refused to allow the Union's request to allow its representative to conduct union business, including investigations, on paid time, as had been provided under the Guild contract. I therefore conclude that the Union did not agree that Medco could continue to apply the management's-right provision from the expired Guild contract. Next, Medco argues that it was merely continuing the existing practice that allowed it to change work rules. In assessing whether a past practice existed I note that it is Medco's burden to prove the past practice. *Caterpillar, Inc.*, 355 NLRB No. 91, slip op. at 2 (2010). In this regard Agnew testified that the practice was that the Medco gave the Union 24-hour notice of any rule changes and if the Union did not object within that time period Medco implemented the changes. She explained that practice arose as a result of the management's-right provision described above. Agnew did not know whether Medco made any of the previous changes at a time when there was no contract in effect. But this testimony is indeed puzzling because as the General Counsel and Union point out in their briefs, the management's-right language places a 24-hour burden on Medco and not the Union. Nor is Agnew's testimony specific enough to carry Medco's burden of proof on this matter. *Caterpillar, Inc.*, supra. Moreover, even if there was a past practice it would not serve to excuse Medco's refusal to bargain over the matter after the Union requested to do so. *Caterpillar, id.*, slip op. at 3 (citing *Owens-Corning Fiberglass*, 282 NLRB 609 (1987)). Finally, Medco seeks to excuse its failure to bargain by arguing that it subsequently bargained to impasse with the Union on the dress code revisions. But it is axiomatic that no good-faith bargaining impasse can exist in the face of prior unremedied refusal-to-bargain violations on the subject of the impasse. Having rejected Medco's defenses, I find that Medco violated Section 8(a)(5) and (1) by changing the dress code rules without first allowing the Union an opportunity to bargain on the matter.

Conclusions of Law

1. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by

(a) Prohibiting employees from wearing clothing that display messages that protest working conditions.

(b) Inviting employees to quit their employment in response to their protest of working conditions.

(c) Maintaining overly broad work rules that prohibit employees from wearing clothing with messages that are provocative, insulting, or confrontational.

2. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act by changing the dress code rules without first allowing the Union an opportunity to bargain on the matter.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to

effectuate the policies of the Act. I have concluded that Medco unlawfully maintained overly broad work rules that prohibit employees from wearing clothing with messages that are provocative, insulting, or confrontational. I shall therefore order Medco to rescind the unlawful rules and notify its employees in writing that it has done so. I have concluded that Medco
 5 unlawfully changed the dress code rules without first allowing the Union an opportunity to bargain on the matter. I shall therefore require Medco, upon request of the Union, to rescind those changes. In his brief the General Counsel requests that Medco be ordered to also post a notice by electronic means. I conclude, however, that the record in this case is not sufficiently developed on this point to justify the imposition of this additional remedy.

10 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.⁹

ORDER

15 The Respondent, Medco Health Solutions of Las Vegas, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

20 1. Cease and desist from

(a) Prohibiting employees from wearing clothing that display messages that protest working conditions.

25 (b) Inviting employees to quit their employment in response to their protest of working conditions.

(c) Maintaining overly broad work rules that prohibit employees from wearing clothing with messages that were provocative, insulting, or confrontational.

30 (d) Changing the dress code rules without first allowing the Union an opportunity to bargain on the matter.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

35 2. Take the following affirmative action necessary to effectuate the policies of the Act.

40 (a) Rescind the overly broad work rules that prohibit employees from wearing clothing with messages that are provocative, insulting, or confrontational and notify employees in writing that it has done so.

45 (b) Upon request of the Union, rescind the changes that it made to dress code without first bargaining with the Union.

50 ⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, copies of the attached notice marked “Appendix.”¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60
5 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility
10 involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 22, 2009.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the
15 steps that the Respondent has taken to comply.

Dated, Washington, D.C., September 14, 2010.

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William G. Kocol
Administrative Law Judge

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10 If this Order is enforced by a judgment of a United States court of appeals, the words in
50 the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

APPENDIX

NOTICE TO MEMBERS AND EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.
Choose representatives to bargain on your behalf with your employer.
Act together with other employees for your benefit and protection.
Choose not to engage in any of these protected activities.

WE WILL NOT prohibit employees from wearing clothing that display messages that protest working conditions.

WE WILL NOT invite employees to quit their employment in response to their protest of working conditions.

WE WILL NOT maintain overly broad work rules that prohibit employees from wearing clothing with messages that are provocative, insulting, or confrontational.

WE WILL NOT change the dress code rules without first allowing the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC, Local 675 an opportunity to bargain on the matter.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the overly broad work rules that prohibit employees from wearing clothing with messages that are provocative, insulting, or confrontational and WE WILL notify employees in writing that we have done so.

WE WILL, upon request of the Union, rescind the changes that we made to dress code without first bargaining with the Union.

Medco Health Solutions of Las Vegas, Inc.,

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

2600 North Central Avenue, Suite 1800

Phoenix, Arizona 85004-3099

Hours: 8:15 a.m. to 4:45 p.m.

602-640-2160.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 602-640-2146.