United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: June 20, 2012

TO: Robert W. Chester, Regional Director
Region 6

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: McKesson Corporation
Case 6-CA-066504

This case was initially submitted for advice on whether the Employer violated Section 8(a)(1) by, *inter alia*, giving the Charging Party a low performance rating and putting her on a personal improvement plan (PIP) because of a comment she posted on Facebook regarding outsourcing. In an Advice memorandum dated March 1, 2012, we concluded that the Charging Party was not engaged in protected concerted activity at any time, including when she posted her comment on Facebook.[1] We further concluded that, *assuming arguendo* that the Charging Party was engaged in protected concerted activity, the Employer had a legitimate basis to issue her a negative performance review and place her on a PIP based on her improper conduct.[2] The Region's partial dismissal letter issued on March 15, 2012. On April 5, 2012, the Charging Party appealed, raising new assertions regarding protected concerted activity prior to her Facebook posting. The Office of Appeals suspended processing the appeal on April 23, 2012 pending the Region's investigation of the Charging Party's new assertions. After completing that investigation, the Region revoked the partial dismissal on May 31, 2012, and resubmitted the case for Advice. This memorandum supercedes the March 1 Advice memorandum.

Based on the Region's additional investigation, it now appears that the Charging Party had engaged in protected concerted activity in her discussions with coworkers regarding outsourcing. Nonetheless, we conclude that the Employer did not violate Section 8(a)(1) by issuing the negative performance review and PIP. To the extent that arguably the performance review and PIP were based upon the Charging Party's

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[1] *McKesson Corporation*, Cases 06-CA-066504 and 06-CA-070189, Advice Memorandum dated March 1, 2012, at 3-4.

[2] *Id.* at 5. We found other Section 8(a)(1) allegations to have merit, including the Employer's maintenance of overly broad social media guidelines.

protected concerted activity, the Employer has met its burden of showing that it would have taken the same action in the absence of protected concerted activity.[3] Thus, before issuing the performance review and PIP, the Employer investigated other employees' complaints about the Charging Party's behavior, including that she threatened coworkers that she could get them fired; that she stated that management should not "f" with her because she knows people who can blow up cars; that employees felt threatened when she wore a t-shirt bearing the slogan, "Trust No One"; and that an employee was contemplating contacting a lawyer about working in a hostile work environment. The performance review states that the Charging Party's "production has steadily decreased" and that she was "disruptive both on the work floor and off," not only because of her comments regarding outsourcing, but also because she wore "clothing with [a] controversial message" and engaged in "loud behavior on the work floor." Similarly, the PIP references Charging Party conduct that was not protected by the Act, such as making "insulting and degrading remarks to co-workers regarding their workload"; "[d]isrupting co-workers by calling out employee names preceded by 'Meow, Meow' or 'Boom, Boom'"; stating that a supervisor's resignation was "better than taking drugs"; and leaving work "without appropriate notification to management." Our conclusion is further supported by the timing of the negative performance review and PIP, which issued after the Employer completed its investigation of other employees' complaints regarding the Charging Party's behavior.

Accordingly, the Region should dismiss the allegations regarding the negative performance review and PIP notwithstanding the new evidence indicating that the Charging Party had engaged in protected concerted activity by discussing outsourcing with coworkers.

/s/
B.J.K.

[3] *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).