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Dress Codes and the NLRA: Can a T-Shirt Slogan Amount to Protected Activity?

By JoAnn Victor

One of the ongoing struggles many employers face is what seems to be an ever-broadening definition of "protected concerted activity" under the National Labor Relations Act ("NLRA"). Even seemingly neutral policies have been found to run afoul of the NLRA's protections. Take, for example, the case of *Medco Health Solutions of Las Vegas, Inc. v. National Labor Relations Board*, which demonstrated that even a company's dress code can - at least according to the National Labor Relations Board ("Board") - violate employees' rights under the NLRA.

Medco, a pharmacy benefits management company, sold pharmaceuticals from its mail-order facility in Nevada. To encourage superior employee performance, Medco initiated a "WOW program," which centered on voluntary weekly events at which selected employees received a "WOW Award." Employees with WOW recognition were not given money, but recent winners were named on the "Wall of WOW" in the employee cafeteria. Employees could decline WOW awards or choose not to attend WOW award presentations, and the awards carried no weight in determining promotions.

Medco had a dual purpose in developing the WOW program. It not only thought that employees would appreciate the gesture, but Medco also used the program to advertise itself to its clients. The

Wall of WOW was a regular stop when managers showed customers and prospective customers around the facilities. Medco also featured the WOW program in a slide show presentation that it showed members of tours. Tours were given about twice a week.

Not all of Medco's pharmacy unit employees, who were in a union, were enthused about the WOW program. In February 2010, one of them came to work in a T-shirt with a union logo on the front and the words "I don't need a WOW to do my job" on the back. A Medco client was scheduled to visit its facilities that day, and Medco found nothing amusing about the T-shirt. The offending employee was told to remove the T-shirt because it was insulting to the company. He was also told that if he could not support the WOW program, "there were plenty of jobs out there." The employee complied and did not wear the T-shirt again.

His union, however, filed an unfair labor practice charge alleging, in part, that Medco's acts had violated the NLRA because the T-shirt was a union-supported protest of a working condition protected by the NLRA and because Medco had unlawfully invited the employee to quit over a lawful protest about working conditions. In defense, the company invoked a provision of its dress code that prohibited employees from wearing clothing with "Phrases, Words, Statements, pictures, cartoons or drawings that are degrading, confrontational, slanderous, insulting or provocative." An administrative law judge agreed with the union, finding not only that the company committed an unfair labor practice by ordering the employee to remove the T-shirt, but also that the company's dress code policy violated the NLRA because its employees would read the policy to prohibit them from engaging in protected concerted activity under the NLRA. The National Labor Relations Board affirmed the finding.

On appeal, the United States Court of Appeals for the District of Columbia Circuit set aside the Board's finding that Medco committed an unfair labor practice by ordering the employee to take off his T-shirt and by banning clothing with provocative, insulting, and confrontational expressions. Although the appellate court found that the record supported a finding that the employee was engaged in concerted activity under the NLRA when he wore the T-shirt, the appellate court agreed with Medco that "special circumstances" warranted Medco's response to the T-shirt incident because the employee's T-shirt posed a threat to the company's client relationships. Medco provided ample evidence that the WOW program was an important element of the pitch it gave prospective and current clients and that Medco even assigned a full-time employee to manage the program. In its ruling, the court recognized the principle - previously followed by the Board - that an employee's message or action can harm an employer's customer relations by belittling or critiquing aspects of the employer's operations. The

court further noted that it seemed natural for a company engaged in selling a service to be concerned over customers' appraisals of its employees' attitudes, including resentment over seemingly inoffensive company programs. Finally, the appellate court overturned the Board's ruling that the company's dress code was in violation of the NLRA, noting that the Board failed to offer any justification for its decision.

In making its ruling, the court noted that in the past, the Board had proven itself "remarkably indifferent to the concerns and sensitivity" that encourage employers to adopt rules that are meant to "maintain a civil and decent workplace." Hence, even in a union environment, there can be circumstances where employees engaging in otherwise protected activity under the NLRA may cross the line when their actions risk adverse customer reaction.

While Medco's actions were vindicated on appeal, the message is not that employers can arbitrarily ban clothing that has pro-union messages or that is otherwise unfavorable to or critical of the employer. Employers must still be mindful not to infringe on the rights employees have under the NLRA. And, even though the dress code at issue here was ultimately upheld, employers must carefully craft dress codes to avoid blanket prohibitions on "message" apparel that express viewpoints and slogans that are negative towards the company. To minimize the chance of losing the battle over questions of acceptable dress, employers may want to consult with a knowledgeable labor lawyer to craft appropriate clothing policies in employee handbooks.


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