

D.C. Circuit Rejects Board's Determination that Medco Violated the National Labor Relations Act

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On Friday, December 14, 2012, the U.S. Court of Appeals for the D.C. Circuit set aside the determination of the National Labor Relations Board (Board) that Medco Health Solutions of Las Vegas, Inc. (Medco) violated the National Labor Relations Act (Act) when it prohibited an employee from wearing a shirt.....

On Friday, December 14, 2012, the U.S. Court of Appeals for the D.C. Circuit set aside the determination of the National Labor Relations Board (Board) that Medco Health Solutions of Las Vegas, Inc. (Medco) violated the National Labor Relations Act (Act) when it prohibited an employee from wearing a shirt that was critical of the company. The court also set aside the Board's finding that the company's dress code, which banned insulting, provocative, and confrontational expressions on clothing, was overly broad and violated the Act.

In about July 2009, Medco, a pharmacy benefits manager, introduced the "WOW" recognition program at its Las Vegas pharmacy. The WOW program is an effort to recognize employees for doing a good job. Employees are nominated by co-workers, patients, physician's offices, or supervisors. Medco management then votes on the nominations and makes the decision to award a "WOW." An employee who receives a "WOW" award gets a lanyard and a certificate and is honored at a reception in the employee cafeteria.

In February 2010, an employee wore a t-shirt to work that had a union logo on the front and said on the back: "I Don't Need a WOW To Do My Job." That day, a client of Medco's was touring the facility. (Such client tours occur two to three times per week.) The company informed the employee that the slogan on the back of the shirt was offensive, insulting to the WOW program, and violated the company's dress code policy that states: "Articles of clothing that contain phrases, words, statements, pictures, cartoons or drawings that are degrading, confrontational, slanderous, insulting or provocative are never appropriate." The employee was directed to remove the shirt.

Medco argued that the employee's wearing of the t-shirt was not "protected concerted activity" because the purpose of the shirt was to belittle the company's WOW program, not to call attention to conditions of employment. Even if the employee's behavior was concerted and related to a condition of employment, Medco argued that "special circumstances" justified the prohibition—the shirt disparaged the company and threatened to harm its relationship with its customers. On July 26, 2011, however, the Board ruled that Medco violated the Act when it required the employee to remove the t-shirt, as there were no "special circumstances" to justify the restriction of his right to wear union insignia. The Board also concluded that Medco's dress code policy was overly broad.

On appeal, the D.C. Circuit stated that the Board failed to offer a reasoned explanation for its rejection of Medco's argument, and that Medco "provided considerable evidence that the WOW program is an important element of the pitch it gives prospective and current client." The court stated: "This evidence, and the tone of the T-shirt gibe at Medco's management, seem to preclude an offhand dismissal of the contention that the T-shirt would threaten to damage Medco's relationship with its customers. Yet the Board concluded that Medco had 'not offered any evidence that the slogan reasonably raised the genuine possibility of harm to the customer relationship.'" The court found the Board's conclusion "puzzling, for the Board has had no difficulty in identifying potential harm to customer relations in prior rulings." The court continued: "Especially for a firm selling a service, concern for customers' appraisal of its employees' attitudes seems natural."

The court also overturned the Board's order that Medco rescind its dress code policy, which prohibits insulting, confrontational, and provocative phrases on clothing, because the Board "offered no explanation for its implicit ruling that each of the three adjectives was overly broad." The court stated that, in prior cases, before the Board concluded that the mere existence of a rule violated the Act, the Board found "either that the rule was promulgated in response to union activity or that a reasonable employee reading the rule would construe it to prohibit protected conduct. For no apparent reason the Board seems to have abandoned that analysis in proscribing Medco's ban on provocative and confrontational words. As a general matter, we suspect that such expressions are seldom found in civil and decent places of employment."

The case will be remanded to the Board for further proceedings.

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