Medco Health Solutions of Las Vegas, Inc. *and* United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, CLC, Local 675. Cases 28–CA–22914 and 28–CA–22915

July 26, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND PEARCE

On September 14, 2010, Administrative Law Judge William G. Kocol issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Union filed answering briefs, and the Respondent filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified below and to adopt his recommended Order as modified and set forth in full below.[2]

1. The 8(a)(1) Violations

The Section 8(a)(1) violations at issue center on the Respondent's requirement that employee Michael Shore remove a T-shirt critical of the Respondent's "WOW" program, a nonmonetary incentive program under which employees were publicly recognized at weekly ceremonies for various work-related accomplishments. The judge found that the Respondent violated Section 8(a)(1) of the Act by prohibiting Shore from wearing the T-shirt, which displayed a union logo and the slogan, "I don't need a WOW to do my job"; by telling him that if he could not support the Respondent's programs "[m]aybe this wasn't the place for him"; and by maintaining an overly broad work rule prohibiting apparel containing "degrading, confrontational, slanderous, insulting or provocative" statements. In adopting these findings, we agree with the judge, for the reasons he stated and those that follow, that Shore's activity was concerted.[3] The judge's factual findings demonstrate that, at a minimum, Shore's wearing the shirt (1) was a logical outgrowth of concerted activity that (2) brought a group complaint to management's attention.[4] These circumstances, separately and together, render Shore's activity concerted. See *Salisbury Hotel*, 283 NLRB 685, 687 (1987); *Meyers Industries (Meyers II)*, 281 NLRB 882, 887 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Although the Respondent cites several cases in support of its position that Shore's conduct did not constitute concerted activity under the Act, these cases are distinguishable, as they involve complaints the Board found were purely individual.[5] We also agree with the judge that Shore's criticism

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order and substitute a new notice to conform more closely to the Board's standard remedial language for unlawful unilateral changes. See, e.g., *Mimbres Memorial Hospital*, 337 NLRB 998 (2002), affd. sub nom. *NLRB v. CHS Community Health Systems, Inc.*, 108 Fed. Appx. 577 (10th Cir. 2004).

The judge found that the record did not justify electronic notice posting. As that determination is properly made at the compliance stage, we shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010).

[3] The judge based his finding that wearing the T-shirt was concerted activity in part on the presence of the union logo on Shore's T-shirt. At the hearing, the parties stipulated that the Respondent allowed employees to wear other union-related T-shirts. The Respondent argues that, given this stipulation, the judge should not have considered the logo at all. We fail to see how this stipulation can be read in the way the Respondent urges, particularly as the stipulation would seem to be relevant only to the Respondent's motive in requiring Shore to remove his T-shirt, which is not at issue in this case. The Respondent's willingness to allow other union-related apparel is irrelevant in determining if wearing the T-shirt in question was concerted, protected activity, and, as the Board has recently stated, it also "adds nothing to [the Respondent's] 'special circumstances' defense." *AT&T Connecticut*, 356 NLRB 883, 883 (2011). In any event, as our subsequent analysis demonstrates, we would affirm the violations the judge found regardless of the logo's presence.

[4] The record establishes widespread discontent with WOW among the Respondent's employees, both at the Las Vegas facility, where Shore worked, and elsewhere. The T-shirt itself was designed by some of the Respondent's Pittsburgh employees (and displayed "Local 993"—the number of the Pittsburgh local—under the United Steelworkers insignia). These Pittsburgh employees distributed the T-shirt at a national conference for local union officials from the Respondent's various facilities, and the distribution took place during a discussion of employee concerns about WOW. Thus, Shore was making common cause not only with the Las Vegas employees who shared his dislike for the program, but with employees from other facilities who shared the sentiments expressed on the T-shirt. As the Board has noted, employees working for the same employer at different locations "will often have common interests and concerns . . . that may be addressed by concerted action." *Hillhaven Highland House*, 336 NLRB 646, 649 (2001), enfd. sub nom. *First Healthcare Corp. v. NLRB*, 344 F.3d 523 (6th Cir. 2003).

[5] *Abramson, LLC*, 345 NLRB 171, 173–174 (2005), involved an individual's unassisted Title VII discrimination claim, which he admitted was filed only to "better himself"; *National Wax Co.*, 251 NLRB 1064, 1064 (1980), dealt with an employee's attempt to secure a wage increase for himself only; and *Tampa Tribune*, 346 NLRB 369, 371–372 (2006), involved an employee's protest, which the Board found to be purely individual, of a supervisor's alleged favoritism. Chairman

of the WOW program was related to terms and conditions of employment and was therefore protected activity.[6]

We similarly adopt the judge's finding that the Respondent failed to demonstrate "special circumstances" justifying the prohibition of the shirt. As the judge observed, the Respondent's claim that customer tours justified its absolute ban on Shore wearing the T-shirt is unavailing because the tours were not a daily occurrence.[7] Cf. *USF Red Star, Inc.*, 339 NLRB 389, 391 (2003) (no special circumstances where ban on union button applied to facility with no customer contact). We further observe that, even if the tours were conducted daily, the Respondent has not offered any evidence that the slogan reasonably raised "the genuine possibility of harm to the customer relationship." *Pathmark Stores, Inc.*, 342 NLRB 378, 379 (2004).[8]

Because Shore engaged in protected, concerted activity, and there were no special circumstances to justify the Respondent's prohibition on wearing the T-shirt, we adopt the judge's finding that the Respondent violated Section 8(a)(1) by prohibiting the wearing of the T-shirt.

We similarly adopt the judge's finding that the Respondent's statement that, if Shore could not support the Respondent's policies, there were other jobs out there and perhaps "this wasn't the place for him" was an implied threat in violation of Section 8(a)(1). Cf. *Jupiter Medical Center Pavilion*, 346 NLRB 650, 651 (2006) (finding employer's statement that, if complaining employee was unhappy, "[m]aybe this isn't the place for you . . . there are a lot of jobs out there" was implied threat of discharge). We also agree that the judge properly applied *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), in determining that the Respondent, in applying the dress code to restrain Section 7 activity, violated Section 8(a)(1) by maintaining an overly broad work rule.[9] We find it unnecessary to address the judge's additional finding that employees would reasonably read the code to restrict Section 7 activity, as any such finding would not affect the remedy.

2. The 8(a)(5) Violation

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its dress code to require pharmacists to wear lab coats at all times. We affirm this finding. As an initial matter, we adopt the judge's findings that the Respondent failed to demonstrate that the Union waived bargaining either through the management-rights clause contained in a collective-bargaining agreement between the Respondent and a predecessor union (the Guild contract)—an agreement that was not in effect during the events in question—or through past practice, about which the Respondent has offered no reliable evidence.[10] We also reject the Respondent's implicit argument that the Union waived bargaining by failing to pursue it diligently. Although the Union took 3 weeks to request bargaining, it nevertheless did so well in advance of the new policy's

Liebman adheres to her dissents in *Abramson* and *Tampa Tribune*, but agrees that they are distinguishable in any event.

[6] The Respondent itself characterized WOW as an incentive program in its position statement to the Region. See GC Exh. 14. We are not aware of any case in which the Board has stated that employees' criticism of an employer's nonmonetary incentives cannot be protected activity. The cases cited by the Respondent are easily distinguished, as the courts found that they involved mere griping or "protests" intended solely to belittle the employer (*New River Industries. v. NLRB*, 945 F.2d 1290, 1295 (4th Cir. 1991)), protests involving policies unrelated to working conditions (*NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464, 476 (1953)), and protests that articulate no goal to which the employer can respond (*Vemco, Inc. v. NLRB*, 79 F.3d 526, 529–530 (6th Cir. 1996)). More importantly, none of these cases supports the Respondent's argument that conduct protesting the WOW program is not protected by Sec. 7 either because WOW recipients receive no monetary award or because the WOW program is not directly connected to discipline, wage increases, or promotions. Criticism of a program intended to create an incentive for employees to work harder or be more productive relates to terms and conditions of employment.

[7] The record also shows that employees generally received advance notification of upcoming tours.

[8] The Respondent appears to argue that the nature of the T-shirt itself constituted special circumstances because it was "immediately offensive." The Board has found that special circumstances can justify bans on otherwise-protected apparel where the apparel at issue was vulgar, obscene, or threatened to disrupt production or employee discipline. See, e.g., *Leiser Construction, LLC*, 349 NLRB 413, 415 (2007) (vulgar and obscene drawing), petition for review denied 281 Fed. Appx. 781 (10th Cir. 2008); *Southwestern Bell Telephone Co.*, 200 NLRB 667, 670 (1972) (obscene slogan); *United Aircraft Corp.*, 134 NLRB 1632, 1634–1635 (1961) (slogan threatened discipline and production). Shore's shirt was neither vulgar nor obscene, and the Respondent has offered no evidence that it threatened to disrupt discipline or production.

[9] The Respondent asserts that the challenge to the Respondent's dress code is time-barred because the dress code language at issue had been in place for many years prior to the filing of the relevant charge. We reject the Respondent's 10(b) defense because the charge at issue challenges the maintenance, not the promulgation, of an overly broad work rule. See *Varo, Inc.*, 172 NLRB 2062, 2062 fn. 1 (1968), enfd. 425 F.2d 293 (5th Cir. 1970).

[10] The Respondent's human resources director, Michele Agnew, testified that under the parties' past practice, which derived (according to Agnew) from the language of the management-rights clause in the Guild contract, the Respondent gave the Union notice of any rule change, and if the Union did not object within 24 hours, the change would be implemented. But the language of the management-rights clause only referred to the *Respondent* having a 24-hour window to withdraw work rules after the Guild gave notice of its belief that the rules were not in accord with the contract. The clause imposed no obligation on the Guild to act within any particular timeframe. Thus, we agree with the judge that Agnew's testimony was "puzzling" and insufficient to sustain Respondent's burden of proof.

announced implementation date.[11] This delay is further justified because it was due, in part, to union chair, William Webb's, need to consult with his superiors regarding whether the dress code was a mandatory subject of bargaining. See *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1024 (2001). Under these circumstances, we find that the Respondent has not established that the Union waived its right to bargain over the dress code change by failing to pursue bargaining in a diligent manner.[12]

Unlike the judge, we find it unnecessary to pass on whether the Respondent presented the Union with a fait accompli on November 19, when it first informed the Union of the intended change. When the Union actually requested bargaining on December 9, the Respondent stated that it did not believe the dress code was a mandatory subject of bargaining, and when the parties met on December 10, the Respondent opened the meeting by announcing it was not there to bargain. These statements constitute an overt refusal to bargain, in violation of Section 8(a)(5) and (1). We reject the Respondent's argument that these statements were mere "bluster and banter" that the judge took out of context. Both statements expressed substantive legal positions, rather than the types of comments the Board has previously found to be "bluster and banter."[13] Likewise, nothing else about the context of the statements suggests they were anything other than straightforward statements of the Respondent's unwavering position. The supposed concession the Respondent claims it made on December 10—a provision for short-sleeved lab coats—was already mentioned on November 19, and therefore does not demonstrate that the Respondent was bargaining or was willing to bargain on December 10. And the Respondent's willingness to "discuss" or "explain" the change and "listen to" the Union's concerns has no bearing on the Respondent's willingness to bargain over the change. It is entirely possible to listen to concerns about a change without being willing to bargain over the change, and that is precisely what happened here. Accordingly, we affirm the judge's finding that the Respondent violated Section 8(a)(5) and (1) by refusing to bargain over the change to the employee dress code.

ORDER

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

1. Cease and desist from

(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 were provocative, insulting, or confrontational.

(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.

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

(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.

(b) Upon request of the Union, rescind the unilateral change that it made to the dress code on January 1, 2010, without first bargaining with the Union.

(c) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

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[11] Past cases in which the Board has found a lack of due diligence on a union's part typically involve situations in which the union has not requested bargaining at all, or has waited until after implementation to request bargaining when it had adequate opportunity to do so before implementation. See, e.g., *Haddon Craftsmen*, 300 NLRB 789, 790 (1990) (no bargaining requested), review denied mem. 937 F.2d 597 (3d Cir. 1991); *City Hospital of East Liverpool*, 234 NLRB 58, 59 (1978) (request after implementation).

[12] The collective-bargaining agreement entered into between the Respondent and the Union in December 2009, which contained a management-rights clause vesting in the Respondent "[t]he promulgation and enforcement of rules and regulations not inconsistent with the provisions of this Agreement," was, by its terms, made retroactive to September 1. The duty to bargain over the dress code change arose on November 19, when the Respondent announced the change. The Respondent excepts to the judge's finding, in concluding that the Union did not waive bargaining over the change, that "the mere retroactivity of the contract does not amount to a clear and unmistakable waiver of a preexisting obligation to bargain." Because the Respondent does not articulate, either in its exceptions or supporting brief, any grounds for overturning this purportedly erroneous conclusion, we shall disregard this exception. See *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005) (applying Sec. 102.46(b)(2) of the Board's Rules and Regulations), enfd. 456 F.3d 265 (1st Cir. 2006).

[13] See, e.g., *Logemann Bros. Co.*, 298 NLRB 1018, 1021, 1036 (1990) (excusing employer's occasional statements during negotiations that "it is this contract or none"); *Allbritton Communications*, 271 NLRB 201, 206, 243 (1984) (excusing nonsubstantive comments made during negotiations that the respondent would stick to its proposals "no matter what," insisted on a particular provision "no ifs, ands, or buts," and would "roll right over" employees who disagreed), enfd. 766 F.2d 812 (3d Cir. 1985), cert. denied 474 U.S. 1081 (1986), overruled on other grounds *Avon Roofing & Sheet Metal Co.*, 312 NLRB 499 (1993).

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

(d) Within 14 days after service by the Region, post at its Las Vegas, Nevada facility, copies of the attached notice marked "Appendix."[14] 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 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 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.

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

APPENDIX

NOTICE TO 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 with us on your behalf

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 set forth above.

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, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

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

WE WILL, on request by the Union, rescind the change that we made to the dress code, unilaterally, on January 1, 2010.

MEDCO HEALTH SOLUTIONS OF LAS VEGAS, INC.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in 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."

Pablo A. Godoy and *Paul R. Irving, Esq.,* for the General Counsel.
Marc L. Zaken, Esq. (Edwards, Angell, Palmer & Dodge, LLP), of Stamford, Connecticut, for the 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

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.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

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.

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.

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:
>
> 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) 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.

[1] The recognized bargaining unit is:
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.

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.
>
> . . . .
>
> 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].

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.

The WOW award levels are described as follows:

Breakdown of Award levels:

- 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

(Additional degrees of the Black Belt can be earned)

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.

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.

However, not all employees liked the WOW program. Michael Shore worked[2] 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 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.

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

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.

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 914, 916 (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 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).

[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.

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.
>
> . . . .
>
> 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.

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.

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:

> 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.

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[.]

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

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.

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:

> 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 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.

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.

Analysis

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.

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;

> "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.

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.

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 repre-

[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.

sentative 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 521, 522 (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. at 523 (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 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.

[Recommended Order omitted from publication.]