

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4084
Summary Calendar

DELTA HEALTH CENTER, INC.,

Petitioner-Cross
Respondent,

VERSUS

NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross
Petitioner.

Petition for Review and Cross-Petition for Enforcement
of an Order of the National Labor Relations Board
(26-CA-14218-1 & 26-CA14218-2)

(September 20, 1993)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

Delta Health Center, Inc. ("Delta"), seeks review of an order of the National Labor Relations Board (the "Board"), finding that Delta committed unfair labor practices within the meaning of section 8(a)(1) of the National Labor Relations Act (the "Act"), 29 U.S.C. § 158(a)(1), when it reprimanded and ultimately dis-

* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

charged two of its employees, Priscilla Hill and Charlotte Mosley. The Board cross-applies for enforcement of its order. Finding no error, we deny the petition and order enforcement.

I.

The parties agree on the essential facts. Delta is a health care institution that provides outpatient medical and professional care services to the residents of four Mississippi counties. Its principal office is in Mound Bayou, and it operates a center in Clarksdale and a clinic in Greenville. A fifteen-member board of directors establishes its policies. Delta receives fifty-one percent of its funds from fees charged to those using its services, with the remaining forty-nine percent provided by a grant award from the Public Health Service division ("PHS") of the United States Department of Health and Human Services ("HHS"). As a health center partially funded by federal monies, Delta must file an annual report with the PHS regional office in Atlanta, Georgia.

In November 1988, Dr. L.C. Dorsey became Delta's executive director. On June 5, 1990, she announced at a general staff meeting that Delta intended to open a satellite clinic in Greenville. Dorsey also expressed her desire to convert the Greenville facility into the main site and the Mound Bayou facility into a satellite operation, but she cautioned that "if this is repeated outside this room, I will deny it." The Greenville clinic opened on August 13 and was staffed by personnel also employed at the Mound Bayou facility, as well as by some new hires.

The Greenville clinic is situated approximately forty-five miles from Mound Bayou. Some of the Mound Bayou employees who were required to drive to the Greenville clinic two days per week expressed concern about the expense of the longer commute, the additional wear on their cars, and the resulting staff shortage at the Mound Bayou facility. Although employees assigned to work at the Greenville clinic initially received travel reimbursement, Dorsey announced on August 28 that such employees would no longer be eligible for reimbursement, effective September 4.

On September 5, Delta's interim medical director, Dr. Luther McCaskill, held his monthly staff meeting, during which employees raised several questions concerning the Greenville clinic. At McCaskill's request, Dorsey attended the meeting in order to respond to the questions.

When Mosley expressed concern about the decision to cease the travel reimbursement, Dorsey stated that Delta did not have the funds to continue that practice. Hill then commented that perhaps Delta should re-evaluate the status of the Greenville clinic and make some adjustments. In response, Dorsey stated that Delta was making such evaluations. Dorsey further remarked that the board had asked for the names of employees who refused "to go along with" Delta's mission and that such employees needed further training in that mission because they seemed to have forgotten it.

During this meeting, McCaskill appointed a committee, which included Hill and Mosley, to study the employees' concerns regarding the opening of the Greenville clinic. McCaskill selected Ivey

Odom, Delta's medical records manager, to be chairman of the committee.

On the following day, Dorsey summoned Hill into her office. Referring to Hill's comments the previous day about Delta's need to reevaluate the Greenville clinic, Dorsey stated that she was tired of Hill's critical remarks and tired of people not having anything constructive to offer. When Dorsey asked Hill how she would have handled the travel situation, Hill replied that she would have tried carpooling instead of paying employees to drive. On September 11, Dorsey issued a memorandum stating that mileage reimbursement would be reinstated for staff assigned to work at the Greenville clinic and encouraging employees to carpool to the clinic.

On September 7 and 11, the committee met to draft a two-page memo to Dorsey setting forth the employees' concerns. McCaskill approved the draft except for remarks in one paragraph, which Odom assured him would be deleted. McCaskill then gave verbal and written approval for forwarding the revised memo to Dorsey.

The revised memo, which was dated September 14, stated generally that the employees were committed to providing quality health care; that while there was no objection to the opening of a satellite clinic, there existed locations in Delta's service area that required patient care more than Greenville; and that expansion at the present time was not appropriate in light of the reduced number of physicians. The memorandum further stated that the appointed committee had met and expressed the following concerns:

an insufficient number of physicians to handle patient needs and patients turned away because physicians were rotated to the satellite clinic; the lack of a permanent medical director to oversee operations and to keep personnel informed of guidelines; inadequate support staff in critical clinical areas; nonexistent use of physical therapy equipment; the lack of opportunity for divisional directors and department heads to manage and implement procedures in their divisions and departments; the inconsistent application of policies and procedures set forth in the personnel manual; and the staffing and funding problems that had arisen since the opening of the satellite clinic. The memorandum concluded by stating that the committee hoped that its concerns would not be viewed as mere negative criticism and requested permission to present them to the board of directors at its next meeting.

On September 19, Odom delivered the revised memorandum listing the employees' concerns, as well as McCaskill's memorandum approving submission of the revised memo, to Dorsey's office. That afternoon, Odom also delivered copies of the two memoranda to McCaskill.

Upon receiving them, McCaskill told Odom that if the employees persisted in pursuing their complaints, Dorsey had indicated that she would close the facility. Odom replied that she did not think that one person could close it and asked McCaskill whether the latter believed that the committee's concerns were legitimate. McCaskill replied affirmatively, and Odom stated that the committee intended to send its concerns to the board of directors. Dorsey

previously had forwarded the committee's September 14 memo to members of the board.

On September 20, Dorsey called Odom and Mosley into her office and asked them to provide specific examples of the concerns raised in the committee's letter. Odom and Mosley indicated that they would provide specific examples if Dorsey summoned the full committee for the discussion. Dorsey declined and told Mosley that the committee had bypassed her by going directly to Delta's board with its concerns.

Approximately one hour after the meeting, Mosley observed Dorsey talking in the hallway with Delta's financial director. Dorsey looked directly at her and stated that the "folks in Atlanta are tired of these people around here. What I'll do is just close this place for 90 days." Mosley repeated Dorsey's remarks to the other committee members before the board meeting that evening.

That afternoon, Dorsey sent a memorandum to Odom requesting that she provide, in writing, specific instances of the violations referred to in the committee's memorandum. Dorsey's communication also instructed Odom to submit her response for Dorsey's review by 5:00 p.m. before the board meeting that evening. Odom provided the requested response and listed specific examples of the violations.

During her presentation of the executive director's report at the board meeting, Dorsey told the board members that the committee's September 14 memorandum was from a group of "political activists" who were "troublesome, disgruntled, and uncooperative" and opposed the opening of the Greenville satellite clinic. She

also stated that these "activists" wanted the Greenville clinic closed and were attempting to force the physicians to strike. Dorsey then asked the board for permission to close the main facility in Mound Bayou for ninety days in the event a strike occurred. The board tabled Dorsey's request. When Odom attempted to refute some of Dorsey's statements, she was ruled out of order because she was not listed on the agenda.

Upon leaving the meeting, the committee members discussed what they had heard and concluded that the board ultimately would grant Dorsey's request to close the Mound Bayou facility and that they would lose their jobs when the closing became permanent. They therefore decided to send a letter expressing their concerns to Delta's board, with copies to Dorsey and the PHS regional office in Atlanta.

On September 25, Dorsey advised Odom, by memorandum, that the board of directors would listen to the committee's concerns at its October 11 meeting in Greenville. On the same day, the committee drafted a letter expressing its disappointment that it had not been permitted to present its views at the September 20 meeting, to oppose Dorsey's request to close the Mound Bayou facility, or to refute other statements made by Dorsey. The letter also requested the board to hold a special meeting, prior to the October 11 meeting, at the Mound Bayou facility, in order to address the committee's concerns regarding the survival of that facility.

On September 26, the letter was mailed to the board of directors, Dorsey, and the PHS regional and central offices. On

September 28, McCaskill informed the committee that he had disbanded it because they had gone over his head by drafting and sending the September 25 letter without his knowledge or permission.

On September 30, Dorsey issued a memo reprimanding each member of the committee for sending the September 25 letter. The memo stated that the committee's letter contained deliberate lies, showed disrespect for the board of directors, and bypassed Dorsey without any authority to do so.

The memo further stated that because the committee members had committed a serious offense by sending the letter to the PHS, and because the contents of the letter violated several company policies and procedures, the matter had been recorded in their personnel files. The specified policy violations included willful misconduct, maladministration, falsification of company records, and violation of federal regulations restricting political activity. The memo further instructed committee members to "cease and desist" their "campaign of disruption and personal attacks by lies and innuendos."

On October 17, the five members of the disbanded committee appeared before the personnel committee of the board of directors and its attorney, Willie Bailey, at the Mound Bayou facility. During the committee members' presentation, Bailey asked whether the disbanded committee members would be satisfied if Delta closed the Greenville facility and fired Dorsey.

Hill replied that that was not what they were seeking. Board

member Alice Redfield asked the disbanded committee members whether they appreciated the "seriousness" of sending the letter to the PHS. Marilee Lucas, another committee member, defended the action by stating that they had not been given the opportunity to respond to Dorsey's accusations at the September 20 board meeting and had provided factual support for their claims in the letter. Other committee members emphasized that they had felt compelled to contact the board and third parties because they feared that the board would close the Mound Bayou facility and that it might never reopen.

On October 22, Dorsey fired all of the disbanded committee members. The discharge letter sent to Mosley and Hill stated that their actions had "created an atmosphere of tension and confusion" at the company and in the community and that their response to the Board's attempt to address their concerns had been "disrespectful, hostile, and demeaning."

With respect to the September 14 memorandum, the letter stated that the members had not presented any concerns that constituted a grievance justifying their "disruptive" activities. The letter further stated that the grounds for discharge were (1) intentionally seeking to disrupt the operations of the company through "an organized campaign of misinformation, intimidation and confusion"; (2) intentionally circumventing lines of authority by demanding a meeting with the board in the absence of a grievance and in defiance of Dorsey, by sending complaints directly to the regional and central offices of HHS, and by rejecting the board's

proffered meeting time and place; and (3) causing unnecessary anxiety in the community and patient population, who feared that the Mound Bayou facility was closing, based upon misinformation spread by the committee members.

II.

On December 17, 1990, Hill and Mosley filed charges against Delta, alleging that it had committed unfair labor practices by threatening, reprimanding, and discharging them based upon their concerted, protected activity as members of the medical staff committee. On the basis of these charges, the Board brought a consolidated complaint against Delta. After an extended administrative hearing on the charges, the Administrative Law Judge ("ALJ") rendered his decision and order on March 20, 1992, finding in favor of Hill and Mosley. By decision and order dated January 7, 1993, a three-member panel of the Board affirmed the ALJ's rulings, findings, and conclusions of law.

III.

Delta first challenges the Board's jurisdiction, asserting that as an entity in fact controlled in large part by the federal government, it cannot be a statutory employer under the Act. See § 2(2) of the Act, 29 U.S.C. § 152(2) ("The term 'employer' . . . shall not include the United States or any wholly owned Government corporation . . ."). Because Delta failed to raise this argument before the Board, by means of an exception to the ALJ's decision,

it has not preserved the issue for our review.

Section 10(e) of the Act, 29 U.S.C. § 160(3), states that "[n]o objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Delta alleges no such extraordinary circumstances, nor are we aware of any. We therefore decline to disturb the exercise of jurisdiction in this matter.

IV.

As to Delta's contentions that the Board erred in concluding that substantial evidence supported the ALJ's finding that the alleged threats made by Dorsey and the reprimands and discharges issued to Hill and Mosley were unfair labor practices in violation of section 8(a)(1) of the Act, we must disagree. The ALJ's decision is well written and well reasoned and, in almost every instance, favored the credibility of the charging parties and their witnesses over that of Dorsey and McCaskill. Ample evidence supported Hill and Mosley's version of events, and prior caselaw suggests that similar conduct by employees has been found to be protected behavior under the Act. See, e.g., NLRB v. New York Univ. Medical Ctr., 702 F.2d 284, 289-92 (2d Cir.) (employees' leaflets accusing employer of racist and "fascist" searches of black and Hispanic employees held protected), vacated on other grounds, 464 U.S. 805 (1983); Community Hosp. v. NLRB, 538 F.2d 607, 610 (4th Cir. 1976) (finding, as protected concerted activity,

employee nurse's television interview respecting inadequate staffing and low salary at employer hospital).

Delta's petition for review is DENIED, and the Board's cross-application for enforcement is GRANTED.