UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5393

MARSHALL DURBIN POULTRY COMPANY,

Petitioner-
Cross-Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent-
Cross-Petitioner.

Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board (NLRB #15-CA-11528)

(September 28, 1994)

Before POLITZ, Chief Judge, and DUHÉ and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

At issue is whether substantial evidence supports the National Labor Relations Board's decision in this proceeding, which arises out of union organization activities at Marshall Durbin's poultry processing plant in Hattiesburg, Mississippi. The dispute focuses principally on whether an employee was discharged in retaliation for having testified at a Board proceeding. We enforce the Board's order in full.

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[1] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

On April 25, 1991, Annette Strickland testified at an unfair labor practice (ULP) hearing, concerning her discussions with her supervisor, Jim Sanders, about sexual harassment by her foreman, Luke Moody.[2] The following May 6 or 7, approximately two weeks after the hearing, Strickland and others heard that foreman, Moody, tell a new foreman, Floyd Washington, that there were troublemakers on the line; he then pointed to Strickland and said that she should be fired.

That May 8, approximately two weeks after testifying and two days after Moody's remarks, Strickland found her car missing from her home and believed that it was stolen. She telephoned Marshall Durbin at approximately 7:00 a.m., and asked Sanders if she could use one of her vacation days that day.[3] Sanders responded that, under company policy (unwritten), vacations had to be pre-scheduled and, therefore, denied her request.[4] He did tell her, however,

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[2] The unfair labor practice charge concerned Marshall Durbin's termination of another foreman, Billy Johnson. The union contended that Johnson was fired for refusing to attempt to suppress union organizing efforts; Marshall Durbin, that the termination should be upheld because of Johnson's sexual misconduct with employees. Strickland and other employees were rebuttal witnesses, testifying about Marshall Durbin's response to their allegations of sexual harassment by other foremen. The ALJ in the instant proceeding stated that "Strickland testified ... that ... Sanders had refused to discipline ... Moody, after she told Sanders that Moody granted her time she did not work in the hope that she would grant Moody sexual favors."

[3] It is undisputed that, on the day in issue, Strickland had available vacation days and, if she had been allowed to take one of them, would not have been terminated then.

[4] It was stipulated that this policy was not in writing.

that she would be charged only for one-third of an absence if she arrived by 11:20 a.m. (that is, within four hours of her starting time); but, that if she arrived after 11:20, she would be charged a full day's absence. Sanders was not certain whether they discussed that another absence would result in termination, but he might have checked her absence records while on the telephone.[5]

Strickland learned that her car had been repossessed, not stolen. As a result of time spent in retrieving the vehicle, she did not report to work until 2:30 p.m., after her department had finished its work. She was told that she had accumulated more than 11 absences, and was discharged.

As a result of that discharge, an unfair labor practice charge was filed against Marshall Durbin, which, *inter alia*, claimed violations of §§ 8(a)(1), (3) and (4) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(1), (3) and (4).[6] At the hearing, the earlier referenced Billy Johnson, a former foreman at Marshall Durbin, testified that the plant manager told him in 1989

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[5] Under the written absentee policy then in effect, an employee was discharged upon accumulating 11 absences during any 12-month period. (Vacation days did not count; excused, as well as unexcused, absences and sick leave did.) An employee was charged one absence for either missing an entire day or being more than four hours late. But, if an employee was late by less than four hours, only one-third of an absence was charged. Although excused and unexcused absences counted toward the ten allowed, any employee with three unexcused absences within a 12-month period was terminated.

[6] The charge, as amended, also claimed § 8(a)(1) violations in connection with, *inter alia*, a threat to discharge an employee in reprisal for protected activities, statements made to employees that it would be futile to select the union as their representative, and interrogation of employees about their union sympathies and/or activities.

that the company's policy regarding same-day vacation requests was to "take care of the good employees, and [that] people who were becoming in peril with their absenteeism would be put on vacation days when they called in"; that thereafter, numerous employees called Johnson with same-day vacation requests, and he granted each one; and that he recalled telling Sanders about granting these requests.[7]

On the other hand, foreman Tom Thorla testified that the policy of denying same-day vacation requests had been in effect since 1987, but that he had granted such requests until 1989, when Sanders was hired as supervisor. And, other foremen and Sanders testified that, at the time in issue (May 1991), the policy was to deny same-day vacation requests. Sanders testified that he had granted only one such request, to an employee who had been involved in an accident which resulted in the death of a pedestrian.

But, no witness identified any employee whose same-day request had been denied. Moreover, several witnesses offered by the General Counsel testified that they had been granted same-day requests, including one who testified that Sanders had granted it. (This was in addition to the above described request that Sanders admitted granting.)

The ALJ's findings were extremely extensive and detailed. Concerning Strickland's termination, the ALJ found that the General Counsel made a *prima facie* case by showing that Marshall Durbin

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[7] The General Counsel asked Johnson to identify those callers, but the ALJ sustained Marshall Durbin's objection.

strongly opposed union activities; that Strickland had testified at the ULP hearing on April 25, 1991, on behalf of the General Counsel; that, on May 6 or 7, foreman Moody told new foreman Washington that Strickland was a troublemaker and that Washington should get rid of her; and that, on May 8, Strickland was fired. With regard to Marshall Durbin's alleged policy of denying same-day requests, the ALJ noted that "[o]n several occasions both before and after May 8, [1991, the date of discharge,] employees were permitted vacation time off, immediately following requests under emergency conditions on the day they made the request for vacation". According to the ALJ, Marshall Durbin, however, did not show either that a particular employee, other than Strickland, was ever told he or she could not take an immediate vacation under emergency conditions, or that an employee was ever disciplined under the employment policy after requesting immediate vacation under emergency conditions.

Accordingly, the ALJ rejected Marshall Durbin's contention that Strickland was fired in strict accord with its policy, because the General Counsel's evidence showed that employees were granted immediate vacations both before and after May 8, 1991. In so finding, the ALJ specifically credited the testimony of the General Counsel's witnesses who testified that their same-day requests had been granted, as well as the testimony of Billy Johnson. As for the request which one witness stated Sanders granted, but which he denied, the ALJ discredited Sanders' testimony, both because it conflicted with testimony that was credited, and because of

Sanders' "evasive[ness] on cross and ... poor recall of ... important issues...." The ALJ concluded that Marshall Durbin had violated § 8(a)(4) by terminating Strickland.

The ALJ also found three § 8(a)(1) violations. First, for an alleged threat to terminate Strickland, the ALJ credited the testimony of witnesses to the conversation in which foreman Moody recommended Strickland's discharge because she was a troublemaker. The ALJ found it was reasonable to conclude that Moody made this recommendation "because of her allegations in the prior unfair labor practice proceeding." Second, the ALJ credited the testimony of employee-witnesses to find a violation in connection with statements in October 1991 by Scott Varner, a Marshall Durbin vice president, that it would be futile to select the union as the employees' representative, because Marshall Durbin would not bargain and would close the plant. And third, the ALJ found a violation as a result of Sanders interrogating an employee in October 1991 regarding her preference for the union and the extent to which she would support it.[8]

Marshall Durbin appealed to the Board, which remanded with three instructions: (1) to "address the evidence of witnesses who testified, without contradiction, that there was ... a policy" of denying same-day requests; (2) if the ALJ relied on "evidence concerning requests for immediate leave either prior to November 1989[, when Sanders was hired,] or after September 1991" (when

[8] The ALJ rejected the claim that Marshall Durbin, Jr., violated § 8(a)(1) through a speech made to employees in September 1991.

Marshall Durbin admitted it began granting same-day requests), to explain its relevance; and (3) to determine whether "the relevant examples of disparity constitute substantial evidence, not isolated events."[9]

On remand, the ALJ discredited the testimony of the witnesses who testified that there was a policy of denying same-day requests, especially where the request resulted from an emergency, on the basis that this testimony was refuted by credited testimony that Marshall Durbin's policy was to grant such requests.[10] In making this credibility choice, the ALJ noted that Johnson's earlier described testimony about his conversation in 1989 with the plant manager concerning when to grant such requests had not been refuted at all.

With respect to the second remand instruction (whether the ALJ relied on events before Sanders began in November 1989, or after September 1991, when the company began granting same-day requests), the ALJ stated that he was not relying on post-September 1991 requests. But, by crediting Johnson's testimony, he necessarily considered events before Sanders began. As for the third remand instruction, the ALJ found that the "relevant examples of disparity constitute substantial evidence and not isolated events. The

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[9] Marshall Durbin also challenged the ALJ's conclusion that it had violated § 8(a)(1), but the Board did not address these issues.

[10] In so doing, the ALJ found also "that ... Sanders [did not] enforce[] a unique policy in his area of responsibility ... of denying same day requests ... from January 1991 to September 1991." *See* note 15, *infra*.

evidence shows that employees were routinely granted *emergency* vacations on the day the requests were made." (Emphasis added.)

Therefore, the ALJ again concluded that Marshall Durbin had violated § 8(a)(1) and (4) in terminating Strickland. Marshall Durbin appealed again; and the Board, without an opinion, "affirm[ed] the [ALJ's] rulings, findings, and conclusions...." (Footnotes omitted.)[11]

II.

Asserting that there is no substantial evidence of violations of either §8(a)(1) and (4) because of Strickland's discharge, or §8(a)(1) because of communications with employees, Marshall Durbin seeks to set aside the Board's order. The General Counsel seeks its enforcement.

Under our well-established and narrow standard of review for sufficiency of the evidence challenges in administrative proceedings, we review the Board's decision with considerable deference, and must affirm if it is supported by substantial evidence. *E.g.*, ***Universal Camera Corp. v. NLRB***, 340 U.S. 474 (1951). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." ***Id.*** at 477. In making this

[11] Based on finding § 8(a)(1) and (4) violations, the Board ordered Marshall Durbin to cease and desist from the unfair labor practices, and from interfering with, restraining or coercing employees in the exercise of their rights concerning union activities pursuant to NLRA § 7, 29 U.S.C. § 157. It also ordered Marshall Durbin to reinstate Strickland and make her whole for any losses as a result of her unlawful discharge. Finally, it directed Marshall Durbin to post the appropriate notices.

determination, we consider the totality of the evidence, including that which "fairly detracts" from the Board's decision. ***Id.*** at 488.

This is a close case; the parties skillfully analyze and present the evidence so that two fairly acceptable, but opposite, views emerge. It is for just such an instance that the substantial evidence test was devised. As stated superbly in ***T.I.M.E.-DC, Inc. v. N.L.R.B.***, 504 F.2d 294, 300 (5th Cir. 1974):

> The fact of the matter is that, although we may question the Board's disposition of a particular controversy, the substantial evidence standard, predicated as it is upon the Board's experience and expertise, *forbids us to displace the choice of the NLRB between two fairly conflicting views* even though we might justifiably have made a different choice had the case been before us as an original matter. Moreover, we are neither empowered nor equipped to make *de novo* determinations of witness credibility based upon any impressions we might glean from the printed record. *Where the record contains conflicting testimony, the responsibility for the resolution of such conflicts reposes exclusively in the administrative trier of fact and in the Board.*

(Emphasis added; citations omitted.)

A.

As for Strickland's discharge, § 8(a)(4) "prohibits[, among other things,] an employer from retaliating against an employee for giving testimony at Board proceedings." ***NLRB v. Delta Gas, Inc.***, 840 F.2d 309, 311 (5th Cir. 1988).[12] The General Counsel must first

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[12] Section 8(a)(4) provides:

> It shall be an unfair labor practice for an employer --
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> ...

make a *prima facie* showing that the "particular supervisor responsible for the [action] knew about [the employees'] union activities," ***Pioneer Natural Gas Co. v. NLRB***, 662 F.2d 408, 412 (5th Cir. 1981), and that "anti-union animus was a *motivating factor* in the employer's decision." ***Texas World Service Co. v. NLRB***, 928 F.2d 1426, 1435 (5th Cir. 1991) (emphasis added).

"Motive is a factual matter to be determined by the Board", and may reasonably be inferred from direct evidence or circumstances surrounding the employer's actions. ***NLRB v. Mini-Togs, Inc.***, 980 F.2d 1027, 1032 (5th Cir. 1993). "Once the Board has inferred an illegal motive for an employment decision, this court `may not lightly displace the Board's factual finding of discriminatory intent.'" ***Texas World Service***, 928 F.2d at 1435 (quoting ***NLRB v. Brookwood Furniture***, 701 F.2d 452, 464 (5th Cir. 1983)).

Upon this *prima facie* showing, the "burden shifts to the employer to establish that it would have taken the same action even in the absence of the employees' protected activity." ***Texas World Service***, 928 F.2d at 1435.

1.

Marshall Durbin contends that the ALJ improperly rejected its assertedly unrebutted testimony that it had a policy of denying same-day vacation requests. (It bears repeating that this policy

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> (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter....

29 U.S.C. § 158(a)(4).

was not in writing.) However, that testimony was rebutted. As discussed earlier, Johnson, who had been a foreman, testified that the plant manager told him in 1989 that the vacation policy was to "take care of the good employees and [that] people who were becoming in peril with their absenteeism would be put on vacation days when they called in". Johnson testified that, from then on, he granted immediate vacation days until his departure in 1990.

The ALJ credited this testimony. Marshall Durbin counters that the ALJ's credibility choices were "hopelessly incredible" and, therefore, compel reversal. Needless to say, "[w]hen findings of fact rest upon credibility determinations, we defer to the NLRB's findings and will overturn them only in rare circumstances." ***NLRB v. McCullough Environmental Services, Inc.***, 5 F.3d 923, 928 (5th Cir. 1993). On the other hand, we are not required to defer to a credibility choice that is "based on an inadequate reason, or no reason at all". ***NLRB v. Mini-Togs, Inc.***, 980 F.2d 1027, 1032 (5th Cir. 1993). Marshall Durbin's credibility argument boils down to the position that the ALJ simply should not have believed the witnesses whose testimony conflicted with that for Marshall Durbin. Despite Marshall Durbin's dissatisfaction with the credibility choices, those choices are amply supported, as described *supra* and below.

Because Johnson's testimony was contrary to Marshall Durbin's position, it was incumbent upon Marshall Durbin to present evidence either refuting that Johnson's conversation with the plant manager in 1989 took place, or demonstrating that the policy in effect in

1989 (as testified to by Johnson) changed prior to Strickland's discharge. Marshall Durbin did neither. No witness, not even the plant manager, contradicted Johnson's account of his conversation.[13] And no one testified that the policy about which Johnson testified changed prior to the termination.

Instead, Marshall Durbin merely offered contradictory evidence that essentially ignored Johnson's testimony, and asserts, as noted, that the Board should have believed its witnesses instead. For purposes of our limited review, the testimony for Marshall Durbin that the policy in May 1991 was to deny same-day requests does not defeat Johnson's testimony.[14] In the absence of proof that there was a change in the 1989 policy communicated to Johnson by the plant manager, substantial evidence supports the Board's finding that, in May 1991, the policy was to grant same-day requests as needed.[15]

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[13] At the time of the hearing, the identified plant manager to whom Johnson referred apparently still held that position and was available presumably to testify on behalf of Marshall Durbin. To justify his not testifying, Marshall Durbin asserts that he (the plant manager) was not involved in the daily administration of the attendance policy; but this is refuted by the fact that the memorandum describing the attendance policy to the employees was from that plant manager.

[14] As noted, foreman Thorla testified that the policy of denying same-day vacation requests began in 1987, and several foremen testified that the policy in 1991 was to deny same-day vacation requests, but even this testimony was not uncontradicted. Thorla admitted that he allowed vacation requests until Sanders arrived. Marshall Durbin notes that the ALJ did not discredit Thorla's testimony that the policy began in 1987, but Thorla did that himself.

[15] Marshall Durbin maintains that requests granted either before November 1989 (when Sanders' tenure began) or after September 1991 (when management announced that same-day requests

Moreover, there was testimony that some employees -- indeed, all employees who asked -- were given same-day vacations *for emergencies*. This testimony refuted Marshall Durbin's characterization of the policy; had there been a policy of denying same-day requests, these emergency requests would have been denied rather than granted. Myrtle Temple testified that Sanders granted her same-day vacation request to attend the funeral of a friend of her daughter, and she also received a same-day vacation when her daughter was sick.[16] And, Sanders admitted that he granted Annette Fairley's same day request after she killed a pedestrian in an automobile accident.

This testimony not only refutes Marshall Durbin's testimony that, in May 1991, it had a policy of denying all same-day requests, but also constitutes substantial evidence supporting the Board's findings. Based on this testimony, the Board could reasonably conclude that Marshall Durbin's policy was to grant

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would be granted) are irrelevant, as are same-day vacations that were granted by anyone other than Sanders. The Board's decision does not rely on requests granted after September 1991. Although requests granted before November 1989 are not controlling, we reject Marshall Durbin's contention that requests granted either before Sanders was hired or by persons other than Sanders are irrelevant, particularly in light of Marshall Durbin's position that the alleged policy operated plant-wide and not just in Sanders' area. But, even without considering those requests, substantial evidence supports the Board's decision.

[16] As described *supra*, Sanders denied this, but the ALJ credited Temple's testimony and discredited Sanders'.

same-day vacation requests -- at the very least, for emergencies.

2.

Marshall Durbin contends next that there was no substantial evidence that Strickland received disparate treatment; that is, evidence that Strickland's request for a same-day vacation was handled differently from those made by other employees. But, there is substantial evidence that Strickland's request was handled differently; every employee who was identified by name as having made such a request was allowed to take a same-day vacation. Strickland was not; and, as a direct result, she was terminated.[17]

From this disparity, and based on the record as a whole, the Board could infer that Strickland's treatment was motivated by anti-union animus. For example, this inference is supported by both the timing of Strickland's termination (approximately two weeks after her ULP hearing testimony) and the circumstances of Marshall Durbin's opposition to the union organization campaign.[18] ***See NRLB v. Brookwood***, 701 F.2d 452, 467 (5th Cir. 1983). In short, the Board's determination of anti-union motivation is also supported by substantial evidence.

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[17] Marshall Durbin claims that its conduct cannot be motivated by anti-union animus because, when it deviated from its policy, it granted requests made by active union members. The fact that other employees engaged in protected activities without reprisal, however, does not undermine a finding of anti-union animus. ***NLRB v. Delta Gas, Inc.***, 840 F.2d 309, 312 (5th Cir. 1988).

[18] Marshall Durbin does not dispute the Board's finding that, as part of the *prima facie* case, the General Counsel established that Marshall Durbin strongly opposed union activities.

3.

Finally, Marshall Durbin asserts that the ALJ never made a specific finding that Sanders was aware of the substance of Strickland's testimony at the ULP hearing. (Sanders also testified at that hearing.) Sanders admitted, however, that he was aware generally of Strickland's testimony.[19] Therefore, this is not a case where the Board has mechanically imputed knowledge from one management employee to another, as prohibited by ***Pioneer Natural Gas Co. v. NLRB***, 662 F.2d 408 (5th Cir. 1981). Instead, the discharging supervisor, Sanders, admitted that he knew of the protected conduct.

We conclude by noting that, usually, a trier of fact must make credibility choices. The very fact that a matter requires a hearing indicates that the parties probably disagree on the salient facts. This is all the more true for an unfair labor practice charge where motive is an element of proof. Generally, motive must be shown by inference; rare indeed would be the occasion for the company witnesses to admit that anti-union animus was a motivating factor in the employer's decision to discharge an employee. As the foregoing discussion of the record should indicate, the charge concerning Strickland, involving an unwritten policy, presents close and difficult calls on credibility and motivation. Two fairly conflicting views of the evidence are present. Accordingly,

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[19] He testified that he was aware that Strickland testified about his investigation of sexual harassment charges made by Strickland and another employee against a foreman under Sanders' supervision.

pursuant to our narrow standard of review for substantial evidence *vel non*, and for the reasons stated, we hold that, viewing the record as a whole, and considering evidence that fairly detracts, the Board's findings regarding Strickland's termination are supported by substantial evidence.

B.

Marshall Durbin also challenges the § 8(a)(1) violations as to three communications with employees. That section prohibits employers from "interfer[ing] with, restrain[ing] or coerc[ing] employees in the exercise of their Section 7 rights." 29 U.S.C. § 158(a)(1).[20]

1.

Marshall Durbin asserts erroneously that the Board failed to determine whether foreman Moody threatened to terminate Strickland because of her sexual harassment allegations or her ULP hearing testimony. The ALJ stated that Moody recommended the termination "because of her allegations *in the prior unfair labor practice proceeding*". Moody's testimony was discredited, and the statement was made soon after the ULP hearing.

2.

Next, Marshall Durbin disputes the finding that Scott Varner threatened employees regarding the futility of selecting the union.

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[20] Under § 7 of the NLRA, employees have the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities." 29 U.S.C. § 157.

The Board, however, both credited the testimony of the employees who testified to the threats, and stated reasons for discrediting Varner's testimony to the contrary.

3.

Finally, concerning the finding that Sanders improperly interrogated employees about union activities, Marshall Durbin maintains that Sanders merely asked innocently whether the employee would cross the picket line. The employee testified, however, that the conversation extended to questions by Sanders regarding the wisdom of that decision (e.g., who would pay her family's bills?).

In sum, the Board's § 8(a)(1) findings are supported by substantial evidence.

III.

For the foregoing reasons, we **DENY** Marshall Durbin's petition to set aside the Board's order and **GRANT** the Board's petition for its enforcement.

ENFORCEMENT GRANTED