

Two Recent Cases Analyze Classification of Nurses Under the National Labor Relations Act

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Are nurses “employees” under the National Labor Relations Act (NLRA), and thus guaranteed the right to unionize, or are they “supervisors” who are *not* entitled to unionize? The answer to that question, not surprisingly, is “it depends.” But, as the party asserting supervisory status (which, in almost all instances, is the employer) bears the burden of proving that status by a preponderance of the evidence,¹ health-care employers can glean valuable guidance from two recent decisions from the Sixth and Eleventh Circuits.

Who Is a Supervisor?

Under the NLRA, “employees” are guaranteed the right to unionize, while “supervisors” are not.² According to the NLRA, a supervisor is

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.³



In other words, a supervisor is one who has the authority to perform one or more of the supervisory functions described in the statute, where the exercise of that authority requires the use of independent judgment, and that authority is held in the employer's interest.⁴ As to the second point—*independent judgment*—an individual must “act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.”⁵ Judgment is not independent “if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement.”⁶

Whether a nurse is a supervisor, therefore, is a highly fact-intensive analysis. The question cannot be answered simply by looking at the nurse's title, but must include a thorough consideration of his or her job duties and responsibilities. This fact-intensive analysis may yield divergent outcomes, as illustrated by the following two cases.

Frenchtown Acquisition Co. v. NLRB

The Sixth Circuit recently considered whether charge nurses working in nursing homes were supervisors, and thus prohibited from unionizing, in *Frenchtown Acquisition Co., Inc. d/b/a Fountain View of Monroe v. NLRB*.⁷ Fountain View of Monroe is a 119-bed nursing home in Monroe, MI, that offers long term care and rehabilitation. Forty-three charge nurses who worked at the nursing home were putatively represented by the American Federation of Labor and Congress of Industrial Organizations Local 1548, but Frenchtown refused to bargain with the union. Instead, Frenchtown filed a unit-clarification petition seeking to have the National Labor Relations Board (NLRB) determine that the charge nurses were statutory supervisors under the NLRA. After a hearing, the Regional Director denied Frenchtown's petition, finding that it did not meet its burden of proof to show that the charge nurses are statutory supervisors.

Notwithstanding the Regional Director's determination, the facility refused the union's request to bargain on the nurses' behalf, leading the union to file unfair labor practice charges in April 2010 and November 2010. Frenchtown admitted that it refused to bargain, but again claimed that the charge nurses were statutory supervisors. The NLRB's General Counsel (GC) filed a summary judgment motion, and the case was transferred to the NLRB. The NLRB granted the GC's motion, finding that Frenchtown violated the NLRA by refusing to bargain with the union, and ordered Frenchtown to bargain in good faith.

Frenchtown appealed to the Sixth Circuit, arguing that its charge nurses should be deemed supervisors because they had the authority to assign, responsibly direct, discipline, hire, and transfer other employees, or effectively recommend these actions. Specifically, Frenchtown argued that the charge nurses supervised 45 certified nursing aides (CNAs) working at the facility.

The Sixth Circuit was not persuaded. With respect to discipline, the facts demonstrated that, in the relevant time period, only one charge nurse issued only one verbal warning to only one aide. All

other disciplinary actions were initiated by the nursing managers at the facility. Indeed, the aides' union contract prohibited charge nurses from delivering progressive discipline. At most, the charge nurses could provide "one-on-one in-services" to the aides, i.e., educational demonstrations aimed at correcting the aides' performance, which the court deemed not to be disciplinary in nature.

The facts were no better with respect to hiring. Frenchtown's managers solicited applications, granted and conducted interviews, and decided when and whom to hire. The charge nurses' involvement in the process was limited to interviewing candidates when managers were too busy, and occasionally offering their opinion on whether a candidate would be a good fit for the organization. These infrequent recommendations did not, in the court's opinion, constitute substantial evidence of hiring authority.

The court also was unconvinced that the nurses had authority to assign the CNAs. In the healthcare context, "assign" means the "responsibility to assign nurses and aides to particular patients" using independent judgment, "weigh[ing] the needs of a patient against the skills or special training of staff."⁸ Simply instructing an employee to perform a discrete task is insufficient evidence of authority to assign; instead, the supervisor must designate "significant overall duties to an employee."⁹ At Frenchtown, aides' duties were pre-printed on daily assignment sheets. Charge nurses did not prepare these sheets. In fact, aides divided patients among themselves with limited involvement by the charge nurses, and often "swapped" patient assignments throughout the day to accommodate family member requests or as patient census changed. Taken together, the court was not persuaded that the nurses retained significant responsibility to assign aides to specific patients.

There also was insubstantial evidence of supervisory authority with respect to transferring aides among the facility's units. At Frenchtown, aides may be temporarily transferred to ensure adequate staffing levels. This is done using a "float sheet." The float sheet makes selecting which aide to transfer a routine choice rather than a decision requiring independent judgment. Frenchtown presented evidence of only one occasion on which two charge nurses chose to retain a more experienced aide in this unit rather than consult the float sheet, but this isolated occurrence was insufficient proof of the nurses' ability to exercise discretion in transferring employees.

Finally, there was insufficient evidence that the charge nurses "responsibly directed" the aides. The court, quoting *NLRB v. KDFW-TV, Inc.*,¹⁰ defined a statutory supervisor's responsible direction as being "answerable for the discharge of a duty or obligation." "In determining whether direction in any particular case is responsible, the focus is on whether the alleged supervisor is held fully accountable and responsible for the performance and work product of the employees he directs."¹¹ Applying this definition, the court found that, while the nurses' job descriptions suggested that they were accountable for the performance of aides, and while their performance review forms ostensibly rewarded "leadership," there was no concrete evidence that any nurse actually had suffered

adverse consequences for the aides' performance. For example, no Frenchtown nurse ever had been demoted, denied a promotion, docked in pay, or disciplined due to the inadequate performance of the aides he or she purportedly supervised.

Because Frenchtown had not produced specific evidence showing that the charge nurses performed any of the twelve functions indicative of supervisory status, the court affirmed the NLRB's determination that the charge nurses were non-supervisory employees, and granted the NLRB's application for enforcement of its order directing the facility to bargain with the union on the nurses' behalf.

Lakeland Health Care Associates, LLC v. NLRB

Just three months later, the Eleventh Circuit was presented with the same question—whether licensed practical nurses (LPNs) employed at a long term healthcare facility were supervisors under the NLRA.¹² Applying the factors set forth in 29 U.S.C. Sections 152(3), the Eleventh Circuit concluded that the LPNs were, in fact, supervisors, and, therefore, were not entitled to unionize.

Lakeland Healthcare Associates LLC, doing business as Wedgewood Healthcare Center, is a nursing and long term care facility in Lakeland, FL. The United Food and Commercial Workers Union, Local 1625, filed a petition with the NLRB seeking a representation election to establish the union as the collective bargaining representative for Lakeland's LPNs. Lakeland opposed the petition, arguing that the LPNs were supervisors under the NLRA, and therefore ineligible for union representation.

After a lengthy hearing, the NLRB's Regional Director concluded that the LPNs were not supervisors under the NLRA. Following a representation election, the union was certified as the exclusive bargaining representative for Lakeland's LPNs. Notwithstanding the order and the election results, Lakeland refused to recognize and bargain with the union, prompting the union to file an unfair labor practice charge with the NLRB. The NLRB's GC filed a complaint against Lakeland. Three months later, the NLRB granted summary judgment in favor of the NLRB's GC, finding that Lakeland violated the NLRA. Lakeland appealed.

After citing the three-part test for determining whether an individual is a statutory supervisor, the court analyzed whether record evidence established that the LPNs possessed the authority to independently discipline, suspend, and effectively recommend the termination of CNAs, and to assign and responsibly direct the CNAs' work.

The court first considered the LPNs' authority to discipline the CNAs. The LPNs' job description states that their primary purpose "is to provide direct nursing care to the residents, and to supervise the day-to-day nursing activities performed by the [CNAs]." According to their job description, LPNs are charged with ensuring that nursing personnel perform their work assignments in accordance with acceptable nursing standards, and that the CNAs follow established policies and procedures. The LPNs are authorized to interpret those policies and procedures and to make recommendations for revisions thereto.

The record established that LPNs fulfilled these supervisory responsibilities through Lakeland's progressive discipline system, which it describes as a "coaching" program. Under the program, employees who engage in misconduct, or who fail to meet performance expectations, can receive either a "level one" or "level two" coaching, depending on the severity of the issue. Level-one coachings are issued for minor infractions, such as tardiness. They require the employee and his or her "supervisor" to agree to a plan to address the issue. Four level-one coachings result in immediate termination. Level-two coachings are reserved for more serious failures of customer service standards, automatically result in suspension, and often result in termination. LPNs prepare coachings, either on their own initiative or at the instruction of management.

Based on the documentary evidence establishing the nurses' responsibilities, and testimonial evidence that the LPNs coached CNAs, issued verbal and written warnings, suspended CNAs, and, at times, terminated CNAs for poor performance or disciplinary infractions, a majority of the court concluded that the LPNs had the authority to discipline CNAs.

The majority also found sufficient evidence that the CNAs exercised independent judgment in the execution of these duties. Nurses presented uncontroverted testimony that they had independent authority to discipline CNAs without involving another level supervisor, even in situations resulting in termination. Moreover, the types of misconduct for which LPNs could discipline CNAs required the exercise of independent judgment and fact-specific decision-making, such as determining whether CNAs had engaged in negligent conduct, harassment, or fraudulent activity. The LPNs were fully authorized to make such determinations and to mete out consequences when appropriate. The court was persuaded that the LPNs had full authority to determine whether and when discipline was appropriate, the level of "coaching" appropriate for the infraction, and the consequences associated with the disciplinary action. This alone was sufficient, in the majority's opinion, to render the LPNs "supervisors" under the NLRA.

Going a step further, however, the majority determined that the NLRB erred in concluding that the LPNs do not "responsibly direct" or "assign" CNAs. With respect to "responsible direction," Lakeland conceded that no LPN had suffered adverse consequences for failing to exercise proper supervision over a CNA, but insisted that the NLRA requires only a *prospect* of adverse consequences. The majority agreed. According to their job description, LPNs were required to: supervise the day-to-day nursing activities of the CNAs; ensure that all nursing personnel comply with written policies and procedures; ensure that all nursing service personnel are in compliance with their job duties; and make daily rounds to ensure that nursing service personnel are performing their work assignments in accordance with acceptable nursing standards. While the court stated that this "paper" evidence alone would likely be insufficient to support a finding of supervisory status, Lakeland also presented un rebutted

testimony establishing that LPNs would be "written up" for failing to ensure the CNAs' compliance with Lakeland's standards. Because Lakeland's managers reserved the right to, and testified that they would, discipline an LPN if he or she failed properly to supervise the CNAs' performance, the majority found sufficient evidence of responsible direction.

The majority also determined that the LPNs "assign" the CNAs. Whereas the CNAs in Frenchtown only performed discrete tasks set forth for them on a sheet prepared by the facility's management, the LPNs at Lakeland had a significant role in assigning CNAs to specific shifts, rooms, and residents. The LPNs exercised independent discretion in choosing which CNAs worked with them or with particular patients, and, on occasion, changed the CNAs' room assignments and unit assignments. Moreover, the LPNs had sole responsibility for preparing assignment sheets during late shifts and weekends when they were the highest-ranking employees onsite. The majority found this to be sufficient evidence of assignment responsibility. Therefore, as the LPNs exercised independent judgment in performing multiple functions indicative of statutory supervisory status, the majority vacated the NLRB's decision.

Practical Considerations

These two decisions, issued just months apart and involving the same legal question, illustrate how fact sensitive the determination of supervisor status is in the traditional labor context. The take-home message for employers in the healthcare industry is that the determination of supervisor status under the NLRA is complex and case specific. Employers cannot rely on job titles alone to determine whether an employee is a statutory supervisor. The determination must be made after reviewing pertinent personnel documents and considering the employee's day-to-day responsibilities.

However, the time and effort spent in analyzing supervisor status will be well spent. Properly drafting personnel documents to reflect nurses' responsibility for supervising and disciplining subordinates, and ensuring that the nurses in fact carry out those responsibilities with some measure of independent judgment, will prove a valuable tool for healthcare employers facing unionization efforts.

1 See *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 711-12 (2001).

2 See 29 U.S.C. §§ 152(3); 157.

3 See 29 U.S.C. § 152(11).

4 See *Kentucky River Cmty. Care, Inc.*, 532 U.S. at 712-13.

5 *In re Oakwood Healthcare, Inc.*, 348 NLRB 686, 692-93 (2006).

6 *Id.* at 693.

7 683 F.3d 298 (6th Cir. 2012).

8 *In re Oakwood Healthcare, Inc.*, 348 NLRB 686, 689 (2006).

9 *Id.*

10 790 F.2d 1273, 1278 (5th Cir. 1986).

11 *In re Oakwood Healthcare, Inc.*, 348 NLRB 686, 689 (2006).

12 See *Lakeland Health Care Assocs., LLC v. NLRB*, 696 F.3d 1332 (11th Cir. 2012).