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OUTSIDE COUNSEL

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Supreme Court Rejects NLRB's Supervisor Test

After installing a pro-business president, the conservative justices on the Supreme Court recently struck another blow to organized labor.[1]

In *NLRB v. Kentucky River Community Care, Inc.*, _U.S._, 121 S. Ct. 1861, 167 LRRM 2164 (2001), the Court refused to enforce the NLRB's ruling that "independent judgment" — one of the elements of the National Labor Relations Act's (NLRA) definition of a supervisor — does not include judgment "informed by professional or technical training or experience."[2] The decision significantly reduces the number of employees afforded protection under the NLRA. This article will discuss *Kentucky River* and some of the decisions upon which the Court relied.

Since 1947, the NLRA has excluded supervisors from the definition of a covered employee. "The term 'employee' ... shall not include ... any individual employed as a supervisor...." 29 U.S.C. §152(3). A supervisor has:

> 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.

29 U.S.C. §152(11) (emphasis added).[3] Employees are supervisors if (1) they have authority to engage in (or effectively recommend) any of the 12 listed functions, (2) exercise of such authority requires the use of "independent judgment," and (3) their authority is held "in the interest of the employer." *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-74 (1994) (citations and quotations omitted) (discussed infra).

In *Kentucky River*, the Board found that a nursing home's registered nurses (RNs) were not supervisors, and thus included them in the petitioned-for bargaining unit. The Board ruled that "employees do not use 'independent judgment' when they exercise 'ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards.' " See 167 LRRM at 2168.

The Court rejected this reading.

> The first five words of this interpretation insert a startling categorical exclusion into statutory text that does not suggest its existence....
>
> Let the judgment be significant and only loosely constrained by the employer; if it is "professional or technical" it will nonetheless not be independent."

Id. at 2169.[4] The majority stated that although the Board has discretion to determine what "degree" of judgment is required to confer supervisory status, the Board cannot exclude an entire "kind" of judgment, i.e., "ordinary professional or technical judgment." Id.

The dissent strongly disagreed.

> [I]n a tour de force supported by little more than ipse dixit, the Court concludes that no deference is due the Board's evaluation of the "kind of judgment" that professional employees exercise. Thus, under the Court's view, it is impermissible for the Board to attach a different weight to a nurse's judgment that an employee should be reassigned or disciplined than to a nurse's judgment that the employee should take a patient's temperature, even if nurses routinely instruct others to take a patient's temperature but do not ordinarily reassign or discipline employees. The Court's approach finds no support in the text of the statute, and is inconsistent with our case law.

Id. at 2174-75 (Stevens, J. dissenting).[5]

Next, the majority rejected the Board's more limited argument that only a specific kind of professional judgment — that used "in directing less-skilled employees to deliver services" — is not independent judgment.

Every supervisory function listed by the Act is accompanied by the

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statutory requirement that its exercise "requires the use of independent judgment" before supervisory status will obtain, but the Board would apply its restriction upon "independent judgment" to just 1 of 12 listed functions: "responsibility to direct."

Id. at 2169-70 (citation omitted).

The dissent countered:

> But of those 12, it is only "responsibly to direct" that is ambiguous.... The authority to "promote" or to "discharge," to use only two examples, is specific and readily identifiable. In contrast, the authority "responsibly to direct" is far more vague. Thus, it is only logical for the term "independent judgment" to take on different contours depending on the nature of the supervisory function at issue and its comparative ambiguity.[6]

Id. at 2175 (Stevens, J. dissenting).

The Board had argued that its interpretation was necessary to preserve the inclusion of "professional" employees in the Act. (See 29 U.S.C. §152(12).) "The problem with the argument is not the soundness of its labor policy (the Board is entitled to judge that without our constant second-guessing). It is that the policy cannot be given effect through this statutory text." *Kentucky River*, 167 LRRM at 2171 (citation omitted).

> What is at issue is the Board's contention that the policy of covering professional employees under the Act justifies the categorical exclusion of professional judgments from a term, "independent judgment," that naturally includes them. And further, that it justifies limiting this categorical exclusion to the supervisory function of responsibly directing other employees. These contentions contradict both the text and structure of the statute, and they contradict as well the rule of *Health Care* that the test for supervisory status applies no differently to professionals than to other employees.

Id. at 2172.[7]

The Court called the Board's decision "particularly troubling" in light of *Health Care*. "It is impossible to avoid the conclusion that the Board's interpretation of 'independent judgment,' applied to nurses for the first time after our decision in *Health Care*, has precisely the same object" as that rejected therein. Id. at 2170.

'Health Care'

In *Health Care*, the Court rejected the Board's argument that a nurse's direction of less-skilled employees, in accordance with professional judgment and incidental to the treatment of patients, is not "authority exercised in the interest of the employer."

> [T]he Board has created a false dichotomy ... between acts taken in connection with patient care and acts taken in the interest of the employer. That dichotomy makes no sense. Patient care is the business of a nursing home, and it follows that attending to the needs of the nursing home patients, who are the employer's customers, is in the interest of the employer. We thus see no basis for the Board's blanket assertion that supervisory authority exercised in connection with patient care is somehow not in the interest of the employer.

511 U.S. at 577-78 (citation omitted).

> Under the Board's test, however, a nurse who in the course of employment uses independent judgment to engage in responsible direction of other employees is not a supervisor. Only a nurse who in the course of employment uses independent judgment to engage in one of the activities related to another employee's job status or pay can qualify as a supervisor....

Id. at 579.

The Court relied on its previous decision in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), which examined the common-law managerial exclusion as applied to university professors. "Managerial employees are exempted from the coverage of the Act not by explicit statutory language but as a matter of Board policy and unanimous court approval. Employees who fall within this category include those who formulate, determine, and effectuate an employer's policies." *NLRB v. Yeshiva University*, 582 F.2d 686, 695 (2d Cir. 1978) (quotations and citations omitted).

Managerial employees:

- Develop and enforce employer policies.
- Exercise discretion within, or even independently of, established employer policy and must be aligned with management.
- Represent management interests by taking or recommending discretionary actions that effectively control or implement employer policy.[8]

'Yeshiva'

In *Yeshiva*, the Board found that the university's faculty members were not supervisors or managers because "faculty participation in collegial decision making is on a collective rather than individual basis, it is exercised in the faculty's own interest rather than 'in the interest of the employer,' and final authority rests with the board of trustees." *Yeshiva University*, 221 NLRB No. 169, 91 LRRM 1017, 1018 (1975).

The Second Circuit refused to enforce the Board's order.[9]

> Logically, we see no reason that the fact that the policies of a company are created by a group (as indeed they usually are by the Board of Directors) rather than by an individual should be of significance in determining whether an individual has managerial status, and the Board has advanced no satisfactory rationale for the weight it has given this factor....
>
> [T]hat the administration and the Board ... so rarely interfered in the faculty decisions indicates that the interests of the faculty and of the

University were almost always co-extensive.

Yeshiva University, 582 F.2d at 699-700.[10]

The Supreme Court affirmed.

> [The Board] contends that the managerial exclusion cannot be applied in a straightforward fashion to professional employees because those employees often appear to be exercising managerial authority when they are merely performing routine job duties....
>
> *Yeshiva*, 444 U.S. at 683-84.
>
> The controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial....
>
> The Board nevertheless insists that these decisions are not managerial because they require the exercise of independent professional judgment. We are not persuaded by this argument. There may be some tension between the Act's exclusion of managerial employees and its inclusion of professionals, since most professionals in managerial positions continue to draw on their special skills and training. But we have been directed to no authority suggesting that that tension can be resolved by reference to the "independent professional judgment" criterion proposed in this case. Outside the university context, the Board routinely has applied the managerial and supervisory exclusions to professionals in executive positions without inquiring whether their decisions were based on management policy rather than professional expertise.
>
> Id. at 686-87.

Conclusion

The Kentucky River Court concluded by offering the Board a lob — inviting it to devise "a limiting interpretation of the supervisory function of responsible direction by distinguishing employees who direct the manner of others' performance of discrete tasks from employees who direct other employees as §152(11) requires." *Kentucky River*, 167 LRRM at 2172. Surely, it will not be long before the Board accepts that invitation. In the meantime, one thing is certain — the issue of supervisory status will continue to be fertile ground for litigation. See, e.g., *NLRB v. Quinnipiac College*, 2001 U.S. App. Lexis 14993 *22 (2d Cir. 2001) (refusing to enforce NLRB decision that college security department's "shift supervisors" and "assistant supervisors" are not supervisors, finding that the NLRB ignored plain evidence of supervisory status, "a perfect example of the practice followed all too often by the Board of rejecting evidence that does not support [its] preferred result"); *Entergy Gulf States v. NLRB*, 167 LRRM 2445, 2448 (5th Cir. 2001) (refusing to enforce NLRB decision that utility company's operations coordinators are not supervisors because "NLRB departed without a 'reasonable explanation' from the position it has espoused for nearly twenty years.")

(1) See "Perspective: First, Do No Harm," *NYLJ*, Feb. 1, 2001 Page A-2.

(2) This part of the decision, written by Justice Antonin Scalia, was joined by Justices William H. Rehnquist, Sandra Day O'Connor, Anthony Kennedy and Clarence Thomas. Separately, a unanimous Court reaffirmed the Board's traditional rule that the party claiming supervisory status bears the burden of proof on the issue. In practice, the position a party takes with respect to an employee's status may be a factor of how the party thinks that person will vote in a representation election.

(3) Simply because a person is a supervisor under the NLRA does not mean he or she is exempt under the Fair Labor Standards Act. Cf. "Reviewing Overtime White Collar Exemptions," *NYLJ*, April 19, 2000.

(4) The Sixth Circuit had rejected that reading, as well as the Board's labeling the RN's responsibilities " 'routine' because the nurses have the ability to direct patient care by virtue of their training and expertise, not because of their connection with 'management.' " The court found they exercised "independent judgment which is not limited to, or inherent in, the professional training of nurses." *Kentucky River Community Care, Inc. v. NLRB*, 193 F.3d 444, 453 (6th Cir. 1999).

(5) The majority did not discuss the RN's duties at all. The dissent focused on their lack of authority to hire, fire, or discipline, and the fact that they "for the most part 'worked independently and by themselves without any subordinates.'" *Kentucky River*, 167 LRRM at 2173 (Stevens, J. Dissenting).

(6) Justice Stevens added, "[o]ddly, the majority in this Court omits one element — namely, 'in accordance with employer-specified standards.' In so doing, it ignores a key nuance in the NLRB's position. That, however, is characteristic of the majority's treatment of the NLRB's position, which is at once more fact specific and far less categorical than the majority makes it out to be." Id. n.3.

(7) According to the dissent, however, "since Congress has expressly provided that professional employees are entitled to the protection of the Act, there is good reason to resolve the ambiguities consistently with the Board's interpretation." Id. at 2174.

(8) See generally *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). In *Bell Aerospace*, the company argued that its buyers, who had great discretion in entering into purchase agreements, were managerial employees. The Board rejected that argument. The Second Circuit refused to enforce the Board's award, holding that the managerial exclusion extends not only to employees "so closely related or aligned with management" as to create an apparent conflict of interest, but also to those "formulating, determining and effectuating his employer's policies or [who have] discretion, independent of an employer's established policy, in the performance of his duties." *Bell Aerospace Co. v. NLRB*, 475 F.2d 485, 494 (2d Cir. 1973). The Supreme Court affirmed.

(9) The Second Circuit criticized the board for failing to engage in factual analysis, and instead merely citing prior decisions in the university context. See *Yeshiva*, 582 F.2d at 696.

(10) The court also rejected the Board's argument that the board of trustees' ultimate authority over the faculty showed they were not supervisors or managers, because the definition of supervisors "expressly includes those who have the power 'effectively to recommend' any of the enumerated actions. Obviously then, the section contemplates a review by some higher authority." Id. at 701-02.