

# H.R. ALERT\*

OCTOBER 2006

## The National Labor Relations Board (“NLRB”) Issues Important Ruling on Who is a Supervisor Under the National Labor Relations Act (“NLRA”)

In a decision that could send shock waves through the American labor workforce, the NLRB ruled that registered nurses who have permanent jobs with assigning responsibilities must be considered supervisors and are, therefore, **ineligible to join unions**. In *Oakwood Healthcare Inc.*, 348 NLRB No. 37, the NLRB held recently that “permanent charge nurses” were supervisors and, therefore, not covered by the NLRA. Additionally, the NLRB held that workers who exercise independent judgment and assign tasks are supervisors and thus, do not have protected rights under the NLRA.

In this decision, the NLRB issued new interpretations regarding certain criteria defining a supervisor. The NLRA has historically defined a supervisor as an employee who has the authority to perform any of twelve (12) tasks; performs those tasks in the interests of the employer; and, uses independent judgment in the performance of those tasks. In this case, the NLRB issued new interpretations regarding the meaning of “assigning work” to other employees, “responsibly directing” others, and using “independent judgment.”

The NLRB interpreted the task of “assigning work” as the act of “designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties to an employee. The NLRB found that choosing the order in which an employee will perform discrete tasks within the assignments (e.g. restocking one item before another item) would not be indicative of exercising the authority to assign.

The NLRB also interpreted the task of “responsibly directing work” as requiring the person directing and performing the oversight of an employee to be accountable for the performance of the task by the other employee. Such responsibility and oversight must create some adverse consequence to the one providing the oversight if the task performed by the employee is not performed properly. The NLRB found that “responsible

direction” requires a showing that the employer delegated to the supervisor the authority to direct the work and the authority to take corrective actions, if necessary.

With regard to “independent judgment,” the NLRB found that judgment is not independent if it is dictated or controlled by detailed instructions. The NLRB explained that it is of no consequence, whether the instructions are set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement. The NLRB explained that the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.

Aside from the *Oakwood* decision, the NLRB ruled on two other cases. Aside from issuing a decision in the lead case, involving charge nurses at Oakwood Healthcare in Taylor, the NLRB also issued decisions involving charge nurses at Golden Crest Healthcare Center in Hibbing, Michigan, and employees at Croft Metals in McComb, Mississippi. The NLRB decided that the employees in Hibbing and McComb were not supervisors, and that nurses who simply rotate as charge nurses, but who are not permanent, are not excluded from labor law protection.

Together, these cases are known as the *Kentucky River* decision because they are intended to clarify issues left open by the Supreme Court in a 2001 case involving a mental health facility with that name. In the *Kentucky River* decision, the Court had rejected the NLRB’s definition of supervisor and told it to try again.

The NLRB’s decisions can be appealed to a U.S. Circuit Court of Appeals and ultimately to the U.S. Supreme Court. There is already a push by some in Congress to seek legislation to overturn the decision. Stay tuned.

**Practice Tip:** This decision by the NLRB can be read on the Internet at no charge at the following url: [http://www.nlr.gov/nlr/shared\\_files/decisions/348/348-37.htm](http://www.nlr.gov/nlr/shared_files/decisions/348/348-37.htm)

\* H.R. ALERT is intended to provide late-breaking news in the employment arena.

## Discipline of Public Employee at County Hospital for Wearing Pro-Labor Union Button Upheld

The United States Fifth Circuit Court of Appeals has jurisdiction to hear cases from the federal district courts in Louisiana, Mississippi and Texas. Typically, a three-judge panel will review an appeal. Occasionally, for important or novel issues, the entire court will review a lower court decision in what is known as an “en banc” decision. An *en banc* ruling came out just this month in the seminal decision of *Communications Workers of America v. Ector County Hospital District*, No. 03-50230 (5<sup>th</sup> Cir. 10/5/06) (*en banc*).

The case centered around a Hospital employee named Herrera, who was a carpenter employed by the Ector County Hospital District (the “Hospital”). He was disciplined by the Hospital after he wore a “Union Yes” lapel button in violation of the Hospital’s dress code. Herrera and the Communications Workers of America (“CWA”) brought suit under § 1983, claiming that the anti-adornment provision of the dress code policy violated his First Amendment rights. The district court held that the employee had the right to wear the pro-labor union button because it was considered speech on a matter of public concern. The district court issued a permanent injunction requiring the hospital to allow all of its employees in its integrated services organization to wear buttons and awarded the plaintiffs \$548.85 in

damages and \$91,000 in attorney’s fees. A divided three-judge panel of the Fifth Circuit reviewed the case and affirmed the district court’s decision. However, the case didn’t stop at that point, because the Hospital sought further appellate review with the full Fifth Circuit Court. The Hospital filed a petition for rehearing *en banc* which was granted.

The entire Fifth Circuit Court of Appeal then proceeded to examine the issue and reversed the decisions of the district court and the appeal panel that had ruled against the Hospital. The Court held that even assuming that the button-wearing addressed a matter of public concern, it did so “only insubstantially and in a weak and attenuated sense.” The Court found that the interest of the Hospital in promoting the efficiency of the public service it performs by means of its uniform non-adornment policy outweighed the interest of its employees in wearing “Union Yes” buttons on their uniform while on duty.

*Practice Tip:* If you want to read the full decision, *Communications Workers of America v. Ector County Hospital District*, you can access it on the Internet at the following url: <http://www.ca5.uscourts.gov/opinions/pub/03/03-50230-CV0.wpd.pdf>

### *The 10th Annual New Orleans Employment Law Seminar*

Thursday, November 9, 2006  
Wyndham Hotel at Canal Place

Please join us for our 2006 New Orleans Employment Law Seminar. This seminar has been an annual event in New Orleans for several years, and we are pleased to bring it back to the city. We are particularly excited about this year, because 2006 marks our 10th Anniversary as a stand-alone employment law practice group in New Orleans at Phelps Dunbar.

This year’s program is designed to provide in-depth coverage of the most recent updates in Employment and Employee Benefits. We will address many topics regulated by the federal and state government and review recent rulings by federal and state courts that impact the way you do business.

For more information or to register, please contact:

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# EMPLOYMENT PRACTICES

WHAT YOU NEED TO KNOW

2006 HOUSTON  
EMPLOYMENT LAW SEMINAR

Thursday, November 16

Doubletree Hotel

Downtown Houston

8:00–8:30 a.m.	<b>REGISTRATION / CONTINENTAL BREAKFAST</b>
8:30–8:40 a.m.	<b>WELCOME REMARKS</b> Speaker - Patty Hair
8:40–9:30 a.m.	<b>THE LATEST TRENDS IN IMMIGRATION, WORKPLACE HARASSMENT, DISCRIMINATION AND OTHER HOT TOPICS</b> Speaker - Nan Alessandra
9:30–10:15 a.m.	<b>HANDLING WHISTLEBLOWER AND RETALIATION CLAIMS</b> Speaker - Tom Kiggans
10:15–10:30 a.m.	<b>REFRESHMENT BREAK</b>
10:30–11:15 a.m.	<b>EMPLOYEE LEAVE ISSUES</b> Speaker - David Korn
11:15–12:00 p.m.	<b>THE TOP 15 REASONS THAT BEING A TEXAS EMPLOYER IS BETTER THAN BEING A CALIFORNIA EMPLOYER</b> Speaker - Elsa Ward
12:00–1:15 p.m.	<b>LUNCH / PANEL DISCUSSION</b> <i>Seminar attendees will be invited to submit written questions for the panel discussion the morning of the seminar.</i>
1:15–2:00 p.m.	<b>PUBLIC SECTOR NUANCES IN THE LAW AND HOW THEY IMPACT THE PRIVATE SECTOR</b> Speaker - Kim Boyle
2:00–2:45 p.m.	<b>EMPLOYED IN A WAR ZONE - WHAT EVERY EMPLOYER MUST KNOW ABOUT SPECIAL RULES GOVERNING THOSE EMPLOYEES WORKING UNDER DEPARTMENT OF DEFENSE CONTRACT</b> Speaker - John Schouest
2:45–3:00 p.m.	<b>REFRESHMENT BREAK</b>
3:00–3:45 p.m.	<b>THE NEW E-DISCOVERY RULES UNDER THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE</b> Speakers - Nan Alessandra and Kim Boyle

FOR MORE INFORMATION OR TO  
REGISTER, PLEASE CONTACT:

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## H.R. ALERT

Your comments, questions, and suggestions are encouraged.

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