
Legal Briefs

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When is a supervisor not a supervisor?

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In May 1994, the Supreme Court of the United States issued a decision concerning nurses which confronts common concerns about the law and its separation from what most people would accept as reality.

The National Labor Relations Act was passed by Congress in 1935 to permit employees to organize into bargaining units or unions and negotiate with employers and to give them certain protections if they do so. Congress later provided an exemption for "supervisors," which Congress defined as individuals "*having authority in the interest of the employer to hire, transfer, suspend, layoff, 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 clerical nature, but requires the use of independent judgment.*"

Health Care & Retirement Corporation of America operated a nursing home in Urbana, Ohio. The director of nursing had overall responsibility for the nursing department. There was also an assistant director of nursing, 9-11 staff nurses and 50-55 nurse's aides. The staff nurses were the senior ranking employees on duty after 5:00 PM during the week and at all times during the week-

ends. When the staff nurses were the senior ranking employees, they were responsible for ensuring adequate staffing, making daily work assignments, monitoring the aides' work to ensure proper performance, disciplining aides, resolving their problems and grievances, and evaluating the aides' performance. As can be seen from the quoted language on "supervision," the staff nurses' relationship to the aides is one which the statute defines as "supervision."

In the case of *National Labor Relations Board v Health Care & Retirement Corporation of America*, (114 S.Ct. 1778, 1994), the Supreme Court of the United States ruled that a nurse who supervises other employees is a supervisor under the National Labor Relations Act, and, therefore, is not protected by the Act.

In reaching its conclusion, the Supreme Court specifically criticized and overthrew a doctrine followed by the National Labor Relations Board (NLRB) that drew a distinction between supervisory activities of nurses which related to patient care and those which related to management. A nurse whose only supervisory responsibilities were related to patient care was not a supervisor under the National Labor Relations Board doctrine. Supervisors were those who exercised supervisory responsibility in *managerial* areas as opposed to *patient care* areas. The Board justified this distinction because of the language in the statute which re-

quired that the supervisory powers must be exercised "in the interest of the employer." The Supreme Court held that there was no distinction between patient care and the interest of the employer. A nurse who *supervises* was a supervisor whether the nurse's supervisory duties related to patient care or anything else.

The Supreme Court's decision seemingly simplifies a great deal of complexity. Surely, this will solve many problems. Nurses who supervise other employees will be supervisors, and nurses who do not will be entitled to the benefits of the National Labor Relations Act. Surely, life will be simpler because the Supreme Court has removed a level of complexity from the law.

Charitable immunity

The NLRB doctrine reminds us of the arbitrary distinctions made by the courts in the area of "charitable immunity." In the days of charitable immunity, surgeons were made liable for negligence of operating room personnel on the theory of "Captain of the Ship" to compensate for the fact that hospitals, most of which were charities, could not be sued for the negligence of their employees. Over the years the apparent unfairness of holding surgeons responsible for every mishap in the operating room was tempered by the courts' development of distinctions between negligence resulting from "administrative" acts and negligence resulting from "medical" acts. In some states, such as New York, surgeons were held liable only for medical acts. Because the distinctions were largely arbitrary, there were several conflicting court decisions which made little sense and played a major role in the elimination of the Captain of the Ship doctrine. The NLRB doctrine has all of the earmarks of an arbitrary distinction. In May, the Supreme Court put an end to yet another line of arbitrary distinctions and made it possible to say that any individual who supervises is a "supervisor" under the National Labor Relations Act.

And yet, the Supreme Court decision illustrates the difficulty of finding simple solutions for complex problems. According to the NLRB decision which was overturned, three nurses at the nursing home complained to the administrator about enforcement of absentee policy, short staffing, low wages for nurse's aides, the switching of prescription business in such a way as to increase paperwork, and failure to communicate with employees. The administrator refused to discuss the matters, and the nurses met with the organization's director of human resources. The director of human resources investigated, discovered that the concerns which the nurses had raised were shared

by many others and that, in fact, many of their complaints were valid. He then met with all of the employees, admitted that some of their complaints were valid but informed them that they were still supposed to support decisions made by management. Eventually, he met with the three nurses who had originally brought the complaints to his attention and determined that they would be unwilling to support the decisions of management. The nurses were fired because of what the NLRB held would have been "protected" activity if the National Labor Relations Act applied to them.

Distinction between management and labor

The Supreme Court determined that the National Labor Relations Act did not apply to these nurses because they supervised nurse's aides and the National Labor Relations Act does not apply to supervisors. *Should* the Act have applied to the nurses? The reason the NLRB developed its confusing and complex doctrine that sometimes supervisors are not supervisors, is because the nature of certain occupations requires that one employee supervise other employees. Professionals are, by definition, persons with additional education and expertise. In a nursing home, nurse's aides are untrained and rely on professional nurses for direction and problem solving on how to take care of patients and other matters. Is this the type of supervision that Congress was thinking about when it said that supervisory employees were not covered by the National Labor Relations Act? Congress was trying to create a distinction between management and labor.

Management adopts certain rules which it expects its employees to obey. Supervisors are usually understood to be the people who determine the rules or see that they are enforced. Should not there be a distinction between personnel whose function it is to make sure that employees are at work from 9:00 until 5:00 on the one hand, and persons who by the nature of their education and experience are able to tell other employees to be careful how patients are turned or fed or cared for? The NLRB tried to articulate a distinction between supervision in the management sense and supervision in the sense that one employee, having superior education and experience, becomes a resource for other employees.

In fact, there was some evidence that in passing the National Labor Relations Act, Congress intended this very dichotomy. In its report to Congress, the Senate committee which had drafted the bill stated that the language, "in the interest of the employer" was intended to distinguish between "minor supervisory employees" and "the supervi-

sor vested with such genuine management prerogatives as the right to hire, or fire, discipline or make effective recommendations with respect to such action." Moreover, in developing its doctrine, the NLRB considered reality in the healthcare field. In the healthcare area, virtually every professional engages in some supervisory activities. Most hospitals include not only professional employees but also lower paid nonprofessional employees who provide a great deal of the care under the supervision of professional staff. The NLRB believed that this type of supervision was not what Congress had meant. After all, Congress clearly intended professionals to be able to take advantage of the protections in the National Labor Relations Act.

In *National Labor Relations Board v Health Care & Retirement Corporation of America*, Justice Ginsberg submitted a dissenting opinion in which three other justices joined. She quoted from an earlier case: "most professionals have some supervisory responsibilities in the sense of directing another's work—the lawyer his secretary, the teacher his teacher's aide, the doctor his nurses, the registered nurse her nurse's aide and so on. If possession of such authority in the exercise of independent judgment were sufficient to classify an individual as a statutory 'supervisor,' then few professionals would receive the Act's protections, contrary to Congress' express intention categorically to include 'professional employees.'"

Distinction between supervision in management and patient care sense

The majority opinion in *National Labor Relations Board v Health Care & Retirement Corporation of America* considered this argument and determined

that neither the NLRB's long-standing policy nor the Senate report which had been quoted was sufficient to justify a distinction between supervisory in a management sense and supervisory in a patient care sense: "That dichotomy makes no sense. Patient care is the business of the 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."

It is often difficult to clearly understand the meanings of words used in statutes. When amending the National Labor Relations Act, Congress was concerned about a very specific issue: the fact that the words it used in adopting the original Act permitted persons who were clearly management to be lumped in with employees in the formation of labor unions. Congress attempted to exempt from the protection of the Act persons who were management by eliminating employees who exercised supervisory functions. The problem which Congress did not anticipate was that certain occupations, such as nursing, require the carrying out of duties which are supervisory in nature. But these professionals are not management and do not carry out management's prerogatives. They are professionals, people with expertise and knowledge, who become authorities, especially among those who lack the expertise and knowledge.

While the Supreme Court decision seems to simplify the law, it causes an unfair result. While many of us object to the complexity of the law, we fail to recognize that complexity in the law often results from the inherent complexity of the situation. Efforts to simplify the law necessarily result in unfair outcomes when simple solutions are forced onto complex situations.