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Briefly

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WHAT IS SUFFICIENT AUTHORITY FOR ONE TO BE CONSIDERED A SUPERVISOR UNDER THE NATIONAL LABOR RELATIONS ACT?

Edward H. Trent

"A supervisor is not limited to the one entrusted with the responsibility of hiring, suspending, and terminating employees."

In *GGNSC Springfield LLC v. NLRB*, Case No. 12-1529/1628 (6th Cir. July 2, 2013), the Sixth Circuit Court of Appeals was faced with the question of whether registered nurses in a nursing home in Springfield, Tennessee were supervisors such that they were not entitled to unionize under the National Labor Relations Act (NLRA). The facility was managed by the Executive Director with a Director of Nursing and two Assistant Directors of Nursing who oversaw each of two wings within the facility. Patient care was provided by 12 registered nurses (RNs), 10 licensed practical nurses (LPNs) and 46 certified nursing assistants (CNAs). The RNs and LPNs were designated as "charge nurses" who reported to the Director of Nursing or an Assistant Director of Nursing. Two charge nurses were assigned to each wing at any given time to oversee the various CNAs on duty.

Only the RNs attempted to organize. After voting to organize, the Center refused to bargain. The Center argued that the RNs were supervisors and thus not entitled to organize. Under 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.

29 U.S.C. § 152(11). The question for the National Labor Relations Board and then the court was whether the RNs had "authority to discipline, assign, and responsibly direct CNAs, all by using independent judgment." The Board held the RNs did not have such authority and were, therefore, not supervisors. In reversing this decision and holding that the RNs qualified as supervisors, the court focused primarily on the RNs ability to impose discipline versus merely reporting misconduct. At issue were the differing opinions of the RNs authority, in light of a CNA's misconduct to decide whether to do nothing, provide verbal counseling (and decide whether to document the counseling), or prepare a written memorandum of misconduct.

The Center maintained a four-step disciplinary process. While for serious offenses such as patient abuse, a CNA would be suspended pending an investigation, for less serious offenses, a CNA was subject to termination only upon receipt of a fourth written warning in a 12-month period. A written memorandum of misconduct by an RN counted as a written warning or a step on this progressive discipline process. So the question was whether the authority and discretion to issue a written memorandum made the RN a supervisor under the NLRA.

In completing the written memorandum form, the RNs would identify the particular infraction or misconduct. The RNs were not privy to which step in the disciplinary process the CNA was on at the time of the memorandum, so the RN would not know if the particular written warning would subject the CNA to suspension pending an investigation and possible termination. The RN did not need approval to issue the written memorandum, but also did not review the memorandum with the Assistant Director of Nursing or Director of Nursing after submitting the memorandum. The memorandum was simply accepted and placed in the CNA's file.

There was no question that the issuance of the written memorandum by an RN counted as a step in the progressive

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PLAINTIFF'S BELLIGERENT DISCRIMINATION COMPLAINT
WARRANTS FITNESS-FOR-DUTY EXAM

Kelly Campbell

"The Court first noted that an employee claiming protection under this section of the ADA does not have to prove that he has a disability to be entitled to protection from an unwarranted medical examination by an employer."

HR Scenario: An employee, while presenting a complaint of discriminatory treatment, becomes agitated, bangs his hand on the table, and says that someone was "going to pay for this." This fact pattern and some other unusual developments occurred in a recent case in which the 11th Circuit Court of Appeals ultimately found the employee was lawfully required to undergo a mental health fitness-for-duty evaluation. *Owusu-Ansah v. Coca-Cola, Co.*, 27 AD Cases 1583 (C.A. 11, 5/8/13).

Plaintiff, Franklin Owusu-Ansah, a customer service representative, alleged that he was harassed and/or discriminated against because of his national origin (from Ghana). Based on plaintiff's conduct during that meeting, as described above, management and HR were concerned that plaintiff's comments constituted potential threats against company employees. An independent consulting psychologist/specialist in crisis management and threat assessment was contacted, who interviewed plaintiff regarding the alleged instances of discrimination. The psychologist expressed concern to the employer over the emotional and psychological stability of plaintiff, noting he was a "very stressed and agitated individual," and that there was a "strong possibility that he was delusional." The consultant recommended plaintiff be put on paid leave to allow for further evaluation. The employer placed plaintiff on paid leave, and after further assessment and at the consultant's suggestion, plaintiff agreed to visit a psychiatrist. Plaintiff declined to answer questions from the psychiatrist regarding his employment and workplace issues, and also refused to sign a release allowing the psychiatrist to discuss his impressions with the consultant. The consultant informed HR of his continued concerns about plaintiff's "apparent level of emotional distress and also about his ability to perceive events accurately." The consultant recommended that plaintiff undergo a psychiatric/psychological fitness-for-duty evaluation "to rule out the possibility of a mental condition that could interfere with his ability to successfully and safely carry out his job duties."

The employer thereafter informed plaintiff that, as a condition to continued employment, he was to "complete an evaluation to identify whether there were any issues that could represent a risk to the safety of others in the workplace." Failure to do so, explained the letter, would subject plaintiff to immediate termination. Plaintiff thereafter returned for another session with the psychiatrist, who recommended that he undergo a personality test, the Minnesota Multi-Phasic Personality Inventory, before being cleared for work. When plaintiff failed to attend a scheduled appointment to take this test, the employer sent a letter which advised Plaintiff that he was not in compliance with the conditions outlined in the prior correspondence, informed him that he would be placed on unpaid leave, and warned him that continued noncompliance with the evaluation process would be considered a voluntary resignation. Plaintiff finally took the test, which indicated that his personality profile was "within normal limits," and he was cleared for return to work.

Plaintiff returned to work, but filed a lawsuit alleging a violation of the Americans with Disabilities Act (ADA) by his employer's requirement he undergo the fitness-for-duty evaluation.

The District Court granted summary judgment to the employer, finding that the required fitness-for-duty evaluation was both job-related and consistent with business necessity, and thus permissible under the ADA. On appeal, the 11th Circuit Court of Appeals agreed. The Court first noted that an employee claiming protection under this section of the ADA does not have to prove that he has a disability to be entitled to protection from an unwarranted medical examination by an employer.

With regard to the propriety of the fitness-for-duty examination, the Court cited a previous ruling involving a fitness-for-duty examination for a police officer, in which the 11th Circuit had held that in "any case where a police department reasonably perceives an officer to be even mildly paranoid, hostile, or oppositional, a fitness-for-duty examination is job-related and consistent with business necessity." While the situation in this case did not involve a

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SIXTH CIRCUIT UPHOLDS NLRB'S USE OF "MICRO-UNITS"

Mary Moffatt Helms

"This case illustrates the NLRB's efforts to increase union organizing by allowing a union to target a small group, or 'micro-unit' for union representation."

On August 15, 2013, the Sixth Circuit Court of Appeals issued a decision in *Kindred Nursing Centers East, LLC (formerly Specialty Healthcare) v. NLRB*, which addressed a union's ability to organize "micro-units" within the workplace. In its decision, the Court of Appeals upheld a 2011 ruling by the NLRB which the employer, Kindred Nursing Centers of Mobile, Alabama had petitioned for review by the Sixth Circuit Court of Appeals (which decides cases arising in Tennessee, Michigan, Ohio, and Kentucky)[1]. *Speciality Healthcare and Rehab. Ctr. of Mobile, 2011 WL 3916077 (2011).*

As background, the United Steelworkers Union[2] sought to organize a small group of approximately 53 Kindred Nursing Centers employees who held the position of Certified Nursing Assistants (CNAs). Prior to the election, Kindred, as the employer, objected to the classification of the CNAs as an appropriate unit on the grounds that it was too small, was not representative, and argued that the unit should be expanded to include an additional 86 employees. At a pre-vote hearing on the issue, the NLRB Regional Director for Region 15 ruled in favor of the Union and allowed the election to proceed to vote, which the Union won.

Kindred Nursing Centers eventually refused to bargain with the Union and the Union filed an unfair-labor-practice charge. Under the National Labor Relations Act (NLRA), an employer cannot obtain direct Court review of the Board's bargaining unit determination and, as the Court of Appeals noted "instead, it must refuse to bargain with the Union and then raise the issue of the unit's appropriateness in a subsequent unfair-labor-practice proceeding." Regarding the unfair-labor practice issue, the NLRB ruled in favor of the Union, finding that the CNAs comprised an appropriate unit for organizing purposes and held that the Union had not unreasonably excluded other employees who had a community of interest. In that decision, the Board overruled a long-held standard used to determine the appropriateness of a bargaining unit from the 1991 case of *Park Manor Care Center*, 305 NLRB 135. In adopting a tougher standard for employers, the Board in *Specialty Healthcare* held that if an employer challenges the petitioned-for unit, the burden is on the employer to show that the employees excluded from the unit share an "*overwhelming* community of interest with the employees included in the unit." Following this decision, Kindred then appealed to the Sixth Circuit Court of Appeals, which upheld the NLRB decision. The Court of Appeals was required to uphold the Board's determination unless Kindred was able to establish that the Board's decision was "arbitrary, unreasonable or an abuse of discretion."

This case illustrates the NLRB's efforts to increase union organizing by allowing a union to target a small group, or "micro-unit" for union representation. Several business-friendly groups, such as the U.S. Chamber of Commerce, filed amicus briefs with the Court of Appeals, urging the Court to overturn the NLRB ruling, but to no avail. As the Chamber of Commerce noted, "such piecemeal bargaining is inefficient and counter to the NLRA's goal of promoting industrial peace through collective bargaining." The case also illustrates how moves such as this by the NRLB create potential organizing issues for all employers.

[1] Even though the case arose in Alabama, Kindred's corporate headquarters is located in Louisville, Kentucky and, therefore, the Sixth Circuit had jurisdiction over the appeal based on a provision of the NLRA.

[2] Full name, United Steel, Paper and Forestry, Manufacturing, Energy, Allied Industrial and Service Workers, the USW represents workers in a variety of industries, including health care.

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"BEING CONSIDERED A SUPERVISOR UNDER THE NLRB" continued from page 1

discipline process. The Board believed that because there were no immediate consequences as a result of the written memorandum, at least not for the first three, then the memorandum did not constitute "discipline." The court disagreed because the memorandum clearly put the offending CNA a step closer to termination if his or her behavior did not improve or the CNA committed further infractions of Center policy. Although the RNs did not have authority to formally suspend or terminate a CNA, that was not dispositive of the issue. Because the issuance of the written warning constituted a step in the disciplinary process which may either initiate or be considered in determining future disciplinary action, the RNs had authority and discretion to impose "discipline."

Because the court found that the RNs possessed authority to impose discipline through the exercise of independent judgment, the court held the RNs were supervisors and, therefore, not entitled to organize. The lesson for employers to take from this case is that supervisors must be able to exercise some independent discretion when it comes to discipline and any action they take with regard to an employee must be actual discipline and not simply a reporting of possible violations that others review and determine. A supervisor is not limited to the one entrusted with the responsibility of hiring, suspending, and terminating employees. While disciplinary authority is not something to be doled out with impunity as it carries a real impact on an employee's future with the company, when such authority is given it should not be downplayed and certainly recalled when those holding such authority seek to organize.

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police department or other situation in which the employee was engaged in dangerous work, the Court nevertheless found the requirement to undergo a psychiatric/psychological fitness-for-duty evaluation to be "job-related and consistent with business necessity" and therefore lawful under the ADA. The evaluation was "job-related" because an "employee's ability to handle reasonably necessary stress and work reasonably well with others are essential functions of any position." Despite the fact that there were no prior incidents showing plaintiff had a propensity for workplace violence, the Court recognized that plaintiff did engage in potentially threatening conduct during the meeting in which he complained about discrimination and harassment (although plaintiff denied making those statements during the litigation). The Court noted that the employer not only relied on witnesses to the conversation but also on the advice of the psychologist, and plaintiff admittedly refused to speak to the human resource director and the psychologist about his workplace problems. The Court therefor concluded that the employer had a reasonable, objective concern about plaintiff's mental state, which affected job performance and potentially threatened the safety of its other employees.

Editor's Note: This case is controversial, but does illustrate that an employer has certain rights to require an employee to undergo an independent mental health exam where the employee displays abnormal behavior, where there is objective concern about job performance, and where the employee is unstable and may pose a danger to others. The Court was apparently influenced by the employer's reliance on expert medical opinion, and other circumstances indicating the employer was acting quite cautiously, including good documentation and a well written job description. Obviously, the advice of counsel is recommended before requiring a fitness-for-duty evaluation in similar circumstances. A critical part of the decision appears to be that the Court's conclusion that the employer had a reasonable, objective concern about the employee's mental state, with information suggesting the employee was unstable and may pose a danger to others. An issue not raised in this case was whether the employer's actions could have been considered retaliatory, in response to the complaints of discriminatory treatment. While plaintiff did not allege that theory in his lawsuit, this could be an area of potential liability in this type of situation.

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ASHLEY GRIFFITH is an Associate with the Knoxville, Tennessee office of the Firm, which she joined in August 2013. Her practice involves civil defense litigation and handling special matters. Ashley received her B.A. from Emory & Henry College and her J.D. from the University of Tennessee where she was a member of the Order of the Coif. During law school, she received the Charles H. Miller Excellence in Civil Advocacy Award and was a student materials editor for the *Tennessee Law Review*. Following law school, she served as a law clerk to the Honorable C. Clifford Shirley, Jr., and the Honorable H. Bruce Guyton, United States Magistrate Judges for the Eastern District of Tennessee. She is a member of the Knoxville Bar Association.