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# Eleventh Circuit Rules Licensed Practical Nurses Are Supervisors, Providing Strong Ammunition to Long-Term Healthcare Facilities

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On October 2, 2012, a three-judge panel of the U.S. Court of Appeals for the Eleventh Circuit reversed the National Labor Relations Board's decision that licensed practical nurses (LPNs) employed at a long-term health care facility were not supervisors under the National Labor Relations Act. Indeed, the court emphasized that, "while we are mindful of the limited nature of our review in this appeal, this is not a case in which we merely disagree with the board's conclusions. Our review of the record as a whole reveals that the board meticulously excluded or disregarded record evidence, which, when taken into account, compels a different result." This decision will be a strong weapon for long-term healthcare employers seeking to ward off unionization of nurses at their facilities.

## Factual Background

Lakeland Healthcare Associates, LLC d/b/a Wedgewood Healthcare Center, operates a long-term care facility in Lakeland, Florida and is managed by Consulate Health Care. The facility has a disciplinary coaching program in which LPNs have the authority to issue level one or level two coachings to certified nursing assistants (CNAs). Level two coachings are issued for serious infractions, such as failing to properly care for a resident, and result in immediate suspension, removal from the facility, and, typically, termination. Level one coachings are issued for less serious infractions and result in termination only if the employee received four prior level one coachings in a 12-month period.

The United Food and Commercial Workers Union Local 1625 represents the CNAs and the service employees at the facility. During the summer of 2010, the union filed a petition for representation of the LPNs. A hearing was held on the sole issue of whether the LPNs were supervisors, and therefore ineligible for union representation. Following the hearing, the Regional Director for Region 12 issued a Decision and Direction of Election, finding that the LPNs were not supervisors under the Act. The NLRB subsequently denied the facility's request for review of the Regional Director's determination. Following an election, the union was certified for representation on January 6, 2011, as the exclusive bargaining representative for the LPNs. The facility refused to

bargain with the union and the union filed an unfair labor practice charge with the Board. The Board's general counsel filed a complaint and the Board granted summary judgment, finding that the facility violated the Act by refusing to bargain with the union.

## The Act's Test for Supervisory Authority and the Court's Analysis

Under the Act, if the LPNs are "employees," they are guaranteed the right to unionize; if deemed "supervisors," they are not entitled to unionize. Section 2 of the Act, 29 U.S.C. section 152(11), defines a supervisor as:

> 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.

Accordingly, an individual is a "supervisor" under the Act if: (1) he or she has the authority to perform one of the 12 supervisory functions described in the statute; (2) the exercise of that authority requires the use of independent judgment; and (3) such authority is held in the interest of the employer.

The majority opinion emphasized that there was no dispute that the LPNs' authority to care for patients was exercised in the interest of the facility because patients are the facility's customers. The balance of the court's analysis focused on: (1) whether the LPNs had authority to perform one of the 12 supervisory functions described in the statute; and (2) whether the exercise of that authority required the use of independent discretion and judgment. Following this analysis, the court held that the evidence demonstrated that the LPNs had authority to discipline, suspend, and effectively recommend the termination of CNAs and to assign and responsibly direct the CNAs work. The court further determined that the exercise of this authority required LPNs to use independent discretion and judgment.

As for discipline, the court ruled that the evidence showed the LPNs had authority to issue level one and level two coachings to CNAs under the facility's disciplinary coaching program using independent discretion and judgment. First, the court found that LPNs had authority to issue level two coachings for serious disciplinary infractions that resulted in a CNA's immediate suspension and removal from the facility. The court found the level two coaching evidence indicative of supervisory authority and rejected the Board's argument that such evidence should be discounted because level two coachings were so infrequent. In particular, the court noted that, "[s]uch infrequency does not suggest a lack of disciplinary authority. Rather, it indicates only that the LPNs had only isolated or sporadic opportunities to exercise this authority over the CNAs." The court also advised that while it did recognize that in some cases the infrequency of the exercise of purported authority may be relevant to determining supervisory authority, "logic dictates that this consideration has little relevance when the authority claimed is the authority to discipline, suspend, or terminate and the frequency of disciplinary incidents is limited." The court also noted that the LPNs' job description, the employee handbook, and the level two coaching forms further supported the conclusion that the LPNs exercised supervisory authority when they issued level two coachings to CNAs.

Similarly, the court agreed with the facility that the LPNs' authority to issue level one coachings for less serious infractions was evidence of supervisory authority. The court cited to the employee handbook's coaching program and the fact that the handbook made it clear that a level one coaching was a disciplinary action that could lead to termination. The court rejected the Board's position that the level one coaching evidence should be disregarded because the facility could not demonstrate a "nexus" between the issuance of a level one coaching and any actual terminations of CNAs for receipt of four level one coachings in a 12-month period. Specifically, the court advised that "we reject the notion that the Board may infer solely from the lack of CNA terminations resulting from level one coachings that LPNs are not vested with authority to 'effectively recommend' their termination. Similarly, the fact that CNAs receive 'coaching' before receiving other, more serious forms of discipline such as suspension or termination –which may or may not need approval from the chain of command – does not make coaching any less of disciplinary action."

Moreover, the court sided with the facility and rejected the Board's determination that the LPNs did not "responsibly" direct and assign CNAs work. Although there was no dispute between the parties that the LPNs oversaw CNA job performance and used independent discretion and judgment to do so, the Board concluded that the LPNs did not "responsibly" direct and assign CNA work because the facility could not provide any evidence that any LPN had been disciplined for failing to properly supervise a CNA. Once again the court agreed with the facility, finding

that it was unnecessary for the facility to demonstrate an incident where a LPN had been disciplined. Instead, it was sufficient for the facility to demonstrate through its policies, job descriptions, and the testimony of the Director of Nursing and other nurses that LPNs would be held accountable for failing to supervise CNAs appropriately. The Act, the court emphasized, requires only a *prospect* of adverse consequences to the supervisor, and the facility had provided ample evidence to support the conclusion that LPNs responsibly direct the work of CNAs.

Finally, and arguably the most notable part of the decision (because most LPNs perform these duties), the court ruled that LPNs who have authority to transfer CNAs between units, change room assignments, and reassign tasks between CNAs are "responsibly" assigning work using independent judgment, particularly on shifts where the LPNs are the highest ranking employees in the facility. In this regard, the court noted that it "could not accept the conclusion that the LPNs, who are charged with 'leading' [the facility's] unit teams in order to insure proper patient care, and who are the highest ranking employees during a third of [the facility's] operations, have the authority to assign and reassign CNAs, but have no flexibility in doing so." As a result, based on the facility's evidence, including testimony by the Director of Nursing that the LPNs were responsible for leading their team of CNAs, the court ruled that the Board's determination was not supported by substantial evidence.

## Practical Considerations

Supervisory status cases are always fact sensitive and this decision does not mean the Eleventh Circuit would hold that all LPNs in long-term care facilities are supervisors under the Act. However, there are aspects of the decision that should give the vast majority of long-term care employers, especially those in the Eleventh Circuit (which includes Alabama, Florida, and Georgia), ammunition to argue that their LPNs are supervisors.

With regard to discipline authority, the court emphasized that the *frequency* with which an LPN exercises disciplinary authority is not determinative of supervisory authority. The court clarified that an employer does not need to prove *actual* examples of disciplinary authority being exercised to establish supervisory status.

With regard to *responsible* direction of work, again the court made it clear that an employer does not have to show *actual* examples where an LPN has suffered adverse consequences for not ensuring subordinates did their jobs properly. It is sufficient that an employer have in place documentary evidence (policies, job descriptions, performance evaluations) corroborated by witness testimony that there are *prospective* consequences.

With regard to the responsible assignment of work, the court indicated that LPNs who engage in assigning CNAs to certain residents based on the LPNs' individual assessment of a CNA's skills, transfer CNAs between rooms, and reassign tasks to CNAs are responsibly assigning work using independent discretion and judgment, especially when they are the highest ranking employee at a long-term facility, *e.g.*, those on the night shift.

As illustrated by the decision, employers should ensure that their LPN job descriptions, employee handbooks, disciplinary forms, and other applicable policies clearly identify the chain of command for CNAs and state that LPNs are responsible for supervising and disciplining CNAs and responsible for implementing discipline and working with a CNA to improve the employee's performance.

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