

Case Comment

Responsible Direction and the Supervisory Status of Registered Nurses

NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001).

The National Labor Relations Board (NLRB or the Board) has, for many years, wrestled with the problem of whether various classes of professional employees who regularly exercise discretion and judgment in their jobs should be classified as “supervisors” and therefore denied the collective bargaining rights the National Labor Relations Act (NLRA)¹ extends to other employees. The Act clearly recognizes that professional employees exercise some level of judgment and discretion. The Act, however, also makes “independent judgment” in the exercise of certain acts (e.g., hiring, firing, and promotion) the touchstone of supervisory status. So the distinction between supervisors and mere professional employees turns on the level of independent judgment exercised in certain capacities; this distinction becomes crucial to determining which employees receive bargaining protection. Reading as *de minimis* the amount of independent judgment needed to clear the supervisor threshold would remove professionals from the coverage of the Act completely—a result clearly at odds with congressional intent, given the express inclusion of professional employees in the Act. This inherent tension between the inclusion of professional employees and the exclusion of employees who exercise independent judgment has been at the root of much of this conflict.

This Comment examines a recent Supreme Court decision, *NLRB v. Kentucky River Community Care, Inc.*,² that exemplifies the struggle over the classification of professional employees, specifically registered nurses,

1. 29 U.S.C. §§ 151-169 (1994).

2. 532 U.S. 706 (2001).

as “supervisors.” The Board has consistently tried to classify nurses as nonsupervisory professional employees, while the Court has repeatedly cabined nurses within the class of supervisors. The Board’s efforts have been focused on achieving protection for *all* nurses who exercise any kind of discretion, crafting statutory arguments that would narrowly interpret the supervisory-status requirements. Striking down these interpretive strategies, the Court has rejected broad protection for registered nurses.

This Comment suggests a new interpretive strategy that the NLRB could adopt in order to afford at least some bargaining protection to certain classes of nurses and other professional employees, albeit not the broadest level of protection that the NLRB has previously sought. This strategy counsels focusing on one of the statutory criteria that defines a supervisor, the “responsibly to direct” term, which the NLRB has largely ignored in litigation. The plain text of the Act, standard interpretive tools, and policy considerations of the statute all militate toward differentiating mere professional employees from supervisors, not on the grounds of mere “independent judgment,” but via the capacity in which that judgment is exercised. When a professional exercises independent judgment to carry out functions with respect to other employees and is accountable for the results and performance of the other employees, clearly he is responsibly directing these employees. This narrow reading of the “responsibly to direct” term splits the difference between inclusion of professional employees and exclusion of supervisors who exercise “independent judgment,” resolving the inherent tension between these two terms. Responsible direction should therefore be the touchstone of supervisory status when the professional employee is not carrying out one of the specific functions that automatically qualify as supervisory.

I

The NLRA generally provides employees with the right to organize and states that its goal is to “encourage[] the practice and procedure of collective bargaining.”³ The Act also requires employers to engage in negotiations with employees who are properly organized under the terms of the statute.⁴ While the Act includes so-called “professional employees” within its scope of collective bargaining protection,⁵ it excludes “supervisors” from the negotiation protections of the law. A “supervisor” is defined as

3. 29 U.S.C. § 151.

4. *Id.*

5. The Act defines a “professional employee” as an employee whose work is “predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work” and involves “the consistent exercise of discretion and judgment.” *Id.* § 152(12)(a).

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 exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.⁶

When an employee falls under both the supervisor and professional employee definitions, she is excluded from the protections of the Act.⁷

The Court has always recognized that three conditions must be satisfied for an employee to be considered a supervisor under the Act: (1) The employee holds the authority to engage in any one of the twelve supervisory functions, including “responsibly . . . direct[ing]” other employees; (2) the exercise of this authority is not routine but rather arises from “independent judgment”; and (3) the authority is held in the interest of the employer.⁸ In *NLRB v. Health Care & Retirement Corp.*, the Board argued that the nurses in question did not satisfy condition (3), because they did not act “in the interest of the employer” when directing nurses’ aides.⁹ Rather, the Board argued, they were acting in the best interests of their patients and were therefore entitled to collective bargaining protection regardless of any direction they exercised over other employees. The Court rejected this “false dichotomy” between the interests of the patient and those of the employer.¹⁰ Relying on previous case law, the Court found that acts within the scope of employment are, as a matter of law, in the interest of the employer.¹¹

In *NLRB v. Kentucky River Community Care, Inc.*, the Supreme Court again faced the issue of whether registered nurses who did not exercise the core supervisory functions of the Act (hiring, firing, promoting, and disciplining) were protected by the NLRA when they did occasionally request that nurses’ aides perform certain tasks. The Board’s argument here was not that the nurses did not act “in the interest of the employer”; that door had been closed by *Health Care*. Rather, the NLRB offered a more nuanced argument built around the “independent judgment” requirement of

6. *Id.* § 152(11) (emphasis added).

7. *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 585 (1994) (Ginsburg, J., dissenting).

8. *Ky. River*, 532 U.S. at 713; *Health Care*, 511 U.S. at 574.

9. 511 U.S. at 574.

10. *Id.* at 577. Several commentators noted the erosion of the Act’s protection as a result of this opinion. See, e.g., Joseph A. Stegbauer, Casenote, *Form over Function: The Supreme Court Eviscerates the National Labor Relations Act’s Protection of Professionals*, 63 U. CIN. L. REV. 1979 (1995).

11. *Health Care*, 511 U.S. at 580 (citing *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 493 (1947)).

condition (2). It contended that the kind of judgment the nurses exercised, namely ordinary professional or technical judgment to direct less-skilled employees to deliver service in accordance with employer-specified standards, did not qualify as truly “independent” judgment within the meaning of condition (2).¹²

The Court was no more deferential to the Board in *Kentucky River* than it had been in *Health Care*. Justice Scalia, writing for a five-Justice majority, agreed that the term “independent judgment” was ambiguous with respect to the degree of discretion sufficient to create supervisory status. The majority, however, claimed that it was beyond the power of the Board to exclude a particular *kind* of judgment, here technical or professional judgment, from the reading of “independent judgment.”¹³ The Court held that the Board was limited to defining the *degree* of discretion that would qualify an employee as supervisory, and so had no power to introduce into the statute a “categorical exclusion [that] turns on factors that have nothing to do with the degree of discretion an employee exercises.”¹⁴

Thus, while *Health Care* ruled that the NLRB could not include nurses under the Act’s protection through a narrow interpretation of the “in the interest of the employer” term, *Kentucky River* precluded the NLRB’s attempt to exclude certain kinds of technical or professional judgment from the purview of “independent judgment,” effectively eviscerating any future Board attempt to define supervisory status through that term.

II

The NLRB’s focus in litigation on conditions (2) and (3) has been a critical mistake. The Board should instead have argued that the *Health Care* and *Kentucky River* nurses did not “responsibly . . . direct” other workers and therefore did not satisfy condition (1) for supervisory status. This strategy suggests reading the responsible direction element in a stricter fashion, finding supervisory status only when the potential supervisor is, in fact, *responsible for* the work of those she directs. This would necessarily exclude some nurses and professional employees from the protection of the Act but at least would afford substantial bargaining protection to the large class of nurses who do not exercise this responsible direction, protection the NLRB has to date failed to secure.

A few reviewing courts have tried to define the term “responsibly to direct” more precisely. In 1949, the Sixth Circuit stated that “[t]o be responsible is to be answerable for the discharge of a duty or obligation.”¹⁵

12. *Ky. River*, 532 U.S. at 713.

13. *Id.* at 714-15.

14. *Id.* at 714.

15. *Ohio Power Co. v. NLRB*, 176 F.2d 385, 387 (6th Cir. 1949).

The Ninth Circuit refined this definition eleven years later, holding that whether an employee exercises responsible direction turns on whether the employee is “held fully accountable and responsible for the performance and work product” of the employees he supposedly directs.¹⁶ In the interest of casting the net of labor protection as widely as possible, the Board has refused to follow these courts’ leads, proclaiming continued adherence to “the Board’s traditional approach of resolving the issue of responsible direction by examining whether the employees at issue exercise independent judgment.”¹⁷ Indeed, the Board itself has noted that it has historically chosen not to refine the meaning of “responsibly to direct” in an independent fashion but, rather, has collapsed the term into the “independent judgment” requirement.¹⁸

This approach, however, was explicitly rejected by the Supreme Court in *Kentucky River*, so a renewed focus on reading “responsibly to direct” to require actual accountability on the part of the purported supervisor is justified, even if it means affording slightly less labor protection than the Board would prefer. A test focused on “responsibl[e]” direction would ask whether the purported supervisor is actually answerable for the work and product of the supervised employees, not merely whether he gives instructions. So, if *A* routinely provides instruction or direction to *B* but bears no responsibility or accountability to management for *B*’s finished result or performance, *A* would not be considered a supervisor. If, however, *A* is responsible to management to see that *B* correctly carries out the instructions, then a supervisory relationship would inure.

This new test is strongly supported by the plain text of the Act, especially in light of standard canons of statutory interpretation. Also, this test comports more readily with the Act’s underlying rationale for excluding supervisors: to bar from the collective bargaining unit those employees whose interests are aligned with management rather than with labor.¹⁹ Finally, this test is consistent with the one opening the *Kentucky River* Court left for the Board to pursue in defining supervisory status. Given that the Board’s prior two interpretive strategies have not survived judicial review, this stricter test, though providing more narrow protection than the NLRB has heretofore hoped to secure, would achieve a modest level of protection for many nurses and other professional employees.

First, a test of this nature is strongly supported by the plain meaning of the statute’s text. In addition to listing a series of specific activities that

16. NLRB v. Fullerton Publ’g Co., 283 F.2d 545, 550 (9th Cir. 1960).

17. Providence Hosp. & Alaska Nurses’ Ass’n, 320 N.L.R.B. 717, 729 (1996).

18. See *id.* at 728.

19. NLRB v. Health Care & Ret. Corp. of Am., 511 U.S. 571, 588 (1994) (Ginsburg, J., dissenting) (stating that the Act excluded employees who are the “front-line” of management, because they owe management their “undivided loyalty”).

qualify an employee as a supervisor, including “to hire, transfer, suspend, lay off, recall, [and] promote,” the statute includes “authority . . . responsibly to direct” other employees as an indicator of supervisory status. *Webster’s Dictionary* defines “responsible” as “likely to be called upon to answer; answerable as the primary cause, motive or agent; creditable or chargeable with the result; liable or subject to legal review; involving a degree of accountability.”²⁰ Further, it includes “accountable” and “answerable” as synonyms for “responsible.”²¹ Clearly, then, the plain meaning of the words points to supervisory status only when the supposed “supervisor” bears accountability for the performance of his charges and is liable or accountable to management for inadequate results.

Similarly, common canons of statutory construction support this result. The canon *ejusdem generis*, where general words following specific words in a statutory enumeration are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words,²² would dictate that the general term “responsibly to direct” be read in light of the specific actions listed previously. Those acts, such as hiring, firing, suspending, promoting, and disciplining, are all managerial functions that imply accountability for the acts or decisions.²³ A manager who hires a poorly performing employee can be held liable for the bad hiring decision. Similarly, a professional employee should only be deemed a supervisor when he is held accountable for the direction he exercises over other employees. The canon *noscitur a sociis*, where a term is informed by the surrounding terms,²⁴ counsels the same result. Reading “responsibly to direct” in light of the neighboring terms—managerial activities involving some measure of accountability—leads to the conclusion that the direction involved should be understood as accountable direction.

This test also is strongly supported by policy considerations concerning the relationship between the underlying interests of the professional employee and those of management. As the dissent in *Health Care* recognized, the reason that supervisors are excluded from the collective bargaining unit is that these persons have been imbued by management with traditional management powers, and therefore management must have their undivided loyalty.²⁵ The framers of the Act were trying to define a delicate balance between labor and management. They did not want to give

20. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1935 (Philip Babcock Gove ed., 1993).

21. *Id.*

22. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001).

23. A complete list of these supervisory activities can be found in the NLRA’s definition of “supervisor.” See *supra* text accompanying note 6.

24. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995).

25. *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 589-90 (1994) (Ginsburg, J., dissenting).

those employees whose interests and incentives were aligned with management (supervisors) the ability to bargain collectively alongside labor, due to possible conflicts of interest. Separating supervisors from employees based on the responsibility they possess for directing others serves to embody this balance. Supervisors truly become an arm of management through the responsibility they bear for the performance of those they oversee. At the point where supervisors become answerable to others for those they direct, their incentive becomes to maximize the value of those employees' performance. Thus, these supervisors' interests are aligned with management rather than with other employees.²⁶ Because of this alignment of interests with management, it is clear that supervisors who bear responsibility for performance should be excluded from the employee collective bargaining unit. Professional employees who do not bear this responsibility, however, and merely supervise in a capacity incident to their regular duties, would not have a conflict of interest if included with the employees in the labor unit. These professionals simply supervise in connection with greater technical or professional skill and not through any "connection with management."²⁷ As such, they should be entitled to the Act's protection and should be allowed to join the bargaining unit.

Finally, this proposed test is consistent with Justice Scalia's majority opinion in *Kentucky River*. The Court stated that "[p]erhaps the Board could offer 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."²⁸ The test proposed in this Comment, focusing on responsible direction, is broad enough to encompass the discrete-task distinction made by the Court. Professional employees who direct others in

26. Judge Posner has recognized this distinction concerning the alignment of interests, finding that authority does not fit within the "interest of the employer" category if it is exercised in accordance with "professional standards rather than the company's profit-maximizing objectives." *Children's Habilitation Ctr., Inc. v. NLRB*, 887 F.2d 130, 134 (7th Cir. 1989). Similarly, when constructing a rule here, authority should fit within the "responsible direction" category only when exercised in accordance with a company's value-maximizing objectives. The link between the authority to direct and the company's objectives is provided by the responsibility the professional bears for the actions of his subordinates. Responsibility then aligns the purported supervisor's goals with management's and justifies his exclusion from the bargaining unit.

27. *Ky. River*, 532 U.S. at 724 n.2 (Stevens, J., dissenting). One of the Court's main objections to the Board's rule in *Kentucky River* was that it was a categorical exclusion based on the kind of judgment used. *Id.* at 714. Thus, a professional employee could be using "technical or professional" judgment while still having a high degree of supervisory discretion and, under the Board's rule, would not qualify as a supervisor. The proposed test would guarantee that professionals who exercise only technical or professional judgment, but who have responsibility and discretion for other employees, would be classified as supervisors.

The Court's focus on the degree of discretion can be seen as trying to get to the issue of responsibility indirectly. Employees with a large amount of discretion in directing other employees will likely be responsible to management for their performance. This is a variation on the corporate law theme of control following risk. In this case, responsibility follows discretion.

28. *Id.* at 720.

performing discrete tasks due to greater professional or technical expertise are not likely to bear direct responsibility for the general performance of the directed employees. The test here is broader than the Court's discrete-task model, however, in that it does contemplate greater direction by professionals in general matters, such as the completion of a wider project, without necessarily qualifying these professionals as supervisors. As long as the professional employee is not accountable for the performance of those he directs, he would not qualify as a supervisor even if he directed more than discrete tasks. Thus, the test is consistent with the Court's opinion but moves beyond it by focusing on the incentives and risks involved with true responsible direction rather than on the questionable dichotomy between discrete and general tasks.

III

This new test can be applied in any particular fact situation; the result—whether or not the professional qualifies as a supervisor—will depend on the specific facts of the case. Registered nurses presumably direct their aides in the performance of some set of duties. The inquiry would turn on whether or not management held the nurses accountable for the performance of the aides. If they were accountable to management, this would indicate that the nurses' interests were aligned with management—namely, to direct the aides in a manner that maximized efficient performance and thereby avoid being held accountable for less-than-adequate performance. As such, they would have a conflict of interest with employees and should not be allowed in the collective bargaining unit. On the other hand, if the facts showed that the nurses were not accountable to management for the performance of the aides, then one should conclude that the nurses did not supervise the aides.

The Board needs to develop an interpretive test that leverages some distinction in the degree of discretion exercised by supervisors as opposed to mere professional employees—a test that stratifies supervisors and professionals who direct others on the basis of the responsibility they bear for such direction. Those professionals who are held accountable by the firm's management for the performance of other employees are likely to have a high degree of discretion in dealing with these employees and should be seen as supervisors. Conversely, those professionals who do not bear responsibility for the actions of those they incidentally direct are unlikely to have the same high level of discretion in their direction and should not be classified as supervisors. This more refined development of responsible direction has the benefit of comporting with the text and underlying policy of the Act and is consistent with the majority's opinion in *Kentucky River*.

—Nikhil Shanbhag