New Cases Affect Treatment of Healthcare Employees

Nov 01 2001

Posted By: Daniel T. Dennehy

Practice Area: Health Law & Health Industry Labor, Employment and Immigration & Labor and Employment

Four recent cases provide guidance to our health care clients in dealing with their employees. This summary discusses the following cases: *N.L.R.B. v. Kentucky River Community Care, Inc.*; Brockton Hospital and Massachusetts Nurses Association; Crown Cork & Seal Company, Inc. and Martin Rodriguez; and *Phelps v. Optima Health, Inc.* The first three cases discuss various employment issues that arise under the National Labor Relations Act: (1) the supervisory status of a nurse; (2) hospital employees' rights to distribute and solicit union information; and (3) the structuring of employee committees so they do not violate the N.L.R.A. The final case provides insight into the terms, "reasonable accommodation" and "essential job functions" as found in Title I of the Americans with Disabilities Act.

N.L.R.B. v. Kentucky River Community Care, Inc.

The Supreme Court Rejects the N.L.R.B.'s Attempt to Limit the Number of Nurses Found to be Supervisors and Thereby Barred Them from Being Part of a Bargaining Unit. The United States Supreme Court found that a rehabilitation center that employs nurses who (1) use ordinary professional or technical judgment in directing less skilled employees and (2) who are permitted by their employer to exercise such judgment should be treated as "supervisors" and, therefore, excluded from a collective bargaining unit.

The Board argued that the rehabilitation center nurses do not use independent judgment when they direct the actions of less skilled employees. Rather, the Board characterized the nurse's actions as based on ordinary professional or technical judgment. By distinguishing between the two types of judgment, the Board attempted to create two nurse categories: (1) Non-Supervisory Nurses: A nurse who used ordinary professional, nonindependent judgment when directing the actions of less skilled employees; and (2) Supervisory Nurses: A nurse who relies on independent judgment when directing the actions of less skilled employees.

While the Supreme Court recognized that the term "independent judgment" does not suggest the amount of discretion that is required to elevate a nurse's judgment from ordinary and nonsupervisory to independent and supervisory, it rejected the Board's attempt to create a new category of judgment. In reaching this conclusion, the Court found that the National Labor Relation Board's interpretation of the term "independent judgment" as excluding professional judgment and limiting the supervisor exclusion to responsibly directing other employees, contradicted the National Labor Relations Act and prior circuit court decisions.

The Supreme Court also noted that the burden of proving the nurses' supervisory status was on the Board and not on the employer.

Application of Case

This case is important in that it clarifies that many nurses are supervisors and if nurses try to organize, an employer can challenge the right of their nurses to organize.

Brockton Hospital and Massachusetts Nurses Association, 333 N.L.R.B. No. 165

The N.L.R.B. Narrows the Definition of "Immediate Patient Care" Areas Where Employee Solicitation and Distribution Activities can be Barred. The N.L.R.B. found that an acute care hospital violated Section 8(a)(1) of the National Labor Relations Act when it prohibited employees from distributing union literature in the vestibule adjacent to its front lobby; maintained an overly broad non-solicitation/no-distribution policy and confidentiality policy which prohibited any solicitation or distribution of literature in halls and corridors used by patients; and when it allowed a nurse supervisor to remove a handwritten notice posted by a nurse on her locker concerning an upcoming union meeting.

This opinion focused largely on whether a patient vestibule area could be construed as an "immediate patient care" area and whether a hospital could ban the distribution of union literature in such area. The Board recognized that the term "immediate patient care" care is not readily defined, but reasoned that such area is not found just anywhere in the hospital. Rather, the Board indicated that the area was typically a patient's room, an operating room, and places where a patient received treatment, such as x-rays and therapy areas. Consequently, it concluded that a hospital could lawfully prohibit solicitation in immediate patient care areas or in work areas where a hospital could demonstrate that the solicitation would be disruptive to its patients. However, a hospital could not issue a blanket prohibition of solicitation in areas, such as the vestibule and lobby, that were merely accessed by patients, families, and visitors. The Board found this type of prohibition to be overly broad and violative of Section 8(a)(1) of the Act.

The Board also recognized that an employer's policy manual which is so far-reaching that it would not allow solicitation or distribution in any hospital area that was utilized by patients, however infrequently, including the hospital's gift shop, cafeteria, and its vestibule area was a sweeping and unlawful violation of an employees' Section 7 rights and also violated Section 8(a)(1) because it prohibited solicitation in any work area.

Finally, the Board determined that an employer may not require preapproval of union literature as a condition to the posting of such literature unless the preapproval requirement applies to all types of posting. The Board reasoned that to do otherwise would be viewed as an attempt to single out union postings and treat them differently from other non-union materials. This type of disparate treatment was also considered a violation of § 8(a)(1).

Application of Case

When creating an employee handbook, an employer should pay close attention to the locations which may be used for distribution and solicitation and remember that such actions may be lawfully restricted in "immediate patient care" areas, but not in ordinary working areas. Additionally, an employer should create posting rules that apply to all categories of literature and avoid rules or practices that single out union literature as a special category.

Crown Cork & Seal, Inc. and Martin Rodriguez, 334 N.L.R.B. No. 92

Certain Employee Committee Teams are Lawful. A manufacturing plant that utilizes a nontraditional plant organizational structure where authority is delegated to descending levels of committees that make decisions by consensus rather than delegating power to managers who make decisions on an individual basis did not "deal with" the company and, therefore, was not in violation of Section 8(a)(2) of the Act.

In determining whether these committees "deal with" upper management, the Board explained that "dealing with" involves a system where employees make proposals to management and management responds to such proposals by acceptance or rejection. The Board indicated that "dealing with" upper management does not occur in a situation where managerial duties and functions are flatly delegated to a group of employees. Here, the Board found that the company had delegated managerial authority to the employee committee teams and imbued them with the power to operate the plant within certain parameters. The Board concluded that the committees were, in actuality, management and compared such committees to a front-line supervisor in a traditional plant setting. The Board also rejected a suggestion that "dealing" occurs when the committees' recommendations are passed on to a higher level of authority by saying that such recommendations are merely winding its way up the chain of command. Further, it commented that higher management review of a recommendation made by lower management cannot be equated to "dealing with" upper management.

Application of Case

An employer should pay close attention to the decision-making authority of its employee involvement committees and determine whether such authority involves mere proposals to upper management or concludes in the committees' decision to take affirmative action. In order to effectively utilize employee involvement committees, an employer should narrowly define the subject matters and areas of authority that they feel comfortable giving over to the committees, hold the committees accountable for their decisions, benchmark their results, and be prepared to accept their decisions and recommendations with only occasional and very limited overruling. Where this is appropriate, the employer can, with the N.L.R.B.'s approval, turn such decision making over to its employees. In allowing some management involvement and limited overruling, the N.L.R.B. has retained its prohibitions on allowable employee committees.

Phelps v. Optima Health, Inc.

The Importance of Essential Job Functions. An employee may not be considered a qualified individual with a disability where such employee cannot perform the essential functions of a job with or without a reasonable accommodation.

Although an employee demonstrated that the hospital where she worked had allowed her to work in a modified job position that eliminated the lifting duties of such position, the United States Court of Appeals for the First Circuit determined that the modifications did not bear on whether lifting was a non-essential job function. The court reasoned that while the hospital had allowed the employee's co-workers to perform the heavy lifting for her, the ability to do such heavy lifting remained an essential function of her position.

The employee argued that the hospital should provide her with a reasonable accommodation. She argued that a reasonable accommodation would be to allow her to continue sharing patient lifting duties with other nurses or, in the alternative, to be reassigned to a prior, non-lifting position. The court rejected her first accommodation suggestion by explaining that an employer is not required to exempt an employee from performing essential functions and it does not need to reallocate essential functions to other employees. The court also rejected her second accommodation suggestion because she failed to prove that a vacant nonlifting position existed at the time of her termination. The Court noted that an employer is not required by the Americans with Disabilities Act to create a new job for an employee nor does it have to reestablish a position that no longer exists.

Finally, the court rejected the employee's claim that she had been denied the opportunity to investigate other vacant positions for which she was qualified because the hospital failed to engage in an interactive process to determine job vacancies. The court found that the hospital had offered the employee several potential alternatives, began the interactive process immediately after her dismissal, returned her phone calls and letters promptly, and generally acted in good faith.

Application of Case

This case should serve as a reminder to employers that they should not create special job positions without going through the proper Human Resource channels and need to include a list of essential job functions in their job descriptions so that there is no confusion as to the job's essential functions. Additionally, employers do not need to exempt an employee from performing essential job functions, reallocate essential job functions to other employees, create a new job for an employee or reestablish a position that no longer exists.

Finally, it is important that an employer should use an informal interactive process to determine an employee's eligibility for alternative employment. If an employee fails to become involved in this process, the employer can use that information to help defeat accusations of liability under the Americans with Disabilities Act. The employer who does remove what may have been essential functions from a job position, probably loses the right to claim that the removed functions were essential in the first place.

---

von Briesen & Roper Legal Update is a periodic publication of von Briesen & Roper, s.c. It is intended for general information purposes for the community and highlights recent changes and developments in the legal area. This publication does not constitute legal advice, and the reader should consult legal counsel to determine how this information applies to any specific situation.