



Cincinnati Law Library News

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NLRB's "Kentucky River" Decisions Shed Light on Who is a "Supervisor"

by Jeremy S. Rogers, Dinsmore & Shohl
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On September 29, 2006, the National Labor Relations Board (NLRB) issued decisions in three cases, often referred to as the *Kentucky River* cases, that significantly impact the definition of which employees can be characterized as supervisors. The cases were given the Kentucky River nickname because they follow in the wake of the 2001 U.S. Supreme Court decision in *NLRB v. Kentucky River Community Care, Inc.*

Unlike other employees, "supervisors" do not have the right to join labor unions under the National Labor Relations Act. Whether an employee is considered a supervisor under the Act depends upon a number of definitions, which, in turn, depend on other definitions. Generally, an employee is deemed to be a supervisor if, among other things, she exercises "independent judgment" in "responsibly directing" or "assigning" other employees in the interest of the employer. The Kentucky River cases have helped to define these terms and, thus, the scope of employees who are considered supervisors under the Act.

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Resolved: Better Online Research in the New Year

by David Whelan, Law Librarian

Start the new year off on the right foot – er, fingers – by improving your searching. Whether you are using LexisNexis or a free Web site, there are opportunities to save yourself time and improve your recall of information. Here are ten tips to help you.

10. Upgrade Your Browser

The Web browser is the software you use to access Web pages. Most of us use the Microsoft Internet Explorer Web browser. In November 2006, both Microsoft and its competitor, Mozilla, released new versions of

their Web browsers, Internet Explorer version 7 and Mozilla Firefox version 2. Both browsers offer features that can help you manage your online research better, including:

- tabbed browsing, so that you can have multiple Web pages open in a single window
- custom searching, so that you can search quickly and focus just on specific Web sites (like www.irs.gov or www.supremecourtfohio.gov)
- support for extensions and add-ons that make the browser more powerful

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Background on Kentucky River

The U.S. Supreme Court addressed the Act's definition of supervisor in the *Kentucky River* case. (Attorneys from Dinsmore & Shohl represented Kentucky River in that case.) In the *Kentucky River* case, the Supreme Court rejected the NLRB's interpretation of supervisor, which held that "independent judgment" did not include ordinary professional or technical judgment in directing less-skilled employees to deliver services. The Supreme Court ruled that ordinary professional judgment (in that case, the professional judgment of nurses) in the direction of other employees can constitute the kind of independent judgment that makes an employee a supervisor under the Act. After *Kentucky River*, the NLRB was required to take a new tack on how it defined who is and who is not a supervisor.

The Oakwood Case

One of the three *Kentucky River* cases involved Oakwood Healthcare, Inc. Like the *Kentucky River* case itself, the Oakwood decision specifically addressed the definition of supervisor as it pertains to nurses. Oakwood employed nearly 200 staff registered nurses to provide direct care to hospital patients. As part of their duties, the RNs directed less-skilled employees to perform tasks such as feeding, bathing, and walking patients and also directed employees to perform various tests ordered by doctors.

Many of Oakwood's RNs served as charge nurses, with responsibility to oversee patient care units, assign other RNs and other staff members to patients on their shifts. Several Oakwood RNs served permanently as charge nurses on every shift, while other RNs rotate in and out of the charge nurse position.



The NLRB found that the charge nurses, as a regular part of their duties, assigned employees to the specific patients for whom they would care during their shift. Such assignments, according to the NLRB, consisted of giving "significant overall duties" to an employee, and therefore met the definition of "assign" under the Act. The NLRB also held that Oakwood met its burden to show that its charge nurses used independent judgment in making those assignments. On the other hand, the NLRB found that Oakwood failed to establish that the exercise of supervisory authority constituted a "substantial" part of the rotating charge nurses' work time. As a result, the NLRB found that only the permanent charge nurses were supervisors under the Act.

In reaching its decision, the NLRB set forth new guidelines for examining whether an individual is a supervisor under the Act. Primarily, this involved the definitions of the Act's terms "assign," "responsibly to direct," and "independent judgment."

A. Assign

The NLRB defined "assign" as "designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, i.e. tasks, to an employee." Further, "assign ... refers to the . . . designation of significant overall duties to an employee, not to the . . . ad hoc instruction that the employee perform a discrete task."

B. Responsibly to Direct

In addressing what it means to "responsibly direct," the NLRB said,

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"[i]f a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both 'responsible' . . . and carried out with independent judgment." The element of responsibility is shown where the employer: 1. delegates the authority to direct work; 2. delegates the authority to take corrective action, if necessary; and 3. makes the supervisor accountable in some way for her direction of other employees.

C. Independent Judgment

The NLRB defined "independent judgment" in relation to two concepts. First, to be independent, judgment must not be effectively controlled by some other authority such as a detailed instruction manual or regulations. In other words, the degree of judgment exercised must rise above the "routine or clerical" in order to be "independent" under the Act.

The Golden Crest Case

The second *Kentucky River* case involved Golden Crest Healthcare Center. In that decision, the NLRB applied the definitions it developed in *Oakwood* and found that charge nurses at Golden Crest's nursing home were not supervisors under the Act. Unlike the permanent charge nurses at Oakwood, the Golden Crest charge nurses lacked the authority to assign other employees. Golden Crest failed to meet its burden of showing, for example, that its charge nurses had authority to require other employees to work overtime, to fill in when

they were on off-duty status, or to change assigned sections.

Also, because Golden Crest did not establish that its charge nurses were in any way held accountable for the job performance of the employees they directed, the NLRB held that they lacked authority to responsibly direct other employees. Specifically, the NLRB held that Golden Crest's practice of grading charge nurses in their annual evaluations on their performance in directing other employees was insufficient to show the required level of accountability.

The Croft Metals Case

The third and final *Kentucky River* case involved Croft Metals, Inc. The NLRB applied Oakwood case's definitions for "assign" and "responsibly direct" to hold that "lead persons" at Croft's manufacturing facility were not supervisors under the Act.

Although they did not possess the authority to "assign" under the Act, the NLRB found that the lead persons responsibly directed their crew members. Lead persons were required to manage their crew members by correcting performance, shifting crew members, and deciding the order of work to be performed all with the goal of achieving production specifications. Moreover, lead persons were held accountable for the performance of their crew members.

However, the NLRB held that Croft failed to meet its burden to establish that the lead persons exercised independent judgment in directing their crew members. Rather, lead persons' exercise of judgment was either simple routine or was controlled by guidelines established by Croft, such as delivery schedules. Accordingly, the NLRB held that the lead persons were not supervisors and could claim the protections of the Act.

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What the Kentucky River cases mean for employers

The obvious lesson of the *Kentucky River* cases is in their more detailed definitional parameters for determining who is or is not a supervisor. But the *Kentucky River* cases also demonstrate that each case is highly fact-specific. Not *all* charge nurses are supervisors. Whether a charge nurse is a supervisor depends upon exactly what authority and independence the employer bestows upon her and how she is actually held accountable for their exercise. The cases further shows how the facts that make a supervisor (independent judgment, assigning, and responsibly directing) have to be sufficiently proven and cannot be merely abstract or theoretical.

If you're an employer, it's never too early to develop an effective legal strategy to address potential organization and collective bargaining issues.

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Useful Links

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

<http://www.law.cornell.edu/supct/html/99-1815.ZS.html>

Briefs: http://supreme.lp.findlaw.com/supreme_court/docket/2000/feb_docket.html#99-1815

NLRB Decisions

Oakwood Healthcare (7-RC-22141, 9/29/2006)

http://www.nlr.gov/shared_files/Board%20Decisions/348/348-37.pdf

Golden Crest (18-RC-16415 and -16416, 9/29/2006)

http://www.nlr.gov/shared_files/Board%20Decisions/348/348-39.pdf

Croft Metals (15-RC-8393, 9/29/2006)

http://www.nlr.gov/shared_files/Board%20Decisions/348/348-38.pdf



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Wireless network throughout the Law Library

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Professional **reference service** by our law librarians, available via e-mail, telephone, and in person;

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Inexpensive **CLE seminars** throughout the year, on legal research and substantive topics

In addition, solos and members whose firm has a membership have **24 hour remote access** to Fastcase.com case law and Aspen/LOISLaw treatises

9. Go Beyond AND and OR

The world of information you are searching is growing exponentially, with billions of pages available on the Internet and many more documents available in Thomson-Westlaw and LexisNexis. You can often cut down the number of documents you retrieve by using a more refined search query. For example, you can require one word or phrase and block another:

Google: +ohio +hamilton -butler

LexisNexis: hamilton and not butler

A minus sign tells Google that you want to exclude documents with that word or phrase. It has the same effect as and not on LexisNexis.

8. Site-Specific

All the major search engines – Google.com, Yahoo.com, Live.com, and Ask.com – can be targeted to search a single Web site. This can be helpful when trying to find a document on a government Web site which may not have a good search tool of its own. For example, using Google, I can look at the bills introduced by the Ohio General Assembly on estate tax:

estate tax site:www.legislature.state.oh.us

This will take the power of Google and focus it like a laser on the General Assembly Web site. Another example would work on the IRS "advanced notice" publication folder

"life estates" site:www.irs.gov/pub/irs-drop

where you can find revenue rulings, procedures, and announcements.

7. Get Advanced on the Internet

The major Internet search engines all have advanced search features that can help you better control the content you retrieve. They are found at:

Ask: www.ask.com/webadvanced

Google: www.google.com/advanced_search

Yahoo: search.yahoo.com/web/advanced

(Microsoft's Live.com has an advanced search feature, but you can only reach it after you execute a search; there is no direct link to it). All use a simple form that you fill in with your search terms and then select criteria to restrict the information or sites being searched.

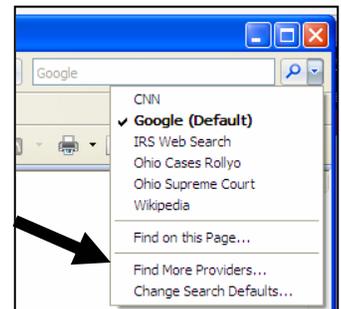
6. Roll Your Own

This utility takes the site-specific search to a new level. A Rollyo custom search roll enables you to search across up to 25 different, specific Web sites all at once. It's a nice midpoint between one site and the entire Web, which is how the major search engines work. You can create one at http://www.rollyo.com and share it with others at your firm. This is terrific when you are trying to stay current on an issue and have to visit multiple sites.

5. Personalize Your Search

Research got better on the Internet when Google, Yahoo!, and others released their own Web browser toolbars. You could search the Web without having to visit the Google or Yahoo Web site – the search box was there in your Web browser all the time. Both Microsoft Internet Explorer 7 and Mozilla Firefox 2 enable you to add almost ANY Web site search to your Web browser.

In IE7, click on your Search toolbar and choose Find More Providers. Follow the instructions on how to turn any Web search tool to your Web browser, including Rollyos.



In Firefox 2, download the OpenSearch extension. Then right-click your mouse on any Web search box to add it to your browser.

OpenSearch Extension for Firefox: https://addons.mozilla.org/firefox/3698/

4. Start Searches Simply

Your research problem may include a lot of terms you could use in a search. Start off with a simple search – perhaps just one or two key words or phrases – and see what your results look like. If you have too many search results, edit your search to make it more focused.

If you start with a search query that is too detailed, you may end up missing cases. Or worse, getting no results and not being sure which term or phrase is causing the search to fail. So a LexisNexis search process on Ohio state case law might progress like this:

dog w/4 bite

opinion(dog w/4 bite)

opinion(dog w/4 bite) and court(hamilton)

The first search returns 197 cases. The second restricts the search to the text of the opinion, but only eliminates 30 cases. The last search focuses on just cases in the 1st District Court of Appeals, and retrieves just 15 dog bite cases.

3. Legalese? Think Terms of Art

Terms of art can be a great way to eliminate unwanted search results. Why? Because they are often either non-English terms (*res judicata*, etc.) or unusual phrasings ("bivens test") that are less likely to occur than more common terms, like "search and seizure".

Keep in mind that this can set a bit of a trap. Internet search engines will not look for alternate phrasings of your term of art. Where you can ask LexisNexis or Thomson-Westlaw to look for one word or phrase **within** so many words of another word or phrase, you cannot do that on the Internet.

2. Spelling Counts

Think about alternate spellings when you are doing your research. Online search tools are getting better, and misspelled words will be caught in a search on Google or Thomson-Westlaw and you will be asked whether you

meant an alternate spelling. A simple example is to search Google using the keyword **marijuana**, which will result in over 20 million search results. Change the **j** to an **h** for **marihuana**, as sometimes occurs in court opinions, and you retrieve another 5 million pages. The same thing occurs in LexisNexis or Thomson-Westlaw. A search of Ohio cases in LexisNexis adds 6 cases with the alternate spelling; a search of Baldwin's Ohio Criminal Practice manual retrieves 86 documents with a **j** and 10 with an **h**.

1. Save Your Searches

"I remember looking for X last week", you might hear yourself say. But what exactly was that search you did that brought up the right results? How do you recreate that? On Thomson-Westlaw and LexisNexis, you have a **research trail** or **search history**, respectively. You can go back through your recent searches and re-execute them to pick up a research problem.

The Internet has fewer choices for saving your searches. One of the nicest is Google's new *beta* tool called Personalized Search. You have to create a free account with Google but once you've logged in, it will start to remember your searches. You can then access your search history, and see which searches returned results that you clicked on, and which ones didn't. There is also a small, color-coded calendar showing the days that you performed searches, so that you can go directly to a specific day.

Google Personalized Search beta
www.google.com/psearch

Conclusion

Electronic legal research is fundamental to the practice of law. Good search skills can help you to find information faster. As search tools and engines, whether on the Internet or in LexisNexis and Thomson-Westlaw, continue to change and improve, you can get a head start by improving how you use these important tools.

2007: Another Year of Valuable Law Library Membership

by David Whelan, Law Librarian

By now you will have received your membership renewal notice for 2007. As a member, your access to information and services has increased in 2006, including:

- In-Library access to extensive electronic and print legal resources
- Members-only 24-hour access to case law, treatises, and other resources on our Web site
- Circulation privileges to an extensive collection of secondary resources
- Electronic document delivery by e-mail of articles and information you need quickly

We know you have many sources for legal information. Your Law Library membership goes

beyond just information, whether in books or on computers. Your membership enables you to leverage professional research librarians and their expertise, and to participate in accredited CLE seminars relevant to your practice. Few firms could afford the breadth and depth of legal information accessible to our members from the Library's collection.

You may prefer to visit the Law Library to use our print collection, computers, and wireless network. Or you may prefer to use our remote access resources, e-mail reference and document delivery. We look forward to serving you in the new year, supporting how **you** practice law, and extending your practice so that you can do more in 2007.

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