# United States Court of Appeals

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

**No. 17-1191** **September Term, 2017**

FILED ON: MAY 22, 2018

THYME HOLDINGS, LLC, D/B/A WESTGATE GARDENS CARE CENTER,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 2015,
INTERVENOR

---

Consolidated with 17-1206

---

On Petition for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board

---

Before: ROGERS, KAVANAUGH, and PILLARD, *Circuit Judges*.

**J U D G M E N T**

This petition for review and the cross-application for enforcement were briefed by counsel for the National Labor Relations Board and counsel for petitioner Thyme Holdings, LLC d/b/a Westgate Gardens Care Center. The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

**ORDERED AND ADJUDGED** that the petition for review be denied and the cross-application for enforcement be granted.

Thyme Holdings ("Thyme"), which operates a nursing home, seeks review of the National Labor Relations Board's decision that it violated sections 8(a)(1) and (5) of the National Labor Relations Act ("Act") by refusing to bargain with the Service Employees International Union Local 2015 ("Union"), which was certified to represent Licensed Vocational Nurses ("LVNs") at the nursing home. The Board summarily affirmed the Regional Director's decision that Thyme had failed to meet its burden of proof to show that LVNs are "supervisors" under the Act. 29 U.S.C. § 152(11). A "supervisor" is defined in the Act 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." *Id.*

The party asserting supervisory status bears the burden of proving that status by a preponderance of the evidence. *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 711–12 (2001); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003). That party must, in view of the deprivation of statutory rights and protections that would result, *see* 29 U.S.C. § 164(a), offer specific evidence that the putative supervisor has and exercises "genuine management prerogatives" rather than merely "minor supervisory duties." *Oakwood Healthcare, Inc.*, 348 NLRB 686, 688 (2006); *see Jochims v. NLRB*, 480 F.3d 1161, 1168 (D.C. Cir. 2007); *Sears, Roebuck & Co.*, 304 NLRB 193, 193–94 (1991). Conclusory or generalized testimony — such as statements by management purporting to confer authority — or a lack of evidence in the record, is construed against the asserting party. *Beverly Enters.-Mass., Inc. v. NLRB*, 165 F.3d 960, 962–63 (D.C. Cir. 1999) ("*Beverly*"); *see Oil, Chem. & Atomic Workers Int'l Union v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971) ("*Chemical Workers*"); *G4S Regulated Security Solutions*, 362 NLRB, No. 134, slip op. at 1–2 (2015). The court, in turn, will uphold the Board's decision unless it is "contrary to law, inadequately reasoned, or unsupported by substantial evidence." *Allied Aviation Serv. Co. of N.J. v. NLRB*, 854 F.3d 55, 65 (D.C. Cir. 2017); 29 U.S.C. § 160(f).

**Authority to Reward.**Thyme maintains LVNs have authority to "reward" nursing assistants because they complete performance evaluations of the assistants, the results of which directly impact the assistants' individualized wage increases. To establish supervisory status on this basis, the employer must show a "direct correlation" between the evaluation and the reward, in that the evaluation directly leads to pay changes without management "independently investigat[ing] or chang[ing] the ratings." *NLRB v. Hilliard Dev. Corp.*, 187 F.3d 133, 145 (1st Cir. 1999); *see Franklin Hosp. Med. Ctr.*, 337 NLRB 826, 831 (2002). The completion of the evaluation must also rise above "a merely routine or clerical" activity and "require[] the use of independent judgment." 29 U.S.C. § 152(11). The evaluator must "at minimum act . . . free of the control of others and form an opinion or evaluation by discerning and comparing data." *Oakwood*, 348 NLRB at 692–93.

Thyme's administrator, Eric Tolman, testified the LVNs learned at a July 2016 meeting that they would begin conducting annual performance evaluations of the nursing assistants that would lead directly to the assistants' individualized wage increases. Tolman stated the LVNs signed a document acknowledging that they read and understood their new duties. The process was implemented, and some of the LVNs completed evaluations by numerically rating the assistants based on six factors, totaling the scores for an overall rating, and had the option of offering narrative comments. The forms were collected and generally accepted by management. Another manager, Kulsum Hussain, referring to a chart that summarized the LVNs' evaluations and the evaluations used for determining the assistants' wage increases, testified that in general,

assistants receiving an "excellent" score received a 3% wage increase, those receiving a "good" score received a 2% increase, and those receiving a "fair" score received a 1% increase.

The Union called Abel Gonzalez, an LVN, who testified that he was not told of the impact the evaluations would have on assistants' wages. He also described how he filled out the evaluations, testifying that he did little more than make quick notations on the assistants' performance and offer brief narrative comments. He described the qualities he personally took into account in filling out the forms. On cross-examination, Gonzalez acknowledged that he may have been told about the impact of the evaluations, but he did not remember.

The Regional Director, "assuming arguendo that the lack of instructions from [management] to LVNs about how to fill out such evaluation forms created an opportunity for LVNs to exercise independent judgment," found that Thyme had failed to show these evaluations resulted in wage increases for assistants without an intervening assessment by management. Reg. Dir. Op. at 10 (Oct. 27, 2016). The documentary evidence Thyme submitted provided no underlying information for some evaluated assistants, did not explain how divergences within those duplicate evaluations were reconciled, and showed that in a number of instances the LVN's evaluation did not match the wage increase. Thyme did not present testimony from other LVNs or employees, or otherwise introduce documentary evidence, to link the evaluations to the wage increases or otherwise confirm Tolman's account. Further, Thyme did not offer any payroll records into evidence to establish that assistants received wage increases as a result of the evaluations. Thyme accordingly failed to carry its burden of showing a "direct link" between evaluation and reward. *Hilliard*, 187 F.3d at 145. The record evidence, the Regional Director permissibly concluded, "strongly suggests that it was [management] rather than the LVNs who retained ultimate control over the ratings received by the [assistants] and consequently the amount of their raises." Reg. Dir. Op. at 11; *see Pac Tell Group, Inc. v. NLRB*, 817 F.3d 85, 92–93 (4th Cir. 2015); *Beverly*, 165 F.3d at 962–63.

To the extent Thyme maintains that the Regional Director improperly subjected it to a "secret" and "discriminatory" corroboration requirement in violation of due process and equal protection, Pet'r's Br. 31–32, it is mistaken. The Regional Director's approach accords with Board precedent that to meet the employer's burden of proof, "[s]tatements by management purporting to confer [supervisory] authority do not alone suffice." *Beverly*, 165 F.3d at 963. Thyme identifies certain inconsistencies in Gonzalez's testimony, but never introduced employee testimony or documentary evidence to rebut Gonzalez's account, despite having the opportunity and incentive to do so.

**Authority to Assign.**To establish supervisory status on this basis, the individual must "designat[e] an employee to a place (such as a location, department, or wing), appoint[] an employee to a time (such as a shift or overtime period), or giv[e] [an employee] significant overall duties." *Oakwood*, 348 NLRB at 689. An individual who merely gives an "ad hoc instruction that the employee perform a discrete task" or makes assignments "solely on the basis of equalizing workloads" does not exercise "independent judgment." *Id*. at 689, 693.

The record evidence showed that managers, not LVNs, make the daily assignment schedule that determines the assistants' shift-times, station locations, and LVN-assistant pairings. That schedule is distributed to the LVNs, who "plug[] in the information" to the daily assignment sheets. Reg. Dir. Op. at 7. When no current schedule is available, LVNs will copy assignments from a recent schedule. LVNs and assistants, the Regional Director found, generally "work side by side performing many of the same patient care duties," and much of the assistants' work is "performed without significant instruction or oversight by an LVN." *Id.* at 7–8 & n.6. Occasionally, LVNs will assign discrete tasks to assistants, such as sending an assistant to work in a certain location when the facility is short-staffed or sending an assistant home when sick, but there was no evidence that they have the authority to call additional assistants to work, keep them beyond their shifts, or approve vacation requests. Rebalancing of assistants' work is not done in consideration of an assistant's skills or the particular needs of a patient, as was the case in *Oakwood*, 348 NLRB at 695–97, but simply to equalize workloads and ensure timely completion of tasks. *See Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273, 278–79 (D.C. Cir. 2001); *Frenchtown Acquisition Co., Inc. v. NLRB*, 683 F.3d 298, 311–12 (6th Cir. 2012). Although on nights and weekends LVNs are the highest-ranking workers on site, as dissenting Member Miscimarra pointed out, managers are at all times on call and available by telephone. *See Chemical Workers*, 445 F.2d at 241–42. As the Regional Director found, the evidence showed that although LVNs may make some decisions on patient care, they possess only a limited authority to assign, the exercise of which is routine and does not require independent judgment. Reg. Dir. Op. at 6.

**Authority to Discipline.**To establish supervisory status on this basis, the evidence must show meaningful involvement in the disciplinary process, in which the putative supervisor takes a disciplinary action without independent investigation by other supervisory personnel. *Jochims*, 480 F.3d at 1170 (citation omitted). An individual who has a mere "reportorial" authority, in which it is "higher-ups who make the disciplinary decisions," is not a supervisor. *Allied Aviation*, 854 F.3d at 65; *see Beverly*, 165 F.3d at 963.

The Regional Director found that LVNs' involvement with disciplining nursing assistants amounted largely to reporting observed infractions by nursing assistants and issuing minor corrective actions, and nowhere demonstrating the use of independent judgment. They lack access to personnel records and have received no disciplinary training. Thyme points to evidence that LVNs have disciplined assistants by completing forms located at the nursing stations, signing those forms along with the assistant, and giving those forms to management, and those forms are generally placed in the assistants' personnel files without further managerial review, except in cases of patient abuse or where the LVN needs help. But the Regional Director found that some forms in evidence were missing substantive information or had other "defects or uncertainties." Reg. Dir. Op. at 14–15. The Regional Director noted that there was no evidence to show how the forms are incorporated into Thyme's disciplinary system or that the forms have any independent disciplinary effect. *Id*. at 16–17; *cf. Lakeland Heath Care Assoc., LLC v. NLRB*, 696 F.3d 1332, 1336–37 (11th Cir. 2012). Rather, the Regional Director accepted Thyme's concession that management would "conduct an independent investigation of a discipline if the disciplined employee were to complain . . . , or if an incident involved alleged

abuse of a patient." Reg. Dir. Op. at 16. There was substantial evidence to support the Regional Director's finding that Thyme failed to show LVNs exercise anything beyond an essentially reportorial disciplinary authority. *Id*. at 17–18; *see Allied Aviation*, 854 F.3d at 65–66; *Jochims*, 480 F.3d at 1165, 1170.

**Authority to Hire.**To establish supervisory authority on this basis, the evidence must show that the putative supervisor exercises meaningful involvement in the hiring process, such as offering recommendations that are taken "without independent investigation by superiors." *Allied Aviation*, 854 F.3d at 66 (quoting *DirecTV U.S.*, 357 NLRB 1747, 1749 (2011)). "[M]inisterial participation" does not suffice. *J.C. Penney Corp.*, 347 NLRB 127, 129 (2006).

The record evidence showed the LVNs' involvement in hiring was limited and largely ministerial. *See Frenchtown*, 683 F.3d at 310. It is "undisputed" that management has at all times controlled the hiring process and that, prior to July 2016, LVNs had no involvement in hiring. Reg. Dir. Op. at 12. Since then, LVNs are sometimes "quickly pulled into hiring interviews with no prior notice or time to prepare," and no prior knowledge of the applicant's background, and they assist in recording the applicant's answers to a pre-written list of five questions. *Id.* at 13. But there was no evidence that the LVNs are involved at the initial screening or the final decision-making stages of hiring. Nor was there evidence, apart from a single incident in which management hired an assistant after an LVN mentioned her prior professional relationship with the applicant, that an LVN's comment about an applicant, offered "due to her status as an LVN," factored into management's hiring decision. *Id.* at 14.

In sum, because Board precedent provides that an employer cannot rely on general statements, as Thyme attempted to do to meet its burden of establishing that certain employees are statutory supervisors, Thyme failed to show that the Board erred in concluding that the LVNs are not statutory supervisors. Accordingly, the petition is denied and the Board's cross-application for enforcement is granted.

Pursuant to D.C. Cir. Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk