

## LABOR RELATIONS BOARD REFINES SUPERVISOR TEST



The National Labor Relations Board (NLRB) issued much-anticipated decisions in a trio of cases intended to refine the standard for determining supervisory status under the National Labor Relations Act (NLRA). Known as the Kentucky River cases, these rulings were the NLRB's response to the 2001 decision in *NLRB v. Kentucky River Community Care, Inc.* in which the US Supreme Court ruled that the NLRB had been applying the wrong standard in deciding whether individuals (especially nurses) are "supervisors" under federal labor law.

### What did the decisions do?

The issue of who is a supervisor under the NLRA is extremely important. Supervisors do not have the right to be represented by a union, which means that an employer can have them excluded from all bargaining units. In addition, an employer may legally forbid supervisors from engaging in union activities, and may even require that they participate in implementing the employer's labor relations strategy. Further, supervisors are considered "agents" of the employer such that the

employer can be held responsible for conduct on their part amounting to unfair labor practices (i.e., violations of the NLRA).

**Under the law, a supervisor is –** 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.

Employees are supervisors if they perform any one of the twelve listed supervisory functions, provided that the exercise of that authority requires the use of independent judgment.

Oakwood Healthcare, Inc. was the lead case of the three; the other two cases merely apply the principles announced in Oakwood. In Oakwood Healthcare, the NLRB set out new definitions for what it means to "assign" and "responsibly to direct" employees (the two most ambiguous of the twelve indicia of supervisory status), and adopted a refined interpretation of the term "independent judgment."

### IN THIS ISSUE

	page
New Minnesota Leave Law for Military Families	3
Court Won't Bless Chaplain's Disability Claim	4
2007 Complimentary Felhaber Seminars	5
City and Fire Chief Take the Heat for Sexual Harassment Laws	6
Looking Ahead in 2007	7
Best Lawyers in America 2007	8

### Authority to assign

The NLRB now construes the term "assign" as "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." This is contrasted with merely instructing employees to perform a discrete task, or to perform one discrete task before another.

### Responsibly to direct

The NLRB now interprets the term "responsibly to direct" to mean that the individual is accountable for

the performance of the employees that they supervise. The NLRB clarified this as follows: “[T]o establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the [employees’] work and the authority to take corrective action, if necessary. It must also be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.”

### Independent judgment

The term “independent judgment” applies to all of the twelve signs of supervisory status listed in the definition above. The NLRB wrote that “a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” At the same time, however, they were careful to note that “the mere existence of company policies does not eliminate independent judgment from decision-making[.]” The key issue is whether the individual makes discretionary choices while exercising supervisory authority, as opposed to just making “routine or clerical” decisions.

### Response to decisions

The impact of these cases has yet to be seen. Not surprisingly, labor organizations and pro-labor groups (including the AFL-CIO) have criticized these decisions, predicting that it will be much easier to prove that individuals are supervisors and thereby preclude them from forming or joining a union. While this remains to be seen, these decisions make it clear that each such issue will be decided by an analysis of the unique, individual set of facts presented in each case.

Now that we have some more guidance on this issue, employers should review and evaluate their labor relations strategy as it relates to supervisors.

### For example —

An employer that is currently non-union (at least as to the relevant group or bargaining unit of employees) should evaluate the likelihood that borderline individuals would, or would not, qualify as supervisors under the new, refined standards. After performing this analysis, adjustments can be made to ensure that the probable result is consistent with the employer’s labor relations strategy.

A similar evaluation should be performed by an employer whose employees are already represented by a union, but some might now qualify as supervisors as the result of these new decisions. If it appears that employees in the union might be considered as supervisors, you should consult with a labor relations specialist to decide how you might want to respond.

Although these refined standards for supervisory status apply to employers in all industries, they are particularly important for health care employers. The need to staff the hospitals around the clock means a larger number of employees might possess some of the indications of supervisory status. Disputes over the supervisory status of nurses have already reached the US Supreme Court twice (in 1994 and 2001), and two of the three Kentucky River cases also involved litigation over the supervisory status of nurses.



Tom Trachsel  
Attorney  
612.373.8432  
ttrachsel@felhaber.com

## Sign Up To Receive the Labor & Employment Newsletter at your Desktop

Would you like to receive this newsletter via email? You will receive this newsletter as well as news alerts on hot labor & employment topics. Log on to [www.felhaber.com](http://www.felhaber.com) to sign up for this new email service offer. You may continue to receive the printed newsletter should you opt to receive it via email also.



# NEW MINNESOTA LEAVE LAWS FOR MILITARY FAMILIES

With surprisingly little fanfare, Minnesota's legislature enacted two new laws requiring employers to grant leaves to families of military members under rather different circumstances.

## Employment Leave for Family Members of an Injured or Killed Soldier

A new Minnesota law, Minn. Stat. §§ 181.947, obligates public and private employers to grant up to 10 days of unpaid leave of absence to an employee whose immediate family member is injured or killed while serving in active military service. The following particulars apply to this new law:

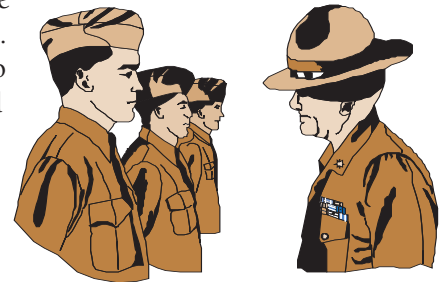
### • Definitions:

- “Active service” includes both federal and state active military service for any purpose, including training.
- “Employer” and “employee” are defined as both public and private sector, including independent contractors.
- “Immediate family member” is defined as the deceased service member's parent, child, grandparents, siblings or spouse.
- The employee must give the employer as much notice as is practicable before taking leave.
- The employer is allowed to reduce the unpaid leave by any period of paid leave provided for the employee.
- **Effective date:** This section became effective on June 2, 2006 and applies to the immediate family members of military personnel injured or killed on or after that date. This section also applies to immediate family members of personnel who, on June 2, 2006, are recovering from injuries that occurred prior to June 2, 2006.

This new law has no provision regarding certification of the need for leave. Existing policies and practices regarding requests for funeral leave or other leaves of absence would seem to be appropriate guide posts.

## Employment Leave for Military Ceremonies

Another new state law adds Minn. Stat. § 181.948 to the books in regard to unpaid leave to attend military ceremonies. These are the details:



- All public and private employers in Minnesota, except independent contractors, are required to provide unpaid leave to attend the send-off or homecoming ceremony of an immediate family member who has been ordered into active military service in support of a war or other national emergency.
- The employer is allowed to limit the amount of leave to the actual time necessary to attend a send-off or homecoming ceremony, not to exceed one day's duration in any calendar year.
- “Immediate family member” is defined as a person's grandparent, parent, legal guardian, sibling, child, grandchild, spouse, or fiancé/fiancée.
- The effective date of this new law was August 1, 2006.

Note the difference in how the “immediate family” is defined in these two new laws, as well as the ambiguity of what constitutes a “send-off” or “homecoming” ceremony. While it only involves one unpaid day off, it is easy to see some potential mischief ahead in determining when an employee may exercise this new right.

Paul J. Zech  
Attorney  
612.373.8436  
pzzech@felhaber.com



## COURT WON'T BLESS CHAPLAIN'S DISABILITY CLAIM

*Employees with medical conditions often can perform the tasks required of their jobs but are limited in the number of hours they can work or the schedules that they can meet. These restrictions pose particular problems for employers seeking to find ways to provide accommodations. The following case demonstrates what can happen when an employee can perform her job duties but not necessarily during the hours when she is needed.*

### No rest for the weary

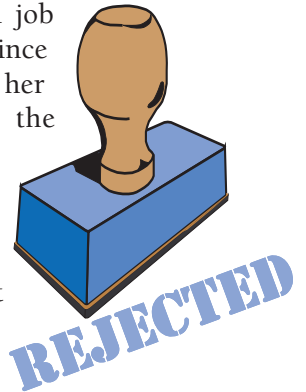
Marty Meyer-Gad was one of seven full or part time chaplains employed by St. Cloud Hospital to provide 24-hour access to chaplaincy services. The chaplains worked during the day and then each took one shift per week of on call service during the evening and night hours to respond to emergencies. The chaplains could serve the on-call hours if they lived within 15 minutes of the hospital; otherwise, they were required to stay on site in sleeping quarters provided by the hospital.

All of the chaplains, including Meyer-Gad, were informed at the time of hire that participating in the rotation for taking night call shifts was a requirement of the job, even though it was not specifically stated in the job description.

Beginning in 2003, Meyer-Gad began to have trouble sleeping and concentrating on tasks. She was eventually diagnosed with narcolepsy, a condition that causes the sufferer to fall asleep suddenly, often without notice and at inappropriate times. She and the hospital agreed that she should be scheduled for on call duties on nights before she had days off, a schedule that seemed to work well for both parties since it allowed Meyer-Gad to make up for sleep that she lost during the on-call assignment.

Due to short-staffing, Meyer-Gad's supervisor asked her to cover two additional on-call shifts in July, 2004, in addition to her regular shifts. Meyer-Gad then submitted a note from her doctor stating in no uncertain terms that she must not work past 9:00 p.m. She was taken off the call schedule temporarily while the hospital obtained additional information and reviewed its options. Despite asking about different alternatives, such as allowing Meyer-Gad to sleep in quiet quarters in the hospital until called, her doctor insisted Meyer-Gad required normal sleep patterns and that the ban on working past 9:00 p.m. was absolute. Consequently, the hospital concluded that since Meyer-

Gad could not fulfill the critical job function of working nights, and since they could not accommodate her permanently, termination was the only reasonable course. Meyer-Gad then sued in Federal Court under the Americans with Disabilities Act and the Minnesota Human Rights Act ("MHRA"), and the hospital brought a motion to dismiss.



### Putting the claims to bed

Meyer-Gad argued that her narcolepsy qualified as a disability since it substantially limited her in the major life activities of sleeping, thinking, and consciousness. The judge felt differently, however, noting that her own sworn testimony indicated that she managed her condition very ably during her employment. In fact, she worked for over a year at the hospital without incident after her narcolepsy was diagnosed. While she may have fallen asleep at times, there was no evidence that her work actually suffered as a result of the condition. In addition, her outside activities were not restricted – in fact, she maintained an active schedule of physical exercise and volunteer activities. Interestingly, the judge also observed that in Meyer-Gad's new job after leaving the hospital, she worked between 33-40 hours a week, usually between the hours of noon and midnight. Finding that Meyer-Gad was not "severely" or "permanently" affected, he concluded that a reasonable jury could not find that Meyer-Gad is or was "disabled" for purposes of the ADA or the MHRA.

The judge also ruled that even if Meyer-Gad was disabled, she could not perform the essential functions of her job, even with reasonable accommodation. The ability to be on call was an essential function of the hospital's full-time chaplain position. Obviously, the need for a chaplain's service might arise at any time of the day or night and the hospital needed employees who could respond quickly to those needs. While the job description did not identify this as a requirement, Meyer-Gad admitted that she knew when she took the job that she would have to pull her weight in this area.

Meyer-Gad suggested several accommodations that the hospital could have considered, such as a leave of absence, reduced or split shifts or simply requiring current or new employees to assume her on-call shifts.

The judge concluded, however, that none of these alternatives was reasonable. For example, the leave was not viable since the doctor's note did not address whether Meyer-Gad would ever be able to work past 9:00 p.m. The judge observed that an employer is not obligated under the law to "wait indefinitely for [the employee's] recovery." As for the remaining suggestions, the court noted that the law does not require an employer to reallocate an essential function as an accommodation. In short, even if the hospital needed to consider an accommodation, there was nothing that met the reasonableness standard.

**Dreaming up one last argument**

Meyer-Gad reminded the judge that the hospital had managed to accommodate her for a long time by scheduling her call shift before her day off. As such, she asserted that the decision not to continue doing so was discriminatory. Meyer-Gad had to acknowledge, however, that the rules of the game changed when she herself brought in the doctor's note that established, for the first time, that she could not work the night time hours. As a result, the previous history of accommodation was irrelevant.

In a last-ditch attempt to win the case, Meyer-Gad claimed that regardless of the hospital's decision, their failure to engage in the interactive process violated the law. The "interactive process" is the terminology used by the Equal Employment Opportunity Commission (EEOC) and some courts to articulate how the employer must consult with the employee and their health care provider in considering possible accommodation. The judge rejected this argument as well,

observing that the Hospital more than fulfilled any such duty. They knew of Meyer-Gad's impairment for almost the entire period of her employment and accommodated her until July, 2004. When the new restriction came in, the hospital immediately sought more information before making the accommodation decision. While deeming this effort "not a terribly robust interactive process", the judge concluded that it nevertheless passed muster under the ADA. Perhaps more importantly, he observed that the ADA does not create separate liability for failure to meet the interactive process requirement. Therefore, if there is no actual disability, there simply can be no unlawful failure to engage in the interactive process. *Marty Meyer-Gad v Centra Care Health System, D/B/A St. Cloud Hospital*, No. 05-1086 U.S. District Court, District of Minnesota.

**What have we learned?**

In many ways, it is easier to accommodate restrictions in job duties than it is to modify the employee's schedule or work hours. Since so many jobs must be performed at a time when co-workers are present or when customers need to be served, precise schedules or hours can rise to the level of essential job functions. Nevertheless, it is still critical that employers give thoughtful consideration to all requests for accommodation in this regard, making sure to seek out the employee's perspective as well as that of other knowledgeable persons.

Dennis J. Merley  
 Attorney  
 612.373.8434  
 dmerley@felhaber.com



**2007 COMPLIMENTARY FELHABER SEMINARS**



Our upcoming seminars focus on a variety of timely legal topics presented by our firm attorneys. Seminars include a complimentary continental breakfast and/or luncheon.

<u>Topic</u>	<u>Date</u>	<u>Location</u>
<b>Property Manager Seminar</b>	Thursday, March 29	Double Tree, Saint Louis Park
<b>Workers' Compensation Seminar</b>	Friday, May 11	Town & Country Club, St. Paul
<b>Business Law Seminar</b>	Wednesday, October 22	Town & Country Club, St. Paul
<b>Builder Developer Seminar</b>	Thursday, November 1	Town & Country Club, St. Paul
<b>Labor &amp; Employment Seminar</b>	Friday, November 9	Marriott Mall of America, Bloomington

To receive a seminar invitation, e-mail [kdyck@felhaber.com](mailto:kdyck@felhaber.com). State your name and address with the name of the seminar(s) you wish to attend. You may also log on to [www.felhaber.com](http://www.felhaber.com).

## CITY AND FIRE CHIEF TAKE THE HEAT FOR SEXUAL HARASSMENT LAWSUITS

The recent demotion of the Chief of the Minneapolis Fire Department is a good reminder of the many different ways an employer can get burned when a top manager is alleged to have sexually harassed employees.

### Where there's smoke...

The City of Minneapolis and its Fire Chief, Bonnie Bleskachek, finally reached a settlement over her removal from the top post. Chief Bleskachek, the first openly lesbian chief of a large city fire department, has been the target of a number of sexual harassment lawsuits claiming that her personnel decisions were based on romantic involvements and that women, and particularly lesbians, received favorable treatment.

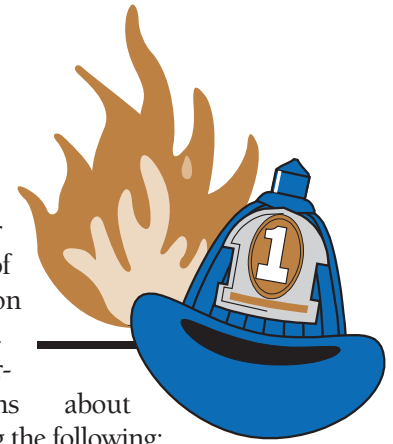
Under the settlement, Bleskachek was demoted to staff captain, with a pay cut exceeding \$40,000 a year. She will not supervise any employees, which was a key element to the settlement in the eyes of the Minneapolis City Council. Instead, Bleskachek will take a "desk job" doing administrative work for the department's emergency preparedness unit. She received no severance pay and agreed not to sue the city regarding her removal from the top post.

While Chief Bleskachek seemed to favor stepping down as much as the City Council wanted her gone, her protections under her union agreement and the city's civil service rules made it difficult for the City to force the issue, particularly since doing so could have been viewed as an admission of sorts that the allegations in the outstanding lawsuits are true. Politics also played a role since any settlement was to have been paid by public monies.

### ...Why can't they fire?

Of course, by continuing this firestorm, the City continued to incur significant expense, especially because Chief Bleskachek had been on a paid leave for the better part of a year. Together with the cost of investigations and the money paid to settle some of the lawsuits, this case cost the City over \$400,000. These costs would have risen dramatically had a settlement not been reached because Bleskachek could have fought a termination in a hearing before the City's Civil Service Commission, filed a union grievance or even pursued a lawsuit claiming discrimination based on gender and/or sexual orientation under the city or state EEO laws.

The basis for the City's concerns about Bleskachek's tenure as Chief became clearer after the release of a summary of the independent investigation into Bleskachek's leadership. The investigation reached several significant conclusions about Bleskachek's behavior, including the following:



- She had intimate relationships with three firefighters under her command.
- There were at least 19 allegations of substantiated inappropriate conduct, retaliation abuses of authority.
- She had "a history of dating and romantic pursuits of others in the fire department, which clearly had a negative effect on the conduct of others".
- She brought someone not employed by the city to a command post at the scene of a fire and used the department's dispatch system for personal purposes.

These and other findings led to the conclusion that Bleskachek had created "an intimidating, hostile or offensive work environment." Although Bleskachek vehemently denies these actions, she complied with a term of the settlement by issuing a written apology to the Fire Department and the City's residents wherein she acknowledged that "even the appearance of impropriety can undermine the effectiveness of a department head and cause disruption."

It's easy to say in hindsight that this could have been avoided, and we certainly do not know all of the details of the extent to which City officials knew of such behavior. One thing is known, however – having to answer for the actions of an embattled manager while also working to remove her from the job can make any employer hot under the collar.

Dennis J. Merley  
Attorney

612.373.8434  
dmerley@felhaber.com



## LOOKING AHEAD IN 2007

With Democrats in control of both houses of Congress, it is almost certain that a new work place agenda will be advanced. Already, there is talk of raising the federal minimum wage by \$2.00 and President Bush has indicated that he very well would sign such legislation into law. Beyond this, what can we expect from our lawmakers in Washington?

- **Mandated paid sick leave?**

Under the “Healthy Families Act” sponsored by Senator Kennedy of Massachusetts, employers would be obligated to provide up to 7 days of paid sick leave to all eligible employees. This benefit could be applied to care for the employee’s own illness or physical or mental condition, to obtain a medical diagnosis or related treatment or to obtain preventive care (i.e., routine medical reasons), or to care for a family member of the employee for any of the above reasons. This legislation was first proposed in 2005 and is almost certain to be raised again in the near future. Whether Congress will take the big step of actually requiring the nation’s employers to adopt a paid benefit remains to be seen.

- **Union certification with no elections?**

The “Employee Free Choice Act” would mandate that unions be certified as the employees’ bargaining representative if the National Labor Relations Board finds that a majority of employees in an appropriate unit signed authorizations designating the union as such. New rules regarding the language of authorization cards and the methods of determining authenticity would be enacted. In addition, this law would create the option for mandatory mediation/arbitration for first contracts, impose stronger penalties against employers interfering with organizing drives, permit triple damages for employees discharged or discriminated against during such drives and authorize fines against

employers found to have willfully or repeatedly violated employees’ rights during an organizing campaign.



Interestingly, this bill was just 3 votes short in the House of Representatives and 7 short in the Senate even during the days of Republican control. Newly elected Speaker of the House Nancy Pelosi has vowed to make passage of this bill a top priority, which may be a tough task without sufficient votes to override a likely presidential veto.

- **Expansion of the Family & Medical Leave Act**

Likely presidential candidate Hillary Clinton, among others, has spoken at length about the need to enhance the protections of the Family and Medical Leave Act (FMLA). Among the expansions that may be considered are reducing from 50 the number of employees necessary for an employer to be covered, leave to participate in children’s school activities (which already is granted to many Minnesota employees under state law); relaxed requirements for time off to care for relatives, and funding for income replacement for employees taking FMLA leave.

Although some of these changes have been talked about for quite some time, the new line-up in Congress could bring one or more of these items a bit closer to reality.

Karen Schanfield  
Attorney  
612.373.8417  
kschanfield@felhaber.com



## We Want to Hear From You!

Let us know what would serve you best

The *Labor & Employment Report* is a service to Felhaber’s clients and friends. Our goal is to write articles you will read, learn from, and enjoy. Let us know what would serve you best: Practice tips? Answers to questions submitted by readers? A funny case or strange ruling from time to time? Please contact editor Dennis Merley with your suggestions at [dmerley@felhaber.com](mailto:dmerley@felhaber.com)

## Seven Felhaber Attorneys Have Been Named As *The Best Lawyers in America* 2007

Congratulations to the following attorneys who were chosen by their peers for inclusion in *The Best Lawyers in America Publication*<sup>TM</sup>- 2007 Edition. The Best Lawyers selection is based on an exhaustive peer-review survey in which 15,000 leading attorneys cast more than half a million votes on the legal abilities of other lawyers in their specialties. Felhaber's Best Lawyers in America included four of our Labor & Employment Attorneys: James M. Dawson, Jan D. Halverson, Dennis J. Merley, and Paul J. Zech. The other attorneys recognized were John G. Brian III (Workers' Compensation), David B. Eide (Real Estate) and Honnen S. Weiss (Trusts and Estates)



James Dawson



Jan Halverson



Dennis Merley



Paul Zech



John Brian III



David Eide



Honnen Weiss

Felhaber Larson  
Fenlon & Vogt

A Professional Association – Attorneys at Law

*The Labor & Employment Report is an update on legal developments. It is not intended to be legal advice and should not be relied upon without consulting counsel.*

[www.felhaber.com](http://www.felhaber.com)

©2007 Felhaber, Larson, Fenlon and Vogt, P.A.

Felhaber Larson Fenlon & Vogt

220 South Sixth Street | Suite 2200  
Minneapolis, MN 55402-4504