“NOW WHO IS A SUPERVISOR?”

OAKWOOD HEALTHCARE, INC., 348 NLRB No. 37 (9/29/06)

I. The statutory definition—Section 2(11) of the National Labor Relations Act:

any individual having the 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 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.

Individuals are statutory supervisors if: 1) they hold the authority to engage in any one of the 12 supervisory functions listed in Section 2(11); 2) their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment”; and 3) their authority is held “in the interest of the employer.” The burden to prove supervisory authority is on the party asserting it. NLRB v. Kentucky River Community Care, 532 U.S. 706, 167 LRRM 2164 (2001).

II. Why is Oakwood Healthcare a big deal, and how did we get here?

A. The legislative history of the 1947 Taft-Hartley amendments to the NLRA, which created Section 2(11), discusses the important distinction between “foremen”, to be regarded as supervisors excluded from the Act’s protections, and “straw bosses, leadmen, set-up men, and other minor supervisory employees”, not to be excluded from the Act’s protections.

B. The Board’s previous approaches to these questions have twice been rejected by the U.S. Supreme Court. NLRB v. Healthcare & Retirement Corp. of America, 511 U.S. 571, 146 LRRM 2321 (1994) (a nurse’s supervisory activity was
incidental to patient care and not exercised in the interest of the employer) and Kentucky River, supra (no exercise of independent judgment where nurses use ordinary professional or technical judgment in directing less-skilled employees).

C. The distinction between “supervisors” and “minor supervisors” continues to be viable and important. NLRB v. Bell Aerospace Co., 416 U.S. 267, 85 LRRM 2945 (1974), cited in Oakwood Healthcare by both the majority and dissent at sl. op. 3 and 16, respectively.

D. The questions regarding Section 2(11) status decided by the Board in Oakwood Healthcare by a 3-2 majority (Battista, Schaumber and Kirsanow, with Liebman and Walsh in dissent) are: how does one define “assign”, “responsibly to direct” and “independent judgment”, admittedly ambiguous phrases? How are the dissent’s concerns to be understood?

III. The legislative history of Section 2(11)

Both the Oakwood Healthcare majority and dissent explore the legislative history, but draw different conclusions. Both would agree that “the dividing line between these two classes of workers [supervisors and minor supervisors], for purposes of Section 2(11), is whether the putative supervisor exercises “genuine management prerogatives.” The majority insists its neutral definitions for these three critical terms are appropriate as they “eschew a results-driven approach” and provide “meaningful and predictable standards for the adjudication of future cases and the benefit of the Board’s constituents” (sl. op. at 3). The dissent argues the majority’s approach disregards other indications of Congressional intent and is inappropriately narrow in that that approach “seems based on the premise that any statutory interpretation that does not contradict the text and structure of the Act is sufficient, even if competing interpretations more accurately reflect original Congressional intent and better serve the policy interests underlying the Act.” (sl. op. at 17, emphasis in original).

The most cogent legislative historical discussion concerns the phrase “responsibly to direct”, as that was the subject of a floor amendment by Vermont Senator Ralph Flanders. Sen. Flanders was concerned that “the definition of ‘supervisor’ in this act seems to me to cover adequately everything except the basic act of supervising.” This comment was founded on his explanation that most of the Section 2(11) duties had been centralized in a personnel manager or department and missed the daily duties performed by the production floor foreman, who, noted Sen. Flanders, is charged with the responsible direction of his department and the men under him. He determines under general orders what job shall be undertaken and who shall do it. He gives instructions for its proper performance. If needed, he gives training in the performance of unfamiliar tasks to the worker to whom they are assigned. Such men are above the grade of “straw bosses, lead men, set-up men, and
other minor supervisory employees” as enumerated in this report [the report of the Senate Committee]. (sl. op. at 6, fn. 27, at 21).

The majority claims its definitions hews to this distinction; the dissent claims the definitions disregard the Act’s broader policy concerns and the real world impact of these definitions.

IV. The Board, in struggling with the distinction between supervisors and minor supervisors, and with the further distinction of Section 2(11) supervisors from Section 2(12) professional employees, has twice failed to gain U.S. Supreme Court approval, resulting in extreme sensitivity to likely Supreme Court review of this third effort.

A. In Healthcare & Retirement Corp., supra, the Board attempted to find that nurses, giving patient care instruction to nursing assistants and similar subordinate status employees, were not Section 2(11) supervisors because they gave such direction in the exercise of their professional experience and responsibility and thus were not really acting in the interest of the employer. The Supreme Court found this distinction between “patient care” and “interest of the employer” to be artificial and unsustainable, as the denial that such direction of work was in the interest of the employer was a false dichotomy, and the Board’s decision failed to adequately address the ambiguity in the phrases “independent judgment” and “responsibly to direct” or to found its decision on the interpretation of those phrases. 146 LRRM 2321, 2323-2325.

B. In Kentucky River, supra, the Board attempted to reconcile the tension between Sections 2(11) and 2(12) by finding that nurses, in similarly giving patient care instruction to subordinate employees, were exercising ordinary professional or technical judgment and therefore not exercising supervisory “independent judgment”. The Supreme Court rejected this distinction, too, finding the Board’s determination based on the kind of judgment (professional or technical vs. supervisory) was unsustainable and suggesting the Board would be better served in considering the degree of judgment that was being exercised to determine whether it was clerical or routine, and hence not supervisory, or sufficiently independent and therefore in fact supervisory. 167 LRRM 2164, 2171-2172.

While too lengthy to be fully reproduced here, Section 2(12) in essence defines “professional employee” as any employee engaged in work that is 1) predominantly intellectual and varied in character and not routine, 2) involving the consistent exercise of discretion and judgment in its performance, 3) of such a character that the output or result cannot be standardized in relation to a given period of time, 4) requiring knowledge of an advanced type customarily acquired by a prolonged course of specialized intellectual instruction and study in an institute of higher learning or a hospital, as distinguished from a general academic education or apprenticeship, or any employee who has completed such courses of specialized intellectual instruction and is performing related work under the supervision of a professional person to qualify himself or herself to become a professional employee.
V. Supervisors and “Minor Supervisors”

Senator Flanders’s distinction between these concepts, cited earlier, constitutes the core legislative history in this regard. To recap, he said that the act of supervising, performed by foremen, meant the responsible direction of his department and the men under him, determining under general orders what job shall be undertaken and who shall do it, and giving training in the performance of unfamiliar tasks to the worker to whom those tasks have been assigned. In contrast, said Sen. Flanders, such foremen are above the grade of straw bosses, lead men, set-up men and other minor supervisory employees. The House-Senate Conference Committee adopted this distinction as articulated by Sen. Flanders. As described by the U.S. Supreme Court in *Bell Aerospace*, supra, 85 LRRM 2945, 2949-2951, “The legislative history of the Taft-Hartley Act of 1947 may be summarized as follows. The House wanted to include certain persons within the definition of ‘supervisors,’ such as straw bosses, whom the Senate believed should be protected by the Act. As to these persons, the Senate’s view prevailed. *Id.*, at 2951.

The issue, as stated in *Oakwood Healthcare* by the majority, is whether the putative supervisor exercises “genuine management prerogatives”, as defined in Section 2(11). The dissent does not dispute this concept, but strongly disagrees with how the majority draws the distinction by how the latter defines “assign”, “responsibly to direct” and “independent judgment”.

VI. The definitions in *Oakwood Healthcare* and their impact.

A. The Majority’s Approach

The majority looked to dictionary meanings for the three concepts in issue as starting points, following its analysis of Congressional intent and the assumption, as expressed by the Supreme Court, “that the legislative purpose is expressed by the ordinary meaning of the words used.” In so doing, it denied the dissent’s contention that it was ignoring real world consequences, asserting it was declining to engage in a results-oriented process, described as having an objective of narrowing the scope of supervisory status and reasoning backwards from there. Sl. op. at 3.

1. **Assign**—this is **not** synonymous with “responsibly to direct”. The dictionary definition of “assign” is “to appoint to a post or duty”. Because this overlaps with other Section 2(11) functions, the majority defined “assign” thusly:

   we construe the term “assign” to refer to 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. Sl. op. at 4.
The majority distinguished the assignment of significant overall tasks from the assignment of discrete tasks within those assignments, with the latter not being evidence of the supervisory authority to assign. It explained, in responding to the dissent’s criticism that this violated the canon of redundancy by failing to meaningfully distinguish between assigning and directing, by explaining “direction may encompass ad hoc instructions to perform discrete tasks; assignment does not.” Sl. op. at 5.

2. **Responsibly to Direct**—in reviewing the legislative history, particularly Sen. Flanders’ floor amendment that added this concept, the majority argued that the Senator was concerned the person on the shop floor would not be considered a supervisor even if that person directly oversaw the work being done and would be held responsible if the work was done badly or not at all. For that reason, the majority rejected the dissent’s argument that “responsibly to direct” authority is limited to department heads. Rather, the majority defined this authority as follows:

> If 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” (as explained below) and carried out with independent judgment. Sl. op. at 6.

In so defining this authority, the majority rejected the dissent’s argument that this definition was so expansive that it would convert any worker who instructs a person to perform a task, no matter how minor, into a supervisor, stating that the de minimis principle would obviously apply. It also reaffirmed that the person giving such direction would have to be held “responsible”, and that the direction reflect independent judgment that is not clerical or routine in nature for the person’s performance to warrant a supervisory status finding. The majority asserted that “for an individual ‘responsibly to direct’ under the Act with ‘independent judgment’, that individual would need to exercise ‘significant discretion and judgment in directing’ others.” Sl. op. at 7, fn. 38.

The majority, in further discussing “responsible”, considered the discussion in *Providence Hospital*, 320 NLRB 717 (1996) of various federal circuit court decisions considering the concept of accountability, and decided to adopt the Fifth Circuit’s definition set forth in *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273, 1278, 122 LRRM 2502, 2505 (5th Cir. 1986). Stated in the majority’s words:

> We agree with the circuit courts that have considered the issue and find that for direction to be “responsible,” the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.

Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the
putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps. Sl. op. at 7.

3. Independent Judgment—in considering this function, the majority cited the Supreme Court’s Kentucky River admonition that it is the degree of discretion involved in making the decision, not the kind of discretion, that determines the existence of independent judgment under Section 2(11), and adopted that interpretation in Oakwood Healthcare. Sl. op. at 7.

The majority first cited the dictionary definition of “independent” as meaning “not subject to control by others.” Similarly, “judgment” means “the act of judging; the mental or intellectual process of forming an opinion or evaluation by discerning and comparing.” Then, in considering the Act as a whole, its legislative history, policy considerations and judicial precedent, the majority turned to consideration of the statutory language that the exercise of independent judgment be “not of a merely routine or clerical nature.” The majority determined thusly:

Consistent with the [Supreme] Court’s view, we find 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. Sl. op. at 8.

However, if the employer’s policies allow for discretionary choices, the mere existence of those policies would not eliminate independent judgment from decision making.

The majority concluded by considering the impact of these new standards on part time supervisors and left that standard unchanged. Thus, “the legal standard is whether the individual spends a regular and substantial portion of his/her work performing supervisory functions. Under the Board’s standard, ‘regular’ means according to a pattern or schedule, as opposed to sporadic substitution.” Sl. op. at 9. The dissent did not dispute this standard, but argued strongly against the majority’s implication that it also was a settled proposition that individuals serving in a supervisory role for as little as 10-15 percent of their total work time could be sufficient to establish regularity in the supervisory role. Sl. op. at 24, fn. 33.

B. The Dissent’s Approach

After chiding the majority for failing to offer “a clear and carefully reasoned explanation” for its choices of interpreting the three terms in issue, the dissent embarked on a detailed critique of the majority’s approach—illustrated above—and offered an explication of its differing view of how the questions should be approached and answered. The dissent’s primary points of departure were in how to understand the legislative history of Section 2(11) and how to factor in the policy considerations
underlying the Act. It argued “The Board must be sensitive, then, to the distinction between “minor supervisory employees” (persons Congress intended to treat as employees) and the equivalent of “foremen” (persons Congress intended to exclude from statutory coverage.” Sl. op. at 17. The dissent explained as follows:

[O]ur disagreement with the majority on the interpretation of “assign” focuses on the treatment of task assignments made to employees, which we view as a quintessential function of the minor supervisors whom Congress clearly did not intend to cover in Section 2(11). As to responsible direction, we differ principally concerning the scope and scale of the authority required to satisfy the statutory test. In our view, the phrase “responsibly to direct” was intended to reach persons who were effectively in charge of a department-level work unit, even if they did not engage in the other supervisory functions identified in Section 2(11). Id. (emphasis in original).

1. Assign

The dissent argued that by the majority’s standard even a single assignment of daily duties, in contrast to designating the employee’s job classification which entails the expected performance of certain tasks, is sufficient to establish supervisory authority. It argued the enumerated Section 2(11) functions do not merely affect terms and conditions of employment, but rather “speak either to altering employment tenure itself (‘hire,’ ‘suspend,’ ‘lay off,’ ‘recall,’ ‘discharge’) or to actions that affect an employee’s overall status or situation (‘promote,’ ‘reward,’ ‘discipline,’ ‘transfer’). Viewed as a member of this series, ‘assign’ must denote authority to determine the basic terms and conditions of an employee’s job, i.e., position, work site, or work hours.” Sl. op. at 18-19. Thus:

“Assign” is the corollary to the authority to “transfer” employees (i.e., to reassign them to a different classification, location or shift). By contrast, the act of assigning tasks—whether on a daily basis or task-by-task—from among those already included within an employee’s overall job responsibilities effects no real change in basic terms and conditions of employment. Sl. op. at 19 (emphasis in original).

The dissent also argued the majority’s approach was inconsistent with Congressional intent regarding the type of responsibility held by minor supervisors, who were to continue to enjoy the Act’s protection. “The defining characteristic of such minor supervisors, in turn, was that their supervisory duties were incidental to their production duties, in contrast to foremen.” Sl. op. at 19-20. It also asserted that the majority’s interpretation “threatens to sweep almost all staff nurses outside the Act’s protection.” Id, at 20.
2. **Responsibly to Direct**

The dissent argued the majority’s focus on “responsibly” was too narrow, as the full phrase “responsibly to direct” must be understood as a term of art and interpreted in light of Senator Flanders’ floor statement (cited above). This more proper approach would demonstrate that the phrase “responsibly to direct” refers to the general supervisory authority delegated to foremen in contrast to the kind of one-on-one task direction typical of minor supervisory employees. Regarding the latter, as explained in the Senate committee report:

> such workers may have directed certain other employees in the performance of their tasks—and might well have been held accountable in that connection. But their supervisory duties were incidental to their own productive work, and they were not in charge of a work unit, nor did they exercise (in Senator Flanders’ words) “essential managerial duties,” in the same sense as the foreman, their superior. Sl. op. at 22.

The dissent closed this argument by asserting “The majority’s interpretation of responsible direction eliminates the Congressionally intended distinction between individuals with ‘essential managerial duties’ and those with only ‘minor supervisory’ duties. *Id.*

3. **Independent Judgment**

The dissent’s chief argument with the majority’s approach was not in the statement of the general test, but in its application to specific cases, with the dispute turning on determining how much and what measure of discretion is sufficient to establish supervisory independent judgment. It characterized the majority’s use of hypothetical examples as unhelpful, arguing there is no way to resolve the issue of how much discretion is sufficient except on a case-by-case basis.

VII. **How these standards were applied in three specific cases.**


   In issue were the permanent charge nurses and several rotating non-permanent charge nurses, all RNs, at the Employer’s Oakwood Heritage Hospital in Michigan. The majority found the Employer failed in its burden to establish that any of its charge nurses possessed the authority to responsibly direct employees. It further found that 12 non-emergency room permanent charge nurses were supervisors based on their authority to assign employees using independent judgment, but that the emergency room charge nurses were not supervisors because they did not have the same degree of assignment or responsible direction authority. The majority further found that none of the rotating charge nurses had such authority to assign as they did not spend a regular and substantial portion of their work time performing supervisory functions.
Regarding “responsible direction”, there was no evidence the charge nurses were held accountable to take corrective action if other staff members failed to do their assigned tasks. While the charge nurses were held accountable for their own performance, they were not held accountable for the performance of others in their charge.

Regarding “assignment”, the evidence showed the charge nurses assign nursing personnel to patients in particular work units, thus meeting the test for Section 2(11) assignment authority. The majority held this kind of assignment was not incidental to the charge nurses’ own nursing duties, as this duty exists independent of the charge nurses’ own nursing duties.

Regarding “independent judgment”, the majority held that the charge nurses’ function of choosing among available staff for particular assignments frequently requires a meaningful exercise of discretion, as that function requires the charge nurse to analyze an available nurse’s skill set and level of proficiency at performing certain tasks, and that analysis “involves a degree of discretion markedly different than the assignment decisions exercised by most leadmen.” Sl. op. at 11. Thus, the Employer’s general patient care policy guides charge nurses in making assignments, but permits a sufficient degree of discretion as to reflect independent judgment. While conceding the dissent’s argument that this assignment function serves the purpose of equalizing work loads, the majority concluded that the process of that equalization involved independent judgment, based on the degree of discretion that is exercised.

In considering the supervisory status of the emergency room charge nurses, though, the majority rejected the parties’ stipulation that all the charge nurses have the same authority, as the specific evidence was to the contrary. It concluded the evidence failed to show the same exercise of independent judgment among emergency room charge nurses, particularly noting the evidence that emergency room staff nurses rotated assignments among themselves without charge nurse input. The majority thus concluded the emergency room charge nurses are not supervisors.

Regarding the supervisory status of rotating charge nurses, the majority concluded the evidence did not establish the rotating charge nurses exercised their purported supervisory authority on a regular basis. Rather, the RNs decided among themselves who would serve as charge nurses, and the evidence revealed no pattern for these selections. Similarly, where managers assigned a rotating charge nurse, there was no evidence of any particular system or order for such assignments. In the absence of a showing of regularity, the majority determined it did not have to address whether these RNs possessed rotating charge nurse duties for a substantial part of their work time.

The dissent would have found none of the charge nurses to be supervisors. After describing the Employer’s hierarchy, ranging from nurse site leader (the highest level) to the assistant clinical managers—all stipulated supervisors—the dissent argued the evidence, in contrast, shows the charge nurses spend the vast majority of their time in line work, strongly supporting their conclusion that charge nurses are no more than minor
supervisors. Applying its different standards, the dissent concluded the charge nurse authority to assign patients to staff nurses was merely the authority to assign tasks already within the basic job duties of staff employees and thus not indicative of supervisory authority—it was merely a means of distributing the day’s work among RN peers or other staff.

Regarding responsible direction authority, the dissent concluded that charge nurses do not have basic operational responsibility for their units and are not held accountable for the overall performance of their unit. Thus, it is the clinical manager who is in charge of the unit, not the charge nurses.

In closing, the dissent noted:

The consequences of today’s decision, among the most important in the Board’s history, will take time to play out. They depend, in some measure, on how the Board applies in practice the principles announced here, on whether the federal appellate courts uphold those principles, and on the extent to which employers seek to take advantage of the Board’s decision. Sl. op. at 25.

2. Croft Metals, Inc., 348 NLRB No. 38 (9/29/06)

Applying the standards enunciated in Oakwood Healthcare, the Board panel (Battista, Schaumber and Kirsanow) determined the Employer’s lead persons are not Section 2(11) supervisors. The issue arose in an RC petition filed by the Boilermakers Union. The Employer is located in Mississippi.

The Employer asserted the lead persons have supervisory authority to assign production and maintenance employees, direct those employees in the performance of tasks, effectively recommend employees for hire, discipline and discharge, and/or participate in the evaluation process for these employees.

These lead persons had all been included, without Employer challenge, in a production and maintenance collective bargaining unit previously represented by the Carpenters Union for nearly 30 years.

The Board determined that the evidence failed to show that any of the lead persons’ duties satisfied the Section 2(11) standards. In particular, applying Oakwood Healthcare, the Board stated the Employer failed to establish that lead persons have the authority to assign within the meaning of the Act, and that while they do have the authority to responsibly direct, the Employer failed to demonstrate that such involves a degree of discretion that rises above the merely routine or clerical, thereby failing the independent judgment test.
Regarding assignment, the evidence showed the lead persons do not prepare employee work schedules, appoint employees to production lines, departments, shifts or overtime, or give significant overall duties to employees. Lead persons primarily work alongside the other employees, performing the same work. While lead persons occasionally switch job tasks of other employees, that activity did not meet the *Oakwood Healthcare* test of designating significant overall duties to an employee.

Similarly, while the evidence showed that lead persons responsibly direct employees, they do not exercise independent judgment in so doing. Thus, lead persons are required to manage their assigned teams, to correct improper performance move employees when necessary to different tasks, decide about the order in which work is to be performed, and instruct employees in the proper performance of their jobs. Lead persons are also held accountable for the job performance of the employees assigned to them. However, there was virtually no evidence as to the factors weighed or balanced by the lead persons in making these responsible direction decisions, and what evidence there was indicated that such direction was routine. Based on the paucity of evidence, the Board stated it was unable to conclude that the degree of discretion rose above the routine or clerical. Accordingly, the lead persons were determined to not be supervisors.


Applying the standards set forth in *Oakwood Healthcare*, the Board panel (Battista, Schaumber and Kirsanow) determined the Employer failed to meet its burden of showing that its charge nurses were Section 2(11) supervisors. The issue arose in two consolidated RC petition cases filed by the Steelworkers Union.

The Employer asserted the RN and LPN charge nurses were supervisors based on their authority to assign CNAs and responsibly direct them. Regarding assignment authority, the Employer asserted the charge nurses could order CNAs to go home early, reassign CNAs from one floor to another if the other floor was understaffed, order CNAs to stay past the end of their work shifts, and mandate that CNAs come in to work from home. The Board concluded the record failed to support any of these assertions. Thus, while charge nurses could *request* that CNAs come in from home, for example, the evidence failed to show they could *require* that of the CNAs. The evidence showed the decision of how to redistribute workloads was often made by the CNAs themselves, not by the charge nurses, and failed to show that the charge nurses could require such reassignments, or that even if they could so require, that that was done in the exercise of independent judgment. Rather, such reassignments were found to merely reflect a goal of balancing work loads.

Regarding responsible direction, the Board held the evidence showed the charge nurses had the authority to direct the CNAs, as the charge nurses oversee the CNAs’ job performance and correct the CNAs when they are not providing adequate care, and direct the CNAs to perform certain tasks when the charge nurse determines such tasks are
necessary. However, the Board further held there was no evidence that the charge nurses were held accountable in any way for the exercise of this authority. It noted the Board’s longstanding policy that purely conclusionary evidence is not sufficient to establish supervisory status and stated that “in determining whether accountability has been shown, we shall similarly require evidence of actual accountability.” Sl. op. at 5.

VIII. What does this all mean?

The Board will continue its historic practice of developing the law through case-by-case consideration. 56 cases (46 R cases and 10 C cases) have been remanded by the Board to the respective Regions (not including Milwaukee) for further consideration in light of the Oakwood Healthcare standards.

The Board’s own efforts to apply these new standards in Croft Metals and Golden Crest Healthcare Center shows the difficulties in uniformly interpreting and applying them. The 32 Regional Directors will face their own challenges in their efforts to apply these standards, all subject to the potential for further Board review.

The General Counsel may soon issue a memorandum providing guidance to the Regions in the interpretation and application of these new standards in an effort to further promote uniformity across the Agency. Should such a guidance memorandum issue, it likely will be released to the public for its edification as well.

In the final analysis, the Oakwood Healthcare dissent’s forecast, set forth at page 10 of this outline, will certainly prove true, that the consequences of this decision will take time to play out.

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2 The Board’s example of such direction—clipping resident’s toenails and fingernails, emptying catheters, or changing incontinent residents—was highlighted by the dissent in Oakwood Healthcare as an example of what it considered the potential breadth of the majority’s test for determining responsible direction, should the responsibility and independent judgment tests be satisfied, that could all but eliminate the protected class of minor supervisors. Oakwood Healthcare, supra, sl. op. at 23.