

# “Rubbing Salt in the Wound”<sup>1</sup>: As Nurses Battle with a Nationwide Staffing Shortage, an NLRB Decision Threatens to Limit the Ability of Nurses to Unionize

By Amy Albro

## I. INTRODUCTION

¶1 On average, hospitals in this country are experiencing an 8.1% staffing shortage in registered nurses, resulting in reduced staffing levels in hospital units and long hours for nurses.<sup>2</sup> There are many problems created by the shortage. For instance, staffing-related factors are the cause of twenty-four percent of unexpected major adverse health events in hospitals.<sup>3</sup> The vast majority of registered nurses feel the impact of the nursing shortage in their jobs and believe that it is negatively impacting patient care and reducing the amount of time nurses are able to spend with patients.<sup>4</sup> The inability of hospitals to recruit and retain an adequate number of nurses is threatening the quality of healthcare in the United States. The staffing shortage has not gone unnoticed; health consumers are becoming concerned about the quality of healthcare they are receiving.<sup>5</sup>

¶2 Now more than ever, nurses find themselves stretched to their limits as a result of the nursing shortage that plagues health facilities. The Health Resources and Services Administration (HRSA) found that the current shortage is around 220,000 nurses.<sup>6</sup> By 2020, that number is estimated to climb to over 1,000,000.<sup>7</sup> Factors contributing to the shortage include: growing demand for nurses caused by an aging population, job

---

<sup>1</sup> Tristan Takos, Kennedy on Decision to Strip Rights to Organize for Millions, <http://www.tedkennedy.com/journal/1219/kennedy-statement-on-decision-to-strip-right-to-organize-for-millions> (last visited Jan. 13, 2008).

<sup>2</sup> AM. HOSP. ASS'N, THE 2007 STATE OF AMERICA'S HOSPITALS—TAKING THE PULSE: FINDINGS FROM THE 2007 AHA SURVEY OF HOSPITAL LEADERS 6 (2007), <http://www.aha.org/aha/content/2007/PowerPoint/StateofHospitalsChartPack2007.ppt> (last visited Jan. 13, 2008).

<sup>3</sup> VICKY LOVELL, INST. FOR WOMEN'S POL'Y RES., SOLVING THE NURSING SHORTAGE THROUGH HIGHER WAGES 15 (2006), <http://www.iwpr.org/pdf/C363.pdf> (last visited Jan. 13, 2008) (citing JOINT COMMISSION ON ACCREDITATION OF HEALTHCARE ORGANIZATIONS, HEALTH CARE AT THE CROSSROADS: STRATEGIES FOR ADDRESSING THE EVOLVING NURSING CRISIS 6 (2006), [http://www.jointcommission.org/NR/rdonlyres/5C138711-ED76-4D6F-909F-B06E0309F36D/0/health\\_care\\_at\\_the\\_crossroads.pdf](http://www.jointcommission.org/NR/rdonlyres/5C138711-ED76-4D6F-909F-B06E0309F36D/0/health_care_at_the_crossroads.pdf)) (last visited Jan. 13, 2008).

<sup>4</sup> Peter I. Buerhaus, *Registered Nurses' Perceptions of Nursing*, 23 NURSING ECON., 58, 58 (2005).

<sup>5</sup> A 2004 study showed that four out of ten Americans believe that health care has deteriorated in the past five years. Significantly, sixty-nine percent of Americans are concerned that too few nurses in hospitals are the cause of medical errors. Press Release, Kaiser Family Foundation, Five Years After IOM Report On Medical Errors, Nearly Half of All Consumers Worry About the Safety of Their Health Care (Nov. 17, 2004), <http://www.kff.org/kaiserpolls/pomr111704nr.cfm> (last visited Jan. 13, 2008).

<sup>6</sup> HEALTH RES. & SERVS. ADMIN., WHAT IS BEHIND HRSA'S PROJECTED SUPPLY, DEMAND, AND SHORTAGE OF REGISTERED NURSES? 27 (2004), <ftp://ftp.hrsa.gov/bhpr/workforce/behindshortage.pdf> (last visited Jan. 13, 2008).

<sup>7</sup> *Id.*

dissatisfaction, an aging nursing workforce, the physically demanding nature of the job, healthcare restructuring, low enrollment in nursing schools, and a shortage of nursing faculty. Inadequate staffing not only impacts the nursing profession, but also patient care. A number of studies have found that low staffing levels<sup>8</sup> or long hours<sup>9</sup> negatively impact patient care.

13 With the nursing profession's struggle spanning from recruitment to retention, some nurses and scholars have advocated for unionization as a possible response.<sup>10</sup> Studies show that nurses working in unionized hospitals earn higher wages than those in non-unionized hospitals.<sup>11</sup> Further, on average, nurses working in states that are highly unionized make a higher hourly wage than nurses in sparsely unionized states.<sup>12</sup> The authors of one article theorized that collective bargaining leads to higher job satisfaction among nurses and, consequently, improved patient care.<sup>13</sup> The most effective response to meeting patient care demands and improving the nursing work environment may be for nurses to make themselves heard through collective bargaining. However, recent developments in labor law in the United States have left the ability of many nurses to unionize as an open question. The issue of whether charge nurses<sup>14</sup> should be able to participate in union activity under the National Labor Relations Act<sup>15</sup> (NLRA or the Act) has been in dispute for over a decade.<sup>16</sup> On September 29, 2006, the National Labor Relations Board<sup>17</sup> (NLRB or the Board) issued a trio of much anticipated decisions that

<sup>8</sup> See Linda H. Aiken et al., *Hospital Nurse Staffing and Patient Mortality, Nurse Burnout and Job Dissatisfaction*, 288 J. AM. MED. ASS'N 1987 (2002) [hereinafter Aiken, *Nurse Staffing*]; Mark W. Stanton, Agency for Healthcare Research and Quality, *Hospital Nurse Staffing and Quality of Care*, 14 RES. IN ACTION (2004), available at <http://www.ahrq.gov> (search "Hospital Nurse Staffing").

<sup>9</sup> See Anne. E. Rogers et al., *The Working Hours of Hospital Staff Nurses and Patient Safety: Both Errors and Near Errors are More Likely to Occur When Hospital Staff Nurses Work Twelve or More Hours at a Stretch*, 23 J. HEALTH AFF. 202 (2004).

<sup>10</sup> See Mary E. White, *Nurses and Hospitals Battling: Hospitals Protect Profits; Nurses Advocate for Quality Patient Care While Turning to Unions as a Solution*, 27 OHIO N.U. L. REV. 285 (2001); LOVELL, *supra* note 3, at 16; Press Release, Am. Nurses Ass'n, New ANA Study Provides More Proof of Link Between RN Staffing and Quality Patient Care (May 2, 2000), <http://nursingworld.org/MainMenuCategories/ThePracticeofProfessionalNursing/PatientSafetyQuality/RNStaffingandQualityPatientCare.aspx> (last visited Jan. 13, 2008).

<sup>11</sup> Roger Feldman & Richard Scheffler, *The Union Impact on Hospital Wages and Fringe Benefits*, 35 INDUS. & LAB. REL. REV. 196 (1982); Barry T. Hirsch & Edward J. Schumacher, *Monopsony Power and Relative Wages in the Labor Market for Nurses*, 14 J. HEALTH ECON. 443 (1995); LOVELL, *supra* note 3, at 16.

<sup>12</sup> LOVELL, *supra* note 3, at 16.

<sup>13</sup> Jean Ann Seago & Michael Ash, *Registered Nurses' Unions and Patient Outcomes*, J. NURSING ADMIN. 143, 150 (2002) [hereinafter Seago & Ash, *Unions and Patient Outcomes*].

<sup>14</sup> Stedman's Medical Dictionary defines "charge nurse" as a nurse who is "administratively responsible for a designated hospital unit, usually on an 8-hour basis." STEDMAN'S MEDICAL DICTIONARY 1244 (Lippincott, Williams & Wilkins 27th ed. 2000). Every hospital staffs charge nurses differently, but typical charge nurse duties include: supervising, organizing and assigning work to staff nurses, assessing, monitoring, and directing patient care on the unit, as well as providing direct patient care. Typically, he or she will be an experienced nurse. Salary.com, *Average Charge Nurse Salary*, [http://swz.salary.com/salarywizard/layouthtml/swz1\\_compresult\\_national\\_HC07000333.html#bottom](http://swz.salary.com/salarywizard/layouthtml/swz1_compresult_national_HC07000333.html#bottom) (last visited Jan. 13, 2008).

<sup>15</sup> 29 U.S.C. §§ 151-169 (2000).

<sup>16</sup> NLRB v. Health Care & Ret. Corp. of Am., 511 U.S. 571 (1994).

<sup>17</sup> The National Labor Relations Board, a five member board appointed by the President, is the administrative agency that was created to carry out the National Labor Relations Act. 29 U.S.C. §§ 153-156 (2000).

might take the option of unionization off the table for many nurses.<sup>18</sup> In the latest development in this ongoing saga, on March 22, 2007, Democratic leaders in the United States House of Representatives and the United States Senate responded directly to the NLRB's rulings by proposing a bill that would amend the NLRA to reverse the impact of those decisions.<sup>19</sup>

¶4 The trio of September NLRB decisions, often called the *Oakwood* decisions, marked a significant change in the NLRB's approach to determining which workers will be allowed to participate in collective bargaining and unions. After twice being reprimanded by the Supreme Court for failing to comply with the NLRA in its attempt to interpret the Act in a way that would allow all staff nurses to organize, the NLRB made a new attempt to interpret the Act in *Oakwood Healthcare, Inc.*<sup>20</sup> The new definition provided in the lead case was refined in *Croft Metals, Inc.*<sup>21</sup> and *Golden Crest Healthcare Center.*<sup>22</sup> Barring the success of the proposed legislative intervention, these decisions may end a debate that has raged for over a decade as to whether nurses with certain oversight responsibilities should be classified as employees or supervisors for the purposes of the NLRA.

¶5 Employees are allowed to organize under the protection of the NLRA,<sup>23</sup> but supervisors are explicitly excluded from that group.<sup>24</sup> The NLRB has historically classified registered nurses as employees who are eligible to participate in unions. However, in 1995, the Supreme Court struck down the NLRB's narrow approach to analyzing whether an individual may be classified as a supervisor as inconsistent with the meaning of the NLRA.<sup>25</sup> At the time, some speculated that the decision would be a blow to nurses' ability to unionize.<sup>26</sup> Instead, evidently determined to maintain NLRA protection for nurses, the NLRB attempted to circumvent the decision by adopting a new approach for classifying all staff nurses as employees. In 2001, the NLRB's revised approach was also struck down by the Supreme Court for similar reasons in *NLRB v. Kentucky River Community Care.*<sup>27</sup>

¶6 The *Oakwood Healthcare* decision marked the NLRB's attempt to modify its approach to classifying supervisors in a way that complies with the Supreme Court's ruling in *Kentucky River*. For the first time, the NLRB has conceded the need to limit the right of nurses to unionize pursuant to the Supreme Court's interpretation of the language in the NLRA. This dealt yet another blow to members of a struggling profession who have been turning toward unionization in order to voice their complaints about staffing, patient safety, compensation, benefits, and work environment. If a significant portion of

<sup>18</sup> *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 37 (2006); *Croft Metals, Inc.*, 348 N.L.R.B. 38 (2006); *Beverly Enters-Minn.*, 348 N.L.R.B. 39 (2006).

<sup>19</sup> Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers Act, H.R. 1644, 110th Cong. (2007), S. 969, 110th Cong. (2007).

<sup>20</sup> 348 N.L.R.B. 37.

<sup>21</sup> 348 N.L.R.B. 38.

<sup>22</sup> 348 N.L.R.B. 39.

<sup>23</sup> 29 U.S.C. § 157 (2000) (allowing employees to form and join labor organizations, and to bargain collectively).

<sup>24</sup> 29 U.S.C. § 152(11) (2000).

<sup>25</sup> *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994).

<sup>26</sup> Judy Prutzman Osgood, *NLRB v. Health Care & Retirement Corporation of America: A Setback for Nurses' Unions?*, 46 SYRACUSE L. REV. 135, 153-154 (1995).

<sup>27</sup> 532 U.S. 706 (2001).

nurses are prevented from organizing or removed from unions, the consequence could be a step backward in a movement that has helped to improve working conditions for the nation's short supply of nurses.

¶17 However, in the wake of this damaging trio of decisions, the political tide in the United States shifted and with it came a potential reversal of fortune for nurses. On March 22, 2007, democratic lawmakers, armed with a new majority in Congress, proposed an amendment to the definition of "supervisor" in the NLRA that would directly undo the impact of the *Oakwood* decisions. Despite the democratic majority in Congress, the bill, entitled the Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers Act (RESPECT Act), still faces an uphill battle versus strong conservative anti-labor opposition.<sup>28</sup>

¶18 This Comment begins by providing background on the nursing shortage and nurses in unions. The next sections review the "supervisor" exclusion under the NLRA, the case law that has resulted in the exclusion of charge nurses from NLRA protections, and the proposed legislation that will counteract the recent case law. The final sections of the article explore the revised understanding of "supervisor" and its potential impact, which ultimately depends on the responses taken by hospitals, nurses, courts, and, most importantly, lawmakers.

## II. THE NURSING SHORTAGE

¶19 Over time, those in the nursing profession have found themselves increasingly overburdened, dissatisfied, and underpaid. The nursing shortage, which has been described as a "crisis,"<sup>29</sup> has been well documented. There are currently over 200,000 vacant nursing positions nationwide. That number is expected to rise to over one million vacancies by 2020.<sup>30</sup> In 2005, eighty-five percent of hospital CEOs reported concern over a shortage of nurses in their hospitals<sup>31</sup> and nearly half admit that it has grown increasingly difficult to recruit nurses.<sup>32</sup> Annual nurse turnover in hospitals is twenty-one percent nationally.<sup>33</sup>

¶10 The lack of nurses is detrimental to patient care. According to a study conducted by Linda Aiken, one of the foremost researchers in the field, and reported in the *Journal of the American Medical Association*, "the impacts of staffing on patient and nurse outcomes suggest that by investing in registered nurse staffing, hospitals may avert both preventable mortality and low nurse retention in hospital practice."<sup>34</sup> The study showed that the odds of patient mortality increase by seven percent for every additional patient in

<sup>28</sup> Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers Act, H.R. 1644, 110th Cong. (2007), S. 969, 110th Cong. (2007).

<sup>29</sup> Am. Ass'n of Colleges of Nursing, Nursing Shortage Fact Sheet, <http://www.aacn.nche.edu/Media/FactSheets/NursingShortage.htm> (last visited Jan. 13, 2008).

<sup>30</sup> HEALTH RES. & SERVS. ADMIN., *supra* note 6.

<sup>31</sup> Am. College of Healthcare Executives, *Top Issues Confronting Hospitals: 2005*, [www.ache.org/pubs/research/ceoissues.cfm](http://www.ache.org/pubs/research/ceoissues.cfm) (on file with author).

<sup>32</sup> In 2006, forty-nine percent of hospital CEOs reported that registered nurse recruitment was more difficult in 2005 than it had been in 2004. AM. HOSP. ASS'N, *supra* note 2. In 2007, forty-four percent of hospital CEOs found nurse recruitment more difficult in 2006 than it had been in 2005. AM. HOSP. ASS'N, THE STATE OF AMERICA'S HOSPITALS—TAKING THE PULSE: FINDINGS FROM THE 2006 AHA SURVEY OF HOSPITAL LEADERS 12 (2006), <http://www.ahapolicyforum.org/ahapolicyforum/resources/content/StateHospitalsChartPack2006.ppt> (last visited Jan. 13, 2008).

<sup>33</sup> See LOVELL, *supra* note 3, at 8.

<sup>34</sup> Aiken, *Nurse Staffing*, *supra* note 8, at 1993.

the average hospital nurse's workload.<sup>35</sup> The shortage itself is also compounding the problems that are plaguing the nursing profession. Nurses report that insufficient staffing is increasing stress, decreasing the quality of patient care, and prompting nurses to become so dissatisfied that they choose to leave the profession.<sup>36</sup>

### A. *The Causes*

¶11 The nursing shortage can be traced to the convergence of a variety of factors that have strained the profession and made nursing both an unappealing career choice and a difficult career to maintain once chosen.

#### 1. The Aging and Ailing Population

¶12 The healthcare needs of the population are growing as the baby boomer generation ages. In 2004, there were nearly 2.4 million registered nurses working in the United States.<sup>37</sup> It is estimated that by 2014, the demand for nurses will increase to the point that 3.1 million nurses will be needed to serve the needs of the population.<sup>38</sup> Between 2004 and 2014, it has been estimated that healthcare facilities will need to fill 1.2 million registered nurse positions given the increased demand combined with the loss of workers due to retirement and attrition.<sup>39</sup>

#### 2. Shortage of Nursing Faculty

¶13 The nursing shortage is not limited to a lack of nurses at patients' bedsides. Due to a shortage of faculty, U.S. nursing schools do not have the capacity to train the number of nurses needed to respond to the growing demands. Surprisingly, seventy-one percent of nursing schools reported turning away qualified students for lack of faculty.<sup>40</sup> In 2006, baccalaureate and graduate nursing programs were forced to turn away 42,866 qualified candidates due largely to the faculty shortage.<sup>41</sup> This shortage of nursing professors is a serious problem given that the HRSA estimated that the United States will need ninety percent more nursing school graduates to address the nursing shortage.<sup>42</sup>

#### 3. Attrition

¶14 Nursing is a physically demanding profession. The physical strains of handling patients and spending twelve hours on one's feet are taxing and increasingly difficult for the aging workforce to manage. Both disability and physical exhaustion are causing nurses to leave the profession. Fifty-five percent of all nurses intend to retire between

<sup>35</sup> *Id.* at 1991.

<sup>36</sup> *See* Am. Ass'n of Colleges of Nursing, *supra* note 29, at 3.

<sup>37</sup> Daniel E. Hecker, *Occupational Employment Projections to 2014*, 128 MONTHLY LAB. REV. 70, 88 (2005), available at <http://www.bls.gov/opub/mlr/2005/11/art5full.pdf> (last visited Jan. 13, 2008).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *See* Am. Ass'n of Colleges of Nursing, *supra* note 29, at 2.

<sup>41</sup> *Id.*

<sup>42</sup> Press Release, Am. Hosp. Ass'n News, Nursing School Enrollments Rise 5%; More Than 32,000 Turned Away (Dec. 6, 2006), [http://www.ahanews.com/ahanews\\_app/hospitalconnect/search/article.jsp?dcrpath=AHANewsNowArticle/data/ann\\_061205\\_AACN&domain=AHANews](http://www.ahanews.com/ahanews_app/hospitalconnect/search/article.jsp?dcrpath=AHANewsNowArticle/data/ann_061205_AACN&domain=AHANews) (last visited Jan. 13, 2008).

2011 and 2020, which will dramatically reduce the already insufficient supply of nurses.<sup>43</sup>

#### 4. Inadequate Compensation

¶15 Compensation in nursing is low, given the level of education required, the physically risky nature of the work, and the competition among healthcare facilities to recruit nurses.<sup>44</sup> The lack of sufficient return on a hard work day makes the profession less attractive to potential candidates.<sup>45</sup> Inadequate pay is one aspect of the nursing profession that researchers and scholars have overlooked when analyzing the shortage.

¶16 A report published by the Women's Institute on Policy Research shows a correlation between employment levels and wages.<sup>46</sup> Despite burgeoning concern over the nursing shortage, wages and staffing levels remained stagnant throughout the 1990s. When wages were increased in 2001, employment levels also rose.<sup>47</sup> In 2004, when wages dropped, employment levels in hospitals dropped.<sup>48</sup> The report also noted that wage increases have been successful in attracting students to training programs, retaining nurses, and encouraging nurses to work more hours.<sup>49</sup> The report's analysts conclude that an annual wage increase of as little as 3.2 to 3.8% could encourage as much as 6.2% growth in nursing school graduates, sufficient to meet the demand by 2020.<sup>50</sup>

¶17 Nurse wages do not appear to respond well to market forces. Wages for the total labor force rose by 6.8% from 1992 to 2002, while wages for registered nurses grew by only 3.3% during the same period.<sup>51</sup> Some researchers suggest that monopsony<sup>52</sup> power in the hospital labor market is one reason why nurse wages have remained low.<sup>53</sup> One study suggests either antitrust regulation or union organizing as a method for making wages competitive.<sup>54</sup>

#### 5. Instability in the Healthcare System

¶18 The restructuring of the healthcare system has also contributed to the nursing shortage.<sup>55</sup> The arrival on the scene of managed care and a trend toward hospital mergers

<sup>43</sup> Bernard Hodes Group, Nursing Management Aging Workforce Survey (2006), <http://www.medicalnews.today.com/printerfriendlynews.php?newsid=50833> (last visited Jan. 13, 2008).

<sup>44</sup> See LOVELL, *supra* note 3, at 12.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 16.

<sup>50</sup> *Id.*

<sup>51</sup> Brief for American Nurses Association and United American Nurses et al. as Amicus Curiae Supporting Petitioner, Croft Metals, Inc., 348 N.L.R.B. 38 (2006) (citing U.S. Department of Labor, Bureau of Labor Statistics, Current Population Survey).

<sup>52</sup> BLACK'S LAW DICTIONARY 1028 (8th ed. 2004) (defining monopsony as a market situation in which one buyer controls the market).

<sup>53</sup> Richard W. Hurd, *Equilibrium Vacancies in the Labor Market Dominated by Non-Profit Firms: The "Shortage" of Nurses*, 55 REV. ECON. & STAT. 234 (1973); Feldman & Scheffler, *supra* note 11, at 206.

<sup>54</sup> Hurd, *supra* note 53, at 239.

<sup>55</sup> See LOVELL, *supra* note 3, at 8; see generally, Linda H. Aiken et al., *Nurses Reports on Hospital Care in Five Countries*, 20 J. HEALTH AFF. 43 (2001) (noting that hospital working conditions brought about through health care restructuring are causing discontent and contributing to staffing shortages).

changed the climate of the healthcare field. As healthcare facilities pushed to cut costs, nurses were faced with reduced staffing, heavier work loads, and increased responsibilities. In the midst of managed care organizations, hospital mergers, and health maintenance organizations, the number of nurses staffed in hospitals was reduced. Assistive personnel, such as certified nursing assistants (CNAs), were hired to perform tasks formerly carried out by registered nurses. An offshoot of this reorganization was that cost-cutting efforts, which mandated fewer hospitalizations, shorter lengths of stay, and resulted in a more severely ill mix of patients. A study funded by the Agency for Healthcare Research and Quality and the National Science Foundation found that patient acuity went up twenty-one percent between 1991 and 1996. During the same time period, there was no change in levels of nurse staffing.<sup>56</sup>

¶19 The job description of the staff nurse underwent a drastic overhaul as nurses' responsibilities shifted from primarily providing direct patient care to overseeing the performance of these less trained practitioners.<sup>57</sup> This formidable shift in conditions has been detrimental to nurse satisfaction levels. The additional responsibility of overseeing support staff, caring for more critically ill patients, and the pressure to keep costs down created a more stressful workplace for nurses.<sup>58</sup> Nurses who experienced this reform-related job restructuring held more negative views toward the profession than those who had avoided it.<sup>59</sup> These frustrated nurses expressed a desire for a voice within their organizations and also an interest in joining a union.<sup>60</sup>

#### B. Responses to the Shortage

¶20 Lawmakers, union leaders, lawyers, hospital administrators, and nurses themselves have taken notice of the issues related to the nursing shortage. These parties have attempted various responses, some more successful than others. Many of these efforts have been geared towards changing the underlying causes of the shortage, including improving the working life of nurses in terms of pay, hours, and work environment. Other proposed solutions are merely short-term attempts to augment the workforce and fail to address the professional discontent and attrition rates.

¶21 A number of states have launched statewide initiatives to respond to the shortage. For example, in Illinois, Governor Rod Blagojevich launched the Illinois Center for Nursing to assess and help respond to the state's growing healthcare demands. This is the Governor's most recent move in an ongoing campaign to address the shortage. The campaign has included expanding nursing education opportunities and scholarship programs.<sup>61</sup> In 1999, California became the first state to implement mandatory nurse-to-patient ratios in hospitals to force hospitals to respond to their staffing needs.<sup>62</sup> In January of 2007, Tennessee Governor Philip Bredesen and state health officials launched

<sup>56</sup> Stanton, *supra* note 8, at 5.

<sup>57</sup> Paul F. Clark et al., *Healthcare Reform and the Workplace Experience of Nurses: Implications for Patient Care and Union Organizing*, 55 INDUS. & LAB. REL. REV. 133, 134-35 (2001).

<sup>58</sup> *Id.* at 135.

<sup>59</sup> *Id.* at 144-45.

<sup>60</sup> *Id.*

<sup>61</sup> Press Release, Rod R. Blagojevich, Governor of Ill., Blagojevich Administration Officials Open Illinois Center for Nursing (Nov. 2, 2006), <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=64&RecNum=5487> (last visited Jan. 13, 2008).

<sup>62</sup> *Nurse-Staffing Laws Inadequate Salve for Hospitals' Wounds*, USA TODAY, Oct. 18, 1999, at 18A.

the Graduate Nursing Loan Forgiveness Program to raise 1.4 million dollars in funding for a scholarship program to help nurses earn the graduate degree necessary to teach nursing school.<sup>63</sup> These are just a few examples of the many state initiatives taking place across the nation.

¶22 The federal government is also taking notice. A bill entitled Nurse Staffing Standards for Patient Safety and Quality Care Act of 2007 is currently under consideration in the United States House of Representatives. The bill proposes mandatory staffing ratios nationwide.<sup>64</sup> While there is a proven link between increased nurse staffing and better patient outcomes,<sup>65</sup> there will be no way to enforce these mandates without enough nurses to fill the positions. In 2002, President Bush signed the Nurse Reinvestment Act,<sup>66</sup> which allocated funds to grant scholarships to nursing students as well as recruitment programs to get more people interested in the profession.

¶23 Another response to the nursing shortage seen in the United States has been to import nurses from developing nations. While this practice may help solve some immediate staffing needs, it raises the concern that poaching nurses from their home countries, which are also experiencing staffing shortages, is unethical and merely serves as a band-aid solution. Exacerbating the issue is the fact that other developed nations, including Ireland and the United Kingdom, are using the same practice of recruiting foreign nurses to meet their own healthcare needs.<sup>67</sup> A recent bulletin released by the World Health Organization (WHO) expressed concern that many of the nurses who are relocating to serve the needs of these nations come from low and lower-middle income level nations, which may be less equipped to handle a nursing shortage than the wealthier nations that are recruiting the nurses.<sup>68</sup> Africa, a primary target of these recruitment measures, bears approximately one quarter of the world's burden of disease and is home to only three percent of the world's healthcare workers.<sup>69</sup> Data from the WHO indicates that there is a worldwide shortage of health providers. One such statistic is incredibly revealing: there are currently 0.11 healthcare workers per one thousand people in the world.<sup>70</sup> In order to meet the most basic healthcare needs of the world, that number should be at eighty workers per one thousand people.<sup>71</sup> The WHO report suggests that international recruitment is just a "quick fix" and that policies should be implemented to address the underlying shortages and to ensure that the flow of nurses between nations is

<sup>63</sup> Press Release, Philip Bredesen, Governor of Tenn., Tennessee Health Care Community Raises Money to Support Governor's Nurse Loan Forgiveness Program (Jan. 22, 2007), <http://www.tennesseeanytime.org/governor/viewArticleContent.do?id=959> (last visited Jan. 13, 2008).

<sup>64</sup> H.R. 2123, 110th Cong. (2007).

<sup>65</sup> See Aiken, *Nurse Staffing*, *supra* note 8, at 1992; see also Stanton, *supra* note 8, at 1.

<sup>66</sup> Pub. L. No. 107-205, 116 Stat. 811 (2002) (codified as amended in scattered sections of 42 U.S.C.).

<sup>67</sup> James Buchan & Julie Sochalski, *The Migration of Nurses: Trends and Policies*, 82 BULL. WORLD HEALTH ORG. 587, 588 (2004).

<sup>68</sup> *Id.* at 588-590.

<sup>69</sup> Shashank Bengali, *Nurses Leave, Health Care in Africa Suffers*, PHILADELPHIA INQUIRER, Apr. 20, 2006, at A20.

<sup>70</sup> Mary A. Pittman, *A Worldwide Crisis: A Shortage of Healthcare Workers Disproportionately Affects Developing Countries, But it Endangers Us All*, HOSPS. & HEALTH NETWORKS MAG., Dec. 19, 2006, [http://www.hhnmag.com/hhnmag\\_app/jsp/articledisplay.jsp?dcrpath=HHNMAG/PubsNewsArticle/data/2006December/061219HHN\\_Online\\_Pittman&domain=HHNMAG](http://www.hhnmag.com/hhnmag_app/jsp/articledisplay.jsp?dcrpath=HHNMAG/PubsNewsArticle/data/2006December/061219HHN_Online_Pittman&domain=HHNMAG) (last visited Jan. 13, 2008).

<sup>71</sup> *Id.*

equitable.<sup>72</sup> Given the global shortage, international recruitment is not likely to be a long-term solution to the shortage.

¶24 Finally, nurses themselves have addressed the shortage by unionizing to improve working conditions.<sup>73</sup> Tired of being overworked, poorly paid, and underappreciated, many nurses are banking on strength in numbers to solve their problems. While unions still represent only 19.5% of nurses,<sup>74</sup> widespread unionization, unlike other attempted solutions, could address many of the factors contributing to the nursing shortage at once.

¶25 Unionization can eliminate many of the grievances that have been voiced by nurses about their working conditions. As demonstrated by the various responses discussed above, many other parties have weighed in on how to solve the nursing shortage, but unionizing has the unique capacity to put the power in the nurses' own hands. Through bargaining, nurses can combat low wages, poor benefits, at-will employment, insufficient lifting equipment, inadequate staffing levels, oppressive management, and mandatory overtime.

### III. NURSING & UNIONS

¶26 Collective bargaining has yielded some positive results for nurses. Unions have won battles by bargaining with hospitals across the country. At least one nursing union won a "No Single Lift" policy that helps to mitigate the physical strains of nursing by forbidding hospitals to require any single nurse to move a patient alone.<sup>75</sup> Nurses have also bargained for higher wages<sup>76</sup> and better benefits, including improved healthcare plans.<sup>77</sup> On average, unionized nurses make thirteen percent more than their non-unionized counterparts.<sup>78</sup> In some hospitals, nursing unions have also successfully eliminated mandatory overtime<sup>79</sup> and created compulsory nurse-to-patient ratios in some hospitals.<sup>80</sup> Unions have even had some success circumventing the impact of the *Oakwood* decisions through proactive bargaining. Before the decisions were rendered, a number of hospitals agreed not to challenge the supervisory status of bargaining-unit members for at least the length of their bargaining contracts.<sup>81</sup> Notably, since *Oakwood*, nurses have continued to use their bargaining power to win contract language that

<sup>72</sup> Buchan & Sochalski, *supra* note 67, at 591-92.

<sup>73</sup> See Mary E. White, *Nurses and Hospitals Battling: Hospitals Protect Profits; Nurses Advocate for Quality Patient Care While Turning to Unions as a Solution*, 27 OHIO N.U. L. REV. 285, 287 (2001); LOVELL, *supra* note 3; United Am. Nurses, AFL-CIO, *The RN Staffing Crisis*, <http://www.uannurse.org/crisis/index.html> (last visited Jan. 13, 2008).

<sup>74</sup> United Am. Nurses Publ'n, *Registered Nurse Unionization 1* (2005), <http://www.uannurse.org/research/pdfs/unionization.pdf> (last visited Jan. 13, 2008) [hereinafter UAN Publ'n].

<sup>75</sup> Jennifer Keenan & Alyson Wolvin, *Organizing a Union Just Makes Sense!*, MICH. NURSE MAG., Mar./Apr. 2006, at 11, [http://www.minurses.org/news/MN2006/0304mn/0304mn\\_organizing.shtml](http://www.minurses.org/news/MN2006/0304mn/0304mn_organizing.shtml) (last visited Jan. 13, 2008).

<sup>76</sup> Mass. Nurses Ass'n, *Dana-Farber Nurses Ratify New Contract Making Them Highest Paid Nurses in New England*, Apr. 18, 2007, [http://www.massnurses.org/News/2007/04/dana\\_farber\\_ratify.htm](http://www.massnurses.org/News/2007/04/dana_farber_ratify.htm) (last visited Jan. 13, 2008).

<sup>77</sup> Associated Press, *New Brunswick: Striking Nurses Return to Work*, N.Y. TIMES, Sept. 19, 2006, at B7.

<sup>78</sup> See LOVELL, *supra* note 3, at 16.

<sup>79</sup> United Am. Nurses, *No More Forced Overtime*, <http://www.uannurse.org/highlights/overtime.html> (last visited Jan. 13, 2008).

<sup>80</sup> United Am. Nurses, *Safe Staffing: Good for Patients, Good for Nurses*, available at <http://www.uannurse.org/highlights/staffing.html> (last visited Jan. 13, 2008) [hereinafter UAN, *Safe Staffing*].

<sup>81</sup> Kris Maher, *Unions Race to Get Ahead of Eligibility Rule Change*, WALL ST. J., July 24, 2006, at A2.

protects the right of all staff nurses to remain unionized.<sup>82</sup> Although these are small steps toward solving the nursing shortage crisis, winning these contract victories helps nurses to improve their working environments.

¶27 The common unionization of nurses is a relatively new phenomenon. Today nearly 500,000 nurses are represented by a union, which constitutes almost twenty percent of the registered nurse workforce.<sup>83</sup> Over the past decade, union participation has steadily hovered just below twenty percent of the nursing population,<sup>84</sup> but with the number of nurses in the workforce increasing overall, the number of union represented nurses is also climbing.<sup>85</sup>

¶28 While unionized nurses still constitute the minority of nurses by a large margin, union successes cannot be denied. Unionized hospital nurses make an average of \$2.84 more per hour than their non-unionized counterparts.<sup>86</sup> Further, in areas with high union density, wages are increased for all hospital nurses, union and non-union.<sup>87</sup> One review of several metropolitan areas concluded that in cities with more than fifty percent union density, the average wage was \$29.20 per hour.<sup>88</sup> In several of the least unionized cities, wages were significantly lower at \$22.85 per hour.<sup>89</sup> Research has revealed that higher wages can reduce nurse turnover.<sup>90</sup> Additionally, nurse turnover has been found to be lower in unionized hospitals.<sup>91</sup>

¶29 There is also a correlation between unionized hospitals, patient care, and work environment. One report suggests that unionization can improve “morale, job stability, and collegial relationships.”<sup>92</sup> Research has connected unionized nurses to better health outcomes: hospitals with unionized nurses have heart attack mortality rates over five percent lower than non-union hospitals.<sup>93</sup>

¶30 Further, workplace benefits that are not specific to unionization, but that are often won through bargaining, can result in better healthcare and better morale. For instance, unions often negotiate for improved nurse staffing levels.<sup>94</sup> In cities with high union density, hospitals boast nearly twenty percent more nurses per patient on average.<sup>95</sup> Higher staffing levels lead to better health outcomes for patients, as evidenced by the statistic that the odds of patient mortality increase by seven percent for each additional

<sup>82</sup> Mass. Nurses Ass’n, *supra* note 76; United Nurses Ass’n of Cal., *Unions Get Some RESPECT at State Capitol*, <http://www.nursesunite.org> (last visited Jan. 13, 2008).

<sup>83</sup> UAN Publ’n, *supra* note 74, at 1.

<sup>84</sup> *Id.* at 2.

<sup>85</sup> *Id.* at 3.

<sup>86</sup> LOVELL, *supra* note 3, at 16.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Linda Aiken, *The Hospital Nursing Shortage: A Paradox of Increasing Supply and Increasing Vacancy Rates*, 151 W.J. MED. 87, 89-90 (1989); LOVELL, *supra* note 3, at 12; Michael Ash & Jean Ann Seago, *The Effect of Registered Nurses’ Unions on Heart-Attack Mortality*, 57 INDUS. LAB. REL. REV. 422, 425 (2004) [hereinafter Ash & Seago, *Unions on Heart-Attack Mortality*].

<sup>91</sup> Ash & Seago, *Unions on Heart-Attack Mortality*, *supra* note 90, at 425.

<sup>92</sup> LOVELL, *supra* note 3, at 16.

<sup>93</sup> Ash & Seago, *Unions on Heart-Attack Mortality*, *supra* note 90, at 422; Seago & Ash, *Unions and Patient Outcomes*, *supra* note 13, at 149.

<sup>94</sup> UAN, *Safe Staffing*, *supra* note 80.

<sup>95</sup> LOVELL, *supra* note 3, at 16.

patient that a nurse must care for during a shift.<sup>96</sup> A jump from four patients, a low patient load, to eight patients, a high but common load, results in a thirty-one percent increase in patient mortality.<sup>97</sup> Low nurse staffing has also been linked to increases in the risk of negative events in the hospital, including urinary tract infections, pneumonia, shock, upper gastrointestinal bleeding, longer hospital stays, and failures-to-rescue.<sup>98</sup>

¶31 An additional benefit of increased staffing is the reduction of nurse burnout. A 2002 study links high nurse-to-patient ratios with emotional exhaustion and job dissatisfaction. Taking on one additional patient per shift increased levels of job dissatisfaction by fifteen percent and burnout by twenty-three percent.<sup>99</sup> Unions have a great potential to address the nursing shortage because through bargaining, nurses can address many of these types of grievances. Higher pay, better patient care, and more control over the work environment could lessen the current shortage through improved recruitment and retention.

#### A. *The Economic Impact of Unions on Hospitals*

¶32 Hospitals have strongly opposed unionizing campaigns. However, the actual financial ramifications associated with accommodating a union have yet to be determined. While organized nurses command higher wages than non-organized nurses, there may be overall benefits associated with hospital unions.<sup>100</sup> An early study found that hospital unionization significantly increased hospital costs with no corresponding efficiency benefits.<sup>101</sup> However, some research has indicated that organized labor can be associated with an increased efficiency that actually offsets the cost of increased wages and fringe benefits.<sup>102</sup> That theory has been tested on hospital unions with conflicting results. While one study found that the increased productivity in unionized hospitals more than offset the increase in wages,<sup>103</sup> another found exactly the opposite.<sup>104</sup> Both of these studies included, but were not limited to, nurse unions.

¶33 To supplement these inconclusive findings, another more recent study shows that additional nurse staffing, one factor associated with nurse unions, does not reduce hospital profits. A one percent increase in nurse staffing levels result in a 0.25% increase in operating costs, but does not cause any statistically significant drop in profits. The study's author noted that "[a]t a minimum, these results call into question the idea that a route to greater profitability is through cuts in RN staffing."<sup>105</sup> These results are not surprising when considered along with studies that show that low nurse staffing causes adverse health outcomes. Complications result in increased costs for the hospital. For

<sup>96</sup> Aiken, *Nurse Staffing*, *supra* note 8, at 1991.

<sup>97</sup> *Id.*

<sup>98</sup> Stanton, *supra* note 8, at 2-3.

<sup>99</sup> Aiken, *Nurse Staffing*, *supra* note 8, at 1990.

<sup>100</sup> LOVELL, *supra* note 3, at 16.

<sup>101</sup> Frank A. Sloan & Killard W. Adamache, *The Role of Unions in Hospital Cost Inflation*, 37 *INDUS. & LAB. REL. REV.* 252, 261 (1984).

<sup>102</sup> Steven G. Allen, *Can Union Labor Ever Cost Less?*, 102 *Q.J. ECON.* 347, 347-348 (1987).

<sup>103</sup> Charles A. Register, *Wages, Productivity, and Costs in Union and Nonunion Hospitals*, 9 *J. LAB. RES.* 325 (1988).

<sup>104</sup> Sloan & Adamache, *supra* note 101.

<sup>105</sup> Michael McCue et al., *Nurse Staffing, Quality, and Financial Performance*, 29 *J. HEALTH CARE FIN.* 54, 68 (2003).

example, pneumonia, one of the most common complications, results in an eighty-four percent increase in cost and an additional five days in the hospital per patient.<sup>106</sup> The positive patient outcomes and the decreased turnover connected to nurse unions also indicate that nurse unions may create efficiencies to offset costs.

¶34 The fact that the data does not demonstrate conclusively whether unions result in additional cost to hospitals suggests that, at the very least, unions are not imposing drastic cost increases. On the other hand, the data demonstrating the positive potential of nursing unions is fairly persuasive. Consequently, hospitals may want to rethink their opposition to unions and instead embrace nurse unionization as a way to battle the challenge of nurse recruitment and retention.

#### IV. THE SUPERVISOR EXCLUSION

¶35 For decades, a debate affecting millions of Americans has raged over the definition of one little word: “supervisor.” In 1947, the NLRA was amended to expressly exclude supervisors from the definition “employees,”<sup>107</sup> thus depriving them of the right to engage in collective bargaining under the Act. The amendment came in response to complaints by employers that the existing act afforded too much power to workers.<sup>108</sup> Congress passed the amendment to correct the bottom-heavy imbalance and prohibit those with close ties to management from engaging in the bargaining process.<sup>109</sup> Section 2(11) of the Act provides that:

The term “supervisor” means 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.<sup>110</sup>

¶36 Under the definition, a nurse who acts with independent judgment in the interest of the employer during the performance of any one of the enumerated powers qualifies as a “supervisor” and is not eligible to organize.<sup>111</sup>

#### V. NURSE AS SUPERVISOR OR EMPLOYEE: THE CASE LAW

¶37 For the past decade, the nursing profession has found itself squarely in the middle of a debate over how the definition of “supervisor” under the NLRA should be applied. There is tension over a category of workers who have oversight responsibility for less senior employees, but who also do not have strong management prerogatives. Historically, the NLRB has allowed all floor nurses to unionize. In 1994, a split among

<sup>106</sup> Stanton, *supra* note 8, at 6.

<sup>107</sup> Pub. L. No. 80-101, 61 Stat. 1947 (codified as amended at 29 U.S.C. § 152(11) (1947)).

<sup>108</sup> *Id.*

<sup>109</sup> Robert C. Black, Note, *The Impact of State Nursing Practice Acts on Nurses’ Eligibility for Protection Under the National Labor Relations Act*, 73 UMKC L. REV. 181, 183 (2004).

<sup>110</sup> 29 U.S.C. § 152(11).

<sup>111</sup> NLRB v. Kentucky River Cmty. Care, 532 U.S. 706, 713 (2001).

the circuits over the question of whether charge nurses are properly categorized as employees or supervisors prompted the Supreme Court to address the question.

¶38 Charge nurses are nurses who have some oversight responsibilities in addition to performing patient care. A charge nurse is typically the head nurse on a shift. He or she oversees the unit, directs the actions of the other nurses, and monitors his or her own patient load. While some hospitals designate full-time charge nurses, more typically many nurses in a unit rotate through the charge nurse position, spending some days in the role of charge nurse and some days in the role of staff nurse.<sup>112</sup>

¶39 In *NLRB v. Health Care & Retirement Corp.*, the first in a series of controversial decisions, the Supreme Court found that the NLRB approach to determining the supervisory status of nurses was inconsistent with the language in the NLRA.<sup>113</sup> The question presented in the case was what constitutes employee action “in the interest of the employer.” According to the NLRA, performing any one of twelve actions carried out in the interest of the employer qualifies an individual as a supervisor.<sup>114</sup> In an attempt to classify nurses as employees, the NLRB reasoned that nurses perform their duties in the interest of patients and not pursuant to a duty to their employer. The Court rejected that approach, arguing that actions taken in the interest of the patient are, by their very nature, also in the interest of the employer.<sup>115</sup> When the decision in *Health Care* came down, many thought it would make unionizing more difficult for nurses. Their fears were assuaged, at least temporarily, when the NLRB adopted a new, union-friendly approach for determining whether a nurse was acting in a supervisory position.

¶40 In 2001, the supervisory status of nurses was again scrutinized in *NLRB v. Kentucky River Community Care*.<sup>116</sup> This case hinged on the interpretation of the phrase “independent judgment” under the Act. The NLRB had determined that employees do not use independent judgment when they exercise “ordinary professional or technical judgment in directing less-skilled employees to deliver services.”<sup>117</sup> The Supreme Court again rejected the NLRB’s reasoning as in conflict with the NLRA. The Court reasoned that when Congress amended the NLRA to exclude protection for supervisors, it intended for this to be a broad exclusion.<sup>118</sup> The definition put forth by the NLRB limited the application of the amended policy.<sup>119</sup> The Court posited: “What supervisory judgment worth exercising, one must wonder, does not rest on ‘professional or technical skill or experience?’”<sup>120</sup>

¶41 The Supreme Court again left open the question of how better to approach the application of the Act to the nursing profession. Five years later, on September 29, 2006, the NLRB finally crafted a much anticipated new approach in accordance with the *Kentucky River* decision. The NLRB hopes that the third time will be the charm, as it laid out a new interpretation of the definition of “supervisor” in *Oakwood Healthcare*,

<sup>112</sup> Teresa R. Laidacker, Comment, *The Classification of the Charge Nurse as a Supervisor Under the National Labor Relations Act*, 69 U. CIN. L. REV. 1315 (2001).

<sup>113</sup> 511 U.S. 571, 576 (1994).

<sup>114</sup> Taft-Hartley Act, 29 U.S.C. § 152(11) (1947).

<sup>115</sup> 511 U.S. at 571.

<sup>116</sup> 532 U.S. 706 (2001).

<sup>117</sup> *Id.* at 714.

<sup>118</sup> *Id.* at 721-22.

<sup>119</sup> *Id.* at 715.

<sup>120</sup> *Id.*

*Inc. v. NLRB*, along with two partner cases.<sup>121</sup> In *Oakwood*, Oakwood Heritage Hospital wished to exclude charge nurses from the bargaining unit being formed in the hospital.<sup>122</sup> At the time of the filing, the Hospital had 181 staff nurses, including twelve nurses who served full time as charge nurses and many others who rotated through the charge nurse position. The *Oakwood* decision interpreted three terms that have proved ambiguous in the supervisor definition: “responsibly to direct,” “assign,” and “independent judgment.”<sup>123</sup> The other two decisions, *Croft* and *Golden Crest*, are examples of how to apply the standard.

¶42 Analyzing legislative intent and case law, the Board determined that the statutory text “responsibly direct” indicates that a supervisor has authority to delegate and oversee tasks, take corrective action if necessary, and is personally accountable for the outcome of the task.<sup>124</sup> The Board was particularly concerned with accountability because it:

creates a clear distinction between those employees whose interests, in directing other employees’ tasks, align with management from those whose interests, in directing other employees, is simply the completion of a certain task. . . . [I]n directing others, he will be carrying out the interests of management—disregarding, if necessary, employees’ contrary interests.<sup>125</sup>

In the present case, the Board found that the nurses were not accountable, holding that the Hospital failed to demonstrate that the charge nurses were subject to corrective action in response to the poor performance of a staff person he or she directed. It is not enough for a nurse to be accountable for his or her own performance; the nurse must also be accountable for the performance of others.<sup>126</sup>

According to the Board, under the Act, “assign” means:

[T]he 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. . . . In sum, to ‘assign’ for purposes of Section 2(11) refers to the . . . designation of significant overall duties to an employee, not to the . . . ad hoc instruction that the employee perform a discrete task.<sup>127</sup>

¶43 At *Oakwood*, charge nurses “assign” staff nurses to particular patients each day. The particular type of assignment is covered under the supervisory duties because it dictates the course of the staff nurse’s entire day.<sup>128</sup> The analysis then turns to whether the assignments were carried out with independent judgment.

<sup>121</sup> *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 37 (2006); *Croft Metals, Inc.*, 348 N.L.R.B. 38 (2006); *Beverly Enters-Minn.*, 348 N.L.R.B. 39 (2006).

<sup>122</sup> 348 N.L.R.B. 37.

<sup>123</sup> *Id.* at 15.

<sup>124</sup> *Id.* at 7.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 10.

<sup>127</sup> *Id.* at 4.

<sup>128</sup> *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 37 (2006).

¶44 The interpretation of “independent judgment” was at the heart of the Supreme Court’s ruling in *Kentucky River*.<sup>129</sup> The Court did not agree with the NLRB’s interpretation that decisions made based on ordinary professional judgment did not constitute independent judgment under the Act. According to the Court, this interpretation read “a startling categorical exclusion into statutory text that does not suggest its existence.”<sup>130</sup>

¶45 In reshaping the definition, the Board was instructed by the Court that “it is the *degree* of discretion involved in making the decision, not the *kind* of discretion exercised—whether professional, technical, or otherwise—that determines the existence of ‘independent judgment . . . .’”<sup>131</sup> Independent judgment must be an on-the-job judgment that is not directed by instructions, company policy, contract provisions, or other authority.<sup>132</sup> Further, it must rise above the level of “routine or clerical.”<sup>133</sup> Here, the Board determined that the nurses at Oakwood were using independent judgment in assigning staff nurses to patients. They reasoned that “[i]n the healthcare context, choosing among the available staff frequently requires meaningful exercise of discretion” because nurses have varied skills and patients have unique problems.<sup>134</sup> Charge nurses must take these factors into account when making the life and death decisions of which nurses are best suited to perform.<sup>135</sup> After numerous approaches to the language in the statute, the NLRB, with guidance from Supreme Court decisions, arrived at the seemingly unavoidable conclusion that full-time charge nurses are supervisors.

¶46 Finally, regarding the issue of part-time charge nurses, the Board determined that individuals who perform regular supervisory work (“according to a pattern or schedule”) at least ten to fifteen percent of the time will be classified as supervisors.<sup>136</sup> The NLRB held that Oakwood failed to establish that its rotating charge nurses were staffed regularly in supervisory roles. As a result, only the twelve permanent charge nurses, and not the 112 part-time charge nurses, are excluded from the bargaining unit.<sup>137</sup>

¶47 The two other cases in the *Kentucky River* trio, *Golden Crest Healthcare*<sup>138</sup> and *Croft Metals, Inc.*,<sup>139</sup> provide further clarification on the standard set forth in *Oakwood*. In *Golden Crest*, the NLRB was again presented with the question of whether a certain group of charge nurses exercised supervisory authority pursuant to the NLRA. In this case, unlike *Oakwood*, the employer failed to meet its burden of proof. At issue was whether nursing home nurses had the authority to “assign” or to “responsibly direct” CNAs working under them.<sup>140</sup> A finding of either would qualify the nurses as supervisors.

<sup>129</sup> NLRB v. Kentucky River Cmty. Care, 532 U.S. 706 (2001).

<sup>130</sup> *Id.* at 714.

<sup>131</sup> *Oakwood*, 348 N.L.R.B. 37, at 8.

<sup>132</sup> *Id.* at 10.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 13.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 11.

<sup>137</sup> *Id.* at 12.

<sup>138</sup> Beverly Enters-Minn., 348 N.L.R.B. 39 (2006).

<sup>139</sup> Croft Metals, Inc., 348 N.L.R.B. 38 (2006).

<sup>140</sup> Beverly Enters-Minn., 348 N.L.R.B. 39.

¶48 The Board found that the nurses did not have absolute assignment authority over the CNAs, but rather had to consult the Director of Nursing for final approval on numerous issues. While nurses could make requests of CNAs, such as asking them to stay late, they were not authorized to compel these actions. For that reason the Board concluded that these charge nurses did not have authority to “assign” tasks to the CNAs.<sup>141</sup>

¶49 The Board then turned to the question of whether the charge nurses “responsibly direct[ed]” the CNAs.<sup>142</sup> *Oakwood* defined “responsibly direct” as delegating or overseeing a task while remaining accountable for its completion.<sup>143</sup> The NLRB did find that the charge nurses directed the actions of the CNAs because they provided oversight and took corrective measures if an error was perceived.<sup>144</sup> However, the Board was not convinced that the charge nurses were accountable for the performance of the CNAs. The Board required actual evidence that failure to properly direct the actions of a staff person would result in adverse consequences for the charge nurse.<sup>145</sup> Even giving direct oversight and reports to the administrative staff were not sufficient to show accountability in the absence of evidence that adverse actions had been undertaken.<sup>146</sup>

¶50 *Croft Metals* gives important insight into the meaning of “independent judgment” as well as how this standard can be applied to fields outside of healthcare. At issue in *Croft Metals* was the supervisory status of lead persons in an aluminum and vinyl door and window manufacturing plant.<sup>147</sup> While the lead person is ostensibly the person in charge of a crew of people on a manufacturing line, nearly all the decision making comes from above, including decisions related to work schedules, employee replacement, overtime, hiring, and firing.<sup>148</sup> Because all of these directives came from higher management, lead persons did not “assign” the employees as defined in *Oakwood*.<sup>149</sup> The employer did, however, establish that lead persons “responsibly direct” employees because they manage and instruct employees in order to meet specific goals set out by management. The employer can point to situations in which employees have been held accountable for mistakes and shortcomings of employees.<sup>150</sup> However, the employer was still unable to show that the employees should be classified as supervisors because it failed to demonstrate that the employees exercised “independent judgment.” The NLRB was concerned with the level of discretion exercised by the lead person. The facts in *Croft Metals* indicated that the employer mandates how tasks should be accomplished. For example, while the lead person oversees truck loading, management provides specific instructions for how each truck should be loaded. Because he or she does not exercise independent discretion, the Board did not believe that the lead person’s duties rise above the level of routine or clerical.<sup>151</sup>

---

<sup>141</sup> *Id.* at 6.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 5.

<sup>145</sup> *Id.* at 10.

<sup>146</sup> *Id.*

<sup>147</sup> *Croft Metals, Inc.*, 348 N.L.R.B. 38 (2006).

<sup>148</sup> *Id.* at 2-4.

<sup>149</sup> *Id.* at 5-6.

<sup>150</sup> *Id.* at 8.

<sup>151</sup> *Id.*

¶51 In the *Oakwood Healthcare* trio, the Board allowed most of the employees to remain in their bargaining units; however, the standard used by the Board still deals a blow to nursing unions. The decision in *Oakwood* provides a description of precisely how a hospital should staff charge nurses to qualify them as supervisors under the Act: set routine charge nurse shifts for at least ten percent of a nurses' work week for as many nurses in the facility as possible. Fortunately, the outcomes in *Golden Crest* and *Croft* indicate that these rules will be strictly construed to ensure that "supervisors" encompass only those who exercise genuine discretion and accountability.

#### VI. PUBLIC RESPONSE TO THE *OAKWOOD* DECISIONS

¶52 With so many interested parties eagerly anticipating the 2006 NLRB response to the Supreme Court's *Kentucky River* holding, the initial public response was predictably varied. The *Oakwood* decisions have been characterized, among other things, as "ruthless,"<sup>152</sup> a violation of "the principles of freedom,"<sup>153</sup> "horrendous,"<sup>154</sup> a denial of long-standing rights,<sup>155</sup> "not . . . as far as business had wanted,"<sup>156</sup> and a "seismic" shift.<sup>157</sup>

¶53 As would be expected, nurses and nursing groups promptly renounced the decision. The day that the *Oakwood* decision was released, the ANA issued a press release, stating: "Registered nurses face rampant under-staffing of their nursing units, the use of untrained floaters, and mandatory overtime. Limiting employees' rights will not foster the atmosphere in which healthcare delivery issues can be effectively addressed."<sup>158</sup> Unions that represent other trade groups were also disheartened by the decision because of its potential impact on other trades, including construction, broadcast, energy, shipping, and accounting.<sup>159</sup> AFL-CIO President John Sweeney saw the new approach as "the latest in the Bush-appointed NLRB's legal maneuvering to deny as many workers as possible their basic right to have a voice on the job and improve their living standards through their union."<sup>160</sup> Even Human Rights Watch issued a vehement denunciation of the decision, warning that it "set[] the stage for destroying the rights of millions of workers to form and join trade unions and to bargain collectively" and "violate[d] the principles of freedom of association as established in international law."<sup>161</sup>

<sup>152</sup> Press Release, House Democratic Leader Nancy Pelosi, NLRB Rulings Are a "Ruthless Attack on American Workers" (Oct. 5, 2006) (on file with author).

<sup>153</sup> Letter from Jamie Feller, Dir. of U.S. Program, Human Rights Watch, to Robert J. Battista, Chairman, NLRB, Human Rights Watch Expresses Deep Concern about Recent U.S. National Labor Relations Board "Supervisor" Ruling (Oct. 23, 2006), <http://hrw.org/english/docs/2006/10/23/usdom14430.htm>.

<sup>154</sup> Kris Maher, *Labor Board Eases Supervisor Rule—Decisions Could Give Firms Sway to Keep More Workers from Entering Union Ranks*, WALL ST. J., Oct. 4, 2006, at A8.

<sup>155</sup> Takos, *supra* note 1.

<sup>156</sup> Steven Greenhouse, *Labor Board Broadens Definition of Supervisors*, N.Y. TIMES, Oct. 4, 2006, at A16 (quoting Steve Bokas, General Counsel, U.S. Chamber of Commerce).

<sup>157</sup> *Id.* (quoting William B. Gould, IV, NLRB Chairman under Clinton).

<sup>158</sup> Press Release, Am. Nurses Ass'n, ANA Rejects NLRB Decision to Block Nurses' Freedom to Unionize (Oct. 3, 2006), <http://nursingworld.org/FunctionalMenuCategories/MediaResources/PressReleases/2006/PR1003068567.aspx>.

<sup>159</sup> Ross Eisenbrey & Lawrence Mishel, Econ. Pol'y Inst., *Supervisor in Name Only: Union Rights of Eight Million Workers at Stake in Labor Board Ruling*, Issue Brief No. 225 (July 2006), at 1, <http://www.epinet.org/issuebriefs/225/ib225.pdf> (last visited Jan. 13, 2008).

<sup>160</sup> Sean Lengell, *NLRB Decision Angers Unions: Labor: Rules Exclude Millions*, WASH. TIMES, Oct. 4, 2006, at C8 (quoting John Sweeney, President, AFL-CIO).

<sup>161</sup> Feller, *supra* note 153.

¶54 Big businesses, on the other hand, lamented that, while the standard is clear, they would have preferred if all of the individual workers in the cases had been found to be supervisors.<sup>162</sup> One lukewarm supporter of the decision, Steven Bokart, general counsel for the United States Chamber of Commerce, said that “estimates that millions of workers would be exempted from union coverage were ‘outrageous numbers.’”<sup>163</sup>

¶55 Political leaders also weighed in on the decisions. Representative Nancy Pelosi, who has since assumed the role of Speaker of the United States House of Representatives, called the rulings “a ruthless attack on American workers,” and noted “in an economy where wages are down and the incomes of middle-class families have declined for five straight years, the Bush Administration continues to work to undermine hard-working Americans.”<sup>164</sup> Democratic Senator Harry Reid, now the United States Senate Majority Leader, was similarly angered by the decisions and, in a pre-2006-election day comment, expressed hope that the Democrats would gain a majority in Congress so that the damage could be reversed.<sup>165</sup> Senator Edward Kennedy likened the NLRB decision to “rubbing salt into the wound” of hard working American families. “It’s an unfair decision,” he said, “and if it’s not revised on appeal, Congress should step in and restore these important protections.”<sup>166</sup>

¶56 Less than six months after the NLRB stated the new standard, and armed with a new Democratic majority in Congress, lawmakers made good on their promises to address the situation. The proposed legislation, entitled the Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers (RESPECT) Act,<sup>167</sup> is intended to directly nullify the impact of the *Oakwood* modifications to the interpretation of the word supervisor under the NLRA.

## VII. PROPOSED LEGISLATION

¶57 The RESPECT Act<sup>168</sup> has given hope to the labor community in the wake of the *Oakwood* decisions. The bill, introduced in the United States House of Representatives and the United States Senate on March 22, 2007,<sup>169</sup> and approved by the House Education and Labor Committee on September 19, 2007,<sup>170</sup> is intended to clarify the definition of the word “supervisor” in subchapter two of the National Labor Relations Act.<sup>171</sup> If the

<sup>162</sup> Press Release, U.S. Chamber of Commerce, National Chamber Litigation Center Applauds Ruling Clarifying Supervisor Standard (Oct. 4, 2006), <http://www.uschamber.com/press/releases/2006/october/06-160.htm> (last visited Jan. 13, 2008) (quoting Steven Bokart, Executive Vice President, Nat’l Chamber Litig. Ctr.).

<sup>163</sup> Greenhouse, *supra* note 156, at A16.

<sup>164</sup> Pelosi, *supra* note 152.

<sup>165</sup> Leigh Tyson & W. Jonathan Martin, II, *NLRB Clarifies When an Employee is a “Supervisor,”* CLIENT BULL. (Constangy, Brooks & Smith, LLC, Atlanta, Ga.), Oct. 6, 2006, [http://www.constangy.com/publication/EB\\_366.html](http://www.constangy.com/publication/EB_366.html) (last visited Jan. 13, 2008).

<sup>166</sup> Takos, *supra* note 1.

<sup>167</sup> Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers Act, H.R. 1644, 110th Cong. (2007), S. 969, 110th Cong. (2007).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> The House Education and Labor Committee passed the legislation by a twenty-six to twenty vote. *Rep. Andrews Ensures that Workers’ Bargaining Rights Made Clear in Legislation Passed by House Labor Committee*, Sept. 20, 2007, [http://www.house.gov/list/hearing/nj01\\_andrews/respect.html](http://www.house.gov/list/hearing/nj01_andrews/respect.html) (last visited Jan. 13, 2008).

<sup>171</sup> 29 U.S.C. 152 (11) (2000).

proposed bill passes, it will add to the definition the phrase “and for a majority of the individual’s worktime” after the phrase “interest of the employer” and strike from the definition “assign” and “or responsibly to direct them.”<sup>172</sup> The bill, which is still in the early stages of the legislative process, will likely have difficulty overcoming a Republican filibuster and a Presidential veto.

#### VIII. REACTIONS TO THE PROPOSED LEGISLATION

¶58 As with the September 2006 NLRB decisions, the proposed bill has been the subject of strong responses from both supporters and opponents. The American Nurses Association commended the sponsors of the proposed Act for putting forth legislation that “will serve to protect the safety and well being of both registered nurses and their patients.”<sup>173</sup> Connecticut Senator Christopher Dodd, the author of the bill, called the Act “a critical and commonsense step to help protect rights.”<sup>174</sup>

¶59 Taking the opposite stance, the *Washington Times* described the amendment as “a payoff to the Democratic Party’s patrons at the AFL-CIO and Service Employees International Union”<sup>175</sup> that overcorrects the *Oakwood* outcome and will “strip[] the management of companies of an unknown number of foremen, shift supervisors and go-betweens who until now could not be unionized.”<sup>176</sup> Michael Eastman, Director of Labor Policy at the U.S. Chamber of Commerce, called Congress’s actions “reactionary” and wished for “a more measured approach.”<sup>177</sup> In a hearing before the Subcommittee on Health, Employment, Labor and Pensions of the House Committee on Education and Labor, G. Roger King, a partner at Jones Day law firm, testified in opposition to the legislation on behalf of the U.S. Chamber of Commerce, the HR Policy Association, and The Society for Human Resource Management. He contended that the RESPECT Act, if implemented, “would seriously damage the important equilibrium established in Section 2(11) of the [Taft-Hartley] Act in determining who is and who is not a part of management.”<sup>178</sup>

¶60 Certainly, new legislation that clarifies the existing language would be the most effective and definitive way to bring a close to this seemingly perpetual saga of interpreting the ambiguous definition of supervisor. The powerful responses show that each side has a lot at stake in this debate and the amendment will likely not slip unnoticed through Congress.

<sup>172</sup> Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers Act, H.R. 1644, 110th Cong. (2007), S. 969, 110th Cong. (2007).

<sup>173</sup> Press Release, Am. Nurses Ass’n, ANA Statement on H.R. 1644/S. 969: The Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers (Respect) Act (Mar. 27, 2007), <http://www.medicalnewstoday.com/articles/66311.php> (last visited Jan. 13, 2008).

<sup>174</sup> Press Release, Senator Christopher Dodd, RESPECT Act Would Amend the Definition of “Supervisor” under the NLRA (Mar. 23, 2007), <http://dodd.senate.gov/index.php?q=node/3796> (last visited Jan. 13, 2008).

<sup>175</sup> Editorial, *No Proper RESPECT*, WASH. TIMES, Sept. 7, 2007, at A20.

<sup>176</sup> *Id.*

<sup>177</sup> Mark Schoeff, Jr., *Democrats Seek to Overturn Labor Rulings*, WORKFORCE MGMT., June 25, 2007, at 10.

<sup>178</sup> *Classification of Employees: Hearing on H.R. 1644 Before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. on Education and Labor*, 110th Cong. (2007) (statement of G. Roger King, Partner, Jones Day law firm).

## IX. THE POTENTIAL IMPACT

¶61 If the RESPECT Act fails to pass, the impact on nurses of the NLRB's narrowed definition of supervisor could be significant. Remarkably, in the year that has elapsed since *Oakwood* was issued, there have been few visible impacts on nursing unions. This may be because some unions have successfully bargained for contracts to preserve their right to unionize.<sup>179</sup> On the other hand, in one recent regional NLRB hearing, the NLRB denied the right to unionize for sixty-four out of eighty-eight nurses in the case.<sup>180</sup> Following *Oakwood*, the regional director found all the nurses who worked regularly as charge nurses to be supervisors. While the impacts have been minimal so far, this is a situation where the full effect of the new legal interpretation will not be apparent for a number of years. As more collective bargaining contracts expire, as new union organizing efforts are launched, as new bargaining units are determined, and existing units are challenged, the impact of the standard on nurses' ability to unionize will become clear. The ultimate effect will depend on (1) how hospitals respond, (2) how nurses respond, (3) how courts respond, and perhaps most importantly, (4) how Congress responds.

A. *The Numbers*

¶62 The exact impact that the *Oakwood* supervisor standard will have on the unionization of nurses is difficult to predict because nurse staffing is different in every facility. Should employers choose to use the new supervisor test to their advantage, the impact on nurse unionization could be significant. In advance of the NLRB decision, the Economic Policy Institute (EPI) made predictions about its potential ramifications. Their study indicated that the broadened definition of supervisor advocated for by employers could strip bargaining rights from eight million American workers across multiple industries.<sup>181</sup> According to EPI estimates, 34.8% of registered nurses have significant supervisory duties associated with their regular duties.<sup>182</sup>

¶63 According to the study, 843,000 registered nurses nationally may now be deprived of their right to bargain.<sup>183</sup> This figure includes both those currently unionized and those non-unionized nurses who previously possessed a right to organize. Currently, 19.5% of nurses are unionized.<sup>184</sup> It follows from those figures that 164,385 charge nurses could be stripped of their bargaining rights if hospitals and health facilities respond as expected. In Illinois alone, 35,673 nurses have been affected, including 6,956 nurses who were already unionized.<sup>185</sup> Nurses can rest assured that they cannot be removed from a union if

<sup>179</sup> Mass. Nurses Ass'n, *supra* note 76; United Nurses Ass'n of Cal., *supra* note 82.

<sup>180</sup> Salt Lake Reg'l Med. Ctr., Inc., N.L.R.B. Reg'l Decision, No. 27-RC-8157 (Feb. 20, 2007), *available at* [http://www.nlr.gov/shared\\_files/Regional%20Decisions/2007/27-RC-8157%202-20-07.pdf](http://www.nlr.gov/shared_files/Regional%20Decisions/2007/27-RC-8157%202-20-07.pdf) (last visited Jan. 13, 2008).

<sup>181</sup> Eisenbrey & Mishel, *supra* note 159, at 1.

<sup>182</sup> *Id.* at 2. This number was drawn from information collected by the Bureau of Labor Statistics related to occupational responsibilities. This category of worker is defined as follows: "Incumbent sets the pace of work for the group and shows other workers in the group how to perform assigned tasks. Commonly performs the same work as the group, in addition to lead duties. Can also be called group leader, team leader, or lead worker." *Id.* at 3.

<sup>183</sup> *Id.* at 2.

<sup>184</sup> UAN Publ'n, *supra* note 74.

<sup>185</sup> Econ. Pol'y Inst., *The Potential Impact of NLRB's Supervisor Cases, A State-by-State Analysis*, Policy

they have an existing collective bargaining agreement in effect. However, once existing contracts expire, employers have no obligation to bargain with “supervisor” nurses.

¶164 The raw numbers paint a bleak picture for the future of nurses’ right to unionize. With over one third of the workforce potentially removed from the bargaining table, the ability to organize a bargaining unit, as well as the power of the group, once organized, could be dramatically compromised.

### B. The Hospital

¶165 The *Oakwood* decisions provide a roadmap for a health facility to structure its staffing procedures in a way that specifically limits unionization. Nurse groups have expressed concern, and employer groups pleasure, at the fact that the ruling expresses a “clear test of supervisory authority”<sup>186</sup> and allows for nurses’ “authority and responsibility” to be “spelled out in advance, by the employer.”<sup>187</sup> The General Counsel for the AFL-CIO lamented that it is “an invitation for employers to manipulate job duties.”<sup>188</sup> As an indication that this is the approach hospitals may take, the law firm Gardner Carton & Douglas LLP, now known as Drinker Biddle, issued a memorandum recommending that its health facility clients modify their staffing procedures in order to classify more nurses as supervisors.<sup>189</sup>

¶166 That said, the recent ability of some unions to negotiate around the new definition is encouraging.<sup>190</sup> Their success indicates that many hospitals with existing unions may wisely opt not to manipulate their nurse staffing in order to exclude currently unionized nurses from unions. Non-unionized hospitals, on the other hand, may have less hesitation about re-crafting their employment policies to prevent charge nurses from ever having the option to join union organizing campaigns.

¶167 With the knowledge of what it means to “assign” and “responsibly direct” using “independent judgment,” a hospital seeking to limit the number of employees covered in a bargaining unit can implement the following measures to ensure that the maximum number of their nurses are classified as supervisors:

- (1) Revise the job description of the charge nurse to include language that grants charge nurses high levels of discretion and decision-making authority on issues such as staffing, scheduling, making patient care assignments, and taking disciplinary action.

---

Memorandum No. 115 (Sept. 2006), <http://www.epi.org/content.cfm/pm115> (last visited Jan. 13, 2008).

<sup>186</sup> Lengell, *supra* note 160, at C8 (quoting Martin Payson, a New York lawyer with Jackson Lewis law firm).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *NLRB Issues Long-Awaited Decisions Impacting Supervisory Status of Registered Nurses*, Gardner Carton & Douglas LLP: Client Memorandum, Oct. 2006, <http://www.ons.org/lac/pdf/correspondence/109/100106OakwoodHealthcare.pdf> (last visited Jan. 13, 2008) (“In light of this decision, healthcare employers will want to adapt their job descriptions, policies, and practices to better protect the supervisory status of key job classifications. . . . Healthcare employers should review policies and practices for assigning charge nurse responsibilities on a particular unit, either designating fulltime charge nurses or creating policies establishing a pattern of rotation. Employers should also review their standards and policies regarding decision making authority of charge nurses.”).

<sup>190</sup> Mass. Nurses Ass’n, *supra* note 76; United Nurses Ass’n of Cal., *supra* note 82.

- (2) Review policies and procedures to ensure that they are not so specific as to mandate the actions taken by charge nurses in the course of their duties. For example, if the mandatory number and level of nurses to be assigned to a patient undergoing a particular procedure is pre-determined by hospital policy, that excuses the nurse from exercising “independent judgment.”
- (3) Implement a procedure whereby charge nurses will be held accountable for the poor performance of their subordinates. It is also important that this procedure be more than a mere formality. The Board requires proof that disciplinary action has actually been taken as a result of staff shortcomings.<sup>191</sup>
- (4) Revamp staffing procedures so that charge nurses are assigned to a patterned, regular schedule. Registered nurses need only serve as charge nurses for ten to fifteen percent of their work hours to be classified a “charge nurse.” A schedule that assigns each nurse one shift as charge nurse per week will ensure that a large number of nurses are labeled as supervisors, effectively removing them from the bargaining unit. Hospitals would also be well-advised to do away with full-time charge nurses entirely.<sup>192</sup> A full-time charge nurse might work five shifts per week in that role. A hospital could assign five different nurses to those shifts, creating four more supervisory roles. Using this approach, a health facility could arrange a system whereby a large percentage of its nursing staff works a sufficient amount of time to qualify as a supervisor.

¶168 While the consensus seems to be that the power is in the hands of the employers to craft their employment policies, employers who believe that preventing bargaining is a good idea should first consider the fact that they may alienate their workforce. As some hospitals seem to have recognized,<sup>193</sup> an employer who modifies policies in order to create more supervisors risks souring employer-employee relationships. Healthcare facilities will be faced with the difficult decision of weighing their immediate economic considerations against the well-being and potential productivity of their workforce. This consideration is especially important given that the research discussed in Part Three indicates that the financial burden imposed on the hospital by the nursing union could well be minimal or nothing at all. One report contends: “Hospitals that choose to follow a ‘high-road’ approach to nurse employment enjoy significant benefits.”<sup>194</sup> With employers desperate to retain quality nurses, the costs of blocking unionization might outweigh the benefits.

¶169 Trying to limit the bargaining unit to exclude charge nurses could be costly for employers given that they have to initiate the challenge to an existing unit and potentially engage in litigation. Each bargaining unit will be assessed by the NLRB on a case-by-case basis and there is always the risk that the employer will not meet its burden of proof.

¶170 Furthermore, hospital reputations could suffer if they assume an adversarial stance toward their nurses. Hospitals that have good relationships with their nursing staff can

<sup>191</sup> Beverly Enters-Minn., 348 N.L.R.B. 39, at 5 (2006).

<sup>192</sup> This is strictly from the perspective of blocking bargaining rights. There is a possibility that this move could have a negative impact on patient care.

<sup>193</sup> Mass. Nurses Ass’n, *supra* note 76; United Nurses Ass’n of Cal., *supra* note 82.

<sup>194</sup> LOVELL, *supra* note 3, at 7.

earn praise and prestige, including the highly coveted Magnet Award for excellence in nursing. Further, as mentioned earlier, patients' experiences at a hospital are frequently shaped by the quality of the nursing care they receive. Fostering animosity may not be the prudent approach in today's healthcare climate. Hospitals would be well advised to carefully consider how they choose to act upon the new definition.

### C. *The Nurses*

¶71 While nurses' clout has been weakened, they may still have enough of a voice to combat the anti-labor *Oakbrook* standard. Nurses have an uphill battle if they wish to retain their rights, but early bargaining victories that prevent hospitals from challenging the status of already unionized nurses show that nurses have the ability to soften the impact.<sup>195</sup> In addition to explicitly contracting for union protections, nurses, as the largest employee group in a hospital, should use their numbers to influence hospital staffing policies. They can advocate three specific modifications to hospital policy if they wish to preserve their right to unionize. However, if they choose to do so, they will have to make some professional concessions.

¶72 First, nurses should encourage hospitals to create written job descriptions for staff nurses and charge nurses that downplay the level of discretion. A job in which a nurse has to turn to his or her administrative supervisor for final approval does not qualify under the new "supervisor" definition.<sup>196</sup>

¶73 Second, in the same vein of eliminating discretion, nurses can work with administrators to create very specific "best practice" hospital policies that mandate how a nurse should provide treatment and make work assignments in nearly every situation. While most decisions of this nature are more or less already mandated by responsible medical practice, putting them in writing would remove any sign of discretion. These policies would then serve to limit the amount of decision-making authority held by nurses. Just as the lead person in *Croft* did not use "independent judgment" when following specific employer instructions while overseeing truck loading, nurses would not use "independent judgment" when following hospital-mandated best practices.

¶74 Third, nurses can avoid being classified as full-time charge nurses by requesting a hospital policy that creates irregular staffing patterns. In *Oakwood*, nurses were not defined as charge nurses where they selected their own schedules or were irregularly assigned the role of charge nurse.

¶75 While it may sound counterproductive to limit one's opportunity for advancement through bargaining, there are several reasons why both nursing unions and charge nurses might be willing to make these concessions in order to retain their union status. For example, the unions support charge nurses because the experienced charge nurse vote may be crucial to unionizing and effective bargaining by the union. Charge nurses improve both the voting numbers and the wage and skill mix of the unit, thus strengthening the unit's bargaining power. Additionally, the experienced nurses might concede to such an arrangement because their absence from the unit could threaten the power and existence of the union. If the union fails, the whole nursing staff's wages could suffer. According to the decision in *Oakwood*, charge nurses earn only \$1.50 more

<sup>195</sup> Maher, *supra* note 81, at A2.

<sup>196</sup> *Beverly Enters-Minn.*, 348 N.L.R.B. 39.

per hour than staff nurses. Unionization, on average, results in almost three dollars more per hour for staff nurses. Using these figures, a charge nurse working in a non-unionized hospital would earn almost \$1.50 less per hour than a staff nurse in a unionized hospital. Thus, the incentive to continue to unionize and to preserve existing union membership is strong.

¶76 These negotiations to modify hospital policy to preserve the employee status of staff nurses are likely to be more successful in currently unionized facilities. Even prior to the *Oakwood* decision, bringing a union into a hospital was not an easy task. Now the potential for a hospital to halt an organizing effort may be even greater. Stalling is one of the most effective tactics available to an employer to prevent an organizing effort.<sup>197</sup> A health facility that has the ability to prevent a quick vote has time to reduce enthusiasm among the nursing staff, cool emotions, and educate on the downside of unionizing. John Hiatt, General Counsel for the AFL-CIO, predicts that “every case now where an employer wants to drag it out for three years in the courts will be able to do so.”<sup>198</sup> Further, as mentioned above, charge nurses, as more senior persons at the hospital, may be the most likely to initiate the union campaign.<sup>199</sup> If charge nurses feel they will ultimately be excluded from the unit, they will not waste their efforts organizing employees.

#### D. The Courts

¶77 In the trio of *Oakwood* decisions issued in October of 2006, the modified interpretation of the word “supervisor” under the NLRA was applied to two professions, charge nurses, and metal workers. It will be left to the courts to determine how the definition will be applied to other professions and other roles within the healthcare industry. In the case of nurses, the NLRB analyzed only the role of the charge nurse. Employers now have explicit instructions from the NLRB on how to demonstrate the supervisory capacity of their employees: if they can establish either that their employees assign or responsibly direct using independent judgment, employers can eliminate other occupations from collective bargaining units.

¶78 There remains the possibility that even more nurses could be prohibited from unionizing. The duties performed by registered nurses during the course of a regular shift were not evaluated in the NLRB decision. Discussing the new NLRB interpretation, Democratic Senator Barbara Boxer said: “By this logic, almost anyone who works with an assistant, or who in any way oversees another employee’s work, can be considered a supervisor.”<sup>200</sup> During the course of a shift, even a staff nurse might have responsibility to oversee the performance of orderlies and nursing assistants in an effort to ensure satisfactory patient care. If they can be held accountable for those oversight responsibilities, an employer may argue that ordinary staff nurses have prerogatives in line with their hospital employers.

---

<sup>197</sup> Velinda Block, *Running a Successful Campaign Against Unionization*, 35 J. NURSING ADMIN. 23, 29 (2005).

<sup>198</sup> Lengell, *supra* note 160.

<sup>199</sup> Tyson & Martin, *supra* note 165.

<sup>200</sup> Barbara Boxer, Boxer Updates: RESPECT for Workers’ Rights, Aug. 13, 2007, <http://boxer.senate.gov/news/outreach/2007/08/respect.cfm> (last visited Jan. 13, 2008).

### *E. Congress—The RESPECT Act*

¶79 Of the four groups that dictate the impact of the decision, lawmakers have the most power to craft an equitable, long-term solution. Commendably, sponsors of the RESPECT bill in the United States House of Representatives and the Senate have already taken steps to do so by proposing the Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers Act. The RESPECT Act is intended to amend the National Labor Relations Act to create a more precise definition of the word “supervisor” and one that is in line with original Congressional intent.

¶80 A look at the legislative history behind the National Labor Relations Act shows that the NLRB and the Supreme Court have strayed from the original meaning of the word “supervisor,” and Congress has taken appropriate steps by attempting to return to the original meaning. A close look at the responsibilities of nurses indicates that the bill properly addresses the needs of nurses as well as rectifies the anomalies created under the present understanding of the word “supervisor.”

#### 1. Legislative Intent Behind the Supervisor Definition

¶81 This is not the first time that the word “supervisor” has been the subject of legislative amendment. In 1974, in response to a Supreme Court ruling that held that supervisors should be considered employees under section 2(3) of the NLRA,<sup>201</sup> Congress wrote in a specific exception that supervisors not be included among the definition of employees who are granted protection under the Act.<sup>202</sup> Congress objected to the sweeping allowance created by the Supreme Court ruling that placed bargaining rights in the hands of employees “traditionally regarded as part of management” and who owed “undivided loyalty” to their employers.<sup>203</sup> Recent Democratic outcry in response to the broadening of the interpretation of supervisor and a review of the legislative record indicate that the courts and the NLRB have again deviated from the initial intent behind the Act, this time taking an over-inclusive approach to the word “supervisor.”

¶82 The 1947 Senate Report provides insight into the congressional intent behind the addition of the supervisor distinction to the NLRA:

In drawing an amendment to meet this situation, the committee has not been unmindful of the fact that *certain employees with minor supervisory duties have problems which may justify their inclusion in that act*. It therefore distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such *genuine management prerogatives* as the right to hire or fire, discipline, or make effective recommendations with respect to such action.<sup>204</sup>

<sup>201</sup> Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947).

<sup>202</sup> 29 U.S.C. § 152(3) (1947).

<sup>203</sup> S. Rep. No. 105, at 4 (1947).

<sup>204</sup> *Id.* (emphasis added).

¶83 The Report also takes note of a case in which “group leaders with authority to give out instructions and lay out work” were appropriately categorized as employees. This description sounds remarkably like the role of a charge nurse.<sup>205</sup>

¶84 The Senate Report clearly states that “leadmen” are not to be grouped in the category of “supervisor.” However, it was a lead person in *Croft* who very narrowly escaped having his employee classification stripped. The fact that the NLRB grappled with the decision when congressional intent on the proper classification of lead persons was so clear indicates a deviation from the intent of the statute. In September 2006, the nursing profession became an unfortunate victim of the diverging interpretations.

¶85 It is difficult to imagine how nurses who are engaged in a service industry, who have no real opportunity for advancement in the clinical setting, and who are merely utilizing their professional training to ensure quality patient care, have been placed in the same category as foremen and upper management. The grievances expressed by nurses in the context of the nursing shortage—low wages, mandatory overtime, insufficient staffing, and unhealthy work environments highlight how little authority nurses actually have within the hospital. Nurses have almost no say in management decisions within their healthcare organizations, so it seems inconsistent to label them as management.

¶86 It is particularly difficult to connect those nurses who spend only ten to fifteen percent of their time working as charge nurses to management. A nurse who works a standard forty-hour work week could work as a charge nurse for a mere four hours per week and lose his or her ability to be called an employee and right to unionize. Using the figure from *Oakwood*, charge nurses make only \$1.50 more per hour than staff nurses. It follows that a nurse who serves as a charge nurse for ten percent of her time during a forty-hour week would only make six extra dollars that week in her capacity as a charge nurse. The small difference certainly cannot be enough to tie that nurse to the “prerogatives of management.”<sup>206</sup> This is especially true given that she spends thirty-six hours of the week as a regular staff nurse.

¶87 After a decade of debate, the NLRB, with the assistance of the Supreme Court, has arrived at an illogical standard for determining which workers are “supervisors” under the NLRA that is not in line with the original goal behind distinguishing supervisors from employees. Congress has appropriately and commendably moved quickly to revise and clarify the definition of the word “supervisor.”

## 2. The Proposed Language

¶88 The RESPECT bill should be applauded by the nursing profession as a prompt and succinct response to the *Oakwood* saga that will protect the rights of nurses to unionize.<sup>207</sup> The supervisor definition under the proposed language would read as follows:

---

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> An analysis of the proposed language as it applies to industries and trades other than nursing is beyond the scope of this paper. The amended definition may have additional, more dramatic impacts on other professions and, as critics have suggested, upset the balance of power between managers and employees. Suffice it to say, drawing the line precisely at fifty percent of an employees’ work time may not be an appropriate distinction across industries. For example, G. Roger King, a partner at Jones Day law firm, warned that the Act would be particularly harmful to small and medium size businesses that depend on their senior level workers to perform a cross-section of tasks. *Classification of Employees: Hearing on H.R. 1644 Before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. on*

The term “supervisor” means any individual having authority, in the interest of the employer and for a majority of the individual’s worktime, to hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees, 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.<sup>208</sup>

¶89 Applying the new standard to the healthcare setting, and the nursing profession in particular, seems to correct the wrongs created by *Oakwood*. Eliminating the tasks of “assign” and “responsibly to direct” from the definition ensures that only truly significant employment tasks and responsibilities remain on the list. The charge nurse is assigned the role of overseeing the coordination of care at the bedside based on experience and education, not based on management prerogatives. Charge nurses, whether full-time or part-time, do not generally make significant employment decisions such as hiring, firing, and promoting. Those decisions are left to those with genuine management prerogatives who are properly categorized as supervisors. Further, because the amendment was proposed as a direct response to the NLRB’s attempt to classify charge nurses as supervisors, there can be no doubt that Congress intends for charge nurses to remain employees under the NLRA, should the bill successfully pass through Congress.

¶90 Unfortunately, earlier this year, Republicans in the Senate demonstrated a willingness to block pro-labor bills from becoming law. The Democrat-sponsored Employee Free Choice Act,<sup>209</sup> which, among other things, aimed at making it easier for workers to choose whether to join a union, was passed in the House of Representatives before being filibustered in June by Republicans in the Senate. With a Republican filibuster and a Presidential veto also available to block the RESPECT Act, it may not succeed this year. However, lawmakers should be persistent in their efforts to push through an amendment to the NLRA. As 2008 is an election year, 2009 could prove to be a more opportune year for change.

## X. CONCLUSION

¶91 The immediate impact of the *Oakwood* standard will depend on how hospitals, nurses, courts, and lawmakers respond. Should hospitals choose to take advantage of the decisions by restructuring their policies, it will become very difficult for nurses to organize or to remain unionized. As a result of *Oakwood*, hospitals now have the ability to significantly limit the number of nurses who may be included in the bargaining unit. If nurses continue to take an aggressive approach to retaining their status as employees, they may be able to slow the erosion of their bargaining rights. However, nurses who choose to initiate a unionizing campaign may have less success getting charge nurses into the union, as the law is currently on the side of the hospital. There is only one case so far that informs us how courts may respond to the new interpretation. Unfortunately, that

---

*Education and Labor*, 110th Cong. (2007) (statement of G. Roger King, Partner, Jones Day Law Firm).

<sup>208</sup> Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers Act, H.R. 1644, 110th Cong. (2007), S. 969, 110th Cong. (2007).

<sup>209</sup> Employee Free Choice Act, H.R. 1696, 110th Cong. (2007), S. 1041, 110th Cong. (2007).

case led to the exclusion of sixty-four charge nurses from a bargaining unit.<sup>210</sup> Finally, legislators have the power to turn the tide through an amendment to the Act and have admirably assumed that responsibility.

¶92

Considering the small percentage of nurses who are currently unionized, the *Oakwood* standard might not significantly worsen nurse staffing woes. Discontent, attrition, and burnout are already widespread.<sup>211</sup> Limiting unionization is not likely to dramatically worsen the situation. It will, however, take one potential solution—which has proved effective at increasing wages, improving recruitment and retention,<sup>212</sup> causing better patient outcomes, and better overall morale—off the table at a time when it is critical that the nation support nurses rather than limit their opportunities.

---

<sup>210</sup> Salt Lake Reg'l Med. Ctr., Inc., N.L.R.B. Reg'l Decision, No. 27-RC-8157 (Feb. 20, 2007), *available at* [http://www.nlr.gov/shared\\_files/Regional%20Decisions/2007/27-RC-8157%202-20-07.pdf](http://www.nlr.gov/shared_files/Regional%20Decisions/2007/27-RC-8157%202-20-07.pdf) (last visited Jan. 13, 2008).

<sup>211</sup> See Am. Ass'n of Colleges of Nursing, *supra* note 29.

<sup>212</sup> See LOVELL, *supra* note 3.