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A Smack on the Chin or a Nibble? Content Analysis of the Impact of the Oakwood Trilogy

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INTRODUCTION

John Steinbeck’s protagonist in his Depression Era novel, *In Dubious Battle,* portrayed the struggles and humanity of labor organizers in central California. In response to a question about his motivation for joining a small group of strike organizers, Jim declared, “I don’t mind getting smacked on the chin. I just don’t want to get nibbled to death.” Jim personified labor’s frustration with management—a constant nibbling away at rights.

In September 2006, the National Labor Relations Board (NLRB) continued its ongoing discussion with the United States Supreme Court about the nature of a ‘supervisor’ under the National Labor Relations Act (NLRA). This decision, in fact a trio of decisions which has come to be known as the Oakwood trilogy, defined three important elements of a supervisor: independent judgment, the responsibility to direct work, and the authority to assign work to subordinates. The Oakwood trilogy generated intense criticism and commentary. This article attempts to ascertain the actual impact of these decisions generally, and in regards to the health care industry in particular. First, this article describes the history of both the NLRB and the importance of the status of supervisors in

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1 JOHN STEINBECK, IN DUBIOUS BATTLE (Random House 1936).
2 *Id.* at 39.
modern labor law. This discussion provides necessary background to the inquiry and provides a footing for proper understanding of the scope of the issues. Next, the article discusses and explains content analysis, a methodology seldom applied in legal scholarship, used in this article to analyze the actual impact of the trilogy in subsequent decisions at the local, regional, and national NLRB levels, and in the Federal Circuit Courts of Appeal. This analysis will demonstrate consistency in the Oakwood trilogy’s application. Part three posits action that health care organizations may use to attempt to thwart unionization campaigns. Also, it will discuss strategies labor organizers may take to ensure the success of union representation given the observed application of the Oakwood trilogy, particularly in the health care industry.

I. LABOR LAW AND THE NATIONAL LABOR RELATIONS BOARD

The field of labor law is not a modern phenomenon; employees have been in conflict with employers⁵ since the creation of civilizations.⁶ However, the past century has seen labor law’s maturation, at least in the United States.⁷ Generally, organized labor movements, worker protection campaigns, and unionization efforts are strongly correlated with modern industrialization.⁸ In the early part of the 19th century, attempts to create

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⁵ Historically, various, often culturally or economically charged, names have been given to employers: capitalists, management, landowners, bourgeoisies, etc. The author intends no distinction in the use of the term ‘employer’ or ‘management’ in this article and uses them synonymously.
⁶ See generally, STEVEN EPSTEIN, WAGE LABOR AND GUILDS IN MEDIEVAL EUROPE (Univ. of N.C. Press 1995) (discussing the rise of labor organizations and protection during medieval era); ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870 (Univ. of N.C. Press 2002) (describing the development of labor law and employment relations prior to 1870).
⁸ Id. at 2.
collective labor organizations were treated as criminal conspiracies.\(^9\) Between 1806 and 1842, members of labor and trade unions were convicted of criminal conspiracy in seventeen separate trials.\(^10\)

Not until *Commonwealth v. Hunt*\(^11\) did the U.S. courts began to recognize an affirmative legal right for employees to organize and collectively bargain for protection.\(^12\) In *Hunt*, the Court overruled the long-standing assumption that unionization activities were conspiratorial and illegal.\(^13\) This assumption was based largely upon the *Commonwealth v. Pullis* decision in 1806.\(^14\)

Labor’s conflict and sometimes violent clashes with employers in the United States were dynamically captured by the work of John Steinbeck.\(^15\) As labor law developed and grew, it assumed a greater, more established role in both the society and in the legal literature.\(^16\) The employee-employer tension, described in much of Steinbeck’s work, led to the codification of various federal laws. Congress’ first foray into labor law was the Norris-La Guardia Act of 1932.\(^17\) This act put a buffer between the courts and labor

\(^9\) *Id.* at 3.
\(^10\) *Id.*
\(^12\) *Witney*, supra note 7, at 2.
\(^13\) *Hunt*, supra note 11, at 4-5.
\(^15\) See generally *Steinbeck*, supra note 1; *John Steinbeck, The Grapes of Wrath* (Viking Press 1939); *John Steinbeck, Of Mice and Men* (Covici Friede Publisher 1937); *John Steinbeck, The Long Valley* (Penguin Press 1938).
\(^16\) See supra note 7, at 1-41 (tracing the development of labor relations in the United States through important court cases in the last 200 years).
\(^17\) Norris-LaGuardia Act (Labor Disputes Act) 29 USCA §§ 101-110 (1932) (among other things made “yellow dog” contracts (contracts including a covenant not to join a labor union as a condition so employment) unenforceable in federal courts.
disputes.\textsuperscript{18} The NLRA\textsuperscript{19} expanded on the Norris-La Guardia Act in 1935 and was passed to stop employer retaliation against labor and union organizers.\textsuperscript{20} It was intended to:

\textit{[P]romote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with [sic] the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.}\textsuperscript{21}

These were important first steps in legitimizing and formalizing both the rights of the employers and employees by “establishing a favorable legal climate for union growth and collective bargaining.”\textsuperscript{22}

The NLRA is the foundational labor law doctrine in the United States.\textsuperscript{23} Congress eventually passed significant changes and clarifications to the NLRA in 1947 in the Taft-Hartley Act.\textsuperscript{24} The Taft-Hartley Act placed significant restrictions on the ability to form labor and trade unions, and limited who could participate in the union.\textsuperscript{25} It also prohibited ‘superisors’ from participating in labor unions.\textsuperscript{26} The rationale was to avoid conflicts of interests that would arise if an individual’s job was to represent the management but they

\textsuperscript{18} \textit{W}ITNEY, \textit{supra} note 7, at 37.
\textsuperscript{19} NLRA, \textit{supra} note 3, at § 151.
\textsuperscript{20} \textit{W}ITNEY, \textit{supra} note 7, at 37.
\textsuperscript{21} NLRA, \textit{supra} note 3, at § 141(b).
\textsuperscript{22} \textit{W}ITNEY, \textit{Supra} note 7, at 37.
\textsuperscript{23} \textit{Id.} at 13.
\textsuperscript{26} \textit{Id.}
were included in a collective bargaining unit. The Act went further—it did not limit employers’ ability to terminate supervisors who engaged in union activities because supervisors had no protections under the Act. The NLRA also made a distinction between ‘supervisors’ and ‘professionals’ by allowing professionals to join unions under certain conditions. Interestingly, and problematically, the NLRA failed to define or provide a test for ‘supervisors.’ This lacuna, as this article will highlight, developed into a point of rancorous controversy and prolonged litigation.

The NLRA also created the National Labor Relations Board (NLRB). The NLRB was created as the sole agency charged with oversight of representation elections and adjudication of unionization disputes. The precise nature and scope of the NLRB’s power has been interpreted over time by the courts and the NLRB’s procedures are now fairly clear. For example, one aspect of the unionization process is to articulate a defined bargaining unit. A group desiring to join a union must be certified by a local NLRB office. Certification is granted when the local office officials are satisfied that composition of the bargaining unit complies with the NLRA. Supervisors are not permitted to be part of the unit and must be excluded. Employers may challenge the local

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28 NLRA, supra note 3, at § 152 (3) (excluding all workers covered by the Railway Labor Act, 45 U.S.C. § 151 from NLRA protection, including ‘supervisors’).
30 NLRA, supra note 3, at § 153 (a) (establishing the NLRB as the agency to administer the NLRA).
31 Wiesner, supra note 25, at 463.
32 See N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (establishing the constitutionality of the NLRA); Packard Motor Car Co. v. N.L.R.B. 330 U.S. 485 (1947), (giving full NLRA protection to supervisors); supra note 7, at 111-12.
33 See NLRA, supra note 3, at § 159.
34 Id. at § 159 (b).
35 Id. at § 153 (b).
36 Id.
determinations and appeal to the national NLRB. At the national level the NLRB may conduct another inquiry into the composition of the bargaining unit. If a party remains unsatisfied with the determination of the national NLRB, they have the right to appeal to federal district court. Once the dispute enters the federal district court system, all of the rights inherent in that system are applied—including the right to appeal up to the United States Supreme Court. This multi-level appeal system allows the NLRB and, ultimately, the United States Supreme Court to have somewhat of a dialogue about the interpretation of the NLRA. This is perhaps most obvious in the back-and-forth exchanges between the NLRB and the Supreme Court regarding the interpretation and test for ‘supervisors’.

A. SUPERVISORS

Perhaps the difficulty in defining supervisors lies in the various sources of interpretation. The NLRA states that a supervisor is:

[An] 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.

The Act seems to exclude all ‘supervisors’ as the term is generally defined. The NLRB has made several attempts at defining ‘supervisor,’ articulating definitions as varied as “[an] employee is considered to be in the unit [and protected by the NLRA] only to the

37 See NLRA, supra note 3, at § 159.
38 Id. at § 160.
39 Id. at § 160 (e).
40 Id.
42 NLRA, supra note 3, at § 152 (11).
extent that his interests as a nonsupervisory [sic] employee are involved,”

43 and that employees are supervisors if they are “so allied with management as to establish a differentiation between them and other employees in the unit.”

44 The Supreme Court has also ventured into the discussion with efforts such as “employees are considered ‘supervisors,’ and thus are not covered under the [NLRA], if they have authority, requiring the use of independent judgment, to engage in one of 12 listed activities and they hold the authority ‘in the interest of the employer,’”

45 and “employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their ‘exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,’ and (3) their authority is held ‘in the interest of the employer.’”

46 The issue is further complicated by ‘professional’ employees who may or may not also be ‘supervisors’.

47 In the health care setting, professional employees include certified nurse assistants (CNAs), licensed practical nurses (LPNs), and various certified technicians. Professional employees often direct or lead less-skilled employees, thus, acting as supervisors in certain situations.

48 Some commentators have argued that the Taft-Hartley Act established a hierarchy of “minor supervisory employees” and “bona fide supervisors.”

49 This distinction would allow professionals to be categorized as “minor supervisory employees,” enjoy the rights of unionization, and avoid much of the

43 Adelphi University, 195 N.L.R.B. 639, 644 (1972).
46 Kentucky River, supra note 41.
48 Id.
49 Weisner, supra note 25.
interpretive morass that has plagued the NLRB recently. However, neither the NLRB nor the federal courts have recognized such a tidy interpretation.

B. LABOR LAW IN THE HEALTH CARE INDUSTRY

Although originally protected, hospital employees were excluded from NLRA protection by a floor amendment to the 1947 Taft-Hartley Act. After that law was enacted, workers at non-profit hospitals, nurses, technicians, etc., lacked fundamental protections until 1974. Even after the NLRA was amended to protect hospital employees, strict requirements were placed on the worker’s ability to exercise their rights. For example, the 1974 amendment required that hospital workers provide ten days notice before engaging in strikes. These restrictions were imposed in an attempt to balance the needs of vulnerable patients who rely on prompt, expert care and the rights of the hospital’s workers. Despite these provisions, hospitals and health care management organizations feared a tidal wave of unionization campaigns. These fears turned out to be overblown, but statistics showed that when hospital workers attempted to unionize, they were more successful than the national average.

51 See Id. at 10.
52 Id.
53 Id.
55 Mulcahy, supra note 54, at 102, 114 (In 1978, nation-wide NLRB unionization elections were successful 48% of the time, but hospital elections had a 54% success rate).
on who may be part of the bargaining unit.\textsuperscript{56} The NLRB failed to articulate a clear
distinction between supervisors and non-supervisors in the health care industry.\textsuperscript{57} This is
partly due to the complex education and licensing requirements, flexible staff duties, and
unclear hierarchy inherent in the health care industry.

Nurses, as professional employees of hospitals and health care providers, are
catched in the center of the ‘supervisor status’ interpretation battle.\textsuperscript{58} Whether nurses are or
are not supervisors is befuddling. The NLRB and the U.S. Supreme Court have issued
conflicting explanations using the same interpretive theory. In 1994, ‘patient care analysis’
was applied to the nursing context.\textsuperscript{59} The NLRB determined that nurses were not
supervisors because they lacked the responsibility to oversee the work of less-skilled
employee and did not work “in the interest of the employer.”\textsuperscript{60} However, on appeal, the
U.S. Supreme Court held that nurses were supervisors and issued a stern warning to the
NLRB to not read the “in the interest of the employer”\textsuperscript{61} language in such a way that
stripped the “responsibility to direct”\textsuperscript{62} element of meaning and utility.\textsuperscript{63} Obviously, the
lack of a unified voice on the subject has left employers and employees, nurses in
particular, grasping at vague definitions.

In 2001, the Court again overturned a supervisory determination in the health care
setting.\textsuperscript{64} After the \textit{Health Care & Retirement Corp.} decision was reversed by the

\begin{itemize}
\item \textsuperscript{56} \textit{Compare} Physicians National House Staff Association v. Murphy, 1979 WL 4851 (D.C. Cir., 1979) \textit{with}
Cedars-Sinai Medical Center, 223 N.L.R.B. 251 (1976); \textit{see also} Methodist Hospital of Sacramento, 223
N.L.R.B. 1509 (1976); \textit{Stop and Shop Covipanics v. NLRB}, 548 F.2d 17 (1st Cir., 1977).
\item \textsuperscript{57} \textit{See} Mulcahy, \textit{supra} note 54, at 106-07.
\item \textsuperscript{58} \textit{Id}.
\item \textsuperscript{59} \textit{Health Care & Retirement Corp. of America}, \textit{supra} note 45.
\item \textsuperscript{60} \textit{NLRA}, \textit{supra} note 3; \textit{Wiesner, supra} note 25, at 472.
\item \textsuperscript{61} \textit{NLRA}, \textit{supra} note 3.
\item \textsuperscript{62} \textit{Id}.
\item \textsuperscript{63} Wiesner, \textit{supra} note 25, at 473.
\item \textsuperscript{64} \textit{Kentucky River}, \textit{supra} note 41.
\end{itemize}
Supreme Court, the NLRB posited a new supervisor test applied to nurses. In *Kentucky River*, the NLRB determined nurses to be employees and therefore under the protection of the NLRA. The NLRB placed a great degree of importance on the ‘independent judgment’ arm of the statutory definition. The U.S. Supreme Court could find no examples where the NLRB did not hold an employee to be a supervisor when analyzing their ‘independent judgment’. The board’s analysis in *Kentucky River*, was similarly rejected by the Supreme Court because it placed too much emphasis on the employee’s ‘independent judgment’ and failed to limit it in any recognizable manner.

The Supreme Court’s ruling in *Kentucky River* forced the NLRB to develop a test for supervisor status from square one. Perhaps out of frustration, perhaps out of a determination to not be thrice rebuffed by the High Court, the NLRB invited *amici* briefs on their next case regarding supervisory status of nurses, *Oakwood Health care*.

### C. THE *OAKWOOD* TRILOGY

The three cases, which constitute the *Oakwood* trilogy, *Oakwood*, *Croft Metals* and *Golden Crest Health care* were decided on September 29, 2006. The *Oakwood* decision was issued first; *Croft Metals* and *Golden Crest Healthcare* then applied its

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65 Amy Albro, "Rubbing Salt in the Wounds": As Nurses Battle with a Nationwide Staffing Shortage, an NLRB Decision Threatens to Limit the Ability to Unionize, 3 N.W. J. L. & POLY 103, 105 (2008).
66 *Kentucky River*, supra note 41, at 717.
67 Id.
68 Id.
69 Pending NLRB Decisions Could Limit Rights of Nurses to Organize, Bargain, 11 HEALTH CARE DAILY REPORT (BNA) 59 (Mar. 28, 2006).
71 *Oakwood*, supra note 4.
72 Id.
73 *Croft Metals*, supra note 4.
74 *Golden Crest Healthcare Center*, supra note 4.
holding. Oakwood, a health care facility with 257 licensed beds in 10 units, employed 181 staff registered nurses (RNs). In addition to RNs, Oakwood employed various other employees who participated in patient care, including nurse practitioners, nursing assistants, technicians, and paramedics. Although all RNs have supervisory duties over the non-professional employees, some RNs served as “charge nurses”—responsible for overseeing the patient care in the entire units, in addition to their individual patient responsibilities. They often met with doctors and patient families, followed up on unusual cases and accidents, and were paid at a higher rate than other RNs for their shifts when working as charge nurses. When the nurses at Oakwood attempted to organize into a collective bargaining unit, Oakwood argued that the charge nurses were supervisors, and therefore ineligible from participation in the union activities.

The Regional Director issued a Decision and Direction in this case on February 4, 2002. He found that the employees in dispute, the charge nurses, were non-supervisory employees and should be included in the collective bargaining unit. Oakwood filed a timely request for review by the national NLRB, which was granted. The NLRB solicited amici briefs on the issue of supervisory status. After review of these documents and the facts of the case, in a 3-2 decision, the NLRB overruled the Regional Director and

75 Oakwood, supra note 4, at 686.  
76 Id. at 686-87.  
77 Id.  
78 Id.  
79 Id.  
80 Oakwood, supra note 4, at 687.  
81 Id.  
82 Id.  
83 Id.  
84 See supra note 70.
held that the charge nurses were supervisors and ineligible for collective bargaining under the NLRA.\textsuperscript{85}

The composition of the national NLRB played a unique role in this decision. National NLRB members are appointed by the sitting U.S. President, and approved by Congress. Expectedly, the President generally appoints Board members from the President’s political party\textsuperscript{86}—those most likely to have similar policy and ideological positions on labor law issues.\textsuperscript{87} However, the NLRA requires that two of the five member board be from a political party other than that of the current administration.\textsuperscript{88} A political quagmire in Congress has resulted in 3 open seats on the NLRB.\textsuperscript{89} Although technically still a functional quorum, the legitimacy of decisions from the current situation is highly suspect.\textsuperscript{90} Board members Batista, Kirsnow, and Schaumber, all Republican appointees,\textsuperscript{91} were in the Oakwood majority.\textsuperscript{92} Board members Liebman and Walsh, Democratic appointees, wrote a scathing dissent.\textsuperscript{93} The dissent called the majority decision “puzzling”,\textsuperscript{94} and claims that it “violates the canon against redundancy,”\textsuperscript{95} and “is inconsistent with Congressional intent.”\textsuperscript{96}

\textsuperscript{85} Oakwood, supra note 4, at 699.
\textsuperscript{86} National Labor Relations Board, Board Members Since 1935 at http://www.nlrb.gov/About_Us/Overview/board/board_members_since_1935.aspx (last visited Fed. 5, 2009) (listing all board members since 1935, their political party, and their period of service).
\textsuperscript{87} See William N. Cooke & Frederick H. Gautschi III, Political Bias in NLRB Unfair Labor Practice Decisions, 35 Industrial and Labor Relations Review 539 (1982) (describing the correlation between NLRB voting behavior and the ideology of the Administrations who appoint the board members).
\textsuperscript{88} See supra note 86.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Oakwood, supra note 4, at 686.
\textsuperscript{93} Id. at 700.
\textsuperscript{94} Id. at 705.
\textsuperscript{95} Id. at 703.
\textsuperscript{96} Id.
The tension between board members extends beyond this case and this topic.\textsuperscript{97} Recently, Liebman wrote a highly critical article about the NLRB.\textsuperscript{98} She said, “American labor law, enacted when the prototypical workplace was the factory, and the rotary telephone was ‘the last word in desktop technology,’ increasingly appears out of sync with changing workplace realities.”\textsuperscript{99} She concludes that absent major reformation, the NLRB and the field of labor law will continue to become an anachronism and irrelevant—a “doomed legal dinosaur.”\textsuperscript{100} This tension between board members is repeatedly demonstrated in numerous 3-2 decisions—including in \textit{Oakwood}.

The \textit{Oakwood} decision articulated three prongs for determining supervisory status: 1) authority to assign, 2) responsibility to direct, and 3) independent judgment.\textsuperscript{101} First, the Board defined the ‘authority to assign’ as the ability to direct an employee when, where, and for how long to perform their duties.\textsuperscript{102} The charge nurses at Oakwood demonstrated the ‘authority to assign’ by designating staff nurses to certain care units or patients. These designations materially determine what types of tasks will be required of the staff nurses and often their duration.\textsuperscript{103}

Next, the NLRB stated that an employee has the ‘responsibility to direct,’ and is thus a supervisor, when they are “accountable for the performance of the task…that some adverse consequence may befall the one providing the oversight if the tasks…are not

\textsuperscript{99} \textit{Id}. at 576.
\textsuperscript{100} \textit{Id}. at 570.
\textsuperscript{101} \textit{Oakwood}, \textit{supra} note 4, at 687.
\textsuperscript{102} \textit{Id}. at 689.
\textsuperscript{103} \textit{Id}. at 695.
performed properly… [has the authority] to take corrective actions, if necessary.”

Oakwood’s charge nurses were granted the responsibility to direct by being responsible for the maintenance of the medical equipment on their units, taking inventory of supplies, and compiling and reporting statistics and data to the hospital administration.

Finally, the NLRB held that ‘independent judgment’ refers to the “degree of discretion involved in making a decision.” This degree may be determined by the detail of instructions and policies under which the decision is made, or whether the actions were ‘routine and clerical.” In light of this spectrum, the charge nurses at Oakwood were held to have shown ‘independent judgment’ by assessing patient’s condition and needs based upon relevant medical history, making informed judgments as to the level of necessary patient care, and assigning patients to staff nurses based upon the personnel and capabilities of the individual units to ensure continuity of care.

Despite inviting and receiving numerous amici briefs from interested parties, the NLRB made scant reference to their arguments or their submissions in its decision. It is unclear whether the invitation for input from outside parties was a white flag, a punt, or an attempt to apply a salve to the divisive issue. Regardless of the NLRB’s intentions, the results were clear—yet another supervisor status test specifically applied to nurses.

The response by academics, practitioners, employers and union rights activists was swift, sometimes preemptory, and pointed. Many responses praised the decision and

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104 Id. at 690-91.
105 Id. at 694-95.
106 Id. at 692-93.
107 Id. at 693.
108 Id. at 699.
109 See supra note 86.
110 Pending NLRB Decisions Could Limit Rights of Nurses to Organize, Bargain, 11 HEALTH CARE DAILY REPORT (BNA) 59 (Mar. 28, 2006).
lauded both its reasoning and implications.\textsuperscript{111} One commentator said, “the NLRB now has offered objective, reasonable, and understandable definitions of what it means to be a supervisor under the NLRA;”\textsuperscript{112} providing employers with the security to trust that future NLRB decisions would be “made in a reasonable, predictable manner consistent with the law.”\textsuperscript{113} Hawkins, in a recent law review article, argued that the textual approach taken by the NLRB in deciding \textit{Oakwood} was not only historically accurate, but necessary to pass Supreme Court review.\textsuperscript{114}

However, much of the literature blasted the decision and prophesied bleak, sometimes cataclysmic, consequences.\textsuperscript{115} The first criticism came from \textit{Oakwood}’s dissenting opinion: the Democratic appointed board members, Liebman and Walsh, warned that the decision would create a “new class of workers” who had neither the authority and privilege of truly being part of management nor the collective bargaining protection afforded to employees by the NLRA.\textsuperscript{116} Others have called the decision “‘ruthless,’ ‘horrendous’, and a denial of long-standing rights.”\textsuperscript{117} In a more measured response, one critic predicted that the decision would allow employers in many other


\textsuperscript{113} Id.

\textsuperscript{114} Hawkins, \textit{supra} note 111 (arguing that the Supreme Court majority, led by Justice Scalia and Justice Thomas—self professed textualists or originalists—would only support a strict textual analysis of the language in the NLRA).


\textsuperscript{116} \textit{Oakwood, supra} note 4, at 700 (dissenting opinion).

\textsuperscript{117} Albro, \textit{supra} note 65, at *52.
industries to make almost any employee a supervisor and therefore more easily avoid unionization efforts.\textsuperscript{118}

Barker and Beato looked at the impact and application of the \textit{Oakwood} trilogy a year after it was issued.\textsuperscript{119} They stated that the cases did not show a great move toward excluding employees from NLRA protection as supervisors.\textsuperscript{120} However, they did note a persisting inconsistency among local NLRB decisions in applying the \textit{Oakwood} trilogy test.\textsuperscript{121} Ultimately, Barker and Beato conceded that there were simply not enough cases to make any firm conclusions.\textsuperscript{122} Now, two years after the trilogy was decided, there are nearly seventy cases citing \textit{Oakwood}. This essay will use these cases, and a novel methodology, to supplement and complete the analysis started by Barker and Beato. Because it is uncommon in legal scholarship, part two will describe the methodology in detail.

\textbf{II. CONTENT ANALYSIS}

Despite the initial strong criticism of the \textit{Oakwood} trilogy and the dire predictions of its application, the trilogy may not have been applied in a manner that dramatically shifts the “supervisor” doctrine to the exclusion of significant numbers of employees. This is significant because a consistent, predictable test will allow employers and unions to rely upon the test to shape unionization campaigns. Also, the health care industry will be afforded some direction on how to deal with nurse unions and the varying levels of

\textsuperscript{118} Smith, \textit{supra} note 115, at FN39.
\textsuperscript{120} \textit{Id.} at 246.
\textsuperscript{121} \textit{Id.}
\textsuperscript{122} \textit{Id.} at 250.
supervisory status among charge nurses. This article found that the decision seems be routinely applied conservatively. The *Oakwood* trilogy provides employers, particularly health care providers, a golden formula by which to construct job duties and define job descriptions to exclude more workers from bargaining units on the basis of the three-prong supervisor test.

This essay will use content analysis\(^\text{123}\) to empirically analyze NLRB and federal court decisions citing to the *Oakwood* trilogy. By so doing, a reliable understanding of the impact of the *Oakwood* decision, largely devoid of author opinion and bias, will be elucidated and analyzed.

### A. METHODOLOGY

Content analysis is a relatively new tool in legal literature.\(^\text{124}\) It is widely used in the social sciences, journalism, and statistics.\(^\text{125}\) Hall and Wright recently, and powerfully, advocated for wider use of empirical methods, and specifically content analysis, by legal scholars, particularly in studying judicial decisions.\(^\text{126}\) Content analysis is similar to traditional legal scholarship in that it takes a body of information and attempts to make conclusions and predictions based upon a structured analysis.\(^\text{127}\) However, content analysis imbues the rigors of social science into legal scholarship\(^\text{128}\) and may generate

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\(^{123}\) KLAUS KRIPPENDORFF, CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY (Sage Publications, Inc. 2nd ed. 2004).


\(^{125}\) Hall, *supra* note 124, at 64; see also Fred Kort, *Predicting Supreme Court Decisions Mathematically: A Qualitative Analysis of the ‘Right to Counsel’ Cases*, 51 AM. POL. SCI. REV. 1 (1957).

\(^{126}\) Hall, *supra* note 124, at 63;

\(^{127}\) Id.

\(^{128}\) Id. at 64.
falsifiable, objective, reproducible conclusions. One significant obstacle for young legal scholars is a lack of academic reputation since, generally, legal research stands or falls on the back of the author’s reputation. Content analysis is particularly useful in that its methodology provides veracity, almost independent of the scholar. In a well-designed content analysis project, “the results matter more than the researcher’s authority” or an established reputation.

Simply stated, content analysis is a structured, systematic reading of a specific sample of texts, often judicial decisions. Although more thoroughly discussed elsewhere, because content analysis is relatively new to legal scholarship, this essay will briefly explain the basic methodology and process of content analysis research.

**B. DATA COLLECTION**

Content analysis relies upon a finite set of data. The universe of judicial decisions is far too large to properly analyze in any reasonable format. By necessity, content analysis requires the researcher to choose and analyze a finite set of texts. This selection process inherently introduces a measure of potential author bias. After all, the veracity of the methodology depends upon the data set being a fair sample of the entire body of available data. If a researcher, intentionally or subconsciously, selects a sample that...

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129 Id.
130 This methodology should be used more widely, as Hall and Wright advocate, in law review Notes and Comments authored by law students for precisely this reason.
131 Hall, supra note 124, at 65.
132 Id. at 67.
134 KRIPPENDORFF, supra note 123, at 111.
supports his or her hypothesis, the entire endeavor would be critically flawed. Krippendorff, a leading content analysis proponent, stated that “when researchers analyze a sample of texts in place of a larger population of texts, however, they need a sampling plan to ensure that the textual units sampled do not bias the answers to the research question.”

Sampling problems are major obstacles for social science researchers. Minimizing sample bias requires sophisticated, thoughtful sampling plans and techniques. Legal research using content analysis may largely avoid sample bias issues. By virtue of specialized databases and research techniques, legal scholars can create very specific data sets that are almost completely free of researcher bias. In this project, the use of specific search terms resulted in a clearly defined data set. The big picture question of the research project is: How is the Oakwood trilogy being applied? This question necessarily limited the data set in three significant ways. First, the set must only include NLRB or Federal Court cases that were decided after September 29, 2006, the date the Oakwood trilogy decisions were published. Second, the data set must only included NLRB cases. The application of the trilogy outside of labor law context would not yield results useful in predicting the outcome of future NLRB cases. Finally, the data set must only include NLRB or Federal Court decisions that specifically reference the Oakwood trilogy. It is possible that cases may exist that apply the Oakwood trilogy’s three-fold test without citing to the trilogy specifically. However, limiting the data set to decisions that reference the

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135 Id. at 113.
136 See id. at 111-124.
137 See e.g. Westlaw.com and Lexisnexis.com.
138 Researchers may limit the results in Westlaw.com or Lexisnexis.com queries by inserting restrictions for many indicators, including date, geographic location, state, federal districts or circuits, legal topics and issues, or even judge names. For a more detailed consideration of legal research techniques, see generally ROY M. MERSKY, DONALD J. DUNN & J. MYRON JACOBSTEIN, FUNDAMENTALS OF LEGAL RESEARCH (Foundation Press 8th ed. 2002).
trilogy is reasonable given the convention of citing legal precedent in judicial opinions. These three factors combined to produce a large sample of decisions which presumably includes all of the cases that have applied the Oakwood trilogy factors since it was published.

This project attempts to identify patterns in application of the Oakwood trilogy. Although a smaller sample size would be more manageable, the identification of trends and patterns over time necessitates a large sample set. This project’s data set is constantly expanding as more decisions are published weekly. As explained above, this number represents all NLRB or Federal Court decisions since September 29, 2006 that include a citation to the Oakwood decision.

The set of decisions citing to Oakwood showed some interesting characteristics. The entire universe constituted 61 decisions. These decisions were issued between

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139 Krippendorff, supra note 123, at 49-51.
September 2006 and January 2009. Many decisions that contained at least one of the three-prong supervisor test were decided by regional administrative law judges and regional directors, but the majority were issued by the national NLRB. Some of the cases in the sample set referred to Oakwood only tangentially or for reasons other than for analysis of supervisor status. Many of these cases referred to Oakwood for support of evidentiary standards and which party assumes the burden of proof and persuasion.\footnote{See e.g. Am. Directional Boring, Inc., 353 N.L.R.B. No. 21 (2008) (After Oakwood was decided, dozens of cases were remanded for reconsiderations. Additionally, parties in many other cases filed motions for reconsideration for their cases based upon the new language in Oakwood).}


These 34 cases provide no data in the final analysis of the impact of the Oakwood trilogy.\footnote{See e.g. LOPAREX, LLC, 2008 WL 4905801 (N.L.R.B. Div. of Judges, Nov 12, 2008) (relying upon the burden of proof holding in Oakwood).}
### Characteristics of Sample Set

<table>
<thead>
<tr>
<th></th>
<th>#</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Decisions</td>
<td>61</td>
<td>100</td>
</tr>
<tr>
<td>National NLRB Decisions</td>
<td>39</td>
<td>64</td>
</tr>
<tr>
<td>Local NLRB/ALJ Decisions</td>
<td>20</td>
<td>33</td>
</tr>
<tr>
<td>Federal Court Decisions</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Decisions involving health care industry</td>
<td>16</td>
<td>26</td>
</tr>
<tr>
<td>Decisions involving “authority to assign” element</td>
<td>24</td>
<td>40</td>
</tr>
<tr>
<td>Decisions involving “independent judgment” element</td>
<td>18</td>
<td>30</td>
</tr>
<tr>
<td>Decisions involving “responsibility to direct” element</td>
<td>20</td>
<td>33</td>
</tr>
<tr>
<td>Decisions involving two or more elements</td>
<td>21</td>
<td>34</td>
</tr>
<tr>
<td>Decisions not involving any elements</td>
<td>34</td>
<td>58</td>
</tr>
</tbody>
</table>

### Fig. 1: Industry Distribution

- **Health Care**: 29%
- **Construction/Manufacturing**: 37%
- **Education**: 5%
- **Hospitality/Food Service**: 4%
- **Other**: 25%

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C. CODING

After the identification the data set, the texts must be analyzed and converted into quantitative values. The strength of content analysis is in its reliability and verifiability. Traditional legal scholarship generally relies upon the interpretation of one researcher analyzing a single case, a series of cases, or a string of related jurisprudence themes. Content analysis uses codification to reduce the language of the decisions into statistically significant, malleable numeric values. The transposing of nuanced judicial reasoning and legal precedent into numeric values in not without critics. Hall and Wright acknowledge what critics call a “false sense of precision” or “pseudo-measurement." Other critics have noted that the “judges’ art is far too subtle to be measured by any existing behavioral technique." The venerable Justice Oliver Wendell Holmes declared, “the law is the painting of a picture—not the doing of a sum.” Also, more recent criticism was levied at the entire endeavor of results-based analysis of the law. However, as Hall and Wright respond, the use of content analysis is not proposed to the exclusion of all other forms of legal analysis. There is still great need for the nuanced interpretation of decisions and judicial intentions that comes from seasoned legal scholars. Content analysis is most useful in concert with traditional forms of legal scholarship. This project attempts to codify the application of the three main elements of the Oakwood trilogy: authority to assign, responsibility to direct, and independent judgment.

144 Hall, supra note 124, at 83.
145 Id.
146 Id.
147 See William M. Sage, Judicial Opinions Involving Health Insurance Coverage: Trompe L'Oeil or Window on the World? 31 IND. L. REV. 49, 50-51 (1998) (arguing that the U.S. common law system of jurisprudence assumes general uniformity in application in creating and confirming the law. However, by analyzing litigation outcomes, researchers are affirming the proposition that the case law does not state the law and that a clear understanding of the law may only be obtained by reading the subtext of the decisions).
148 Hall, supra note 124, at 87.
Traditional content analysis procedures require four distinct steps: 1) creation of a set of coding categories—questions to be answered, 2) writing a coding sheet, 3) revision of coding sheet based on pilot testing, 4) creation of a final codebook and application to a data sample.\textsuperscript{149}

First, a basic questionnaire was created with very simple categories (e.g. appropriate application of \textit{Oakwood}? yes / no). It became quickly apparent that yes/no style of questions were not very useful, created a false dichotomy in the interpretation of relatively nuanced discussions, and yielded overly simplistic results. These categories and the initial questionnaire were refined to include the graduated scale present in the final questionnaire. Instead of asking yes/no style questions, the final questionnaire utilized a style of questioning that allows for the coder to indicate a varying agreement with declarative statements.\textsuperscript{150} Next, the questionnaire and codebook explaining the intent of the questions were distributed to a small group of the author’s colleagues as a pilot test.\textsuperscript{151} Although the responsiveness of the volunteers was disappointing, the results seemed to indicate reliability in the questionnaire. This was determined by comparing the pilot coder’s results with results from the author’s own coding of the same articles. Admittedly, the author’s participation in coding is not ideal, but it is not uncommon. Hall and Wright studied 134 content analysis projects and determined that in almost 80\% of the projects, authors performed the coding.\textsuperscript{152} Careful comparison between the author’s coding sample and the results of the pilot study indicated reliable results. Finally, the entire sample set was coded by the author and spot checked against random coding by a third-party coder.

\textsuperscript{149} \textit{Id.} at 107.
\textsuperscript{150} \textit{See infra} Appendix A
\textsuperscript{151} \textit{See infra} Appendix B
\textsuperscript{152} Hall, \textit{supra} note 124, at 107
Given the admitted limitations in the coding protocol and the simplistic statistical analysis, the results of the final coding effort are illustrative rather than definitive. They show interesting trends and patterns but have not been subjected to formal statistical analysis.

**D. IMPACT OF OAKWOOD TRILOGY**

The content analysis in this article was performed to answer a series of questions:

1) How often is each prong on the *Oakwood* trilogy being decided and by whom?
2) Has the frequency of the elements being tested changed over time?
3) Have the judges closely followed the holding in *Oakwood* when applying the test to subsequent cases?
4) Has the application of *Oakwood* changed over time?
5) How have employees fared in the decisions applying *Oakwood*?

These questions have been answered in the data compiled in this article. The results to each question are discussed below.

1) How often is each prong on the *Oakwood* trilogy being decided and by whom?

It is important to initially determine how often each prong of the Oakwood test is applied. Figure two demonstrates the prevalence of the elements in each source. The national NLRB and regional ALJs applied the ‘authority to assign’ prong of the *Oakwood* trilogy most often. This pattern is understandable—the ALJ decisions as well as the elements tested and adjudicated by the ALJ are brought before the national NLRB on appeal. Thus, whichever element is most often tested in the lower board decisions will be reviewed by the NLRB through the appeals process. The Federal Court decisions applied

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153 *See Id.* at 112 (stating that “formal statistical reliability testing is not mandatory,” and “as long as the researcher describes the coding in sufficient detail for others to replicate, she can choose to let other challenge or verify reliability”)
the ‘independent judgment’ element most often, although the overall number of decisions is relatively low.

Fig. 2: Number of Cases Testing Each Element

<table>
<thead>
<tr>
<th>Authority to Assign</th>
<th>Responsibility to Direct</th>
<th>Independent Judgment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nat'l NLRB</td>
<td>ALJ</td>
<td>Courts of Appeal</td>
</tr>
<tr>
<td>24</td>
<td>20</td>
<td>8</td>
</tr>
<tr>
<td>29</td>
<td>20</td>
<td>10</td>
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<td>2</td>
<td>2</td>
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</tr>
<tr>
<td>2</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>3</td>
<td>3</td>
<td>3</td>
</tr>
</tbody>
</table>

2) Has the frequency of the elements being tested changed over time?

Next, the coding looked at how often each element was tested over time. This inquiry would show trends of which prongs are litigated at different times during the years since the initial decision. Figure three shows how the three Oakwood trilogy prongs were applied over time. Interestingly, there are a few distinct jumps in the data (marked as X, Y, and Z). The first jump (X) was in April 2007, the second (Y) was in July 2007 and the third jump (Z) was in July 2008. It is unclear whether these increases in the volume of decisions and the application of the Oakwood trilogy correspond to any particular circumstances or are merely coincidental. The dotted vertical line indicates the
approximate time, December 2007, when three board members, Battista, Kirasnow, and Walsh, left their positions. Initially, it was expected that this drastic change in the board’s composition would predicate a shift in application based upon political ideology. However, as the charts demonstrate, there seems to be no significant change in which elements were applied.

3) How have the courts followed the test in Oakwood?

Figures four and five show the data relevant to the question: have the subsequent decisions expanded the scope and language of the Oakwood test? The coders were asked whether, and to what extent, they agreed with the statement that the decision they just read expanded the scope or language of the Oakwood test. The coders disagreed with this

154 See supra note 86.
statement the majority of the time—indicating that the vast majority of decisions did not expand the scope or language of *Oakwood*.

This data was plotted over time in Figure four. A vertical increase indicates disagreement with the assertion that the decision expands the scope or language of the *Oakwood* test. A vertical drop indicates agreement with the statement. The sharper the increase or decrease indicates stronger disagreement or agreement with the statement.

![Fig. 4 Expands Oakwood](image)

Figure five demonstrates a relatively uniform disagreement with the assertion that the *Oakwood* test is being expanded. This shows, along with the data in Figure four, that the *Oakwood* test is being conservatively applied.
4) Has the application of Oakwood changed over time?

Similar to the information in Figures four and five, Figure six asks how faithfully each element is applied. Here, the coders were asked to identify which of the three prongs of the Oakwood test were being tested. They were then asked to agree, on a spectrum, to an assertion that the decision followed the test laid out in Oakwood. Opposite to above, a vertical increase indicates agreement with the assertion. Each element is represented by a different line and an aggregate agreement is represented in a fourth line on the graph.

The graph demonstrates a general opinion that the Oakwood test is being followed. Figure six shows different lines for the each element. Notably, the ‘independent judgment’
element is significantly lower than the other two measures. Also, a marked increase is not evident until September 2008. One may speculate on the reason for this distinct result: possibly, the language of the test for this element in *Oakwood* is less concrete than the other elements and introduces more need for interpretation by the judges; or the cases that challenge a purported supervisor’s independent judgment are much more difficult to apply. In either case, or others not mentioned here, these results indicate an area where thoughtful traditional legal analysis can compensate where content analysis reaches its limits.

![Fig. 6: Follows Oakwood](image)

5) How have employees fared in the decisions applying *Oakwood*? Another common criticism of the *Oakwood* trilogy is that it would allow the courts to exclude a vast number of employees from the protections of the NLRA.\(^{155}\) To answer this question, the coders were asked to determine whether the outcome of the decision resulted in more or less employees being covered by the NLRA. Figure seven

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\(^{155}\) See generally supra note 115.
demonstrates the results. According to the data, employees maintained or were granted protection under the NLRA in three-quarters of the cases. Only one case in four resulted in less protection for employees. Clearly, the critics who claimed that the *Oakwood* trilogy would set a precedent of limiting protection under the NLRA were incorrect, at least thus far.

![Fig. 7: Employees Protection](image)

### III. WHERE DO WE GO FROM HERE?

The true value of analyzing judicial and administrative opinions is in the prediction power for future outcomes. By looking at what has been decided, practitioners can attempt to plan courses of actions for clients in future business situations and litigation. The *Oakwood* trilogy’s test for supervisory status is most useful for health care providers who
face the possible formation of a union by their employees, unions who are looking to include larger swaths of the workforce, and groups of health care professionals who may wish to unionize in the future. At least in the near future, the Oakwood trilogy, as analyzed in this essay, may be used as a shield or as a sword. Contrary to the strong initial criticisms of the trilogy, the patterns shown in the content analysis above demonstrate a conservative application of the Oakwood test. Thus, practitioners, lawyers, union organizers, and health care administrators may strictly apply the language of the Oakwood trilogy in proactive strategic planning.

A. Oakwood As A Sword

Employers, especially in the health care industry, may have a keen interest in using the information discussed above and applying it to their employees. By following a close interpretation of the Oakwood trilogy’s language and some specific language in the NLRA, employers may be able to proactively thwart attempts to include certain employee in collective bargaining units. These proactive efforts may be as undemanding as redefining certain position’s formal descriptions or changing the tasks upon which the employees are evaluated. These simple changes may amount to conclusive evidence that the employee in question is a supervisor, thus avoiding expensive NLRB litigation.

The first method of applying the Oakwood trilogy as a sword is by rewriting job descriptions. If an employer, such as a hospital, views a particular employee, a charge nurse for example, as a supervisor, and thus should be ineligible for inclusion in the

\[\text{156 See generally } \text{JACKSON LEWIS, WINNING NLRB ELECTIONS: AVOIDING UNIONIZATION THROUGH PREVENTATIVE EMPLOYEE RELATIONS PROGRAMS 150 (CCH, Inc. 4th ed. 1997).}\\]
\[\text{157 Albro, supra note 123, at *69.}\\]
\[\text{158 Joan Gratto Liebler, Job Descriptions: Development and Use, in THE HEALTH CARE SUPERVISOR 94 (Aspen Publ’n. 1993).}\]
collective bargaining unit, the hospital may change the written job description of the nurse’s position to definitively establish them as a supervisor when working as a charge nurse, for example. By simply adding language to the job descriptions such as “the charge nurse has the authority to assign work task,” “the charge nurse is expected to use their independent judgment,” or “the charge nurse has responsibility to direct,” the hospital can persuasively argue that the nurse, when working as a charge nurse, is a supervisor under the language of the Oakwood trilogy. Rewriting job descriptions is a very cost effective method, especially when compared to the expense of arguing these same points by inference before the NRLB.

Second, employers may require employees to perform evaluations of their fellow employees. Similarly, the supervising employee may also be evaluated on their skill and performance in evaluating subordinates. This would create a clear indication that the employee has supervisory responsibility over their co-workers. In Berthold, discussed in more detail below, just merely filling out evaluation questionnaires on other employees may be sufficient to establish supervisory status.159

The NLRB has consistently required that the supervisor spend a substantial amount of time in a supervisory role to be considered a supervisor under the NLRA.160 However, the NLRB and the NLRA are silent on the definition of “substantial”. The case law shows that an employee acting in a supervisory role even as little as sixteen percent of the time could be considered ‘substantial’.161 Also, the NLRB has held that short, infrequent supervisory duties may also be considered ‘substantial’. If the NLRB eventually holds that mere job description language is inadequate to establish an employee as a supervisor, the

159 Berthold Nursing Care Center, Inc., 351 N.L.R.B. No. 9 (Sep. 26, 2007).
161 Id.
employer need only require supervisory duties for one shift out of every seven. This low bar for “substantial amount of time” obviously is a powerful sword for employers.

Third, employers may alter the job titles and pay rates of employees to demonstrate their supervisor status. By changing the name of a position from “charge nurse” to “supervising nurse” the employer declares its understanding that the employee is a supervisor. Also, the employee and their co-workers would be hard pressed to argue that the position lack supervisory status. Merely changing the name of a title has little financial cost. However, it is foreseeable, at least initially, that employees may demand a pay increase to accompany the new job title. This cost is likely to be minimal compared to litigation. Also, a slight pay raise would also be further evidence that the employer views the supervisor in a different light than the other non-supervisory employees.

It is important to note that some hospitals may choose to not reclassify certain nurses and positions as supervisors. Potentially, if a nurse or other employee is deemed to be a supervisor, the hospital may be more likely to be subject to vicarious liability for their tort actions.162 This vicarious liability potential may be more problematic for the employer than proactively ensuring that the employee be ineligible for collective bargaining representation.

These strategies use the *Oakwood* trilogy as a sword to defeat supervisory status challenges by unionization campaigns. However, employers taking these steps should do so with caution. By changing job descriptions and duties with the intention of making employees ineligible for participation in collective bargaining, without actually conferring any privileges associated with actual management, employers may be fulfilling the dire prophecy of *Oakwood*’s dissent: creation of “a new class of workers under Federal labor

law: workers who have neither the genuine prerogatives of management, nor the statutory rights of ordinary employees.”

B. OAKWOOD AS A SHIELD

Just as employers may use the NLRB’s consistent application of the Oakwood trilogy to their benefit, unionization efforts may also be benefited. Although, it seems that employers have a much better position to use the Oakwood trilogy for their advantage. First, unions and employees may use the trilogy’s application as leverage for higher pay for employees whose participation in the union campaign may be challenged. The employee may use the Oakwood dissent language to argue that they may be left in this potential new class of workers who lack both actual management privilege and statutory protection to unionize. An employee may be able to convince the employer that they would be willing to enter this new class for an increase in pay. While this will do little to alleviate the concerns expressed in the Oakwood dissent, the employee may directly benefit and be satisfied with the situation.

Second, a similar strategy may be employed to negotiate adjustment to the employee’s job responsibilities. If an employer intends to exclude an employee from the collective bargaining unit, the employee may have the opportunity to negotiate what new duties their positions will include. For example, an employee may be able to effectively argue that their position does not warrant, or cannot perform evaluation of fellow employees. A clear understanding of the employers motives for changing job descriptions and job duties—to render an employee ineligible for collective bargaining—the employee,

163 Oakwood, supra note 4, at 700.
often with the union’s support, is in a better position to formulate strategies and negotiate for changes which will directly benefit the employee.

C. OAK PARK CARE CENTER

The foregoing discussion and data analysis may prove useful in the legal academy, but real significance may be shown only through real-world application. The National NLRB decision in *Berthold Nursing Care Center, Inc.* provides an example of a health care facility applying the *Oakwood* trilogy. Berthold, Inc. owns and operates a long-term nursing care facility in central St. Louis, Missouri under the name of Oak Park Care Center (Oak Park).\(^{164}\) Oak Park is a 120 bed nursing home that employs approximately 100 health care professional including LPNs, (RNs), CNAs and certified medical technicians (CMT).\(^{165}\) The CNA and CMT employees are represented by the union and are covered by a collective bargaining agreement.\(^{166}\) In 2004, the United Food and Commercial Workers Union Local No. 655 began a unionization campaign to represent the LPNs and RNs at Oak Park.\(^{167}\) Oak Park resisted the campaign and argued that the LPNs and RNs were supervisors and ineligible for NLRA protection.

At Oak Park, LPNs and RNs are classified as ‘charge nurses.’ The designation of ‘charge nurse’ does not generate much understanding between the union and the employer regarding the supervisor status of the LPNs and RNs. The LPNs and RNs have the

\(^{164}\) *Berthold Nursing Care Center, Inc.*, supra note 159.


\(^{166}\) *Id.* at 2

\(^{167}\) *Berthold Nursing Care Center, Inc.*, supra note 159, at 1.
responsibility to oversee and direct the work of the CNAs and CMTs. All members of the health care staff provide medical care to the residents, but LPNs and RNs function as foremen or shift supervisors. They report directly to the Assistant Director of Nursing (ADON) and the Director of Nursing (DON). The NLRB Regional Director found it significant that the LPNs and RNs did not have authority to transfer CMTs or CNAs, hire or terminate any employees, report on the work of the CNAs and CMTs working under them, or participate in promotion decisions of CMTs and CNAs. The Regional Director held that the LPNs and RNs were not supervisors under the language of the NLRA and were eligible for union participation and representation.

Oak Park appealed this holding to the National NLRB. During the interim, the Oakwood trilogy was published, creating a more definite test of supervisor status. The National NLRB overturned the Regional Director’s decision and held that the LPNs and RNs were supervisors. This decision was largely based upon the fact that LPNs and RNs had the authority to report on the performance of CNAs and CMTs working on their shifts. Where the Regional Director categorized this authority as merely clerical, the national NLRB, relying on the Oakwood trilogy test, found this function to represent ‘independent judgment’ because it involved disciplining subordinates.

This result, given the data discussed above, is not surprising. The Oakwood trilogy has often been conservatively applied. However, this case is notable because the strict

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168 Regional Director’s Decisions, supra note 165.
169 Id.
170 Id. at 4.
171 Id.
172 Id.
173 Berthold Nursing Care Center, Inc., supra note 159, at 3.
174 Id.
175 Id. at 2.
176 See infra Part II.
interpretation more often is in favor of employee’s rights under the NLRA.\textsuperscript{177} The Administrator of Oak Park recently described the role of the LPNs and RNs within the organization.\textsuperscript{178} She explained that the LPNs report directly to the ADON, the DON and the Administrator.\textsuperscript{179} Additionally she stated that the LPNs and RNs, in her opinion, were supervisors because they were in charge of the entire floor’s patient care.\textsuperscript{180} If the LPNs or RNs failed to adequately supervise their subordinates, their positions were in jeopardy. Additionally, she stated that the LPNs and RNs were encouraged to keep a close eye on the subordinates.\textsuperscript{181} As described above, since the Berthold decision and the Oakwood trilogy Oak Park has taken proactive measures to clearly establish the charge nurse as supervisors. Oak Park has rewritten job descriptions to include supervisory language and duties.\textsuperscript{182} Oak Park has also begun including evaluation of the LPN and RN’s supervisory skills during period performance evaluations.\textsuperscript{183} These steps have been taken to ensure that LPNs and RNs understand that they are supervisors. These facts reinforce the conclusions drawn by the proceeding data analysis.

IV. CONCLUSION

Is the Oakwood trilogy a smack on the chin or a nibble at statutory rights of U.S. worker under the NLRA? Does the application of the language of the Oakwood trilogy


\textsuperscript{178} Telephone Interview with Tracy Unger, Administrator, Oak Park Nursing Center, Saint Louis, Mo. (Jan. 31, 2009).

\textsuperscript{179} Id.

\textsuperscript{180} Id.

\textsuperscript{181} Id.

\textsuperscript{182} Supra note 178.

\textsuperscript{183} Id.
create an unfair advantage for employers in proactively excluding more employees from collective bargaining units? These questions are not conclusively answered in this article. However, the application of content analysis, a budding methodological approach in legal scholarship, demonstrates a consistent application of the language and faithful adherence to the language of the decisions. Previous attempts by the NLRB to create a supervisor status tests resulted in inconsistent application by regional directors and ALJs and were rejected by the U.S. Supreme Court. The consistency in both National NLRB and lower board application tends to indicate that the NLRB has finally created a functional test for supervisor status, but it is not without strong criticism. Ultimately, the critics will either be justified by an additional rebuff by the U.S. Supreme Court or they will be disappointed by continued consistent and predictable application of the test.
APPENDIX A

Coding Form

1. Coder ID#:
2. Case Name:
3. Date of Decision:
4. Who issued the decision?
   a. National NLRB
   b. Regional Director
   c. Administrative Law Judge
   d. Unknown
5. If the National NLRB issued the decision, please mark each of the Board members involved in the decision.
   a. Battista
   b. Liebsman
   c. Schaumber
   d. Kirsanow
   e. Walsh
6. Which of the three (3) elements of supervisor status from *Oakwood Health care, Inc.* was tested in this case? Mark all that apply.
   a. Independent Judgment
   b. Responsibility to direct
   c. Ability to assign
   d. None
   e. Unsure
7. Which of the following industries do the parties represent? Mark all that apply
   a. Health Care
   b. Construction
   c. Hospitality/Food Service
   d. Education/Teaching
   e. Other: ____________________________
   f. Unknown
8. The decision follows the definition of Independent Judgment as provided in *Oakwood Health care, Inc.*
   a. Strongly agree
   b. Somewhat agree
   c. Neutral
   d. Somewhat disagree
   e. Strongly disagree
   f. Unsure
9. The decision follows the definition of Ability to Assign as provided in *Oakwood Health care, Inc.*
   a. Strongly agree
   b. Somewhat agree
   c. Neutral
   d. Somewhat disagree
   e. Strongly disagree
   f. Unsure

10. The decision follows the definition of Responsibility to Direct as provided in *Oakwood Health care, Inc.*
    a. Strongly agree
    b. Somewhat agree
    c. Neutral
    d. Somewhat disagree
    e. Strongly disagree
    f. Unsure

11. The decision results in more employee being covered by the act.
    a. Strongly agree
    b. Somewhat agree
    c. Neutral
    d. Somewhat disagree
    e. Strongly disagree
    f. Unsure

12. The decision expands the definitions under Oakwood?
    a. Strongly agree
    b. Somewhat agree
    c. Neutral
    d. Somewhat disagree
    e. Strongly disagree
    f. Unsure
APPENDIX B

CODEBOOK

1. Coder ID#:  
   This number will be pre-assigned to you and indicated on your packet.
2. Case Name:  
   Please write the primary name of the party AND the case citation.
3. Date of Decision:  
   Write the date the decision was issued located in the case citation

Mark the authority that issued the decision. This information may be found in the 
text of the decision or in the caption at the top of the first page.

4. Who issued the decision?  
   a. National NLRB  
   b. Regional Director  
   c. Administrative Law Judge  
   d. Unknown  

If the National NLRB issued the decision, the names of the Board members will be 
listed in the decision. Please mark which members participated in the decision.

5. If the National NLRB issued the decision, please mark each of the Board members 
   involved in the decision.  
   a. Battista  
   b. Liebsman  
   c. Schaumber  
   d. Kirsanow  
   e. Walsh

In deciding the supervisor status of employees in the Oakwood decision, the court 
focused on three elements; 1) the independent judgment of the employee, 2) the 
ability and responsibility to direct other employees, and 3) the ability assign tasks 
and responsibilities to other employees. Please mark each of the elements that the 
decision discusses, there may be more than one elements discussed in the decision.

6. Which of the three (3) elements of supervisor status from Oakwood Health care, 
   Inc. was tested in this case? Mark all that apply.  
   a. Independent Judgment  
   b. Responsibility to direct  
   c. Ability to assign  
   d. None  
   e. unsure
The case will involve a group of people that are attempting to create a union of similarly situated workers in a distinct industry.

7. Which of the following industries do the parties represent? Mark all that apply
   a. Health Care
   b. Construction
   c. Hospitality/Food Service
   d. Education/Teaching
   e. Other: ____________________________
   f. Unknown

According to Oakwood, Independent Judgment means:
“[employee’s] discretion involved in making a decision”
Did this decision follow this definition accurately?
8. The decision follows the definition of Independent Judgment as provided in Oakwood Health care, Inc.
   a. Strongly agree
   b. Somewhat agree
   c. Neutral
   d. Somewhat disagree
   e. Strongly disagree
   f. Unsure

According to Oakwood, Ability to Assign means:
“the [employee’s] decision or effective recommendation to affect one of these—place, time, or overall tasks.”
Did this decision follow this definition accurately?
9. The decision follows the definition of Ability to Assign as provided in Oakwood Health care, Inc.
   a. Strongly agree
   b. Somewhat agree
   c. Neutral
   d. Somewhat disagree
   e. Strongly disagree
   f. Unsure
According to Oakwood, Responsibility to Direct means:
“...must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.”

Did this decision follow this definition accurately?
10. The decision follows the definition of Responsibility to Direct as provided in Oakwood Health care, Inc.
   a. Strongly agree
   b. Somewhat agree
   c. Neutral
   d. Somewhat disagree
   e. Strongly disagree
   f. Unsure

Generally, the key issue in these cases is how many people should be able to be a part of the potential labor union (collective bargaining unit). This case may result in more or less employees being excluded from the unit; being excluded from the unit means that they would not be covered by the protection of the National Labor Relations Act.

11. The decision results in more employees being covered by the act.
   a. Strongly agree
   b. Somewhat agree
   c. Neutral
   d. Somewhat disagree
   e. Strongly disagree
   f. Unsure

Given the definitions provided above, the decision may interpret the definition more or less liberally; does it widen the scope of the decision or the language of the test? If the decision interprets the definition more liberally it may expand the definition.
12. The decision expands the definitions under Oakwood?
   a. Strongly agree
   b. Somewhat agree
   c. Neutral
   d. Somewhat disagree
   e. Strongly disagree
   f. Unsure