Eighth Circuit Overturns NLRB Ruling On Supervisory Status of Television News Producers
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In a recent decision, Multimedia KSDK, Inc. v. NLRB, 2002 WL 31011133 (Sept. 10, 2002), the U.S. Court of Appeals for the Eighth Circuit overturned a ruling by the National Labor Relations Board ("NLRB" or "Board") and found that news producers employed by a St. Louis television station were "supervisors" within the meaning of the National Labor Relations Act ("NLRA"), who should not have been permitted to vote in a representation election. The appellate court ruled that the Board had employed an impermissible legal standard when it determined that the producers did not exercise independent judgment in performing their work and that they therefore were not supervisors.

The NLRA defines a "supervisor" as an individual having the authority "to hire, transfer, suspend, layoff, recall, promote discharge, assign, reward or discipline other employees, or responsibly direct them, or to adjust their grievances, or to effectively recommend such action, if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment." 29 U.S.C. § 152(11). Supervisors are not entitled to the protections of the NLRA. The issue in Multimedia KSDK was whether the news producers employed by KSDK-TV exercised the "independent judgment" required under Section152(11) so as to make them supervisors.

The case began in 1997 when the NLRB conducted an election among a group of 16 producers, 4 assignment editors, and 2 tape coordinators employed in KSDK-TV's news department to determine whether they wished to be represented by the International Brotherhood of Electrical Workers. The station challenged the eligibility of the assignment editors and news producers, arguing that they were supervisors. The NLRB's Regional Director rejected the station's argument and ordered that those employees' ballots be counted. When the ballot count showed that a majority had voted for the union, the Board certified the IBEW as the unit's bargaining representative. KSDK-TV subsequently refused to bargain with the union, and the IBEW filed a charge alleging unfair labor practices.

The case then went before the NLRB, and the Board agreed with the Regional Director's earlier determination that the assignment editors and producers were not supervisors. Although the individuals in question performed functions that were in some sense supervisory (i.e., the assignment editors assigned work to photographers and editors, and the producers assigned work to and/or directed the anchors, reporters, directors, graphic artists and writers), the Board concluded that they did not exercise "independent judgment" in performing those functions and that they therefore were not statutory supervisors. With respect to the news producers, the Board appeared to conclude that because the
producers' judgment in making supervisory decisions stemmed from their "own experience, skills, training, or position," they did not exercise the "independent judgment" specified in Section 152(11).

KSDK-TV subsequently filed a petition with the Court of Appeals, seeking review of the Board's decision. Initially, a three-judge panel issued a decision enforcing the Board's order (See Eighth Circuit Finds that News Producers and Assignment Editors Are Not Supervisors under the National Labor Relations Act (Nov 29, 2001)). KSDK-TV then filed a petition for rehearing before the full Court of Appeals, challenging only the Board's decision regarding the news producers.

In its recent decision, the full Court reversed the panel's ruling and denied enforcement of the Board's order. The Court found that the theory employed by the Board in deciding that the news producers did not exercise independent judgment was in direct conflict with the Supreme Court's decision in NLRB v. Kentucky River Cmty. Care, Inc., 121 S. Ct. 1861 (2001). In Kentucky River, the Supreme Court ruled that the NLRB could not find a lack of independent judgment merely because the judgment exercised by an alleged supervisor was based on "professional or technical skill or experience." (See Supreme Court Overturns NLRB Standard On Supervisory Status (Jun 1, 2001)). Citing Kentucky River, the Eighth Circuit stated that "the error in [the Board's standard] is its exclusion of certain kinds of judgment from the definition of independent judgment, whereas the statute only 'introduces the question of degree of judgment.' " The Court further noted that in Kentucky River, the Supreme Court stated that by its refusal to consider "professional or technical" judgment as supervisory, the Board inserted a "startling categorical exclusion into statutory text that does not suggest its existence."

Because the Board had improperly relied on the "professional or technical" test in concluding that KSDK-TV's producers did not exercise independent judgment, and had not offered any alternative theory to sustain its finding that the producers did not qualify as supervisors, the Eighth Circuit denied enforcement of the Board's order.

As noted above, to qualify as a supervisor under the NLRA an employee must either hire, fire or discipline employees, or must responsibly direct them, exercising independent judgment. The Eighth Circuit's decision in Multimedia KSDK makes clear that the mere fact that the type of judgment an individual exercises may be limited to professional or technical aspects of his or her work does not necessarily mean that he or she will not qualify as a supervisor under the NLRA.