
Legal Briefs

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Postscripts

There have been some recent developments concerning matters which have been previous subjects of this column.

National Labor Relations Act

In December, 1988, in an article entitled "CRNAs and the NLRB" we discussed the application of the National Labor Relations Act to CRNAs. Under the National Labor Relations Act, labor unions have the right to bargain collectively with employers with regard to wages, hours and working conditions.

The use of labor unions to bargain with employers over working conditions such as restrictions on CRNA practice, has not received widespread use, primarily, because some CRNAs believe it is unprofessional to form labor unions and because congressional restrictions on "proliferation" of unions in hospital settings often make it difficult to form labor unions which would appropriately represent CRNAs.

One of the tactics which hospitals have used in diluting the bargaining power of nursing unions is to attempt to have the collective bargaining unit represent so many diverse groups that it is difficult to establish an agenda or to be able to bargain effectively. A bargaining unit representing all nurses within a hospital might be so overwhelmed with issues that concerns of CRNAs about supervision would become lost.

At the end of the article, we suggested that if anesthesiologists' restrictions on CRNA practice be-

came severe enough, a unique solution could be used. In many hospitals, anesthesiologists have become separately incorporated while the CRNAs remain hospital-employed. We suggested that there was a doctrine under the National Labor Relations Act of "joint employer" that might make it possible for CRNAs, employed by a hospital but effectively controlled by anesthesiologists, to claim they were employees of "joint employers" and to be entitled to form their own unions. In these circumstances, CRNAs might be able to create their own collective bargaining unit if the restrictions on their practice were so severe that the anesthesiologists were exercising rights normally exercised by an employer. The union would then be able to bargain with the "joint employers" over working conditions.

Denied separate bargaining unit

This "unique" approach was recently used, unsuccessfully, in National Labor Relations Board Region 6, in a case called *Lee Hospital, Employer and Laurel Certified Registered Nurse Anesthetists Associates, Petitioner*, decided in Pittsburgh, Pennsylvania, on March 29, 1989. The decision held that in the circumstances presented, the nurse anesthetists were not entitled to form a separate bargaining unit.

Lee Hospital was administratively structured in a manner similar to the way in which many hospitals are organized. The Anesthesia Department and other departments providing direct patient care, were under the supervision of a department head and a medical director. The medical

directors were physicians who were not employees of the hospital but were either individuals or officers of professional corporations with whom the hospital independently contracted for the operation of the particular department.

The medical director of the Anesthesia Department was an officer of a professional corporation of anesthesiologists which was an independent contractor. The chief nurse anesthetist was the department head. The decision indicated that in preparing work schedules, scheduling vacations, making daily assignments and determining lunch and coffee breaks, the Anesthesia Department performed in the same manner as other departments even though the medical director of the Anesthesia Department may have been more involved than other department medical directors.

In leading up to its conclusion that the CRNAs were not employed by a "joint employer," the decision attempts to point out that the operation of the Anesthesia Department was not significantly different than the operation of other hospital departments.

Joint employer relationship

The decision set forth the requirement that to have a "joint employer," there must be a showing that the alleged joint employer meaningfully affects matters relating to the employment relationship, such as hiring, firing, discipline, supervision and direction. In the case decided, it was argued that there was a variety of factors establishing the "joint employer" relationship. First, under an agreement with the hospital, the anesthesiology group assumed responsibility for the Anesthesia Department. Members of the anesthesiology group "almost exclusively" determined the CRNAs' daily assignments. The head of the anesthesiology group significantly participated in the hiring of CRNAs, participated in discussions between CRNAs and the hospital regarding overtime compensation and "call" policies, and had at least some limited authority to discipline employees.

Interestingly, the anesthesiology group also billed for CRNA services and indicated on bills it submitted that it was billing for medical direction of the group's *own employees*. The decision indicates that, notwithstanding this practice, it was not a concession by the anesthesiology group that it was the sole or joint employer of the CRNAs.

The question of supervision did not get very much attention from Region 6. The decision noted that the medical director of the anesthesia department "*formulated a number of policies impacting upon the working conditions of the CRNAs involving [Anesthesia Department] operating procedures.*" However,

the decision contended that "*all medical directors are responsible for directing the work of hospital employees working in their department with respect to medical issues and patient care matters.*" While the decision does not describe the type of operating procedures adopted, there does not appear to have been any showing that the procedures were significantly different than procedures adopted in other departments.

In the original article in *Legal Briefs*, we stated that if restrictions on CRNA practice become severe enough, the "joint employer doctrine" may offer relief. Notwithstanding, the decision in Region 6, this may still be true. However, there would have to be proof, which will probably be available, that the relationship between anesthesiologists in the Anesthesia Department to hospital-employed CRNAs was significantly different than the relationship of physicians in other departments to hospital employees working in those departments. Consequently, even after the decision of Region 6, there could be instances where the doctrine could be utilized.

Wrongful termination

In the last issue, this column discussed "wrongful termination." We pointed out that in at least 60% of the states, the courts had developed inroads into the so-called doctrine of Employment at Will. (In the absence of a specific agreement, either party to an employment relation was free to terminate the relationship at any time without notice and without reason or explanation.)

Many states now recognize exceptions to the Employment at Will rule where employees must be protected to carry out public policy such as protection of minorities and older workers; where employers are required to act in good faith; where employers adopt personnel policies which the courts interpret as a contract; or where employees perform public duties in ways which the courts must protect, such as "whistle-blowers."

In the article, we indicated that there had been only two Appellate Court decisions in this area involving CRNAs. As soon as it was too late to update the article, two more CRNA cases became available from the service which we use to find cases involving nurse anesthetists.

A suit filed in Tennessee by a nurse anesthetist for wrongful termination was dismissed by the Trial Court for lack of evidence after the Trial Court held that the evidence the CRNA intended to rely on could not be presented. The Appellate Court reversed and sent the case back to the Trial Court for further proceedings. The Plaintiff (the CRNA) claimed that she was blamed for injuries to a patient

caused "as a result of faulty oxygen lines running to the operating room in which [the patient's] operation was taking place. Plaintiff also discovered evidence that Defendant had known of defects in the oxygen lines as early as 1983."

The Plaintiff's evidence was excluded on the grounds that the documents on which the plaintiff was relying were prepared by a group of physicians which the Trial Court held constituted a "Medical Review Committee," and that under Tennessee law, records of a Medical Review Committee could not be introduced in court. The Appellate Court determined that to constitute a Medical Review Committee, there had to be some formal creation. Since there had been no proof that the committee was serving a function under the statute creating Medical Review Committees, the Appellate Court held that the documents could not be excluded for this reason (1988 Tenn. App. LEXIS 851).

Constructive discharge

The second case, also decided against the nurse anesthetist, discussed the concept of "constructive discharge." In this case, a CRNA had taken preliminary action to report that an anesthesiologist was "impaired." There was evidence of various personal conflicts between the CRNA and the anesthesiologist, each claiming that the other was the aggressor. The hospital had attempted to determine who was at fault in the dispute between the anesthesiologist and the CRNA but was unable to find the cause of the dispute. When the hospital required the CRNA to work under the supervision of the anesthesiologist, the CRNA resigned.

The CRNA argued that despite the resignation, the termination of employment was a "constructive discharge" and the hospital's "constructive discharge" was wrongful because the CRNA was seeking to report the anesthesiologist as impaired.

Constructive discharge occurs when an employer renders an employee's working conditions so difficult and intolerable that a reasonable person would feel forced to resign. . . . A claim of constructive discharge must be supported by more than the employee's subjective opinion that the job conditions have become so intolerable that he or she was forced to resign. . . . Normally, an employee who resigns is not regarded as having been discharged and, thus, would have no right of action for abusive discharge. . . . Through the use of constructive discharge, the law recognizes that an employee's "voluntary" resignation may be, in reality, a dismissal by the employer (17 Conn. App. 532 at 540).

The Court next turned its attention to determine if the CRNA was discharged, did the discharge violate a public policy. The Court decided that there was insufficient evidence presented to determine that the anesthesiologist was impaired or incompetent. Consequently, the CRNA was not performing a public duty which would bring the CRNA within an exception to the Employment at Will doctrine. The hospital decision requiring the CRNA to work under the direction of the anesthesiologist was not so unreasonable as to constitute a dismissal.