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Independent Judgment Day: The Fourth Circuit Deems Nurses to Be Supervisors in *Glenmark Associates v. NLRB*

Employees in most occupations are protected by the National Labor Relations Act (NLRA), which grants them the right to organize and to engage in collective bargaining free from employer interference.¹ The NLRA does not, however, grant such organizational rights and protections to supervisory employees.² The National Labor Relations Board (NLRB or “the Board”), which administers the NLRA,³ has ruled that nurses are not supervisors and may, therefore, organize with the protection of the NLRA.⁴

Recently, however, the U.S. Courts of Appeals have split on the question of how much deference should be accorded to NLRB determinations on whether certain groups of employees are “supervisors” under the NLRA.⁵ Cases involving nurses who wish to

1. See 29 U.S.C. §§ 151–169 (1994).

2. See 29 U.S.C. § 152(3). The NLRA defines a supervisor as 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.

Id. § 152(11).

Congress excluded supervisors from the protection of the NLRA to ensure that management would have the undivided loyalty of those employees authorized to act on behalf of management on matters that might divide management and labor. See H.R. Rep. 80-245, at 13–17 (1947); *infra* notes 84–94 and accompanying text (outlining the history of the NLRA).

3. The NLRB’s main responsibilities are to conduct elections to establish whether employees wish to be represented by a union in negotiations with their employer and to prevent and remedy “unfair labor practices” by employers and unions that violate the NLRA. See BERNARD D. MELTZER & STANLEY D. HENDERSON, *LABOR LAW: CASES, MATERIALS, AND PROBLEMS* 69 (3d ed. 1985). Although the NLRB consists of five members, the term “Board” generally refers to the entire agency, including the office of General Counsel and the regional offices. See *id.* Although the five-member Board has the authority to hear disputes, it has no enforcement powers. Instead, enforcement lies with the federal circuit courts and the Supreme Court. An enforcement order entered by a court of appeals operates like an injunction; violation of such an order is punishable by an action for contempt. See *id.* at 74–75.

4. See, e.g., *STB Investors, Ltd.*, 326 N.L.R.B. No. 159, 1999–2000 NLRB Dec. (CCH) ¶ 15,233 (Sept. 30, 1998) (granting summary judgment against an employer who argued that its licensed practical nurses were supervisors); *Youville Health Care Ctr.*, 326 N.L.R.B. No. 52, 1998 NLRB LEXIS 622, at *9 (Aug. 27, 1998) (adopting a finding that nursing home charge nurses in the case were employees rather than supervisors).

5. See *infra* notes 156–61 (discussing the standard of review for agency decisions).

unionize highlight this circuit split. Some circuits have deferred to the NLRB's determination that nurses are not supervisors, while others have overruled the Board.⁶ The result is that nurses who perform virtually identical tasks are accorded a different status and different legal protections based simply on their geographic locations.⁷ Recently, in *Glenmark Associates v. NLRB*,⁸ the Fourth

Compare *Glenmark Assocs. v. NLRB*, 147 F.3d 333, 338 (4th Cir. 1998) (observing that a thorough examination of the evidence "should be particularly true when the Board is determining supervisory status because of the inconsistency in the Board's application of the statutory definition and of the factors to be used in determining such application" (quoting *NLRB v. St. Mary's Home, Inc.*, 690 F.2d 1062, 1067 (4th Cir. 1982)), *Caremore, Inc. v. NLRB*, 129 F.3d 365, 371 (6th Cir. 1997) (stating that, when determining supervisory status, the NLRB "misapprehend[s] both the law and its own place in the legal system"), and *Spentonbush/Red Star Cos. v. NLRB*, 106 F.3d 484, 492 (2d Cir. 1997) (holding that the Board's bias towards supervisory status lowers the standard of judicial deference), *with* *Passavant Retirement & Health Ctr. v. NLRB*, 149 F.3d 243, 246 (3d Cir. 1998) (holding that "[b]ecause of the Board's 'special competence' in the field of labor relations, its interpretation of the Act is accorded special deference" and noting that "[w]hether a [bargaining] unit is appropriate involves a large measure of informed discretion vested in the Board and is rarely to be disturbed" (quoting *Pattern Makers' League of N. Am., AFL-CIO v. NLRB*, 473 U.S. 95, 100 (1985); *St. Margaret Mem'l Hosp. v. NLRB*, 991 F.2d 1146, 1152 (3d Cir. 1993))), and *Providence Alaska Med. Ctr. v. NLRB*, 121 F.3d 548, 551 (9th Cir. 1997) ("Because the Board has expertise 'in making the subtle and complex distinctions between supervisors and employees, . . . the normal deference [we] give to the Board is particularly strong when it makes those determinations.'" (quoting *NLRB v. S.R.D.C., Inc.*, 45 F.3d 328, 333 (9th Cir. 1995))).

6. *Compare* *NLRB v. Attleboro Assocs.*, 176 F.3d 154, 169 (3d Cir. 1999) (determining that nurses meet the definition of supervisor under the NLRB), *Beverly Enters., Va., v. NLRB*, 165 F.3d 290, 298 (4th Cir. 1999) (en banc) (same), and *Caremore, Inc.*, 129 F.3d at 371 (same), *with* *NLRB v. GranCare, Inc.*, 170 F.3d 662, 668 (7th Cir. 1999) (en banc) (holding that nurses are not supervisors), *Beverly Enters. v. NLRB*, 148 F.3d 1042, 1048 (8th Cir. 1998) (same), *Beverly Enters.-Pa. v. NLRB*, 129 F.3d 1269, 1271 (D.C. Cir. 1997) (per curiam) (mem.) (same), and *Providence Alaska Med. Ctr.*, 121 F.3d at 554 (same).

7. One basic justification for unionization is that unorganized employees suffer from an inherent bargaining disadvantage. For greater discussion of unions and the benefits of labor organization, see ARCHIBALD COX ET AL., *CASES AND MATERIALS ON LABOR LAW* 98 (12th ed. 1996); MELTZER & HENDERSON, *supra* note 3, at 35. Health care unions represent nurses and other workers and seek improvements regarding wages, hours, and other employment conditions. See GEORGE D. POZGAR, *LEGAL ASPECTS OF HEALTH CARE ADMINISTRATION* 559 (Nina Santucci Pozgar ed., 6th ed. 1996) (detailing aspects of unions and health care organizations); James E. Eggleston, *Patient Advocacy and Consumer Protection Through Union Activism: Protecting Health Care Consumers, Patients and Workers During an Unprecedented Restructuring of the Health Care Industry*, 41 ST. LOUIS L.J. 925, 937-43 (1997) (advocating nurses' unions as a means to combat the rising power of health maintenance organizations); Michael H. LeRoy et al., *The Law and Economics of Collective Bargaining for Hospitals: An Empirical Public Policy Analysis of Bargaining Unit Determinations*, 9 YALE J. ON REG. 1, 15-20 (1992) (discussing nurses' unions and the collective bargaining process); Ellen L. Luepke, *White Coat, Blue Collar: Physician Unionization and Managed Care*, 8 ANNALS HEALTH L. 275, 278-82 (1999) (tracing the rise of physicians' unions).

Circuit sided with those circuits overruling the Board and held that certain nursing home nurses are supervisors, rather than employees.⁹

Because many nurses view their ability to unionize not only as an important legal right,¹⁰ but also as conducive to quality patient care,¹¹ the *Glenmark* decision and others like it may be important for patients as well as for nurses.¹² The *Glenmark* decision comes as the United States faces a nursing shortage in its hospitals and nursing homes¹³ and as an aging population¹⁴ increases demand for quality health care.¹⁵ In light of the potential nursing shortage and the need for improved care, the court's determination of the supervisory status of nurses may impact nurses' power to bargain for themselves and for patients.¹⁶

This Note examines the Fourth Circuit's opinion in *Glenmark*, the history of the NLRA, and the case law interpreting the statute.¹⁷ The Note then reviews the Board's construction of the NLRA and examines the approach used by different circuits in analyzing the Board's interpretation.¹⁸ The Note next discusses the proper standard of review for judicial examinations of administrative

8. 147 F.3d 333 (4th Cir. 1998).

9. *See id.* at 345.

10. *See* GINNY WACKER GUIDO, *LEGAL ISSUES IN NURSING* 264 (1997) (stating that the American Nurses Association consistently has supported the right of nurses to bargain collectively); *NURSE'S HANDBOOK OF LAW AND ETHICS* 259 (1992) (noting that the number of unionized nurses has increased dramatically since 1974); *Nurse Supervisors Exemplify NLRB Bias*, *IND. EMP. L. LETTER*, Oct. 1998, at 2, 2 (asserting that "nurses are frequently sympathetic to unions" and will join them when allowed by law).

11. *See* Eggleston, *supra* note 7, at 929-42 (outlining the dangers that health maintenance organizations pose to quality patient care and the efforts of nurses to combat such diminished care by unionizing).

12. *Cf. id.* at 943 (explaining that unionized nurses have the ability to affect quality of care through their collective bargaining efforts).

13. A recent survey by the American Hospital Association, American Society of Health Care Human Resources Administration, and the American Organization of Nurse Executives revealed an impending shortage of nurses. *See Nursing Shortage: Shortfall May Be Long Term*, *Am. Health Line*, Mar. 23, 1999, available in LEXIS, New Library, Medical & Health Materials Combined File. The shortage is already severe in some areas, prompting Congress to pass the Nursing Relief for Disadvantaged Areas Act of 1999, a law that allows more foreign health care workers to work in the United States. *See* Pub. L. No. 106-95, 113 Stat. 852.

14. *See* U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 17 (1998) (estimating that the U.S. elderly population will more than double between 2000 and 2050).

15. *See* Peter Kemper & Christopher M. Murtaugh, *Lifetime Use of Nursing Home Care*, 324 *NEW ENG. J. MED.* 595 (1991) (projecting a continuing rise in nursing care use).

16. *See* Eggleston, *supra* note 7, at 943.

17. *See infra* notes 22-97 and accompanying text.

18. *See infra* notes 98-147 and accompanying text.

decisions, analyzing the Fourth Circuit's approach in *Glenmark* and the split among other circuits.¹⁹ Finally, the Note suggests that the Supreme Court²⁰ or Congress²¹ needs to provide explicit protection for nurses under the NLRA and to clarify how courts are to review Board decisions.

In 1995 and 1996, the Health Care and Social Services Union was certified as the exclusive bargaining representative for the licensed practical nurses and registered nurses who worked at Cedar Ridge Nursing and Rehabilitation Center and Carehaven at Point Pleasant, two nursing homes owned by Glenmark Associates in West Virginia.²² The Union then requested that Glenmark enter into negotiations,²³ but Glenmark refused to bargain and contended that, because the bargaining units at both Cedar Ridge and Point Pleasant contained employees who fit the NLRA's definition of "supervisor," the bargaining units were organized illegally.²⁴ After Glenmark

19. See *infra* notes 148–78 and accompanying text.

20. See *infra* notes 179–93 and accompanying text.

21. See *infra* notes 194–99 and accompanying text.

22. The nursing homes are located in Sissonville and Point Pleasant, West Virginia. See *Glenmark*, 147 F.3d at 335. The Union sought to represent 22 licensed practical nurses (LPNs) at Cedar Ridge and 10 LPNs and 2 registered nurses (RNs) at Point Pleasant. See *id.* at 336, 337. At Cedar Ridge, 21 nurses voted. See *id.* at 336. Of those nurses, 11 voted in favor of the union representation, and 10 voted against it, giving the Union a simple majority, and thus a sufficient number of votes to obtain certification as the exclusive collective bargaining representative for the bargaining unit of nurses. See *id.* At Point Pleasant, 9 of the 11 nurses approved representation, so the Union was certified there as well. See *id.* at 337.

23. Under the NLRA, employers have an enforceable duty to bargain with validly selected union representatives chosen by a majority of employees in an appropriate bargaining unit. See 29 U.S.C. § 158(a)(5) (1994). Such representatives have the exclusive right to bargain on behalf of all the members of the unit. See *id.* An employer is guilty of unfair labor practices if it refuses to bargain with the representative of a legally formed union. See *id.* § 158(a)(1), (5).

24. See *Glenmark*, 147 F.3d at 335. Glenmark's refusal to negotiate served as a vehicle for the nursing home to obtain judicial review of the Union's representation of the nurses. Courts only may review the Board's representation determinations indirectly. See *AFL v. NLRB*, 308 U.S. 401, 409–11 (1940) (holding that NLRB representation determinations are not "final orders" and are thus not judicially reviewable). During a representation determination, the NLRB's regional director conducts a hearing to establish that a potential bargaining unit does not contain employees excluded from the protection of the NLRA. See 29 C.F.R. § 102.67(a) (1998); MELTZER & HENDERSON, *supra* note 3, at 433–34. The employer may dispute the eligibility of the employees' protected status at this time. See 29 C.F.R. § 102.67(a); MELTZER & HENDERSON, *supra* note 3, at 433–34. If the regional director then finds the bargaining unit to be appropriate, the director will order an election for certification of a bargaining unit. See 29 C.F.R. § 102.67(b); MELTZER & HENDERSON, *supra* note 3, at 433–34. A simple majority in the representation vote is sufficient to certify the bargaining unit. See 29 U.S.C. § 159(c)(3); *Glenmark*, 147 F.3d at 336. To obtain judicial review of union representation determinations, an employer generally will decline to bargain with the union certified by

refused to bargain, the Union filed charges with the NLRB, alleging unfair labor practices.²⁵

The Board found that the bargaining units had been formed legally at the two nursing homes²⁶ and disagreed with Glenmark's contention that the licensed practical nurses (LPNs) were supervisors.²⁷ Instead, the Board found that the LPNs did not

the Board as the unit's exclusive bargaining representative. See, e.g., *B B & L, Inc. v. NLRB*, 52 F.3d 366, 369 n.2 (D.C. Cir. 1995) (per curiam) (noting that refusing to bargain is the standard procedure for employers who wish to challenge a certification order). The union will charge the employer with violating the NLRA by refusing to bargain with a certified bargaining representative. See 29 U.S.C. § 158(a)(5); MELTZER & HENDERSON, *supra* note 3, at 433. After an unfair labor practice proceeding, the Board will order the recalcitrant employer to bargain. The employer is then free to seek court review of the bargaining order, including an examination of the initial representation determination. See *id.* at 433-34.

25. See *Glenmark*, 147 F.3d at 337.

26. See *id.* During an unfair labor practice proceeding, a Board regulation prevents the relitigation of any issue that was or could have been raised in the representation proceeding. See 29 C.F.R. § 102.67(f). Because the Board regulations prevent relitigation of status determinations absent special circumstances, and because the Board found that Glenmark offered no new evidence or special circumstances as to this issue, the Board found a reexamination of the initial determination to be unwarranted. See *Glenmark Assocs.*, 322 N.L.R.B. No. 87, 1996 NLRB LEXIS 753, at *2-3 (Nov. 15, 1996); *Glenmark Assocs.*, 322 N.L.R.B. No. 29, 1996 NLRB LEXIS 638, at *2-3 (Sept. 20, 1996). Thus, the Board granted summary judgment against Glenmark. See *Glenmark Assocs.*, 1996 NLRB LEXIS 638, at *3; *Glenmark Assocs.*, 1996 NLRB LEXIS 753, at *3.

27. Although the bargaining unit at Point Pleasant also contained a few registered nurses, the status of the LPNs was at the heart of the dispute. See *Glenmark*, 147 F.3d at 340, 343. The nursing staffs at Cedar Ridge and Point Pleasant were organized in a typical nursing home hierarchy: one Director of Nursing, one assistant administrator, a small number of registered nurses (three full-time, one part-time at Cedar Ridge, two at Point Pleasant), some licensed practical nurses (22 at Cedar Ridge, 10 at Point Pleasant), and a large number of certified nursing aides (CNAs) (about 60 at Cedar Ridge and up to 40 at Point Pleasant). See *id.* at 335-36; Jonathan Edward Motley, Note, *Grandmothers and Teamsters: How the NLRB's New Approach to the Supervisory Status of Charge Nurses Ignores the Reality of the Nursing Home*, 73 IND. L.J. 711, 717-18 (1998) (outlining the standard structure of nursing care facilities).

A registered nurse must complete a four- or five-year baccalaureate program at a college or university, graduating with a bachelor of science degree. See PDR MEDICAL DICTIONARY 1232 (Marjory Sprycar ed., 1995); see also LEXIKON: DICTIONARY OF HEALTH CARE TERMS, ORGANIZATIONS, AND ACRONYMS FOR THE ERA OF REFORM 680 (Margaret R. O'Leary et al. eds., 1994) [hereinafter LEXIKON] (describing qualifications and responsibilities of registered nurses). After obtaining the necessary training, the nursing school graduate must pass the National Council Licensure Examination. See LEXIKON, *supra*, at 515, 680. The nurse is then licensed by the state as a registered nurse. See LEXIKON, *supra*, at 680; PDR MEDICAL DICTIONARY, *supra*, at 1232.

Licensed practical nurses are professional nurses licensed to administer patient care under the supervision of a doctor or a registered nurse. See PDR MEDICAL DICTIONARY, *supra*, at 1231. LPNs usually study practical nursing and direct patient care for one to two years at an accredited school of practical nursing. Upon graduating, the

exercise independent judgment as required by the NLRA and were simply highly skilled professionals²⁸ whose incidental job requirements included sharing knowledge and expertise with lesser skilled coworkers through direction and task assignment.²⁹

The Board acknowledged that the LPNs' duties required them to perform one or more of the statute's enumerated supervisory tasks,³⁰ but pointed to several other aspects of their duties in concluding that the LPNs did not exercise independent judgment when assigning tasks to or imposing discipline upon certified nursing assistants (CNAs).³¹ First, the Board contended that, rather than utilizing their *own* critical faculty, the LPNs were required to follow routine procedures in assigning the CNAs various tasks.³² The Board reasoned that such institutional procedures eliminated the necessity of exercising independent judgment.³³ Second, any decisions requiring independent judgment during an LPN's shift could be made by the registered nurse on call.³⁴ The LPNs also did not have the ultimate authority to discipline CNAs; rather, the LPNs could only file reports recommending appropriate action with the Director of

student must then pass a state board examination to be licensed as an LPN. *See id.*

Certified nursing aides have minimal training and assist in the most basic patient care responsibilities, such as bathing and dressing patients, changing their linens, and brushing their hair and teeth. *See Glenmark*, 147 F.3d at 336.

28. Professional employees are specifically protected under the NLRA, which defines "professional employee" as any employee who is engaged in intellectual work that demands both discretion and judgment in its performance and some type of specialized intellectual instruction and study in an institution of higher learning or a hospital. *See* 29 U.S.C. § 152(12). The line between supervisors and professional employees has not been an easy one for the courts to draw. *See* David M. Rabban, *Distinguishing Excluded Managers from Covered Professionals Under the NLRA*, 89 COLUM. L. REV. 1775, 1802-05 (1989) (outlining the difficulties in designating an employee as a professional); *infra* notes 95-98 and accompanying text (discussing the tension between the two categories).

29. *See Glenmark*, 147 F.3d at 340.

30. *See id.* at 341. The nurses both assigned work and disciplined employees, which are actions covered by the statutory language. *See* 29 U.S.C. § 152(11); *Glenmark*, 147 F.3d at 340; *supra* note 2 (quoting the statute).

31. *See Glenmark*, 147 F.3d at 341-44.

32. *See id.* at 341-42; *supra* note 27 (defining CNAs' duties). For instance, at Cedar Ridge, if an LPN needed to change a CNA's assigned duties for any reason, the LPN had to first ask for volunteers and then fill the slot according to CNA seniority. *See Glenmark*, 147 F.3d at 346 (Jones, J., dissenting). LPNs were authorized to permit a CNA to leave work early, but they were required to inform the supervising RN of that decision. *See id.* (Jones, J., dissenting). Furthermore, at Point Pleasant, because the CNAs were unionized, a collective bargaining agreement dictated many aspects of calling in off-duty aides and of discipline procedures. *See id.* (Jones, J., dissenting).

33. *See Glenmark*, 147 F.3d at 340.

34. *See id.* at 341. The Board did not present any evidence, however, that any of the Cedar Ridge LPNs actually called the RNs for consultation. *See id.*

Nursing, who then made the final decision to implement discipline.³⁵ Third, the Board classified verbal reprimands by the LPNs as instruction rather than discipline.³⁶ Because the command structure and procedures limited LPNs' ability to exercise discretion, the Board argued that they did not apply independent judgment as envisioned by the NLRA.³⁷ Accordingly, the Board determined that Glenmark's failure to negotiate was an unfair labor practice.³⁸ When the Board ordered the nursing home back to the bargaining table, Glenmark appealed, claiming that the Board was mistaken in characterizing the LPNs as non-supervisors.³⁹

Upon analyzing the nursing homes' physical facilities, staffs, job descriptions, shift schedules, and the nature of the duties performed by the LPNs at both Point Pleasant and Cedar Ridge,⁴⁰ the Fourth

35. *See id.* at 342-44.

36. *See id.* at 342. This conclusion contradicted the testimony by the Cedar Ridge Director of Nursing, who confirmed that LPNs discipline CNAs without prior approval from RNs. *See id.* at 342 n.13. The Assistant Director of Nursing also testified that an LPN had suspended a CNA on her own authority when she discovered that the CNA had mistreated a resident. *See id.* at 343.

37. *See id.* at 342.

38. *See* Glenmark Assocs., 322 N.L.R.B. No. 87, 1996 NLRB LEXIS 753, at *4-5 (Nov. 15, 1996); Glenmark Assocs., 322 N.L.R.B. No. 29, 1996 NLRB LEXIS 638, at *4-5 (Sept. 20, 1996).

39. *See* Glenmark, 147 F.3d at 337.

40. At Cedar Ridge, the RNs operated on a separate 12-hour shift schedule and served as charge nurses when they were on the floor. *See id.* at 335. The charge nurse was any staff nurse (RN or LPN) who was "in charge" of the facility during a certain shift. *See id.* at 335 n.2. The charge nurse's duty consisted primarily of coordinating patient care within the assigned area of her department. *See id.* For example, a charge nurse might have spent time assessing patients' needs, monitoring attendance, insuring adequate personnel, and monitoring and evaluating staff nurses' performances. *See id.* at 335 n.2, 336. Charge nurses supervised all of the other nurses during their shifts. *See id.* at 344. When there was no RN coverage, however, the senior LPN on the shift took over the charge nurse's responsibilities. *See id.* at 335. Any LPN employed at the facility could potentially serve as the charge nurse. *See id.* This potential for charge nurse status was particularly important to the court in its analysis of LPN supervisory capacity. *See infra* notes 64-70 and accompanying text.

LPNs' duties primarily related to direct patient care, but also included managing CNAs in certain circumstances. *See* Glenmark, 147 F.3d at 336. LPNs could reassign or call in CNAs when a staff shortfall occurred. *See id.* If a CNA made a special scheduling request during a shift, the LPN floor nurse had the authority to approve or disapprove that request. *See id.* LPNs were also involved in the discipline of aides, including counseling the CNAs, filing "verbal correction notices" with the Director of Nursing, and, for serious infractions, immediately suspending CNAs. *Id.* The duties of CNAs at Cedar Ridge primarily involved more basic personal hygiene-oriented duties than did the LPNs' responsibilities. *See id.* For example, CNAs turned, bathed, dressed, brushed the teeth of, and changed the linens and clothing for patients. *See id.*

At Point Pleasant, the LPNs performed essentially identical tasks to those at Cedar Ridge. *See id.* at 336-37. Because none of the administrative staff was on call or

Circuit reversed the Board's decision.⁴¹ The court explained that it would have sustained the Board's determination if that determination had been reasonable and consistent with the NLRA, but noted that the Board had displayed "manifest . . . inconsistency" in the past when determining supervisory status.⁴² Because of this inconsistency, the court concluded that it should conduct a thorough examination of the evidence in the case to evaluate the Board's conclusions.⁴³

The court first outlined the three-prong test for determining whether an employee qualifies as a supervisor under the NLRA.⁴⁴ First, an employee must have the authority to perform at least one of twelve enumerated tasks.⁴⁵ Second, these tasks must promote the interests of the employer,⁴⁶ and third, an employee must use "independent judgment" while exercising such authority.⁴⁷ The Fourth Circuit focused its analysis on the third criterion, rejecting the Board's contention that the Glenmark nurses' duties of assigning and disciplining lower employees were merely incidental and did not

carried beepers, the Point Pleasant charge nurses did not receive direction when administrators were off-site and were the most senior employees at the nursing home during the evenings and weekends. *See id.*

41. *See Glenmark*, 147 F.3d at 333, 345. Judge Williams wrote the majority opinion in which Judge Niemeyer joined. *See id.* at 334. Judge Jones, a United States District Judge for the Western District of Virginia who was sitting by designation, wrote a dissenting opinion. *See id.* at 345-47 (Jones, J., dissenting); *infra* notes 75-82 and accompanying text (discussing the dissent).

42. *Glenmark*, 147 F.3d at 338 (quoting *NLRB v. St. Mary's Home, Inc.*, 690 F.2d 1062, 1067 (4th Cir. 1982)). The Fourth Circuit has long been suspicious of the Board's motives in determining supervisory status and openly doubtful of the Board's ability to remain appropriately neutral. *See id.* at 339-40 n.8. In 1982, the Fourth Circuit stated that a thorough examination of the evidence is particularly necessary in cases in which the Board decides supervisory status, citing one commentator who accused the Board of implementing a policy biased in favor of whatever definition of supervisor would widen the coverage of the NLRA. *See St. Mary's Home, Inc.*, 690 F.2d at 1067 (quoting Note, *The NLRB and Supervisory Status: An Explanation of Inconsistent Results*, 94 HARV. L. REV. 1713, 1713-14, 1721 (1981) [hereinafter *The NLRB and Supervisory Status*]).

43. *See Glenmark*, 147 F.3d at 338.

44. *See id.*

45. *See id.* Examples of such tasks include the authority to assign, discipline, or responsibly direct other employees, or effectively to recommend such action. *See* 29 U.S.C. § 152(11) (1994); *supra* note 2 (quoting the statute). The court noted that whether the employee actually exercised the authority was irrelevant, as long as the authority had been delegated properly. *See Glenmark*, 147 F.3d at 338.

46. *See* 29 U.S.C. § 152(11); *NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 583-84 (1994) (holding that a nurse's patient care satisfies the "in the interest of the employer" requirement of the NLRA); *see also infra* notes 98-133 and accompanying text (discussing this requirement).

47. *See* 29 U.S.C. § 152(11); *Glenmark*, 147 F.3d at 339.

require independent judgment.⁴⁸

The court held instead that the nurses had considerable discretion to exercise management prerogatives⁴⁹ and chided the Board for "fail[ing] to appreciate the distinction between using skill and professional judgment to perform a complex job and using related skills and judgment to manage others."⁵⁰ The court held that the plain language of the NLRA establishes that nurses share in the power of management by making critical supervisory decisions that substantially affect lower ranking employees.⁵¹ Specifically, the court refuted the Board's characterization of LPNs as non-supervisors in three areas: their ability to assign work, their power to discipline, and the role of charge nurses.⁵²

First, the court disagreed with the Board's assessment that an LPN's ability to assign work was merely incidental to her other duties and cited many instances of LPNs' direction and control of employees.⁵³ For example, the Glenmark LPNs were often responsible for maintaining appropriate staff levels within the nursing home,⁵⁴ a task that required an LPN to decide whether to call additional CNAs into work, to alter hallway assignments and break schedules, or to allow CNAs to leave work early.⁵⁵ Such authority, the court maintained, "rises above the mere incidental direction of assistants."⁵⁶ Accordingly, the court rejected the Board's evaluation of these tasks as routine, noting that an established procedure does not abdicate the necessity for thought.⁵⁷ Individual patients may have specialized health risks or physical limitations to which a particular CNA with unique skills is better suited to respond.⁵⁸ For example, a seasoned CNA would be better assigned to more vulnerable patients

48. See *Glenmark*, 147 F.3d at 340.

49. See *id.* at 340.

50. *Id.* The court cited language from *Health Care* as support for its contention that there is "a distinction between authority arising from professional knowledge and authority encompassing front-line management prerogatives." *Id.* at 340 (quoting *NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 583 (1994)); *infra* notes 115-33 and accompanying text (discussing *Health Care*).

51. See *id.* For a discussion of the court's examination of the plain meaning of the statute, see *infra* notes 162-67 and accompanying text (questioning the applicability of the plain meaning approach to a statutory phrase when the circuits substantially disagree as to its interpretation).

52. See *Glenmark*, 147 F.3d at 341-45.

53. See *id.*

54. See *id.* at 340.

55. See *id.* at 341.

56. *Id.*

57. See *id.*

58. See *id.* at 342.

than an inexperienced CNA who is new to the job. Because staffing decisions require an individualized analysis of patients' needs and particular staff members' skills, the court held that independent judgment by the LPNs is inseparable from their duties, routine or otherwise.⁵⁹

The court also rejected the Board's conclusion that the LPNs' ability to discipline lower-level employees was not an indication of supervisory status.⁶⁰ Observing that the NLRA demands only that a supervisor have the ability "effectively to recommend" discipline,⁶¹ the court stated that the relevant approach would be to consider the LPNs' ability to recommend discipline, rather than to focus on their ultimate authority to implement punishment.⁶² The court concluded that the LPNs did have sufficient authority "effectively to recommend" discipline, so that despite their lack of ultimate authority, they satisfied this requirement for supervisory status.⁶³

The court reserved its harshest critique of the Board's ruling for the final line of analysis, the interpretation of the role of charge nurses.⁶⁴ The Glenmark LPNs often function as charge nurses.⁶⁵

59. *See id.* The court noted that by finding that LPNs use independent judgment to assign tasks, it need go no further in its analysis. *See id.* In other words, the court held that a finding that an employee has one of the 12 listed duties is enough to confer supervisory status. *See id.*

60. *See id.*, 147 F.3d at 342-44.

61. 29 U.S.C. § 152(11) (1994); *supra* note 2 (quoting the statute).

62. *See Glenmark*, 147 F.3d at 342 (quoting *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 683 n.17 (1980)). The Directors of Nursing at both Glenmark facilities testified that they depended upon the input of the LPNs, who are often the only witnesses to any misbehavior by CNAs. *See id.* at 343. CNAs, who often lack training and are minimally regulated, comprise the majority of nursing personnel at most nursing homes. *See Motley, supra* note 27, at 717. Moreover, they are the lowest paid and most transient of any employee in the average nursing home. *See id.* at 740. Finally, because many nursing home residents suffer from some form of dementia, they are not alert, making it easy for CNAs to take advantage of them. *See id.* at 741-42 (arguing that such abuse is easier to prevent when charge nurses are aligned with management). Dishonest CNAs might be tempted to supplement their low incomes by stealing from unsuspecting and vulnerable residents. Members of Congress specifically recognized this problem when they recently proposed the Patient Abuse Prevention Act, which would create a national registry for nursing home employees and require nursing homes to perform criminal background checks. *See S. 1445*, 106th Cong. (1999) (Sup. Docs. No. Y1.4/1:106-1445).

Cedar Ridge and Point Pleasant, like many nursing homes, rely upon LPN charge nurses to control such problems. *See Glenmark*, 147 F.3d at 343-44. The LPNs have the authority to suspend any CNA for serious breaches of patient care protocol. *See id.* At Cedar Ridge, an LPN had in fact suspended a CNA for rough treatment of a patient. *See id.*

63. *See Glenmark*, 147 F.3d at 342-44.

64. *See id.* at 344-45; *supra* note 40 (describing the duties of charge nurses).

65. *See Glenmark*, 147 F.3d at 341-42.

During evenings and weekends, charge nurses are the highest ranking employees on site.⁶⁶ The court questioned how a nursing home could operate effectively for two-thirds of the week with no one at the facility exercising independent judgment.⁶⁷ After noting that the charge nurses possess a vested managerial authority even if they do not frequently exercise such power, the court held that whether charge nurses actually performed any additional duties was immaterial to determining supervisory status.⁶⁸

Citing Fourth Circuit case law that had already determined a charge nurse at a nursing home to be a supervisor,⁶⁹ the court viewed the Board's refusal to follow this precedent as another example of the Board's consistent policy push for an expansive interpretation of the NLRA, despite judicial rejection of such a broad reading.⁷⁰ Warning that the Board's adherence to the expansive reading strained its credibility with the Fourth Circuit, the court advised the Board to re-evaluate its "single-minded pursuit of its policy goals."⁷¹ Having asserted its supervisory authority over the Board, the court concluded that the Board proffered little evidence to support its interpretation of "independent judgment" and, therefore, had acted irrationally in its interpretation of the NLRA.⁷² Furthermore, the

66. See *id.* The Board had deemed the LPNs' charge nurse duties insignificant because such a station held little extra responsibility. See *id.* at 344. This conclusion, the court asserted, contradicted both the evidence and circuit precedent. See *id.*

67. See *id.* at 344-45.

68. See *id.* at 344 ("Being designated 'charge nurse' is more significant than acquiring a mere title, it is acceding to full responsibility for the nursing home.").

69. See *id.* (citing *NLRB v. St. Mary's Home, Inc.*, 690 F.2d 1062 (4th Cir. 1982)). In *St. Mary's Home, Inc.*, the court repeatedly emphasized the importance of the designation "charge nurse" at a nursing home that operated on a 24-hour schedule because the charge nurse is often the highest ranking official present at the home. 690 F.2d at 1067.

70. See *Glenmark*, 147 F.3d at 345 (stating that "the Board once again has declined to follow our Circuit's law"). The Board's refusal to acquiesce to a court of appeals decision and the subsequent judicial criticism is not unusual, however. See Edward Silver & Joan McAvoy, *The National Labor Relations Act at the Crossroads*, 56 *FORDHAM L. REV.* 181, 199 (1987) (describing the friction between the circuits and the Board over the Board's tendency to disregard circuit precedent). The Board is responsible for uniform administration of the NLRA and, thus, often adheres to its own interpretation of the Act despite the rejection of its position by some circuits. See *id.* at 203.

71. *Glenmark*, 147 F.3d at 340 n.8. The court described the NLRB's position as "an end run around an unfavorable Supreme Court decision in order to promote policies of broadening the coverage of the Act, maximizing the number of unions certified, and increasing the number of unfair labor practice findings it makes rather than explicate a well-reasoned interpretation of the NLRA." *Id.* at 339 n.8.

72. See *id.* at 345. Thus, the court tacitly acknowledged the doctrine announced by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), which instructs appellate courts to uphold agency decisions interpreting ambiguous statutory language unless the interpretations are irrational. For

court held that the licensed practical nurses and registered nurses who worked at the Glenmark nursing homes exercised independent judgment in the performance of their duties and, as such, qualified as supervisors under the NLRA.⁷³ Their supervisory status disqualified the RNs and LPNs from organizing under the Act, and, thus, Glenmark had not engaged in an unfair labor practice when it refused to deal with bargaining units that included such nurses.⁷⁴

In dissent, Judge Jones contended that the record contained abundant evidence to support the Board's decision.⁷⁵ He noted the difficulty of determining the supervisory status of professional employees who regularly exercise discretion in their daily tasks.⁷⁶ According to Judge Jones, however, the degree of discretion exercised by such professionals, rather than inherent authority, is determinative.⁷⁷ That is, if an employee's discretion is constrained substantially by superiors, then any application of managerial power is routine and necessarily devoid of independent judgment within the meaning of the NLRA.⁷⁸ Whether an employee's discretion is substantially constrained is a fact-specific determination.

Judge Jones argued that the Glenmark nurses were limited to "set options" in their ability to assign and discipline CNAs and, therefore, should be considered employees.⁷⁹ Judge Jones disagreed with the ruling that LPNs retained ultimate authority over the facility during their shifts as charge nurses, arguing instead that this designation remained with the on-call nurse at all times.⁸⁰ To illustrate the distinction, he observed that a "night watchman is not a supervisor just because he is the only person on the premises at

greater discussion of the standard of review and *Chevron's* implications, see *infra* notes 156-68 and accompanying text.

73. See *Glenmark*, 147 F.3d at 345.

74. See *id.*

75. See *id.* at 345-47 (Jones, J., dissenting).

76. See *id.* (Jones, J., dissenting) (emphasizing the circuit split over the issue of independent judgment and professional employees).

77. See *id.* at 346 (Jones, J., dissenting) (pointing to similar distinctions made by the D.C. and Sixth Circuits as authority for his argument).

78. See *id.* (Jones, J., dissenting).

79. See *id.* at 346-47 (Jones, J., dissenting). For example, Judge Jones pointed out that if a vacancy in a work shift occurred, the LPNs are required to ask for volunteers, then to fill the spot according to CNA seniority. See *id.* at 346 (Jones, J., dissenting). Regarding the LPNs' ability to discipline, Judge Jones noted that the LPNs have no power to either fire a CNA or compel specific discipline on the basis of a verbal correction notice. See *id.* (Jones, J., dissenting).

80. See *id.* at 347 (Jones, J., dissenting). On-call nurses are registered nurses who are not physically present at the nursing home, but who may be "called in" to the facility in case of an emergency. *Id.* (Jones, J., dissenting).

night, and if there were several watchmen it would not follow that at least one was a supervisor.’”⁸¹ Judge Jones then concluded that the nurses were substantially constrained in their discretion and, therefore, did not exercise independent judgment within the meaning of the Act.⁸²

The court’s decision in *Glenmark* is one of the latest to highlight the tension between the circuits and the Board regarding supervisory status of employees under the National Labor Relations Act.⁸³ Enacted in 1935, the NLRA originally did not exempt supervisory employees from its coverage.⁸⁴ As a result, supervisory employees could organize as part of bargaining units and negotiate with their employers.⁸⁵ Employers complained that this framework produced an imbalance between labor and management, but the Supreme Court refused to carve out a supervisory exception from the Act’s broad coverage.⁸⁶ In *Packard Motor Car Co. v. NLRB*,⁸⁷ the Court determined that acts within the scope of employment or for the authorized business of the employer are “in the interest of the employer.”⁸⁸ The Court stated that “it is for Congress, not for us, to create exceptions or qualifications at odds with [the Act’s] plain

81. *Id.* at 347 (Jones, J., dissenting) (quoting *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983)).

82. *See id.* (Jones, J., dissenting).

83. *Compare NLRB v. Attleboro Assocs.*, 176 F.3d 154, 169 (3d Cir. 1999) (concluding that LPN charge nurses are supervisors under the NLRA), *Beverly Enters., Va. v. NLRB*, 165 F.3d 290, 298 (4th Cir. 1999) (en banc) (holding LPNs to be supervisors), *and Caremore, Inc. v. NLRB*, 129 F.3d 365, 370–71 (6th Cir. 1997) (determining that nursing home LPNs meet the definition of supervisor under the NLRA), *with NLRB v. GranCare, Inc.*, 170 F.3d 662, 668 (7th Cir. 1999) (en banc) (holding that nursing home LPNs are not supervisors under the NLRA), *Beverly Enters. v. NLRB*, 148 F.3d 1042, 1048 (8th Cir. 1998) (holding that charge nurses are not supervisors), *Beverly Enters.-Pa. v. NLRB*, 129 F.3d 1269, 1270–71 (D.C. Cir. 1997) (per curiam) (mem.) (enforcing the Board’s order determining that LPNs are not supervisors), *and Providence Alaska Med. Ctr. v. NLRB*, 121 F.3d 548, 554–55 (9th Cir. 1997) (holding that charge nurses are not statutory supervisors).

84. *See National Labor Relations Act (Wagner Act)*, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–161 (1994)). For in-depth discussions of the NLRA and its history, see HARRY A. MILLIS, *FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS* 30–75 (1950), and George Feldman, *Workplace Power and Collective Activity: The Supervisory and Managerial Exclusions in Labor Law*, 37 ARIZ. L. REV. 525, 534–40 (1995) (relating Congress’s passage of the Wagner and Taft-Hartley Acts, which are the foundation of the NLRA).

85. *See NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 573 (1994).

86. *See id.* at 573; *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 490 (1947).

87. 330 U.S. 485 (1947).

88. *Id.* at 488–89.

terms.”⁸⁹

Congress responded by passing the Labor-Management Relations Act of 1947,⁹⁰ which amended the NLRA to state that the term “employee . . . shall not include . . . any individual employed as a supervisor.”⁹¹ As amended, the NLRA’s section 2(11) defines “supervisor” according to a three-prong test. First, an individual must possess the authority to perform at least one enumerated supervisory task: hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline, responsibly direct other employees or adjust their grievances, or “effectively to recommend” such action.⁹² Second, the individual must carry out these activities “in the interest of the employer.”⁹³ Finally, the exercise of such authority must require the use of “independent judgment.”⁹⁴

This definition of supervisor is in tension with section 2(12) of the NLRA, which specifically protects “professional” employees by allowing them to unionize.⁹⁵ The Act defines professionals as those employees whose work is “predominantly intellectual and varied in character,” involves “the consistent exercise of discretion and judgment,” and requires advanced knowledge “acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital.”⁹⁶ Professional employees may incidentally direct other employees in carrying out daily work, but as long as this direction is limited and does not encompass supervisory authority under the NLRA, professionals will not be classified as supervisors and will be protected by the NLRA as employees.⁹⁷ Ironically then, non-supervisory professional

89. *Id.* at 490. A more detailed discussion of *Packard* can be found in Feldman, *supra* note 84, at 534–40.

90. Labor Management Relations Act (Taft-Hartley Act), ch. 120, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 141–197 (1994)).

91. *Id.* § 14, 61 Stat. at 151 (codified at 29 U.S.C. § 152(3) (1994)). The Senate explained that the only employees to be excluded are those regarded as foremen and not workers with minor supervisory duties, emphasizing that only employees vested with genuine management prerogatives should be considered supervisors. *See* S. REP. No. 80-105, at 4 (1947).

92. 29 U.S.C. § 152(11).

93. *Id.*

94. *Id.*

95. *See id.* § 152(12); *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 686 (1980) (holding that university faculty members are supervisors under section 2(11) despite the “tension between the Act’s exclusion of managerial employees and its inclusion of professionals”); Rabban, *supra* note 28, at 1798–99 (analyzing the tension between the statutory definitions of “supervisor” and “professional” under the Act).

96. 29 U.S.C. § 152(12).

97. *See Yeshiva Univ.*, 444 U.S. at 681–82 (noting that professionals may be exempted

employees, who typically enjoy strong bargaining positions with employers, may unionize, while employees with less workplace power but some supervisory duties may not.

Because many nursing jobs possess both supervisory and professional characteristics, this distinction is problematic when determining whether nurses can unionize.⁹⁸ In order to gain union protection for nurses, the National Labor Relations Board originally attempted to reconcile sections 2(11) and 2(12) by using an analysis unique to the nursing industry.⁹⁹ In analyzing cases assessing whether charge nurses are supervisors, the Board focused on the NLRA's phrase "in the interest of the employer."¹⁰⁰ In what came to be known as the "patient care analysis," the NLRB reasoned that the supervisory duties performed by charge nurses were discharged in the interest of the patient rather than in the interest of the employer.¹⁰¹ The Board deemed a nurse's authority to perform the enumerated supervisory activities to be an exercise of professional judgment and incidental to the nurse's primary obligation of patient care.¹⁰² In addition to the Board's legal interpretation of the Act, the Board had strong policy reasons for advocating this position. The Board was concerned that the similarities between professional duties and supervisory activities might result in decreased protection for professionals.¹⁰³ Moreover, because of nurses' professional and

from coverage of the Act if they are supervisors).

98. Registered nurses generally qualify as professionals, while licensed practical nurses do not. See *St. Elizabeth's Hosp.*, 220 N.L.R.B. 325, 325 (1975) (granting professional status to graduate nurses and senior nursing assistants who have graduated but not yet passed the required registration examination for registered nurses); *Presbyterian Med. Ctr.*, 218 N.L.R.B. 1266, 1266-67 (1975) (granting registered nurses professional status, but denying the same to LPNs); *Pikeville Investors, Inc.*, 204 N.L.R.B. 425, 425-26 (1973) (finding that LPNs lack the academic instruction necessary for professional status).

99. See *NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 574 (1994) ("In cases involving nurses, the Board admits that it has interpreted the statutory phrase in a unique manner.").

100. See, e.g., *Beverly Enters.-Ohio*, 313 N.L.R.B. 491, 493-94 (1993) (finding that the nurse's role in assigning, directing, and disciplining aides was an exercise of professional judgment in the interests of patient care rather than an exercise of supervisory authority in the interest of the employer). But see *Beverly Cal. Corp. v. NLRB*, 970 F.2d 1548, 1552 (6th Cir. 1992) (rejecting the Board's argument that the nursing home staff worked in the interest of the patients, rather than in the interests of the employer).

101. See *Beverly Enters.-Ohio*, 313 N.L.R.B. at 493-94; Roger King, *Where Have All the Supervisors Gone?—The Board's Misdiagnosis of Health Care & Retirement Corp.*, 13 LAB. L. 343, 344-46 (1997) (tracing the history of the patient care analysis).

102. See *Beverly Enters.-Ohio*, 313 N.L.R.B. at 494.

103. See *Health Care*, 511 U.S. at 581 (noting the Board's argument that an overbroad interpretation of the Act should not be allowed to nullify Congress's intended protection for professional employees).

ethical commitments to their patients, the Board believed that the Act's original purpose of avoiding divided loyalties between labor and management was not in question.¹⁰⁴ In light of its interpretation of the Act and its underlying policy concerns, the Board granted charge nurses specific protection under the Act as non-supervisory professionals.¹⁰⁵

The Board's interpretation of the phrase "in the interest of the employer"¹⁰⁶ had mixed success when reviewed by the federal circuit courts.¹⁰⁷ The Sixth Circuit rejected the Board's test as inconsistent with the NLRA,¹⁰⁸ echoing the Supreme Court's holding in *Packard* that Congress, not the judicial or executive branches, is responsible for carving out an exception for the health field.¹⁰⁹ The Second,¹¹⁰ Seventh,¹¹¹ and Eighth Circuits,¹¹² in contrast, upheld the Board's determination, emphasizing judicial deference to administrative agencies¹¹³ and the routine nature of the nurses' supervisory duties.¹¹⁴

The Supreme Court resolved the dispute over the Board's approach to supervisory status for nurses in *NLRB v. Health Care & Retirement Corp. of America*.¹¹⁵ In a five-to-four decision,¹¹⁶ the

104. See *id.* at 580-81 (noting the Board's confidence in its assertion that, because divided loyalties were not a problem with nurses, any managerial exclusion was unnecessary).

105. See *id.*

106. 29 U.S.C. § 152(11) (1994).

107. Compare *Waverly-Cedar Falls Health Care Ctr., Inc. v. NLRB*, 933 F.2d 626, 630-31 (8th Cir. 1991) (finding LPNs to be protected under the Act), *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1468 (7th Cir. 1983) (same), and *Misericordia Hosp. Med. Ctr. v. NLRB*, 623 F.2d 808, 816 (2d Cir. 1980) (same), with *Beverly Cal. Corp. v. NLRB*, 970 F.2d 1548, 1552-53 (6th Cir. 1992) (holding that the NLRA does not protect charge nurses because they qualify as supervisors).

108. See *Beverly Cal. Corp.*, 970 F.2d at 1552 (noting that simply because nursing home personnel are directed to ensure "quality care" for the patients does not disqualify such direction as being "in the interest of the employer"); see also *NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d 1076, 1080 (6th Cir. 1987) (concluding that there is no support for the Board's patient care exception in the Taft-Hartley Act or its legislative history).

109. See *Beverly Cal. Corp.*, 970 F.2d at 1556.

110. See *Misericordia Hosp. Med. Ctr.*, 623 F.2d at 816.

111. See *Res-Care, Inc.*, 705 F.2d at 1468.

112. See *Waverly-Cedar Falls Health Care Ctr., Inc.*, 933 F.2d at 630-31.

113. Courts must defer to administrative agency interpretations of vague statutory language if they are "permissible constructions." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *infra* notes 156-68 and accompanying text (discussing *Chevron* and its implications in *Glenmark*).

114. See *Waverly-Cedar Falls Health Care Ctr., Inc.*, 933 F.2d at 629-30.

115. 511 U.S. 571 (1994).

116. Justice Kennedy wrote the majority opinion, in which Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas joined. Justice Ginsburg filed a dissenting opinion, in which Justices Blackmun, Stevens, and Souter joined. See *id.* at 572; *id.* at 584

Court invalidated the Board's patient care analysis, stating that it created a "false dichotomy" between the interest of the employer and the interests of the patient that was contrary to the language and spirit of the NLRA.¹¹⁷ Given that patient care is the business of a nursing home, the Court reasoned that "attending to the needs of nursing home patients, who are the employer's customers, is in the interest of the employer."¹¹⁸ The Court explained that *Packard's* broad definition of the phrase "in the interest of the employer" includes actions of all employees acting within the scope of employment.¹¹⁹ According to the Court, the plain meaning of the NLRA does not support the dichotomy created by the Board's patient care analysis.¹²⁰ Although the Court agreed that the Board should be given "ample room" to interpret such ambiguous phrases from the Act as "responsibly to direct" and "independent judgment," it reminded the Board that ambiguity elsewhere in the Act was irrelevant because the Board had relied exclusively upon the "in the interest of the employer" language as a basis for finding that nurses are covered by the NLRA.¹²¹ Because the Court found the "in the interest of the employer" language to be unambiguous, it refused to defer to the Board's "distorted" interpretation of the statute.¹²²

The *Health Care* Court also rejected each of the Board's policy arguments for upholding the patient care approach.¹²³ The Board

(Ginsburg, J., dissenting).

117. *Id.* at 577. For greater discussion of the *Health Care* decision, see King, *supra* note 101, at 344-52 (criticizing the Board's approach to supervisory status in *Health Care*); Colleen A. Manning, 1995-96 Annual Survey of Labor and Employment Law, *Status of Charge Nurses as "Supervisors" Under the National Labor Relations Act*, 38 B.C. L. REV. 335, 345 (1997) (arguing that *Health Care* does not necessarily end protection for nurses); J.P. Nusbaum, Note, *NLRB v. Health Care & Retirement Corporation: Nurses as Supervisors Under the National Labor Relations Act*, 74 OR. L. REV. 1087, 1096-1104 (1995) (analyzing the implications of the Court's decision); Joseph A. Stegbauer, Note, *Form over Function: The Supreme Court Eviscerates the National Labor Relations Act's Protection of Professionals: NLRB v. Health Care & Retirement Corporation of America*, 114 S. Ct. 1778 (1994), 63 U. CIN. L. REV. 1979, 2003-05 (1995) (arguing that the Court's decision in *Health Care* has the potential to nullify the NLRA's protection of professionals); R. Jason Straight, Note, *Who's the Boss?: Charge Nurses and "Independent Judgment" After National Labor Relations Board v. Health Care & Retirement Corporation of America*, 83 MINN. L. REV. 1927, 1954 (1999) (arguing that the Supreme Court failed to recognize the subtle distinction between acting as a professional and acting as a supervisor).

118. *Health Care*, 511 U.S. at 577.

119. See *id.* at 578; see also *supra* text accompanying notes 87-88 (discussing *Packard's* definition of "in the interest of the employer").

120. See *Health Care*, 511 U.S. at 578-79.

121. *Id.* at 579.

122. *Id.*

123. See *id.* at 580-82.

had posited that the underlying policy reason for excluding supervisors from the Act—the danger that supervisors will have conflicting loyalties—did not exist in patient care industries.¹²⁴ The Court disagreed, stating that the statute was clear and did not allow for the creation of “legal categories inconsistent with its meaning.”¹²⁵ The Court also hypothesized that the danger of divided loyalties could exist in patient care industries.¹²⁶ Finally, the Court addressed the statutory overlap between supervisors and professionals.¹²⁷ The Board had argued that, because incidental supervisory powers are often inherent in professional duties, professionals were particularly susceptible to supervisory classification, thereby losing their intended protection under the Act.¹²⁸ The Court recognized the tension, but stated that the Board could not resolve it by “distorting the statutory language.”¹²⁹

In a lengthy dissent, Justice Ginsburg argued that the Board's attempt to distinguish protected professionals who incidentally direct other employees from excluded supervisors who exercise key managerial authority was rational and consistent with the Act.¹³⁰ Justice Ginsburg reminded the Court of its earlier approval of the Board's inclusion of those employees whose discretion is limited to “‘routine discharge of professional duties’” under the NLRA, even if such inclusion may entail some divided loyalties.¹³¹ Noting that the Board had employed this distinction to resolve numerous other cases involving the supervisory status of other professional workers, such as doctors, lawyers, and engineers,¹³² Justice Ginsburg concluded that the *Health Care* decision would provide little protection for professionals under the Act.¹³³

124. *See id.* at 580–81. The Board argued that nurses whose supervisory authority concerns patient care would not pose the threat of divided loyalty that the supervisor exception was designed to avoid. *See id.* at 580.

125. *Id.* at 580.

126. *See id.* at 580–81. The Court was concerned that the owners of a health care facility might at times be forced to insist on the “undivided loyalty” of their nurses. *Id.* at 581.

127. *See id.* at 582–84.

128. *See id.*

129. *Id.* at 581. The Court did point out, however, that the Board may recognize a difference between “authority arising from professional knowledge and authority encompassing front-line management prerogatives.” *Id.* at 583. As long as such a finding does not result from manipulation of statutory language, it will be valid. *See id.*

130. *See id.* at 586 (Ginsburg, J., dissenting).

131. *See id.* at 592 (Ginsburg, J., dissenting) (quoting *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 690 (1980)).

132. *See id.* at 591–92 (Ginsburg, J., dissenting).

133. *See id.* at 598 (Ginsburg, J., dissenting) (positing that, if anyone who may use

While the health care and legal communities were discussing the impact of *Health Care* on the organizational rights of nurses,¹³⁴ the Board developed a new interpretation of section 2(11) to allow nurses continued protection under the Act.¹³⁵ The Board abandoned its focus on whether nurses' actions were "in the interests of their employers." Instead, the Board focused on whether the nurses' duties required "independent judgment," interpreting the phrase to require a high level of discretion beyond a "routine or clerical nature."¹³⁶ Based on this interpretation, the Board again concluded that charge nurses are not supervisors in either hospital or nursing home settings.¹³⁷

Once more, the NLRB's broad interpretation of section 2(11) has split the circuits. The Third,¹³⁸ Fourth,¹³⁹ and Sixth Circuits¹⁴⁰ have rejected the Board's interpretation of the "independent judgment" test, holding that LPNs are supervisors within the meaning of the NLRA.¹⁴¹ In contrast, the Seventh,¹⁴² Eighth,¹⁴³

independent judgment to assign tasks is a supervisor, most professionals will qualify as supervisors).

134. See, e.g., Michelle Amber, *Full Impact of High Court Ruling on Status of Nurses Still Unclear*, Daily Lab. Rep. (BNA) No. 165, at D-22 (Aug. 29, 1994) (calling on the NLRB to clarify the definition of supervisor for the health care industry); *Justices Find Nurses Who Direct Other Employees Are Supervisors*, Daily Lab. Rep. (BNA) No. 98, at D-3 (May 24, 1994) (discussing nurses' unions' fears that the decision would affect membership in labor organizations).

135. See *The NLRB and Supervisory Status*, *supra* note 42, at 1721 (accusing the NLRB of an institutional policy bias for its practice of adopting whatever definition of supervisor that most broadens the scope of the NLRA).

136. *Providence Hosp.*, 320 N.L.R.B. 717, 733 (1996) (explaining that a patient treatment plan may require professional judgment, but will not implicate independent judgment if direction given to other employees in implementing such a plan is routine).

137. See *Nymed, Inc.*, 320 N.L.R.B. 806, 811 (1996) (finding that nurses are not supervisors because they do not exercise independent judgment as required by the NLRA); *Providence Hosp.*, 320 N.L.R.B. at 733 (same).

138. See *NLRB v. Attleboro Assocs.*, 176 F.3d 154, 169 (3d Cir. 1999) (concluding that LPN charge nurses exercise independent judgment under the NLRA).

139. See *Beverly Enters., Va. v. NLRB*, 165 F.3d 290, 298 (4th Cir. 1999) (en banc) (holding LPNs to be supervisors); *Glenmark*, 147 F.3d at 345 (same).

140. See *Mid-America Care Found. v. NLRB*, 148 F.3d 638, 643 (6th Cir. 1998) (determining that nursing home LPNs met the definition of supervisor under section 2(11) of the NLRA); *Caremore, Inc. v. NLRB*, 129 F.3d 365, 370-71 (6th Cir. 1997) (same).

141. LPNs often function as charge nurses. See *supra* note 40.

The Second Circuit has determined that tugboat and barge captains are supervisors under the NLRA using an analysis of independent judgment similar to the Fourth Circuit's. See *Spentonbush/Red Star Cos. v. NLRB*, 106 F.3d 484, 490-92 (2d Cir. 1997) (stating that tugboat captains exercise independent judgment and chastising the Board for its "biased mishandling" of supervisor cases). The *Spentonbush* court announced that the NLRB had forfeited the normal standard of deferential judicial review by its manipulation of the supervisor definition and was thus subject to a "more probing"

Ninth,¹⁴⁴ and D.C. Circuits¹⁴⁵ have reached the opposite conclusion.¹⁴⁶ These circuits emphasize judicial deference to the Board and the routine nature of the nurses' jobs.¹⁴⁷

One of the reasons for the circuit split over supervisory status is a fundamental disagreement over the level of deference to be accorded to the NLRB.¹⁴⁸ The dissension was perhaps predictable, given the Supreme Court's ambivalent attitude towards NLRB discretion.¹⁴⁹ Critics have denounced the *Glenmark* approach as

review than otherwise required. *Id.* at 492.

142. See *NLRB v. GranCare, Inc.*, 170 F.3d 662, 668 (7th Cir. 1999) (en banc) (holding that nursing home LPNs are not supervisors under the NLRA).

143. See *Beverly Enters. v. NLRB*, 148 F.3d 1042, 1048 (8th Cir. 1998) (holding that charge nurses are not supervisors).

144. See *Providence Alaska Med. Ctr. v. NLRB*, 121 F.3d 548, 554-55 (9th Cir. 1997) (holding that charge nurses are not supervisors).

145. See *Beverly Enters.-Pa. v. NLRB*, 129 F.3d 1269, 1270-71 (D.C. Cir. 1997) (per curiam) (mem.) (enforcing the Board's order determining that LPNs are not supervisors).

146. The Eleventh Circuit has adopted an approach to independent judgment similar to the Ninth Circuit's, but has not ruled specifically on the supervisory status of nurses. See *Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259, 1268 (11th Cir. 1999) (refusing to apply *Spentonbush/Red Star's* "reduced level of deference" in upholding the Board's finding that docking pilots exercise only routine judgment and, therefore, are not supervisors under the NLRA).

147. See *Beverly Enters.-Pa.*, 129 F.3d at 1270 (emphasizing that nurses' routines lack the degree of discretion determinative of independent judgment); *Providence Alaska Med. Ctr.*, 121 F.3d at 551-53 (finding charge nurses' duties to be more clerical in nature than supervisory); *infra* notes 148-55 and accompanying text (discussing the cases' treatment of judicial deference).

148. Compare *Spentonbush/Red Star Cos. v. NLRB*, 106 F.3d 484, 491 (2d Cir. 1997) (ruling that the NLRB had forfeited the normal standard of deferential judicial review by its manipulation of the supervisor definition), and *NLRB v. St. Mary's Home*, 690 F.2d 1062, 1067 (4th Cir. 1982) (determining that because of the Board's inconsistency in determining supervisory status, normal judicial deference is replaced by careful scrutiny of the Board's findings and the factual record), with *VIP Health Services, Inc. v. NLRB*, 164 F.3d 644, 648 (D.C. Cir. 1999) (noting that the Board's findings need "only" be supported by substantial evidence), and *Providence Alaska Med. Ctr. v. NLRB*, 121 F.3d 548, 551 (9th Cir. 1997) (stating that because of the Board's expertise in distinguishing employees from supervisors, the normal judicial deference is heightened).

It should be noted that the Eighth Circuit has also chastised the Board for its inconsistency in determining supervisory status and has stated that scrutiny is particularly important in such cases. See *Schnuck Markets, Inc. v. NLRB*, 961 F.2d 700, 704 (8th Cir. 1992). Despite what might be seen as a less deferential standard or review, however, the Eighth Circuit has held that charge nurses are employees rather than supervisors. See *Beverly Enters. v. NLRB*, 148 F.3d 1042, 1048 (8th Cir. 1998) (holding that charge nurses are not supervisors).

149. Compare *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 366 (1998) (rejecting the NLRB's standard for employer polling), with *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996) (reminding courts that they must respect and uphold agency decisions even when the issue might be resolved another way with nearly equal reason). For an analysis of *Allentown*, see Curtis H. Allen III, Note, *Judicial Review Gone Awry: The Supreme Court Rewrites the NLRB's Unitary Standard in Allentown Mack Sales &*

failing to provide the judicial deference¹⁵⁰ due an administrative agency.¹⁵¹ The *Glenmark* court proclaimed that, because of an "evidentiary deficiency," the Board had presented an irrational interpretation of the NLRA.¹⁵² Yet, as Judge Jones noted in dissent, some evidence supported the Board's interpretation that the LPNs did not practice independent judgment as envisioned by the NLRA.¹⁵³ The *Glenmark* court disregarded that evidence, however, and reviewed the case de novo.¹⁵⁴ Thus, the *Glenmark* decision reinforces the growing criticism that the Fourth Circuit is not affording the Board its due deference.¹⁵⁵

Service, Inc. v. NLRB, 77 N.C. L. REV. 1925, 1925-28 (1999) (arguing that the Supreme Court has departed from the standard of review for agency decisions that it espouses).

150. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984) (holding that if an agency's interpretation of an ambiguous statute is a "permissible construction," courts must defer to the agency); *infra* notes 156-61 and accompanying text (further explaining *Chevron* and the proper standard of review).

151. See *Cooper/T. Smith, Inc.*, 177 F.3d at 1262 n.3, 1268 (declining to adopt *Glenmark*'s "reduced level of deference" toward Board decisions); *Beverly Enters., Va. v. NLRB*, 165 F.3d 290, 303 (4th Cir. 1999) (Phillips, J., dissenting) ("[T]he majority's . . . conclusion is reached by declining to accord the Board's decisions the deference normally commanded by . . . *Chevron*, instead effectively reviewing the Board's decisions de novo, both as to legal conclusions and factual findings."); Straight, *supra* note 117, at 1965-66 (arguing that cases like *Glenmark* unacceptably substitute the court's judgment for that of the Board's).

152. *Glenmark*, 147 F.3d at 345.

153. See *id.* at 346-47 (Jones, J., dissenting).

154. See *id.* at 338 (announcing that careful scrutiny of the factual record is necessary in supervisory determinations because of the Board's inconsistent application of the statutory definition).

155. See *Cooper/T. Smith, Inc.*, 177 F.3d at 1262-63 & n.3 (criticizing the lowered standard of review used in *Glenmark* and other NLRB cases); *NLRB v. Attleboro, Assocs.*, 176 F.3d 154, 160-61 (3d Cir. 1999) (rejecting the Fourth Circuit's reduced level of deference standard); *Beverly Enters., Va. v. NLRB*, 165 F.3d 290, 304 (4th Cir. 1999) (en banc) (Phillips, J., dissenting) (arguing that the Fourth Circuit failed to accord due judicial deference to the Board's interpretation of independent judgment); *Providence Alaska Med. Ctr. v. NLRB*, 121 F.3d 548, 551 (9th Cir. 1997) ("Because the Board has expertise 'in making the subtle and complex distinctions between supervisors and employees, . . . the normal deference [we] give to the Board is particularly strong when it makes those determinations.' " (quoting *NLRB v. SRDC, Inc.*, 45 F.3d 328, 333 (9th Cir. 1995))); *NLRB v. St. Mary's Home, Inc.*, 690 F.2d 1062, 1072 (4th Cir. 1982) (Murnaghan, J., dissenting) ("The majority . . . disregards . . . our limited role on appeal. An appellate court 'may not "displace the Board's choice between two fairly conflicting views . . ."' " (quoting *NLRB v. Aerovox Corp.*, 435 F.2d 1208, 1209 (4th Cir. 1970) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951))); J. Mitchell Armbruster, Note, *Deference Defiantly Denied: The Fourth Circuit Rejects NLRB Position on § 8(f) Pre-hire Agreements in Industrial TurnAround Corp. v. NLRB*, 76 N.C. L. REV. 2331, 2355-59 (1998) (describing the conflict between the NLRB and the Fourth Circuit stemming from the court's refusal to give deference to the NLRB when it conflicts with *stare decisis*); Joseph A. Fazioli, Recent Case, *Chevron Up in Smoke?: Tobacco at the Crossroads of Administrative Law*, *Brown & Williamson Tobacco Corp. v. Food & Drug Administration*,

The Fourth Circuit's approach contrasts with the standard announced by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹⁵⁶ *Chevron* established a two-part process for courts reviewing an agency's interpretation of a statute.¹⁵⁷ Initially, the court must decide whether the statute plainly and specifically speaks to the precise issue at hand.¹⁵⁸ If the statute passes this "plain meaning" test, the court is free to disregard the agency's interpretation because the express will of Congress, whose intent is paramount, is clear.¹⁵⁹ If, however, the statute is ambiguous or silent as to the issue at hand, the court must decide whether the agency's interpretation is a "permissible construction" of the statute.¹⁶⁰ If the construction is a reasonable one, and therefore permissible, the court must defer to the agency's interpretation.¹⁶¹

Thus, in applying the *Chevron* principle to determine if nurses exercise "independent judgment" under section 2(11) of the Act, courts should first consider whether the phrase is ambiguous. If the phrase is unambiguous and, thus, clearly reflects Congress's intent on the precise issue of supervisory status, a court need not defer to the Board's interpretation.¹⁶² If the language is unclear, the court must defer to the Board's interpretation if it is a reasonable one. Although the *Glenmark* court insisted that the "independent judgment" language of section 2(11) is "plain,"¹⁶³ the Supreme Court specifically noted in *Health Care* that the language is ambiguous.¹⁶⁴ The current

153 F.3d 155 (4th Cir. 1998), 22 HARV. J.L. & PUB. POL'Y 1057, 1067-80 (1999) (criticizing the Fourth Circuit's failure to follow *Chevron* and to defer to agency interpretation).

156. 467 U.S. 837 (1984). Before *Chevron*, courts applied varying standards of review to agency decisions. See Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 87-94 (1994).

157. See *Chevron*, 467 U.S. at 842-44.

158. See *id.* at 842-43.

159. See *id.* at 842-43 & n.9.

160. *Id.* at 843. A construction is permissible if it is reasonable. See *id.* at 845.

161. *Id.* at 843, 845. The Fourth Circuit, however, has selectively ignored *Chevron*, especially when deference to agency decisions conflicts with the principle of stare decisis. See Armbruster, *supra* note 155, at 2359 (predicting that the Fourth Circuit's refusal to defer to the NLRB in *Industrial TurnAround Corp. v. NLRB*, 115 F.3d 248, 254-56 (4th Cir. 1997), and the Board's refusal to defer to the Fourth Circuit will lead to inconsistent nationwide application of collective bargaining statutes as well as an increase in conflicts between the Fourth Circuit and administrative agencies).

162. *Chevron*, 467 U.S. at 842-43 & n.9. The Supreme Court's decision in *Health Care* illustrates this principle: because the Court found the "in the interest of the employer" language to be unambiguous, it declined to defer to the Board's interpretation. *NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 579 (1994).

163. *Glenmark*, 147 F.3d at 340.

164. *Health Care*, 511 U.S. at 579 (agreeing with the NLRB that section 2(11)'s

circuit split over the interpretation of "independent judgment"¹⁶⁵ also suggests that the phrase's meaning is not clear.¹⁶⁶ If the language is ambiguous, the Fourth Circuit has overreached its boundaries by ignoring the *Chevron* judicial deference standard.¹⁶⁷ Although the Supreme Court rejected the Board's original construction of the Act in *Health Care*, the "independent judgment" analysis is more fact-driven and subjective than the "in the interest of the employer" language and, thus, should be subject to judicial deference.¹⁶⁸

Because of the differing standards of review, judges in different circuits are examining identical facts and reaching opposite conclusions.¹⁶⁹ For example, some courts have found that LPNs

"independent judgment" language is ambiguous). Two circuits have specifically relied upon this language from *Health Care* in determining that they should defer to the Board's recent rulings on nurses' status. See *VIP Health Servs., Inc. v. NLRB*, 164 F.3d 644, 648 (D.C. Cir. 1999); *Providence Alaska Med. Ctr. v. NLRB*, 121 F.3d 548, 552 (9th Cir. 1997).

165. Compare *Glenmark*, 147 F.3d at 340 (concluding that nurses "share the power of management in the manner contemplated by the plain language of § 2(11)"), with *Providence Alaska Med. Ctr.*, 121 F.3d at 555 (holding the language of section 2(11) to be elusive). Even among Board members, there is disagreement on this point. See *Nymed, Inc.*, 320 N.L.R.B. 806, 814 (1996) (Cohen, Board Member, dissenting) (arguing that the Board had stretched the plain language of section 2(11)).

166. That is, the fact that reasonable minds are interpreting "independent judgment" in different ways indicates that the language is not as plain as the Fourth Circuit claims it to be. See *NLRB v. GranCare, Inc.*, 170 F.3d 662, 666 (7th Cir. 1999) (en banc) (holding that term's ambiguity entitled it to *Chevron* deference); *VIP Health Servs., Inc.*, 164 F.3d at 648 (stating that "independent judgment" is an ambiguous phrase); *Providence Alaska Med. Ctr.*, 121 F.3d at 552 (noting that the "independent judgment" language is ambiguous). In contract law, the plain meaning rule is inapplicable to ambiguous terms. See Carlton J. Snow, *Contract Interpretation: The Plain Meaning Rule in Labor Arbitration*, 55 *FORDHAM L. REV.* 681, 682 & n.4 (1987).

167. See Armbruster, *supra* note 155, at 2353.

168. See *Health Care*, 511 U.S. at 579 (agreeing that because the phrase "independent judgment" is ambiguous, the courts must give the Board "ample room" to apply the language to different categories of employees). But see *Caremore, Inc. v. NLRB*, 129 F.3d 365, 371 (6th Cir. 1997) (warning that the fact-intensive nature of supervisory-status cases will not permit the NLRB to use "razor-thin factual distinctions" to engender protected status for nurses).

169. Even within the circuits, judges are deeply divided over independent judgment. See *NLRB v. Attleboro Assocs.*, 176 F.3d 154, 169-70 (3d Cir. 1999) (Bright, J., dissenting) (stating that LPNs do not exercise sufficient independent judgment to qualify as supervisors); *Beverly Enters., Va. v. NLRB*, 165 F.3d 290, 303 (4th Cir. 1999) (en banc) (Phillips, J., dissenting) (arguing that an LPN charge nurse is not a supervisor under section 2(11)); *Glenmark*, 147 F.3d at 345 (Jones, J., dissenting) (arguing that LPNs do not use independent judgment within the meaning of the Act); *Providence Alaska Med. Ctr.*, 121 F.3d at 556 (Noonan, J., dissenting) (contending that nurses are supervisors under section 2(11)). Board members also consistently disagree with fellow members on this issue. See *Frontier of Conn., Inc.*, 326 N.L.R.B. No. 10, 1997-1998 NLRB Dec. (CCH) ¶ 16,604, 16,605 (Aug. 12, 1998) (Brame, Board Member, dissenting) (arguing that the NLRB should review "factual issues" to determine whether nurses are supervisors under the Act); *Nymed, Inc.*, 320 N.L.R.B. 806, 814 (1996) (Cohen, Board Member, dissenting)

exercise independent judgment because they can submit reprimand reports.¹⁷⁰ Other courts have found that LPNs do not exercise independent judgment because the only disciplinary action they can take is to file such reports.¹⁷¹ The pattern has been repeated with other aspects of the nurses' duties, including on-site authority,¹⁷² emergency procedures,¹⁷³ and patient care.¹⁷⁴

Furthermore, although appeals courts agree that the LPNs' exercise of discretion plays a key role in determining supervisory status,¹⁷⁵ they differ in their analyses regarding such discretion. The Fourth and Sixth Circuits have held that LPNs display independent judgment because of the amount of discretion LPNs exercise within their normal routine, even if their routine entails repetitive, standard procedures.¹⁷⁶ According to the Ninth and D.C. Circuits, however,

(contending that the Board had reached its decision by stretching the language of section 2(11)).

170. See *Glenmark*, 147 F.3d at 344 (stating that filing the reports is a disciplinary action requiring independent judgment); *Caremore, Inc. v. NLRB*, 129 F.3d 365, 370 (6th Cir. 1997) (holding that disciplinary forms required "sensitive and nuanced judgment" implicating statutory language).

171. See *VIP Health Servs., Inc., v. NLRB*, 164 F.3d 644, 648 (D.C. Cir. 1999) ("[M]ere reporting is insufficient to establish that the nurses effectively recommend discharge or discipline."); *Glenmark*, 147 F.3d at 346 (Jones, J., dissenting) (noting that a nurse's discretion is constrained by the ineffectual correction reports).

172. Compare *VIP Health Servs.*, 164 F.3d at 649-50 (stating that the absence of supervisory authority on site does not automatically confer such authority upon the highest ranking employees on site), and *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983) (reasoning that simply because the LPNs may be the highest ranking employees on site "does not ipso facto make them supervisors"), with *Glenmark*, 147 F.3d at 344-45 (noting that when the Director of Nursing is absent, the employees must look to the charge nurse for direction, indicating supervisory authority).

173. Compare *Attleboro Assocs.*, 176 F.3d at 167 (stating that the charge nurse's ability to call in extra staff in case of an emergency illustrates her authority to use independent judgment), with *Providence Alaska Med. Ctr.*, 121 F.3d at 552-54 (holding that charge nurses who work in the emergency services center follow a routine and do not exercise independent judgment).

174. Compare *Caremore, Inc.*, 129 F.3d at 369 (indicating that LPNs' ability to direct aides regarding patient care evidenced their use of independent judgment), with *Beverly Enters.-Pa. v. NLRB*, 129 F.3d 1269, 1270 (D.C. Cir. 1997) (maintaining that, because patient care activities are repetitive, the LPNs fail to exercise "anything even resembling supervisory authority").

175. See, e.g., *Glenmark*, 147 F.3d at 346 (Jones, J., dissenting) ("[I]t is ultimately the degree of discretion exercised by the individual that controls whether they are an employee or a supervisor."); *Beverly Enters.-Pa.*, 129 F.3d at 1270 ("[T]he question of independent judgment under section 2(11) is one of the degree of discretion exercised with respect to the statutory indicia of supervisory status.").

176. See *Glenmark*, 147 F.3d at 341-42 (concluding that nurses used independent judgment in the established procedure); *Caremore, Inc.*, 129 F.3d at 370 (concluding that completing standard evaluation forms, although routine, nevertheless indicates independent judgment by nurses).

LPNs do not exercise independent judgment within a routine precisely because the work is repetitive.¹⁷⁷ Such dissension over "independent judgment" and the fact-based analyses of nursing duties probably will have to be resolved by the Supreme Court or Congress.¹⁷⁸

If the Supreme Court were to address the supervisory status of licensed practical nurses again,¹⁷⁹ the Board's position would be stronger than it was in *Health Care*.¹⁸⁰ The Supreme Court has already admitted that the "independent judgment" language is ambiguous,¹⁸¹ and, given the fact-specific analyses used to determine whether particular employees exercise such judgment, the Court has ample room to provide guidance on the issue raised in *Glenmark* without overturning *Health Care*. The Supreme Court's fundamental contention in *Health Care* was that the Board attempted to "shoehorn" nurses into the statutory definition by using a strained and unacceptable interpretation of the "ordinary meaning" of the NLRA.¹⁸² This concern would probably not reappear as a key factor in an "independent judgment" analysis, however, because the Court has already acknowledged the language's ambiguity.¹⁸³ According to the dictates of *Chevron*, the Court would need to determine only whether the Board's construction of the statute is reasonable because the "independent judgment" language is unclear.¹⁸⁴

177. See *Providence Alaska Med. Ctr.*, 121 F.3d at 552-53 (holding that an LPN's assignment of duties to lower employees does not involve independent judgment because it is "within the parameters" of the monthly assignment schedule); *Beverly Enters.-Pa.*, 129 F.3d at 1270 (holding that, if an exercise of authority is routine, it does not involve independent judgment).

178. For a context-based analysis, see *The NLRB and Supervisory Status*, *supra* note 42, at 1718-27 (detailing the complexities and potential motivations behind supervisory status determinations).

179. The Supreme Court's criteria for granting certiorari include the existence of a conflict between the circuit courts of appeals. See SUP. CT. R. 10.

180. The Supreme Court in *Health Care* noted several times that the Board relied exclusively on its interpretation of "in the interest of the employer" in arguing against supervisory status for LPNs, hinting broadly that an alternative argument based on more ambiguous language may have succeeded where the patient care analysis failed. *NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 579, 583-84 (1994) (admitting that "independent judgment" is ambiguous but irrelevant because the Board had failed to argue its significance, and noting that, if the question of nurses as supervisors had been presented under a "proper test," the Court would have spent more time examining the evidence).

181. See *id.* at 579.

182. *Id.* at 583.

183. See *id.* at 579.

184. See *Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984); *supra* notes 156-61 and accompanying text (discussing the dictates of *Chevron*).

Revisiting the issue of supervisory status for nurses would give the Supreme Court an opportunity to clarify its position on proper judicial deference toward Board interpretations.¹⁸⁵ The NLRA explicitly authorizes the Board to define collective bargaining units,¹⁸⁶ and it should be afforded adequate discretion to do so.¹⁸⁷ Because of its vast experience in distinguishing the complexities and subtleties of the employer-employee relationship, the Board is uniquely qualified to resolve textual ambiguities in the statute in a manner consistent with the various purposes of the Act.¹⁸⁸ The Supreme Court should recognize and support that expertise and reaffirm the judicial deference toward the Board that it is due under *Chevron*.¹⁸⁹

If the Court adheres to *Chevron*, there is solid support from several circuits holding that the Board's interpretation of "independent judgment" is rational under the NLRA.¹⁹⁰ Legislative history also provides support for the right of licensed practical nurses to unionize.¹⁹¹ LPNs, who may only oversee a facility for a few hours a week and who otherwise are under the direction of registered nurses, do not seem to share the same power of management as the foremen who were the focus of congressional debate over excluding supervisors from the NLRA.¹⁹² Indeed, there is evidence that Congress specifically intended that nurses be protected under the

185. See *supra* note 149 and accompanying text (discussing the Supreme Court's apparent ambivalence regarding judicial deference).

186. See 29 U.S.C. § 159(b) (1994).

187. See Michael C. Harper, *The Case for Limiting Judicial Review of Labor Board Certification Decisions*, 55 GEO. WASH. L. REV. 262, 294-95 (1987) (explaining that Congress created the Board to resolve labor dilemmas because of its dissatisfaction with judicial law-making in the area of labor law and that Congress entrusted the Board with wide discretion).

188. See *id.* at 294-300 (arguing that the Board is far better suited than the judiciary to make certification decisions).

189. See *supra* notes 156-61 and accompanying text (discussing *Chevron*).

190. Besides the declared ambiguity of the language, the Board may point to the decisions by the Seventh, Eighth, Ninth, and D.C. Circuits upholding the Board's interpretation. See *supra* notes 142-47 and accompanying text (listing the circuit decisions which affirmed the Board's analysis as reasonable under the NLRA). It should be remembered as well that the Supreme Court's rejection of the Board's interpretation in *Health Care* was approved by the narrowest of margins. *NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 572 (1994) (reversing the Board's ruling by a five-to-four decision).

191. The Court discounted the legislative history that supports nurses' rights to unionize in *Health Care*, but it might be more persuasive when combined with a reasonable interpretation of the NLRA. See *Health Care*, 511 U.S. at 581-82.

192. See H.R. CONF. REP. NO. 80-510, at 35 (1947) (Sup. Docs. No. Y1.1/8:H.Rpt.80-510) (relating that supervisors should be limited to foremen and persons of higher rank, as opposed to minor supervisory employees); *supra* notes 84-91 and accompanying text (describing the history of the NLRA).

Act.¹⁹³ Accordingly, the Supreme Court should rule that licensed practical nurses are not supervisors under the NLRA because they do not exercise the discretion necessary to meet the "independent judgment" standard.

Another possible approach to the LPNs' dilemma is to seek legislative action. A long-term health care system in which nursing homes play an increasingly significant role has taken on increased importance as the Baby Boom generation ages.¹⁹⁴ The health care industry as a whole is expanding and will likely grow further as the number of elderly Americans sharply rises in coming decades.¹⁹⁵ The workers employed by the health care industry are fundamental to this growth.¹⁹⁶ Nurses are increasingly unionizing in order to improve

193. See S. REP. NO. 80-105, at 11 (1947) (Sup. Docs. No. Y1.1/5:S.Rpt.80/105) (stating that, although Congress had not given nurses' special problems of professional status recognition in the past, nurses employed at manufacturing corporations and other non-traditional settings have a great interest in maintaining professional standards and, thus, should be included under the definition of "professional" with the option of maintaining a bargaining unit separate from less-skilled employees). Congress had no reason to consider protecting nurses working in hospitals or nursing homes when it originally amended the NLRA because these facilities did not fall under the Act until it was amended in 1974. Cf. Straight, *supra* note 117, at 1930-34, 1938. (describing the legislative history of the NLRA and the 1974 amendments to the Act). When the Act was amended to cover all health care facilities, Congress declined to specifically protect nurses, but noted with approval the Board's handling of cases involving the supervisory status of health care professionals. See S. REP. NO. 93-766, at 6 (1974) (Sup. Docs. No. Y1.1/5:S.Rpt.93/766) (encouraging the Board's continued distinction of health care professionals whose direction of other employees is incidental to professional judgment).

194. Researchers project that of the persons who reached 65 in 1990, 43% will be admitted to a nursing home before they die. See Kemper & Murtaugh, *supra* note 15, at 597.

195. See U.S. BUREAU OF THE CENSUS, *supra* note 14, at 17 (estimating that the U.S. elderly population will more than double between 2020 and 2050).

196. Doctors, like nurses, are attempting to unionize in the face of increasing power held by health maintenance organizations and managed care plans. See Jeremy Lutsky, *Is Your Physician Becoming a Teamster: The Rising Trend of Physicians Joining Labor Unions in the Late 1990s*, 2 DEPAUL J. HEALTH CARE L. 55, 64-87 (1997) (tracing the rise and legal challenges to physicians joining unions); see also Thomas-Davis Med. Ctrs. v. NLRB, 157 F.3d 909, 910 (D.C. Cir. 1998) (affirming a Board finding that doctors were not supervisors under section 2(11)). Physicians who are employed by health care providers in a staff physician capacity may organize for collective bargaining purposes, but most doctors are independent contractors and thus may not organize. See Francis J. Serbaroli, *When Physicians Try to Unionize Against HMOs*, N.Y. L.J., Nov. 30, 1998, at 3.

From a public policy standpoint, it appears anomalous that nurses may not unionize in some circuits when doctors are allowed to do so. Looking at the statutory language, however, it is clear that most doctors do not reach the first prong of the test because they do not perform any of the enumerated tasks as contemplated by section 2(11). Furthermore, the ability of one group to unionize should, from a legal standpoint, not affect another group's classification as either employee or supervisor. Nevertheless, the discrepancy between nurses and doctors remains an inconsistency that Congress should address.

patient welfare in the face of monetary cutbacks by managed care companies.¹⁹⁷ Currently, there is a loud call for nursing home reform¹⁹⁸ that may force Congress to address the special needs of health care professionals by specifically amending the Act to protect RNs and LPNs.¹⁹⁹ Legislative reform would have a major advantage over judicial resolution because specifically protecting RNs and LPNs under the NLRA could help to end the judicial wrangling over the subject once and for all.

In contrast, a Supreme Court decision upholding the Board's interpretation of "independent judgment" probably would provide more narrow protection for nurses than a congressional edict. For example, if the Court ruled that LPNs who function only occasionally as charge nurses do not exercise independent judgment within the meaning of the Act, many questions would remain unanswered. The circuit courts might split again over the status of RNs and of LPNs who work frequently as charge nurses.

Additional legal wrangling would be even more likely if the Court rejected the Board's interpretation of "independent judgment"

197. See Eggleston, *supra* note 7, at 929-42 (arguing that health maintenance organizations sacrifice patient care for financial reasons and outlining nurses' attempts to combat the declining standards by organizing); *More Nurses Join Unions to Address Patient Care*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 24, 1999, at 13A (describing the nurses' attempts to improve patient care by gaining more bargaining power through unionization).

198. See Lorraine Adams, *The Hazards of Elder Care; Overexertion, Assault Put Aides at High Risk for Injury*, WASH. POST, Oct. 31, 1999, at A1 (outlining nursing reform advocates' attempts to minimize resident-to-staff ratios); Robert Salladay, *Davis Vetoes Overhaul of Elderly Care Laws*, S.F. EXAMINER, Oct. 11, 1999, at A4, available in 1999 WL 6878451 (reporting the California governor's veto of nursing home reform, despite overwhelming legislative and popular support for the reform); see also S. 1445, 106th Cong. (1999) (proposing a Patient Abuse Prevention Act that would require employee background checks at nursing homes to prevent abuse of residents).

199. See H.R. 4277, 105th Cong. (1998) (proposing greater protection for nurses and doctors to unionize). Part of the problem facing the courts and the Board is that the NLRA no longer fits in with modern employment practices. When the Act was written in 1935, Congress was thinking in terms of foremen and traditional laborers. See COX ET AL., *supra* note 7, at 237. New types of management with decentralized power structures and front-line management empowerment make it increasingly difficult for the Board and the courts to mold the Act to fit certain situations. See Peter R. McLeod, 1995-96 Annual Survey of Labor and Employment Law, *Status of Nurses as "Supervisors" Under the National Labor Relations Act*: Nymed, Inc., 38 B.C. L. REV. 323, 334 (1997). For example, many health maintenance organizations are restructuring traditional nursing staff hierarchies by placing nurses and caregivers into "patient care teams." Eggleston, *supra* note 7, at 939-40 n.49. Such restructuring drastically reduces the number of registered nurses, thereby reducing costs. This "team approach" makes it difficult to draw a clear line between supervisors and employees, because a licensed practical nurse may participate equally in patient care. Congress should clarify the matter by addressing the Act's increasing impotence.

and the Board decided to return to the first prong of the NLRA supervisor test to argue that nurses are not supervisors.²⁰⁰ The Court's opinion in *Health Care* seemed to invite this argument, suggesting that the Board examine nurses' professional duties to determine whether they perform any of the listed activities in a manner that makes them supervisors.²⁰¹ The Court noted that such an inquiry would be "part of the Board's routine and proper adjudicative function,"²⁰² but warned the Board not to interpret phrases in such a way that defies the ordinary meaning of the statute.²⁰³

Since *Health Care*, several circuits have accepted the Board's argument that nurses' duties do not fall within the twelve enumerated tasks,²⁰⁴ although the only courts to do so have been the ones that held nurses are not supervisors under the "independent judgment" test.²⁰⁵ Given the close scrutiny, if not outright hostility, that the Fourth and Sixth Circuits apply to the Board's decisions, it is doubtful that the Board would succeed in arguing that nurses do not "discipline" or "assign" other employees under the Act.²⁰⁶ The now-familiar cycle of circuit court dissension would be repeated yet again.²⁰⁷

200. See *infra* notes 201-08 and accompanying text (addressing the Board's options if their interpretation of independent judgment were to be rejected).

201. See *NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 582-83 (1994).

202. *Id.* at 582.

203. See *id.* at 583. The Fourth Circuit echoed this sentiment in *Glenmark*, 147 F.3d at 339 n.8 (criticizing the Board for its attempt to "modify the plain language of § 2(11)").

204. See *VIP Health Servs., Inc. v. NLRB*, 164 F.3d 644, 648 (D.C. Cir. 1999) (holding that nurses did not assign or discipline employees under section 2(11)); *Providence Alaska Med. Ctr. v. NLRB*, 121 F.3d 548, 554 (9th Cir. 1997) (holding that the nurses did not "responsibly direct" other employees).

205. See, e.g., *VIP Health Servs., Inc.*, 164 F.3d at 647-50; *Providence Alaska Med. Ctr.*, 121 F.3d at 552-55.

206. See *Glenmark*, 147 F.3d at 340 n.8 (stating that the Board's obsession with its policy goals has resulted in a "troubling pattern" of disregard for circuit precedent); *Caremore, Inc.*, 129 F.3d at 371 (declaring that the Board misapprehends both the law and its own place in the legal system).

207. To succeed, the Board would have to be particularly careful not to stretch the language of the Act. See *Health Care*, 511 U.S. at 583 (recommending that the Board adhere to the "ordinary meaning of the language"); *Glenmark*, 147 F.3d at 339-40 n.8 (disapproving of the Board's attempt to modify the plain language of the NLRA); *Caremore, Inc.*, 129 F.3d at 371 (warning the Board that "razor-thin" factual distinctions cannot serve as a basis for interpreting the NLRA). The Board's failure to argue that nurses do not meet the first prong of the supervisor test in the past, however, may condemn it in the future, as precedent now exists that creates a low threshold for defining duties as one of the enumerated activities. See *Glenmark*, 147 F.3d at 341 (holding that minimal exercise of duties constitutes "assignment" under the Act).

Until the Supreme Court or Congress addresses the issue, *Glenmark* definitively rejects the NLRB's interpretation of "independent judgment," at least for LPNs with any supervisory capability.²⁰⁸ Any future attempts to unionize health care workers within the Fourth Circuit probably will be challenged by health care management companies on the basis of *Glenmark*. Given the court's low opinion of the Board, it is unlikely that the health care workers would prevail.²⁰⁹ Consequently, while LPNs who work as charge nurses in Washington, D.C., where the D.C. Circuit has held them to be employees, may unionize, it appears that LPNs employed in identical jobs across the Potomac River in Virginia, within the Fourth Circuit, may not be able to bargain collectively.

Glenmark is one of the Fourth Circuit's latest skirmishes over the Board's policy push for a broad reading of section 2(11). By denying nurses the right to unionize despite changes in the population and the industry that are redefining health care worker roles, the Fourth Circuit's decision demonstrates the need for

208. See *Glenmark*, 147 F.3d at 335. Registered nurses, who have even greater supervisory capacity than LPNs, would also be excluded. It is unclear whether LPNs who never act as charge nurses would be deemed to be employees or supervisors by the Fourth Circuit, but the *Glenmark* opinion appears to categorize LPNs who exercise any of the enumerated tasks of section 2(11) as supervisors, regardless of whether they act as charge nurses. See *id.* at 342 (noting that the LPNs' ability to assign tasks while utilizing independent judgment is sufficient to establish supervisory status).

209. *Glenmark* is only one example of the Fourth Circuit's growing hostility to what it perceives as the Board's apparent indifference to circuit precedent. See *Case Farms of N.C., Inc. v. NLRB*, 128 F.3d 841, 850 (4th Cir. 1997) (Williams, J., concurring) (expressing "concern with the Board's apparent disregard for the decisions of the Circuit Courts"); *Bi-Lo Stores v. NLRB*, 126 F.3d 268, 273 (4th Cir. 1997) (holding that the Board did not analyze the facts in the case properly, given circuit precedent); *NLRB v. D&D Enters.*, 125 F.3d 200, 206 (4th Cir. 1997) (declining to enforce an unfair labor practice order because the Board did not follow circuit precedent); *Performance Friction Corp. v. NLRB*, 117 F.3d 763, 768 (4th Cir. 1997) (noting that the Board's order requiring an employer to rescind a disciplinary policy and rehire all workers terminated under that policy overstepped the Board's remedial authority); *Industrial TurnAround Corp. v. NLRB*, 115 F.3d 248, 253-54 (4th Cir. 1997) (noting that the NLRB analyzed a case arising in the Fourth Circuit under its own law, rather than circuit precedent).

Remarking upon the hostility, one Fourth Circuit judge recently predicted that "[o]nly uncontrollable mischief can result from courts presuming, on the basis of some perceived policy bias in a course of agency decisions, to confer a general pariah status upon that agency." *Beverly Enters., Va. v. NLRB*, 165 F.3d 290, 307 (4th Cir. 1999) (en banc) (Phillips, J., dissenting).

The Sixth Circuit also has expressed its ire with the Board, complaining that the NLRB "continues to misapprehend both the law and its own place in the legal system." *Caremore, Inc.*, 129 F.3d at 371. The Second Circuit has also warned that "the Board's biased mishandling of cases involving supervisors increasingly has called into question our obeisance to the Board's decisions in this area." *Spentonbush/Red Star Cos. v. NLRB*, 106 F.3d 484, 492 (2d Cir. 1997).

congressional or Supreme Court action to protect nurses under the NLRA. Until the Supreme Court addresses the issue or legislative amendment takes place, however, the Fourth Circuit is now in a minority that prohibits charge nurses from joining a union.

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