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## Labor Relations - Third Circuit Adopts Exception to Parker-Robb Rule - Unfair Labor Practice to Discharge Supervisor in Retaliation for Relatives' Pro-Union Activity

Karen D. McDonnell

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1991]

LABOR RELATIONS—THIRD CIRCUIT ADOPTS EXCEPTION TO *PARKER-ROBB* RULE—UNFAIR LABOR PRACTICE TO DISCHARGE SUPERVISOR IN RETALIATION FOR RELATIVES' PRO-UNION ACTIVITY

*Kenrich Petrochemicals, Inc. v. NLRB* (1990)

I. INTRODUCTION

When faced with a union organizational campaign among rank-and-file employees, management will often turn to supervisors to lead the counter-organizational effort.<sup>1</sup> In extreme situations, management will place supervisors in the untenable position of choosing between the loss of their job or the risk of violating an employee's right to organize.<sup>2</sup>

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1. See A. DEMARIA, *HOW MANAGEMENT WINS UNION ORGANIZATIONAL CAMPAIGNS* 193 (1980) ("Frontline supervision is the company's first line of defense against union invasion in the workplace."); Comment, *Union Busters and Front-Line Supervisors: Restricting and Regulating the Use of Supervisory Employees by Management Consultants During Union Representation Election Campaigns*, 135 U. PA. L. REV. 453 (1987).

The involvement of supervisors in an anti-union campaign is crucial for two reasons. First, because supervisors are typically the only representatives of management who have daily contact with the rank-and-file, "they serve as an excellent conduit" through which anti-union propaganda may be disseminated. Comment, *supra*, at 457. Second, their regular contact with the rank-and-file enables them to act as a "barometer" of pro-union sentiment, as well as to identify the leaders of the organizational campaign. *Id.*

2. See Hamment, *Are Instructions to Supervisors to Commit Unfair Labor Practices Unlawful Per Se?*, 26 LAB. L.J. 281, 281 (1975) (arguing that employer can require supervisor to engage in lawful anti-union activity); Comment, *supra* note 1, at 462-64 (noting that supervisors are induced to participate in anti-union campaign through use of hints of promotion or veiled threats of demotion or discharge).

Often, mere neutrality on the part of a supervisor during an anti-union campaign is not tolerated by management. Comment, *supra* note 1, at 462; see also A. DEMARIA, *supra* note 1, at 192. One foreman, for example, testified before a congressional subcommittee that his neutrality toward the union organizational campaign resulted in the loss of his job.

I didn't mention the union [to the employees] pro or con. I was concerned with production. I didn't harass the people and I told Mr. Dickerson that at the meeting . . . .

Mr. Dickerson stated to me: "John, you are going to either follow the game plan or get off the team." I remarked that "a man's job is not a game and I do not feel that I can do what you require of me." He said: "John, leave your I.D., you are terminated."

Comment, *supra* note 1, at 463 (quoting 3 *Pressures in Today's Workplace: Oversight Hearing Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 96th Cong., 1st & 2d Sess. 212-13 (1979-1980) (statement of John Jones, Lexington, N.C.)).

(973)

The extent to which the National Labor Relations Act<sup>3</sup> (NLRA or the Act) protects supervisors against dismissal has been unclear since it was adopted in 1935.<sup>4</sup> Although supervisors are expressly excluded from the statutory definition of employee, and therefore from the pro-

3. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1988)).

4. See K. MCGUINNESS & J. NORRIS, *HOW TO TAKE A CASE BEFORE THE NLRB* 5 (5th ed. 1986) ("The exemption of supervisors . . . has been most troublesome to the Board."); Bethel, *The NLRB and the Discharge of Supervisors: Parker-Robb Brings Questionable Reform*, 54 U. COLO. L. REV. 1 (1982); Baer, *Protection of Supervisors from Discharge*, N.Y.L.J., March 16, 1990, at 3, col. 1 ("considerable attention" given to issue of supervisor discharge under NLRA despite exclusion of supervisors from Act's protection).

Historically, the proper scope of protection afforded supervisors by the NLRA has been an issue surrounded by much confusion. See generally Brod, *The NLRB in Search of a Standard: When is the Discharge of a Supervisor in Connection with Employees' Union or Other Protected Activities an Unfair Labor Practice?*, 14 IND. L. REV. 727 (1981). Under the original legislation, known as the Wagner Act, a statutory employee included "any employee" and excluded only domestic workers, agricultural laborers and close relatives of the employer. National Labor Relations (Wagner) Act, Pub. L. No. 74-198, 49 Stat. 449 (1935). For the text of the current statutory definition of "employee," see *infra* note 5.

The NLRB, in the fourth case it reported, extended the protection of the Act to supervisors. *Fruehauf Trailer Co.*, 1 N.L.R.B. 68 (1935) (foremen reinstated because union activity protected by Act), *enforcement denied on other grounds*, 85 F.2d 391 (6th Cir. 1936), *rev'd*, 301 U.S. 49 (1937). The Supreme Court upheld the Board's inclusion of supervisors in the statutory definition of employee. *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49, 57 (1937); see *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 490 (1947) ("no basis in . . . Act whatever for holding that foremen are forbidden the protection of the Act"); see also *Jones & Laughlin Steel Corp.*, 71 N.L.R.B. 1261, 1262-63 (1946) (Act as written today requires that we protect rights of employees, including supervisory employees, to bargain collectively).

In response to *Packard*, Congress passed the Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-197 (1988)), which expressly excluded supervisors from the statutory definition of employee. 29 U.S.C. § 152(3) (1988). Congress's intent in amending the legislation was to ensure that an employer could demand strict loyalty from a supervisor and to discourage any conflict of interest between a unionized supervisor and his employer. S. REP. NO. 105, 80th Cong., 1st Sess. 5 (1947) ("It is natural to expect that unless this Congress takes action, management will be deprived of the undivided loyalty of its foremen. There is an inherent tendency to subordinate their interests wherever they conflict with those of the rank and file."); H. REP. NO. 245, 80th Cong., 1st Sess. 14-17 (1947) (an employer "need [not] have as his agent one who is obligated to those on the other side, or one whom, for any reason, he does not trust.") (emphasis in original). See generally Seitz, *Legal, Legislative and Managerial Responses to the Organization of Supervisory Employees in the 1940s*, 28 AM. J. LEGIS. HIST. 199 (1984). Despite this amendment, the Board and the courts have continued to hold that under certain circumstances, the discharge of a supervisor constitutes an unfair labor practice. See *Parker-Robb Chevrolet Inc.*, 262 N.L.R.B. 402 (1982), *enforced sub nom. Automobile Salesmen's Union v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983). For a discussion of the circumstances under which the discharge of a supervisor constitutes an unfair labor practice, see *infra* notes 33-42 and accompanying text.

tections offered by the NLRA,<sup>5</sup> the discharge of a supervisor, under certain circumstances,<sup>6</sup> can constitute an unfair labor practice.<sup>7</sup> The

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5. Supervisors were excluded from the protection of the Act by the Taft-Hartley Amendments, Labor-Management Relations Act of 1947, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-197 (1988)). The Act defines an employee as:

[A]ny employee . . . and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include . . . any individual employed as a *supervisor* . . . .

29 U.S.C. § 152(3) (1988) (emphasis added).

The Act defines a supervisor as:

[A]ny 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.

29 U.S.C. § 152(11) (1988).

An employee is considered a statutory supervisor "if he possesses *any one* of the types of authority listed in Section 2(11) and the exercise of such authority is non-routine and entails the use of independent judgment." Warner Co. v. NLRB, 365 F.2d 435, 437 (3d Cir. 1966) (emphasis in original); *see also* NLRB v. Yeshiva Univ., 444 U.S. 672 (1980) (employee has supervisor status if any of the statutory tests are met). Along with this statutory definition, the courts and the Board have developed "certain secondary tests of supervisory status," such as comparative wage rate and attitudes among fellow workers. K. McGUINNESS & J. NORRIS, *supra* note 4, at 6. For a further discussion of the analysis utilized to determine supervisory status, see 2 THE DEVELOPING LABOR LAW 1451-57 (C. Morris 2d ed. 1983).

6. For a discussion of the circumstances under which the discharge of a supervisor constitutes an unfair labor practice, see *infra* notes 33-42 and accompanying text.

7. See J.F. HUNSICKER, J. KANE & P. WALTHER, NLRB REMEDIES FOR UNFAIR LABOR PRACTICES 115 (1986). An employer commits an unfair labor practice when an employer "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in section 157 of this title." 29 U.S.C. § 158(a)(1) (1988). Such rights include: "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (1988).

Most commentators agree that proof of motive is not a *necessary* element of a § 8(a)(1) violation. See 1 THE DEVELOPING LABOR LAW, *supra* note 5, at 76-78; *see also* H. PERRITT, EMPLOYEE DISMISSAL LAW & PRACTICE 80 (2d ed. 1987); Modjeska, *The Reagan NLRB, Phase I*, 46 OHIO ST. L.J. 95, 109 (1985) ("[S]ection 8(a)(1) is violated in a wide variety of situations irrespective of motive"); Oberer, *The Scienter Factor in Sections 8(a)(1) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs and Tails*, 52 CORNELL L.Q. 491 (1967). The NLRB has held that a violation of § 8(a)(1) "does not turn on the employer's motive," American Freightways Co., 124 N.L.R.B. 146, 147 (1959); however, the Supreme Court has been less firm in excluding consideration of motive from the analysis of an unfair labor practice. See 1 THE DEVELOPING LABOR LAW, *supra* note 5, at 76-77. Still, as a general rule, "scienter [is] not . . . essential in Section 8(a)(1) cases."

National Labor Relations Board (NLRB or the Board) is “empowered” by Congress to remedy such unfair labor practices<sup>8</sup> by reinstating the discharged employee.<sup>9</sup>

In *Kenrich Petrochemicals, Inc. v. NLRB*,<sup>10</sup> the United States Court of Appeals for the Third Circuit clarified this problematic area of a discharged supervisor’s protection under the NLRA. The court addressed the issue of a supervisor’s protection in its review of an NLRB order for the reinstatement of a supervisor discharged in retaliation for her rela-

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*Id.* at 77. In any case, a motive element “can be inferred from evidence of conduct making it more likely than not the prohibited motive existed.” H. PERRITT, *supra*, at 379.

The Act also provides that “[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged . . . if such individual was suspended or discharged for cause.” 29 U.S.C. § 160(c) (1988). Situations arise where the motivations of an employer in discharging an employee are “mixed”—that is, both lawful and unlawful. See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 394-95 (1983). In such mixed-motive cases, the motive of the employer is examined. *Id.*; see also *Oberer*, *supra*, at 516-17 (asserting that motive should only be considered in analysis of § 8(a)(1) if used in conjunction with § 8(a)(3)). However, “it is undisputed that if the employer fires an employee for having engaged in union activities and has no other basis for the discharge, or if the reasons that he proffers are pretextual, the employer commits an unfair labor practice.” *Transportation Management*, 462 U.S. at 398. Yet, the employer does not commit an unfair labor practice “if any antiunion animus that he might have entertained did not contribute at all to an otherwise lawful discharge for good cause.” *Id.*

8. 29 U.S.C. § 160(a) (1988); see J.F. HUNSICKER, J. KANE & P. WALTHER, *supra* note 7, at 5. Section 160(a) states: “The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in § 158 of this title) affecting commerce.” 29 U.S.C. § 160(a). The Act further instructs that:

If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter . . . .

29 U.S.C. § 160(c) (1988).

Moreover, “[b]oard orders are unenforceable to the extent they are punitive rather than remedial.” J.F. HUNSICKER, J. KANE & P. WALTHER, *supra* note 7, at 9; see also *Local 60, Carpenters v. NLRB*, 365 U.S. 651, 655 (1961) (“[T]he power of the Board ‘to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board’s authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act.’” (quoting *Consolidated Edison v. NLRB*, 305 U.S. 197, 236 (1938))).

9. 29 U.S.C. § 160(c) (1988). See J.F. HUNSICKER, J. KANE & P. WALTHER, *supra* note 7, at 115. (“The reinstatement rights of discriminatorily discharged employees are usually automatic.”). For the statutory language of § 160(c), see *supra* note 8.

10. 893 F.2d 1468 (3d Cir.) [hereinafter *Kenrich I*], *rev’d in part*, 907 F.2d 400 (3d Cir.) (en banc) [hereinafter *Kenrich II*], *cert. denied*, 111 S. Ct. 509 (1990).

tives' participation in activities protected by the NLRA.<sup>11</sup> In *Kenrich I*, a panel of the Third Circuit held that the discharge of a supervisor in retaliation for her relatives' involvement in union organizational activities constituted an unfair labor practice.<sup>12</sup> Reversing the panel solely on the issue of an appropriate remedy for the unfair labor practice, the Third Circuit, sitting en banc in *Kenrich II*, enforced the NLRB's reinstatement and back pay order which remedied the supervisor's unlawful discharge.<sup>13</sup>

The Third Circuit has provided important guidance to employers and their attorneys in determining when the discharge of a supervisor constitutes an unfair labor practice. The court also clarified the analysis necessary to develop new exceptions to the NLRB's holding in *Parker-Robb Chevrolet, Inc.*<sup>14</sup> Furthermore, the court illustrated that reinstatement of a supervisor does not per se contravene the NLRA.

11. *Kenrich II*, 907 F.2d at 402.

12. *Kenrich I*, 893 F.2d at 1480 (violation of § 8(a)(1) because Kenrich's sole intent was to retaliate for supervisor's relatives' attempt to unionize). Circuit Judges Stapleton, Greenburg and Garth heard the case. *Id.* at 1471. Judge Greenberg wrote the opinion of the court. *Id.* Judge Stapleton filed a separate opinion, concurring in part and dissenting in part. *Id.* at 1487 (Stapleton, J., concurring and dissenting). For a discussion of the Third Circuit's holding and analysis in *Kenrich I*, see *infra* notes 33-55 and accompanying text.

Although the panel held that the termination of the supervisor was an unfair labor practice, it declined to enforce the Board's reinstatement order holding that "the Board exceeded its remedial authority and stepped beyond the permissible boundaries of the Taft-Hartley Act in seeking to recompense a supervisor for Kenrich's unlawful attempt to thwart the union's organizational campaign." *Kenrich I*, 893 F.2d at 1480. A majority of the active judges of the Third Circuit granted the NLRB's petition for rehearing and vacated that portion of *Kenrich I* that dealt with the remedy for discharge of the supervisor. *Id.* at 1488.

For other cases addressing the discharge of supervisors in retaliation for relative's pro-union activity, see *Advertisers Mfg. Co.*, 280 N.L.R.B. 1185, 1202 (1986), *enforced*, 823 F.2d 1086 (7th Cir. 1987) (supervisor discharged in retaliation for son's pro-union activities); *American Feather Products Corp.*, 248 N.L.R.B. 1102, 1114 (1980) (discharge of supervisor for failure to conduct unlawful surveillance of employees who were her daughters); *Consolidated Foods Corp.*, 165 N.L.R.B. 953, 954 (1967), *enforced*, 403 F.2d 662 (1968) (supervisor discharged in retaliation for employee-wife's pro-union activities); *Golub Bros. Concessions*, 140 N.L.R.B. 120, 120-21 (1962) (supervisor discharged in retaliation for employee-husband's pro-union activities).

13. *Kenrich II*, 907 F.2d at 411 ("The reinstatement and back pay order issued is reasonably calculated to dispel the intimidation caused by [the supervisor's] firing.").

Judge Stapleton wrote the opinion of the court. *Id.* at 402. Judge Greenberg filed a separate dissenting opinion in which Judges Hutchinson and Garth joined. *Id.* at 411-18 (Greenberg, J., dissenting). For a discussion of the holding and analysis of the *Kenrich II* court, see *supra* notes 57-66.

14. 262 N.L.R.B. 402 (1982), *enforced sub. nom.* *Automobile Salesmen's Union v. NLRB*, 711 F.2d 383 (1983). For a discussion of the holding of *Parker-Robb*, see *infra* notes 34-42 and accompanying text.

## II. FACTS

Kenrich Petrochemicals is a family-owned corporation which manufactures and sells numerous chemical products.<sup>15</sup> Kenrich employed Helen Chizmar (Chizmar) as an office manager who supervised seven clerical employees.<sup>16</sup> Three members of the Chizmar family were among the seven clerical workers directly under her supervision.<sup>17</sup>

On May 21, 1987, Kenrich's clerical employees advised Chizmar of their plans to unionize.<sup>18</sup> The clerical staff also advised Chizmar that Kenrich management would receive a letter from the union requesting recognition.<sup>19</sup> Although Chizmar considered informing Salvatore Monte, the company's President, of the organizational drive when she learned of it, she declined to do so in an effort to avoid the appearance that she was involved with her relatives' union activities.<sup>20</sup>

Seven days after receiving the union's letter requesting recognition,

15. *Kenrich I*, 893 F.2d at 1471. Kenrich's founder is Eric Spiegelhalter. *Id.* at 1472. His daughter, Erica is Vice-President and her husband, Salvatore Monte is the current President of Kenrich. *Kenrich II*, 907 F.2d at 402. Kenrich has for many years employed several members of the Chizmar family in both management and staff positions. *Id.* According to Salvatore Monte, the Chizmar family's situation was not unusual as "many of the rank-and-file production employees are related to supervisors." *Id.* at 403. The court specifically noted one situation at Kenrich in which a father supervised his son who is a production employee and a union member. *Id.* at 403 n.1.

16. *Kenrich I*, 893 F.2d at 1471-72. Chizmar worked for Kenrich for a total of twenty-four years. *Kenrich II*, 907 F.2d at 402. She held her position as supervisor for ten years. *Id.*

17. *Kenrich I*, 893 F.2d at 1472. Barbara Knorowski, Chizmar's sister, was employed as a sales order clerk and had been with the company since 1962. *Kenrich II*, 907 F.2d at 402. Karen McPartlan, Chizmar's daughter, also held the position of sales order clerk and had been employed at Kenrich Petrochemicals for ten years. *Id.* Catherine Chizmar, Helen Chizmar's daughter-in-law, worked as a secretary intermittently since 1975. *Id.* at 402-03. Notably, Helen Chizmar's father was the first union shop steward for Kenrich's production workers. *Id.* at 402.

18. *Kenrich I*, 893 F.2d at 1472. Along with Chizmar's three relatives, four other members of Kenrich's clerical staff, Michelle Bobb, Marge McNally, Judy Kobryn and Linda Ferrano, signed authorization cards designating Local 8-406, Oil, Chemical and Atomic Workers International Union, AFL-CIO as their bargaining representative sometime in May of 1987. *Id.* This union had been representing Kenrich's production workers for approximately 20 years prior to this incident. *Id.* at 1471.

19. *Id.* at 1472. According to Chizmar, she was both "shocked and upset" that the clerical staff was planning to unionize. *Kenrich II*, 907 F.2d at 403.

20. *Kenrich I*, 893 F.2d at 1472. Chizmar also believed that it would be "futile to raise the issue of the organizational drive, given that Kenrich would receive the union's letter the following day." *Id.*

Upon receiving the union's letter of recognition, "Monte testified that he 'felt . . . betrayed.'" *Id.* During a manager's meeting called to assess "Kenrich's prospects for defeating the union campaign," the Vice-President of Operations "showed Chizmar the letter and stated, '[h]ere read the letter, but you probably know all about it already.'" *Id.* (brackets in original). Chizmar did not respond. *Id.*

Monte discharged Chizmar explaining that while her job performance was satisfactory, he could no longer afford her salary.<sup>21</sup> On numerous other occasions, however, Monte offered varying explanations for Chizmar's discharge; and, while some of these rationales reflected contempt toward her relatives' participation in unionization, none of the explanations offered *prior* to the Board hearing demonstrated that Monte was concerned with a potential conflict of loyalty.<sup>22</sup> In fact, no evidence existed which proved that Chizmar participated in any pro-union activity or acted contrary to the interests of Kenrich.<sup>23</sup>

At the time of Chizmar's discharge, Monte was hopeful that he could quash the movement toward unionization.<sup>24</sup> Monte was unsuccessful in his fight against unionization, and, on July 10, 1987, a certificate of representative status was issued by the NLRB.<sup>25</sup> Collective bargaining began in September of 1987, during which Monte asserted that "he was going to 'get rid of the whole [Chizmar] family.'" <sup>26</sup>

In the action before the Third Circuit, Kenrich challenged the order of the NLRB<sup>27</sup> which held that Kenrich committed a myriad of unfair

21. *Kenrich II*, 907 F.2d at 403. As he fired Chizmar, he stated: "[We] have to let you go, Helen. We just can't afford you anymore . . . we think we can get somebody for \$20,000 less and that's what we plan to do." *Id.*

22. *Id.* Shortly after Monte fired Chizmar, he told an agent of Kenrich that "[h]e couldn't keep [Chizmar] for financial reasons and [he] was not going to put up with any union bullshit." *Id.* In early June, Monte informed Catherine Chizmar that "[he] had to fire Helen because she couldn't do the technical end of her job." *Kenrich I*, 893 F.2d at 1473. Monte later conceded that Helen Chizmar's termination was not based upon her job performance. *Id.* at 1473 n.2.

On another occasion, Monte explained to Catherine Chizmar that Chizmar was fired "because [he] couldn't afford her and no matter what [he] did for her, she was never happy." *Id.* at 1473. Finally, at the hearing, Monte contended that Helen Chizmar's discharge was due to a potential conflict of interest that would arise in her management of a bargaining unit that consisted of three of her close relatives. *Id.*

23. *Kenrich II*, 907 F.2d at 403.

24. *Id.* Monte believed that he could convince Catherine Chizmar, Helen Chizmar's daughter-in-law that unionization was not in her best interest. *Id.* She had expressed fears that she would be fired because her mother-in-law was fired and "it seemed like a pattern." *Id.* at 403-04. Monte assured Catherine Chizmar of her job security but noted that "[i]f you vote in a union you have to start from scratch. No benefits, no salary, no vacations." *Id.* at 404 (brackets in original).

He did not attempt to dissuade Barbara Knorowski and Karen McPartlan because "unionization was in their 'family culture.'" *Id.* at 403. Moreover, Monte transferred Linda Ferrano to a position as his confidential secretary, "rendering her ineligible for union member status." *Id.* Judy Kobryn had previously decided to leave Kenrich. These personnel changes left the swing votes in the union election in the hands of Catherine Chizmar, Bobb and McNally. *Id.*

25. *Id.* at 404. After failing to dissuade his clerical workers from unionizing, Monte "authorized Kenrich's offer of voluntary recognition of the bargaining unit pending a card count." *Kenrich I*, 893 F.2d at 1472. Rejecting this offer, the union demanded a Board election. *Id.*

26. *Kenrich II*, 907 F.2d at 404.

27. *Kenrich Petrochemicals, Inc.*, 294 N.L.R.B. (No. 41) (1989), 1988-89



labor practices in connection with the clerical workers' effort to unionize, one of which was the retaliatory discharge of Chizmar.<sup>28</sup> A Third Circuit panel held that while Chizmar's discharge violated section 8(a)(1) of the NLRA, the NLRB lacked the power to order reinstatement and back pay.<sup>29</sup> The NLRB filed a petition for rehearing en banc on the issue of the panel's refusal to enforce the NLRB's order reinstating supervisor Chizmar with back pay.<sup>30</sup> The petition for rehearing en banc was granted solely on the issue of whether the NLRB's remedial order regarding Helen Chizmar's termination should be enforced.<sup>31</sup> On rehearing en banc, the court overruled the panel's decision and enforced the order of the NLRB.<sup>32</sup>

### III. DISCUSSION

#### A. Discharge of Helen Chizmar—Kenrich I

In *Kenrich I*, the Third Circuit rested its analysis upon the "settled law" that, "notwithstanding the statutory exclusion of supervisors from the Act's protection, . . . an employer's discharge of a supervisor may give rise to an 8(a)(1) violation."<sup>33</sup> The court noted, however, that the

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NLRB Dec. (CCH) ¶ 15581 (July 21, 1989). In this opinion, the National Labor Relations Board summarily upheld the earlier decision of an administrative law judge who found that Kenrich committed numerous unfair labor practices. 294 N.L.R.B. at —, 1988-89 NLRB Dec. (CCH) ¶ 15582.

28. *Kenrich I*, 893 F.2d at 1471. Aside from the discharge of Helen Chizmar, the administrative law judge found other unfair labor practices, such as, the layoff and subsequent refusal to recall one employee, a change in working hours, assaulting an employee, and requiring a physician's note to substantiate and be paid for work absences. 294 N.L.R.B. at —, 1988-89 NLRB Dec. (CCH) ¶ 15581-15582. The scope of this Casebrief is limited to the discriminatory discharge of Helen Chizmar.

29. *Kenrich I*, 893 F.2d at 1480 (sole intent in discharge was retaliation for unionization but reinstatement of supervisor beyond remedial authority).

30. *Id.* at 1488.

31. *Id.* The panel's opinion was vacated at 893 F.2d 1480-82. *Id.*

32. *Kenrich II*, 907 F.2d at 411.

33. *Kenrich I*, 893 F.2d at 1475 (citations omitted). The court grounded this assertion on established precedent. *See, e.g.*, *NLRB v. Oakes Mach. Corp.*, 897 F.2d 84, 92-94 (2d Cir. 1990) (enforcing Board's order reinstating supervisor discharged for threatening to testify on behalf of employee in NLRB hearing); *Delling v. NLRB*, 869 F.2d 1397, 1401 (10th Cir. 1989) (enforcing Board's order reinstating supervisor discharged for refusing to falsify termination slips to cover-up unlawful discharge of rank-and-file employees); *Kessel Food Mkts., Inc. v. NLRB*, 868 F.2d 881, 887 (6th Cir.) (enforcing Board's order reinstating supervisors discharged for testifying at hearing on discriminatory hiring), *cert. denied*, 110 S. Ct. 76 (1989); *NLRB v. Advertiser's Mfg. Co.*, 823 F.2d 1086, 1088-89 (7th Cir. 1987) (enforcing Board's order reinstating supervisor discharged in retaliation for son's union activities).

Kenrich made no challenge to the assertion that a supervisor's discharge can constitute an unfair labor practice. *Kenrich I*, 893 F.2d at 1475. Rather, Kenrich argued that the administrative law judge "erred in finding that Kenrich's discharge of Helen Chizmar violated section 8(a)(1) of the Act, because the judge improperly applied an outmoded subjective test when analyzing the

issue of "the extent to which the Board, in seeking to vindicate the statutory rights of rank-and-file employees [which] may limit an employer's otherwise unfettered right to discharge a supervisor," presented a "difficult and recurring problem in the federal labor law."<sup>34</sup>

claim." *Id.* (citations omitted). Kenrich contended that when assessing the discharge of a supervisor, "the only relevant inquiry . . . is whether the circumstances underlying the discharge were objectively reasonable, regardless of the employer's motivation or the effect of the discharge on the employees' protected activity." *Id.* at 1476.

34. *Id.* at 1477. For a discussion of the interpretation of the Act prior to the Taft-Hartley amendments, see *supra* note 4.

Notwithstanding the passage of the Taft-Hartley amendments which excluded supervisors from the protective ambit of employee status, the NLRB continued to render decisions holding that, under certain circumstances, the discharge of a supervisor "ran afoul" of § 8(a)(1). See Brod, *supra* note 4, at 729. The rationale underlying such decisions was that the supervisor's discharge had a deleterious effect on the rank-and-file employees' exercise of protected concerted activity. See Bethel, *supra* note 4, at 8 ("[T]he Board has found that supervisor discharges violated section 8(a)(1) because of their effect on employee rights."); see also *Gerry's Cash Mkts., Inc. v. NLRB*, 602 F.2d 1021, 1023 (1979) (The "theory is that if employers are allowed to force supervisors to engage in unfair labor practices, this necessarily results in direct interference with the affected rank-and-file employees in the exercise of their § 7 rights."). For many years, the Board "has struggled to balance the right of employers to demand that supervisors be on management's side in labor disputes with the right of employees to be free from unfair labor practices." Baer, *supra* note 4, at 3, col. 1.

The factual settings in which a supervisor discharge constituted a violation of § 8(a)(1) were often similar and therefore, easily categorized. See Bethel, *supra* note 4, at 8; Brod, *supra* note 4, at 729-30. The Board has consistently held that the discharge of a supervisor who refused to commit unfair labor practices is itself a violation of § 8(a)(1). See, e.g., *Delling v. NLRB*, 869 F.2d 1397, 1399 (10th Cir. 1989) ("Courts have recognized . . . that an employer's discharge of a supervisor for refusing to participate in an unfair labor practice is itself an unfair labor practice."); *Howard Johnson Co. v. NLRB*, 702 F.2d 1, 4-5 (1st Cir. 1983) (unfair labor practice to discharge supervisor who refused to engage in unlawful surveillance of employee's union activity); *American Feather Products*, 248 N.L.R.B. 1102, 1114 (1980) (unfair labor practice to discharge supervisor for failure to "unlawfully trample on the protected rights of her daughters"); *Vail Mfg. Co.*, 61 N.L.R.B. 181, 182 (1945) (supervisor discharged for refusal to allow employer to list them as eligible voters in union election), *enforced*, 158 F.2d 664 (7th Cir.), *cert. denied*, 331 U.S. 835 (1947).

The Board has also continually held that the discharge of a supervisor for testifying adversely to his or her employer at an NLRB hearing or at an in-court proceeding constituted an unfair labor practice. See, e.g., *NLRB v. Oakes Mach. Corp.*, 897 F.2d 84, 92-94 (2d Cir. 1990) (enforcing Board's order reinstating supervisor discharged for threatening to testify on behalf of employee in NLRB hearing); *Kessel Food Mkts., Inc. v. NLRB*, 868 F.2d 881, 887 (6th Cir. 1989) (enforcing Board's order reinstating supervisors discharged for testifying at hearing on discriminatory hiring); *Oil City Brass Works*, 147 N.L.R.B. 627, 629-30 (1964) (Board ordered reinstatement of supervisor discharged for testifying at Board hearing notwithstanding that employer took no adverse action against rank-and-file employees who also testified), *enforced*, 357 F.2d 466 (5th Cir. 1966); *Better Monkey Grip Co.*, 115 N.L.R.B. 1170, 1182 (1956) (unfair labor practice to discharge supervisor in retaliation for testimony before Board), *enforced*, 243 F.2d 836 (5th Cir.), *cert. denied*, 355 U.S. 864 (1957).

The court evaluated the legality of Chizmar's discharge by applying

Distinguishable from these cases are the unpredictable decisions of the Board holding that a supervisor's discharge constituted an unfair labor practice as "an integral part of a pattern of conduct aimed at penalizing employees." *Krebs & King Toyota, Inc.*, 197 N.L.R.B. 462, 463 n.4 (1972). See *Pioneer Drilling Co.*, 162 N.L.R.B. 918 (1967), *enforcement granted in part and denied in part*, 391 F.2d 961 (10th Cir. 1968). *Pioneer Drilling* "is seen as the genesis of that line of cases where the Board evolved the concept that a supervisor's discharge in connection with reprisals against employees' union or other protected concerted activities may violate section 8(a)(1)." Brod, *supra* note 4, at 731. In *Pioneer Drilling*, the Board encountered a unique factual situation in which the discharge of a drilling supervisor compelled the discharge of all the rank-and-file employees he supervised. *Pioneer Drilling*, 162 N.L.R.B. at 921. The employer in *Pioneer Drilling* discharged two supervisors in an effort to purge the company of the pro-union employees they supervised. *Id.* at 922-23. The Board held this to be an unfair labor practice because the supervisors' discharges were "an integral part of a pattern of conduct aimed at penalizing employees for their union activities." *Id.* at 923.

The Board then extended this holding far beyond the specific facts of *Pioneer Drilling*. See *DRW Corp.*, 248 N.L.R.B. 828, 828-29 (1980) (discharge of supervisor who initiated union organizational drive unlawful because part of "widespread pattern of misconduct against employees and supervisors alike . . . motivated by a desire to discourage union activities among its employees"); *Fairview Nursing Home*, 202 N.L.R.B. 318, 324 n.34 (1973) (discharge of supervisors engaged in pro-union activities unlawful), *enforced mem.*, 486 F.2d 1400 (5th Cir. 1973), *cert. denied*, 419 U.S. 827 (1974); *Krebs & King Toyota, Inc.*, 197 N.L.R.B. 462, 464-65 (1972) (termination of supervisor who represented striking workers' interests to employer, contemporaneous with refusal to rehire protected employees' violated § 8(a)(1)).

The holding of *Pioneer Drilling* "developed a concept that an employer's discharge of a supervisor in connection with a union organization campaign or similar protected activities by employees violates section 8(a)(1) if it is an integral part of a pattern of conduct aimed at penalizing employees for exercising their statutory rights." Brod, *supra* note 4, at 738. A discharge of a supervisor was held to be part of such a "pattern of conduct" if the "employer acted out of hostility toward the employees' exercise of statutory rights rather than out of a legitimate desire to insure the loyalty of its supervisory personnel." *Id.*

In *Parker-Robb Chevrolet, Inc.*, the Board expressly overruled all precedent which was progeny of *Pioneer Drilling*. *Parker-Robb Chevrolet, Inc.*, 262 N.L.R.B. 402, 404 n.20 (1982), *enforced sub nom. Automobile Salesmen's Union v. NLRB*, 711 F.2d 383 (6th Cir. 1983). The Board reasoned that although the "pattern of conduct" rationale was attractive from an equitable standpoint, it "disregard[ed] the fact that employees, but not supervisors, are protected against discharge for engaging in union or concerted activity." *Id.* at 403 (emphasis in original). However, the Board expressly affirmed that the discharge of supervisors in retaliation for giving testimony adverse to employer's interest or for refusal to commit an unfair labor practice constituted a violation of § 8(a)(1). *Id.* at 402-03. Moreover, *Pioneer Drilling* was not expressly overruled; but rather, restricted to the novel factual situation it presented. *Id.* at 403 & n.12.

In repudiating the "pattern of conduct" line of cases, the Board also rejected the suggestion it had made in such cases that "employer motivation in discharging a supervisor controls." *Id.* at 404. The Board emphasized that "there is no violation if a supervisory discharge is motivated by disloyalty, but a supervisor's discharge is found to be unlawful if it is motivated by a desire to thwart organizational activity among employees." *Id.* It found that a subjective test was "clearly unworkable" and "contrary to the Board's objective approach in analogous areas." *Id.* at 404 n.15.

the test outlined by the NLRB in *Parker-Robb Chevrolet, Inc.*<sup>35</sup> The *Parker-Robb* panel held that the “discharge of a supervisor is unlawful under the Act only if it directly interferes with the section 7 rights of an employee.”<sup>36</sup> In *Parker-Robb*, the Board set forth several “basic exceptions” to its holding.<sup>37</sup> For example, an employer violates section 8(a)(1), despite the exclusion of supervisors from the statutory definition of employee, if a supervisor is discharged in retaliation for testifying before the Board<sup>38</sup> or if a supervisor is discharged for refusing to commit an unfair labor practice.<sup>39</sup> Moreover, in *Parker-Robb*, the NLRB affirmed its holding in *Pioneer Drilling Co.*, in which the Board found that an

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35. *Parker-Robb Chevrolet*, 262 N.L.R.B. 402 (1982), *enforced sub. nom.* Automobile Salesmen’s Union v. NLRB, 711 F.2d 383 (6th Cir. 1983). In *Parker-Robb*, a supervisor attended a union organization meeting and was subsequently terminated. *Parker-Robb*, 711 F.2d at 385. The administrative law judge found “that the discharge was part of an overall plan to discourage the rank-and-file employees” from participating in the union. *Id.* For a further discussion of *Parker-Robb*, see *supra* note 34.

36. *Parker-Robb*, 711 F.2d at 385. The NLRB’s holding in *Parker-Robb* was an attempt to “draw the proper line between protecting the employer’s right to demand loyalty from his supervisors and protecting the employee’s right to be free from unfair labor practices funnelled through a supervisor by the employer.” *Id.* at 386. The Board noted in explanation of its holding that:

when a supervisor is discharged either because he or she engaged in union or concerted activity or because the discharge is contemporaneous with the unlawful discharge of statutory employees, or both, this incidental or secondary effect on the employees is insufficient to warrant an exception to the general statutory provision excluding supervisors from the protection of the Act.

*Parker-Robb*, 262 N.L.R.B. at 404.

37. *Parker-Robb*, 711 F.2d at 386. For a further discussion of the cases upheld in *Parker-Robb*, see *supra* note 34.

38. *Parker-Robb*, 711 F.2d at 386; see *NLRB v. Oakes Mach. Corp.*, 897 F.2d 84, 92-94 (2d Cir. 1990) (enforcing Board’s order reinstating supervisor discharged for threatening to testify on behalf of employee in NLRB hearing); *Kessel Food Mkts., Inc. v. NLRB*, 868 F.2d 881, 887 (6th Cir. 1989) (enforcing Board’s order reinstating supervisors discharged for testifying at hearing on discriminatory hiring); *Oil City Brass Works*, 147 N.L.R.B. 627, 629-30 (1964) (Board ordered reinstatement of supervisor discharged for testifying at Board hearing notwithstanding that employer took no adverse action against rank-and-file employees who also testified), *enforced*, 357 F.2d 466 (5th Cir. 1966); *Better Monkey Grip Co.*, 115 N.L.R.B. 1170, 1182 (1956) (unfair labor practice to discharge supervisor in retaliation for testimony before Board), *enforced*, 243 F.2d 836 (5th Cir.), *cert. denied*, 355 U.S. 864 (1957).

39. *Parker-Robb*, 711 F.2d at 386; see *Delling v. NLRB*, 869 F.2d 1397, 1399 (10th Cir. 1989) (“Courts have recognized . . . that an employer’s discharge of a supervisor for refusing to participate in an unfair labor practice is itself an unfair labor practice.”); *Howard Johnson Co. v. NLRB*, 702 F.2d 1, 4-5 (1st Cir. 1983) (unfair labor practice to discharge supervisor who refused to engage in unlawful surveillance of employee’s union activity); *American Feather Products*, 248 N.L.R.B. 1102, 1114-15 (1980) (unfair labor practice to discharge supervisor for failure to “unlawfully trample on the protected rights of her daughters”); *Vail Mfg. Co.*, 61 N.L.R.B. 181, 182 (1945) (supervisor discharged for refusal to allow employer to list them as eligible voters in union election), *enforced*, 158 F.2d 664 (7th Cir.), *cert. denied*, 331 U.S. 835 (1947).

employer committed an unfair labor practice when it discharged two supervisors because those discharges compelled the discharge of all the rank-and-file employees they supervised,<sup>40</sup> only in so far as the specific, unique facts of that case.<sup>41</sup> The Board emphasized, however, that a supervisor who is discharged because of participation in union or concerted activity is *not* accorded the protection of the NLRA.<sup>42</sup>

The Third Circuit, in applying the *Parker-Robb* rule, followed the approach utilized by the NLRB, and approved by the Seventh Circuit in *NLRB v. Advertisers Manufacturing Co.*<sup>43</sup> In *Advertisers Manufacturing*, the Board “grafted an additional exception to the *Parker-Robb* rule for cases in which a supervisor is discharged in retaliation against the protected concerted activities of her close relatives.”<sup>44</sup> The *Kenrich I* panel noted that the Board viewed such a discharge as a retaliatory discharge which it distinguished from the “pattern of conduct” cases overruled in *Parker-Robb*.<sup>45</sup> Furthermore, the Board analyzed the rationale for finding a section 8(a)(1) violation in a retaliatory discharge case to the rationale underlying the exceptions outlined in *Parker-Robb*.<sup>46</sup>

In *Kenrich I*, the Third Circuit interpreted *Advertisers Manufacturing* to imply that investigations into the employer’s motive for the discharge are legitimate in cases falling within a *Parker-Robb* exception.<sup>47</sup> It found

40. *Pioneer Drilling*, 162 N.L.R.B. 918 (1967). For the facts and holding of *Pioneer Drilling*, see *supra* note 34.

41. *Parker-Robb*, 711 F.2d at 386.

42. *Parker-Robb*, 262 N.L.R.B. at 404. The Board’s rationale in so holding was simply “that employees, but not supervisors, have rights protected by the Act.” *Id.* In applying the *Parker-Robb* rule, the Board inquired whether the supervisor discharge “interfere[d] with the rights of employees to exercise their rights under section 7” and whether the reinstatement of the supervisor was “necessary to convey to employees the extent to which the Act protects these rights.” *Id.*

43. *Kenrich I*, 893 F.2d at 1477 (relying on *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086 (7th Cir. 1987)).

44. *Id.* (citations omitted). In *NLRB v. Advertisers Manufacturing Co.*, 823 F.2d 1086 (7th Cir. 1987), a supervisor was discharged shortly after her son was elected chief steward for the local union. *Id.* at 1088. The supervisor had “not engaged in any activities pro or con the union.” *Id.* The Seventh Circuit stated that the Board did not intend the list of exceptions as given in *Parker-Robb* to be exhaustive. *Id.* The Board noted that “the discharge of supervisors is unlawful when it interferes with the right of employees to exercise their rights under Section 7 of the Act,” utilizing the exceptions as examples of such an interference. *Id.* (quoting *Parker-Robb*, 262 N.L.R.B. at 404).

45. *Kenrich I*, 893 F.2d at 1478. The Board noted specifically that the supervisor did not engage in any union activity. *Advertisers Mfg. Co.*, 262 N.L.R.B. at 1186. For a discussion of “pattern of conduct” cases, see *supra* note 34.

46. *Kenrich I*, 893 F.2d at 1478 (“[T]he Board indicated that retaliatory discharges of relative-supervisors have as deleterious an effect on employees’ protected activities as do discharges of supervisors for their refusal to commit unfair labor practices.”). “[The] rationale for finding a violation and ordering a make-whole remedy in the exceptional cases that were mentioned in *Parker-Robb* applies with equal force here.” *Advertisers Mfg. Co.*, 280 N.L.R.B. at 1186.

47. *Kenrich I*, 893 F.2d at 1478 (footnote omitted). *Parker-Robb* had clearly

support for this analysis in other “post-*Parker-Robb* decisions involving 8(a)(1) violations predicated upon the employer’s discharge of supervisory personnel.”<sup>48</sup>

The Third Circuit then set out a framework for the analysis of all “[c]ases falling within recognized exceptions to the *Parker-Robb* rule.”<sup>49</sup> The NLRB must first demonstrate that “an antiunion animus contributed to the employer’s decision to discharge [the] employee.”<sup>50</sup> The burden of persuasion shifts to the employer once the NLRB establishes this *prima facie* case.<sup>51</sup> The employer must “prove by a preponderance of the evidence that it would have discharged the employee even absent its unlawful motivation.”<sup>52</sup>

In the case at bar, the Third Circuit found that “Kenrich’s antiunion animus at the time of Chizmar’s discharge was amply demonstrated”<sup>53</sup> and that Kenrich did not offer any credible proof to the contrary.<sup>54</sup>

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rejected the use of any analysis in which the lawfulness of a supervisor’s discharge is evaluated *solely* on a basis of the employer’s motivation for such discharge. *Parker-Robb*, 262 N.L.R.B. at 404 n.15. However, the Board in *Parker-Robb* did note that “a supervisor’s discharge is found to be unlawful if it is motivated by a desire to thwart organizational activity among employees.” *Id.* at 404.

48. *Kenrich I*, 893 F.2d at 1478. The court specifically noted *Oakes Machine Corp.*, 288 N.L.R.B. 456 (1988), *enforcement granted in part and denied in part*, 897 F.2d 84 (2d Cir. 1989), in which a supervisor was discharged after threatening to testify “in-court” about allegedly unsafe working conditions. The employer also had “‘concurrent’ reasons” for dismissing the supervisor such as, “his failure to exercise sufficient control over the employees under his supervision.” *Id.* at 466. The Board, while conceding that the supervisor’s “demonstrated inability to properly supervise the employees under his responsibility could, standing alone, justify” the supervisor’s dismissal, held that it was an unfair labor practice when coupled with an unlawful motivation and the employer’s failure to prove that the supervisor would have been dismissed regardless of his threat to testify. *Id.* at 458.

49. *Kenrich I*, 893 F.2d at 1479. The court noted that such cases are “analyzed in the same manner as any discharges alleged to violate section 8(a)(1).” *Id.*

50. *Id.* (brackets in original) (quoting *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983) (citing with approval *Wright Line*, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982))).

51. *Id.*

52. *Id.* (citing *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400 (1983)). The court noted that the employer’s burden is analogous to an affirmative defense. *Id.* Therefore, the employer need not rebut the evidence offered by the General Counsel to prove anti-union animus. *Id.*

53. *Id.* The court pointed specifically to Monte’s statement that he “was not going to put up with any union bullshit.” *Id.* It also noted that Monte felt betrayed by the organizational drive and his professed intention to “get rid of the whole [Chizmar] family.” *Id.* at 1479-80 (brackets in original).

54. *Id.* at 1480. Kenrich claimed that Chizmar was discharged “because of the irreconcilable conflict of loyalties she would experience if her relatives unionized.” *Id.* The court responded that while this would be an acceptable basis on which to discharge a supervisor, Kenrich “failed to prove that Chizmar’s anticipated conflict of loyalties in fact contributed to its discharge decision.” *Id.*

Therefore, the Third Circuit held that the discharge of Chizmar violated section 8(a)(1) of the NLRA.<sup>55</sup>

### B. Remedy—Kenrich II

Although the *Kenrich I* court enforced the Board's order holding that the discharge of Helen Chizmar constituted an unfair labor practice, it did "not reach a similar conclusion with respect to the Board's selection of [a] remedy."<sup>56</sup> The panel rejected the Board's order of reinstatement with backpay because it felt that such a remedy failed to serve any legitimate remedial purpose.<sup>57</sup>

In reviewing the NLRB's construction of a remedy, the *Kenrich II* court considered two factors.<sup>58</sup> First, the court noted that the NLRB has

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The administrative law judge found that Monte's "apprehension about Chizmar's loyalty to Kenrich first surfaced at the hearing." *Id.*; cf. *Crouse-Hinds Co.*, 273 N.L.R.B. 333 (1984) (employer could discharge supervisor because of conflict of loyalties inherent in business partnership with union organizer).

55. *Kenrich I*, 893 F.2d at 1480.

56. *Id.* The panel acknowledged that the Board has "wide discretion" in constructing remedies for violations of § 8(a)(1). *Id.* (quoting *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539 (1943)). However, the court emphasized that the remedy must "effectuate the policies of [the Act]." *Id.* (quoting 29 U.S.C. § 160(c) (1988)). While the *Kenrich I* court recognized that many circuits have enforced supervisor reinstatement orders, it stressed that it was not constrained by precedent as the Third Circuit had "not conclusively answered the question of whether the Board has the power to order a supervisor's reinstatement." *Id.* at 1481; see *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916-19 (3d Cir. 1981) (when no rank-and-file employees' rights were implicated, NLRB had no authority to reinstate supervisor).

57. *Kenrich I*, 893 F.2d at 1480. The panel did not believe that any remedial purpose would be served by reinstating Chizmar because any coercive effect that the discharge may have had on the rank-and-file employees was "not apparent from the record" especially in light of the success of the union organizational drive. *Id.* at 1481. The *Kenrich I* court concluded that the reinstatement "conferred benefits flowing exclusively to a supervisor and as such, exceeded its remedial power." *Id.* at 1482.

Judge Stapleton filed a separate opinion, concurring in the court's judgment as to the discharge of Chizmar, but dissenting from the court's opinion that the remedy of reinstatement was inappropriate. *Id.* at 1487 (Stapleton, J., concurring and dissenting). The dissent argued that the majority's opinion would allow the reinstatement of a supervisor who was discharged for the purpose of "coercing protected employees in the exercise of their rights under the Act" only upon a "showing that the employees have failed to successfully exercise their rights in some specific manner." *Id.* (Stapleton, J., concurring and dissenting). The dissent recognized that the coercive effects of such a discharge could be ongoing. *Id.* (Stapleton, J., concurring and dissenting).

58. *Kenrich II*, 907 F.2d at 405-06. The *Kenrich II* court preceded its analysis of the appropriate remedy for Chizmar's discharge by noting that the standard used to review the remedial orders of the NLRB is abuse of discretion. *Id.* at 405. The *Kenrich II* court noted that the "Board's power is a broad discretionary one, subjected to limited judicial review." *Id.* (quoting *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964)). The court emphasized that "[t]he Board's order will not be disturbed unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effec-

the freedom to “draw on the knowledge and expertise it has acquired during its continuous engagement in the resolution of labor disputes and need not confine itself to the record of the dispute before it.”<sup>59</sup> Second, the court recognized that in fashioning a remedy, the “Board is not only concerned with recompensing the injuries suffered by particular protected victims of unfair labor practices, but also with devising the remedy that will best effectuate the public purposes expressed in section 1 of the Act.”<sup>60</sup>

Kenrich advanced two arguments in support of its contention that the NLRB’s reinstatement of Chizmar was in error.<sup>61</sup> Its initial argument that “the Board may not reinstate a supervisor because the Act does not protect a supervisor who engages in union activity” was rejected summarily by the Third Circuit.<sup>62</sup>

In the alternative, Kenrich argued that the NLRB’s order reinstating

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tuate the policies of the Act.” *Id.* (quoting *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964)) (emphasis deleted). Moreover, the *Kenrich II* court stated that the “scope of review is in keeping with the congressional intent reflected in § 10(c) of the Act.” *Id.* at 405; *see* *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 311 & n.10 (1979); *NLRB v. National Car Rental System, Inc.*, 672 F.2d 1182, 1191 (3d Cir. 1982).

59. *Kenrich II*, 907 F.2d at 405. The Supreme Court affirmed this autonomy of the Board stating that “[t]he relation of remedy to policy is peculiarly a matter for administrative competence . . . [which] could not be exercised if in fashioning remedies the administrative agency were restricted to considering only what was before it in a single proceeding.” *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953) (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941)).

60. *Kenrich II*, 907 F.2d at 406. The public policies to which the court referred include the encouragement and protection of collective bargaining and the full freedom of association for workers. 29 U.S.C. § 151 (1988); *see* *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

61. Kenrich did not originally challenge the correctness of the NLRB’s remedy of reinstatement before the Board; rather, it focused its appeal on the propriety of the ruling that the discharge constituted an unfair labor practice. *Kenrich II*, 907 F.2d at 406 n.6. Kenrich only raised the reinstatement issue after being asked by the Third Circuit to address “whether Helen Chizmar’s reinstatement was consistent with the statutory exclusion of supervisors from the Act’s protection.” *Id.* Therefore, the court indicated its intent to “tread lightly lest [it] fault the Board and the [administrative law judge] for failing to address contentions that Kenrich simply did not make.” *Id.*

62. *Id.* at 406. The court noted that although the proposition that the Act does not protect supervisors who engage in union activity is “uncontestably true,” the NLRB certainly possesses the “authority to order the reinstatement of a supervisor whose firing resulted not from her own pro-union conduct, but from the employer’s efforts to thwart the exercise of section 7 rights by protected rank-and-file employees.” *Id.* The court supported its holding with a host of cases. *Id.*; *see, e.g.,* *Delling v. NLRB*, 869 F.2d 1397 (10th Cir. 1989); *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086 (7th Cir. 1987); *Howard Johnson Co. v. NLRB*, 702 F.2d 1 (1st Cir. 1983); *Russell Stover Candies, Inc. v. NLRB*, 551 F.2d 204 (8th Cir. 1977); *Pioneer Drilling Co. v. NLRB*, 391 F.2d 961 (10th Cir. 1968); *NLRB v. Talladega Cotton Factory*, 213 F.2d 209 (5th Cir. 1954).



Helen Chizmar was "punitive rather than remedial."<sup>63</sup> Kenrich based this theory on the contention that the reinstatement order was not necessary "to restore the employees' organizational rights" since the campaign to unionize was successful.<sup>64</sup> The *Kenrich II* court declined to accept this argument because "it evinces an unduly cramped view of the section 7 rights belonging to Kenrich's rank-and-file employees and undervalues the coercive effect of Kenrich's wrongful conduct."<sup>65</sup> Moreover, the *Kenrich II* court noted that collective bargaining is an ongoing process which will constantly be overshadowed by the "coercive impact of Helen Chizmar's discharge."<sup>66</sup>

In determining the "likely rate of dissipation of the coercive impact of Kenrich's conduct," the court deferred to the judgment of the NLRB "and its expertise."<sup>67</sup> The court pointed to the NLRB's previous rein-

63. *Kenrich II*, 907 F.2d at 406. Orders of the NLRB are "unenforceable to the extent they are punitive rather than remedial." J.F. HUNSICKER, J. KANE & P. WALTHER, *supra* note 7, at 9; 2 THE DEVELOPING LABOR LAW, *supra* note 7, at 1634 ("The Board lacks the authority to punish."); *see also* Republic Steel v. NLRB, 311 U.S. 7 (1940); Local 60, United Bhd. of Carpenters & Joiners of America, 365 U.S. 651 (1941). The Supreme Court has instructed that courts should "avoid entering into the bog of logomachy . . . by debate about what is 'remedial' and what is 'punitive.'" NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346 (1953); *see also* United Steelworkers of America v. NLRB, 646 F.2d 616 (D.C. Cir. 1981). The Supreme Court in its examination of whether an order was punitive or remedial has looked to factors such as whether the remedy offered compensatory relief to employees and whether the remedy protected the collective bargaining rights of employees. *Republic Steel*, 311 U.S. at 9-11. The Court has also rejected remedies which have deterrence as a goal. *Id.*

64. *Kenrich II*, 907 F.2d at 406.

65. *Id.* at 407. The court noted that when an employer dismisses a supervisor in an effort to frustrate the rank-and-file's exercise of their protected § 7 rights, the Board, "based on its experience, is entitled to infer in the absence of evidence to the contrary that the intended message was an effective one." *Id.* (citing *Seven-Up Bottling Co. v. NLRB*, 344 U.S. 344 (1953)).

66. *Id.*

67. *Id.* at 408. The court stated that the Board, in formulating a remedy in a specific case may rely "solely [on] its experience in other like cases." *Id.* The court, however, acknowledged that the Board's remedial orders for violations of § 8(a)(1) must be supported by substantial evidence. *Id.* at 408 n.8. The court stressed that such evidence will most often be found in the evidence which was utilized to prove the unfair labor practice. *Id.* Nevertheless, the court underscored the principle that the circumstances surrounding the unfair labor practice must be considered by the Board in its determination of a remedy. *Id.*; *see* *Seven-Up Bottling Co. v. NLRB*, 344 U.S. 344, 349 (1953) ("This is not to say that the Board may apply a remedy it has worked out on the basis of its experience, without regard to circumstances which may make its application . . . oppressive and therefore not calculated to effectuate a policy of the Act."). The Third Circuit, therefore, permits an employer to introduce evidence which would show "that its case is materially different from those upon which the Board's experience is based." *Kenrich II*, 907 F.2d at 408 n.8. Yet, the Board's order will be enforced in deference to its expertise "unless 'it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'" *Id.* (quoting *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943) (emphasis added)).

statement order in the factually similar case of *Advertisers Manufacturing Co. v. NLRB* as indicative of the Board's basis of expertise in such areas.<sup>68</sup> The court reviewed the evidence in light of this deference and concluded that the NLRB's choice of remedy "protects the section 7 rights of Kenrich's employees by assuring them that they need not fear that the exercise of their rights will give the company a license to inflict harm on their family."<sup>69</sup>

Finally, the court analogized the discharge of a supervisor in retaliation for her relatives' pro-union activities to the uncontested situations enumerated in *Parker-Robb* in which make-whole relief is routinely accorded to discharged supervisors.<sup>70</sup> The court held that under circum-

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68. *Advertisers Mfg. Co.*, 280 N.L.R.B. 1185 (1986), enforced, 823 F.2d 1086 (7th Cir. 1987). In *Advertisers Manufacturing*, the employer challenged the Board's supervisor reinstatement order; however, the Seventh Circuit rejected the employer's contentions. The court did recognize that the reinstatement of a supervisor is problematic because the policy of an employer's right to require supervisor loyalty which underlies the Taft-Hartley amendments, as well as the Board's decision in *Parker-Robb*, seems to be circumvented. *Advertisers Mfg.*, 823 F.2d at 1089. The Seventh Circuit stressed that it would be improper to reinstate a supervisor who had aided the union. *Id.*; see *Parker-Robb Chevrolet, Inc.*, 262 N.L.R.B. 402 (1982), enforced sub. nom. *Automobile Salesmen's Union v. NLRB*, 711 F.2d 383 (1983). However, the supervisor in *Advertisers Manufacturing* did not evidence any pro-union sentiment, therefore, "[t]he company is not being asked to grasp a viper to its bosom." *Advertisers Mfg.*, 893 F.2d at 1089. The employer further argued that the bitterness created by the discharge would undermine the supervisor's loyalty and therefore reinstatement was inappropriate. *Id.* The court would not entertain this argument, stating that "the company has only itself to blame." *Id.*

The Third Circuit explained that "[t]he rationale of *Advertisers Mfg. Co.* applie[d] with full force" to the factual scenario in *Kenrich*. *Kenrich II*, 907 F.2d at 410. It stressed the importance of Chizmar's neutrality toward her relatives' pro-union activities. *Id.*

69. *Kenrich II*, 907 F.2d at 409. Moreover, the remedy protects employees "by reassuring their relatives who are supervisors that they need not feel that their jobs are dependent on their ability to dissuade their family members from engaging in protected activity." *Id.*

In examining the record for evidence to support the remedial nature of the Board's reinstatement order, the court pointed to Monte's threat during contract negotiations to "get rid of the whole Chizmar family" as indicative of the continuing nature of the coercion of employees. *Id.* at 408. It stated that this threat sent a "powerful message" to supervisors and employees that Kenrich "may, without fear of redress, use family member supervisors as hostages." *Id.* at 409.

70. *Id.* at 411. The court relied upon the cases in which supervisors who were terminated for refusing to commit unfair labor practices were reinstated. *Id.* (citing *Delling v. NLRB*, 869 F.2d 1397 (10th Cir. 1989); *Howard Johnson Co. v. NLRB*, 702 F.2d 1 (1st Cir. 1983); *Belcher Towing Co. v. NLRB*, 614 F.2d 88 (5th Cir. 1980); *Russell Stover Candies, Inc. v. NLRB*, 551 F.2d 204 (8th Cir. 1977); *NLRB v. Talladega Cotton Factory*, 213 F.2d 209 (5th Cir. 1954)). The Third Circuit believed that reinstatement in such cases "serves to dispel employees' fears and concomitant reluctance to fully exercise their rights, by demonstrating that the law sets boundaries on employers' ability to engage in this sort of conduct with impunity." *Id.* (citing *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 541 (1943)). The Third Circuit also noted that without the reinstatement

stances in which, “non-supervisory employees reasonably [would] fear that the [company] would take similar action against them if they continued to support the union,”<sup>71</sup> reinstatement of the supervisor is the appropriate remedy.<sup>72</sup>

Judge Greenberg dissented from the majority’s decision that reinstatement was the proper remedy for Chizmar’s discharge.<sup>73</sup> He argued that the NLRB had “failed to produce substantial evidence to support its determination that Helen Chizmar’s reinstatement with backpay would serve a legitimate remedial purpose under the [Act].”<sup>74</sup> Judge Greenberg would distinguish the present case from *Advertisers Manufacturing* because in that case, the discharged relative-supervisor did not “directly supervise her immediate relatives.”<sup>75</sup> Moreover, Judge Greenberg disagreed with the majority’s broad grant of authority to the Board in determining the appropriate remedy.<sup>76</sup> He emphasized that “reinstatement with backpay of a supervisory employee never should be regarded as a routine remedial practice.”<sup>77</sup>

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ment remedy, supervisors would be motivated to commit unfair labor practices. *Id.* at 411 n.10. Analogous to this situation, without the reinstatement remedy in supervisor-relative discharge cases, a strong incentive would exist for a supervisor to coerce rank-and-file relatives to curtail their pro-union activities. *Id.*

71. *Id.* at 411 (quoting *NLRB v. Talladega Cotton Factory*, 213 F.2d 209, 214 n.4 (5th Cir. 1954)).

72. *Id.*

73. *Id.* at 411-18 (Greenberg, J., dissenting). Judges Hutchinson and Garth joined in the dissent. *Id.* at 418 (Greenberg, J., dissenting).

74. *Id.* at 411 (Greenberg, J., dissenting).

75. *Id.* at 412 (Greenberg, J., dissenting). Judge Greenberg emphasized this distinction because the direct supervision present in *Kenrich II* exacerbates the conflict of loyalties predicament present in all supervisor discharge cases. *Id.* (Greenberg, J., dissenting).

76. *Id.* at 414-16 (Greenberg, J., dissenting). Judge Greenberg, while recognizing that *Seven-Up Bottling* could be read “to mean that in all cases, the Board is free to rely solely on its expertise when selecting remedies,” interpreted the holding more narrowly. *Id.* at 414 (Greenberg, J., dissenting). Judge Greenberg pointed to the Supreme Court’s rejection of an unconventional remedy as “speculative.” *Id.* at 415 (Greenberg, J., dissenting) (citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984) (“[I]t remains a cardinal, albeit frequently unarticulated assumption, that a backpay remedy must be sufficiently tailored to expunge only the *actual*, and not merely *speculative*, consequences of the unfair labor practice.”)). Furthermore, Judge Greenberg opposed the majority’s “shifting of the burden to the employer to produce evidence disproving the propriety of a remedy, which has been selected solely on the basis of the Board’s expert judgment.” *Id.* (Greenberg, J., dissenting). He contended that this burden shifting in effect does away with the requirement that the Board base its findings on “substantial evidence.” *Id.* (Greenberg, J., dissenting). See 29 U.S.C. § 160(e) (1988) (“The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.”).

77. *Kenrich II*, 907 F.2d at 418 (Greenberg, J., dissenting). Judge Greenberg would hold that “there has been a *per se* abuse of discretion by the Board where . . . the record utterly contradicts the Board’s assumptions about the need

## IV. ANALYSIS

A. *Discharge of Helen Chizmar—Kenrich I*

The Third Circuit's opinion in *Kenrich I* provides useful and needed guidance as to the proper analytical framework to be applied by courts in the Third Circuit when determining whether the discharge of a supervisor constituted an unfair labor practice. Additionally, the *Kenrich I* decision clarifies the approach to be utilized by the courts in recognizing further exceptions to the *Parker-Robb* rule.<sup>78</sup>

The *Kenrich I* court confirmed that, in most instances, the discharge of a supervisor will not give rise to a violation of section 8(a)(1).<sup>79</sup> In a well-reasoned opinion, the court held that because of the exclusion of supervisors from the NLRA's protection, the NLRB should not ordinarily consider the subjective intent of the employer in discharging the supervisor.<sup>80</sup> By not routinely affording supervisors the protections of the Act, the Third Circuit reinforced the policies underlying the Taft-Hartley amendments, ensuring an employer's right to demand strict loyalty from its supervisors.<sup>81</sup>

Nonetheless, the Third Circuit determined that the subjective intent of the employer in discharging a supervisor is an appropriate consideration in "[c]ases falling within recognized *Parker-Robb* exceptions."<sup>82</sup> By scrutinizing the intent of the employer in discharging a supervisor *only* in cases where the discharge adversely affects the rights of employees, the court balanced the conflicting policies underlying the NLRA—protection of the employer's right to insist upon undivided loyalty from its supervisors<sup>83</sup> and the employees' rights to be free from the interference of management in the exercise of protected concerted activity.<sup>84</sup> Notably, the Third Circuit did not consider the interests of the supervisor in

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for a remedy which obviously will undermine a clear statutory objective." *Id.* (Greenberg, J., dissenting).

78. *Parker-Robb Chevrolet, Inc.*, 262 N.L.R.B. 402 (1982), *enforced sub. nom. Automobile Salesmen's Union v. NLRB*, 711 F.2d 383 (6th Cir. 1983). For a discussion of the holding of *Parker-Robb*, see *supra* notes 34-42 and accompanying text.

79. *Kenrich I*, 893 F.2d at 1479. ("As a general rule, a supervisor's discharge cannot serve as a predicate for an unfair labor practice because supervisors are unprotected by the Act.").

80. *Id.* The employer's motivation in discharging a supervisor is in most instances irrelevant and not the proper inquiry for the Board. *Id.* For a discussion of motivation as an element of a § 8(a)(1) violation, see *supra* note 7.

81. For a discussion of the policies underlying the Taft-Hartley amendments, see *supra* notes 4-6 and accompanying text.

82. *Kenrich I*, 893 F.2d at 1477, 1479. ("[W]e believe that the Board continues to apply a subjective standard in cases falling within recognized exceptions to the *Parker-Robb* rule.").

83. See Seitz, *supra* note 4, at 199. For a discussion of the legislative history of the exclusion of supervisors in the Taft-Hartley amendments, see *supra* note 4 and accompanying text.

84. See 1 THE DEVELOPING LABOR LAW, *supra* note 5, at 25-34.

its analysis, thereby, protecting only those employees who are protected by the Act.

The Third Circuit instructs that cases which fall within the scope of the *Parker-Robb* exceptions are “analyzed in the same manner as any discharges alleged to violate section 8(a)(1).”<sup>85</sup> This allows both the courts and the attorneys to operate within the familiar mode of analysis as set forth by the Supreme Court in *NLRB v. Transportation Management Corp.*<sup>86</sup>

85. *Kenrich I*, 893 F.2d at 1479. For a discussion of the analytical framework adopted by the court, see *supra* notes 47-55 and accompanying text.

86. 462 U.S. 393, 395 (1983) (citing with approval *Wright Line*, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982)). In *Transportation Management*, a unanimous Court held that the Board’s construction of the NLRA in *Wright Line* was permissible, although not required. *Id.* at 402-03. *Wright Line* devised a framework of analysis for “mixed-motive” cases. *Id.* at 393-94. The “burden of proving that the employee’s conduct protected by § 7 was a substantial or a motivating factor in the discharge” vests in the General Counsel. *Id.* at 400. After the General Counsel established the *prima facie* case for a violation of § 8(a)(1), the employer “could avoid being held in violation of §§ 8(a)(1) and 8(a)(3) by proving by a preponderance of the evidence that the discharge rested on the employee’s unprotected conduct as well and that the employee would have lost his job in any event.” *Id.* The Court emphasized that the burden of proof carried by the employer “amounted to an affirmative defense.” *Id.* The Court also stressed the burden on the General Counsel was not to disprove an affirmative defense of the employer. *Id.* at 400 n.6. The Court based its decision on fairness, stating that the “employer is a wrongdoer” and underscoring that in acting with an illegal motive, the employer “knowingly created the risk.” *Id.* at 403.

The Board’s decision in *Wright Line* was based on the “allocation of the burden of proof” set forth by the Supreme Court in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 275 (1977), which dealt with the constitutional issue of an employee discharged in violation of the employee’s first amendment rights of expression. The *Transportation Management* Court approved the Board’s analogy to *Mt. Healthy* as “fair.” *Id.*

Often, confusion occurs in the distinction between a “mixed-motive” case and a “pretext” case. “In a pretext case the employer’s asserted justification of a legitimate business reason is found to be wholly without merit—pretextual, in other words.” H. PERRITT, *supra* note 7, at 380. A mixed motive case arises when the employer’s asserted justification “has at least some merit.” *Id.* The Supreme Court instructed that the General Counsel bears the burden of persuasion when the issue is “whether either illegal or legal motives, but not both, were the ‘true’ motives behind the decision.” *Transportation Management*, 462 U.S. at 400 n.5. Thus, the burden of proof shifts only in mixed-motive cases. *Id.*

The use of the *Wright Line* analysis in a mixed-motive case involving a supervisor discharge presents a slightly different analysis than when utilized in a routine statutory employee case. When analyzing the discharge of a supervisor, the Board looks first to whether the employer’s intent in dismissing the supervisor was to impinge on the protected concerted activity of the employees. After the burden shifts, however, the Board examines the employer’s intent with respect to the supervisor—whether the employer had a lawful motive to discharge the supervisor. In a routine statutory employee case, the Board only need look to the employer’s intent in regard to the employee.

Interestingly, the viability of *Transportation Management* has come into question after the discord among the Justices in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Although *Price Waterhouse* addressed the applicability of *Transportation Management* and other *Mt. Healthy* progeny to the issue of mixed-motive

Moreover, the implementation of a bright-line rule enables employers and supervisors to assess the consequences of their actions and proceed accordingly.

As is evidenced by the Third Circuit's recognition of a new exception to the *Parker-Robb* rule in *Kenrich I*, the exceptions articulated by the Board in *Parker-Robb* are not exhaustive.<sup>87</sup> A court may determine that a particular factual situation presents considerations that should be addressed by the development of a new exception to the *Parker-Robb* rule. The sole inquiry in developing an exception to the *Parker-Robb* rule is whether the termination of the supervisor "interferes with the right of employees to exercise their rights under Section 7 of the Act."<sup>88</sup> Only supervisor discharges that interfere with the rights of protected employees violate section 8(a)(1).<sup>89</sup>

To ascertain which discharges interfere with the employees' exercise of protected rights, the Third Circuit analogized the factual situation under consideration to the exceptions outlined in the *Parker-Robb* opinion.<sup>90</sup> For example, *Parker-Robb* expressly affirmed the principle that the discharge of a supervisor for failure to commit an unfair labor practice constitutes a violation of section 8(a)(1).<sup>91</sup> If the Board has not

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cases under Title VII, the statutory schemes are sufficiently similar to necessitate analogous causation analyses. A full discussion of this topic is beyond the scope of this Casebrief, but for an excellent examination of *Price Waterhouse*, see *Leading Cases, Title VII—Burden of Proof in Mixed-Motive Cases*, 103 HARV. L. REV. 340 (1990).

87. *E.g.*, *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1088 (7th Cir. 1987) ("We do not understand th[e] . . . examples given in *Parker-Robb* to have been intended to be exhaustive."). In essence, the *Parker-Robb* rule is nothing more than a test to determine whether the discharge of a supervisor is subject to analysis under the NLRA, that is, whether the discharge constituted an exception to the statutory exclusion of supervisors from protections of the NLRA. Therefore, although widely used, the labelling of the situations detailed in *Parker-Robb* as "exceptions to the *Parker-Robb* rule" is a misnomer. The *Parker-Robb* rule is the means of determining an exception to the general scope of the NLRA. However, because the phrase is so widely used, this Casebrief will continue to employ that terminology. For a discussion of the *Parker-Robb* rule, see *supra* notes 34-42 and accompanying text.

88. *Parker-Robb Chevrolet, Inc.* 262 N.L.R.B. 402, 404 (1982), *enforced sub nom.* *Automobile Salesmen's Union v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983). See also *Kenrich II*, 907 F.2d at 404 ("[T]he Board held that Chizmar's discharge was unlawful under section 8(a)(1) of the Act . . . because it directly interfered with section 7 rights of Kenrich's clerical workers.").

89. For a discussion of the holding of *Parker-Robb*, see *supra* notes 34-42 and accompanying text.

90. *Kenrich I*, 893 F.2d at 1477-78. The Third Circuit adopted the analysis of the Seventh Circuit in its creation of an additional exception to the *Parker-Robb* rule. *Id.*

91. *Automobile Salesmen's Union v. NLRB*, 711 F.2d 383, 386 (D.C. Cir. 1983); see *Delling v. NLRB*, 869 F.2d 1397, 1399 (10th Cir. 1989) ("Courts have recognized . . . that an employer's discharge of a supervisor for refusing to participate in an unfair labor practice is itself an unfair labor practice."); *Howard Johnson Co. v. NLRB*, 702 F.2d 1, 4-5 (1st Cir. 1983) (unfair labor practice to

so held, then the supervisor would be subject to an overwhelming incentive to coerce employees to refrain from the exercise of their protected section 7 rights. The Third Circuit, in recognizing a new exception to the *Parker-Robb* rule for the discharge of supervisors in retaliation for their relative's exercise of protected activities, attempted to combat these same incentives.<sup>92</sup> Therefore, when policies similar to those contemplated by the exceptions to the *Parker-Robb* rule would be furthered by the recognition of a new exception, a strong argument exists for its creation.

In summary, the Third Circuit did not look to the intent of the employer in discharging a supervisor *unless* the discharge fell into an exception to the *Parker-Robb* rule. A discharge that has *not* been recognized by prior cases still may be categorized as an exception to the *Parker-Robb* rule if the discharge "interferes with the right of employees to exercise their rights under Section 7 of the Act."<sup>93</sup> If the discharge falls into a recognized exception to the *Parker-Robb* rule, or if the court develops a new exception, then the correct analysis is the same as is applied to "any discharge[] alleged to violate section 8(a)(1)."<sup>94</sup>

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discharge supervisor who refused to engage in unlawful surveillance of employee's union activity); *American Feather Prods.*, 248 N.L.R.B. 1102, 1114 (1980) (unfair labor practice to discharge supervisor for failure to "unlawfully trample on the protected rights of her daughters"); *Vail Mfg. Co.*, 61 N.L.R.B. 181, 182 (supervisor discharged for refusal to allow employer to list them as eligible voters in union election), *enforced*, 158 F.2d 664 (7th Cir.), *cert. denied*, 331 U.S. 835 (1947).

92. *Kenrich I*, 893 F.2d at 1478 (noting Board's observation that "retaliatory discharges of relative-supervisors have as deleterious an effect on employees' protected activities as do discharges of supervisors for their refusal to commit unfair labor practices").

93. *Parker-Robb Chevrolet, Inc.* 262 N.L.R.B. 402, 404 (1982), *enforced sub nom. Automobile Salesmen's Union v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983).

94. *Kenrich I*, 893 F.2d at 1479. The court would therefore apply the analysis set forth by the NLRB in *Wright Line*, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), and subsequently adopted by the Supreme Court. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The General Counsel must establish by a preponderance of the evidence that the employer committed an unfair labor practice by discharging a supervisor because such discharge interfered with the rights of employees to engage in protected concerted activity. *Kenrich I*, 893 F.2d at 1479. At this stage of the analysis, the intent at issue is the employer's motive to thwart the employee's exercise of protected rights through the discharge of the supervisor.

If the General Counsel presents a *prima facie* case, the burden shifts to the employer to prove that "absent the improper motivation he would have acted in the same manner for wholly legitimate reasons." *Transportation Management*, 462 U.S. at 401. The intent at issue in this aspect of the analysis is the degree to which the employer's legitimate reasons for discharging the supervisor actually impacted on the employer's decision.

Therefore, in utilizing the *Wright Line* test in the context of a supervisor discharge, the motives examined change as the burden of proof shifts. The General Counsel must demonstrate the adverse intent of the employer in regard to the employees. The employer must demonstrate his intent in regard to the su-

B. *Reinstatement Remedy*

The *Kenrich II* court correctly enforced the NLRB's order of reinstatement and back pay to remedy the unlawful discharge of Chizmar.<sup>95</sup> The court accurately adduced that in ordering the reinstatement, the Board upheld its statutory mandate to effectuate "the public purposes expressed in section 1 of the Act."<sup>96</sup> If the court had constrained its view of Kenrich's violation of its employees' section 7 rights to the period before the success of the union's organizational campaign, the court would have frustrated one of the NLRA's primary purposes—protecting the collective bargaining process.<sup>97</sup> The court perceptively emphasized that the collective bargaining process in which Kenrich would participate was a continual process which could be tainted by the lingering intimidation arising from Chizmar's discharge.<sup>98</sup>

Moreover, as the *Kenrich II* court stated, reinstatement in this situation did not violate the fundamental principle that NLRB remedies must not be punitive in nature.<sup>99</sup> The reinstatement in this situation comports with the Supreme Court's opinion in *Republic Steel Corp.*, which held that the remedial purpose of the Act is served if the "employees have been made secure in their right of collective bargaining and have been made whole."<sup>100</sup> By reinstating Chizmar, the court has simply restored the employees to their positions absent Kenrich's unfair labor practice.

In his dissent, Judge Greenberg improperly concentrated on protecting the employer's right to refrain from employing a supervisor it did not trust.<sup>101</sup> While this is certainly a legitimate concern of the Act,<sup>102</sup> it is most appropriately addressed by the adjudication of whether

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pervisor. This differs from the analysis undertaken when *Wright Line* is applied to a standard § 8(a)(1) violation.

95. *Kenrich II*, 907 F.2d at 411. The Third Circuit reviews remedial orders of the Board for abuse of discretion. *Id.* at 405.

96. 29 U.S.C. § 151 (1988). The public policies "include, *inter alia*, the encouragement and protection of collective bargaining and the full freedom of association for workers." *Kenrich II*, 907 F.2d at 406.

97. *See* 29 U.S.C. § 151 (1988). Although the argument was ultimately dismissed, the court felt that Kenrich's assertion that since the union succeeded in organizing at Kenrich, the reinstatement of Chizmar would serve no remedial purpose, was credible. *Kenrich II*, 907 F.2d at 406.

98. *Id.* at 407 & n.7.

99. *See* J.F. HUNSICKER, J. KANE & P. WALTHER, *supra* note 7, at 9-13. Kenrich's most credible argument was that Chizmar's reinstatement was punitive rather than remedial. *Kenrich II*, 907 F.2d at 407.

100. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11 (1940) (emphasizing that remedies "should be construed in harmony with the spirit and remedial purposes of the Act").

101. For a discussion of Judge Greenberg's dissent in *Kenrich II*, *see supra* notes 73-77 and accompanying text.

102. For a discussion of the policies underlying the NLRA, *see supra* note 34.



the discharge constituted an unfair labor practice. In determining a remedy, the emphasis should not be placed on the rights of the wrongdoer; rather, the analysis should focus on ensuring that the coercive impact of the unfair labor practice is dissipated. The importance Judge Greenberg placed on the conflict of loyalties, therefore, is more properly considered in the analysis of whether a lawful or unlawful intent motivated the employer to discharge Chizmar.<sup>103</sup>

#### V. CONCLUSION

The Third Circuit correctly held that the discharge of a supervisor in retaliation for her relatives' exercise of their section 7 rights constituted an unfair labor practice. The court properly recognized that the situation constituted an exception to the *Parker-Robb* rule and applied the appropriate analytical framework. Furthermore, the court provided important guidance to the proper analysis to be followed by future courts when confronted with the issue of a supervisor discharge. Finally, the Third Circuit, sitting en banc, correctly upheld the Board's reinstatement order as the appropriate remedy for the employer's unlawful discharge of the supervisor.

*Karen D. McDonnell*

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103. Presumably, the presence of a familial relationship between the supervisor and the employees supervised presents an even stronger argument that the employer was justified in discharging the supervisor. However, the issue in the present case was previously addressed and adjudicated as pretextual. See *Kenrich II*, 907 F.2d at 404.