

NOTE

REHABILITATIVE EMPLOYEES AND THE NATIONAL LABOR RELATIONS ACT

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INTRODUCTION

Individuals with disabilities are an important part of our society, and the federal government has recognized the valuable role that they can play in the workforce. It is surprising, therefore, that the National Labor Relations Board (the Board) and federal courts have generally denied such individuals protections under the National Labor Relations Act (NLRA) while these individuals seek to enhance their workplace skills through rehabilitation. These protections can be very important for employees' well-being on the job, so the Board's disposition toward denying rehabilitative employees NLRA rights should be closely examined. This Note demonstrates that the current decision-making process for granting rehabilitative employees NLRA protections is far too capricious and politically influenced. Thus, this Note proposes a workable solution that balances competing policy concerns in order to provide rehabilitative employees and employers with greater access to their rights under the NLRA.

The NLRA protects employees who engage in loud, noticeable acts like picketing, striking, and collective bargaining.¹ Importantly, however, it also protects small groups of employees who act together for mutual aid and protection.² For instance, the NLRA would protect a small, unorganized handful of employees who spontaneously refuse to work because a factory is too cold.³

In recent years, the Board and federal courts have classified several groups of workers into categories that prohibit those workers from receiving NLRA protections. Academics and politicians have noticed many of these questionable exclusions. Nominal "independent contractors," student research assistants, and charge nurses with minimal supervisory authority have all received substantial scholarly consideration, and Congress has attempted to amend the NLRA to make sure that the Act covers these excluded groups.⁴

1. National Labor Relations Act (NLRA) §§ 7, 8(b)(4)(B), 29 U.S.C. §§ 157, 158(b)(4)(B) (2006).

2. *Id.* § 7, 29 U.S.C. § 157.

3. *See* NLRB v. Wash. Aluminum Co., 370 U.S. 9, 13-14 (1962).

4. For information regarding the position of nominally independent contractors, see H.R. 915, 111th Cong. § 806 (2009) (granting express carriers independent contractor employee

Although rehabilitative employees are also frequently excluded from the benefits of the NLRA, they have not received the same attention.⁵

Rehabilitative employees are a unique set of employees whose distinct needs require particular consideration. They often have mental disabilities or physical deficiencies that impair their ability to work in typical employment environments.⁶ The Board vividly described some attributes of a group of rehabilitative employees in *Key Opportunities, Inc.*, showing how such employees may not be able to work in a typical workplace.⁷ Several employees, for example, had such low attention spans that their output was only 5 percent of what coworkers without disabilities could produce.⁸ Many wandered away from their workstations, and some needed daily instruction to remind them how to perform simple tasks like mowing lawns.⁹ One employee cried out of jealousy whenever his supervisor paid more attention to another coworker.¹⁰ Perhaps the

status under the NLRA); Todd D. Saveland, *FedEx's New "Employees": Their Disgruntled Independent Contractors*, 36 *TRANSP. L.J.* 95 (2009). Research assistants have received similar legislative and academic attention. *See, e.g.*, Teaching and Research Assistant Collective Bargaining Rights Act, H.R. 1461, 111th Cong. (2009) (proposing to amend the NLRA to include teaching and research assistants as covered employees); Ryan Patrick Dunn, Comment, *Get a Real Job! The National Labor Relations Board Decides Graduate Student Workers at Private Universities Are Not "Employees" Under the National Labor Relations Act*, 40 *NEW ENG. L. REV.* 851 (2006). Professionals with limited supervisory authority have also attracted notice. *See, e.g.*, Re-Empowerment of Skilled and Professional Employees and Construction Trades Workers (RESPECT) Act, H.R. 1644, 110th Cong. (2007) (proposing to amend the NLRA's definition of "supervisor" to enable employees with limited supervisory powers to be classified as "employees" rather than exempt supervisors); John Hensley & Debra Burke, *The Changing Nature of Supervision: Implications for Labor Management Relations in the Twenty-First Century*, 33 *SETON HALL LEGIS. J.* 397 (2009).

5. The academic studies that have been done on rehabilitative employees, though helpful, are now out of date due to changes in the Board's analytical approach toward rehabilitative employees. *See infra* Part III. For helpful background information, see generally Ellen R. Anderson, *Invisible Laborers: Sheltered Workshops Under the National Labor Relations Act*, 3 *LAW & INEQ.* 265 (1985); Catherine A. Bean, Comment, *Labor Law—The National Labor Relations Board's Jurisdictional Power over Handicapped Employees in Sheltered Workshops*, 11 *W. NEW ENG. L. REV.* 347 (1989).

6. *See NLRB v. Lighthouse for the Blind of Houston*, 696 F.2d 399, 401-02 (5th Cir. 1983) (discussing blind rehabilitative employees); *see also Key Opportunities, Inc.*, 265 N.L.R.B. 1371, 1375 (1982) (describing some of the impairments rehabilitative employees possess).

7. *Key Opportunities*, 265 N.L.R.B. at 1375.

8. *Id.*

9. *Id.*

10. *Id.*

biggest obstacle to integration in a typical workplace setting was that some employees had a tendency to “throw things” at coworkers and supervisors.¹¹ Though this group of employees had especially severe employment handicaps, the Board also includes individuals with less severe employment barriers like a criminal record or lack of education as rehabilitative employees in certain circumstances.¹²

Commenting on rehabilitative employees, the Fifth Circuit observed, “Unfortunately, experience indicates that the private sector is not very anxious to hire blind and multi-handicapped workers.”¹³ As a result, some employers, often nonprofits, have stepped in to provide such individuals with a place to work and learn job skills.¹⁴ These employers cater to the needs of individuals with disabilities by providing counseling, job training, reduced or no production standards, minimal discipline, and job placement services.¹⁵

To properly frame why excluding rehabilitative employees from the NLRA’s protections may be a problem, an example from a well-read labor law case is useful. Applying the facts of *NLRB v. Washington Aluminum Co.* to rehabilitative employees illustrates the impact that a lack of NLRA protections may have on the work life of rehabilitative employees.¹⁶ In *Washington Aluminum*, seven employees walked out of work shortly after the morning bell rang.¹⁷ The weather outside was unseasonably cold, with temperatures ranging between 11 and 22 degrees Fahrenheit.¹⁸ Lacking insulation and with several doors wide open, the factory quickly became bitterly cold.¹⁹ The broken furnace failed to warm the plant.²⁰ One of the workers testified that he saw workers huddled together,

11. *Id.*

12. *See, e.g.*, *Goodwill Indus. of S. Cal.*, 231 N.L.R.B. 536, 536-37 (1977) (labeling employees referred by state agencies for vocational training and work experience as “rehabilitative employees” alongside those with physical or mental disabilities).

13. *NLRB v. Lighthouse for the Blind of Houston*, 653 F.2d 206, 208 (5th Cir. 1981), *rev’d on reh’g*, 696 F.2d 399 (5th Cir. 1983).

14. *Brevard Achievement Ctr., Inc.*, 342 N.L.R.B. 982, 983-84 (2004).

15. *Id.* at 984.

16. 370 U.S. 9 (1962).

17. *Id.* at 11.

18. *Id.*

19. *Id.* at 10.

20. *Id.* at 11.

“shaking a little,” because of the cold.²¹ Finally, one said, “I am going home, it is too damned cold to work!”²² Six others followed.²³

Their employer summarily fired all seven men.²⁴ The Board decided that their action was protected concerted activity under section 7 of the NLRA and ordered their reinstatement with backpay.²⁵ The Supreme Court affirmed, holding that employees could walk out without a prior demand for changes in working conditions, even if such an act undermined employee discipline and did not allow for prior negotiations.²⁶

Now change the facts, but only slightly. Seven employees with disabilities—three of whom are blind, three of whom are severely mentally handicapped, and one of whom is a vocational rehabilitation client—work at the same factory for an employer that offers job training, counseling, reduced discipline, and a job placement program. In the same conditions, under the current Board test, each of them most likely could be terminated without recourse.²⁷ Blind, mentally handicapped, and vocational rehabilitation clients

21. *Id.*

22. *Id.* (emphasis added).

23. *Id.* at 12.

24. *Id.*

25. *Id.* at 12-13.

26. *Id.* at 13-14.

27. Rehabilitative employees have received NLRA rights in the ultimate outcome of only four of the fourteen reported cases. See *Goodwill Indus. of N. Ga.*, 350 N.L.R.B. 32 (2007) (granting NLRA rights); *Brevard Achievement Ctr., Inc.*, 342 N.L.R.B. 982 (2004) (denying rights); *Balt. Goodwill Indus., Inc.*, 154 L.R.R.M. (BNA) 1015 (Apr. 30, 1996) (granting rights), *enforcement denied*, 134 F.3d 227 (4th Cir. 1998); *Davis Mem'l Goodwill Indus.*, 318 N.L.R.B. 1044 (1995) (granting rights), *enforcement denied*, 108 F.3d 406 (D.C. Cir. 1997); *Goodwill Indus. of Denver*, 304 N.L.R.B. 764 (1991) (denying rights); *Goodwill Indus. of Tidewater, Inc.*, 304 N.L.R.B. 767 (1991) (denying rights); *Ark. Lighthouse for the Blind*, 284 N.L.R.B. 1214 (1987) (granting rights), *enforcement denied*, 851 F.2d 180 (8th Cir. 1988); *Key Opportunities, Inc.*, 265 N.L.R.B. 1371 (1982) (denying rights); *Lighthouse for the Blind of Houston*, 248 N.L.R.B. 1366 (1980) (granting rights), *enforcement denied*, 653 F.2d 206 (5th Cir. 1981), *rev'd on reh'g*, 696 F.2d 399 (5th Cir. 1983); *Cincinnati Ass'n for the Blind*, 235 N.L.R.B. 1448 (1978) (granting rights), *enforced*, 672 F.2d 567 (6th Cir. 1982); *Goodwill Indus. of S. Cal.*, 231 N.L.R.B. 536 (1977) (denying rights); *Chi. Lighthouse for the Blind*, 225 N.L.R.B. 249 (1976) (granting rights after employer stipulated that rehabilitative employees could be covered by the NLRA); *Epi-Hab of Evansville, Inc.*, 205 N.L.R.B. 637 (1973) (denying rights); *Sheltered Workshops of San Diego, Inc.*, 126 N.L.R.B. 961 (1960) (denying rights). The *Key Opportunities* case is included in this survey because the Board was required to determine whether the rehabilitative employees were “employees,” even though it was their alleged supervisors—not the workers themselves—who were seeking NLRA protections. 265 N.L.R.B. at 1372.

shivering in the cold without a remedy are an incredibly sympathetic group. Do we really want the kind of labor law that would grant section 7 rights to “normal” employees but deny them to this group?

Perhaps even more shocking than this scene, the answer may be yes. In order to reach that conclusion, one must consider the important policy considerations on both sides of the issue. On the one hand, there are strong federal policies promoting employment of those with severe disabilities and extending NLRA protections to this group may reduce employment opportunities for those with disabilities.²⁸ On the other hand, much of the work that these employees do is identical to what an ordinary employee with NLRA protections would perform.²⁹ In addition, sham rehabilitation centers may suppress workplace rights without providing any real benefit to the workers.³⁰ Furthermore, at least on its face, distinguishing between employees on the basis of their disabilities and the steps that they have taken to overcome their disabilities seems to contravene the policies underlying the Americans with Disabilities Act (ADA).³¹

For such a delicate balance, the Board currently uses a remarkably imprecise test to determine whether rehabilitative employees should enjoy the benefits of the NLRA. After all of the appeals were exhausted, rehabilitative employees received NLRA protections in only four of the fourteen reported rehabilitative employee cases.³² At each level of review, the reviewing body frequently reversed lower determinations because of ambiguities in the current test.³³ This Note proposes a two-part solution that will reduce this confusion. It strikes a policy balance in order to provide rehabilitative employers and employees more certainty of their rights and responsibilities under the NLRA.

First, this Note argues that the Board should adopt a rebuttable presumption that the NLRA *does not* cover rehabilitative employees for a short time after they are initially hired, unless an employee

28. See *infra* Part IV.B.

29. See *infra* note 198 and accompanying text.

30. See *infra* Part V.C.

31. See *infra* notes 180-87 and accompanying text.

32. See *supra* note 27.

33. See *supra* note 27. For a graphical representation, see *infra* Part III.D fig.1.

can demonstrate by a preponderance of the evidence that the employer is not providing rehabilitative services. Second, this Note argues that the Board should adopt a rebuttable presumption that the NLRA *does* cover rehabilitative employees after the initial rehabilitation period. An employer may rebut the presumption of “employee” status through a preponderance of the evidence that the employer is providing actual rehabilitation services on a regular basis.

These two rebuttable presumptions make the coverage decision on rehabilitative employees more responsive to the underlying policy concerns affecting rehabilitative employees. During the initial period, the person on the jobsite is more like a client than an employee.³⁴ The Board should give rehabilitative employers an opportunity to help these individuals gain important workplace skills without interference from unions or unfair labor practice charges.³⁵ Easy access to rehabilitative services reflects congressional efforts to extend jobs to those with disabilities who need special training.³⁶ The employer’s ability to rebut the second presumption actually adds an incentive for the employer to ensure that the employees are continually receiving training and support. After the initial period, however, and in the absence of ongoing rehabilitation, the person working begins to become indistinguishable from a true employee and deserves NLRA protections in order to prevent exploitation.³⁷

This Note begins in Part I by defining the term “rehabilitative employee” and contrasting it to the term “employee with disabilities.” Part II gives a brief background of the NLRA and the Board. Part III examines the methods that the Board has used to exclude rehabilitative employees from the NLRA’s protections. Part III uses an example to demonstrate why the label “employee” is much more than mere bureaucratic nomenclature, showing how the lack of “employee” status caused a group of employees to lose their NLRA rights. Part IV sets forth the first presumption—that rehabilitative

34. See *Goodwill Indus. of Denver*, 304 N.L.R.B. 764, 765 (1991) (describing why certain employees are more like clients than employees); see also *infra* Part IV.

35. See *Brevard Achievement Ctr., Inc.*, 342 N.L.R.B. 982, 988 (2004).

36. See *infra* Part IV.A.

37. See *infra* Parts V.A.2, V.B.

employees *are not* entitled to NLRA protections for an initial period—and then supports that presumption with several policy arguments. Part V sets forth the second presumption—that rehabilitative employees *are* entitled to NLRA protections after the initial employment period—and supports that presumption by questioning the anticoverage position and advancing several pro-coverage arguments. In conclusion, this Note shows that the current Board has an excellent opportunity to implement these modifications and then urges it to do so.

I. DEFINING REHABILITATIVE EMPLOYEES

At the outset, it should be noted that the terms “rehabilitative employee” and “employee with disabilities” are not synonymous. The distinction is easily missed.³⁸ The ADA defines “disability” as “a physical or mental impairment that substantially limits one or more major life activities.”³⁹ It further defines “qualified individual with a disability” as one who can, “with or without reasonable accommodation, ... perform the essential functions of the employment position that such individual holds or desires.”⁴⁰ Thus, by definition, a qualified individual with a disability could work at a normal job alongside ordinary employees performing all of the essential functions of the job. The ADA grants strong confidentiality protections to employees with disabilities,⁴¹ so an employee with a disability in fact may be indistinguishable from ordinary employees in the eyes of that worker’s peers. Indistinguishable or not, the NLRA would protect such an employee working for an ordinary employer.⁴²

In one noteworthy rehabilitative employee case, the employer argued that certain employees with disabilities—such as hearing

38. See *Brevard*, 342 N.L.R.B. at 989-96 (Members Liebman and Walsh, dissenting) (arguing passionately throughout the dissent that employees with disabilities should have NLRA protections).

39. Americans with Disabilities Act (ADA) of 1990 § 3(2), 42 U.S.C. § 12102(2)(A) (2006).

40. *Id.* § 101(8), 42 U.S.C. § 12111(8).

41. See *id.* § 102(c), 42 U.S.C. § 12112(d).

42. See, e.g., *Conoco, Inc.*, 265 N.L.R.B. 819, 834 (1982) (holding that employees with disabilities have NLRA protections and can exercise their section 7 right to refrain from participating in a strike); see also *Brevard*, 342 N.L.R.B. at 988 (majority opinion) (noting that once rehabilitative employees leave the rehabilitative employer, they are free to enjoy the protections of the NLRA).

impairment, diabetes, high blood pressure, and high cholesterol—should be excluded from the bargaining unit because they were rehabilitative employees.⁴³ The employer did not actively provide any kind of special job training, counseling, or placement services.⁴⁴ The Board rejected the employer's argument because these alleged rehabilitative employees, though perhaps "qualified individuals with disabilities" under the ADA, were in fact just ordinary employees entitled to all of the NLRA's protections.⁴⁵

The true distinction between rehabilitative employees and employees with disabilities is the relationship with the employer.⁴⁶ If the employer is fulfilling its role as a rehabilitator, it will be providing important services like counseling and training in an atmosphere that is less rigorous than typical competitive work environments.⁴⁷ Additionally, the employer often receives funding from grants or governmental programs and occasionally operates at a significant loss in order to sustain the rehabilitative relationship.⁴⁸ It is this special relationship, and not the employees' disabilities, that causes the Board to treat rehabilitative employees differently than other workers.⁴⁹

Even after understanding this distinction, however, the normative question remains: should the Board treat rehabilitative employees differently than ordinary employees? That question is best resolved by looking first at the aims of the NLRA and the Board's function in enforcing it.

43. *Goodwill Indus. of N. Ga.*, 350 N.L.R.B. 32, 34 (2007).

44. *Id.* at 34-35.

45. *Id.* at 32, 36.

46. *Brevard*, 342 N.L.R.B. at 988 ("First, and most importantly, our position does not exclude disabled people from the protections of the Act on the basis of their disabilities.... We exclude these persons because of the nature of the relationship to the employer.").

47. *See, e.g., Goodwill Indus. of Denver*, 304 N.L.R.B. 764, 765 (1991) (exempting an employer's employees from the NLRA because the lack of discipline, the lack of production standards, and the emphasis on rehabilitation were not typical of ordinary work environments).

48. *See Ark. Lighthouse for the Blind v. NLRB*, 851 F.2d 180, 184 n.4 (8th Cir. 1988) (noting that the employer lost \$200,000 in one year due to its rehabilitation program); *see also Key Opportunities, Inc.*, 265 N.L.R.B. 1371, 1374 (1982) (observing that the employer's losses arising from its rehabilitation services indicated that the employer would be better off financially without the rehabilitative employees).

49. *Brevard*, 342 N.L.R.B. at 988.

II. BRIEF BACKGROUND OF THE NLRA AND THE BOARD

Congress passed the NLRA to forestall obstructions to the free flow of commerce that can arise due to inequalities in bargaining power between employers and employees.⁵⁰ The NLRA grants employees the right to engage in certain concerted activities for mutual aid and protection.⁵¹ The NLRA also protects them with job security and backpay should their employer discharge them for exercising these rights.⁵² Simultaneously, the NLRA grants employers protection from certain kinds of unfair labor practices committed by organized labor, such as secondary boycotts of a third-party business in order to coerce that business into recognizing a union that the Board has not certified.⁵³ In addition, the NLRA protects the right of employers to discharge employees so long as that discharge is not in retaliation for engaging in protected activities.⁵⁴ Congress hoped that giving employees and employers these protections would enable both sides to have the power and influence necessary to reach amicable agreements through collective bargaining.⁵⁵

Congress created the Board in order to have an agency that would develop the special institutional knowledge and expertise necessary to administer the NLRA.⁵⁶ Congress granted the Board broad statutory jurisdiction over private business organizations.⁵⁷ The Board's statutory jurisdiction runs concurrently with the Commerce Clause of the Constitution, reaching all activities that impact interstate commerce.⁵⁸ The NLRA originally gave the Board discretion to

50. NLRA § 1, 29 U.S.C. § 151 (2006).

51. *Id.* § 7, 29 U.S.C. § 157.

52. *Id.* § 10(c), 29 U.S.C. § 160(c).

53. *See id.* § 8(b)(4), 29 U.S.C. § 158(b)(4).

54. *See id.* § 10(c), 29 U.S.C. § 160(c).

55. *See id.* § 1, 29 U.S.C. § 151.

56. S. COMM. ON EDUC. & LABOR, 74TH CONG., MEMORANDUM COMPARING S. 2926, 73D CONG., AND S. 1958, 74TH CONG. (Comm. Print 1935) (noting that the Board would become an entity with expertise in resolving labor disputes), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1362-63 (1949).

57. NLRA § 10, 29 U.S.C. § 160 (giving the Board the power to regulate all unfair labor practices affecting commerce).

58. NLRB, AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES § 1-100 (2008) [hereinafter RC MANUAL]; *see also* NLRA § 2(7), 29 U.S.C. § 152(7).

pursue those labor cases that the Board considered to be the most important for the national welfare, but an amendment to the NLRA has considerably diminished this discretion.⁵⁹ Now, the Board has only limited discretion to decline jurisdiction over labor matters.⁶⁰ In modern times, the Board still attempts to exercise discretion in order to further its labor policy objectives.⁶¹ Due to the statutory limitations, however, if the Board desires to exclude a certain class of employees from NLRA protections for political or policy reasons, it must creatively find ways to do so.⁶²

III. EXCLUDING EMPLOYEES FROM NLRA COVERAGE

The Board has two primary courses of action if it decides that it wants to exclude an individual from the NLRA's protections. First, the Board can attempt to decline jurisdiction over the employer, although this method is difficult due to the Board's limited jurisdictional discretion.⁶³ Second, the Board can decide that the person working at the jobsite is not entitled to the NLRA's protections because the NLRA contains either a specific exception for that type of worker or the person is not an employee at all.⁶⁴ The Board has used both the jurisdictional and definitional approaches in excluding rehabilitative employees from the NLRA's protections.⁶⁵

59. RC MANUAL, *supra* note 58, § 1-100.

60. When Congress passed the Labor-Management Reporting and Disclosure Act (LMRA) of 1959, it sharply curtailed the Board's jurisdictional discretion. *Id.* The Board must assert jurisdiction if the business has either an inflow or outflow across state lines or a gross annual volume of business above a certain level. *Id.* §§ 1-201 to -202.

61. Wilma B. Liebman, *Values and Assumptions of the Bush NLRB: Trumping Workers' Rights*, 57 BUFF. L. REV. 643, 645-50 (2009) (describing methods that the Board uses to narrow the NLRA's application).

62. *See id.*

63. *See supra* note 60 and accompanying text.

64. *See Liebman, supra* note 61, at 646.

65. *Compare* Goodwill Indus. of S. Cal., 231 N.L.R.B. 536, 538 (1977) (refusing to exercise jurisdiction over rehabilitative employers), *with* Goodwill Indus. of Denver, 304 N.L.R.B. 764, 765-66 (1991) (denying NLRA protections to rehabilitative employees because they are not section 2(3) employees).

A. *Declining Jurisdiction over Certain Employers*

In early rehabilitative employee cases, the Board attempted to decline jurisdiction over rehabilitative employers in order to exclude them from the NLRA's protections.⁶⁶ The Board looked at whether the relationship between the employer and employee was typical of a normal industrial relationship, or whether their interactions were more appropriately considered rehabilitative.⁶⁷ If the relationship was rehabilitative, the Board assumed that the employers had good purposes, so exerting jurisdiction over them would not further the policy aims of the NLRA.⁶⁸

In the landmark case *St. Aloysius Home*, the Board decided that it could no longer decline jurisdiction over nonprofit charitable employers simply as a result of the employer's good intentions.⁶⁹ Since that case, the Board must fully consider the employer's effect on commerce and may not decline jurisdiction on the basis of an employer's benevolent intentions alone.⁷⁰ Applying *St. Aloysius Home*, the Board has reasoned that though rehabilitative employers may be nonprofits and may have good purposes, the Board may no longer decline jurisdiction over them for these reasons alone. As a result, the Board must now justify excluding rehabilitative employees from the Act's coverage on other grounds.⁷¹

B. *Deciding that Rehabilitative Workers Are Not "Employees"*

Because the Board typically cannot decline jurisdiction over rehabilitative employers, the Board frequently decides that rehabilitative employees are not actually "employees" within the meaning of

66. See, e.g., *Sheltered Workshops of San Diego, Inc.*, 126 N.L.R.B. 961, 964 (1960).

67. See, e.g., *Ark. Lighthouse for the Blind*, 284 N.L.R.B. 1214, 1216 (1987); *Sheltered Workshops of San Diego*, 126 N.L.R.B. at 964. This test became known as the "typically industrial, primarily rehabilitative" test. See, e.g., *infra* note 75.

68. *Goodwill Indus. of S. Cal.*, 231 N.L.R.B. at 538; *Epi-Hab of Evansville, Inc.*, 205 N.L.R.B. 637, 637 (1973); *Sheltered Workshops of San Diego*, 126 N.L.R.B. at 964.

69. 224 N.L.R.B. 1344, 1344 (1976).

70. *Id.*; see, e.g., *Goodwill Indus. of Denver*, 304 N.L.R.B. at 765 & n.7 (overruling precedent to the extent that it declined jurisdiction due to the rehabilitative employer's good purposes and holding that rehabilitative employees are not entitled to NLRA protections because they are not statutory "employees").

71. *Goodwill Indus. of Denver*, 304 N.L.R.B. at 765 & n.7.

the NLRA.⁷² Section 2(3) of the NLRA defines “employee” as any employee not exempted by an exception in the NLRA.⁷³ Thus, if the Board wants to deny coverage to a certain class of workers through the section 2(3) definitional method, it may either define the person on the jobsite as an individual categorically exempt from the NLRA, such as a supervisor, or it may refuse to define the person as an “employee.” In recent years, the Board has used both approaches to deny NLRA coverage to charge nurses and graduate teaching assistants.⁷⁴

The Board frequently uses this definitional method to remove NLRA protections from rehabilitative employees. After deciding in *St. Aloysius Home* that declining jurisdiction over charitable employers was inappropriate, the Board continued to use the “typically industrial, primarily rehabilitative” analysis in subsequent cases.⁷⁵ Its purpose in using the test, however, changed.⁷⁶ The test now functioned to determine whether the rehabilitative workers were in a traditional industrial relationship with the employer—and thus by implication “employees” that Congress intended the NLRA to cover.⁷⁷

The Board considers several factors when determining whether the employer-employee relationship is “typically industrial” or “primarily rehabilitative.”⁷⁸ It considers whether the employer offers counseling, job training, or other life-skills classes, and whether employees are forced to adhere to production standards.⁷⁹ Additionally, the Board is heavily influenced by whether employees with disabilities receive a different type of discipline than ordinary employees.⁸⁰ It tends to view the employees’ progress out of the rehabilitation program via a job-placement service as an indicator

72. *E.g., id.* at 765 (deciding that the rehabilitative workers were not employees but rather clients of the employer).

73. NLRA § 2(3), 29 U.S.C. § 152(3) (2006) (exempting supervisors, independent contractors, and others from coverage).

74. *See supra* note 4.

75. *Brevard Achievement Ctr., Inc.*, 342 N.L.R.B. 982, 993 (2004) (Members Liebman and Walsh, dissenting) (describing the jurisprudential changes from early to modern cases).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 993 n.17.

80. *Id.*

that the relationship is rehabilitative.⁸¹ The Board believes that these factors show that the employer-employee relationship is unlike ordinary private sector employment situations, and thus not subject to ordinary labor laws.⁸²

C. Applying the Multifactor Test

The application of the multifactor “typically industrial, primarily rehabilitative” test is best understood in the context of an actual rehabilitative case. In *Goodwill Industries of Denver*, the Board determined that a bargaining unit that would have included individuals with a variety of employment impediments was inappropriate.⁸³ Goodwill provided employment, training, and placement services for many of its employees.⁸⁴ The company placed these individuals at a nearby Air Force base, where they stocked merchandise and performed janitorial duties.⁸⁵ Goodwill took on three classes of individuals: client/trainees with severe handicaps who received active rehabilitation services, client/employees who had disabilities but who were more capable than the client/trainees and who were employed full-time by Goodwill, and full-time employees without disabilities.⁸⁶

Goodwill had relaxed discipline policies for client/trainees and client/employees, preferring to counsel or transfer them to another worksite rather than discharge them.⁸⁷ The employees without disabilities, however, were subject to regular discipline and discharge.⁸⁸ The client/trainees and client/employees had no set production requirement, but the employees without disabilities could be discharged for failing to meet their daily quotas.⁸⁹ Goodwill tried to place the client/trainees with outside employers and would keep open their position at Goodwill for thirty days if they did not succeed

81. *Id.*

82. *See Goodwill Indus. of Tidewater, Inc.*, 304 N.L.R.B. 767, 768-69 (1991).

83. *Goodwill Indus. of Denver*, 304 N.L.R.B. 764, 766 (1991).

84. *Id.* at 764.

85. *Id.*

86. *Id.* at 764, 766.

87. *Id.* at 764.

88. *Id.* at 766.

89. *Id.* at 764, 766.

when placed.⁹⁰ Goodwill also provided transportation for the client/trainees and on going counseling and coordination with the governmental agencies that referred these individuals to Goodwill for work.⁹¹ The Board decided that the client/trainees were not in a typical industrial relationship with the employer due to the services the employer provided and thus denied NLRA rights to them.⁹² Objectively, these client/trainees seem to have been receiving active rehabilitation.

At the other extreme, the employees without disabilities had none of the benefits of reduced discipline, counseling, or job placement; instead, they were held to rigid production standards.⁹³ The Board determined that these workers were section 2(3) employees entitled to NLRA protections.⁹⁴ As a result, the Board directed an election for a unit of the employees without disabilities.⁹⁵ If this election were successful, the unit would be able to negotiate a collective bargaining agreement with Goodwill and could possibly gain benefits such as just cause termination, extended health benefits, and grievance processing procedures. Because the client/trainees were excluded from the unit, they would not share in any of these contractual benefits.

Though the “typically industrial, primarily rehabilitative” classifications of full-time employees without disabilities and client/trainees were rather straightforward, the appropriate classification for the client/employees was much more difficult. Most of the client/employees did not receive any counseling services.⁹⁶ They were more independent and did not need Goodwill to transport them to and from work.⁹⁷ The client/employees were also long-term employees of Goodwill.⁹⁸ On the other hand, they did not have to meet production requirements, and Goodwill avoided discharge as a means of discipline.⁹⁹ The Board, dominated by a Republican majority, decided

90. *Id.* at 764-65.

91. *Id.* at 765.

92. *Id.*

93. *Id.* at 766.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 765.

98. *Id.* at 766.

99. *Id.*

that these last two factors tipped the balance toward treating the client/employees as rehabilitative employees, so they lost all NLRA rights and collective bargaining benefits.¹⁰⁰ This conclusion is easily challenged, and one can imagine how a Board with different political preferences and labor agenda could reach a different conclusion.¹⁰¹

Goodwill Industries of Denver demonstrates the importance of how the Board classifies a group of employees: its classification determines whether the client/employees are able to share in the benefits of NLRA protections and collective bargaining agreement terms. The case also illustrates how the Board can grant important rights based on slim distinctions that are subject to easy manipulation.

D. Problems with the Current Multifactor Test

The current “typically industrial, primarily rehabilitative” test has two main problems: political manipulation and inconsistency. A review of the Board’s decisions shows ascertaining the political party holding the majority of seats on the Board is the best way to predict whether the Board will grant NLRA protections to rehabilitative employees. When Republicans hold a majority of the seats, the Board declines to grant NLRA protections; when Democrats hold a majority, the Board grants NLRA protections.¹⁰² The second problem is that the test is inconsistent. Even within a single controversy, regional directors, the Board, and federal courts come to contrary conclusions even though the facts before each body are identical. The following chart is useful for understanding both of these problems.¹⁰³

100. *Id.*

101. For more on the impact of political ideology on the outcome of Board decisions, see *infra* Part III.D.

102. See *infra* fig.1.

103. Figure 1 is based on the cases listed *supra* note 27 and a listing of the political parties of Board members available online at NLRB, Board Members Since 1935, http://www.nlr.gov/About_Us/Overview/board/board_members_since_1935.aspx (last visited Oct. 13, 2010).

NLRA Protections for Rehabilitative Employees

Case Name	San Diego	Epi-Hob	Chicago	So. Cal.	Cincinnati	Houston	Key Op.	Arkansas	Denver	Tide-water	Davis	Baltimore	Brevard	N. Ga.
Year	1960	1973	1976	1977	1978	1979	1982	1987	1991	1991	1995	1996	2004	2007
Regional Director			Deny		Deny	Grant		Grant	Deny	Grant	Grant	Grant	Grant	Grant
Board	Deny	Deny	Grant	Deny	Grant	Grant	Deny	Grant	Deny	Deny	Grant	Grant	Deny	Grant
Court of Appeals					Grant	Deny, Grant		Deny			Deny	Deny		
Political Majority on Board	Rep.	Rep.	Rep.	Rep.	Dem.	Dem.	Rep.	Rep.	Rep.	Rep.	Dem.	Dem.	Rep.	Tie
Ultimate Outcome	Deny	Deny	Grant	Deny	Grant	Grant	Deny	Deny	Deny	Deny	Deny	Deny	Deny	Grant
Reversed in Review Process?	No	No	Yes	No	Yes	Yes	No	Yes	No	Yes	Yes	Yes	Yes	No

Figure 1

Figure 1 demonstrates that the current test is susceptible to political manipulation. Of the fourteen published Board decisions on rehabilitative employees since 1960, all decisions declining to extend NLRA protections to rehabilitative employees occurred when there was a Republican majority on the Board.¹⁰⁴ In every case decided with a Democratic majority, the Board extended NLRA protections to the rehabilitative employees.¹⁰⁵ The political preferences of the Board seem to be the decisive factor in the “typically industrial, primarily rehabilitative” test.¹⁰⁶ The politicization of the determination adds some predictability to the decisions, but predicting outcomes on the basis of political power is an unsatisfying method of granting NLRA rights.¹⁰⁷

104. In only one case did a Republican Board grant NLRA protections to rehabilitative employees, and in that case the employer stipulated that the employees were section 2(3) employees entitled to NLRA protections. *See Chi. Lighthouse for the Blind*, 225 N.L.R.B. 249, 249 (1976).

105. *See supra* fig.1. Note that *Goodwill of North Georgia*, which granted rights to rehabilitative employees, was decided by an equally divided Board, with two Republicans and two Democrats.

106. *Id.*

107. *See James J. Brudney, Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221, 243-52 (2005).

Figure 1 also demonstrates that the current test is difficult to administer and yields unpredictable results within a single controversy. If regional director, Board, and federal court decisions are considered together, eight of the fourteen cases had at least one reviewing body overturn a lower body's NLRA coverage determination.¹⁰⁸ Reasonable minds can evaluate the same facts of each case, apply the test, and yet come to opposite results.

This lack of consistency is a serious problem with the current test. Without consistency, it is difficult for rehabilitative employees, unions, and employers to know when they can rely on their NLRA rights. Because some of the rehabilitative employees may work for the rehabilitative employer for the rest of their lives,¹⁰⁹ this lack of certainty may put such employees in fear of exercising valuable workplace protections for their entire career. If the NLRA actually covers certain employees, then they deserve to know their rights, and the Board ought to adopt policies that will make clear to employees their rights.

Federal courts have criticized the Board for its lack of consistency in applying the rehabilitative employee test. As a result, they refuse to enforce Board orders requiring employers to recognize and bargain with units containing rehabilitative employees.¹¹⁰ One court held that "the Board did not adequately distinguish [the] case from its precedent," so it refused to remand the case to the Board for further factual findings and reversed the Board's decision on its own.¹¹¹ Another court bluntly stated that the Board "clearly erred" in its decision to grant employee status to certain rehabilitative employees.¹¹² A third court stated that it refused to "rubber stamp" the Board's conclusion that certain workers were not rehabilitative

108. *See supra* fig.1.

109. *Abilities & Goodwill, Inc.*, 226 N.L.R.B. 1224, 1224 (1976).

110. *Balt. Goodwill Indus., Inc. v. NLRB*, 134 F.3d 227, 231 (4th Cir. 1998) (per curiam), *denying enforcement to* 154 L.R.R.M. (BNA) 1015 (Apr. 30, 1996); *Davis Mem'l Goodwill Indus. v. NLRB*, 108 F.3d 406, 410 (D.C. Cir. 1997), *denying enforcement to* 318 N.L.R.B. 1044 (1995); *Ark. Lighthouse for the Blind v. NLRB*, 851 F.2d 180, 185 (8th Cir. 1988), *denying enforcement to* 284 N.L.R.B. 1214 (1987).

111. *Balt. Goodwill*, 134 F.3d at 231; *see also Davis Mem'l*, 108 F.3d at 413 ("The Board has had its chance to develop a record that would distinguish the instant case from its [precedent] and has failed.").

112. *Ark. Lighthouse*, 851 F.2d at 185.

employees.¹¹³ Federal courts are supposed to be incredibly deferential toward Board decisions,¹¹⁴ so the rebellion indicates that the current test has serious flaws.

The rebuttable presumptions proposed by this Note will reduce the likelihood of political manipulation and will increase certainty within a single controversy. In close cases like *Goodwill Industries of Denver*, a rebuttable presumption will tip the scale either toward or against coverage, depending on the length of time the employee has worked for the employer. By making employment duration the determinative factor absent special circumstances, the ability for the Board's political policy preferences to decide close cases with ambiguous "typically industrial, primarily rehabilitative" factors will decrease. The rebuttable presumptions also will give other reviewing bodies better guidance in making coverage decisions.

IV. THE FIRST PROPOSED PRESUMPTION: DENY NLRA RIGHTS FOR AN INITIAL PERIOD UPON HIRING

The first prong of the proposed test for classifying workers creates a rebuttable presumption that rehabilitative employees are not section 2(3) employees for an initial period upon hiring, unless the employee can show through a preponderance of the evidence that he or she is not receiving rehabilitative services. Through rulemaking, empirical studies, and public comment, the Board could determine an appropriate initial time period for this presumption to remain in effect.¹¹⁵ However, because the Board is loathe to engage in

113. *Davis Mem'l*, 108 F.3d at 410 (internal quotations omitted).

114. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("[E]ven as to matters not requiring expertise a court may [not] displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*."); *NLRB v. Lighthouse for the Blind of Houston*, 696 F.2d 399, 404 (5th Cir. 1983) ("In reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's ... The Board's determination that specified persons are 'employees' under the Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law." (quoting *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 130-31 (1944))) (omissions in original); see also *id.* at 406 ("Even if subsequent cases reaching the opposite result are truly indistinguishable, it is not our province to ensure an abstract and academic consistency in Board decisions." (quoting *NLRB v. Deaton, Inc.*, 502 F.2d 1221, 1228 (5th Cir. 1974))).

115. See Brudney, *supra* note 107, at 235-36 (arguing that the Board would engage in empirical studies if it began rulemaking).

rulemaking and usually sets standards through adjudication,¹¹⁶ it could pick any time period it pleased. This Note selects six months as an appropriate initial period, recognizing that different periods may also be entirely appropriate.

This presumption will allow the rehabilitative employer to provide its services for six months without interference from unions and other individuals engaged in section 7 activities. Employees could rebut the presumption by presenting evidence that they were not receiving any rehabilitation in the first six-month period. This six-month rebuttable presumption creates certainty for the employer *ex ante*. For example, if the client/employees in *Goodwill Industries of Denver* had worked for Goodwill for less than six months, they presumptively would not be covered by the NLRA. The first presumption thus makes what was a narrow determination into one clearly tipped toward no coverage.

Several policy reasons support this initial presumption, many of which the Board has used to decline NLRA protections to rehabilitative employees in the past. First, several federal programs encourage the employment of individuals with disabilities or other impairments. Second, allowing NLRA protections may actually do more harm than good for rehabilitative employees. Because these arguments have significant weaknesses, Part V limits the impact of the first presumption by imposing a contrary second presumption after six months.

A. Federal Policy Indicates that Employees Receiving Rehabilitation Should Not Have NLRA Protections

Those opposing NLRA coverage for rehabilitative employees can justify their position by pointing to several federal programs that encourage the employment of rehabilitative employees. The Javits-Wagner-O'Day Act, the Rehabilitation Act of 1973, the special minimum wage provisions in Fair Labor Standards Act, and the NLRA collectively show that Congress intended rehabilitative employees to have as many employment opportunities as possible, even if creating these opportunities requires removing other

116. *Id.* at 234-37.

ordinary federal protections.¹¹⁷ NLRA protections for rehabilitative employees would limit employment opportunities and hinder Congress's pro-employment agenda, so during the time that the employer is actively providing rehabilitation, rehabilitative employees should not receive NLRA protections.

1. *The Javits-Wagner-O'Day Act*

Congress passed the Javits-Wagner-O'Day Act (JWOD) in order to provide blind and severely handicapped individuals the opportunity to obtain gainful employment.¹¹⁸ JWOD allows nonprofit organizations to qualify for governmental contracts to produce certain commodities and services so long as 75 percent of the man-hours come from the blind or severely handicapped.¹¹⁹ Through the program, individuals with disabilities assemble "mops, brooms, pillow cases, ball-point pens, box springs, mattresses, signal flags, brushes, mattress pads and dish towels" and similar items.¹²⁰ They also provide janitorial services and assist with inventory stocking.¹²¹

Congress was unapologetic in describing one of the major purposes of JWOD. The House explained that it wanted to turn individuals who would otherwise be a financial burden on their families or the government into productive "wage earners and tax payers."¹²² To further that end, Congress intended for JWOD to provide a constant stream of employment to those who would otherwise have great difficulty in obtaining paying jobs.¹²³ During the last major revision to JWOD in 1971, the House expressed concerns that

117. This Note acknowledges Catherine Bean's helpful research in this area. She outlined how the Javits-Wagner-O'Day Act, the Rehabilitation Act, and the Fair Labor Standards Act may be construed to show strong congressional support of the employment of rehabilitative employees. See Bean, *supra* note 5, at 359-69.

118. H.R. REP. NO. 92-228, at 1-2 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1079, 1080.

119. 41 U.S.C. §§ 47, 48(b)(3) (2006).

120. H.R. REP. NO. 92-228, at 1, *reprinted in* 1971 U.S.C.C.A.N. at 1080.

121. Goodwill Indus. of Denver, 304 N.L.R.B. 764, 764 (1991).

122. H.R. REP. NO. 92-228, at 2, *reprinted in* 1971 U.S.C.C.A.N. at 1080; *see also* Bean, *supra* note 5, at 360.

123. H.R. REP. NO. 92-228, at 13, *reprinted in* 1971 U.S.C.C.A.N. at 1091-92 (noting the need to ensure that the program was available to those "incapable of engaging in regular competitive employment").

a scarcity of resources would decrease job opportunities.¹²⁴ Congress believed that it was vital that individuals with disabilities remained employed, and thus took steps to make more money available for the program.¹²⁵

The number of rehabilitative cases that the Board has decided involving JWOD shows how important the program is to providing job opportunities to individuals with disabilities. JWOD provided funding to employers in at least nine of the fourteen cases involving rehabilitative employees.¹²⁶ Thus, those opposing NLRA coverage of rehabilitative employees may argue plausibly against covering such employees on the basis that anything that increases employer costs will reduce the beneficial impact of these funds. Unionization increases employer costs,¹²⁷ and therefore granting NLRA rights to rehabilitative employers would contribute to the resource scarcity that concerned Congress when it last revised JWOD.

2. Vocational Rehabilitation Programs

Congress passed the Rehabilitation Act of 1973 in order to expand state-run programs that help individuals with job-related disabilities to obtain gainful employment.¹²⁸ The goal of vocational rehabilitation (VR) is to prepare individuals for a career outside of the rehabilitative environment, if possible.¹²⁹ Congress believed the financial benefits of VR programs greatly outweighed their expense, estimating cash returns running anywhere from three to five times the government's outlay.¹³⁰

124. *Id.* at 5, *reprinted in* 1971 U.S.C.C.A.N. at 1083-84 (“[Due to a lack of funding], the work available to the workshops has diminished so that the vocational rehabilitation program of the severely handicapped is faltering. It is essential that the workshops have work.”).

125. *Id.*

126. *See supra* note 27. Of those cases, only *Key Opportunities, Goodwill Industries of Southern California, Chicago Lighthouse, Epi-Hab*, and *Sheltered Workshops of San Diego* do not mention JWOD funding.

127. *See, e.g., Davis Mem'l Goodwill Indus. v. NLRB*, 108 F.3d 406, 410 (D.C. Cir. 1997) (describing how NLRA rights drive up costs and limit the ability of a rehabilitative employer to provide services to needy individuals).

128. Pub. L. No. 93-112 pmb. & § 2(1), 87 Stat. 355, 355-57 (1973) (codified as amended at 29 U.S.C. § 701(b) (2006)).

129. *Id.* § 501(c), 87 Stat. at 391 (codified as amended at 29 U.S.C. § 791); *see also* Bean, *supra* note 5, at 368.

130. S. REP. NO. 93-318, at 9 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2076, 2085-86.

As with JWOD, the Rehabilitation Act demonstrates Congress's desire to assist those with barriers to employment to overcome their challenges and to become productive citizens.¹³¹ Unionism would limit opportunities for rehabilitation because higher costs would limit the number of available positions and force employers to retain the most profitable employees instead of those most in need of rehabilitation services.¹³² Therefore, granting NLRA protections to rehabilitative employees would be counterproductive and contrary to Congress's intent in passing the Rehabilitation Act.

3. *Reduced Minimum Wages*

Because Congress values the employment of individuals with disabilities, it has shown a willingness to limit normal employment laws in order to foster their employment.¹³³ For example, the Fair Labor Standards Act (FLSA) provides for a national minimum wage.¹³⁴ The FLSA has an exception, however, for individuals with disabilities.¹³⁵ Employers may apply for a certificate that allows them to pay employees with disabilities a variable rate depending on the individual's productivity in comparison to similarly employed workers without disabilities in the same community.¹³⁶ In one instance, an employer paid his employees only 8 percent of the minimum wage.¹³⁷ House members noted that some individuals with disabilities would be unable to find employment in the normal market if their employers had to pay a regular minimum wage.¹³⁸ Congress thus decided to abandon a minimum wage for individuals with disabilities—even if fractionally based on the minimum wage—because requiring an artificially high pay level would reduce such workers' employability.¹³⁹ If Congress is willing to remove a

131. See Bean, *supra* note 5, at 367-68.

132. See *Goodwill Indus. of S. Cal.*, 231 N.L.R.B. 536, 537-38 (1977).

133. See Fair Labor Standards Act (FLSA), 29 U.S.C. § 214(c) (2006).

134. *Id.* § 206.

135. *Id.* § 214(c).

136. *Id.* § 214(c)(1)(5); see also 29 C.F.R. § 525.9(a) (2009).

137. See S. REP. NO. 87-145, at 1, 43 (1961), *reprinted in* 1961 U.S.C.C.A.N. 1620, 1620, 1665 (noting the proposed minimum wage increase to \$1.25 for nonsheltered workshop employees, while some sheltered workshops were paying rehabilitative employees only \$0.10).

138. 132 CONG. REC. H8825-01 (1986).

139. *Id.*; see also Bean, *supra* note 5, at 364-65.

basic employment protection—the minimum wage—from employees with disabilities who would otherwise be unable to find a job, it stands to reason that Congress would similarly allow the removal of another set of employment rights—NLRA protections—for the same purpose.

4. The NLRA Was Not Intended To Protect Rehabilitative Employees

Finally, anticoverage Board members have argued that the NLRA itself was never intended to apply to rehabilitative employees.¹⁴⁰ One major purpose of the NLRA was to prevent the exploitation of workers.¹⁴¹ Because rehabilitative employers are not exploiting employees, but are rather conferring benefits upon them, the NLRA is not intended to govern this relationship.¹⁴² Furthermore, although there have been congressional attempts to amend the NLRA in order to protect rehabilitative employees, these attempts never moved beyond the committee level.¹⁴³ The failure of these bills may show that Congress understood the nature of these relationships and intentionally did not grant rehabilitative employees NLRA rights.¹⁴⁴

B. NLRA Protections Would Not Benefit Rehabilitative Employees and May Hurt Them

At times, the Board has argued that rehabilitative employees would not gain anything if they had NLRA rights.¹⁴⁵ In rehabilitative employer situations, the anticoverage advocates believe that the employer is providing all of the benefits that a union could provide, and perhaps in some ways is even more concerned about the

140. See, e.g., *Brevard Achievement Ctr., Inc.*, 342 N.L.R.B. 982, 984-88 (2004) (pointing to the text of the NLRA and congressional policy to show that the NLRA was not intended to govern the rehabilitative relationship).

141. See *Key Opportunities, Inc.*, 265 N.L.R.B. 1371, 1374 (1982).

142. *Id.*

143. See *Cincinnati Ass'n for the Blind v. NLRB*, 672 F.2d 567, 570 (6th Cir. 1982) (collecting seven failed bills).

144. *But see id.* (finding this argument unpersuasive).

145. See *Goodwill Indus. of S. Cal.*, 231 N.L.R.B. 536, 538 (1977).

rehabilitative employees' welfare than a union would be.¹⁴⁶ In *Goodwill Industries of Southern California*, the Teamsters sought to include transportation and production workers with various employment disabilities in a bargaining unit.¹⁴⁷ The employment disabilities included "mental or emotional disturbance" and physical limitations, but also included employment barriers such as limited education and criminal records.¹⁴⁸

After considering the presence of a job placement program, job training, counseling services, minimal discipline, and the absence of production standards, the Board determined that NLRA protections would be inappropriate for these employees.¹⁴⁹ The Board justified its position by arguing that in the rehabilitative employer situation, an employer's "concern for the welfare of his employees competes with, and in some sense displaces, the union's ordinary concern for employee well-being."¹⁵⁰ The Board noted that unions usually seek to improve working conditions for employees, but in this case, the employer had "avowedly and convincingly" pursued that objective.¹⁵¹ If the employer had to meet usual union demands for higher pay, job security, and benefits, then the employer would have less money to employ individuals with disabilities and would have fewer openings for them.¹⁵² The Board concluded that rehabilitative employees were therefore better off without NLRA rights than with them.¹⁵³

Pragmatically, anticoverage advocates also have suggested that rehabilitative employers are providing these employees with steady jobs with steady pay—perhaps the only jobs for which the employees could qualify.¹⁵⁴ If rehabilitative employees become too troublesome, then benevolent employers would simply stop providing services.¹⁵⁵

146. *Id.*

147. *Id.* at 536-37.

148. *Id.*

149. *Id.* at 537.

150. *Id.*

151. *Id.*

152. *Id.* at 537-38.

153. *Id.* at 538.

154. See *NLRB v. Lighthouse for the Blind of Houston*, 653 F.2d 206, 208 (5th Cir. 1981), *rev'd on reh'g*, 696 F.2d 399 (5th Cir. 1983).

155. See *Ark. Lighthouse for the Blind v. NLRB*, 851 F.2d 180, 183 (8th Cir. 1988) ("[Applying NLRA protections] discourag[es] the formation and operation of nonprofit projects

Employees with special needs may find it difficult to find work without rehabilitation, so the Board should not adopt policies that would enable interference with rehabilitation.¹⁵⁶

C. Anticoverage Arguments Justify Removing NLRA Protections in Certain Cases

Because federal policy prefers employment and rehabilitation of workers with disabilities to the alternative of equal rights, the Board should not grant NLRA protections to rehabilitative employees so long as actual rehabilitation is occurring. If the NLRA were to apply to these employees, employers' operating costs would increase.¹⁵⁷ As a result, either fewer employees would be employed or employers would be forced to retain only the most productive workers instead of serving those most in need of rehabilitation.¹⁵⁸ Responding to these concerns, this Note proposes that the Board adopt a rebuttable presumption that the NLRA does not cover rehabilitative employees for the first six months that they work for an employer. With this presumption, employers' costs will remain low and they will have a strong incentive to provide continuously the rehabilitation that their employees need in order to enter the general workforce.

V. THE SECOND PROPOSED PRESUMPTION: GRANT NLRA RIGHTS AFTER THE INITIAL REHABILITATIVE PERIOD

Those in favor of granting NLRA protections to rehabilitative employees have pointed out several weaknesses in the anticoverage position. First, they argue that the federal policies used by

to aid and assist therapeutic and rehabilitative efforts to employ the handicapped.”). One employer threatened rehabilitative employees that a union would cause the workplace to be “closed up tight as a jug and never reopened” like three other sheltered workshops that had attempted unionization. *Ark. Lighthouse for the Blind*, 284 N.L.R.B. 1214, 1218 (1987).

156. *Brevard Achievement Ctr., Inc.*, 342 N.L.R.B. 982, 988 (2004) (expressing fears of interfering with the rehabilitative process); *Goodwill Indus. of Denver*, 304 N.L.R.B. 764, 764 (1991) (same); *Bean*, *supra* note 5, at 387 (“To allow unregulated negotiations between parties with little understanding of the special place in society of the handicapped could be devastating for the parties involved.”).

157. *See Davis Mem'l Goodwill Indus. v. NLRB*, 108 F.3d 406, 410 (D.C. Cir. 1997).

158. *Goodwill Indus. of S. Cal.*, 231 N.L.R.B. 536, 537-38 (1977).

those opposing coverage are, at best, inconclusive evidence regarding whether the NLRA should cover rehabilitative employees. Pro-coverage advocates instead point to other federal laws, like the ADA, that suggest the Board should not treat rehabilitative employees differently than ordinary employees. Second, those favoring coverage question the belief that an employer's benevolence merits any sort of reduction of rights for its workers or that rehabilitative employees are not working hard enough to be considered employees.¹⁵⁹ Third, pro-coverage advocates harbor a real fear of sham rehabilitation centers—a fear that has a substantial basis due to reported employer abuses of the rehabilitative employee system.¹⁶⁰

These pro-coverage arguments are persuasive, indicating that a blanket denial of NLRA protections for rehabilitative employees would be inappropriate. As a result, this Note proposes a second rebuttable presumption that would become effective after an initial period with the rehabilitative employer. As discussed in Part IV, the initial rebuttable presumption would last for six months.¹⁶¹ After six months, there would be a second rebuttable presumption that the rehabilitative employees are true employees, and thus entitled to NLRA rights and protections. The employer could rebut this presumption by presenting a preponderance of the evidence that the employer was providing the workers in question actual, material rehabilitation services on a regular basis. As with the first presumption, this second presumption is well supported by policy arguments and workplace realities.

A. Federal Policy Does Not Demonstrate Congressional Intent To Exclude Rehabilitative Employees; In Fact, Congress Affirmatively Provides Protection

Those favoring NLRA rights for rehabilitative employees argue that the anticoverage advocates have misinterpreted federal intent with respect to rehabilitative employees. They also argue that the NLRA's plain language specifically encompasses rehabilitative

159. See *infra* notes 199-203 and accompanying text.

160. See *infra* Part V.C (discussing sham rehabilitation centers).

161. See *supra* notes 115-16 and accompanying text.

employees. Furthermore, the ADA expressly attempts to create equality for rehabilitative employees, so as a result, these employees should have equal NLRA rights.

1. Rebutting Federal Policy Arguments Addressed by Anticoverage Advocates

The Board, when composed of pro-coverage members, has argued twice that JWOD, the Rehabilitation Act, and the FLSA's variable wage provision fail to indicate that Congress intended to exclude rehabilitative employees from NLRA protections.¹⁶² In one case, the Board petitioned the Fifth Circuit for enforcement of an order requiring a rehabilitative employer to bargain with its rehabilitative employees.¹⁶³ The Board used an amicus brief from the Secretary of Labor to persuade the court that the reduced minimum wage provisions of the FLSA had no bearing on interpreting congressional intent toward rehabilitative employees.¹⁶⁴ The Secretary of Labor asserted that the minimum wage program was a different issue than labor rights and that the court should not consider the FLSA in determining whether the employees should have NLRA rights.¹⁶⁵ The court ultimately agreed with the Board and declared that it could not find any congressional intent in JWOD, the Rehabilitation Act, or the FLSA that would require rehabilitative employees to be excluded from NLRA protections.¹⁶⁶

The Sixth Circuit agreed with this analysis in a similar case.¹⁶⁷ The court noted that although these federal statutes show Congress's willingness to extend employment opportunities to individuals with disabilities, this willingness did not necessarily demonstrate that Congress intended to exclude rehabilitative employees from NLRA coverage.¹⁶⁸ The court decided that the presence of JWOD, the Rehabilitation Act, and the FLSA was not dispositive

162. See *NLRB v. Lighthouse for the Blind of Houston*, 696 F.2d 399, 407 n.25 (5th Cir. 1983).

163. See *id.*

164. *Id.*

165. *Id.*

166. *Id.* at 404 n.21.

167. *Cincinnati Ass'n for the Blind v. NLRB*, 672 F.2d 567, 570-71 (6th Cir. 1982).

168. *Id.* at 571.

and that the court “simply lack[ed] a basis on which to make an informed judgment about ‘Congressional intent’ in this area.”¹⁶⁹ Thus, on two occasions, a pro-coverage Board has successfully questioned the validity of federal policy arguments against NLRA protections for rehabilitative employees.

2. *The NLRA Covers Rehabilitative Employees*

Due to the plain language of the NLRA, pro-coverage activists believe that rehabilitative employees are entitled to the NLRA’s protections. Members Wilma B. Liebman and Dennis P. Walsh argued this position with passion when dissenting in *Brevard Achievement Center, Inc.*¹⁷⁰ They cited the Supreme Court’s expansive understanding of a section 2(3) “employee” in *Sure-Tan, Inc. v. NLRB*.¹⁷¹ In *Sure-Tan*, the Court ruled that undocumented aliens were employees within the meaning of the NLRA because “the Act squarely applies to ‘any employee.’”¹⁷² The *Brevard* dissent also pointed to other Supreme Court cases that suggested that a worker is a section 2(3) employee if he or she has a master-servant relationship with the employer,¹⁷³ or if the worker falls within a dictionary definition of “employee.”¹⁷⁴ Because many rehabilitative employees are working just like ordinary employees, they meet both dictionary and common law definitions of “employee,” and thus, the *Brevard* dissent argued, they are statutory employees under section 2(3) and are entitled to protections under the NLRA.¹⁷⁵

This plain-language argument is persuasive; however, it is subject to a significant counterargument that causes this Note to stop short of recommending NLRA protections for rehabilitative employees at all times and in all cases. Those opposing coverage could point to the irony of selecting *Sure-Tan* in order to prove that

169. *Id.*

170. *Brevard Achievement Ctr., Inc.*, 342 N.L.R.B. 982, 990-92 (2004) (Members Liebman and Walsh, dissenting).

171. *Id.* at 991.

172. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984).

173. *Brevard*, 342 N.L.R.B. at 990 (citing *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995)).

174. *Id.* (citing *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 711 (2001)).

175. *Id.* at 989.

rehabilitative employees are covered by the NLRA.¹⁷⁶ In *Sure-Tan*, the Court held that, although the illegal immigrants were entitled to the NLRA's protections, their special status barred them from receiving a remedy of backpay or reinstatement.¹⁷⁷ Even though the employer had violated the NLRA, the Board was obligated to consider other "equally important Congressional objective[s]" like immigration policies prior to ordering a remedy.¹⁷⁸ These countervailing policies meant that even though the employer violated the NLRA, the Board could not order a remedy.¹⁷⁹

Applying *Sure-Tan*, the Board could theoretically find that the NLRA covers rehabilitative employees, but then could refuse to grant a remedy due to the strong countervailing congressional policies addressing rehabilitative employees. By creating two classes of employees—those with remedies and those without remedies—the Supreme Court has weakened the effectiveness of the *Brevard* dissent's otherwise persuasive plain-meaning approach toward applying the NLRA to rehabilitative employees. Nevertheless, after a period of time, rehabilitative employees begin to resemble ordinary employees more and more, and the force of countervailing congressional policies favoring rehabilitation begins to weaken as the need for rehabilitation declines. As a result, this Note adopts the second presumption after the initial six-month period in order to conform to this plain-meaning approach to the NLRA's coverage.

3. *The Americans with Disabilities Act*

Pro-coverage advocates fervently point to the ADA as the true indication of congressional intent toward rehabilitative employees.¹⁸⁰ Congress enacted the ADA in 1990, and amended it in 2008 to re-emphasize the ADA's importance in light of general underappli-

176. *Id.* at 991.

177. *Sure-Tan*, 467 U.S. at 898-906; *see also id.* at 911 (Brennan, J., dissenting in part) (dissenting due to the Court-created anomaly that the workers were protected by the NLRA but deprived of an effective remedy).

178. *Id.* at 903 (majority opinion) (quoting *S. S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942)).

179. *Id.* at 911 (Brennan, J., dissenting in part).

180. *See Brevard*, 342 N.L.R.B. at 990, 994 (Members Liebman and Walsh, dissenting) (citing the ADA as a principal reason for extending NLRA rights to rehabilitative employees).

cation by the courts.¹⁸¹ Congress passed the ADA so that individuals with disabilities could enter into ordinary economic and social interactions without discrimination.¹⁸² Congress envisioned the federal government playing a central role in eliminating disability discrimination.¹⁸³ One House Report states,

The Act is premised on the obligation of employers to consider people with disabilities as individuals and to avoid prejudging what an applicant or employee can or cannot do on the basis of that individual's appearance or any other easily identifiable characteristic, or on a preconceived and often erroneous judgment about an individual's capabilities based on "labeling" of that person as having a particular kind of disability.¹⁸⁴

Even though the Board, as an adjudicator of labor disputes, is not a "covered entity" under the ADA,¹⁸⁵ Congress did declare that it expected that the federal government—implying its agencies—would take a lead role in eliminating discrimination on the basis of disabilities.¹⁸⁶ The Board, by prejudging rehabilitative employees on the basis of their disabilities, is violating the spirit, if not the letter, of the ADA.¹⁸⁷

The ADA argument is highly persuasive. Nonetheless, upon inspection, it suffers from significant limitations, so this Note does not propose blanket NLRA rights for rehabilitative employees. First, the core element of an ADA violation is discrimination on the basis of *disability*.¹⁸⁸ Anticoverage Board members strongly argue that the Board is not differentiating between rehabilitative employees and regular employees on the basis of their disabilities, but rather on

181. ADA Amendments Act of 2008, Pub. L. No. 110-325 § 2, 122 Stat. 3553, 3553-54 (2008) (codified at 42 U.S.C. §§ 12101-12213 (2006)) (expressing Congress's disappointment with the judiciary's undue narrowing of the ADA).

182. H.R. REP. NO. 101-485(III), at 23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 446.

183. *Id.*

184. H.R. REP. NO. 101-485(II), at 58 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 340.

185. 42 U.S.C. § 12111 (2006) ("The term 'covered entity' means an employer, employment agency, labor organization, or joint labor-management committee.").

186. *See* H.R. REP. NO. 101-485(III), at 23, *reprinted in* 1990 U.S.C.C.A.N. at 446.

187. *See* *Brevard Achievement Ctr., Inc.*, 342 N.L.R.B. 982, 990 (2004) (Members Liebman and Walsh, dissenting).

188. 42 U.S.C. § 12112 ("No covered entity shall discriminate against a qualified individual *because of the disability.*") (emphasis added).

the basis of their *relationship* to the employer.¹⁸⁹ The distinction, though subtle, is crucial.

Second, the ADA and the NLRA have a stormy relationship, which suggests that the Board may disregard portions of the ADA. Many of the ADA's provisions conflict with basic labor law provisions.¹⁹⁰ For instance, if an employer makes reasonable accommodations required under the ADA without union consent, the union could file charges with the Board because the employer violated the NLRA by enacting a unilateral change.¹⁹¹ Although the ADA requires employers to consult individuals with disabilities regarding reasonable accommodations, these discussions may violate NLRA prohibitions against direct dealing.¹⁹² The ADA duty to keep employee disability information confidential may conflict with an NLRA duty to disclose relevant information to the union for bargaining purposes.¹⁹³ These conflicts are so intractable that the NLRB and the Equal Employment Opportunity Commission have been unable to compromise on a joint solution to resolve ADA and NLRA conflicts.¹⁹⁴ In one instance, the Supreme Court has ruled in favor of the NLRA's prerogatives to the subordination of typical ADA rights.¹⁹⁵ Because ADA rights occasionally are subordinated to NLRA prerogatives, it stands to reason that the Board could also act contrary to the spirit of the ADA in certain instances.

The ADA argument standing by itself would suggest that the Board should never differentiate between rehabilitative employees and other employees and should always grant NLRA protections to

189. *Brevard*, 342 N.L.R.B. at 988 (majority opinion).

190. See Stephen M. Crow & Sandra J. Hartman, *ADA Versus NLRA: Is a Showdown Imminent Over Reasonable Accommodation?*, 44 LAB. L.J. 375 (1993); Ann C. Hodges, *The Americans with Disabilities Act in the Unionized Workplace*, 48 U. MIAMI L. REV. 567, 610-14 (1994); Robert W. Pritchard, *Avoiding the Inevitable: Resolving the Conflicts Between the ADA and the NLRA*, 11 LAB. LAW. 375 (1995).

191. Pritchard, *supra* note 190, at 388-89.

192. Crow & Hartman, *supra* note 190, at 379.

193. Hodges, *supra* note 190, at 603, 610-14.

194. Pritchard, *supra* note 190, at 405 (citing *EEOC Suspends Efforts To Work with NLRB on Issuing Joint Memo on Disabilities Act*, [1992] Daily Lab. Rep. (BNA) No. 160, at A-3 (Aug. 18, 1992)).

195. See *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) (holding that an employee with disabilities who had been assigned to a less physically demanding position could not successfully sue under the ADA if another employee under the union's seniority system ousted the employee with disabilities due to the senior employee's seniority).

rehabilitative employees. However, the anticoverage arguments are formidable, so this Note does not propose a rule that would require NLRA protections for rehabilitative employees at all times.

B. The Anticoverage View Is Tainted by Undue Paternalism and Outdated Stereotypes

Those favoring NLRA protections for rehabilitative employees criticize the anticoverage advocates' arguments for assuming either that rehabilitative employees are not working and lack the capacity to use NLRA rights or that the employer is exceedingly benevolent. Pro-coverage advocates balk at the idea that rehabilitative employees are not working hard enough to earn the employer's services.¹⁹⁶ In the earliest rehabilitative employer case, *Sheltered Workshops of San Diego, Inc.*, Chairman Boyd S. Leedom and Member Steven S. Bean dissented from the Board's decision to decline jurisdiction over a rehabilitative employer due to the employer's charitable purposes.¹⁹⁷ They noted that the rehabilitative employees were actually working like normal employees—they were introducing goods into the stream of commerce, were receiving pay for their services, and were subject to layoffs when work slowed.¹⁹⁸ Being in essence hard-working employees, those favoring coverage believe that rehabilitative employees should not be denied the right to collective bargaining, notwithstanding the rehabilitative services the employer may provide.¹⁹⁹

Pro-coverage advocates would also question the sincerity of an employer's benevolence if it seeks to deny NLRA rights to its rehabilitative employees. As Chairman Leedom and Member Bean stated, "[W]e reject the implicit corollary that a nonprofit organization engaging in socially beneficial activities therefore owes its employees less than other employers do."²⁰⁰ Pro-coverage activists

196. See *Brevard Achievement Ctr., Inc.*, 342 N.L.R.B. 982, 994 (2004) (Members Liebman and Walsh, dissenting).

197. *Sheltered Workshops of San Diego, Inc.*, 126 N.L.R.B. 961, 964-65 (1960) (Chairman Leedom and Member Bean, dissenting).

198. *Id.*; see also *Brevard*, 342 N.L.R.B. at 990 (pointing to similar indicia of true work).

199. *Sheltered Workshops of San Diego*, 126 N.L.R.B. at 965 (Chairman Leedom and Member Bean, dissenting).

200. *Id.*

argue that if the employer is truly interested in rehabilitating the employees, it will give the employee an experience that closely parallels the ordinary workforce.²⁰¹ As a result, the employer will allow them the interpersonal interactions and responsibilities that go hand-in-hand with collective bargaining and union representation.²⁰² In essence, they believe that dealing with pressures regarding unionization is a job skill worth acquiring in the rehabilitation stage.²⁰³

Recently, dissenting Board members labeled the Board's desire not to interfere with rehabilitation "paternalistic" and "stereotypical[ic]."²⁰⁴ This accusation has some substance. In a prior case, the Board supported its decision not to grant NLRA protections to a group of rehabilitative employees by suggesting that they lacked the capacity to collectively bargain.²⁰⁵ Although the Board has more recently admitted that rehabilitative employees do have the capacity to collectively bargain,²⁰⁶ the earlier position still seems to affect Board thinking and casts doubt on the credibility of the anticoverage position.

In contrast to these stereotypical notions, the modern sentiment is that individuals with disabilities have the capacity to choose their own destinies and that people seeking to protect them should not foreclose their choices.²⁰⁷ The Board has a mandate to give employees free choice in exercising their NLRA rights.²⁰⁸ Even though workers often are harmed in the process, the Board's attempts to save rehabilitative employees from themselves are ill-founded. If the Board truly wanted to adopt a paternalistic, protective stance, it

201. *Brevard*, 342 N.L.R.B. at 995.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Key Opportunities, Inc.*, 265 N.L.R.B. 1371, 1375 (1982) ("[The NLRA] is predicated on the *ability* of employees to choose to act or refrain from acting in concert with others.") (emphasis added).

206. *Brevard*, 342 N.L.R.B. at 988 (majority opinion) ("We do not exclude these persons because of any assumption that they are incapable of engaging in the collective-bargaining process.")

207. *Id.* at 989 n.1 (Members Liebman and Walsh, dissenting) (collecting policy studies and governmental efforts to extend equal rights and opportunities to individuals with disabilities).

208. *See, e.g.*, NLRA § 9(b), 29 U.S.C. § 159(b) (2006) (requiring the Board to determine bargaining units so as to "assure to employees the fullest freedom in exercising the rights guaranteed by this [Act]").

should find ways to discourage *all* employees from exercising their NLRA rights. So often in attempting to use NLRA rights, employers harass and even terminate employees, and due to the state of labor law, many wrongs go unpunished.²⁰⁹ The bottom line is that there is no “reasonableness” test to using NLRA rights, so even if the employees act unreasonably in such a way that provokes the employer to terminate them, the employees are protected.²¹⁰ Rather than enforcing paternalism, and in recognition of the modern trend toward granting individuals with disabilities equal rights, opportunities, and risks, this Note proposes that after six months, rehabilitative employees presumptively should receive full NLRA benefits.

C. Denying Rights Exposes Long-Term Rehabilitative Employees to Exploitation

Evidence also exists that some ostensibly well-intentioned employers actually may be exploiting their federal protections in order to reap greater profits.²¹¹ In other words, the employer is using federal programs and policies to run what is essentially a sweatshop. Coverage proponents fear that employers are able to hide behind a rehabilitative screen while not actually providing any extraordinary services to employees.²¹² In sham rehabilitation cases, employees should be able to act collectively to recapture some of the benefits that the employer is retaining.

Accusations of rehabilitative employer abuse have existed for decades. In 1973, Congress ordered a special investigation into the value of rehabilitation centers after hearing that employers were giving only marginal services to their employees and then “dump[ing]” those with severe handicaps after the employees’

209. HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS’ FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 13-14 (2004), available at <http://www.hrw.org/reports/pdfs/u/us/uslbr008.pdf>.

210. *C.f. In re Odyssey Capital Group, L.P.*, 337 N.L.R.B. 1110, 1111 (2002) (reiterating that “reasonableness” is not a factor to be considered in determining whether concerted actions are protected under the NLRA).

211. *E.g.*, Jeff Kosseff et al., *Charity Leaders Prosper as “Disabled” is Redefined*, OREGONIAN, Mar. 5, 2006, at A1 [hereinafter Kosseff, *Charity Leaders Prosper*].

212. *See Sheltered Workshops of San Diego, Inc.*, 126 N.L.R.B. 961, 965 (1960) (Chairman Leedom and Member Bean, dissenting).

federal funding expired in order to take on a new crop of workers.²¹³ More recently, other rehabilitative employers have been accused of hiring only the mildly disabled to perform complicated skilled work while retaining six-figure executive salaries.²¹⁴ Some of these nominally disabled individuals are able to complete difficult work, such as repairing battle-damaged military humvees.²¹⁵ As one observer noted, “If they can do that work, they’re competitively employable.”²¹⁶ Perhaps most troublesome, many small, true rehabilitative employers are unable to get federal contracts because they are unable to compete with skill sets possessed by these nominally disabled workers.²¹⁷

Sham rehabilitation centers have several common features. The “training” provided to the employees often sounds remarkably like normal on-the-job training.²¹⁸ In sham centers, even if rehabilitative services are theoretically available, employees often do not know about them or do not take advantage of them.²¹⁹ Turnover may be very low, suggesting that there is an ordinary employment relationship because the target of true rehabilitation is employee placement outside of the rehabilitation program.²²⁰ In addition, some of the rehabilitation benefits are actually just the “normal and usual grist for the mill of collective bargaining.”²²¹ Those favoring NLRA protections for rehabilitative employees could argue that the rehabilitative employee has gained nothing of real value aside from what an ordinary employee could gain from his or her employer, and thus

213. S. REP. NO. 93-318, at 43 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2076, 2120.

214. Kosseff, *Charity Leaders Prosper*, *supra* note 211.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Goodwill Indus. of Tidewater, Inc.*, 304 N.L.R.B. 767, 768 (1991) (describing training in “general office cleaning, cleaning of restrooms, supplying soap and bathroom tissue, cleaning windows, and stripping, waxing, and buffing floors”).

219. *See, e.g., Goodwill Indus. of N. Ga.*, 350 N.L.R.B. 32, 34 (2007) (“Hines, classified as disabled, testified that she had been working for the Employer for approximately 6 years, that she had been unaware of the existence of the career services division until the previous year, and that she had never been assigned to a counselor or received any counseling.”); *Davis Mem’l Goodwill Indus.*, 318 N.L.R.B. 1044, 1047 (1995) (granting NLRA rights because rehabilitative services, though present, were not an active part of the work environment).

220. *Davis Mem’l Goodwill Indus. v. NLRB*, 108 F.3d 406, 410 (D.C. Cir. 1997).

221. *NLRB v. Lighthouse for the Blind of Houston*, 696 F.2d 399, 406 (5th Cir. 1983).

they should not be treated differently because of any purported rehabilitation that the employer supposedly provides.

D. The Second Presumption Balances the Pro-Coverage Position with the Anticoverage Position and Creates Positive Incentives

The second presumption effectively addresses the pro-coverage concerns about implementing affirmative federal directives to create equality for individuals with disabilities. It also helps to undermine stereotypical beliefs about the capacity of rehabilitative employees and to prevent crooked employers from taking advantage of rehabilitative employees without NLRA rights. In recognition of the valid arguments advanced by anticoverage advocates, however, the second presumption is not so broad as to extend NLRA protections when the employer is actively providing rehabilitation.

The second presumption creates several benefits. First, it forces the employer to provide services actively and regularly in order to avoid obligations under the NLRA. Actively providing services advances federal rehabilitation policy. The employer has an added incentive to notify employees of its rehabilitative services, which helps to avoid situations where an employee could work for the employer for years without knowing that help was available.²²² This presumption would also prevent illusory rehabilitation services from blocking employees' NLRA rights. If the employer refused to provide rehabilitation services and was in reality running a sweatshop of rehabilitative employees, then the employees could engage in NLRA protected activities to capture some of the employer's retained benefits.²²³

222. *Goodwill Indus. of N. Ga.*, 350 N.L.R.B. at 33-34.

223. See *Houston Lighthouse*, 696 F.2d at 406 (observing that many rehabilitation benefits could be obtained through collective bargaining).

VI. ADDRESSING POTENTIAL PROBLEMS WITH THE TWO-PRESUMPTION SOLUTION

A. Assumption that Providing Work Is Not a Rehabilitative Service

An employer may argue that providing work to individuals with disabilities is rehabilitation by itself, even without active counseling, training, or job placement programs.²²⁴ The Board, if it chose, could include the mere provision of work as evidence of rehabilitation. The Board should not adopt such a position, however, because it opens the door to sweatshop facilities without NLRA rights. In other contexts, the Board does not consider the availability of work in deciding whether to extend NLRA benefits. For example, small towns may have one dominant employer, such as a major factory, and yet those ordinary employees are not precluded from NLRA rights on the basis that the employer is probably the only place most of those employees could work. The Board should consider other “typically industrial, primarily rehabilitative”²²⁵ factors like minimal discipline, job placement programs, training, and counseling in order to determine whether the employer is providing rehabilitation rather than weighing the mere provision of work.

B. Incentivizing the Termination of Rehabilitative Employees After the Initial Period

This Note’s proposed test, unfortunately, may encourage the employer to terminate employees after six months once the presumption switches over.²²⁶ But if the Board were generous and consistent in determining what constituted rehabilitation, then the employer could have confidence that its employees are not entitled

224. *Ark. Lighthouse for the Blind v. NLRB*, 851 F.2d 180, 183 (8th Cir. 1988) (“Work is probably the most productive and successful method of rehabilitation for handicapped persons.”).

225. *Brevard Achievement Ctr., Inc.*, 342 N.L.R.B. 982, 993 (2004) (Members Liebman and Walsh, dissenting).

226. Congress observed that this “dumping” problem occurred under the Rehabilitation Act once federal funding expired. *See* S. REP. NO. 93-318, at 43 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2076, 2120.

to NLRA protections if it provides rehabilitative services. With this confidence, the employer would be less likely to terminate employees just before the presumption switched because it could rebut the presumption that the workers were section 2(3) employees. Alternately, the employees could invoke the principle that it is an unfair labor practice to refuse to hire an employee due to his or her NLRA-protected activities.²²⁷ By firing rehabilitative employees just before the six-month mark, employers essentially would be refusing to “hire” due to NLRA rights. This threat or actual charge may be enough of a deterrent to prevent the discriminatory discharges because the remedy for such NLRA violations includes reinstatement and backpay.²²⁸ Ultimately, even if the proposed presumptions cause higher turnover rates, perhaps it is in the best interest of the population of individuals with disabilities to have regular turnover in order to make sure that as many such individuals as possible have the opportunity for rehabilitation.

C. Conflicts Between Sections 8(a)(1) and 8(a)(3) and Maintaining the Employer’s Right To Discharge for Cause

There could be a problem if the employer provides rehabilitative services in order to discriminate against employees for exercising their NLRA rights. This situation would arise when a formerly rehabilitative employee continues to work for the rehabilitative employer after that employee gains NLRA rights by the second presumption. Renewing rehabilitative services would allow the employer to rebut the second presumption, removing NLRA protections. Sections 8(a)(1) and 8(a)(3) prohibit an employer from interfering with an employee’s section 7 rights or from taking an adverse employment action toward an employee due to that employee’s protected activities.²²⁹ Fortunately, this problem closely parallels situations in which an employer attempts to promote an employee to a supervisory position in order to remove that individual’s NLRA rights.²³⁰ In such cases, the Board’s focus is on whether

227. See *Love’s Barbeque Rest.* No. 62, 245 N.L.R.B. 78, 81 (1979).

228. See *id.* at 82.

229. NLRA § 8(a)(1), (3), 29 U.S.C. § 158(a)(1), (3) (2006).

230. *E.g., In re Rugby Mfg. Co.*, No. 18-CA-15802-1, 2002 WL 2029505 (NLRB Div. of Judges, Aug. 30, 2002) (finding NLRA violation when employer attempted to promote

the employer had a discriminatory intent behind its actions.²³¹ The Board has plenty of experience in examining an employer's motive in these situations and would be able to find NLRA violations if the employer did begin to discriminatorily provide rehabilitative services to employees.²³²

Looking at the employer's motivation also solves the problem of protecting an employer's right to terminate an employee for good cause. If an employer discharges a former rehabilitative employee from the rehabilitation program because the employee no longer needs the services, that discharge would be for good cause. The employer would have made room for a new individual who needs the program. If rehabilitative employees who wanted to protect their NLRA rights refused to attend any rehabilitation services, the employer could also discharge them for good cause, either for insubordination or because the employees' actions demonstrate that they no longer need a rehabilitative employment position. On the other hand, if the discharge were animated by union animus, the employees could pursue charges with the Board.

CONCLUSION

Rehabilitative employees are a special class of employees. The Board must be sensitive in determining how and when to grant NLRA rights to them. Although the federal government favors the employment of individuals with disabilities in rehabilitative settings, a blanket denial of NLRA rights to this class is dangerous because it enables employers to exploit workers. On the other hand, giving rehabilitative employees sweeping NLRA coverage is unwise because there are risks of overconsumption of resources and reduced willingness to create rehabilitation programs. The solution this Note provides navigates between these concerns by providing NLRA rights to employees with disabilities unless their employer is actively providing rehabilitation services or unless the employees are newly hired.

employee in order to weaken union support); *Steere Broad. Corp.*, 158 N.L.R.B. 487, 496 (1966) (finding NLRA violation for attempting to promote employee to supervisory position in order to remove him from a bargaining unit).

231. *Steere Broad.*, 158 N.L.R.B. at 496.

232. *Cf. id.*

In granting limited NLRA protections to rehabilitative employees, it is important to remember what the rehabilitative employees are receiving. NLRA rights are not a golden ticket. Rehabilitative employees simply would have all the same rights, with all the same problems, that normal employees have, such as difficulty in achieving a first collective bargaining agreement.²³³ They would probably face stiff employer resistance, as do most other organizing groups of employees.²³⁴ Under the employment-at-will doctrine, employers would retain the right to hire or fire anyone for any reason or no reason at all, so long as they did not discriminate on the basis of protected status or activity, like age, sex, religion, or section 7 rights.²³⁵ Section 7 rights are critical, however, in order for rehabilitative employees to protect themselves from long-term exploitation. The modified “typically industrial, primarily rehabilitative”²³⁶ test makes it more likely that rehabilitative employees will have section 7 rights.

The Board presently has an excellent opportunity to adopt this proposed solution. The Board disfavors rulemaking and prefers adopting decision-making rubrics through adjudication.²³⁷ The Supreme Court has recognized the Board’s authority to adopt forward-looking standards through the adjudication process.²³⁸ As this Note shows, when there is a Democratic majority on the Board, the Board recognizes NLRA rights for rehabilitative employees.²³⁹ After three years of vacancies, the Board is now fully staffed and

233. Only 56 percent of Board-recognized bargaining units achieve their first collective bargaining agreement. JOHN-PAUL FERGUSON & THOMAS A. KOCHAN, SEQUENTIAL FAILURES IN WORKERS’ RIGHT TO ORGANIZE 1 (2008), available at http://www.americanrightsatwork.org/dmdocuments/sequential_failures_in_workers_right_to_organize_3_25_2008.pdf.

234. See *Lighthouse for the Blind of Houston*, 248 N.L.R.B. 1366, 1369 (1980) (holding that the employer violated sections 8(a)(1) and 8(a)(5) by refusing to recognize a union as the representative of blind employees, refusing to bargain, and refusing to provide information), enforced, 696 F.2d 399 (5th Cir. 1983).

235. Charles J. Muhl, *The Employment-at-Will Doctrine*, 124 MONTHLY LAB. REV. 3, 3 & n.3 (2001).

236. *Brevard Achievement Ctr., Inc.*, 342 N.L.R.B. 982, 993 (2004) (Members Liebman and Walsh, dissenting).

237. See *supra* notes 115-16 and accompanying text.

238. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (“[T]he Board is not precluded from announcing new principles in an adjudicative proceeding.”).

239. See *supra* note 105 and accompanying text.

has a Democratic majority.²⁴⁰ Moreover, current Chairwoman Wilma B. Liebman wrote a biting dissent against the denial of NLRA rights to rehabilitative employees in *Brevard*.²⁴¹ The current Board thus has the authority and predisposition to adopt the modified standard. This Note's test is a reasonable method for extending NLRA rights to rehabilitative employees, and it does so in a manner that is less capricious than the current test and more responsive to the policy considerations on both sides of the coverage issue. The Board should adopt the proposed test, because there are simply certain cases in which rehabilitative employees should not be left out in the cold.

*Justin C. Sorrell**

240. *After 3 Years, Labor Board Seats Are Full*, N.Y. TIMES, June 23, 2010, at A15.

241. *See Brevard*, 342 N.L.R.B. at 989-96.

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