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**NLRB HOLDS THAT DISABLED WORKERS
IN PRIMARILY REHABILITATIVE SETTING
ARE NOT STATUTORY EMPLOYEES**

The National Labor Relations Board, in a 3-2 decision involving Brevard Achievement Center (BAC), concluded that disabled workers who are in a primarily rehabilitative relationship with their putative employer are not statutory employees within the meaning of the National Labor Relations Act. The majority opinion, by Chairman Robert J. Battista, and Members Peter C. Schaumber and Ronald Meisburg, emphasized that the Board has never asserted jurisdiction over relationships that are primarily rehabilitative in nature. Members Wilma B. Liebman and Dennis P. Walsh dissented. The decision, dated September 10, 2004 and made public today, is posted on the Board's Web site at www.nlr.gov.

Consistent with its recent decision in *Brown University*, 342 NLRB No. 42 (2004) (finding that graduate student assistants are not statutory employees because their relationship with their employer is “primarily educational”), the Board again set forth its interpretation of Section 2(3) of the Act. Reading that section in context with the other sections of the statute, the Board concluded that the Act was intended by Congress to cover primarily economic relationships between employer and employee. “The imposition of collective bargaining on relationships that are not primarily economic does not further the policies of the Act,” it stated. Finding its longstanding rule that it will not assert jurisdiction over relationships that are “primarily rehabilitative” to be consistent with this statutory interpretation, the Board reaffirmed its “primarily rehabilitative” standard as the test for assessing the “employee” status of disabled workers in rehabilitative programs.

The Board thereafter applied the primarily rehabilitative standard to the facts of the case:

Although the disabled clients work the same hours, receive the same wages and benefits, and perform the same tasks under the same supervision as the nondisabled employees, they work at their own pace, and performance problems are dealt with through additional training rather than discipline. These policies support a determination that the relationship between BAC and its clients is primarily rehabilitative, not motivated principally by economic considerations.

Noting the factual similarities between the case and the Board's prior decisions in *Goodwill Industries of Tidewater*, 304 NLRB 767 (1991) and *Goodwill Industries of Denver*, 304 NLRB 764 (1991), the Board concluded that BAC's disabled workers are not statutory employees.

The majority voiced its concern that the imposition of collective bargaining on a primarily rehabilitative relationship would run the risk of interfering with the rehabilitative process. The majority also noted that Congress has not deemed it appropriate to change the Board's longstanding doctrine to refrain from exercising jurisdiction over those relationships.

In dissent, Members Liebman and Walsh observed that this case "presents the Board with the perfect opportunity to revisit longstanding precedent governing disabled workers in light of a legal and policy landscape that has evolved dramatically in the last 15 years." They stated that they would abandon doctrines which, they argued, were based on outdated notions about the place of the disabled in society.

In the dissent's view, the disabled workers are statutory employees, as they come within the common-law meaning of the term "employee" and they are not specifically exempted from the Act's coverage. Contrary to the majority's position that the employment relationship must be primarily economic, the dissent concluded, "economic activity need not be the sole, or even dominant, purpose of a cognizable employment relationship."

The dissenting Members asserted that the majority's decision "ignores the plain language of the Act, invades the legislative arena, and contravenes contemporary federal policy." They contended the majority "relegates the Employer's disabled janitors and all similarly-situated workers to the economic sidelines, making them second-class citizens both in society and in their own workplaces."

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