

Insight

IN-DEPTH DISCUSSION

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NLRB Expands Jurisdiction in Church-Operated Schools, Distinguishing Between "Religious" and "Secular" Instruction in Faculty Bargaining Unit Cases

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In two recent cases, the National Labor Relations Board distinguished between faculty members providing secular instruction and those providing religious instruction, in concluding that only those providing religious instruction were exempt from National Labor Relations Act coverage. In so doing, the Board applied its own test for religious exemption and expanded its jurisdiction beyond what the U.S. Supreme Court had deemed appropriate for a church-operated school.

Since 2014, the National Labor Relations Board has expanded the inclusive nature of contingent faculty bargaining units at self-identified religious colleges or universities, raising concerns under the Free Exercise and Establishment Clauses of the First Amendment. The U.S. Supreme Court first addressed this issue in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). The Court held that Congress did not affirmatively intend to bring teachers of church-operated schools within the NLRB's jurisdiction and, further, that to do so would pose a significant risk to First Amendment rights. Therefore, the Court found the NLRB lacked jurisdiction over the teachers of church-operated schools, finding that it would not construe the National Labor Relations Act in a way that forced the Court "to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses."

Expanding on this rationale, in *University of Great Falls v. NLRB*, 278 F.3d 133 (D.C. Cir. 2002), the D.C. Circuit established a three-part test for determining whether the Board would have jurisdiction over faculty members of the Catholic-affiliated University. Under that test, the Board would have jurisdiction unless the college or university: "(a) holds itself out to students, faculty and the community as providing a religious educational environment;

(b) is organized as a nonprofit; and (c) is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion.”

NLRB Adopts Different Standard Post-Great Falls

In 2014, the NLRB adopted its own two-part test in *Pacific Lutheran University*, 361 NLRB No. 157 (2014), which would exempt faculty from jurisdiction under the Act. Under that test, if the university or college demonstrates that: (a) it holds itself out as providing a religious educational environment; and (b) it shows that the petitioned-for faculty members perform a specific role in creating or maintaining the religious educational environment, faculty are exempt from jurisdiction under the Act.

Using this as a backdrop, the NLRB recently decided two cases that involve faculty bargaining units at universities affiliated with a recognized religious organization.

In *Seattle University and Service Employees International Union, Local 925*, Case 19-RC-122863 (Aug. 23, 2016), the union sought to represent all non-tenure eligible faculty other than those teaching nursing and law. Seattle University is a private, nonprofit university founded in 1891 by the Jesuits, and it holds itself out as a religious institution. In a two-to-one decision, the Board found that the university met the first prong of the *Pacific Lutheran University* test in that it holds itself out as providing a religious educational environment. On the second prong, the NLRB found that the majority of the petitioned-for unit generally “does not play a role in creating or maintaining the university’s religious educational environment” and thus the non-tenure eligible faculty are generally covered by the NLRA. However, the Board held that the non-tenure eligible faculty in the university’s Department of Theology and Religious Studies and in the School of Theology and Ministry meet the second prong of *Pacific Lutheran University* and are to be excluded from the bargaining unit because the performance of their responsibilities would require furtherance of the university’s religious mission.

Saint Xavier University and Saint Xavier University Adjunct Faculty Organization, IEA-NEA, Case 13-RC-022025 (Aug. 23, 2016) involved substantially similar facts as those in *Seattle University*, except the petitioned-for bargaining unit here consisted of all part-time faculty at the university other than those in the School of Nursing. Saint Xavier University is also a private, non-profit university, is located in Chicago and Orland Park, Illinois, and was established in 1846 by the Sisters of Mercy. For essentially the same reasons, the Board denied review on the determination that the Act generally covers the bargaining unit and found that while the university met the first prong of *Pacific Lutheran*, it failed to satisfy the second prong, except as to the part-time faculty in the Department of Religious Studies.

Member Miscimarra dissented in both cases. He opined that the Board’s holdings conflict with the instruction by the Supreme Court in *Catholic Bishop of Chicago*, which is controlling on this issue. Miscimarra would have granted the request for review in its entirety in both cases for three reasons. First, there are First Amendment problems created by applying the *Pacific Lutheran* test because the distinction made by the majority between secular faculty and religious faculty would entangle the courts in defining what constitutes secular versus religious instruction, which is forbidden by *Catholic Bishop*. Second, the Board should have applied the three-part test articulated in *Great Falls*. And third, even if the *Pacific Lutheran* test is applied, review should have been granted on the entire petitioned-for unit because there is a substantial issue raised as to the role played by the “secular” faculty in advancing both of the universities’ religious educational environment.

What This Means

Both the majority and dissenting decisions in these two cases recognize the Board's need to apply the principles outlined in *Catholic Bishop*. The majority found that the two-part test in *Pacific Lutheran* was consistent with *Catholic Bishop*, whereas the dissent argued for the three-part test in *Great Falls*. At a closer glance, the Supreme Court stated that the Act must be construed to exclude teachers in church-operated schools given the concerns with violating the Religion Clauses of the First Amendment. While the Board argued in *Catholic Bishop* that it will not be called upon to resolve factual issues, the Court observed that previous charges of unfair labor practices filed against religious schools were the result of actions that the schools argued were mandated by their religious creeds. The process of inquiry conducted by the Board and its conclusions in those cases may impinge on rights guaranteed by the First Amendment.

In *Catholic Bishop*, the Court did not engage in a constitutional analysis of whether the First Amendment was violated by the Board's exercise of jurisdiction. Instead, the Court conducted a statutory analysis and found that Congress did not contemplate that the Act would confer jurisdiction over teachers at church-operated schools. The Court underscored the fact that there is still a danger that some aspect of faith or morals will be intertwined with the teacher's handling of a secular subject.

The majority decision in these two cases clearly draws a sharp distinction between faculty teaching "secular" subjects and those teaching "religious" subjects. That distinction is precisely why the majority found that the NLRB has jurisdiction over most of the petitioned-for faculty, except the faculty who teach courses with religious content. The Board certainly is resolving the type of difficult and sensitive First Amendment questions that the Supreme Court refused to address in *Catholic Bishop*. The Supreme Court explicitly found that the NLRB did not have jurisdiction over teachers in church-operated schools, whereas the majority in *Seattle University* and *Saint Xavier University* found that the Board does have jurisdiction over most teachers in religious institutions, except those who teach courses with religious content.

Therefore, questions remain as to the viability of the Board's decisions. Does the *Pacific Lutheran* test violate the First Amendment of the Constitution? Is the *Pacific Lutheran* test consistent with the Supreme Court's decision in *Catholic Bishop*? Will the universities appeal these decisions and possibly lead to the Supreme Court deciding this issue once and for all?

Recommendations

Church-affiliated schools should focus on the majority's decision highlighting the inquiry that is undertaken to determine the second prong of the *Pacific Lutheran* test. As indicated in the decision, the first prong is designed to be a "minimal burden" on the employers and can easily be satisfied through its mission statement, course catalogues, or website references that demonstrate the employer holds itself out to the public as providing a religious educational environment. The second prong is where the employers failed in *Pacific Lutheran*, *Seattle University*, and *St. Xavier University*.

In analyzing the second prong, the Board asks "whether a prospective applicant [for a faculty position] would conclude that performance of [her] faculty responsibilities would require furtherance of the college or university's religious mission." To evaluate this prong, the Board scrutinizes "the school's own statements, particularly job advertisements and descriptions, employment contracts, employee handbooks, and similar documents."

Therefore, church-affiliated schools should consider updating their websites, job descriptions, employee handbooks, employment contracts, and all other documents that describe a teacher's function at their institution. These documents should contain language regarding the importance of all faculty in furthering the religious mission of the institution. The language should also contain the specific application of certain religious creeds in everyday instruction. Given the new distinction drawn by the Board in these two recent decisions, it is imperative that this language is present in all documents regarding faculty teaching "secular" subjects.