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D.C. Circuit Vacates NLRB Decision, Reinforcing Board's Limited Jurisdiction over Religious Schools

Labor Relations Update on **January 31, 2020**

Similar to other disagreements between the NLRB and D.C. Circuit (see here for a recent example), a tension developed during the last several years regarding the appropriate standard to determine whether teachers at religious schools are covered by the NLRA and within the Board's jurisdiction, or whether the Religion Clauses of the First Amendment preclude NLRA-coverage.

Most recently, in *Duquesne Univ. of the Holy Spirit v. NLRB,* No. 18-1063 (D.C. Cir. Jan. 28, 2020), the D.C. Circuit reinforced its own standard, established in a 2002 Circuit decision, finding that as long as the school (1) holds itself out to the public as a religious institution, (2) is non-profit, and (3) is religiously affiliated, then the Board lacks jurisdiction over all faculty. *See University of Great Falls v. NLRB,* 278 F.3d 1335, 1341 (D.C. Cir. 2002). If this standard is met, then all faculty members are exempt from the NLRA, regardless of the subjects the faculty members teach, or how the school holds out the faculty members vis-à-vis the school's religious objectives.

In this case, the D.C. Circuit rejected the Board's more expansive test, established in a 2014 decision, which provided the agency would assert jurisdiction over the religious school if the school does not hold out the faculty members as playing a specific role in the school's religious educational environment. *See Pacific Lutheran University,* 361 N.L.R.B. 1404 (2014).

Factual Background

Duquesne University is a non-profit, Catholic institution in Pennsylvania that is home to both undergraduate and graduate students. The school's curriculum includes secular and religious-based courses. Several years ago, some of the adjunct professors sought to join a union, and Duquesne responded that the NLRA did not authorize the Board's jurisdiction in light of the First Amendment. The teachers and union responded that the adjunct faculty were not required to "perform specific religious roles at the school," and the Act could apply to them. The union prevailed in an election. Duquesne refused to bargain and the union initiated a refusal to bargain unfair labor practice charge under Section 8(a)(5) of the Act.

Evolution of the Standard for Determining NLRB Jurisdiction Over Religious Schools

The basis for the Board to decline to exercise jurisdiction of religious schools is grounded in the First Amendment, which provides that the government will not interfere with religious practices, and guarantees religious organizations "independence from secular control or manipulation." *See* *Hosanna-Tabor Evangelical Lutheran Church & Sch. V. EEOC,* 565 U.S. 171, 199 (2012) (Alito, J., joined by Kagan, J., concurring). While the Board "generally will not assert jurisdiction over nonprofit, religious organizations" and will avoid disputes between such organizations and their employees, the Supreme Court has drawn the line as follows: religious schools that are "completely religious" are outside of the Board's jurisdiction, while schools that are merely "religiously associated" are within the Board's grasp. *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 500, 507 (1979).

Applying this standard, in 2002, the D.C. Circuit, on appeal of a NLRB decision, articulated a bright-line, three-factor test (known as the *Great Falls* test) to determine whether the Board may exercise jurisdiction over a religious school. If the institution: (a) holds itself out to the public as a religious institution; (b) is a non-profit; and (c) is religiously affiliated, then the Board must decline to exercise jurisdiction.

Twelve years later, the Board departed from the *Great Falls* test and espoused a different standard: in order to avoid the Board's jurisdiction, a religious institution must first show that it "holds itself out as providing a religious educational environment" (akin to the three-factors outlined above), ***and*** then, it must show that it considers the faculty members to perform a "specific role in creating or maintaining the … university's religious educational environment." *Pacific Lutheran University,* 361 N.L.R.B. 1404 (2014). The additional component may mean that even if a school is religious in nature, some faculty members could be exempt from the NLRA, while others could not.

Application

In this case, the Regional Director held that under the *Pacific Lutheran* test, the agency could exercise jurisdiction over the adjunct professors who, the Regional Director concluded, lacked a role in creating or maintaining the university's religious educational environment.

On appeal, the D.C. Circuit reversed and rejected the *Pacific Lutheran* test, concluding that the standard ran afoul of Supreme Court precedent in *Catholic Bishop of Chicago*; in that case, the Supreme Court concluded that all teachers at a religious school can implicate the school's religious mission, and thus if the school was sufficiently religious in nature, the Board lacked jurisdiction over all teachers at the school. According to the D.C. Circuit, the Supreme Court's decision forecloses application of *Pacific Lutheran*.

Since Duquesne met each of the three *Great Falls* factors – even the NLRB conceded as much – then the Board lacked jurisdiction over the adjunct faculty.

Judge Pillard dissented and couched the issue of whether religious-school employees who arguably do not embody the school's religious mission as a matter left open by the Supreme Court's decision and the Court's own *Great Falls* test. Judge Pillard endorsed the Board's approach for such circumstances.

Takeaways

The D.C. Circuit's decision reinforces the Board's limited authority over faculty at religious schools and the independence of religious organizations, favoring a clear, bright-line test that limits the Board's jurisdiction, rather than a standard that could blur the line of demarcation.

The challenge for religious schools is that "Board law" for future cases is still *Pacific Lutheran*, as only a subsequent NLRB decision overturning prior precedent or a Supreme Court decision will change that fact. The Board frequently chooses not to follow federal circuit court decisions, usually treating an adverse decision as the "law of the case." Nevertheless, as a practical matter, any employer can appeal any unfair labor practice determination by the NLRB to the D.C. Circuit, so as the dissenting NLRB members remarked in *Duquesne,* any attempt by the Board to "chart a different path appears predestined to futility."

It bears watching whether another case with similar facts reaches the Board this term, which may give the Board an opportunity to formally overturn *Pacific Lutheran* and adopt the *Great Falls* test as Board law. As we have blogged about recently, the Board has done just that in other similar disagreements with the D.C. Circuit; most recently, in adopting the "contract coverage" test long-applied by the D.C. Circuit when determining if an employer's unilateral act violated Section 8(a)(5).

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