

Circuit Court Once Again Reins in NLRB Over Jurisdiction

This week, the U.S. Court of Appeals for the District of Columbia Circuit decided the matter of *Duquesne University of the Holy Spirit v. National Labor Relations Board*, and held, once again, that the Board's effort to extend jurisdiction over the organization of faculty at religious colleges and universities is constitutionally deficient. The case involved the attempted organization of a unit of adjunct faculty. In vacating the Board's holding, the Circuit Court struck a blow for the self-control of religious institutions of higher education.

Since the 1970's, there has been a dynamic tension between the NLRB and the courts over whether teachers in religious schools should be considered "employees" under the National Labor Relations Act. The Board attempted to avoid the strictures of the First Amendment Religion Clauses by distinguishing between those schools it determined to be "completely religious" and those that were merely "religiously associated." The Board held that it had jurisdiction over this latter group. In the seminal case on the issue, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Supreme Court rejected this distinction and held that the First Amendment prevented the Board from exercising jurisdiction over employees in both classes of institutions. The Supreme Court made the broad assertion that teachers in religious schools play a critical and unique role in fulfilling the mission of a church-operated school regardless of whether the teacher provides instruction in religious or secular subjects. 440 U.S. at 501.

Despite the breadth of the Supreme Court's holding in 1979, the NLRB continued in its attempt to gain a jurisdictional foothold in the area. Shortly after *Catholic Bishop of Chicago*, the Board suggested that case was limited to primary and secondary schools; holding that colleges and universities were different because the students were "less susceptible to religious indoctrination." The Board also decided that it could have jurisdiction over those schools that provided a "secular education" rather than inculcating religious values. Again, however, the courts rejected these arguments. In *Universidad Central de Bayamon v. NLRB*, 793 F. 2d 383 (1st Cir. 1985) (evenly divided en banc), the Court declined to approve a distinction over curriculum, holding that the very inquiry needed to make such a determination would create the religious entanglement that the First Amendment was intended to avoid.

The Board revisited the issue in 2000, when it asserted jurisdiction over faculty at a religious college in *University of Great Falls*, 331 NLRB 1663 (2000). In *Great Falls*, the Board attempted to distinguish and claim jurisdiction over schools that lacked a "substantial religious character." The Circuit Court for the District of Columbia Circuit, however, rejected this distinction, employing the same analysis as the First Circuit Court did in *Bayamon*: to determine whether the school is "sufficiently religious" is the same question that courts had found to be unacceptable since *Catholic Bishop*. The Circuit Court offered a bright line test to the Board for questions of jurisdiction relating to faculty in a religious school: a) does the institution hold itself out to the public as a religious institution; b) is it nonprofit; and c) is it religiously affiliated. 278 F. 3d 1335, 1347 (D.C. Cir. 2002). Significantly, each prong of this test focused on the institution and not on an individual teacher or the subject taught.

The Board deviated from the court's bright line test in a subsequent case involving Carroll College, resulting in the D.C. Circuit Court vacating the Board decision in a strongly worded opinion. *Carroll College v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009). The Board then created a new test of its own to determine jurisdiction. In *Pacific Lutheran University*, 361 NLRB 1404 (2014), a case involving a potential bargaining unit of both full time and adjunct faculty, the Board held, over the strong objection of two members, that an employer seeking to avoid jurisdiction by the Board must show: 1) it holds itself out as providing a religious educational environment, and 2) must also show that it holds out the faculty who are being petitioned-for as performing a specific role in creating or



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maintaining the school's religious educational environment. Although this test deviated from that enunciated by the D.C. Circuit Court in *Great Falls*, the Board continued to apply this test in numerous cases in the years subsequent to 2014.

It was this *Pacific Lutheran* test that the Board applied in 2017 in the case of the adjunct faculty at Duquesne. The response of the Circuit Court majority was unequivocal: "Applying *Great Falls*, the Board lacks jurisdiction. The parties do not dispute that Duquesne satisfies the test. Nor could they ... *Great Falls* is a bright-line test. If it is satisfied, the school is altogether exempt from the NLRA and the Board must decline to exercise jurisdiction." (Slip Op. at page 15-16).

In dissent, Circuit Judge Pillard attempted to make a distinction that had not been raised throughout the litigation: that this was a case about adjunct faculty, who are more similar to non-teaching employees of the university, who are subject to the Board's jurisdiction. The majority, however, took exception to the distinction of adjunct faculty. ("Adjuncts teach students, thus performing the critical and unique role of the teacher in fulfilling the mission of a church-operated school.") (Slip Op. at page 21). The court majority also held that they are not resolving the extent of the Board's jurisdiction in cases involving religious schools and their non-faculty employees. In reply to this distinction drawn by the dissent, the majority replied that language in *Great Falls* and *Carroll College* exempts institutions from the Board's jurisdiction; not employees. Thus it would appear that two members of the panel would conclude that asserting jurisdiction over non-faculty employees is also not permitted.

While the proposed unit at Duquesne University is less than 100 faculty members, the impact of this decision will be more broadly felt among the many religious institutions of higher education. The application of the *Great Falls* jurisdictional test over that of *Pacific Lutheran* will impact all future attempts at organizing by faculty at religious schools. More directly, as noted in a footnote in the court's opinion, the Board had applied *Pacific Lutheran* to accept jurisdiction in numerous cases since 2014. In some of those cases, petitions for review were filed by the colleges, which were being held in abeyance pending the decision in *Duquesne University*. Those matters will now be addressed.

Finally, further control appears imminent for private institutions of higher education, both religious and secular, as the NLRB has this week extended its time for written comment to its proposed rule establishing that students who perform services for compensation, including teaching and research, are not "employees" under the Act.
