

June 12, 2020

NLRB Reverses Course and Rules Faculty at Religious Institution of Higher Education Are Not Protected by NLRA

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In *Bethany College* decided June 10, 2020, the National Labor Relations Board (NLRB or The Board) ruled that it does not exercise jurisdiction over faculty members at religious institutions of higher education. In so holding, the NLRB reversed course on its previous attempts to assert jurisdiction. The NLRB overruled *Pacific Lutheran University*, an Obama-era ruling, and adopted the three-pronged jurisdictional test announced by the United States Court of Appeals for the District of Columbia Circuit in *University of Great Falls v. NLRB*.

History of Board Decisions

The NLRB and federal courts have long been at odds regarding whether or not the National Labor Relations Act (the Act) covers employees working at a religiously affiliated school. Historically, the NLRB has made frequent attempts to assert its jurisdiction over these schools and their employees while the Supreme Court and federal district courts have consistently rejected the Board's attempts.

In its 1975 decision *Catholic Bishop of Chicago*, the Board first asserted jurisdiction over teachers at two groups of Catholic high schools in the Diocese of Fort Wayne-South Bend in Indiana. In its decision, the Board relied on its policy of declining jurisdiction over religious based educational employers where "they were 'completely religious, not just religiously associated.'"

In 1979, the United States Supreme Court reviewed the NLRB's decision and in *NLRB v. Catholic Bishop of Chicago*, the Court rejected the NLRB's assertion of jurisdiction stating that if the Act covered church-operated schools and their teachers, there would be "significant risk that the First Amendment will be infringed." The Court went on to explain that it would not construe the Act to permit the Board's

exercise of jurisdiction over church-operated schools “in the absence of a clear expression of Congress’ intent” to bring them under the Act.

Over the course of the following decades, the Board attempted to test the limits of the Supreme Court’s *Catholic Bishop* decision, trying to assert its jurisdiction on a case-by-case basis evaluating whether a religiously affiliated school had a “substantial religious character.” These attempts and the “substantial religious character” test were consistently rejected by reviewing federal courts, even when applied to college-level education. One of those decisions was the aforementioned *Great Falls* decision rendered by the D.C. Court of Appeals in 2002.

Great Falls Decision and the Three-Prong Test

In *Great Falls*, the D.C. Circuit rejected the “substantial religious character” test and promulgated a three-prong test to determine jurisdiction. The D.C. court found that the “substantial religious character” test involved the same “exact kind of questions into religious matters which *Catholic Bishop* specifically sought to avoid” with the NLRB “trolling” through the beliefs and the mission of the University. Under the three-prong test, the Board must decline jurisdiction over a religious based educational institution that:

- (1) holds itself out to students, faculty, and community as providing a religious educational environment;
- (2) is organized as a non-profit; and
- (3) 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.

Pacific Lutheran University

The Board again attempted to test the limits of *Catholic Bishop* in its 2014 *Pacific Lutheran University* ruling. The Board again found that in addition to a University holding itself out as creating a religious environment, a religious college or university seeking to establish that it was exempt from the Board’s jurisdiction also had to show that the faculty members seeking to unionize or asserting rights under the Act *themselves* were being held out by the university or play a specific role in creating the religious educational environment. This second-step inquiry into the role played by the specific faculty members became a focal point of a new jurisdictional test.

The Board Changes Course and Adopts Three-Prong Test in *Bethany College*

In its *Bethany College* decision on June 10, the Board ruled that it does not have jurisdiction over matters concerning teacher or faculty at *bona fide* religious educational institutions and that Bethany College is in fact a *bona fide* religious educational institution. It further held that the appropriate test to evaluate whether an educational institution is a *bona fide* religious educational institution is the three-prong test promulgated in *Great Falls*.

Bethany College is a 501(c)(3) institution located in Lindsborg, Kansas. It is a ministry of the Evangelical Lutheran Church in America and is owned and operated by the Central States Synod and the Arkansas/Oklahoma Synod. The Board relied on the College’s handbook to find that the first prong of the test was met, and that the College holds itself out as providing a religious educational environment. The second prong was met due to the College’s 501(c)(3) status. Finally, Central States and

Arkansas/Oklahoma Synods ownership of the College was sufficient evidence to meet the third prong of the test.

Key Takeaways for Higher Education Institutions

This is a monumental decision by the Board impacting *bona fide* religious educational institutions. The Board now is in lock-step with federal courts and the Supreme Court and recognizes that the Act does not apply to employees of *bona fide* religious educational institutions.

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