

THOUGHT LEADERSHIP

LEGAL UPDATES

PUBLISHED: FEBRUARY 17, 2020

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No NLRB Rights for Adjunct Faculty at Religious University

The U.S. Court of Appeals for the D.C. Circuit recently issued a decision in *Duquesne University of the Holy Spirit v. NLRB*, which resulted in the denial of collective bargaining rights to adjunct faculty members employed by Duquesne University (Duquesne), a religious university. The court held that the National Labor Relations Board (NLRB) lacked jurisdiction over the religious institution, including all of its faculty members, consistent with the Supreme Court's prior decision, *NLRB v. Catholic Bishop of Chicago (Catholic Bishop of Chicago)* and the D.C. Circuit's own bright-line test established in *University of Great Falls v. NLRB (Great Falls)*.

Key points

The NLRB lacks jurisdiction over labor matters involving faculty at educational institutions that: (1) hold themselves out as religious; (2) are non-profit; and (3) are religiously affiliated.

The secular versus religious nature of the faculty members' specific roles are irrelevant to the determination of whether the NLRB can assert jurisdiction over a religious school.

The court rejected the NLRB's position that it could assert jurisdiction over those specific faculty members who were not held out by the institution as having religious roles.

An 8-year legal battle challenging the right of adjunct faculty to organize at religious university

In 2012, a majority of the adjunct faculty members voted to unionize at Duquesne. Duquesne requested the NLRB vacate and dismiss the petition to

certify the union as the exclusive bargaining agent of the adjunct faculty because the NLRB lacked jurisdiction over the religious institution due to the potential infringement of Duquesne's First Amendment rights. The parties did not dispute that Duquesne was a non-profit university affiliated with the Catholic Church that held itself out to the public as a religious institution.

In 2017, the NLRB excluded adjunct faculty members who teach theology from the bargaining unit and asserted its authority to exercise its jurisdiction based on its 2014 decision in *Pacific Lutheran University (Pacific Lutheran)*. Duquesne, however, refused to bargain, which resulted in the filing of an unfair labor charge against Duquesne. In 2018, the NLRB declined to review the jurisdictional issue and ordered Duquesne to bargain with the union. Duquesne petitioned the D.C. Circuit Court for review of the NLRB's decision.

Court applies bright-line test under *Great Falls*

In rejecting the NLRB's position, the court reflected on the history of the NLRB's various attempts to exercise jurisdiction over religious organizations. Beginning in 1979, the U.S. Supreme Court issued the "seminal decision" in *Catholic Bishop of Chicago*, holding that the NLRB may not exercise jurisdiction over teachers in church-operated schools regardless of whether teachers provide religious or secular instruction. The Supreme Court concluded that an exercise of jurisdiction would impermissibly entangle the NLRB in the internal affairs of the religious organization in violation of the organization's First Amendment rights.

Subsequently, in 2000, the NLRB attempted to carve out an exception and exert jurisdiction over religious schools that lack a "substantial religious character." The court rejected this inquiry into the religious beliefs of the organization characterizing such as an "intrusive inquiry" of the very type the Supreme Court sought to avoid in *Catholic Bishop of Chicago*. Because the attempts to segregate secular and religious activities necessarily led to impermissible inquiries into the affairs of the religious organization, the court developed a simple bright-line test to determine whether a religious organization is exempt from the NLRB. The test, set forth in *Great Falls*, determined that an entity is exempt from the NLRB if the entity:

Holds itself out to the public as a religious institution;

Is a non-profit; and

Is religiously affiliated.

According to the court, "any school that satisfies this test is exempt from the NLRB's jurisdiction." The court further emphasized that the NLRB's inquiry into the school's public representations about its religious environment was limited. The NLRB is precluded from delving into the sincerity of the

school's public representations, the extensiveness of the religious environment or the religious significance of faculty roles.

Using the bright-line test established in *Great Falls*, the court held that Duquesne satisfies the *Great Falls* test, and that the NLRB lacked jurisdiction.

Court rejects board's *Pacific Lutheran* test

In addition to vacating the NLRB's decision, the court rejected the NLRB's test established in the *Pacific Lutheran* decision that the NLRB applied to extend its jurisdiction over Duquesne. In *Pacific Lutheran*, the NLRB conceded that it neither had adopted nor rejected the Circuit Court's test set forth in *Great Falls*. Then, the NLRB adopted a new test that *presumed* jurisdiction of the NLRB over faculty members at an institution of higher learning unless the institution:

Held itself out as providing a religious educational environment, and

Held the faculty out as "performing as specific role in creating or maintaining the school's religious educational environment."

The NLRB had exercised jurisdiction over Duquesne upon determining that Duquesne did not satisfy the second part of the NLRB's *Pacific Lutheran* test, namely, that the adjunct faculty, excluding the theology department, were held out as performing a religious role at Duquesne.

The court rejected the NLRB's *Pacific Lutheran* test as being inconsistent with the Supreme Court's prior decision in *Catholic Bishop of Chicago*. The court held the only criteria a religious institution must satisfy to be exempt from the NLRB are the three criteria set forth in *Great Falls*. If the NLRB lacks jurisdiction over the religious institution, it lacks jurisdiction over all teachers and faculty of that institution, irrespective of whether those teachers and faculty have a specifically religious function.

What this means to you

The *Duquesne* decision reflects the court's continued resolve to protect the independence of religious organizations from government encroachment under the religion clauses of the First Amendment. The *Duquesne* decision, denying the application of federal labor laws to religious organizations, sets the stage for two cases set for oral argument on April 1, 2020, in the Supreme Court: *Our Lady of Guadalupe School v. Morrissey-Berru* and *St. James School v. Biel*. The consolidated cases address the issue of whether the *Hosanna-Tabor* religious exemption precludes Catholic school teachers from asserting claims under federal employment anti-discrimination laws against their religious employers.

Contact us

If you have questions about faculty collective bargaining rights in light of the recent decision, contact Terry Potter, Derek Teeter or your Husch Blackwell attorney.

Tracey Oakes O'Brien is a contributing author of this content.