

NLRB Seeks To Expand Jurisdiction Over Educational Institutions with Religious Affiliations

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An Administrative Law Judge (ALJ) of the National Labor Relations Board (Board) recently issued a decision which hints that changes might be on the horizon for how the National Labor Relations Act (Act) is applied towards educational institutions with religious affiliations. *Saint Leo University Inc.*, 2023 WL 2212789 (2023). The Board's assertion of jurisdiction over religious institutions reflects a balancing between the First Amendment of the United States Constitution and the rights of an institution's employees under the Act. *University of Great Falls v. NLRB*, 278 F.3d 1335, 1343-44 (D.C. Cir. 2002). The test the Board currently applies in determining whether it has jurisdiction over an employer with religious affiliations is found in *Bethany College*, 369 NLRB No. 98 (2020). General Counsel Abruzzo indicated her interest in replacing the *Bethany College* standard with a new standard in her Mandatory Submissions to Advice. NLRB Gen. Counsel. Mem. 21-04, at 5 (Aug 12, 2021).

In *Bethany College*, the Board adopted the test espoused by the United States Court of Appeals for the D.C. Circuit (D.C. Circuit) in *Great Falls*. The Board in *Bethany College* acknowledged that it "must decline to exercise jurisdiction' over an institution that (a) 'holds itself out to students, faculty, and 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.'" 369 NLRB No. 98, slip op. at 3 (*quoting Great Falls*, 278 F.3d at 1343-44, 3147 & n.2).

The *Bethany College* Board overruled the previous standard set forth by the Board in *Pacific Lutheran*, 361 NLRB 1404 (2014). The *Pacific Lutheran* standard for Board jurisdiction over educational institutions required that an institution claiming exemption from Board jurisdiction:

[M]ust first demonstrate, as a threshold requirement, that First Amendment concerns are implicated by showing that it holds itself out as providing a religious educational environment. Once that threshold requirement is met, the university must then show that it holds out the petitioned-for faculty members themselves as performing a specific role in creating or maintaining the college or university's religious educational environment, as demonstrated by

its representations to current or potential students and faculty members, and the community at large.

Id. at 1414.

In *Saint Leo University Inc.*, the ALJ dismissed the General Counsel's complaint under the *Bethany College* standard, but acknowledged that the General Counsel took the position "that the Board should abandon *Bethany College*, the current state of the law regarding the religious institution exemption, and return to its prior standard in *Pacific Lutheran*]." 2023 WL 2212789 (2023). However, the General Counsel's post-hearing brief to the ALJ makes clear that General Counsel Abruzzo does not merely want to return to the *Pacific Lutheran* standard, writing:

"[T]he General Counsel urges that the Board return to the jurisdictional standard articulated in *Pacific Lutheran* with a minor modification. Under *Pacific Lutheran*, the Board will assert jurisdiction over a private college or university unless the institution holds itself out as providing a religious educational environment, and faculty perform a specific role in creating or maintaining the institution's religious educational environment. The modification that the Board should adopt is that it should consider all marketing representations made by an institution to students, faculty, and the community at large in examining whether the institution consistently holds itself out as providing a religious educational environment."

Counsel for the General Counsel's Brief to the Administrative Law Judge, *Saint Leo University Inc.*, 12-CA-275612, et. al., at 3-4.

Thus, the General Counsel wants to make it even *more* difficult for religious institutions to successfully claim exemption from the Board's jurisdiction than under the prior *Pacific Lutheran* standard. The General Counsel's position, with an additional hurdle, is made more curious by the D.C. Circuit's decision in *Duquesne University v. NLRB*, 947 F.3d 824 (D.C. Cir. 2020). There, in refusing to order Duquesne University to bargain with a union the Board had certified under the *Pacific Lutheran* standard, the D.C. Circuit noted "our precedent is clear: *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.'" *Id.* at 833 (quoting *Great Falls*, 278 F.3d at 1347 and *Carroll College, Inc. v. NLRB*, 558 F.3d 568, 572, 574-75 (D.C. Cir. 2009)). The *Duquesne* court then went on to note that "[t]he Board may not 'dig deeper' by examining whether faculty members play religious or non-religious roles, for '[d]oing so would only risk infringing upon the guarantees of the First Amendment's Religion Clauses.'" *Id.* (quoting *Carroll College*, 558 F.3d at 572).

Despite the D.C. Circuit unequivocally rejecting the *Pacific Lutheran* standard, the General Counsel not only seeks to return to that standard but seeks to "dig" even "deeper" into the nature of a claimed religious exemption by "consider[ing] all marketing representations made by an institution to students, faculty, and the community at large in examining whether the institution consistently holds itself out as providing a religious educational environment." Counsel for the General Counsel's Brief

to the Administrative Law Judge, *Saint Leo University Inc.*, 12-CA-275612, et. al., at 3-4. This appears to make the new standard at even greater “risk [of] infringing upon the guarantees of the First Amendment’s Religion Clauses.” *Duquesne University*, 947 F.3d at 833 (quoting *Carroll College*, 558 F.3d at 572). Institutions with religious affiliations should pay close attention to what the Board does in *Saint Leo University Inc.* as if the Board adopts a revised standard, it will be substantially more difficult for those institutions to successfully claim exemptions from the Act’s jurisdiction before the Board. Subject to potential challenges in federal court, this could result in religious institutions being made to bargain with unions over terms and conditions of employment for their employees and otherwise being liable for alleged unfair labor practices.

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