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NLRB Excludes Theology Teachers from Bargaining Unit at Catholic Universities

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While the ***National Labor Relations Board's (NLRB)*** decision this week in the teaching assistants' case caught most of the headlines, the very same day the Board also issued two important rulings defining appropriate bargaining units at Catholic universities.

In cases arising at Seattle University (a Catholic university operated by the Jesuit order) and Saint Xavier University (a Chicago-area Catholic university founded by the Sisters of Mercy), the Board determined that faculty teaching theology and religion were exempt from the coverage of the National Labor Relations Act (NLRA) and therefore must be excluded from the petitioned-for bargaining units.

At Seattle University, the Service Employees International Union, Local 925, sought to represent a bargaining unit comprised of all non-tenure eligible faculty at the university other than those teaching nursing and law. At Saint Xavier, the Illinois Education Association (IEA-NEA) petitioned to represent all part-time faculty at the university other than those teaching at the School of Nursing.

In reaching its decision, the Board retraced its torturous reasoning in *Pacific Lutheran University*, 361 NLRB 157 (2014), in which it sought to avoid the U.S. Supreme Court's ruling in *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490 (1979). In that case, the Supreme Court instructed that the NLRA must be construed to exclude teachers in church-operated schools because to do otherwise "will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." The court concluded that the Board's assertion of jurisdiction over teachers in church-operated schools would give "rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid." For the Board to engage in such inquiry would violate the First Amendment.

In *Pacific Lutheran*, the Board purports to follow the teaching of *Catholic Bishop* but instead formulates the following seemingly non-compliant test: "[T]he Act permits jurisdiction over a unit of faculty members at an institution of higher learning unless the university or college demonstrates, as a threshold matter, that it holds itself out as providing a religious educational environment, and that it holds out the petitioned-for faculty members as performing a specific role in creating or maintaining the school's religious educational environment."

In both the *Seattle* and *Saint Xavier* cases, the Board agreed that both universities identify

themselves as “providing a religious educational environment,” thus meeting the first part of the two-part test. However, in both cases, the Board concluded that only the faculty in Seattle’s Department of Theology and Religious Studies and School of Theology and Ministry and Saint Xavier’s Department of Theology met the second part of the test. Therefore, those individuals could not be part of the bargaining unit.

In his dissents in each case, NLRB Board Member Phillip A. Miscimarra lays bare the clear conflict between the *Pacific Lutheran* decision and the Supreme Court’s decision in *Catholic Bishop.* “My colleagues and I are not permitted to write from a clean slate regarding this issue. It is governed by *NLRB v. Catholic Bishop of Chicago*, where the Supreme Court rejected the Board’s assertion of jurisdiction over ‘lay teachers’ at church-operated schools, which the Board had attempted to justify on the basis that the schools were ‘religiously associated’ rather than ‘completely religious.’” The Supreme Court held that the Board could not exercise jurisdiction over teachers in church-operated schools based on “abundant evidence” that doing so “would implicate the guarantees of the Religion Clauses.”

And as Miscimarra points out in dissent, the decision reached by the Board in these two current cases actually proves his point. “In other words, my colleagues draw the precise distinction—between faculty members who teach ‘religious’ subjects, on the one hand, and those who teach ‘secular’ subjects, on the other—that the Supreme Court rejected as entailing the type of ‘inquiry’ that, by itself, may impermissibly impinge on rights guaranteed by the Religion Clauses.” That impingement necessarily results, Miscimarra writes because “[l]engthy reflection is not needed to recognize that it will often be impossible to determine whether faculty members at religiously affiliated schools who ostensibly teach ‘secular’ subjects nonetheless perform a ‘specific role in creating or maintaining the school’s religious educational environment.’”

One would expect that both of these cases will be appealed, particularly because, as Miscimarra points out, the D.C. Circuit Court of Appeals reads *Catholic Bishop* in an entirely different fashion than does the Board. In *University of Great Falls v. NLRB,* 278 F.2d 1335 (D.C. Cir 2002), that court articulated a three-part test under *Catholic Bishop*. Under its test, the Board has “no jurisdiction over faculty members at a school that (1) holds itself out to students, faculty and community as providing a religious educational environment; (2) is organized as a nonprofit; 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.”

Copies of the Seattle Board Decision and Saint Xavier Board Decision decisions are available here.

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