

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

BETHANY COLLEGE

and

**Case 14-CA-201546
14-CA-201584**

THOMAS JORSCH, an Individual

and

LISA GUINN, an Individual

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S RESPONSE
OPPOSING RESPONDENT'S MOTION TO
DISMISS/MOTION FOR SUMMARY JUDGMENT**

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Counsel for the General Counsel respectfully files this brief opposing Respondent's Motion to Dismiss the Consolidated Complaint or, In the Alternative, for Summary Judgment. The Consolidated Complaint alleges that Respondent, Bethany College, violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act when it discharged Professor Thomas Jorsch for engaging in union and protected concerted activity and when it discharged Jorsch's wife, Professor Lisa Guinn for Jorsch's union and protected, concerted activity.

I. Standards for Dismissal and Summary Judgment

Rule 102.24 of the Board's Rules and Regulations addresses motions for dismissal and motions for summary judgment. Rule 102.24(b) provides, "The Board in its discretion may deny the motion where the motion itself fails to establish the absence of a genuine issue, or where the opposing party's pleadings, opposition and/or response indicate on their face that a genuine issue may exist."

Accordingly, for the Board to rule favorably on Respondent's Motion, the Motion itself must establish that there are no factual issues requiring resolution. Respondent's Motion fails to meet this burden.

II. Dismissal/Summary Judgment is Not Appropriate

The Board was created by Congress to carry out the policies contained in the Act. As such, "the Board has the duty of determining in the first instance (the jurisdiction) of the National Labor Relations Board and that the Board's determination must be accepted by reviewing courts if it has a reasonable basis in the evidence and is not inconsistent with the law." *NLRB v. E.C. Atkins & Co.*, 331 U.S. 398, 403 (1947).

Under the Board's Congressional mandate, the Board determines when to exercise jurisdiction and when to decline jurisdiction. Such determination may only be made through submission and evaluation of evidence and application of relevant law, making it a mixed

question of fact and law. Accordingly, jurisdictional questions cannot be solely decided as a matter of law unless the employer falls within a clear exception to the Act, such as a state or local government.

Respondent's Motion does not address the actions alleged in the Complaint and underlying charge, but focuses solely on jurisdictional questions. Respondent apparently recognizes the mixed nature of these questions, as it attached two hundred thirty-three pages of exhibits to its Motion. This is a selective and incomplete evidentiary record, composed entirely of Respondent's exhibits. There has been no testimony to support these exhibits, and no cross-examination, counter testimony, or opposing evidence to dispute these exhibits. This is not an evidentiary record from which an accurate jurisdictional determination may be made.

Respondent should not be allowed to circumvent the hearing process. If Respondent disputes the Board's jurisdiction, such jurisdictional arguments and supporting evidence should be presented to the Administrative Law Judge at hearing and a full and complete record created. As Respondent is well aware, both jurisdictional issues raised in Respondent's Motion require fact-intensive analysis.

A. Determining Whether Bethany College Is Excluded From the NLRA Involves Genuine Issues of Material Fact

Respondent's Motion argues the Board lacks jurisdiction over Bethany College because Respondent is a religiously-affiliated higher education institution. As discussed above, this is not an issue that can be resolved as a matter of law; it requires findings of fact. The Board's current jurisdictional standard is found in *Pacific Lutheran University*, 360 NLRB No. 157 (2014).

Jurisdictional analysis under *Pacific Lutheran* requires a college or university disputing jurisdiction on the basis of religious affiliation to first demonstrate it holds itself out as providing

a religious education environment. Slip op at 6. Once that requirement is met, the college or university must show that the faculty member(s) at issue perform a religious function, necessitating a showing that it “holds out those faculty as performing a specific role in creating or maintaining the university’s religious educational environment.” Slip op at 6-7. This portion of the analysis focuses on the individual faculty member; there must be a “connection between the performance of a religious role and faculty members’ employment requirements.” Slip op at 9, n.14.

The Board will exercise jurisdiction unless the college or university can make both showings. Whether the initial threshold is met is a factual determination that can only be made through evidence, testimony, and credibility determinations. The second portion of the test is even more fact-intensive, as it requires examination of individual faculty members’ responsibilities. Citing the College Handbook does not meet this test.

Generalized statements that faculty members are expected to, for example, support the goals or mission of the university are not alone sufficient. These types of representations do not communicate the message that the religious nature of the university affects faculty members’ job duties or requirements. *Pacific Lutheran* Slip op at 8.

It must be established that there is a connection between performance of a religious role and employment requirements. As with the threshold test, determining whether such a connection exists is a factual determination requiring evidence, testimony, and credibility determinations.

Overall, the analysis necessary to determine if Bethany College as a purported religious higher education institution is covered by the Act cannot be completed as a matter of law. It requires submission and analysis of evidence and findings of fact and cannot properly be resolved via Motion for Dismissal/Motion for Summary Judgment. The jurisdictional question

should proceed to hearing where an Administrative Law Judge can hear testimony and receive evidence from both parties and make the necessary and appropriate findings of fact.

B. Determining Whether Thomas Jorsch is a Managerial Employee Involves Genuine Issues of Material Fact

Respondent's Motion further argues that even if the Board has jurisdiction over Bethany College, it lacks jurisdiction over Thomas Jorsch because he is a managerial employee. The Board's current test for determining managerial status of university employees is also found in *Pacific Lutheran University*, 360 NLRB No. 157 (2014).

In *Pacific Lutheran*, the Board refined the test established in *NLRB v. Yeshiva University*, 444 US 672 (1980). The Board stated it will determine whether faculty members are managerial employees as follows:

We will examine the faculty's participation in the following areas of decisionmaking: academic programs, enrollment management, finances, academic policy, and personal policies and decisions, giving greater weight to the first three areas than to the last two areas. We will then determine, if in the context of the university's decision making structure and the nature of the faculty's employment relationship with the university, whether the faculty actually control or make effective recommendation of those areas. If they do, we will find that they are managerial employees and therefore excluded from the Act's protections. *Pacific Lutheran* Slip op at 20.

The Board will examine "both the breadth and depth of the faculty's authority at the university. Slip op at 16. For the primary areas, academic programs is defined to include curricula, major and minor areas of study, and related academic requirements. Enrollment management includes the size, scope, and composition of the student body. Finances include budget, tuition, and financial aid. slip op at 17.

For the secondary areas, academic policy is defined to include teaching and research methods, grading policy, academic integrity, and related areas. Personnel policy is defined to include hiring, promotion, tenure, and leave. slip op at 17.

Determining whether Thomas Jorsch was a managerial employee is highly fact intensive, and requires examination of Dr. Jorsch's particular and specific responsibilities in the three primary and two secondary areas. For Dr. Jorsch to be managerial, evidence must show he had depth of responsibility in one or more areas, as well as breadth of responsibility across the various areas. Additionally, a managerial determination requires analysis of the College's decision-making structure, and where Dr. Jorsch as a tenure-track employee fit within that structure.

Given the fact-intensive nature of this question, neither dismissal nor summary judgment is appropriate. Like the question of whether Bethany College is subject to the Act's jurisdiction, the question of whether Thomas Jorsch was a managerial employee should proceed to hearing where an Administrative Law Judge can hear testimony and receive evidence from both parties and make the necessary and appropriate findings of fact.

III. Conclusion

For the reasons detailed above, Respondent's Motion to Dismiss/Motion for Summary Judgment should be denied and this case should proceed to hearing as scheduled on December 6-7, 2017.

Respectfully Submitted,

/s/ Rebecca Proctor
Counsel for the Acting General Counsel

Date: November 13, 2017