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NLRB v. Yeshiva University: An Introduction

HUGH D. JASCOURT*

Now that the long-awaited Supreme Court decision in *National Labor Relations Board v. Yeshiva University*[1] has finally been handed down, there is considerable uncertainty as to what it means—both in terms of what it says and in terms of what it establishes as the rule for future cases. There are many who have proclaimed (or bemoaned, depending upon one's persuasion) that the Supreme Court's exclusion of the faculty at Yeshiva University from the protection of the National Labor Relations Act as managerial employees is the death knell for collective bargaining in higher education. Others have viewed the facts of *Yeshiva* and/or the faculty governance of Yeshiva to be so atypical that there is little effect upon the rest of higher education.

Therefore, it is imperative to parse the Supreme Court's decision to determine what it really did say. The wisdom of our policy of presenting at least two views is demonstrated in this case, since we have prevailed upon two authors to undertake this task and they have less than a shared viewpoint on what the Supreme Court has really said. Although they differ on what may be likely to occur, they both foresee extended litigation in the future and offer some guidelines for analyzing that litigation to determine what it portends for future cases.

This discussion is not without import to the public sector since a number of state statutes do not specifically refer to higher education and to a significant degree are modeled after the NLRA. Thus, the same question arises whether university faculty are managerial and, therefore, not employees within the meaning of the act. However, the Supreme Court decision concededly did not apply to all institutions of higher education but only "mature" universities like Yeshiva. But how many universities will be willing to state they are not "mature" (whatever that means)? The early court decisions offer little guidance thus far. The Nineth Circuit viewed Stephens Institute as bearing little resemblance to the "mature" university discussed in Yeshiva.[2] This description is obvious when it is realized that it was not until after a union had formed,

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[1] 100 S. Ct. 856, 63 L.Ed.2d 115 (1980).

[2] Stephens Institute v. NLRB, 620 F.2d 720 (9th Cir. 1980).

proposed a contract and had gone on strike to obtain it that then non-union members formed a "faculty senate" which met with the administration and obtained a commitment providing for faculty wages and benefits, faculty review, leave, hiring and termination, a grievance procedure and class size. In short, courts will not be blind to transparent schemes.

Perhaps the Second Circuit Court in *Ithaca College v. NLRB*[3] has told us that present ongoing litigation will not provide the answer and that we will have to await new NLRB decisions and their review by the circuit courts. In the Ithaca case the Second Circuit, as in Yeshiva, overturned a NLRB decision finding faculty are entitled to representation and the NLRB refused to treat the decision as binding until the Supreme Court ruled. Then the NLRB sought to have the case remanded to it for further proceedings in light of *Yeshiva*, but the Court denied the motion although it also denied the College summary judgment.

The articles that follow isolate the factors that may be important in determining the extent to which faculty will be treated as managerial employees in other situations.

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[3] 104 LRRM 2493 (2d Cir. 1980).