

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ROBERT L. SLAMKA, Complainant,

vs.

TOTAL MECHANICAL, INC., Respondent.

Case ID: 565.0000
Case Type: COMP_CE

DECISION NO. 37775-A

Appearances:

Robert L. Slamka, 6810 Winstone Drive, Madison, Wisconsin, appearing on his own behalf.

Daniel D. Barker, Jackson Lewis, P.C., 1 South Pinckney Street, Suite 930, Madison, Wisconsin, appearing on behalf of TOTAL Mechanical, Inc.

FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER

On October 3, 2018, Robert L. Slamka filed a complaint with the Wisconsin Employment Relations Commission alleging that TOTAL Mechanical, Inc., had committed various unfair labor practices within the meaning of the Wisconsin Employment Peace Act. On November 1, 2018, TOTAL Mechanical filed an answer to the complaint. A hearing was held in Madison, Wisconsin, on November 5, 2018, before Commission Examiner Peter G. Davis. The parties thereafter filed written argument, the last of which was received November 30, 2018.

Having reviewed the record, I make and issue the following:

FINDINGS OF FACT

1. TOTAL Mechanical, Inc. is an employer in Wisconsin.
2. Robert L. Slamka is an individual who applied for a job with TOTAL Mechanical, Inc., after seeing an advertisement placed by TOTAL Mechanical, Inc., that stated in part:

TOTAL Residential, a division of TOTAL Mechanical, is looking to hire a Residential HVAC Service Technician/Installer.

...

TOTAL Residential is a union shop; if not already a member of Sheet Metal Workers Union Local 18, individual will be required to join.

3. Slamka is not a member of the Sheet Metal Workers Local Union #18, AFL-CIO.

4. Slamka was not hired by TOTAL Mechanical, Inc.

5. Slamka filed a charge with the National Labor Relations Board asserting that TOTAL Mechanical, Inc. violated the National Labor Relations Act by: (1) refusing to hire him because he is not a member of the Sheet Metal Workers Local Union #18, AFL-CIO; and (2) placing an advertisement stating that membership in Sheet Metal Workers Local Union #18, AFL-CIO was a requirement for employment.

6. Slamka filed the instant complaint with the Wisconsin Employment Relations Commission alleging that TOTAL Mechanical, Inc. had violated § 111.04, Stats., by placing the advertisement set forth in Finding of Fact 2.

Based on the above and foregoing Findings of Fact, I make and issue the following:

CONCLUSION OF LAW

All allegations in Slamka's complaint are preempted by the National Labor Relations Act and thus the Wisconsin Employment Relations Commission cannot exercise jurisdiction over said complaint.

Based on the above and foregoing Findings of Fact and Conclusion of Law, I make and issue the following:

ORDER

The complaint is dismissed.

Dated at Madison, Wisconsin, this 4th day of December, 2018.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis, Examiner

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW, AND ORDER**

It is well settled that where a complaint filed with the Wisconsin Employment Relations Commission contains allegations as to which the National Labor Relations Board (NLRB) could exercise jurisdiction, the Commission cannot assert any jurisdiction it might otherwise have. *Algoma Plywood v. WERB*, 336 U.S. 301 (1949); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959); *Local 248 v. WERB*, 11 Wis.2d 277 (1960). Here, the NLRB has in fact asserted jurisdiction over the allegations pending before me as to the TOTAL Mechanical, Inc., advertisement (as well as over an allegation that Slamka was denied employment due to non-membership in the Sheet Metal Workers Local Union #18, AFL-CIO, a claim that is at least arguably on the far edges of matters raised by Slamka in this matter by virtue of Complainant's Exhibit 1). Thus, there can be no question that all Slamka's complaint allegations before the Commission are matters as to which the NLRB could assert jurisdiction. Therefore, the complaint is dismissed.¹

Dated at Madison, Wisconsin, this 4th day of December, 2018.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis, Examiner

¹ TOTAL Mechanical, Inc. correctly argues that within the scope of a "Right to Work" law, the only conduct that Congress allows a State (and thus this Commission) to regulate is the content of a contract between a union and private sector employer regarding union membership. As the Court held in *Retail Clerks International Assoc. v. Schermerhorn*, 375 U.S. 96, at 105 (1963):

State power, recognized by Sec. 14(b), begins only with the actual negotiation and execution of the type of agreement described by Sec. 14(b). Absent such an agreement, conduct arguably an unfair labor practice would be a matter for the National Labor Relations Board under *Garmon*.

Here, there is no allegation (and certainly no definitive proof) that there is a contract between TOTAL Mechanical, Inc., and any union that impermissibly requires union membership as a condition of employment.

TOTAL Mechanical, Inc. asks that Slamka be required to pay its costs and attorney fees incurred in its defense of this matter. Section 227.483, Stats. allows costs and reasonable attorney fees to be awarded if the examiner finds either that (1) "the petition, claim, or defense was commenced, used, or continued in bad faith, solely for the purposes of harassing or maliciously injuring another" or (2) "the party or the party's attorney knew, or should have known, that the petition, claim, or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law."

I do not find either (1) or (2) present here and thus deny the request for costs and attorney fees.