STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ROBERT SLAMKA, Complainant,

vs.

GENERAL HEATING AND AIR CONDITIONING, INC. Respondent.

Case ID: 560.0000
Case Type: COMP_CE

DECISION NO. 37777-A

Appearances:

Walter W. Stern, Attorney, 920 – 85th Street, Suite 123, Kenosha Wisconsin, appearing on behalf of Robert Slamka.

Ryan N. Parsons, Attorney, Foley & Lardner LLP., 777 East Wisconsin Avenue, Milwaukee, Wisconsin, appearing on behalf of General Heating and Air Conditioning, Inc.

FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER

On July 24, 2018, Robert Slamka filed a complaint with the Wisconsin Employment Relations Commission alleging that General Heating and Air Conditioning, Inc. had committed various unfair labor practices within the meaning of the Wisconsin Employment Peace Act. On December 3, 2018, General Heating and Air Conditioning, Inc. filed an answer to the complaint. A hearing was held in Madison, Wisconsin, on December 18, 2018, before Commission Examiner Peter G. Davis. The parties thereafter filed written argument, the last of which was received February 21, 2019.

Having reviewed the record, I make and issue the following

FINDINGS OF FACT

1. General Heating and Air Conditioning, Inc is an employer in Wisconsin.

2. On June 29, 2018, General Heating and Air Conditioning, Inc. posted an advertisement on the internet site Indeed.com that stated in part:

> General Heating and Air Conditioning is a union shop; if not already a member of Sheet Metal Workers Union, the individual will be required to join.

3. Slamka was not a member of the Sheet Metal Workers Union.

4. On June 30, 2018, Slamka responded to the June 29, 2018 advertisement with an employment application. Slamka was not hired by General Heating and Air Conditioning, Inc.

5. Slamka filed a charge with the National Labor Relations Board (NLRB) asserting that General Heating and Air Conditioning, Inc. violated the National Labor Relations Act by: (1) refusing to hire him because he was not a member of the Sheet Metal Workers Union; and (2) placing an advertisement stating the union membership was a requirement for employment. The NLRB took action as to the charge.

6. Slamka filed the instant complaint with the Wisconsin Employment Relations Commission alleging that General Heating and Air Conditioning, Inc. had violated § 111.04, Stats., by placing the advertisement set forth in Finding of Fact 2 and failing to hire him.

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 March, 2019.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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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 not only could but has in fact asserted jurisdiction over the allegations as to the General Heating and Air Conditioning, Inc. advertisement and the failure to hire. 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 March, 2019.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Peter G. Davis, Examiner

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[1] 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 § 14(b), begins only with the actual negotiation and execution of the type of agreement described by § 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 proof) that there is a contract between General Heating and Air Conditioning, Inc. and any union that requires union membership as a condition of employment.