BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION
STATE OF WISCONSIN

Robert Slamka,

Complainant,

and,

General Heating and Air Conditioning, Inc.,

Respondent.

COMPLAINANT'S REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR REVIEW

Case ID: 563.000
Case Type: COMP_CE

INTRODUCTION

Complainant filed a complaint with the WERC on or about July 20th, 2018, alleging that Respondent violated the right to work act in § 111.04(3)(a) Wis. Stats. in failing to hire him for a position because there was union security language that made joining of the union a condition of employment, contrary to the right to work statute passed in 2015.

The Respondent is arguing pre-emption and that there is no job available for him because they never hired anyone. The Respondent's position is also that there was a certification required for the job, and that the Complainant did not have these qualifications. The Respondent admits that the union security language was posted on Indeed.com; that the job description was also posted, which did not require any sort of certification; and that the union security language for one reason or another was not removed from Indeed.com until approximately 45 days later, after the Complainant applied for the position.

ANALYSIS AND DISCUSSION OF THE EVIDENCE

The facts concerning this case emanate from a hearing held in this matter on December 8th, 2018; all the parties and witnesses appeared and all the parties were represented by counsel.

An analysis of the evidence is extremely contradictory in terms of whether or not union membership, union activities, and the requirements of the posted job are subject to considerable

suspicion. This case involves the application for a job with Respondent and the Complainant relying on the job posting and also the union security language which was placed online on a standardized website that was used for people to find employment (Indeed.com). The exhibits were stipulated to by the parties. Exhibit 3 indicated that there was a union security agreement, or a requirement that the complainant join a union. In particular, the Exhibit indicates that the position did not require any kind of certificate, as well as requiring membership in the union. The specific wording of the union shop posting is as follows: "General Heating & Air Conditioning is a union shop; if not already a member of the Sheet Metal Workers Union, the individual will be required to join." There is no question that according to the job posting, the complainant was more than qualified – with 32 years experience as a sheet metal worker journeyman – to perform the essential duties of the job.

Exhibits 1 and 2 indicated that the Complainant was expelled from the sheet metal union, Local 18.

Respondent's Exhibit 5 is Complainant's resume. He mentioned that he was expelled from the union and that he had fought various battles against the union. He mentioned that he was a journeyman for 32 years. Since the job listing did not require any kind of certification for EPA or otherwise, the Complainant relied on the fact that he did not have to be a member of the union at any time (since it was not possible for him to be a member of the union because he was expelled) and the Respondent-employer knew from reviewing the resume that he had been expelled and fought various battles against the union. The Respondent had full knowledge that it would be impossible for him to be a union member and that he was "a troublemaker." The posting, with the union security language for the HVAC installer, was posted on July 29th, 2018, and was removed from Indeed.com within 45 days. From the time it was removed, the

Complainant had already relied on the clauses, including the job description, was the absolute truth.

Complainant's Exhibit 4 indicates, contrary to her testimony, that Kaitlyn Grossheim in HR thanked the Complainant for bringing "to her attention the union shop provision" and she alludes to the right to work law (dated July 11, 2018).

Exhibit 5 was dated July 11th, 2018 and now required that the prospective employee have a "universal refrigeration certificate." At that point, the Respondent-employer placed a new barrier to the Complainant's employment. See, Complainant's Exhibits 6 and 7.

Complainant's Exhibit 8, a charge filed with the NLRB dated August 6, 2018, did not allege the state right to work act, and there is no indication that the NLRB would have had any jurisdiction with respect to the Respondent contractor over the right to work act. As part of this Exhibit, on October 26, 2018, the NLRB issued a letter of dismissal of the NLRB complaint even though the NLRB stated as follows: "based on the investigation, it appears there may be merit to the allegation that the employer interfered and restrained and coerced employees in the exercises of rights protected by Section 7 of the Act by advertising for job openings and stating that the union membership was a requirement for employment. However, I have conditionally decided to dismiss the portion of your charge six months from today because there have not been any meritorious charges against an employer within the past several years, and because the conduct is isolated in nature; there is no ongoing unlawful effect on any employee's terms and conditions of employment. There are no other accompanying violations which require a Board remedy and the conduct was of limited duration." In other words, the National Labor Relations Act was violated, but it was not a bad violation and the employer (General Heating and Air Conditioning) had not done anything unlawful under Section 7 of the National Labor Relations Act. It is well

conceded that at this point, the case is dismissed, such information provided by Respondent's counsel. Note, in Complainant's Exhibit 8, there is no indication in the decision of October 26, 2018, whether or not the Respondent violated Wisconsin's Right to Work Act.

The original job description posted indicated that the employer was looking to hire a residential HVAC service technician/installer. Also, in Complainant's Exhibit 5, it states that Respondent was a union shop.

With respect to the employer, a Dalton J. Haines' apparently applied for the position. The actual application does not say anything with respect to a certification under the EPA to have the work stated in the job description. There is no evidence in the record that Dalton J. Haines did, in fact, have a certification, because there is no evidence that any of the information stated within Respondent's Exhibit 3 was checked or verified.

The evidence is undisputed that the postings with respect to union security were unlawful under the right to work act. There is no dispute that the job description was changed to include a certification requirement making the Complainant ineligible for employment.

In looking at the testimony, clearly the Complainant was never interviewed, nor does the record indicate that any information was verified by any of the employees at Respondent's business. He testified that he was expelled from the union. (Page 24, Lines 21-25) He also indicated that he has previously worked for General Heating and Air Conditioning (Respondent), had done well there, and had engaged in an exit interview with Mike Polster. (See, Pages 25, Lines 12-16, Page 25, Lines 19-25, Page 26, Lines 1-3)

There is no question that the labor manager, Mike Polster, knew about his expulsion from the union and knew about Complainant's past good experience with the company. He testified that Kaitlyn Grossheim, HR, was informed of the unlawful union security language. (Page 30,

Lines 17-25) Complainant also testified that the union security requirement was still on Indeed.com as of August 10th, 2018. (Page 32, Lines 12-18) Complainant indicated that he had looked at a lot of employment posts in his area of expertise and found that a lot of employers had union security language, as well as Respondent. (Page 33, Lines 21-25) The uncontradicted testimony, in cross-examination, is that the NLRB charge against General Heating was not the same as a state action under the right to work act before the WERC. (Page 41, Lines 8-11)

In reviewing the testimony of Kaitlyn Grossheim from the transcript, she was the human resource specialist with respect to the job posting and the Complainant's application for the job. (Page 47, Line 16) First, Ms. Grossheim attempts to indicate that the union security language was to be removed by a Katie Hampton, but then admits that she was notified about the union security language by Complainant himself. (Page 55, Lines 13-19) She admits that Complainant never did get an interview, and there is no indication that she checked any of the qualifications of other applicants in the record. With respect to Ms. Grossheim, it was admitted that Complainant did notify her of the violation of the union security language, and yet we are asked to believe that this was an internal issue and that the union security language was to be removed from Indeed.com based upon an email from Brad. (Page 50, Lines 16-25)

Joanne Revolinski testified as security manager for Respondent. (Page 59, Lines 10-12) Allegedly, she tells Kaitlyn Grossheim to remove the union security language from Indeed.com. (Page 65, Lines 5-7) She says that Dalton Haines had a universal refrigerant certificate, the record is devoid of that statement in any of the Exhibits marked and admitted in this case. (See, Page 68, Lines 12-21, Page 70, Lines 13-15, and Page 72, Lines 8-10) She admitted though that the original ad for employment did not require a universal refrigeration certificate.

It is admitted that the position that was advertised was never filled. (Page 75, Lines 9-13) She also states that she was ignorant about the union security language in the original postings on Indeed.com. (Page 82, Lines 14-20)

In reviewing the transcript, one is left with the following questions:

1. Why did the Respondent claim ignorance with respect to the union security language?
2. Why did the original posting not contain a requirement to possess a refrigeration certificate?
3. Whey did Respondent take 45 days to post a job position offering that did not require union membership within a certain period of time?
4. What would a reasonable, prospective employee, such as the Complainant, believe when he reviewed the original job posting with the union security language and did not require a certification?
5. When he submitted his application, why would he be in a position to speculate as to whether or not there was a certification requirement and that the union security provision was not part of the requirements of the job?

LAW IN SUPPORT OF COMPLAINANT'S POSITION

The primary issue in this case, really, is pre-emption. That is because, clearly, the Respondent violated the state right to work act by posting a position that required union membership and that did not have a certification requirement.

It is beyond question that the NLRB has now dismissed the unfair labor practice, but the real issue is could the NLRB decide any issue under the state right to work act? Under the Taft-Hartley Act, Section 14(b), the United States Congress granted to the states the right to pass right to work acts to prevent union security agreements or forced unionization or forced payment of

dues or payment of fees. This law, 29 USC Section 141-192, was passed on January 23rd, 1947. Initially, it was vetoed, but Congress passed this law over the veto of the President of the United States. Under Section 1(4), the right to work act law was deemed to protect the rights of individual employees by outlined union security agreements.

Under Section 7 of the National Labor Relations Act, commonly known as the Wagner Act, the National Labor Relations Board ("NLRB") was given jurisdiction only over federal laws with respect to unfair labor practices under Section 7.

Clearly, when there are two acts of Congress, the acts must be construed together. In other words, the NLRB does not have the right to decide issues of state law, such as a right to work act duly passed by a state pursuant to the Taft-Hartley Act. When the statutes are read together, Wisconsin's Right to Work Act is enforceable in state administrative agencies and/or courts. Under § 111.04 Wis. Stats., passed in 2015, under (3)(a), union membership must be voluntary and it cannot be used to force membership. Union security clauses are not enforceable. Under the history and the statutes annotated, states have every right to pass right to work acts and insist that these acts be enforceable in state courts and agencies. See, *Sweeney v. Pence,* 767 Fed.3rd 654, Act 1 is not pre-empted by the National Labor Relations Act and does not work as an unconstitutional taking. See, *International Union of Operating Engineers, Local 139, and International Union of Operating Engineers, Local 420 v. Schimmel*, 210 Fed. Supp.3rd 1088 (2016).

There is not one single decision in the United States that holds that the right to work act is not enforceable because it is pre-empted under the National Labor Relations Act, Section 7. It is clear that state agencies have authority to determine whether or not either a union or company's conduct was in violation of the right to work act. The Court of Appeals published opinion,

International Associates of Machinists District 10, Local Lodge 1061, United States Worker District Two, and Wisconsin State AFL-CIO, Plaintiffs, v. State of Wisconsin, Scott Walker, Brad Schimmel, James R. Scott and Rodney Pasch, 217 Wis APP 66, the Court of Appeals found that the right to work act passed in the State of Wisconsin is constitutional. The Court discussed the Taft-Hartley Act is abandoning union shop agreements, and therefore, this Congressional act justified the State of Wisconsin in passing a right to work act. Essentially, the right to work act under § 111.04(3)(a) is passed pursuant to an act of Congress, and therefore pre-emption by definition cannot apply. To hold otherwise would be to decapitate the right to work act; force an aggrieved party to go to the NLRB to enforce a state law; and to deprive an employee in Wisconsin from having any declaration or any relief under an act passed pursuant to a federal law. This would be counterintuitive, yet is the type of argument that is being advanced in this case and several other cases.

The Complainant respectfully indicates that the hearing examiner was open, frank and honest that more than likely, he would apply the pre-emption doctrine. Somehow, someway, either the Commission or a court should determine that there can be no pre-emption because National Labor Relations Act and the Taft-Hartley Act must be construed together to obtain a fair and reasonable result, rather than an absurd result.

A case commonly cited for pre-emption is *Algoma Plywood v. Wisconsin Board*, 336 US 301 (1949). This decision did not uphold the right of a state agency to apply the pre-emption doctrine to an act that was passed under the authority of another Congressional act. This Supreme Court decision clearly held that the states do not lose all rights to enforce its own laws simply because there is a parallel law under Section 7 of the National Labor Relations Act. Justice Frankfurter states that "when a state act does not conflict with the National Labor

Relations Act, there is no pre-emption." Justice Frankfurter states as follows "… state law remains effective so long as Congress has not manifested an unambiguous purpose that it should be supplanted." (This decision is attached to this Brief.)

The Wisconsin Employment Commission has authority to prevent unfair labor practices under § 111.06 Wis. Stats. There is no question that the right to work act protects employees in terms of state unfair labor practices, to wit, the right to work act itself. The issue in this case is a little more complicated since the commission does not have the jurisdiction to create a job at the Respondent's business. General Heating and Air Conditioning never did hire an employee to fill the job at issue here. But, the evidence clearly shows that its post on Indeed.com violated the right to work act in the State of Wisconsin; that the original post did not include a certification requirement; that the other employee, Dalton J. Haines, did not place in his two page resume that, in fact, he was certified; there is no evidence that he was certified with respect to listing the number of the certification, the date, or any other outside evidence indicating that he was certified; the job duties requiring certification and the union security clause was only changed after the Complainant pointed out the unlawful activities; then the job at issue vanished in its entirety.

Respondent's behavior cannot be countenanced or approved, but requires that the WERC enter declaratory relief indicating that there was a violation of the state right to work act, and that they must cease and desist from any future conduct. The NLRB states, unequivocally, that the ad was a violation of even Section 7 of the National Labor Relations Act. In the context of the state right to work act, the Respondent's behavior is even more deplorable and unacceptable. There was no witness to testify at this hearing on December 8th, 2018 who was unaware of the state's right to work act. The circumstantial evidence clearly indicates an intent to violate the

Complainant's rights under this act and the state agency, applying state law, should enforce the right to work act.

Signed this 21st day of February, 2019

Electronically signed by Walter W. Stern III
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