

**EQUAL OPPORTUNITIES COMMISSION  
CITY OF MADISON  
210 MARTIN LUTHER KING, JR. BOULEVARD  
MADISON, WISCONSIN**

Juanita A Zitnick  
217 North Thompson Rd  
Sun Prairie WI 53590

Complainant

vs.

Capitol Lakes  
333 West Main St  
Madison WI 53703

Respondent

HEARING EXAMINER'S DECISION AND  
ORDER ON RESPONDENT'S MOTION TO  
DISMISS FOR LACK OF SUBJECT MATTER  
JURISDICTION

CASE NO. 20092085

EEOC CASE NO. 26B200900042

### BACKGROUND

This is a review of the Respondent's Motion to Dismiss one of the allegations of the complaint for a Lack of Subject Matter Jurisdiction. The Complainant is Juanita Zitnick. On June 1, 2009, Zitnick filed a complaint with the Madison Department of Civil Rights, Equal Opportunities Division (EOD). The complaint charged that the Respondent, Capitol Lakes, discriminated against the Complainant on the bases of religion and political beliefs in her employment in violation of Equal Opportunities Ordinance sec. 39.03(8) Mad. Gen. Ord. As to her claim of political beliefs discrimination, the Complainant asserts that the Respondent terminated her employment because of her political beliefs related to her efforts to unionize employees. The Respondent denies that it discriminated against the Complainant on the bases of religion and political beliefs.

The Respondent filed a motion to dismiss the allegation of discrimination in employment on the basis of political beliefs for lack of subject matter jurisdiction on July 9, 2009. The Respondent principally argues that the EOD's jurisdiction is preempted by the National Labor Relations Act (NLRA).

On August 28, 2009, this matter was transferred to the Hearing Examiner to determine the jurisdiction of the EOD. The Hearing Examiner provided the parties with the opportunity to submit additional written arguments and documentation with respect to their positions on jurisdiction.

### DECISION

Under Equal Opportunities Ordinance sec. 39.03(8)(a) Mad. Gen. Ord., it is an unfair discrimination practice and unlawful for an "employer...to discharge any individual...with respect to her/his...political beliefs." The term "political belief" is defined as "one's opinion, manifested in speech or association, concerning the social, economic and governmental structure of society

and its institutions." M.G.O., § 39.03(2)(cc). The ordinance refines this definition by stating that it "shall cover all political beliefs, the consideration of which is not preempted by state or federal law." M.G.O., § 39.03(2)(cc). While sec. 39.03(2)(cc) vests jurisdiction in the Commission, state and federal law may supersede the protections set forth in the ordinance. See Moyer, Carey, and Kaatz v. Thrift Printing and Genesis Companies, Inc., MEOC Case Nos. 22440, 22441, 22448, 22449, and 22450 (Ex. Dec. 7/7/97), and Pagel v. Elder Care of Dane County, MEOC Case No. 22442 (Ex. Dec. on Jur. 10/31/96).

The Respondent contends that the NLRA preempts the EOD's jurisdiction over the allegation of political beliefs discrimination, and therefore the allegation must be dismissed. The Respondent asserts that the case at hand is similar to Moyer in that the Complainant argues that she suffered an adverse employment action (i.e., termination) because of her political beliefs as they relate to the unionization of company employees. See Moyer, supra. The Respondent argues that the Complainant's allegation of political beliefs discrimination is within the NLRA's scope of coverage, namely sections 7 and 8 of the Act. According to the Respondent, since the NLRA's scope of protection is sufficiently similar to that of the ordinance, and the NLRA is "supreme" to the ordinance, the NLRA preempts application of the ordinance to this issue.

The essence of the Complainant's allegation of discrimination on the basis of her political beliefs is that, as an employee, she can exercise her political beliefs through pro-union activities and that she has a right to unionize and the Respondent unlawfully interfered with this right when it terminated her employment. The Complainant asserts that a belief in unionism reflects a particular opinion about the social, economic, and governmental structure of society; and an employee has the right to be free from discrimination on the basis of such belief. Therefore, the Complainant argues that her allegation of political beliefs discrimination is within the scope of Madison General Ordinance sec. 39.03(2)(cc) and (8)(a), and that the ordinance's protection should not be undone by another law.

The question for the Hearing Examiner is whether the NLRA effectively preempts the operation of Madison General Ordinance sec. 39.03(8)(a). To that end, the Hearing Examiner must determine whether the NLRA's scope of protection, though cast in different terms, is sufficiently similar to that provided in section 39.03(8)(a) that the federal statute must be given supremacy over the ordinance.

The NLRA is designed to alleviate impediments to the free flow of commerce, "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." National Labor Relations Act, 29 U.S.C. § 151 (2010). Thus, the NLRA generally guarantees the right of an employee to unionize, to assist labor organizations, and to participate in collective bargaining. 29 U.S.C. § 157. Further, the NLRA makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 157]." 29 U.S.C. § 158(a)(1).

The Respondent argues that the EOD must relinquish its subject matter jurisdiction in this case under Moyer. See Moyer, supra. In Moyer, the Complainants argued that the Respondent refused to hire them because of their political beliefs, i.e. support of unions. Id. It may be important that in Moyer, the Complainants were seeking employment so that they could

unionize the Respondent's workforce, a practice known as "salting". Id. "Salting" is a specifically protected activity under the NLRA. Id. The Hearing Examiner relying upon the Supremacy Clause of the U.S. Constitution held that the NLRA preempted application of the Madison General Ordinance in this situation. Id. The Hearing Examiner found that, "the only way to avoid the preemptive effect of the NLRA would be to demonstrate that the NLRA and the ordinance have different scopes of coverage or protect substantially different interests." Id. The Hearing Examiner concluded that no such differences existed and dismissed the Complainants' claims for lack of jurisdiction. Id.

The Hearing Examiner's determination in Moyer is supported by the Court in San Diego Building Trades Council v. Garmon, which held that, "courts are not primary tribunals to adjudicate [issues related to violations of sections 7 or 8 of the NLRA]. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board." 359 U.S. 236, 244 (1959).

Since it is clear that the National Labor Relations Board (NLRB) is the proper authority to adjudicate a claim of an unlawful interference with activities related to the creation or maintenance of a union, the Complainant must show that there is no conflict of laws or purpose and therefore the NLRA does not preempt the Madison General Ordinance. Because the scope of coverage provided by the NLRA is sufficiently similar to that provided by the Madison General Ordinance, the Complainant cannot demonstrate that there is no conflict of laws. The Madison General Ordinance defines 'political belief' broadly such that it includes union activities. See Northport Apartments v. Equal Opportunity Commission & Carey, Case No. 80-CV-2680 (Dane County Cir. Ct., 3/12/81) (agreeing with the Madison City Attorney who stated that the definition "would include, for example pro-union or anti-union sympathies....").

Because the NLRA covers an employee's right to unionize and unlawful interferences with such right, and the Madison General Ordinance also covers unlawful discrimination on the basis of political beliefs which include pro-union sympathies, the Hearing Examiner must conclude that the NLRA preempts the Commission's subject matter jurisdiction on this issue. The U.S. Supreme Court held that, "[w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the [NLRA], or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield." Garmon, 359 U.S. at 244. Relying on Garmon, the Hearing Examiner in Moyer further recognized "that an attempt to forum shop would be frowned upon by the courts," and that "[i]t would be inappropriate to allow a party to undo the federal policy favoring the NLRA by simply not filing a charge with the NLRB." Moyer, *supra*.

While the EOD may generally exercise subject matter jurisdiction over complaints of discrimination on the basis of one's political beliefs pursuant to Equal Opportunities Ordinance sec. 39.03(8) Mad. Gen Ord., federal law preempts the EOD's jurisdiction in this circumstance, because this case involves an interference with the right of an employee to unionize in violation of NLRA sections 7 and 8.

Review of the record in this matter makes it relatively clear that the Complainant was engaged in unionizing activity particularly in relationship to the position of Licensed Practical Nurse (LPN). It is this manifestation of her political beliefs through actions intended to bring about union membership that results in the finding of preemption by the NLRA. Had the Complainant's political beliefs been limited to vocal support for the idea of a union, it is possible

that the Hearing Examiner would not find preemption. One key difference between the NLRA and the ordinance appears to exist along the line of activity as opposed to thought. The NLRA protects those engaged in actual activities related to the formation and maintenance of a union. It is not clear that "mere" support for the idea of a union is protected. Under the ordinance, both action and philosophy are protected. However, when one's political beliefs cross over to active support, in the case of union activity, the ordinance runs afoul of the NLRA. It is in this realm that the ordinance's jurisdiction must take a seat behind that of the NLRA.

Accordingly, the Hearing Examiner must dismiss the allegation of political beliefs discrimination for lack of subject matter jurisdiction.

#### ORDER

IT IS HEREBY ORDERED pursuant to Equal Opportunities Commission Rule 3.44 that the allegation of political belief discrimination is dismissed for lack of subject matter jurisdiction. The allegation of discrimination on the basis of religion is remanded to the Investigator/Conciliator for further investigation and issuance of an Initial Determination.

Signed and dated this 2nd day of March, 2010.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III  
Hearing Examiner