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

William Moyer 1122 Wayridge Dr. Madison, WI 53704 Complainant vs. Thrift Painting 1525 S. Stoughton Rd. Madison, WI 53716 Respondent Case No. 22440 William Moyer 1122 Wayridge Dr. Madison, WI 53704 Complainant vs. Genesis Companies, Inc. 2325 B S. Stoughton Rd. Madison, WI 53716 Respondent Case No. 22441 Michael Carey 1709 Onsgard Rd., # 1 Madison, WI 53704 Complainant vs. Genesis Companies, Inc. 2325 B S. Stoughton Rd. Madison, WI 53716 Respondent Case No. 22447	HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENTS' MOTIONS TO DISMISS FOR LACK OF JURISDICTION

Michael Carey
1709 Onsgard Rd., # 1
Madison, WI 53704

Complainant

vs.

Thrift Painting
1525 S. Stoughton Rd.
Madison, WI 53716

Respondent

Case No. 22448

Steve Kaatz
20 O'Brien Ct.
Madison, WI 53714

Complainant

vs.

Genesis Companies, Inc.
2325 B S. Stoughton Rd.
Madison, WI 53716

Respondent

Case No. 22449

Steve Kaatz
20 O'Brien Ct.
Madison, WI 53714

Complainant

vs.

Thrift Painting
1525 S. Stoughton Rd.
Madison, WI 53716

Respondent

Case No. 22450

BACKGROUND

On June 10, 1996 and June 14, 1996, the Complainants, William Moyer, Michael Carey and Steve Kaatz, filed complaints of discrimination with the Madison Equal Opportunities Commission (Commission). The complaints uniformly allege that the Respondents, Genesis Companies, Inc. and Thrift Painting, failed or refused to hire the Complainants because of the Complainants' political beliefs i.e., support of unions. For purposes of the several motions, the Hearing Examiner is consolidating all six complaints and will address them as a single complaint in order to preserve the Commission's scarce administrative resources and to assure consistency of decision in similar cases. The parties have already tacitly consented to this consolidation by filing single briefs for each group of allegations.

Prior to filing his complaints with the Commission, Moyer filed an unfair labor practice complaint with the National Labor Relations Board (NLRB) pursuant to Section 8(a)(3) of the National Labor Relations Act. This complaint alleged that Moyer was not hired by the Respondents because of his union affiliation. It is not clear from this record but it does not appear that Carey and Kaatz filed similar complaints with the NLRB.

As part of their initial responses to the complaints, the Respondents filed motions seeking dismissal of the complaints asserting that the complaints before the Commission are preempted by federal law. The Complainants, through Moyer, objected to the motions. The complaints were transferred to the Hearing Examiner to resolve the issue of the Commission's jurisdiction.

The Hearing Examiner provided the parties with the opportunity to submit additional written argument with respect to their positions.

After reviewing the arguments of the parties and conducting independent research, the Hearing Examiner reluctantly concludes that the complaints must be dismissed.

DECISION

The question before the Hearing Examiner in these consolidated complaints is whether the allegations of the complaint are preempted by federal law and the Commission is therefore without jurisdiction to proceed with the complaints. The Respondents set forth case law demonstrating the generally preemptive effect of the National Labor Relations Act, 29 U.S.C. Sec. 151 et seq., on state and local proceedings. San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). The Complainants contend that the Commission has retained jurisdiction where there were claims of unconstitutional application of the Ordinance and a mere law should not act to deprive the Commission of jurisdiction over these complaints. Painters Union Local 802 v. Madison Newspapers, Inc., MEOC Case No. 3165 (Ex. Dec. on Jur. 05/23/87), Madison Newspapers, Inc. v. EOC of the City of Madison, et al., Docket No. 87-C-479-S (WD Wis. 09/29/87). The Complainants' position in this matter requires a conclusion that the ordinance may never be preempted by other laws. This conclusion is untenable given the language of the ordinance, decisions of the Commission and decisions of the state and federal courts.

The section of the ordinance defining the term "political beliefs" (MGO Sec. 3.23(2)(v)) expressly recognizes that state and federal law may act to preempt the ordinance's protection of one's political beliefs. The section provides:

"Political beliefs" shall mean one's opinion, manifested in speech or association, concerning the social, economic and governmental structure of society and its institutions. This ordinance shall cover all political beliefs, the consideration of which is not preempted by state or federal law.

While this language may have several different reasonable interpretations, it is clear that the Common Council when creating this protected group recognized that state and federal law may supersede the protection of the ordinance. The Hearing Examiner has concluded in another complaint that federal law can act to deprive the Commission of jurisdiction. Pagel v. Elder Care of Dane County, MEOC Case No. 22442 (Ex. Dec. on Jur. 10/31/96). In Pagel, the complainant, a person with a conviction record for sexual assault of a minor, was employed by an employer that received federal funds to provide care for the elderly and disabled adults. The ordinance proscribes an employer's consideration of an employee's arrest or conviction record under specific circumstances. However, the federal law under which the employer received funding specifically requires an employer to make inquiries of an employee's arrest and conviction records and prohibits organizations receiving specified federal funds for programs relating to the elderly and disabled from employing persons with certain types of arrest and conviction records. There was a clear conflict between the requirements of the ordinance and the federal law. The ordinance prohibited what the federal law required. Because of the operation of the Supremacy Clause of the Constitution, the Hearing Examiner concluded that the conflict had to be resolved in favor of the federal law.

The Wisconsin Supreme Court has recognized that a local ordinance may be preempted by a state law under certain circumstances. Anchor Savings and Loan v. MEOC, 120 Wis. 2d 391, 355 N.W.2d 234 (1984). Essentially the Court found that a state statute or state-wide regulatory scheme will preempt a local ordinance either where the legislature has specifically withdrawn the authority of a local unit of government to act or where there is a fundamental conflict between the state statute or scheme and the local ordinance. In Anchor the Court determined that the Madison Equal Opportunities Ordinance's provisions relating to discrimination in the providing of credit were preempted by the state's establishment of a uniform, state-wide regulatory scheme applying to banks and savings and loan associations.

As noted above, the Complainants rely on the MNI cases to establish that the NLRA should not preempt the ordinance. The circumstances are significantly different. In the MNI cases, the respondent was alleging a constitutional protection. In order for the Commission or the Court to determine whether that protection applied under the circumstances of that case, there needed to be additional fact finding. Under the circumstances of the present complaints, no fact finding is required to determine whether the NLRA Sec. 8(a)(3) applies to these complaints. The NLRB has already taken jurisdiction. The importance of the MNI cases is not that the Commission retained jurisdiction despite a constitutional challenge but that the Commission's procedures adequately protected the rights of a party seeking to exercise a constitutional right and immediate access to the courts was unnecessary.

The Supreme Court has determined that Congress has expressed a strong preference for a nationally consistent system of labor regulation. To accomplish this goal, state statutes and local ordinances must give way to the federal system. San Diego Building Trades Council v. Garmon, supra. It appears to the Hearing Examiner 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. On this record, the Hearing Examiner cannot conclude that such differences exist. Both laws have the effect of protecting people whose support of union activity is manifested by their membership in a union. As noted above, the ordinance protects the belief in unionism rather than merely membership in a union. However, on this record, there is little difference given the fact that all three complainants are in fact members of a union.

It is true that not all federal laws preempt state or local regulation. The preemptive effect arises from the intent of Congress. For instance, Title VII, 42 U.S.C. Sec. 2000e et seq., establishes a uniform national regulatory scheme to protect people from employment discrimination. Rather than preempting state and local law, the Congress wished to create a strong federal/local partnership and contemplated a national network of local, state and federal laws and agencies to provide protection from employment discrimination. The intent is different with respect to regulation of labor activity. San Diego Building Trades Council, supra.

The fact that the Complainants, Carey and Kaatz, have apparently not filed a charge with the NLRB does not minimize the Respondent's preemption argument. Given the strong preemptive intent found by the Supreme Court in the Garmon case, the Hearing Examiner must find that an attempt to forum shop would be frowned upon by the courts. It would be inappropriate to allow a party to undo the federal policy favoring the NLRA by simply not filing a charge with the NLRB.

The Commission is always reluctant to relinquish its jurisdiction. However, where it must recognize another jurisdiction, it will in order to avoid the resulting conflict. The complaints in these cases are hereby dismissed.

Signed and dated this 7th day of July, 1997.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner