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Caton v. Shubert Organization
 S.D.N.Y., 2006.
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United States District Court, S.D. New
 York.

Karen M. CATON, Plaintiff,

v.

The SHUBERT ORGANIZATION, et al.,
 Defendants.

No. 05 Civ. 3686(AKH).

Sept. 22, 2006.

Jason Jerome Rozger, **Beranbaum
 Menken Ben-Asher & Bierman LLP**, New
 York, NY, for Plaintiff.

Peter Michael Panken, Epstein, Becker &
 Green, P.C., Neil Howard Abramson,
 Proskauer Rose LLP, Samantha Dulaney,
 Spivak Lipton Watanabe Spivak & Moss
 LLP, New York, NY, for Defendants.

**ORDER DISMISSING COMPLAINT
 WITH LIMITED LEAVE TO
 REPLEAD**

ALVIN K. HELLERSTEIN, U.S.D.J.

*1 Plaintiff is a former employee of
 Defendant The Shubert Organization (“
 Shubert”), and was formerly represented
 by her union, Theatrical Stage Employees

Local No. One, I.A.T.S.E., AFL-CIO (“
 Local One”), another defendant. Plaintiff
 alleges that she was wrongfully terminated,
 that her union breached its duty of fair
 representation, and that she was subject to
 gender discrimination. The facts are these:
 After Shubert notified Plaintiff, in May
 1995, that she was being terminated, her
 union, Local One, negotiated an agreement
 that allowed Plaintiff to continue in her
 position with Shubert on the condition that
 she submit a signed, undated letter of
 resignation. Plaintiff submitted the
 required letter and continued her
 employment for approximately nine years,
 until April 12, 2004, when she was
 discharged by Shubert pursuant to her
 letter of resignation. An arbitration panel
 affirmed Plaintiff's dismissal. (*See* Defs.'
 Opp., Ruderman Aff., Ex. C.) On April 11,
 2005, after filing of a charge with the
 Equal Employment Opportunity
 Commission (“EEOC”), Plaintiff initiated
 this action by filing of her complaint.
 Subsequently, on April 13, 2005 and May
 17, 2005, the EEOC issued Right to Sue
 Letters.

The case has since been subject to a
 number of rulings. By Order of August 29,
 2005, I dismissed all claims against
 Defendant The League of American
 Theaters and Producers, Inc. (the “League”
). By Order of March 24, 2006, I dismissed
 all claims against Defendant International

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Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, Its Territories and Canada, AFL-CIO, CLC (“I.A.T.S.E.”). I later denied Plaintiff’s subsequent motion for reconsideration of my March 24 Order and directed that Plaintiff, and the remaining Defendants, address the issue of subject matter jurisdiction. (See Order Denying Motion for Reconsideration, dated May 2, 2006 (“May 2 Order”).) I now respond to the parties’ submissions, and to Plaintiff’s motion to amend her complaint

By motion of July 11, 2005, Plaintiff moves to amend her complaint to reflect that, since commencement of the instant litigation, the EEOC has issued Right to Sue Letters on her Title VII claims against Defendants Local One and Shubert. Plaintiff further asserts that the exercise of federal jurisdiction in this case is entirely proper. Shubert and Local One oppose Plaintiff’s motion to amend, and ask that her complaint be dismissed.

Defendant Local One argues that the complaint should be dismissed as against it for lack of jurisdiction. Plaintiff asserts that I have jurisdiction over her claims against Local One under the “National Labor Relations Act, 29 U.S.C. §§ 185 and 159 pursuant to 28 U.S.C. §§ 1331 and 1337.” (Compl. ¶ 3.) I agree that the NLRA confers such jurisdiction. See 28 U.S.C. § 185.

On the merits, Plaintiff asserts that

Local One breached its duty of fair representation (“DFR”) in violation of the National Labor Relations Act by failing to instruct its appointed arbitrator to either rule in favor of Plaintiff, or to insist on an appointment of a neutral arbitrator. (Compl. ¶ 44.) The arbitration clause in question provides that disputes “will be submitted to the [current] International President of I.A.T.S.E. and the President of the uninvolved theater owner or their designee(s).” (See Ruderman Aff., Ex. B, XIV. Grievances, XV. Provisions of General Applicability.) Only if they cannot agree on a resolution shall the case be submitted “to a mutually agreeable third party to hear and determine the dispute.” (Id.) For the reasons stated in my Order of May 2, the two appointed arbitrators had the authority and right to rule in accordance with the merits as they perceived them. Plaintiff’s assertion that the arbitration procedure was compromised by the decision of the arbitrators to not appoint a third, neutral party to the panel is without merit. (See May 2 Order.) Thus, Plaintiff’s claims against Local One on this basis must be dismissed.

*2 Plaintiff’s complaint also alleges state-based claims. However, in the absence of any federal claim against Local One, I decline to exercise supplemental jurisdiction. See 28 U.S.C. § 1367(c)(3). The complaint against Local One is therefore dismissed in its entirety.

Defendant Shubert asserts separately that Plaintiff’s motion to amend her

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complaint to include an additional cause of action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (“Title VII”), should be denied as time-barred. Claims of unlawful employment practice must be filed with the Equal Employment Opportunity Commission (“EEOC”) within 180 days after the alleged unlawful employment practice. 42 U.S.C. § 2000-5(e)(1). Here, Plaintiff was wrongfully terminated on April 12, 2004 but did not file her EEOC charge until February 3, 2005, 297 days after her termination. Plaintiff clearly does not fall within the prescribed 180 day period. Although, on this basis alone, Plaintiff’s claim should be denied, relevant case law suggests that the failure to file within the applicable period may not be fatal.

The limitation period may be extended to 300 days where the aggrieved person “has initially instituted proceedings with a state or local agency with authority to grant or seek relief from such practice.” 42 U.S.C. § 2000-5(e)(1). In a paradoxical twist of judicial reasoning, a claim is deemed “initially instituted” with the relevant state or local agency upon receipt by the EEOC of a complainant’s charge-so long as the charge is filed with the EEOC within 300 days of the disputed practice, the claim is deemed to have been made within the statutorily prescribed period. *Tweksbury v. Ottawa Newspapers*, 192 F.3d 322, 327 (2d Cir.1999); *see also Ford v. Bernard Fineson Dev.*, 81 F.3d 304, 307 (2d Cir.1996). Thus, because Plaintiff filed

her charge with the EEOC within 300 days of her termination, she is deemed to have filed within the applicable period. In light of the Second Circuit’s holding in *Tweksbury*, I decline to dismiss Plaintiff’s motion to amend for lack of timeliness.

Shubert argues further that Plaintiff’s claims are barred because the issue of her discharge was fully arbitrated in accordance with the terms of the Collective Bargaining Agreement (“CBA”), providing that “the final step in the [grievance] procedure” is to submit disputes to arbitration. (*See Ruderman Aff., Ex. B.*) Plaintiff disputes the validity and fairness of the arbitration proceedings and asserts that, in any event, the arbitration proceedings may not operate to bar her Title VII claim as “[n]o evidence or argument on the issue of sex discrimination was received” by the arbitrators.

Plaintiff’s challenges to the validity of the arbitration proceeding are without merit. (*See May 2 Order, at 2.*) By the terms of the CBA, “all disputes, controversies or grievances” were to be submitted, first to a designated union committee, and, as a final step, to arbitration. (*See Ruderman Aff., Ex. B.*) Moreover, the decision of the arbitrators, affirming Plaintiff’s termination pursuant to her letter of resignation, shows that Plaintiff had a full and fair opportunity to present any and all arguments in favor of her position and to refute evidence submitted by Shubert. (*See Ruderman Aff.,*

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Ex. C.) The arbitrators fully considered the arguments presented by both sides to the dispute, including Plaintiff's assertion that any disagreements with production personnel were attributable "to her gender, to her commitment to follow the work rules, and to her need to find a balance among her house, production, and contract work."(*Id.* at 2.) The arbitration panel determined that Shubert had properly terminated Plaintiff pursuant to her letter of resignation.

*3 A plaintiff is prevented from relitigating any matter presented to the arbitrator absent "strong evidence that the decision was wrong as a matter of fact-e.g., new evidence not before the tribunal-or that the impartiality of the proceeding was somehow compromised[.]"*Collins v. N.Y.C. Transit Auth.*, 305 F.3d 113, 119 (2d Cir.2002). Such strong presumption, however, is less applicable in the situation presented here where the arbitrators' decision was limited to a consideration of whether the termination was made pursuant to the letter of resignation and thus not subject to the CBA provision mandating that persons in Plaintiff's position should not be discharged except for cause. (*See Ruderman Aff., Ex. B, C.*)

It is not clear to me that Plaintiff has had an opportunity to present an argument that the circumstances of the arbitration precluded her from showing that she was subjected to employment discrimination based on her gender. Although I doubt that she can do so, I will hold this decision in

abeyance for 20 days to permit Plaintiff this opportunity. If she fails to make such a showing, an order will be entered dismissing her complaint against Shubert.

In accordance with the foregoing, following a 20-day period of abeyance, Plaintiff's complaint is dismissed in its entirety.

SO ORDERED.

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