IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FREDERICK B. LOVE,	:	
Plaintiff,	:	
	:	**CIVIL ACTION**
v.	:	
	:	
MERCK & CO., INC., and PAPER,	:	**No. 04-4878**
ALLIED-INDUSTRIAL, CHEMICAL &	:	
ENERGY WORKERS UNION, LOCAL 2-86,	:	
Defendants.	:	

MEMORANDUM AND ORDER

Schiller, J. **January 21, 2005**

Plaintiff Frederick B. Love brings this action against Defendants Merck & Co., Inc. ("Merck") and Paper Allied-Industrial, Chemical & Energy Workers Union, Local 2-86 ("PACE") for alleged violations of federal law arising from the termination of his employment. Plaintiff asserts that Merck wrongfully terminated him and that, while prosecuting his grievance, PACE breached its duty of fair representation. Presently before this Court are: (1) PACE's motion to dismiss Plaintiff's fair representation claim as time-barred pursuant to Federal Rule of Civil Procedure 12(b)(6); and (2) PACE's motion for sanctions pursuant to Federal Rule of Civil Procedure 11(c). For the reasons set forth below, the motion to dismiss is granted and the motion for sanctions is denied.

I. BACKGROUND

The following facts are set out in the light most favorable to Plaintiff. Plaintiff began working as a biotechnician for Merck in 1992. (Compl. ¶ 6.) Throughout his employment, Plaintiff

was a member of PACE, a union which is an authorized collective bargaining agency for Merck employees. (*Id.* ¶¶ 3-4.) On October 10, 2002, Merck terminated Plaintiff, purportedly for insubordination and for the intimidation of a supervisor. (*Id.* ¶ 7.) PACE filed a grievance on Plaintiff's behalf, leading the parties to sign a "Last Chance Agreement" (the "Agreement") on or about January 24, 2003. (*Id.* ¶ 8.) The Agreement reinstated Plaintiff on a probationary basis but subjected him to immediate termination for any violation of Merck policies. (*Id.*)

On September 16, 2003, Merck again terminated Plaintiff, claiming that he had violated the terms of the Agreement by threatening a PACE steward with physical violence. (*Id.* ¶ 10.) Plaintiff denies threatening or intimidating this individual. (*Id.* ¶ 13.) On September 16, 2003, the day of Plaintiff's second termination, PACE filed another grievance on his behalf. (*Id.* ¶ 16 (misnumbered ¶ 12).)[1] An arbitrator heard the grievance on November 6, 2003 (*id.*) and denied it on February 9, 2004, thereby upholding Merck's decision to end Plaintiff's employment (*id.* ¶ 24 (misnumbered ¶ 20)).

On February 18, 2004, Plaintiff filed a claim against PACE with the National Labor Relations Board ("NLRB") alleging, inter alia, that PACE had failed to represent him adequately during arbitration. (Pl.'s Opp'n to Def. PACE's Mot. to Dismiss Ex. A (NLRB Charge).) Ultimately, however, the NLRB Region Four Director determined that there was insufficient evidence to support Plaintiff's claim and refused to issue a complaint. (*Id.* Ex. C (Rejection of NLRB Charge).) On October 18, 2004, eight months after filing the NLRB charge, Plaintiff instituted the above-captioned action.

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[1] As the Complaint is misnumbered from paragraph fifteen onward, the Court has renumbered the paragraphs in the order of their appearance and cited to them accordingly.

II. PACE'S MOTION TO DISMISS

A. Standard of Review

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a court generally considers only the allegations contained in the complaint, exhibits attached to the complaint, and matters of public record.[2] *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993). The court must accept as true all of the factual allegations pleaded in the complaint and draw all reasonable inferences in favor of the non-moving party. *Bd. of Trs. of Bricklayers & Allied Craftsmen Local 6 of N.J. Welfare Fund v. Wettlin Assocs., Inc.*, 237 F.3d 270, 272 (3d Cir. 2001). A motion to dismiss will only be granted if it is clear that relief cannot be granted to the plaintiff under any set of facts that could be proven consistent with the complaint's allegations. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (*citing Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). While normally asserted as an affirmative defense, a contention that a plaintiff's claim is barred by the applicable statute of limitations may be raised by way of a motion to dismiss if it is apparent, from the face of the complaint, that the claim is untimely. *Robinson v. Johnson*, 313 F.3d 128, 135 (3d Cir. 2002).

B. Discussion

The Complaint alleges that: (1) Merck violated Title VII and 42 U.S.C. § 1981 by

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[2] Here, the Court will consider Exhibit A, Plaintiff's charge to the NLRB, and Exhibit C, the NLRB's official rejection of Plaintiff's charge, because even though these documents are not attached to the Complaint, they are matters of public record. *See, e.g., Mills v. Int'l Union of Operating Eng'rs Local Union 66*, 252 F. Supp. 2d 210, 214 (W.D. Pa. 2003) (holding that charge to Regional Director of NLRB and Regional Director's correspondence indicating that formal complaint would not be filed were public records for purposes of motion to dismiss).

wrongfully terminating Plaintiff's employment; and (2) PACE violated § 301 of the Labor Management Relations Act by breaching its duty of fair representation. PACE has moved to dismiss Plaintiff's § 301 claim (the only claim against PACE) on the grounds that it is barred by the applicable statute of limitations.

1. *The Statute of Limitations on Fair Representation Claims*

A six month statute of limitations applies to § 301 actions where an employee alleges that a union has breached its duty of fair representation. *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 169-72 (1983). The six month period commences "when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged violation." *Vadino v. A. Valey Eng'rs*, 903 F.2d 253, 260 (3d Cir. 1990) (*quoting Hersh v. Allen Prods. Co.*, 789 F.2d 230, 232 (3d Cir. 1986)). A claimant who files an inadequate representation charge with the NLRB has, as matter of law, "discovered" the grounds for his § 301 claim; accordingly, the limitations period begins to run no later than the date of that filing. *See Kavowras v. New York Times Co.*, 328 F.3d 50, 55 (2d Cir. 2003) (collecting cases); *see also Mills*, 252 F. Supp. 2d at 214 (noting that because plaintiff had filed NLRB charge, he "clearly knew [the union's] actions could constitute a violation at that date").

In this case, Plaintiff's § 301 claim is untimely because he brought it at least eight months after the start of the six month limitations period. The parties do not dispute that Plaintiff filed an NLRB charge against PACE on February 18, 2004. (Pl.'s Opp'n to Def. PACE's Mot. to Dismiss Ex. A.) Plaintiff's § 301 claim thus accrued, for statue of limitations purposes, no later than

February 18, 2004.[3] *See Kavowras*, 328 F.3d at 55. Plaintiff did not commence this action until October 18, 2004, at least eight months after the limitations period on that claim began to run.

2. *Tolling of the Limitations Period*

Plaintiff concedes that a six month limitations period applies to § 301 claims, but contends that, here, the limitations period was tolled pending the outcome of his NLRB charge. This contention, however, is belied by the relevant authority in this Circuit and elsewhere, which indicates that the filing of an NLRB charge does not toll the statute of limitations for a § 301 action arising out of the same nucleus of operative fact. *See D'Angelo v. Metro. Life*, Civ. A. No. 93-1035, 1993 WL 131407, at *1, 1993 U.S. Dist. LEXIS 5326, at *3 (E.D. Pa. Apr. 23, 1993); *Bey v. Williams*, 590 F. Supp. 1150, 1154 (W.D. Pa. 1984); *see also Arriaga-Zayas v. Int'l Ladies' Garment Workers' Union-Puerto Rico Council*, 835 F.2d 11, 14 (1st Cir. 1987); *Conley v. Int'l Bhd. of Elec. Workers, Local 639*, 810 F.2d 913, 916 (9th Cir. 1987); *Adkins v. Int'l Union of Elec., Radio & Mach. Workers*, 769 F.2d 330, 335 (6th Cir. 1985); *Kolomick v. United Steelworkers of Am.*, 762 F.2d 354, 355-56 (4th Cir. 1985); *Aarsvold v. Greyhound Lines, Inc.*, 724 F.2d 72, 73 (8th Cir. 1983) (per curiam). Tolling in these circumstances is inappropriate because a plaintiff need not exhaust his remedies under the NLRB before instituting a federal suit. *See, e.g.*, *Conley*, 810 F.2d at 915-16. Therefore, tolling the limitations period pending the outcome of an NLRB charge is unnecessary from an equitable standpoint and would "frustrate the national policy of prompt resolution of labor disputes." *Id.* at 916.

Although Plaintiff urges this Court to following the reasoning of *Simmons v. Howard*

[3] Plaintiff's claim may have even accrued nine days before that, on the date the arbitrator denied Plaintiff's grievance. *See Whittle v. Local 641*, 56 F.3d 487, 490 (3d Cir. 1995) (holding limitations period on employees' § 301 claim began on date of adverse arbitration decision).

University, 157 F.3d 914 (D.C. Cir. 1998), this case does not support Plaintiff's position on tolling. In *Simmons*, the D.C. Circuit did not hold that the statute of limitations on a § 301 claim is tolled pending the outcome of an NLRB charge. Rather, the court found that the statute of limitations for such a claim was *not* tolled where the plaintiff had allegedly relied on representations by union representatives that they would re-open his grievance. *Id.* at 917. Presumably, then, Plaintiff is simply relying on *Simmons* for the proposition that the limitations period may be tolled where a plaintiff "in good faith attempts to exhaust grievance procedures." *Id*.; (*see also* Pl.'s Opp'n to Def. PACE's Mot. to Dismiss at 3 (stating Plaintiff filed NLRB charge in a good faith attempt to exhaust all available administrative grievance procedures)). This reliance is misplaced, however, because the *Simmons* court did not characterize an NLRB charge as a "grievance procedure." Indeed, an NLRB charge filed after a grievance has been arbitrated is not a "grievance procedure" within the traditional meaning of that term. *See* BLACK'S LAW DICTIONARY 712 (8th ed. 2004) (stating that grievance procedure is process for resolution of employee's complaint, the final step of which is arbitration); *see also Whittle*, 56 F.3d at 490 (indicating that grievance procedure ends with adverse arbitration decision). *Simmons*, therefore, in no way contradicts the well-established authority that prohibits tolling in these circumstances.

Accordingly, the limitations period for Plaintiff's § 301 claim was not tolled and the claim is time-barred as a matter of law.

III. PACE'S MOTION FOR SANCTIONS

PACE has also moved for sanctions against Plaintiff and/or Plaintiff's counsel for bringing a § 301 claim that is clearly time-barred. Under Federal Rule of Civil Procedure 11, an attorney who

presents a pleading to the court certifies that, to the best of his or her knowledge, the claims contained therein "are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." FED. R. CIV. P. 11(b). An attorney's signature certifies that the attorney has read the documents, made a reasonable inquiry, and is not acting in bad faith. *CTC Imps. & Exps. v. Nigerian Petroleum Corp.*, 951 F.2d 573, 578 (3d Cir. 1991). Reasonableness under the circumstances is the standard for testing an attorney's conduct and sanctions are appropriate only if "the filing of the complaint constituted abusive litigation or misuse of the court's process." *Simmerman v. Corino*, 27 F.3d 58, 62 (3d Cir. 1994) (citation and quotation omitted). In other words, Rule 11 sanctions are "intended only for exceptional circumstances." *Teamsters Local Union No. 430 v. Cement Express, Inc.*, 841 F.2d 66, 68 (3d Cir. 1988).

The Court finds that Plaintiff's § 301 claim, despite being filed outside the limitations period, was not tantamount to "abusive litigation or misuse of the court's process." *Simmerman*, 27 F.3d at 62. Although the extensive case law from other circuits and from the district courts is more than sufficient to refute Plaintiff's tolling argument, PACE has cited no controlling authority that is on point and renders the argument frivolous. Plaintiff's counsel was free to argue for the establishment of new law, *see* FED. R. CIV. P. 11(b), and while he apparently misread the *Simmons* decision, there is no reason to believe that he did so in bad faith. *See, e.g.*, *Rode v. United States*, 812 F. Supp. 45, 48 (M.D. Pa. 1992) (holding sanctions inappropriate where plaintiff's counsel had cited opinions from districts outside this Circuit and did not exhibit lack of good faith in doing so). Moreover, contrary to PACE's assertions, sanctions cannot be imposed simply because Plaintiff failed to withdraw his § 301 claim following receipt of PACE's motion to dismiss. *See Cement Express*, 841

F.2d at 68 ("Rule 11 should not be invoked against an attorney who fails to dismiss a case after the opposing attorney submits evidence that a statute of limitations or res judicata bars the suit.").

Accordingly, the Court finds that Plaintiff and his counsel acted reasonably under the circumstances and that sanctions are not warranted in this case.

IV. CONCLUSION

For the reasons stated above, PACE's motion to dismiss is granted but PACE's motion for sanctions is denied. An appropriate Order follows.

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Defendants.	:	

ORDER

AND NOW, this **21st** day of **January, 2005,** upon consideration of Defendant Paper Allied-Industrial, Chemical & Energy Workers Union, Local 2-86's ("PACE") Motion to Dismiss and Motion for Sanctions, Plaintiff's responses thereto, all replies thereon, and for the foregoing reasons, it is hereby **ORDERED** that:

1. Defendant PACE's Motion for Leave to File a Reply Brief (Document No. 8) is **GRANTED**.

2. Defendant PACE's Motion to Dismiss (Document No. 2) is **GRANTED**.

3. Defendant PACE's Motion for Sanctions (Document No. 3) is **DENIED**.

BY THE COURT:

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Berle M. Schiller, J.