

**Yarbery v Columbia Univ.**

2009 NY Slip Op 31685(U)

July 27, 2009

Supreme Court, New York County

Docket Number: 116907

Judge: Walter B. Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **WALTER B. TOLUB**

PART 15

Index Number : 116907/2008  
**YARBERY, ANITA S.**  
 VS.  
**COLUMBIA UNIVERSITY**  
 SEQUENCE NUMBER : 001  
 DISMISS ACTION

INDEX NO. \_\_\_\_\_  
 MOTION DATE \_\_\_\_\_  
 MOTION SEQ. NO. \_\_\_\_\_  
 MOTION CAL. NO. \_\_\_\_\_

in this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

**FILED**  
 JUL 29 2009  
 COUNTY CLERK'S OFFICE  
 NEW YORK

**FILED**  
 JUL 29 2009  
 COUNTY CLERK'S OFFICE  
 NEW YORK

Dated: 7/27/09

W  
**WALTER B. TOLUB** S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----X  
ANITA S. YARBERY

Plaintiff,

-against-

COLUMBIA UNIVERSITY (NICHOLAS DIRKS,  
HENRY PINKHAM, ANDREAS HUYSSSEN, JAN ALLEN),

Defendants.

Index No. 116907  
Mtn Seq. 001

**FILED**  
JUL 29 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

-----X  
**WALTER B. TOLUB, J.:**

This is Defendants' (Columbia) motion to dismiss the Complaint on the grounds that the Complaint is time barred. Additionally, the independent Defendants move to dismiss the action against them because they were not served with process.

Facts

On March 12, 2004, Plaintiff, a graduate student at Columbia, received a letter from Columbia that it would agree to her request and grant her a medical leave of absence for the Spring 2004 semester. The notice also informed the Plaintiff that she would not have access to Columbia health services while she was on leave.

On July 6, 2005, Columbia informed the Plaintiff that it would agree to Plaintiff's further request that she be given a retroactive leave of absence for the 2004-2005 academic year. This notice also informed Plaintiff that she would only be permitted to continue in the Masters Program rather than the PhD

program (Plaintiff's Ex. L). Additionally, the notice stated that Plaintiff would not be able to teach any classes for a stipend as a teaching assistant.

Plaintiff complained to the Ombudsperson at Columbia in the Fall of 2005 and filed a grievance in 2006. Throughout her complaints to different departments, Plaintiff claims that Defendants represented that Plaintiff was never blocked for registering in the PhD program (Plaintiff's Ex. M).

On May 9, 2008, Columbia's grievance committee determined that "Although Anita Yarbery was definitely informed that she was not being allowed to continue in the PhD Program, she was not given any very clear account of why." (Plaintiff's Ex. P). Additionally, the committee determined that the actions on the part of the different departments at Columbia were "strictly within university policy" (Id.).

Although Plaintiff had missed the deadline to file a EEOC action, on July 28, 2008, Plaintiff brought a complaint of disability discrimination before the United States Department of Education, Office for Civil Rights. On November 4, 2008, she brought a complaint of disability discrimination before the New York State Division of Human Rights. Both complaints were dismissed by the respective agencies at the request of Plaintiff prior to either agency making a determination on the merits of

the actions<sup>1</sup>.

On December 18, 2008, the Summons and Complaint in this action were filed with the Clerk of the Court. Plaintiff then served Defendant Columbia on April 2, 2009. The individual defendants were not served, nor were there extra copies for the individual Defendants left with Columbia's general counsel.

Defendants now seek an order dismissing the action on the grounds that the Complaint violates the statute of limitations. Additionally, the independent Defendants move to dismiss the action against them because they were not served with process.

Defendants argue that the July 6, 2005 notice received by Plaintiff triggered the three year statute of limitations for which Plaintiff could file a discrimination action.

Plaintiff argues, inter alia, that it was not clear whether there was any discrimination until the grievance committee determined that she was not allowed to continue in the PhD Program on May 9, 2008. Therefore, Plaintiff contends that she is well within the three year statute of limitations for commencing a disability discrimination action.

#### Discussion

An action alleging a violation of the Executive Law §296, et

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<sup>1</sup>As Defendants memorandum points out, there is no tolling of a statute of limitation based on the filing of and then the voluntary withdrawal of agency complaints (Henderson v. Town of Van Buren, 15 AD3d 980 [4<sup>th</sup> Dept 2005]; Ferrugia v. North Shore University Hospital, 13 misc.3d 740 [Cu. Ct. NY Co. 2006]).

seq, is governed by a three year statute of limitation set forth in CPLR §214(2) (See generally Martinez-Tolentino v. Buffalo State College, 277 AD2d 899 [4<sup>th</sup> Dept 2000]).

A discrimination claim accrues on the date that an adverse determination is made and communicated to the plaintiff (Cordone v. Wilens & Baker PC, 286 AD2d 597 [1<sup>st</sup> Dept 2001 citing Delaware State Coll. v. Ricks, 449 US 250, 258).

Here, Plaintiff claims that although she took the July 6, 2005 notice as the school's determination that she would not be permitted to pursue her PhD, that the letter was in fact not a determination since Columbia, in subsequent proceedings, used the letter to indicate that Plaintiff voluntarily failed to register with the school. Plaintiff argues that it was the grievance committee determination that clearly indicated what Columbia's determination was and that it was the committee that communicated it to her in May of 2008. As such, Plaintiff argues that she is within the three year statute of limitations period provided under the Executive Law to commence a discrimination proceeding.

Plaintiff's argument fails. The possibility that a determination may have been reversed or clarified in some way, is insufficient to toll the statute of limitations period. There is no evidence that Columbia actively misled Plaintiff about her status or that it restricted her in some extraordinary way from exercising her rights to commence a proceeding alleging

