COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1254

BONNIE AKERSON

vs.

UNIVERSITY OF PHOENIX & another.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, Bonnie Akerson, appeals from a judgment of the Superior Court dismissing her complaint for employment discrimination on the basis of age pursuant to G. L. c. 151B, § 4 (1), and handicap pursuant to G. L. c. 151B, § 4 (1), on the ground that the complaint was barred by the statute of limitations. We reverse the dismissal to the extent that her handicap discrimination claim alleges a failure to provide her with reasonable accommodations and otherwise affirm.

Background. We accept the factual allegations of the complaint as true, as well as any favorable inferences drawn from them. See Goodwin v. Lee Pub. Sch., 475 Mass. 280, 284 (2016).

[1] Amy Olson. The proper spelling of this defendant's last name is Olsen. Consistent with our practice, we use the spelling of her name in the complaint.

Akerson began working as an online instructor for the University of Phoenix (university) in 2002. She reported to Amy Olson. Akerson suffers from interstitial cystitis, an inflammatory bladder disease.

In January 2014, the university required Akerson to complete a training. It is undisputed that the university concluded that she failed the final quiz, and Akerson disputes whether the university graded her answers correctly. She alleges that she asked to retake the quiz with an accommodation for her disability as part of a broader request for accommodating her workplace conditions. One week later, university employee Gina Miller asked Akerson to complete certain forms concerning her accommodations request, which Akerson did by January 28, 2014.

Meanwhile, on February 13, 2014, Akerson received a letter from the university terminating her employment at the end of the semester for failure to complete the training. She appealed the termination. Around February 14, 2014, Miller requested additional information from Akerson, noting that her request for accommodations was incomplete. On or about February 24, 2014, Akerson appealed her termination to Jill Patterson, the university's director of academic affairs. On or about May 12, 2014, Patterson provided Akerson with a letter alleging that she was not being cooperative with Miller relative to the request

for accommodations. After receiving this letter, Akerson submitted her appeal of her termination to George Love, the regional director of academic affairs, on May 20, 2014. The university has not responded to the final internal appeal. Akerson filed her complaint on May 11, 2017.

The trial court allowed the defendants' motion to dismiss the complaint on statute of limitations grounds. This appeal followed.

Discussion. We review the judge's decision de novo. See Goodwin, 475 Mass. at 284. Under G. L. c. 151B, § 9, as amended by St. 1991, c. 323, § 2, a complaint alleging employment discrimination must be filed "not later than three years after the alleged unlawful practice occurred." See Everett v. 357 Corp., 453 Mass. 585, 594 (2009). In determining the date that triggers the limitations period, the focus must be "upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful." School Comm. of Brockton v. Massachusetts Comm'n Against Discrimination, 423 Mass. 7, 11 n.8 (1996), quoting Delaware State College v. Ricks, 449 U.S. 250, 258 (1980). Applying that test, the United States Supreme Court held in Ricks, a Title VII case, that the limitations period began running when the adverse employment decision (denial of tenure) "was made and communicated to" the plaintiff, even though the "effects" of that decision

(termination) did not occur until one year later. 449 U.S. at 258. In Adamczyk v. Augat, Inc., 52 Mass. App. Ct. 717, 722 (2001), we applied the rationale of Ricks to G. L. c. 151B and concluded that the limitations period commenced on the date that the plaintiffs were notified that their employment would be terminated, not on their actual termination date. However, the statute does not begin to run until "facts that would support a charge of discrimination . . . were apparent or should have been apparent to a person with a reasonably prudent regard for his rights similarly situated to the plaintiff . . . ." Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 931 (5th Cir. 1975). Thus, a plaintiff "who has not learned nor in the circumstances could reasonably have been expected to learn the facts that would support a charge" of employment discrimination will not be considered to have been on notice of the discrimination when calculating the statute of limitations period. Id. at 925.

Here, the university's termination letter received by the plaintiff on February 13, 2014, was unequivocal. To the extent that the plaintiff challenges this decision as discriminatory, her claims are time barred. Adamczyk, 52 Mass. App. Ct. at 722. To the extent that her claim for handicap discrimination is grounded on the university's failure to offer her reasonable

accommodations, it stands on different footing.[2] Akerson requested that the university offer her reasonable accommodations prior to her termination. The university then engaged in an information gathering process with her through at least May 12, 2014. At some point thereafter, the process broke down. Akerson's complaint was brought within three years of the breakdown of that process and is, therefore, timely.

Conclusion. So much of the judgment dated June 6, 2018, pertaining to count two is vacated, and the matter is remanded for further proceedings consistent with this memorandum and order. In all other respects, the judgment is affirmed.

So ordered.

By the Court (Massing, Henry & McDonough, JJ.[3]),

Joseph F. Stanton

Clerk

Entered: June 24, 2020.

[2] To prove a reasonable accommodation claim, Akerson "must show that [she] was a 'qualified handicapped person' capable of performing the essential functions of h[er] job with reasonable accommodation; [she] requested such accommodation, and [the university] refused to provide it; and, as a result of this refusal, [s]he suffered some harm." Alba v. Raytheon Co., 441 Mass. 836, 843 n.9 (2004).

[3] The panelists are listed in order of seniority.