In the Matter of:

GREGG SNYDER, **ARB CASE NO. 09-008**

COMPLAINANT, **ALJ CASE NO. 2008-SOX-055**

v. **DATE: April 30, 2009**

WYETH PHARMACEUTICALS,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Mitchell J. Notis, Esq., Brookline, Massachusetts

For the Respondent:
Frank A. Chernak, Esq.; Donna D. Page, Esq., *Ballard Spahr Andrews & Ingersoll, LLP*, Philadelphia, Pennsylvania

FINAL DECISION AND ORDER OF REMAND

The Complainant, Gregg Snyder, filed a complaint alleging that the Respondent, Wyeth Pharmaceuticals, retaliated against him in violation of the whistleblower protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VII of the Sarbanes-Oxley Act (SOX),[1] and its implementing

[1] 18 U.S.C.A. § 1514(A)(West 2007). SOX's section 806 prohibits certain covered employers from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against employees who provide information to a covered employer or a Federal agency or Congress regarding conduct that the employee reasonably believes

regulations[2] when it terminated his employment. On October 1, 2008, a Department of Labor Administrative Law Judge (ALJ) issued a [Recommended] Decision and Order Dismissing Complaint (R. D. & O.), finding that Snyder failed to demonstrate the existence of a genuine issue of material fact relevant to the issue whether he timely filed his complaint within 90 days of the date on which he knew or should have known that Wyeth intended to terminate his employment. Upon review, we conclude that the ALJ's conclusion that Wyeth finally terminated Snyder's employment on October 15, 2007, is incorrect as a matter of law. Accordingly, we reject the ALJ's recommendation and we remand Snyder's case for further proceedings consistent with this decision.

BACKGROUND

Wyeth Pharmaceuticals employed Gregg Snyder as an Engineer IV at its Cambridge, Massachusetts facility. Snyder was responsible for all Building System functions at the facility. In September 2007, Wyeth's director of human resources, Patricia Lingen, informed Snyder that he was suspended with pay pending Wyeth's investigation of allegations that he improperly accessed a confidential system.[3]

While suspended, Snyder sent an e-mail to Wyeth on October 1, 2007, alleging that Wyeth officials had committed Code of Conduct violations, explaining his allegedly improper conduct, and asserting that the suspension was a continuation of a course of retaliatory actions by Wyeth.[4] On October 15, 2007, Lingen sent a letter to Snyder stating:

> Please note that the Company is reviewing the October 1, 2007 e-mail you sent in which you alleged Code of Conduct Violations and currently is investigating your allegations with respect to the Code of Conduct.
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> The purpose of this letter is [to] inform you that prior to receiving your October 1, 2007 e-mail, the Company had made the decision to terminate your employment based on

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constitutes a violation of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. Employees are also protected against discrimination when they have filed, testified in, participated in, or otherwise assisted in a proceeding filed or about to be filed relating to a violation of the aforesaid fraud statutes, SEC rules, or federal law.

[2] 29 C.F.R. Part 1980 (2007).

[3] R. D. & O. at 2.

[4] *Id.*

> your violation of company protocol by accessing a confidential system as an unauthorized user. You had been warned previously about respecting the confidentiality and security of electronic systems at Wyeth. Your October 1, 2007 e-mail does not address several key facts relating to this incident.[5]

The letter continued, describing three specific instances of behavior that Wyeth found objectionable.[6] The letter then stated:

> If you would like to provide me with evidence in writing that addresses your specific behavior on August 23, 2007 and specifically addresses the three bullet points above, I would be happy to review it. In addition, if you would like to provide me with specific information in writing as to why you think your termination is not justified or specific details of the alleged "harassment" you feel you have received, I would be happy to review it. Please note that any communication with me on this subject must address the fact that the Company has videotape of your infraction.
>
> If I do not hear from you, I will assume you have no information to provide and the Company will move ahead with your termination for misconduct.[7]

In a letter dated October 19, 2007, Snyder responded to Lingen's letter and again alleged retaliation and harassment.[8] Wyeth contends that it investigated Snyder's allegations during the period from October 15, 2007, to February 2008.[9] During this time Snyder remained on suspension with pay.[10] On February 11, 2008, Wyeth sent Snyder a letter that he received on February 12th, informing Snyder that its investigation had not substantiated his claims and that Wyeth "'has concluded that the decision to terminate your employment is appropriate. Accordingly, the decision to terminate your employment will stand and your employment will be terminated effective February 11,

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5 *Id.*

6 *Id.* at 3.

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.* at 4.

2008.'"[11] Snyder contends that he learned that Wyeth was terminating his employment on February 12, 2008, and that prior to that date he had "'no knowledge that my employment with Wyeth had been terminated or was going to be terminated.'"[12]

Snyder filed his SOX complaint on May 8, 2008, with the Department of Labor's Occupational Safety and Health Administration (OSHA).[13] Upon review, OSHA found that Snyder did not timely file his complaint because it was not filed within 90 days of October 17, 2007, the date he received the letter from Lingen informing him that Wyeth had made the decision to terminate his employment.[14]

On August 8, 2008, Snyder filed a hearing request with the Department of Labor's Office of Administrative Law Judges.[15] In response, the ALJ issued an Order to Show Cause directing the parties to demonstrate why the complaint should not be dismissed as untimely.[16] After receiving the parties' responses, the ALJ concluded that the limitations period began to run when Lingen informed Snyder in her October 15, 2007 letter that Wyeth had decided to terminate his employment and that consequently, his complaint, filed on May 8, 2008, was untimely.[17] Snyder filed a Petition requesting the Administrative Review Board to review the ALJ's R. D. & O.[18]

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board her authority to issue final agency decisions under SOX.[19] We review a recommended decision granting summary decision de novo. That is, the standard the ALJ applies also

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11 *Id.*

12 *Id.*

13 *Id.* at 1.

14 Secretary's Findings, July 9, 2008.

15 R. D. & O. at 1. *See* 29 C.F.R. § 1980.106(a).

16 R. D. & O. at 1.

17 *Id.* at 7.

18 *See* 29 C.F.R. § 1980.110(a).

19 Secretary's Order No. 1-2002, (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1980.110(a).

governs our review.[20] The standard for granting summary decision is essentially the same as that found in the rule governing summary judgment in the federal courts.[21] Accordingly, summary decision is appropriate if there is no genuine issue of material fact. The determination of whether facts are material is based on the substantive law upon which each claim is based.[22] A genuine issue of material fact is one, the resolution of which "could establish an element of a claim or defense and, therefore, affect the outcome of the action."[23]

We view the evidence in the light most favorable to the non-moving party and then determine whether there are any genuine issues of material fact and whether the ALJ correctly applied the relevant law.[24] "To prevail on a motion for summary judgment, the moving party must show that the nonmoving party 'fail[ed] to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial.'"[25] Accordingly, a moving party may prevail by pointing to the "absence of evidence proffered by the nonmoving party."[26]

Furthermore, a party opposing a motion for summary decision "may not rest upon the mere allegations or denials of [a] pleading. [The response] must set forth specific facts showing that there is a genuine issue of fact for the hearing."[27] Here, the parties do not dispute the basic facts relevant to the timeliness of the filing of the complaint, but they do disagree on the legal ramifications of the Lingen letter of October 15, 2007.

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[20] 29 C.F.R. § 18.40 (2007).

[21] Fed. R. Civ. P. 56.

[22] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[23] *Bobreski v. United States EPA*, 284 F. Supp. 2d 67, 72-73 (D.D.C. 2003).

[24] *Lee v. Schneider Nat'l, Inc.*, ARB No. 02-102, ALJ No. 2002- STA-025, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight, Inc.*, ARB No. 01-018, ALJ No. 2000-STA-052, slip op. at 2 (ARB Dec. 13, 2002).

[25] *Bobreski*, 284 F. Supp. 2d at 73 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

[26] 284 F. Supp. 2d at 73.

[27] 29 C.F.R. § 18.40(c). *See Webb v. Carolina Power & Light Co*., No. 1993-ERA-042, slip op. at 4-6 (Sec'y July 17, 1995).

DISCUSSION

An employee alleging a SOX retaliation violation must file his or her complaint within 90 days of the date on which the alleged violation occurred.[28] "[The] limitations period begins to run from the time that the complainant knows or reasonably should know that the challenged act has occurred."[29] Thus, an employer violates the SOX on the date that it communicates to the employee its intent to take an adverse employment action, rather than the date on which the employee experiences the adverse consequences of the employer's action.[30]

In whistleblower cases, statutes of limitation, such as section 1514A(b)(2)(D), run from the date an employee receives "final, definitive, and unequivocal notice" of an adverse employment decision.[31] "Final" and "definitive" notice is a communication that is decisive or conclusive, i.e., leaving no further chance for action, discussion, or change. "Unequivocal" notice means communication that is not ambiguous, i.e., free of misleading possibilities.[32]

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[28] 18 U.S.C.A. § 1514A(b)(2)(D) **(**"An action … shall be commenced not later than 90 days after the date on which the violation occurs."); 29 C.F.R. § 1980.103(d)("Time for filing. Within 90 days after an alleged violation of the Act occurs (i.e., when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been discriminated against in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination.").

[29] *Allen v. U.S. Steel Corp.*, 665 F.2d 689, 692 (11th Cir. 1982). *See also Ross v. Florida Power & Light Co.*, ARB No. 98-044, ALJ No. 1996-ERA-036, slip op. at 4 (ARB Mar. 31, 1999)(statute of limitations begins to run "on the date when facts which would support the discrimination complaint were apparent or should have been apparent to a person with a reasonably prudent regard for his rights").

[30] *Overall v. Tennessee Valley Auth.*, ARB Nos. 98-111, 98-128, ALJ No. 1997-ERA-053, slip op. at 36 (ARB Apr. 30, 2001). *See Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (proper focus contemplates the time the employee receives notification of the discriminatory act, not the point at which the consequences of the act become apparent); *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980) (limitations period began to run when the tenure decision was made and communicated rather than on the date his employment terminated).

[31] *See, e.g., Rollins, v. American Airlines*, ARB No. 04-140, ALJ No. 2004-AIR-009, slip op. at 2 (ARB Apr. 3, 2007 (re-issued)); *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-054, slip op. at 3 (ARB Aug. 31, 2005); *Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-002, slip op. at 14 (ARB Feb. 28, 2003).

[32] *Larry v. The Detroit Edison Co*., 1986-ERA-032, slip op. at 14 (Sec'y June 28, 1991). *Cf. Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1141 (6th Cir. 1994) (three letters

Snyder avers in support of his argument that the limitations period did not begin to run until February 12, 2008, that Lingen's October 15th letter was no more than a threat to terminate that left open the possibility that Wyeth would not "move ahead" with his termination, if "he provided specific information in writing as to why [he thought his] termination [was] not justified." The ALJ rejected this argument stating:

> The Respondent's act of affording the Complainant an opportunity to provide the company with information regarding his alleged misconduct, which the company would review, does not convert its decision to terminate Complainant, communicated in the October 15, 2007 letter, into a threat to terminate. Rather, the company was willing to review its termination of Complainant by considering information he might have, similar to an arbitration or grievance procedure which might reverse an adverse employment action. Under *Ricks*[33] and its progeny, the 90-day limitations period for filing a SOX complaint is not stayed pending an internal review of the decision.[34]

In *Ricks*, the Supreme Court addressed the question whether participation in a grievance procedure tolled the commencement of the limitations period. The Court reaffirmed its prior holding that it did not:

> [W]e already have held that the pendency of a grievance, or some other method of **collateral** review of an employment decision, does not toll the running of the limitations periods. . . . The existence of careful procedures to assure fairness in the tenure decision should not obscure the principle that limitations periods normally commence when the employer's decision is made.[35]

The Court further described the attributes of the final decision by the Board of Trustees to deny tenure to Ricks:

> [W]e think that the Board of Trustees had made clear well

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warning of further discipline did not constitute final notice of employer's intent to discharge complainant).

33 *Delaware State Coll. v. Ricks*, 449 U.S. 250 (1980).

34 R. D. & O. at 6-7.

35 449 U.S. at 506 (citations omitted)(emphasis added).

> before September 12 that it had formally rejected Ricks' tenure bid. The June 26 letter itself characterized that as the Board's "official position." It is apparent, of course, that the Board in the June 26 letter indicated a willingness to change its prior decision if Ricks' grievance were found to be meritorious. But entertaining a grievance complaining of the tenure decision does not suggest that the earlier decision was in any respect tentative. The grievance procedure, by its nature, is a *remedy* for a prior decision, not an opportunity to *influence* that decision before it is made.[36]

We conclude that the ALJ erred when she found that the Court's decision in *Ricks* compelled her decision that Lingen's October 15th letter was unambiguous and left "no further chance for action, discussion, or change." The opportunity Lingen offered Snyder to provide information that might change the termination decision was not in the nature of a formal procedure, similar to a grievance procedure that is **collateral** to the termination decision. Grievance procedures and other types of collateral procedures by definition are not invoked until the employer has made a final decision and do not in any way suggest that the employer's decision is ambivalent or equivocal. As the Court stated, these types of procedures are remedies for past decisions not an opportunity to influence the decision before the employer decides to move forward with it.

While Lingen's letter stated that the decision to terminate had been made, it held out the possibility that Snyder could convince Wyeth to not move forward with the decision if he could provide specific information in writing as to why he believed that the termination of his employment was not justified. The opportunity Lingen offered Snyder to convince Wyeth not to go forward carried none of the indicia of a formal collateral procedure to remedy a final decision. Instead, it injected an element of ambiguity into the transaction and an opportunity for further action, discussion, or change. Thus the letter did not constitute final, definitive, and unequivocal notice of the termination of Snyder's employment sufficient to commence the running of the limitations period.

Our interpretation of *Ricks* and application of it in interpreting the Lingen letter are further bolstered by the Fourth Circuit Court of Appeals's decision in *English v. Whitfield*.[37] In this case arising under the whistleblower provisions of the Energy Reorganization Act,[38] the employee, Vera English, challenged the efficacy of a letter from the employer to commence the limitations period because it stated that unless she

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36 *Id.* at 505 (citations omitted).

37 858 F.2d 957 (1998).

38 42 U.S.C.A. § 5851 (West 1995).

could find an available position elsewhere in the facility, she would be put on a layoff in 90 days. Rejecting English's argument that the letter did not constitute sufficient unambiguous notice of termination because it held out the possibility that she could avoid a layoff if she could find a position elsewhere in the facility, the court held:

> The only uncertainty in the notice related to a possibility of avoidance of the consequences of the decision by means **unrelated to its revocation or reexamination by the employer.** . . . But the possibility that the effect(s) of a challenged decision might be avoided by such means, does not render the decision equivocal for the purposes here at issue, at least where, as here, the effect can be avoided **without negating the alleged discriminatory decision itself.**[39]

In contrast to the letter at issue in *English*, Lingen's letter held out the possibility that Wyeth would re-examine and revoke the termination if it was satisfied with Snyder's explanation. Thus, the alleged discriminatory action could be negated. Therefore, because Lingen's letter offered Snyder the possibility that he could avoid the alleged discriminatory act rather than offering him a collateral procedure or opportunity to remedy that act, we hold that Lingen's letter was not a final, definitive, and unequivocal notice of an adverse employment decision sufficient to commence the running of the 90-day limitations period for filing his whistleblower complaint.

We further hold that, because of the letter's element of ambiguity, this case is distinguishable from cases we have decided such as *Levi v. Anheuser Busch Cos., Inc.*,[40] cited by the ALJ and the ultimate outcome of *Halpern v. XL Capital, Ltd.*[41] cited by Wyeth in support of its argument that the clock began running when Snyder received the October 15th letter.

In *Levi*, citing *Ricks*, the Board held that the limitations period began to run when the employer gave the complainant notice of its intention to suspend him indefinitely and discharge him and not when the decision on arbitration was issued because the limitations period begins to run when the decision has been made and communicated to the complainant, not when the complainant feels the adverse effect of the adverse action. *Levi* is distinguishable from this case because Wyeth's October 15th letter held out the possibility that the Wyeth might change the decision if it was satisfied with Snyder's explanation for his actions, thus the Wyeth notification was equivocal. The notice in *Levi*

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39 858 F.2d at 962 (footnote omitted).

40 ARB Nos. 06-102, 07-020, 08-006; ALJ Nos. 2006-SOX-037, 2006-SOX-108, 2007-SOX-055 (ARB Apr. 30, 2008).

41 ARB No. 04-120, ALJ No. 2004-SOX-054 (ARB Aug. 31, 2005).

was unequivocal; it contained no suggestion that Levi could alter the decision by convincing the employer that it had made a mistake. The only method that Levi had to alter the decision was by convincing an arbiter that his employer had made the wrong decision. But the Supreme Court held in *Ricks* that such collateral procedures do not toll the limitations period.[42]

In *Halpern*, the employer suspended the complainant from his position for allegedly exceeding his authority. The complainant sent an e-mail to several individuals predicting that his employment would soon be terminated. The employer's General Counsel wrote back to the complainant stating that he did not understand why the complainant was anticipating the outcome of the company's review or anticipating that any untoward action regarding his employment would ensue. Several months later the company informed the complainant that his employment was terminated. The ALJ found that the limitations period began to run when the employer suspended his employment. The Board reversed, holding that the ALJ failed to discuss the General Counsel's e-mail and that this e-mail cast doubt on whether the complainant had received "'final, definitive, and unequivocal notice'" of the employer's decision to discharge him.[43] Nevertheless, ultimately the Board held that Halpern's complaint was not timely because he did not file it within 90 days of the date on which his employer informed him orally and in writing that his employment was terminated. Similarly, in this case, Wyeth's October 15th letter cast doubt that Wyeth had definitely terminated Snyder's employment by indicating the possibility that upon further investigation, it would not terminate his employment.[44] As was true in *Halpern*, only when Snyder received the unequivocal notice, did the limitations period begin to run.

Our decision today is also consistent with our recent decision in *Corbett v. Energy East Corp.*[45] In *Corbett*, the employer initially informed the complainant, Mark Corbett, on March 21 2005, that he was dissatisfied with his performance as Director of Human Resources. If Corbett wanted to remain as the Director, he would have to notify the employer by March 23 and meet with the employer on March 28. As an alternative to

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42 449 U.S. at 506.

43 *Halpern*, slip op. at 4. We note that in this case, as in *Halpern*, the disputed notice of termination did not include a date certain for termination, While the Board has found that inclusion of a date certain is not required to establish that a termination is unequivocal, *Sneed v. Radio One, Inc.*, ARB No. 07-072, ALJ No. 2007-SOX-018, slip op. at 7-8 (ARB Aug. 28, 2008); *Rollins*, slip op. at 4; *Belt v. United States Enrichment Corp.*, ARB No. 02-117, 2001-ERA-019, slip op. at 5-8 (ARB Feb. 26, 2004), the specification of a date on which the adverse action will become effective could be evidence that the notification was definite and unambiguous.

44 *Halpern*, slip op. at 4.

45 ARB No. 07-044, 2006-SOX-065, slip op. at 4-5 (ARB Dec. 31, 2008).

remaining as Director, the employer offered a separation agreement that would require him to resign as Director, but remain with the company until November 30, whereupon he would retire. The March 23 and March 28 dates came and went without the required action on Corbett's part. By letter dated March 31, which Corbett received on April 1, his removal from the Director position within the company was not the issue, but rather his removal from employment with the company. If he did not execute the separation agreement that would extend his employment in another position through November 30 by April 15, his employment with the company would terminate on April 15. Corbett did not execute the separation agreement, and therefore his employment terminated on April 15. Thus, as in Snyder, the employer initially presented Corbett with performance improvement measures that would have allowed him to retain his Director position. However, when he failed to fulfill them, not just remaining as Director, but remaining with the company was no longer an option. His employment would terminate on April 15 or as late as November 30, depending on what he did. Nevertheless, as of April 1, Corbett had "final, definitive, and unequivocal" notice of the decision to terminate his employment.

CONCLUSION

The ALJ's conclusion that Lingen's letter commenced the 90-day limitations period was not in accordance with law because it did not provide final, definitive, and unequivocal notice of the termination of his employment. Accordingly, we reject her recommendation that we grant Wyeth's Motion for Summary Judgment and we **REMAND** this case to the ALJ for further proceedings in accordance with our decision.

SO ORDERED.

OLIVER M. TRANSUE
Administration Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge