In the Matter of:

CHRISTINE AVLON, **ARB CASE NO. 09-089**

COMPLAINANT, **ALJ CASE NO. 2008-SOX-051**

v. **DATE: May 31, 2011**

AMERICAN EXPRESS COMPANY,

RESPONDENT.

BEFORE: ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Christine Avlon, *pro se*, New Paltz, New York

For the Respondent:
Michael Delikat, Esq.; Renee B. Phillips, Esq.; *Orrick, Herrington & Sutcliffe, LLP*, New York, New York

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge;* Lisa Wilson Edwards, *Administrative Appeals Judge*

FINAL DECISION AND ORDER OF REMAND

This case arises under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C.A. 1514A (the "Act" or "SOX") (Thomson/West 2010), and its implementing regulations found at 29 C.F.R. Part 1980 (2010).[1] Christine Avlon, acting pro se, filed a

[1] SOX has been amended since Avlon filed her complaint. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010). The amendment does not affect our decision.

complaint with the Occupational Safety and Health Administration (OSHA) on March 2, 2008, alleging that her employer, American Express (AMEX), violated SOX when it terminated her employment. OSHA dismissed the complaint as untimely. On motion for summary decision, the ALJ dismissed Avlon's complaint as untimely because it was not filed within 90 days of a September 6, 2007 e-mail AMEX sent to Avlon. Upon review, we conclude that the ALJ's determination that the SOX statute of limitations was triggered by the September 6, 2007 e-mail of is incorrect as a matter of law. Accordingly, we reverse the ALJ's Decision and Order (D. & O.), and remand for further proceedings.

BACKGROUND

I. Undisputed Facts

The central facts pertaining to the timeliness of Avlon's SOX complaint are uncontested and taken from pleadings and exhibits filed before the ALJ.

A. Events leading to Avlon's SOX complaint

Avlon began working for AMEX in January 2006 in the Audit Department as Director, Special Investigations Unit, Enterprise Risk and Assurance Services (ERAS). OSHA Compl. at 1 (dated Mar. 2, 2008). Her responsibilities included investigating Sarbanes-Oxley whistleblower complaints and other allegations of fraud by AMEX employees. *Id.* at 2, 4.

In March 2006, Avlon began raising various allegations of employee misconduct against her supervisors, including her immediate supervisor Jacqueline Wagner, relating in part to two internal fraud investigations involving AMEX employees. OSHA Compl. at 3-4 (Mar. 2, 2008). Wagner placed Avlon on a 60-day period of "performance counseling" beginning August 30, 2006, following the complaints. *Ibid.* Avlon believed that the company's decision to place her in performance counseling was an attempt to "intimidate and harass" her, and to "discourage her from pursuing" the two investigations. *Id.* at 4; *see also* OSHA Compl. (dated Mar. 2, 2008), attached Letter to CEO Chenault dated Oct. 27, 2007.

During September and October 2006, Avlon requested a transfer out of her office and to other positions at AMEX. OSHA Compl. (dated Mar. 2, 2008) at Attachment 1-2. Under company policy, employees could not transfer to another position while they were in "performance counseling," nor could individuals with fewer than two years at the company transfer to a different office. OSHA Compl. at 4 (dated May 16, 2008). Avlon understood that her request was denied because when she made the request she was still in performance counseling, and had only been at the company for 9 to 10 months. D. & O. at 4; OSHA Compl. (dated Mar. 2, 2008), attached Letter to Chenault at 1-2.

B. Communications between Avlon and AMEX on Avlon's employment status

In November 2006, AMEX hired a law firm to investigate Avlon's SOX complaints, including her complaint of retaliation by her supervisor, Wagner, (also called "Endeavor"

investigation). AMEX Motion to Dismiss at 3; OSHA Compl. at 2 (Mar. 2, 2008). At the start of the investigation, Avlon and AMEX discussed the terms of Avlon's employment pending the investigation. These discussions are illustrated in numerous e-mail exchanges between Avlon and company representatives.

1) November 2006 E-mails

In November 2006, Avlon and AMEX discussed the terms of her employment pending the investigation, including the option of Avlon going on paid administrative leave. Avlon wrote to AMEX representative Marcel Melendez asking for clarification about taking administrative leave:

> I want to reiterate the areas where I would need additional clarification to agree to paid administrative leave. . . . (1) How would the paid admin[istrative] leave affect my employment status (if at all)? Am I expected to give up my rights as an employee (I am not inclined to do so.).
>
> At the end of the admin[istrative] leave, what happens? Or is it impossible to project, due to the various potential outcomes of the investigation? I don't want the paid leave itself to harm my pre-existing employment rights and status. . . . (2) . . . I can participate (with the company's consent) from my home if permitted while on paid admin[istrative] leave. . . .

AMEX Motion to Dismiss at Exh A.

Menendez responded to Avlon the next day as follows:

> The only effect that the Paid Administrative Leave has on your employment is that you will not report to work while the Endeavor matter is being investigated. We are not asking you to sign anything and you are not giving up your rights. You will continue to receive full pay, benefits, etc. When the investigation is completed, you will return to ERAS in your same role and on the same terms as when you left. You will not be required to complete the Improvement Plan deliverables while on Administrative Leave. The Improvement Plan process will be reassessed upon your return from Administrative Leave.

Ibid.

2) August 2007 E-mails

In August 2007, the Endeavor investigation ended and Avlon and AMEX began discussions about Avlon's return to work. On August 27, 2007, AMEX human resources representative Indera Rampal-Herrod e-mailed Avlon as follows:

> As agreed, you've been out on a paid administrative leave since early last November while the Endeavor investigation was being completed. The Endeavor investigation has now been completed and we need to meet with you to go over some things before you return to work. At that time, we can also discuss any concerns you might have about returning to work such as your reporting relationship. We need to schedule a time for you to meet with Dave Enders and I this week.

AMEX Motion to Dismiss at Exh. B. Rampal-Herrod noted that Avlon had come to AMEX offices on August 13 to meet, but that Rampal-Herrod and Enders had to re-schedule the meeting. In her e-mail, Rampal-Herrod proposed two dates to meet – August 29 and August 30 – and told Avlon to advise as to her availability by the following day, August 28. Rampal-Herrod noted in the e-mail that Avlon indicated that she would be out of town beginning on August 16 because her mother was ill and that she was not sure when she would return.

The next day, August 28, 2007, Avlon e-mailed Rampal-Herrod stating:

> I am utilizing Paid Time Off [PTO] and I would like to ask you to provide me with a calculation according to my record with how much PTO I have available to me. I was available to [AMEX] all of this calendar year until last Wednesday August 15th. . . . As we have discussed I was available to meet you for our original meeting on August 13, 2007, and I made my plans to commence my vacation on August 15, 2007, based upon your commitment to meet with me and with Dave Enders on Monday 8-13-07. You then contacted me (on or about 8-10-07) and informed me that your schedule had changed and you would be unable to meet . . . . I replied that I would be able to keep the meeting on 8-13-07, and asked you if you could teleconference with Dave and I if I was present at the tower in his office. You agreed to get back to me . . . . I did not hear from you so I proceeded to arrive at the office [on August 13, 2007]. . . . I made a good faith effort to be available at the time you and Dave Enders asked me to on Monday August 13 . . . .
>
> I want to cooperate with you and American Express, while preserving my rights and utilization of benefits. I will much appreciate your providing me with the requested information. In

> all cases I want to resolve any questions you have with respect and high regard for you and your colleagues.

AMEX Motion to Dismiss at Exh. B. On August 30, 2007, Rampal-Herrod requested that Avlon "tell [her] by Friday [August 31, 2007] when [she] is available" to meet next week with Rampal-Herrod and Enders. *Ibid.* Rampal-Herrod also indicated that if Avlon could not meet the following week, she asked for Avlon's availability "for the week of September 10th." *Ibid.*

The next day, on August 31, 2007, Avlon e-mailed Rampal-Herrod regarding the potential terms of her continuing employment with AMEX. Avlon wrote as follows:

> Indera, I have a concern about making a commitment to meet with you in New York during the week of September 10, 2007, or any time shortly thereafter. You indicated to me on the phone on August 13, 2007, that my return from Administrative Leave would be to report to my unit. This group continues to be under the direction of Ms. Wagner. . . . If that is the case I would need to seek legal counsel as I would find those terms for my return to be unacceptable. Regardless of the outcome of the investigation regarding Endeavor, under no circumstances do I believe that Ms. Wagner . . . could be objective with respect to my employment, whether she directly or indirectly was my senior within AXP. If American Express is unwilling to consider my placement outside of Ms. Wagner's purview, I would need to consider career-related alternatives. If so, a return to New York at the conclusion of my vacation for the purpose of meeting with you and Dave may not be in my best employment and career interests at this time. . . .
>
> If you could please reply to the above question regarding the location of the position which I would return to, I would be able to evaluate the appropriateness and utility of attending a meeting with you (or others) from American Express in New York. I request that you inform me in writing via e-mail of the intentions of American Express with respect to my return from Administrative Leave.

AMEX Motion to Dismiss at Exh. B.

3) September 2007 E-mails

In September 2007, Avlon and AMEX representatives continued to discuss the terms for Avlon's return to the company. On September 4, 2007, Rampal-Harrod responded to Avlon's August 31 e-mail as follows:

> You will still be in ERAS as a Director and you will report to Curtis Strohl, who in turn reports to Jacquie Wagner. You have

> expressed concern about being part of Jacquie's organization but you were hired by that group in January 2006 to be a forensic investigator, that is the role you had when you went on administrative leave in November 2006 and that is the role to which you must return if you want to continue to work on American Express. If you don't wish to continue to work at the company on these terms please advise me by this Friday. . . . If you intend to return you'll still need to meet with Dave Enders and I either this week or next week.

AMEX Motion to Dismiss at Exh. B. About 90 minutes later, Avlon responded that she would "not be able to reply" by Friday, September 7, regarding the terms for her return to AMEX. *Ibid.* At 4:36 pm on September 4, 2007, Rampal-Harrod e-mailed Avlon as follows:

> With respect to your return to work at AMEX, you will need to meet with [] Enders and me next week and you need to schedule that meeting this week. This is not optional if you expect to keep working at the company. We have allowed you to take a paid administrative leave for more than 9 months while the Endeavor investigation was being completed. We have also allowed you to take all of your 2007 PTO at one time and next Wednesday (Sept. 12) will be your last PTO day if you choose to exhaust all your PTO time before you return. At this point, if you don't schedule that meeting this week and meet with Dave and me on the scheduled date next week, we will treat this as a job abandonment and/or resignation of your employment. I hope you will abide by this requirement.

AMEX Motion to Dismiss at Exh. B. The next day, on September 5, 2007, Avlon responded to Rampal-Harrod as follows:

> Regarding the commitment to meet with you and Dave Enders within two days of my return from vacation on September 12, I believe that at this time I need to engage legal representation, and I would not and will not meet with you or others from American Express absent counsel. This is based on your statement that my return from leave is conditional on reporting (indirectly) to those who were accused in the Endeavor matter. It is not reasonable that I could interview and select legal counsel within the time parameters for our meeting you outlined in your email to me yesterday. I have, however, already commenced this search. I do not under any circumstances wish to abandon employment or otherwise resign from employment at American Express.

AMEX Motion to Dismiss at Exh. B.

On September 6, 2007, Rampal-Harrod e-mailed Avlon setting out the parameters for her continued employment as follows:

> I want to be clear about how you must proceed if you want to continue your employment at American Express:
>
> 1. By 5 pm this Friday (Sept. 7) you must schedule a meeting with Dave Enders and me for some time next week during normal business hours. You also must attend the meeting at whatever time we agree on. . . .
> 2. If you hire an attorney, the attorney can call John Parauda in the General Counsel's Office. . . . However you still have to meet with Dave and me next week and the attorney can not be present. There will not be an attorney present for the company either.
>
> If you do return to work it will be as part of the audit group and you will be reporting to Curtis Strohl who reports to Jacquie Wagner. If upon your return you feel any adverse action is taken against you because you raised allegations about Ms. Wagner in the Endeavor investigation, you can apprise Human Resources or the Ombuds Office and it will be looked into.
>
> If you're not willing to abide by all of the requirements I've set forth in his note, your employment will be terminated.

AMEX Motion to Dismiss at Exh. B.

4) AMEX Counsel Parauda's December 7, 2007 E-mail to Avlon

No meeting between Avlon, Rampal-Harrod, or Enders occurred during the week of September 9, and Avlon was not terminated. AMEX Motion to Dismiss at 5.

An e-mail by AMEX Counsel John Parauda, dated December 7, 2007, outlines the further discussions that proceeded between Avlon's counsel, Avlon, Parauda, and AMEX employee relations representative Lori Sunberg between September 2007 and early December 2007. In that e-mail, AMEX Counsel Parauda wrote Avlon as follows:

> In early September 2007, Indera Rampal-Harrod of Employee Relations sent you an e-mail indicating you needed to report to work the following week. In response you told her you needed to secure legal counsel. We accommodated your request and I spoke to your counsel on two separate occasions without any progress on your job status. In my first discussion with them they asked that the Company's request that you return to work be put on hold so they could first confer with you and then discuss possible

> resolution of your situation with me as the Company's legal counsel. I agreed to this. The following week, they called me and said they would no longer be representing you but that you had requested to speak with me directly. I agreed to this.
>
> Beginning in September, Lori Sundberg of Employee Relations and I spoke to you on several occasions and during those discussions proposed the following two options:
>
> 1. Return to work in the Audit Group in your position as Director. . . . It has been conveyed to you that if you returned and felt any adverse actions were taken against you because you previously raised allegations about Ms. Wagner, you could apprise Human Resources or the Ombuds Office and a prompt and appropriate investigation would be undertaken.
> 2. Agree to an amicable parting of the ways and enter into a separation agreement to terms acceptable to you and the Company. You said you were unwilling to explore this option without first corresponding with Rick Levin of the Company's Board of Directors. I understand you've done that and have been sent a response from Mr. Levin.
>
> Christine, the Company feels it has been more than reasonable in its efforts to treat you fairly. You have been paid your full salary and bonus over the past year, received full medical and other benefits and performed no work. We have attempted to negotiate with your attorneys and when they told us to talk directly to you, we attempted to work out a fair agreement.
>
> We are still willing to bring this situation to a resolution that is fair for you and the Company but we are not willing to continue in the current status any longer. Since you have rejected our offer that you return to the Audit Group we can only give you one more week to propose reasonable terms for a separation agreement. You can do this by either making a written demand to me by that date or scheduling a time to speak with me next week . . . . If you'd prefer to discuss settlement terms with Indera or Marcel Menendez of the Employee Relations Group I will pass on whatever demand you make to them and they can discuss this with you. If for whatever reason you do not want to take us up on this last chance to resolve the situation, we will have no choice but to terminate your employment as of December 14th.

AMEX Motion to Dismiss, Exh. C. Avlon was terminated, and received her final paycheck on December 23, 2006. D. & O. at 6, citing OSHA Complaint (dated May 16, 2008); *see also* AMEX Motion to Dismiss at 6.

Administrative Proceedings

1) OSHA Complaint and subsequent proceedings before the ALJ

On March 2, 2008, Avlon filed a SOX complaint with OSHA alleging that her termination as of December 2007 violated SOX. She claimed in her complaint that AMEX engaged in the following retaliatory acts that stemmed from her whistleblowing conduct: (1) AMEX's decision to place her on performance probation following her complaints about two fraud investigations; (2) AMEX's failure to find an alternative position for her outside of the authority of her formal manager against whom Avlon filed a complaint; and (3) her ultimate discharge. OSHA Compl. at 3-7 (Mar. 2, 2008). On May 16, 2008, Avlon filed a supplemental complaint alleging that AMEX engaged in various misrepresentations as to the availability of alternative employment opportunities at the company. OSHA Complaint (dated May 16, 2008).

On June 3, 2008, OSHA dismissed the complaint as untimely because Avlon did not file it within 90 days of the September 6, 2007 e-mail. Avlon filed an objection with the Office of Administrative Law Judges. AMEX moved the ALJ to dismiss the complaint as untimely. AMEX Motion to Dismiss. Avlon opposed, arguing that the September 6, 2007 e-mail was not final or unequivocal, and that the e-mail lacked a firm termination date. Avlon Brief in Opposition at 3. In the alternative, Avlon argued that the complaint was timely under equitable estoppel and/or that the there is a genuine issue of material fact with respect to whether a hostile environment existed at AMEX and that circumstances at the company precluded her from returning to her former office. *Id.* at 6-7, 9.

On September 8, 2008, the ALJ dismissed Avlon's complaint by summary decision. D. & O. at 15. The ALJ determined that Avlon's OSHA complaint was untimely because it was filed more than 90 days after the September 6, 2007 AMEX e-mail. *Id.* at 9. The ALJ further determined that Avlon failed to establish circumstances beyond her control that prevented her from filing within 90 days after the September 6, 2007 e-mail. *Id.* at 10-11. Finally, the ALJ determined that Avlon failed to allege a hostile work environment claim as the basis for her March 2, 2008 OSHA complaint, *id.* at 11-12, and that her May 16, 2008 complaint, in which she alleged that the AMEX representatives lied, or withheld information, about the availability of positions to which she could be reassigned, was insufficient to sustain an adverse action. *Id.* at 12-15.

2) Petition for review

Avlon's petition for review of the ALJ's September 8, 2008 decision was due for filing with the ARB on September 22, 2008. On May 4, 2009, the ARB office received a letter from Avlon documenting a telephone call that she had with an ARB staff member inquiring about the status of Avlon's petition. Avlon Letter to ARB (dated May 4, 2009). Avlon notified the ARB staff member that she had sent on September 22, 2008, by facsimile delivery, a petition for review of the ALJ's September 8, 2008 decision. *Ibid.* Avlon states in the letter that she spoke with a person at ARB the following day who confirmed receipt of the petition. *Ibid.* Avlon includes with the letter a facsimile transmittal sheet dated September 22, 2008, documenting the

transmittal of a 16-page document to the ARB facsimile number. *Ibid.* The ARB accepted the petition for filing on May 4, 2009, and issued a briefing schedule.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB her authority to issue final agency decisions under SOX. *See* Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). We review an ALJ's grant of summary decision de novo. *Levi v. Anheuser Busch Cos., Inc.*, ARB Nos. 06-102, 07-020, 08-006; ALJ Nos. 2006-SOX-037, -108; 2007-SOX-055, slip op. at 6 (ARB Apr. 30, 2008). The standard for granting summary decision is essentially the same as the one used in Fed. R. Civ. P. 56, the rule governing summary judgment in the federal courts. *Ibid.* Thus, pursuant to 29 C.F.R. § 18.40(d)(2010), the ALJ may issue summary decision if "there is no genuine issue as to any material fact and that a party is entitled to summary decision." *Ibid*.

We view the record on the whole 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 movant established that it was entitled to judgment as a matter of law. *Smale v. Torchmark Corp.*, ARB No. 09-012, ALJ No. 2008-SOX-057, slip op. at 5-6 (ARB Nov. 20, 2009).

DISCUSSION

I. The ARB Properly Accepted Avlon's Petition for Review for Filing

A petition for review must be filed with the ARB within 10 business days of the date of the ALJ's SOX decision. 29 C.F.R. § 1980.110(a). The ARB has recognized in interpreting filing provisions analogous to 29 C.F.R. § 1980.110(a), that "compliance with such filing periods is not a jurisdictional prerequisite to obtaining review." *Superior Paving & Materials, Inc.,*, ARB No. 99-065, ALJ No. 1999-DBA-011, slip op. at 2 (ARB Sept. 3, 1999) (interpreting 29 C.F.R. § 6.34 as a procedural prerequisite giving ARB discretion to accept late-filed petition for review in case arising from Davis-Bacon Act). "Instead, such filing provisions are procedural in nature, comparable to a statute of limitations, which may be tolled for equitable reasons." *Ibid*, citing *Duncan v. Sacramento Metro. Air Quality Mgmt. Dist.*, ARB No. 99-011, ALJ No. 1997-CAA-012 (ARB Sept. 1, 1999) (Order Accepting Appeal and Establishing Briefing Schedule); *Degostin v. Bartlett Nuclear, Inc.*, ARB No. 98-042, ALJ No. 1998-ERA-007 (ARB May 4, 1998); *Staskelunas v. Northeast Utils. Co.*, ARB No. 98-035, ALJ No. 1998-ERA-008, (ARB May 4, 1998); *Backen v. Entergy Operations*, No. 1995-ERA-046 (ARB June 7, 1996).

We have stated that "[t]his interpretation is fully consistent with Supreme Court and Federal Appellate Court precedent holding that an administrative agency may waive procedural requirements in the interest of justice, provided that such a waiver will not prejudice the other party" *Superior Paving*, ARB No. 99-065, slip op. at 2; *see also Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1980) ("[i]t is always within the discretion of a court or an

administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it."); *accord*, *Zipes v. Transworld Airlines*, 455 U.S. 385, 393 (1982) (filing timely charge with EEOC pursuant to 42 U.S.C. 2000e-5(e)'s 180-day period is not jurisdictional prerequisite but a statute of limitations subject to equitable tolling); *Communications Workers of Am. v. N.J. Dep't of Pers.*, 282 F.3d 213, 216-217 (3d Cir. 2002).

Avlon stated in her May 4, 2009 letter to the ARB that she faxed her petition to the ARB office on September 22, 2008, the date that her petition would have been due for timely filing. In support of her claim of having timely filed her complaint, she submitted a facsimile transmission sheet dated September 22, 2008, reflecting that a 16-page document was faxed to the ARB office fax number. She stated in her letter that an ARB staffer acknowledged receipt of the September 22 fax. Based on this credible information, the ARB was well within its discretion to accept the petition as timely filed.

AMEX argues that Avlon should be "sanctioned" for her ex parte communications with ARB staff in her efforts to cure any procedural mishaps associated with the filing of her petition. We disagree. In this case, there was no misconduct by Avlon, who has handled her administrative proceedings pro se. Indeed, Avlon did nothing more than contact ARB staff when she had not received any response to her petition for review. When she learned from ARB staff that the petition was not reflected on the Board's docket, she sent the petition and the facsimile transmittal sheet showing that the petition had been faxed to ARB on the due date. AMEX eventually received a copy of the May 4, 2009 letter and facsimile sheet, as these documents appear as attachments to AMEX's reply brief filed with the ARB on July 31, 2009. We note that AMEX wanted the opportunity to file an objection in 2009 and we appreciate that concern. However, after learning of Avlon's May 4, 2009 letter and facsimile, AMEX did not move the ARB for an order to show cause or otherwise demonstrated that it was prejudiced by the procedural mishap. We assume that AMEX has incorporated into its responsive brief all of its objections to the May 4, 2009 letter and facsimile, and we have fully considered such objections. Given these circumstances, the ARB was well within its discretion to accept Avlon's petition for review.

B. Statute of Limitations on Avlon's SOX Complaint

1. The ALJ erred in finding that AMEX's September 6, 2007 e-mail triggered the statute of limitations for Avlon's SOX complaint

An employee alleging retaliation under SOX must file a complaint with OSHA "not later than 90 days after the date on which the violation occurred." 18 U.S.C.A. § 1514A(b)(2)(D). The OSHA regulations specify that

> [w]ithin 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 . . . a complaint alleging discrimination . . . .

29 C.F.R. § 1980.103(d). *See also* 69 Fed. Reg. No. 163, p. 52,106 (Aug. 24, 2004) ("In other words, the limitations period [that is, the 90 days] commences once the employee is aware or reasonably should be aware of the employer's decision.").

In the Thursday September 6, 2007 e-mail, Avlon was warned that she must do two things: (1) by Friday September 7, 2007, schedule a meeting with AMEX human resources personnel for the following week (to occur by September 14, 2007), and that (2) if she returned to work it would be in her same position and in her same office, but reporting directly to a different supervisor. *See supra* at 6-7. She was further told that if she did not meet these two requirements, her employment "will be terminated." *Ibid.* The ALJ determined that this September 6 e-mail "clearly conveyed to complainant Respondent's intention to terminate her employment if she failed to return to her previous position with the company or to meet with the company's officials." D. & O. at 8. The ALJ also determined that Avlon "should have been aware as of that date that Respondent intended to terminate her employment if she did not accept the conditions it placed upon her return to work." Ibid.

The statue of limitations in whistleblower cases, such as Section 1514A(b)(2)(D), runs when an employee receives "final, definitive and unequivocal notice of an adverse employment decision." *Snyder v. Wyeth Pharms.*, ARB No. 09-008, ALJ No.2008-SOX-055, slip op. at 6 (ARB Apr. 30, 2009); *Overall v. Tenn. Valley Auth.*, ARB Nos. 98-111, -128; ALJ No. 1997-ERA-053, slip op. at 40-41 (ARB Apr. 30, 2001), citing *Chardon v. Fernandez*, 454 U.S. 6 (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 painful), and *Del. State Coll. v. Ricks*, 449 U.S. 250 (1980) (limitations period began to run when the employee was denied tenure rather than on the date his employment terminated). "The date that an employer communicates a decision to implement such a decision, rather than the date the consequences of the decision are felt, marks the occurrence of a violation." Overall, ARB Nos. 98-111, -128, slip op. at. 40. "Final" and "definitive" notice is a "communication that is decisive or conclusive, i.e., leaving no further chance for action, discussion, or change." *Snyder*, ARB No. 09-008, slip op. at 6; *see also Halpern* v. *XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-054, slip op. at 3 (ARB Aug. 31, 2005). Unequivocal" notice is a "communication that is not ambiguous, i.e., free of misleading possibilities." *Ibid.; see also Halpern*, ARB No. 04-120, slip op. 3, *cf. Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1141 (6th Cir. 1994) (three letters warning of further discipline did not constitute final notice of employer's intent to discharge complainant). "Complaints that employment termination resulted from discrimination can present widely varying circumstances" and "the application of the[se] general principles . . . necessarily must be made on a case-by-case basis." *Ricks*, 449 U.S. at 258 n.9.

Applying those principles here, we conclude that the ALJ erred in finding that the September 6 e-mail from Rampal-Harrod to Avlon triggered the start of the 90-day statute of limitations period for Avlon to file her SOX complaint. Given the facts in this case, we do not agree with the ALJ that the September 6 e-mail gave Avlon "final, definitive, and unequivocal" notice of her termination.

The September 6 e-mail communication from Rampal-Harrod to Avlon followed an e-mail the prior day from Avlon explaining that she was just getting back from vacation on September 12, that she would only have two days on her return (September 13 and 14) to meet, and that she did not want to meet until she had secured legal counsel. *See supra* at 6. While based on the facts in the record, Avlon did not meet with Rampal-Harrod or Enders on September 13 or 14, *she was also not terminated.* Instead, Avlon secured legal counsel, as she said she would in her September 5 e-mail to Rampal-Harrod, and her counsel engaged in discussions with AMEX counsel Parauda over some period of time. Parauda states in his December 7, 2007 e-mail to Avlon that following the September 6 e-mail, he had discussions with Avlon's counsel and they "asked that the Company's request that you return to work be put on hold so they could first confer with you and then discuss possible resolution of your situation with me as the Company's legal counsel . . . [which I] agreed to . . . ." *See supra* at 7. These facts show that there were further discussions after September 6 regarding Avlon's employment status and that this purported termination notice was not final and definitive.

Parauda's December 7 e-mail explains further that after Avlon's attorneys stopped representing her in this matter, that Parauda, AMEX human resources representative Sundberg, and Avlon had discussed options for Avlon to return to the company. During those discussions between Parauda, Sundberg, and Avlon, the option of returning to the company in an equivalent position (either in Avlon's old office as AMEX wanted, or another office as Avlon wanted) remained an option. *See supra* at 7-8 (Dec. 7 e-mail from Parauda reads: "We have attempted to negotiate with your attorneys and when they told us to talk directly to you, we attempted to work out a fair agreement"). "Until an employee is notified of termination 'there is the possibility that the discriminatory decision itself will be revoked, and the contemplated action not taken, thereby preserving the pre-decision status quo.'" *Yellow Freight Sys*, 27 F.3d at 1141, quoting *English v. Whitfield*, 858 F.2d 957, 961 (4th Cir. 1988). In this case, the specific facts show that AMEX representatives continued discussions with Avlon after the September 6 e-mail. These continuing discussions undoubtedly extended the possibility that she would not be terminated, and that her employment at AMEX would continue in some fashion.

The circumstances in this case are analogous to the facts in *Snyder, supra,* which involved a SOX complainant who received a letter dated October 15, 2008, stating, inter alia, that his employer would terminate his employment for misconduct if he did not provide two types of information to the company. *Id.* at 3. The ALJ in that case determined that the October 15 letter triggered the statute of limitations period for the complainant's SOX complaint. We reversed, and held that the letter "held out the possibility that Wyeth would re-examine and revoke the termination if it was satisfied with Snyder's explanation . . . [and,] [t]hus, the alleged discriminatory action would be negated." *Id.* at. 9. We stated that "because [the Oct. 15] letter offered [complainant] 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 [the Oct. 15] 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." *Ibid.*

The ALJ clearly erred in finding that the September 6, 2007 e-mail from AMEX gave Avlon final notice of her termination, and did not trigger the start of the statute of limitations period for her SOX complaint.

2. The December 7, 2007 e-mail from AMEX Counsel Parauda to Avlon triggered the limitations period for the SOX complaint

Based on the undisputed facts, we hold that Avlon had "final, definitive, and unequivocal notice" of her discharge when AMEX Counsel Parauda e-mailed her on December 7, 2007, and that the 90-day statute of limitations on her SOX complaint began to run on that date.

The December 7 e-mail followed continuing discussions between Avlon, her private counsel, AMEX Counsel Parauda, and AMEX human resources representative Sundberg. It was not until the December 7 e-mail that Avlon had final and definitive notice that she would be terminated and that any further alternatives proffered by Avlon were fruitless. Parauda explained in that e-mail that the company was "still willing to bring this situation to a resolution that is fair for [her] and the Company but [that the company is] not willing to continue in the current status any longer." *Supra* at 7-8. Based on these discussions that followed the September 6 e-mail, Avlon apparently made clear that she would not return to her old office, and that December 7 e-mail thus established that AMEX would "only give [her] one more week to propose reasonable terms for a separation agreement." *Ibid*. Within days of this e-mail, Avlon employment was terminated, and she received her last pay check on December 23. Thus the December 7 e-mail makes firm, definitive, and unequivocal the company's decision that it would no longer engage in any further employment discussions with her, thus triggering the statute of limitations period.

The importance of the firm notice requirement is illustrated in our decision in *Corbett* v. *Energy East Corp.*, ARB No. 07-044, ALJ No. 2006-SOX-065 (ARB Dec. 31, 2008). *Corbett* involved a SOX complainant who received a letter indicating that his employer was dissatisfied with his performance as Director of Human Resources, and instructed the complainant that if he wanted to remain as Director, he would have to notify the employer by March 23 and meet with the employer on March 28. As an alternative, the employer offered the complainant a separation agreement that would require him to resign, but remain with the company until November 30, when he would retire. Like Avlon, the complainant in *Corbett* failed to take the required action on March 23 or March 28. On April 1, the complainant received a letter, dated March 31, indicating that his removal as Director was not the issue, but rather his removal from employment with the company, and that if he did not execute the separation agreement his employment would terminate on April 15. We held in *Corbett* that the statue of limitations on the complainant's SOX complaint began to run on April 1, the date he received the March 31 letter from his employer, and not earlier (March 23 or March 28). We determined that under the terms of the April 1 letter, Corbett "[r]tetaining his employment was no longer an option . . . [because he] would be discharged from his employment." *Id.* at 5. Based on these facts, we determined in *Corbett* that the employer's April 1 letter "gave him unequivocal notice . . . that his employment with the company would end." *Ibid.*

Just as in *Corbett*, Avlon retaining her employment at AMEX was "no longer an option" (*Corbett*, ARB No. 07-044, slip op. at 5) when Avlon and AMEX representatives stopped

discussing employment options, and Avlon was finally, definitively, and unequivocally told (as of the December 7 e-mail) that she needed to either (1) return to work at her old office, or (2) enter into a separation agreement. We find based on these facts that the earlier discussions on options for future employment rendered the September 6 notice equivocal, and that Avlon received firm notice with the December 7 e-mail.

Accordingly, based on our review of the record as a whole, we conclude that the ALJ erred in determining that the statute of limitations began to run on September 6, 2007. We instead hold that the 90-day statute of limitations on Avlon's SOX complaint began to run on December 7, 2007. The deadline for Avlon to file her complaint was March 6, 2008. It is undisputed that Avlon filed her OSHA complaint on March 2, 2008. D. & O. at 1. Thus, her complaint was timely filed.

C. The ALJ Can Determine, on Remand, Whether Evidence of AMEX's Failure to Transfer Avlon Contributed to Her Termination

SOX Section 1514A(a) provides whistleblower protection for employees of publicly-traded companies who report certain acts that they reasonably believe to be unlawful. 18 U.S.C.A. § 1514A(a). To prevail in a SOX proceeding, an employee must prove by a preponderance of the evidence that she: (1) "engaged in activity or conduct that the SOX protects; (2) the respondent took an unfavorable personnel action against . . . her; and (3) the protected activity was a contributing factor in the adverse personnel action." *Sylvester v. Paraxel Int'l*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042, slip op. at 9 (ARB May 25, 2011). If the employee proves these elements, the employer may avoid liability if it can prove "by clear and convincing evidence" that it "would have taken the same unfavorable personnel action in the absence of that [protected] behavior." 29 C.F.R. § 1980.104(c); *see also Harp* v. *Charter Commc'ns, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009); *Allen* v. *Admin. Review Bd.*, 514 F.3d 468, 475-476 (5th Cir. 2008); *Livingston* v. *Wyeth, Inc.*, 520 F.3d 344, 351 (4th Cir. 2008).

In light of our holding that that the 90-day statute of limitations on Avlon's retaliatory termination claim under SOX began to run on December 7, 2007, we note that the additional events that she complains of in her OHSA complaint may be relevant to her alleged retaliatory termination. In her complaint, Avlon asserts that company representatives refused her request for transfer to avoid working with supervisor, Jacqueline Wagner, whom she had accused of fraud. Avlon also asserts that AMEX representatives knew that Wagner would soon leave the company but did not share that information with Avlon and did not inform Avlon of potential jobs through AMEX's agreement with the Department of Justice to expand the company's compliance office. OSHA Compl. at 5 (Mar. 2, 2008). The ALJ determined that these claims could not stand on their own as actionable adverse actions because they were either untimely or too speculative. D. & O. at 13-15. We agree that these claims are based on discrete acts that occurred beyond the 90-limitations period, and cannot be used to support separate claims. Nevertheless, the facts, if supported by substantial evidence, relate to Avlon's claim for retaliatory termination in violation of SOX.

On remand, we direct the ALJ to not only conduct proceedings to determine whether Avlon engaged in protected activity, but also to determine, as SOX directs, whether protected

activity, if proven, contributed to Avlon's termination in violation of SOX. In so doing, the ALJ may consider all relevant circumstances, including AMEX's failure to transfer her and any relevant non-disclosures, even though those events and circumstances cannot stand as independent adverse actions under the facts of this case.

CONCLUSION

The ALJ erred in determining that the statute of limitations on Avlon's SOX complaint began to run on September 6, 2007. We find that the 90-day statute of limitations began to run on December 7, 2007, and thus Avlon's OSHA complaint filed March 2, 2008, was timely. Accordingly, we **REVERSE** the ALJ's ruling that Avlon's complaint was time-barred, and **REMAND** this case to the ALJ for further proceedings.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge