In the Matter of:

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

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

v. **DATE: September 14, 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, Renee B. Phillips, *Orrick, Herrington & Sutcliffe, LLP*, New York, New York

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge;* and Lisa Wilson Edwards, *Administrative Appeals Judge*. Judge Corchado has filed a concurring opinion.

ORDER DENYING RECONSIDERATION

Christine Avlon filed two complaints with the Occupational Safety and Health Administration (OSHA) 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 (Thomson/West 2009) (the "Act" or "SOX"), and its implementing regulations found at 29 C.F.R. Part 1980 (2009). Avlon, acting pro se, alleged that her employer, American Express (AMEX), violated SOX when it

terminated her employment. OSHA consolidated the complaints and dismissed both as untimely. Avlon filed objections. The ALJ assigned to the case granted AMEX's motion to dismiss, and held, inter alia, that Avlon's complaint was untimely because she did not file it within 90 days of a September 6, 2007 e-mail AMEX sent to Avlon. On petition for review, we determined that the ALJ committed legal error and that a later e-mail triggered SOX's statute of limitations. We reversed and remanded for further proceedings. AMEX petitioned for reconsideration. We deny the petition.

BACKGROUND

The factual background is set out in the ARB's May 31, 2011 Final Decision and Order of Remand, pages 2-8, and in the ALJ's September 8, 2008 decision, pages 3-6. We very briefly highlight the ALJ's factual findings that formed the basis of our Final Decision and Order of Remand and this order on reconsideration.

A. Facts

Avlon began working for AMEX in January 2006 in the Audit Department as Director of the Special Investigations Unit, Enterprise Risk and Assurance Services (ERAS). Her responsibilities included investigating Sarbanes-Oxley whistleblower complaints and other fraud allegations by AMEX employees. ALJ Decision at 3; ARB Decision at 2. Beginning in August 2006, Avlon was placed on a 60-day period of "performance counseling" following Avlon's allegations of employee misconduct against her supervisors, including her immediate supervisor Jacqueline Wagner. ALJ Decision at 3-4.

Avlon asked to transfer out of her office and into another position at AMEX sometime in September or October 2006. ALJ Decision at 4. AMEX told Avlon that she was not eligible for a transfer because she was in performance counseling and had fewer than two years at the company. ALJ Decision at 4. In November 2006, AMEX hired a law firm to internally investigate Avlon's SOX complaints, including her retaliation complaint against Wagner, her supervisor. *Id*. Avlon accepted AMEX's offer to place her on paid administrative leave pending the investigation. *Id.;* see also ARB Decision at 3.

The internal investigation ended in August 2007, and AMEX's Director of Human Resources, Indera Rampal-Harrod, contacted Avlon about returning to work. ALJ Decision at 4; ARB Decision at 4-5. During the course of these communications, Avlon indicated that she did not want to return to work under Wagner, whom she had accused of misconduct. ALJ Decision 4-5; ARB Decision at 5-6.

On August 30, 2007, Rampal-Harrod requested that Avlon "tell [her] by Friday [August 31, 2007] when [she] is available" to meet. *Id*. Rampal-Harrod indicated that if Avlon could not meet the following week, she asked for Avlon's availability "for the week of September 10th." *Id.* On August 31, 2007, Avlon e-mailed Rampal-Harrod

regarding the potential terms of her continued employment with AMEX. In the e-mail, Avlon indicated that she intended to seek legal counsel because returning to work under Wagner would be "unacceptable." ARB Decision at 5, citing AMEX Motion to Dismiss at Exh. B.

On September 4, 2007, Rampal-Harrod responded to Avlon by e-mail, and stated that Avlon would have to remain in her former unit and that if she wanted to return to the company she must meet with Rampal-Harrod and Dave Enders. ARB Decision at 5-6. Rampal-Harrod told Avlon that if she did not want to continue working for the company, Avlon should let her know by Friday. ARB Decision at 6. About 90 minutes later, Avlon responded that she would "not be able to reply" by Friday. ARB Decision at 6. Rampal-Harrod e-mailed Avlon later that afternoon to tell her that if she did not schedule a meeting, the company would treat her actions as "a job abandonment and/or resignation." ALJ Decision at 5; ARB Decision at 6.

The next day, on September 5, 2007, Avlon e-mailed Rampal-Harrod and told her that she would not be able to meet within "two days of [her] return from vacation on September 12" and that she wanted to "engage legal representation." ARB Decision at 6. She also informed Rampal-Harrod that she "d[id] not under any circumstances wish to abandon employment or otherwise resign from employment at American Express." *Id*., citing AMEX Motion to Dismiss at Exh. B.

The next day, on September 6, 2007, Rampal-Harrod e-mailed Avlon asking that Avlon schedule a meeting for next week and stated that no attorney could be present. Rampal-Harrod told Avlon that if she failed to meet with them, her "employment will be terminated." ARB Decision at 7, citing AMEX Motion to Dismiss at Exh. B. No meeting between Avlon, Rampal-Harrod, or Enders occurred during the week of September 9, and AMEX did not terminate Avlon's employment.

On December 7, 2007, Avlon received an e-mail from AMEX Counsel John Parauda reflecting discussions that had transpired between Avlon's counsel, Avlon, Parauda, and AMEX employee relations representative Lori Sunberg between September 2007 and early December 2007. Parauda's December 7 e-mail explained that after Rampal-Harrod's September 2007 e-mail, Parauda and Sundberg continued to speak with Avlon about returning to the company. ALJ Decision at 5; ARB Decision at 7-8. In that e-mail, Parauda stated that while the company was "still willing to bring this situation to a resolution that is fair for you and the Company," the company was "not willing to continue in the current status any longer." *Id*. Parauda gave her one week to "propose reasonable terms for a separation agreement" or her employment would be terminated as of December 14. ALJ Decision at 5; ARB Decision at 7-8, citing AMEX Motion to Dismiss, Exh. C.

Avlon was terminated and received her final paycheck on December 23, 2006. ALJ Decision at 6.

B. Administrative Proceedings

Avlon filed her SOX complaint with OSHA on March 2, 2008. In the complaint Avlon contended, inter alia, that the "actual retaliatory act of wrongfully terminating [her] took place when [AMEX] issued the final salary payment for the pay period ending December 27, 2007, and therefore wrongfully discharged her." See Avlon's OSHA Complaint attached as Exh. B of AMEX Motion For Reconsideration. OSHA dismissed Avlon's complaint on June 3, 2008, as untimely. OSHA determined that Rampal-Harrod's September 6, 2007 e-mail triggered the 90-day statute of limitations because the e-mail informed Avlon that her employment "would be terminated." OSHA Decision Letter at 2.

Avlon sought a hearing before an ALJ. Prior to the hearing, AMEX moved to dismiss Avlon's complaint as untimely. AMEX argued that the September 6, 2007 e-mail gave Avlon final notice of her termination for purposes of triggering SOX's 90-day filing period. See AMEX Motion to Dismiss at 6-8. Avlon opposed AMEX's motion and, in her brief, argued that the September 6, 2007 e-mail "was not final and was not unequivocal, [that it] lack[ed] a date certain, and should not have been held as the final notice by the Secretary." Avlon Opp. at 3. She also argued that the equivocal nature of the September 6, 2007 e-mail was underscored by Parauda's December 7, 2007 e-mail. Avlon Opp. at 3 n.2. Avlon argued that the first sentence of the December 7 e-mail "corroborates the fact that previous communications were not final and unequivocal, but instead ambiguous and subject to change." *Id.* Avlon also argued that she "did not view Rampal-Harrod as having the authority to make a final and unequivocal decision regarding [Avlon's] employment." *Id.* at 4.

The ALJ determined that Avlon's OSHA complaint was untimely because it was filed more than 90 days after the September 6, 2007 e-mail. *Id.* at 9. While Avlon argued that other e-mail communications would "cast light" on the equivocal nature of the September 7 e-mail, the ALJ determined that there was "no need to look beyond the unambiguous language" that conveyed an intent to terminate Avlon's employment. *Id.* at 8. The ALJ found no support for Avlon's claim that the September 6 e-mail was equivocal because it did not provide a firm termination date. *Id.* at 8-9. While the ALJ agreed that AMEX's "subsequent communications with [Avlon] demonstrate that the actual date of her discharge from employment was uncertain," he determined that she had definite notice of her discharge if she did not return to work. *Id.* at 8-9.

The ALJ rejected Avlon's argument that she did not have a reasonable belief that Rampal-Harrod had "appropriate authority" to communicate the company's decision to terminate her. *Id.* The ALJ further determined that Avlon failed to establish circumstances beyond her control that prevented her from filing within 90 days of 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, where she alleged that the

AMEX representatives lied or withheld information about the availability of positions to which she could have been reassigned, was insufficient to sustain an adverse action. *Id.* at 12-15.

Avlon petitioned the ARB for review. In her petition, she challenged the ALJ's determination that she failed to raise a hostile work environment claim and that her complaint alleging the withholding of information did not constitute an adverse action under SOX. On May 31, 2011, we entered a decision determining that the ALJ's ruling that the SOX statute of limitations was triggered by the September 6, 2007 e-mail was incorrect as a matter of law, and reversed and remanded for further proceedings.

AMEX moved for reconsideration on July 12, 2011. For the following reasons, we deny the motion.

DISCUSSION

The ARB is authorized to reconsider a decision upon the filing of a motion for reconsideration within a reasonable time of the date on which the Board issued the decision. *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 11 (ARB May 30, 2007). In considering whether to reconsider a decision, the Board has applied a four-part test to determine whether the movant has demonstrated:

> (i) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision; (iii) a change in the law after the court's decision, and (iv) failure to consider a material fact presented to court before its decision.

Daisy Abdur-Rahman v. DeKalb County, ARB Nos. 08-003, 10-074; ALJ Nos. 2006-WPC-002, -003; slip op. at 4 (Feb. 16, 2011).

In moving for reconsideration, AMEX argues that the ARB erred by ruling on an issue on which Avlon did not petition for review and that Avlon had waived the issue as to the timeliness of Avlon's SOX complaint with OSHA. While issues not raised in the briefs may be considered waived, courts can exercise discretion to "consider waived arguments" when it is "necessary to avoid a manifest injustice or where the argument presents a question of law and there is no need for additional fact-finding." *Sniado v. Bank of Am. AG*, 378 F.3d 210, 213 (2d Cir. 2004) (per curiam); *Duamutef v. O'Keefe*, 98 F.3d 22, 25 (2d Cir. 1996). See also *Huber* v. *Taylor*, 469 F.3d 67, 84 (3d Cir. 2006); *United States* v. *Ullah*, 976 F.2d 509, 514 (9th Cir. 1992). While it appears that Avlon may have waived the timeliness argument by not expressly preserving it in her petition for review (see Avlon Petition at 1), we believe that we have authority to review that claim. Indeed, not reviewing that claim would render a manifest injustice as it would possibly cause her entire case to be dismissed as it is the central issue on which the ALJ's

decision rests. Moreover, because no additional fact-finding is required and the parties fully litigated this issue before the ALJ, *supra* at 3-4, we are well within the bounds of our discretion to address that issue on Avlon's petition for review.[1]

AMEX suggests in its Motion that the ARB's decision to address the timeliness of Avlon's SOX complaint to OSHA "raises serious due process concerns."[2] However due process may not be triggered in these circumstances since the parties, Avlon and AMEX, fairly and fully litigated this issue before the ALJ, and prior to that the issue was investigated by OSHA, and are fully reflected in the administrative record before us. See generally *Yellow Freight Sys., Inc.* v. *Martin*, 954 F.2d 353, 358 (6th Cir. 1992); *Smithfield Packing Co., Inc.* v. *N.L.R.B.*, 510 F.3d 507, 515 n.6 (4th Cir. 2007). Specifically, the record shows that OSHA investigated the issue whether the September 6, 2007 e-mail triggered the 90-day filing deadline for Avlon's OSHA complaint and her complaint was denied solely on that basis. *Supra* at 3. In proceedings before the ALJ, AMEX moved to dismiss Avlon's complaint on the ground that her OSHA complaint was untimely because it was not filed within 90 days of AMEX's September 6, 2007 e-mail. *Supra* at 4. Avlon opposed the motion. The ALJ granted AMEX's motion, ruling, inter alia, that her OSHA complaint was untimely because it was filed beyond the 90-day period following the September 6, 2007 e-mail. *Id*. Even though Avlon did not challenge the ALJ's ruling on the timeliness of her OSHA complaint before the ARB, that does not limit our review of the ALJ's decision on that issue that the parties fully litigated below. These proceedings, including the parties' arguments below, are fully set out in the administrative record before us. "As long as an issue is adequately litigated below and part of the record, we are not necessarily bound by the legal theory of any party in determining" a question of law. *Funke v. Federal Express Corp.*, ARB No. 09-004, ALJ No. 2007-SOX-043 (ARB July 8, 2011). While this case involved a mixed question of law and fact, no further fact-finding is required here. Thus, Avlon's failure to

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[1] SOX's regulations indicate that the "petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties." 29 C.F.R. § 1980.110(a). Though a petitioner is on notice that an issue below not specifically appealed is ordinarily waived, we conclude this language in the implementing regulations does not mandate that the Board limit its review to the ALJ's holdings of fact or conclusions of law assigned as errors in the petition of review. *Cf. Vineland Fireworks Co., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 544 F.3d 509 (3d Cir. 2008).

[2] AMEX's "due process concerns" are raised in a single sentence on page 9 of its Motion for Reconsideration, and does not contain any specific "contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." Federal Rule of Appellate Procedure 28 (a)(9)(A). "Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal." *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998); *United States v. Restrepo*, 986 F.2d 1462, 1463 (2d Cir. 1993) (an argument made only in a footnote was inadequately raised for appellate review). Despite AMEX's failure to fully brief this possible constitutional issue in its Motion, we address it nonetheless in this decision.

expressly petition for review of that issue does not foreclose us from deciding this central question on which the ALJ's decision principally turned.

In the Motion for Reconsideration, AMEX argues that Avlon's admission that Parauda told her in September 2007 that there were no other positions at AMEX for which she was qualified is further evidence that she had final, unequivocal notice of her termination. See AMEX Motion for Reconsideration at 10, n.1, citing Exh. C at ¶¶ 10-11, 19. Even if this was true, this would not change the fact that, as written, the September 2007 communication was not a clear and unequivocal notice of termination. This alleged admission, if true, merely demonstrates that Avlon allegedly knew that she could not transfer to another position. It does not unequivocally demonstrate that she believed she was fired. Furthermore, this evidence does no more than raise an issue of fact that cannot be decided on a motion for dismissal. As we explained in our prior decision, despite Avlon's statements concerning the September 2007 communications, the December 7, 2007 e-mail evidenced that AMEX's Counsel, Parauda, had subsequent conversations with Avlon's counsel after the September 6 e-mail to Avlon, and that Avlon also had subsequent conversations with AMEX's human resources representative Lori Sundberg, during which employment options were apparently discussed. Thus, Avlon did not have "final, definitive, and unequivocal" notice of her termination until the December 7, 2007 e-mail from Parauda. ARB Decision at 14-15.

Beyond these issues, AMEX does not raise any new issues of material fact or law, no new facts that are not otherwise in the record, nor any change of law that would warrant reconsideration in this case.

For the foregoing reasons, AMEX's motion for reconsideration is **DENIED**.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

Luis A. Corchado, Administrative Appeals Judge concurring:

This matter is before the Administrative Review Board (the "ARB" or "Board") on the American Express Company's (AMEX) motion for reconsideration of the ARB's remand order. The ARB reversed the ALJ's dismissal of Avlon's claim. Avlon alleges that AMEX retaliated against her by constructively terminating her employment pursuant

to a "final unequivocal notice Complainant received December 7, 2007."[3] AMEX argues that Avlon expressly waived this claim in her petition for review. The majority opinion finds that a waiver may have occurred but that the Board has discretion to disregard a waiver, citing several explanations. As I read the majority decision, it cites three reasons for disregarding Avlon's perceived waiver: (1) the issue in question was fully litigated below; (2) the issue is purely legal; and (3) to prevent manifest injustice. Respectfully, I concur with the remand but for different reasons.

My concern with the majority's rationale is that it seems to bypass the first crucial question: did Ms. Avlon expressly and clearly waive all consideration of her claim that she was constructively discharged on December 7, 2007, in retaliation for her whistleblower activities. If Ms. Avlon expressly and clearly waived this claim, then I do not understand what authority we have to disregard a party's clear waiver.[4] It seems we must follow the clear and deliberate choices parties make, even if the party is pro se. In my view, latitude given to pro se complainants should end where the due process rights of the other party begins, admittedly not always a clear line. If there was a clear waiver, then it would seem unfair to disregard a clearly expressed waiver upon which the other party relied. No matter how much an issue was litigated below, it seems the Board must honor a clearly expressed waiver. If the Board wanted to consider an issue that was waived, and to be sure that parties had sufficient opportunity to be heard, it seems we should notify the parties and ask them to more fully address the issue that may have been waived. I see no significant downside to taking such precaution in this case. Finally, in my view, the majority opinion's definition of manifest injustice seems too broad. The fact that a case might be dismissed is a harsh reality in thousands of cases, and defining manifest injustice merely as dismissal of a case would open Pandora's box in appellate jurisprudence. This is not to say that Board cannot exercise its discretion to address substantial legal errors that may impact other cases, but that is not the case here.

Turning to essential question of waiver, in my view, Avlon's appellate arguments for her hostile work environment claim demonstrate that she repeatedly referred to two of the foundational pieces of the Board's initial remand and the decision on reconsideration. First, on appeal, Avlon repeatedly asserted that one of the acts contributing to her hostile work environment claim was her constructive discharge.[5] While addressing the hostile work environment claim in her Petition for Review, Avlon used the phrase "constructive

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[3] See Complainant's Petition for Review, p. 7; Complainant's brief date-stamped June 15, 2009, p. 12 ("adverse action was the final unequivocal notice Complainant received December 7, 2007").

[4] The cases the majority opinion cites in supporting the limited discretion to disregard a waiver do not appear to address cases similar to this case where AMEX argues that Avlon expressly waived her constructive discharge claim.

[5] *See, e.g.*, Petition for Review, p. 3 ("Complainant suffered constructive discharge due to a hostile work environment.").

discharge" on every single page, sometimes multiple times. Second, she repeatedly asserted that it was the December 7, 2007 e-mail that gave her the first unequivocal notice of termination, not the September 6, 2007 e-mail.[6] Avlon raised these points in her petition for review and appellate brief and appeared to conflate her claims of hostile work environment and retaliatory constructive discharge. In fact, in its appellate brief, AMEX appeared to recognize that Avlon conflated her retaliatory hostile work environment and constructive discharge claims.[7] These very arguments made by Avlon support the Board's finding that (1) the Respondent failed to demonstrate, as a matter of law, that the statute of limitations began to run in September 2007 for a SOX claim based on retaliatory discharge and (2) the language in the December 7, 2007 e-mail triggered the statute of limitations, as a matter of law.

In effect, Avlon's retaliatory discharge claim was a type of an alleged "lesser included offense" in her broader alleged claim of a hostile work environment. Given the Board's finding that AMEX unequivocally terminated Avlon's employment on December 7, 2007, and not on September 6, 2007, a SOX claim 90 days after December 7, 2007, is timely if based on a discrete act of allegedly retaliatory discharge. It seems absurd to dismiss Avlon's entire case because she broadbrushed her claim as a pattern of retaliation rather than focusing solely on the discrete act of alleged retaliatory discharge. Such type of a dismissal would elevate a hyper-technical distinction over substance and thereby result in manifest injustice.[8]

LUIS A. CORCHADO
Administrative Appeals Judge

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[6] See Petition for Review, pp. 1-8. She follows a similar repetitious pattern in her brief filed June 15, 2009.

[7] See Respondent's Reply Brief, p. 17 (Complainant "provided evidence of a so-called hostile work environment claim only to support her claim of constructive discharge.") (emphasis in original.)

[8] *See National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002).