In the Matter of:

STANLEY R. SWENK, **ARB CASE NO. 04-028**

COMPLAINANT, **ALJ CASE NO. 03-ERA-30**

v. **DATE: April 28, 2005**

EXELON GENERATION COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Robert F. Datner, Esq., ***Datner & Murphy, P.C., Upper Darby, Pennsylvania***

For the Respondent:
Donna C. Meindertsma, Esq., and Gina M. Petro, Esq., ***Winston & Strawn, Washington, D.C.***

FINAL DECISION AND ORDER DISMISSING COMPLAINT

Stanley R. Swenk filed a complaint against the Exelon Generation Company under the employee protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 2003),[1] and its implementing regulations at 29 C.F.R. Part 24

[1] The statute provides, in pertinent part, that "[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee" notified a covered employer about an alleged violation of the ERA or the Atomic Energy Act (AEA) (42 U.S.C. § 2011 *et seq.* (2000)), refused to engage in a practice made unlawful by the ERA or AEA, testified regarding provisions or proposed provisions of the ERA or AEA, or commenced, caused to be commenced or is about to commence or cause to be commenced, or testified,

Continued . . .

(2004). He alleged that Exelon terminated his employment because of his protected activity involving complaints about inadequate security procedures and training at the Limerick, Pennsylvania nuclear generating plant.

The Administrative Law Judge (ALJ) granted Exelon's motion to dismiss[2] on the grounds that Swenk's complaint was untimely filed. Swenk filed a petition for review with the Administrative Review Board (ARB). We find Swenk's complaint to be untimely filed and, therefore, dismiss his complaint.

BACKGROUND

The ALJ has accurately recited the facts pertinent to the filing of Swenk's complaint with the Occupational Safety and Health Administration (OSHA). Recommended Decision and Order (R. D. & O.) at 2-4. We summarize briefly.

Swenk was employed as a nuclear oversight assessment team leader at Exelon's nuclear power plant in Limerick, Pennsylvania. This position requires an "unescorted access authorization." On July 2, 2002, an Exelon manager informed Swenk by letter that due to his recent arrest his nuclear unescorted access authorization had been placed on "Temporary Hold" and that he could not return to his job until the access was reinstated. Swenk was asked to forward the results of his court hearing to the nuclear security manager. Administrative Law Judge Exhibit (ALJ) 5.

On September 25, 2002, Swenk received and (signed for) a memorandum from Exelon restating the conversation of July 1, 2002 (and letter of July 2, 2002) that his unescorted access had been suspended. ALJ 6. The memorandum stated that, because his position as a nuclear oversight assessment team leader required such access, Swenk had "lost his employment qualifications" and that company policy required that he either regain his access authorization or locate a new position within the company not requiring unescorted access within 90 days (by December 24, 2002). The memorandum clearly stated that if Swenk did not regain his authorization or find a new position, Exelon would terminate his employment.

On November 5, 2002, Exelon sent Swenk a letter stating that his unescorted access to all Exelon facilities had been denied and he was no longer eligible for security access. The denial was based on (1) "inconsistencies" between his statements and court documents and company records, and (2) his "willful omission" of accurate information

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assisted or participated in a proceeding under the ERA or AEA to carry out the purposes of this chapter or the AEA as amended. 42 U.S.C.A. § 5851(a)(1).

[2] We treat Exelon's motion to dismiss as a motion for summary decision pursuant to 29 C.F.R. § 18.40.

concerning his arrests and non-traffic citations. Exelon give Swenk 10 days in which to appeal the decision. ALJ 7.

On January 8, 2003, Exelon informed Swenk that it had denied his appeal and that his employment was terminated effective that day because he had neither regained unescorted access nor found other employment within the company. ALJ 8. Swenk filed his complaint with OSHA on June 4, 2003. ALJ 4.

After reviewing relevant case law, the ALJ found that the November 5, 2002 letter was "final and unequivocal notice" that Swenk had lost his job as a nuclear oversight assessment team leader. R. D. & O. at 8. The ALJ added that neither Swenk's appeal of the November 5, 2002 decision nor any conduct by Exelon warranted a finding of equitable tolling of the statute of limitations. *Id.*

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to review an ALJ's recommended decision in cases arising under the ERA. *See* 29 C.F.R. § 24.8 (2004). *See also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8. The ARB engages in de novo review of the ALJ's recommended decision.[3] *Stone & Webster Eng'g Corp. v. Herman,* 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ Nos. 97-CAA-2, 97 CAA-9, slip op. at 15 (ARB Feb. 29, 2000).

Likewise, the ARB reviews an ALJ's recommended grant of summary decision de novo, i.e., the same standard that the ALJ applies in initially evaluating a motion for summary decision governs our review. *Harris v. General Motors Corp.,* 201 F.3d 800, 802 (6th Cir. 2000); *Rockefeller v. United States Dep't of Energy,* ARB Nos. 03-048, 03-084, ALJ Nos. 02-CAA-5 and 03-ERA-10, slip op. at 3 (ARB Aug. 31, 2004). Section 18.40, which is modeled on Rule 56 of the Federal Rules of Civil Procedure, permits an

[3] The ARB is not bound by an ALJ's findings of fact and conclusions of law because the recommended decision is advisory in nature. *See* Att'y Gen. Manual on the Administrative Procedure Act, Chap. VII, § 8 pp. 83-84 (1947) ("the agency is [not] bound by a [recommended] decision of its subordinate officer; it retains complete freedom of decision as though it had heard the evidence itself").

ALJ to enter a summary decision for either party where "there is no genuine issue as to any material fact . . . ."

Moreover, "[w]hen a motion for summary decision is made and supported as provided in [section 18.40] a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c); *Williams v. Lockheed Martin Corp.*, ARB Nos. 99-54, 99-064, ALJ Nos. 98-ERA-40, 42, slip op. at 4 (ARB Sept. 29, 2000). In deciding a motion for summary decision, we view the factual evidence in the light most favorable to the non-moving party. *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21, slip op. at 7 (ARB Nov. 30, 1999). We also must determine whether the ALJ applied the relevant law correctly. *See generally Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

DISCUSSION

The ERA provides that any employee who believes he has been discharged or otherwise discriminated against in violation of the ERA "may, within 180 days after such violation occurs," file a complaint with the Secretary of Labor alleging such discharge or discrimination. 42 U.S.C.A. § 5851(b)(1). The implementing regulations provide that "any complaint shall be filed within 180 days after the occurrence of the alleged violation." 29 C.F.R. § 24.3(b)(2).

In whistleblower cases, statutes of limitation such as section 5851(b)(1) run from the date an employee receives "final, definitive, and unequivocal notice" of an adverse employment decision. *Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 14 (ARB Feb. 28, 2003). "Final" and "definitive" notice denotes 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. *Larry v. The Detroit Edison Co.*, No. 86-ERA-32, 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 warning of further discipline did not constitute final notice of the employer's intent to discharge complainant).

The time for filing a complaint begins when the employee knew or should have known of the adverse action, regardless of the effective date. *Riden v. Tennessee Valley Auth.*, No. 89-ERA-49, slip op. at 2 (Sec'y July 18, 1990). In *Ross v. Florida Power & Light Co.*, ARB No. 98-044, ALJ No. 96-ERA-36, slip op. at 4, (ARB Mar. 31, 1999), the ARB held that the ERA 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." *See Honardoost v. PECO Energy Co.*, ARB No. 01-030, ALJ No. 00-ERA-36, slip op. at 5-6 (ARB Mar. 25, 2003) (determinative fact of termination on June 30, 2000, through involuntary force reduction program, was "incontestably certain," despite changing estimate of annuity, thus rendering complaint untimely filed).

In determining whether the complainant timely filed the complaint, it is first necessary to identify the precise alleged unlawful action. *Watson v. Eastman Kodak Co.*, 235 F.3d 851, 855 (3d Cir. 2000). The focus is on the time of the alleged *discriminatory act*, not on the point at which "the *consequences* of the act become painful." *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980); *English v. General Elec.*, No. 85-ERA-2, slip op. at 6 (Sec'y Jan. 13, 1987), *aff'd sub nom. English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988), *rev'd on other grounds*, 496 U.S. 72 (1990).

In *Ricks*, the Supreme Court held that the limitations period began to run when the employee was denied tenure rather than on the date his employment terminated. *Ricks*, 449 U.S. at 258. *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). Thus, the date that an employer communicates to the employee its intent to implement an adverse employment decision marks the occurrence of a violation, rather than the date the employee experiences the consequences. *Overall v. Tennessee Valley Auth.*, ARB Nos. 98-111, 98-128, ALJ No. 97-ERA-53, slip op. at 34 (ARB Apr. 30, 2001).

Based on the case law cited above, we find that the November 5, 2002 memorandum notifying Swenk that Exelon had denied his unescorted access provided final and unequivocal notice to Swenk that Exelon had terminated his employment as a nuclear oversight assessment team leader. It is on this date that the adverse action occurred and the 180-day opportunity to file a complaint began. 42 U.S.C.A. § 5851(b)(1). Swenk's June 4, 2003 complaint is therefore untimely filed and must be dismissed.

Swenk argues on appeal, as he did before the ALJ, that the limitations period does not begin to run until either December 23, 2002, when the 90-day period for obtaining a job that did not require security access expired, or January 8, 2003, when Exelon denied his appeal of the November 5, 2002 decision and terminated his employment. Complainant's Brief, unnumbered. Swenk relies on *Ross*, in which the ARB held that a notice to the complainant suspending his access to the employer's nuclear facility and giving him 45 days to find another position within the company did not trigger the statute of limitations. *Ross*, slip op. at 5.

Exelon argues that: (1) the decision to deny Swenk unescorted access was communicated to him on November 5, 2002, and his claim was filed more than a month outside the limitations period; (2) Swenk's position as a nuclear oversight assessment team leader required unescorted access; (3) once that access was denied, Swenk was aware that he had lost his job as team leader permanently; (4) therefore, the November 5, 2002 letter was final, unequivocal notice of an adverse action that triggered the limitations period. Respondent's Brief at 4-5.

We agree. Exelon's letter dated July 2, 2002, and its memorandum dated September 25 clearly indicated that Swenk's security access was on "hold" and "suspended." As in *Ross*, Swenk at that time had an opportunity to change the "hold"

status of the access required for his position. There was some chance that Swenk could undo the suspension by convincing management that his arrest did not pose a security risk.

However, the first precise action adverse to Swenk was Exelon's November 5, 2002 memorandum to Swenk denying his eligibility to obtain the security access required for his job as an oversight assessment leader. There is no ambiguity in Exelon's letter. Swenk's inconsistencies in his statements and the omission of pertinent information resulted in trustworthiness and reliability concerns that clearly caused Exelon to deny him unescorted access. This straightforward denial of access deprived Swenk of the qualification he needed to perform his job. Therefore, Swenk had final and unequivocal notice that his employment as an oversight assessment leader had ended.

Swenk's reliance on *Ross* is misplaced. In that case, the complainant's access was "suspended" and he was informed that he had 45 days to find another job in the company or his employment would be terminated. He was also told that he should seek psychological treatment, and that after obtaining treatment he could, within 45 days, seek conditional unescorted access to the facility. *Ross*, slip op. at 3. In this case, Swenk's access was "denied," not suspended. He was told definitively that he was "not eligible" for unescorted access to all Exelon's facilities. He had no option to apply again for the access qualification he needed to perform his job.

Nor does the fact that Swenk had 90 days to find another position not requiring security access toll the statute of limitations. As the ALJ stated, the situation is more analogous to that in *English*, supra. The complainant there was permanently barred from the laboratory where she had worked, but had 90 days to secure another job within the facility. The ALJ stated: "Although English was told she had 90 days within which to seek a position in the unsecured areas of the facility there was no ambiguity about the fact that she had permanently lost her position." *English*, slip op. at 5. On appeal, the Fourth Circuit agreed that the possibility of avoiding the effects of an adverse decision does not render the decision equivocal where the decision itself is not negated, but remanded the case on other grounds. *English*, 858 F.2d at 962.

Similarly, the fact that Swenk had the opportunity to appeal the November 5, 2002 decision does not prolong the life of the complaint until the appeal is finally decided. The appeal procedure merely serves as a remedy for the prior decision and does not in any way make the earlier decision tentative. *Ricks*, 449 U.S. at 260-61. The actual adverse action occurred on November 5, 2002, when Exelon permanently denied unescorted access to Swenk. The possibility that Swenk might have prevailed in his appeal cannot obviate the fact that, on that day, Swenk lost the qualification necessary to do his job. *See Jenkins*, slip op. at 15 (filing of a grievance does not toll the limitations period for filing a whistleblower complaint).

Finally, the fact that Swenk's actual employment with Exelon did not end until January 8, 2003, is not determinative because the termination letter merely recited the consequences of the earlier adverse action – the denial of security access. The January 8,

2003 letter explained that the November 5, 2002 decision "must be upheld" because Swenk's appeal had been denied and he had been unable to secure an alternative position with Exelon. ALJ 8.

The statute of limitations began to run when Swenk was informed of the adverse action of the denial of his security access, not when the consequences of that action took effect. *Overall*, slip op. at 35. *See Belt v. United States Enrichment Corp.*, ARB No. 02-117, ALJ No. 01-ERA-19, slip op. at 7 (ARB Feb. 26, 2004)(that a company memorandum did not state the actual termination date did not change the finality of the earlier action).

The pertinent facts regarding the timeliness of Swenk's complaint are not disputed. Moreover, the ALJ properly applied the statutes and case law governing the 180-day statute of limitations. He also correctly determined that equitable tolling principles did not apply in this case.[4] Therefore, we accept the ALJ's recommendation, grant summary decision to Exelon, and dismiss Swenk's complaint.

CONCLUSION

Swenk's complaint was filed more than 180 days after Exelon discharged him. Therefore, his complaint was not timely filed. Accordingly, we **DISMISS** Swenk's complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

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[4] The ERA limitations period is not jurisdictional and is subject to modification, but the doctrine of equitable tolling is narrowly applied and focuses on the complainant's excusable ignorance of his or her statutory rights as a reason to modify the limitations period. *School District of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3d Cir. 1981). In this case, Swenk's attorney made no argument regarding equitable tolling, either before the ALJ or us. Swenk bears the burden of justifying the application of equitable modification principles. *Santamaria v. United States Envtl. Prot.* Agency, ARB No. 05-023, ALJ No. 04-ERA-25, slip op. at 4 (ARB Mar. 31, 2005). Therefore, we affirm the ALJ's finding as to equitable tolling.