In the Matter of:

MARY CATHERINE SNEED, **ARB CASE NO. 07-072**

COMPLAINANT, **ALJ CASE NO. 2007-SOX-018**

v. **DATE: August 28, 2008**

RADIO ONE, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Edward D. Buckley, Esq., Daniel N. Klein, Esq., *Buckley & Klein, LLP,* Atlanta, Georgia

For the Respondent:
O'Kelly E. McWilliams, III, Esq., Jennifer W. Persico, Esq., *Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.,* Washington, District of Columbia

FINAL DECISION AND ORDER

The Complainant, Mary Catherine Sneed, filed a complaint alleging that the Respondent, Radio One, Inc., retaliated against her 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

regulations when it terminated her employment.[2] On April 16, 2007, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order on Respondent's Motion for Summary Decision (R. D. & O.) finding that Sneed failed to demonstrate the existence of a genuine issue of material fact relevant to the issue whether she timely filed her complaint within ninety days of the date on which she knew or should have known that Radio One intended to terminate her employment. Upon review, we conclude that Sneed failed in her burden to demonstrate the existence of a genuine issue of material fact sufficient to defeat Radio One's Motion for Summary Decision. Accordingly, we accept the ALJ's recommendation and we dismiss Sneed's complaint.

BACKGROUND

Radio One hired Sneed in July 1994 and promoted her to the position of Chief Operating Officer in January 1998. Sneed, in her affidavit in support of her response to Radio One's Motion for Summary Decision, described her meeting on June 29, 2006, with Radio One's Chief Executive Officer, Alfred Liggins:

> On June 29, 2006, Mr. Liggins did discuss with me in general terms, my separation from Radio One. He did not discuss or refer to any performance related problems in that meeting. Indeed, he stated very broadly to me that he would like me to continue to consult with the company. Although he presented a severance proposal, I rejected it, and he indicated that the company was interested in discussing a resolution concerning my termination on an ongoing basis. He did not indicate in that conversation that my last day would be June 30, 2006. He showed me no paperwork. The conversation was genial and he indicated an ongoing interest on the part of the company to work with me and negotiate with me.[3]

At 9:09 p.m. on June 29th, Liggins sent Sneed an e-mail:

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a Federal agency or Congress regarding conduct that the employee reasonably believes 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] Declaration of Mary Catherine Sneed, para. 11 (Mar. 27, 2007).

> Ok, here is the game plan. We will forward you a termination letter and a severance offer in the morning. Tomorrow will be your last day and I will make that announcement to the company tomorrow. First I will tell the exec team and then the regionals then send an email to the GM's [sic] and then the rest of the company. I will hold a conference call with the GM's [sic] in the afternoon. A press release will also go out tomorrow by 1pm. Since it is a long holiday weekend, you can gather your personal stuff during that time.
>
> I know you have rejected my verbal severance offer, so I suspect you will send our written offer to your attorney and make us some sort of counter. We will see if we can negotiate something that everyone can live with.
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> We should talk this over, first thing in the morning to make sure we are on the same page. Again, I appreciate everything you have done and if you change your mind about considering a consulting relationship with the company in the future, I would be happy to have that discussion.[4]

Sneed responded at 9:20 p.m.:

> Ok. That sounds good but The [sic] game plan needs to b[e] mutual. I also have a press release so [yo]u need to contact me at noon. I have calls until then. My lawyers [a]r[e] prepared to file a suit tomorrow by 2.[5]

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4 Respondent's Motion for Summary Decision (M. S. D.), Exh. B. (Feb. 16, 2007).

5 M. S. D., Exh. B. Initially, Sneed denied reading the 9:09 p.m. e-mail from Liggins until June 30, stating in her request for a hearing:

> Attached as Exhibit B is an email that was not sent until June 29, 2006 at 9:09 PM. In all likelihood at 9:09 p.m., Ms. Sneed had turned off her Blackberry and was no longer reviewing any of her emails. There is no evidence that it was opened on that date and indeed, Ms. Sneed contends that she first learned that she was to be terminated on the 30th in a telephone conference with other managers in which they were informed of her termination.

Sneed's Objection and Request for a Hearing at 2 (Jan. 19, 2007). After Radio One provided to Sneed and the ALJ a copy of Sneed's e-mail indicating that she had responded to the June

On June 30, 2006, there was a further exchange of e-mails. Liggins wrote to Sneed at 9:21 a.m. that as he had stated in his e-mail of the previous night, he had attached the termination letter and proposed severance agreement. He stated that, adhering to the plan he had outlined, he would inform the employees, send out a press release, and would call Sneed at 10:00 a.m. Sneed replied just before 10:00 a.m. that she was at a detention center speaking with kids until noon and that she was unable to open the attachments on her Blackberry. She indicated that she thought Liggins "owe[ed]" her the courtesy of delaying the announcements until she could read the attachments and speak to a few people. She further indicated that she could not clean out her office until Tuesday because she would be out of town for the week-end.[6]

Liggins stated that he was sorry but that he had already followed the game plan and had told the "regionals" and would be initiating the remainder of the plan shortly. He stated that Tuesday was fine for cleaning out her office and that the letters he had attached "include no different info than we discussed yesterday."[7]

Although Sneed had written to Liggins that her attorneys were prepared to file a suit by 2:00 p.m. on June 30th, she did not in fact file her SOX complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) until September 28, 2006 – 91 days after her meeting with Liggins on June 29, 2006, to discuss in general terms her separation and her receipt of the e-mail describing the game plan for her termination the following day and 90 days after the date on which her termination became effective.[8] OSHA investigated Sneed's complaint and concluded that her complaint was untimely.

29th e-mail that same night at 9:20 p.m., Sneed in her response to Radio One's motion to dismiss

> retract[ed] her contention that she had turned off her Blackberry and was no longer reviewing any of her e-mails the evening of June 29. Further, Ms. Sneed shows that at the time that she made that statement, she had not been able to retrieve her reply e-mail and was uncertain of the time she opened the e-mail. She does not dispute that she received the e-mail, but does dispute that this e-mail was one which unequivocally terminated her, as it proposed only a "game plan."

Complainant's Response to Radio One's Motion for Summary Decision at 7 (Mar. 27, 2007).

6 M. S. D., Exh. B.

7 *Id.*

8 R. D. & O. at 1.

Sneed requested a hearing before a United States Department of Labor Administrative Law Judge.[9] The ALJ issued a scheduling order and the Respondent filed a motion for summary decision, requesting that the complaint be dismissed as untimely.[10] Sneed filed an answer and Radio One filed a reply.[11]

The ALJ issued his R. D. & O. recommending that Sneed's complaint be dismissed as untimely. The ALJ concluded that given the exchange of e-mails on June 29th and 30th, Sneed knew or should have known on June 29th that Radio One had decided finally, definitively and unequivocally to terminate her employment as of June 30, 2006. In the alternative, the ALJ determined that even assuming arguendo that there was a material question on June 29th as to whether June 30th would be Sneed's last day, there was no genuine issue of material fact that as of June 29th, she knew or should have known that the termination of her employment "was not in question and was imminent."[12]

Sneed filed a timely petition requesting the Administrative Review Board to review the R. D. & O.[13] The Board issued a Notice of Appeal and Order Establishing Briefing Schedule and both parties filed briefs.

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.[14] We review a recommended decision granting summary decision de novo. That is, the standard the ALJ applies, also governs our review.[15] The standard for granting summary decision is essentially the

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9 *See* 29 C.F.R. § 1980.106(a).

10 R. D. & O. at 1.

11 The ALJ subsequently granted Sneed's request, over Radio One's objection, to file a supplemental brief in reliance upon Sneed's counsel's assurance that he wished to address the issue of equitable relief. Nevertheless, Sneed failed to address equitable principles in her supplemental brief, and instead simply "extended her argument that there was no 'final, definitive, and unequivocal notice' of an adverse employment decision until 30 Jun 06." R. D. & O. at 1 n.3. Nevertheless, the ALJ considered the supplemental brief. *Id.*

12 R. D. & O. at 5-6.

13 *See* 29 C.F.R. § 1980.110(a).

14 Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1980.110(a).

15 29 C.F.R. § 18.40 (2007).

same as that found in the rule governing summary judgment in the federal courts.[16] 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.[17] 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."[18]

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.[19] "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.'"[20] Accordingly, a moving party may prevail by pointing to the "absence of evidence proffered by the nonmoving party."[21] 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."[22]

DISCUSSION

An employee alleging a SOX retaliation violation must file his or her complaint within 90 days after the alleged violation occurred.[23] "This limitations period begins to

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16 Fed. R. Civ. P. 56.

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

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

19 *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 (Dec. 13, 2002).

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

21 *Bobreski*, 284 F. Supp. 2d at 73.

22 29 C.F.R. § 18.40(c). *See Webb v. Carolina Power & Light Co.*, 1993-ERA-042, slip op. at 4-6 (Sec'y July 17, 1995).

23 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

run from the time that the complainant knows or reasonably should know that the challenged act has occurred."[24] Thus, an employer violates the SOX on the date that it communicates to the employee its intent to implement an adverse employment action, rather than the date on which the employee experiences the adverse consequences of the employer's action.[25]

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.[26] "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.[27]

Sneed's argument in opposition to Radio One's motion for summary judgment before both the ALJ and the Board is that Sneed has raised a question of material fact as to whether Liggins finally, definitively, and unequivocally notified her on June 29, 2006, that her last day of employment would be June 30, 2006. Citing *Chardon* and *Ricks*, Sneed argues that the employer is required not only to unequivocally notify the employee of the termination, but also to give a date certain for that termination to activate the limitations clock. We agree

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may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination.").

[24] *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").

[25] *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).

[26] *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).

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

with the ALJ that even if in both *Chardon* and *Ricks*, the employer informed the employee of a date certain on which termination of employment would take effect, the issue whether communication of a specific date was required to effect a termination was not before the Court and thus, these decisions do not stand for the proposition that such a definite date is a prerequisite to starting the limitations period. Furthermore, any such proposition would conflict with decisions of the Eleventh Circuit Court of Appeals,[28] in which circuit this case arises, and of the Board.[29]

The ALJ concluded that Sneed's declaration in support of her response to Radio One's motion for summary judgment might have been sufficient to establish a genuine issue of fact as to whether she **subjectively** understood that her communications with Liggins on June 29, 2006, constituted a "final, definitive, and unequivocal notice" that the termination of her employment would be effective on June 30, 2006. Nevertheless the ALJ concluded:

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[28] *Pearson v. Macon-Bibb County Hosp. Auth.*, 952 F.2d 1274, 1279-80 (1992). In *Pearson,* the employer gave the complainant the option to resign, transfer, or be terminated. After the complainant unsuccessfully attempted to find work elsewhere or to transfer to another department and she took an extended leave, the employer terminated her employment three months after it had originally offered her the three options. The complainant argued that the limitations period began to run when her employment was terminated, not when she was offered the three options. The court held,

> [t]he equivocal character of the adverse employment decision of October 16 does not deprive that decision of its status as the operative act. Thus, even though the termination of Pearson's employment was not inevitable upon the passing of a designated date (as it was for the academicians in *Ricks* and *Chardon*) the distinctive fact that she was offered an opportunity to seek a transfer is relevant only to the availability of equitable modification of the deadline, and not the determination of when the alleged underlying discriminatory act occurred.

952 F.2d at 1279. We note that although given ample opportunity, Sneed chose not to present an equitable modification argument. R. D. O. at 1 n.3.

[29] *Rollins,* slip op. at 4*; Belt,* slip op. at 5-8.

> [T]he language of the e-mails[30] exchanged on 29 Jun 06 leaves no reasonable **objective** conclusion other than that Complainant was to be terminated as of 30 Jun 06. In spite of what may have been some subjective confusion on Complainant's part, there is no genuine issue of material fact that the clear objective interpretation of any future negotiation or discussion of the "game plan," related not to whether Complainant would continue to be employed by Respondent after 30 Jun 06, but to the terms of the severance package and the timing of the public announcements. Moreover, the follow-on communications on 30 Jun 06 indicate no surprise by Complainant at the fact that Respondent considered Complainant to have been terminated on that date.[31]

We agree with the ALJ that given the totality of the communications between Sneed and Liggins, Sneed has raised no issue of material fact regarding the issue whether a reasonably prudent person with regard for her rights, who has been told, "Tomorrow [June 30, 2006] will be your last day and I will make that announcement to the company tomorrow," would have sufficient knowledge that it was her employer's intent to take adverse action against her as of June 30, 2006. This conclusion is especially compelling given Sneed's response to Liggins that her attorneys would be prepared to file a lawsuit on her behalf by 2:00 on June 30. If Sneed had not anticipated that Radio One intended to take adverse action against her on June 30, why were her attorneys prepared to file suit against Radio One by 2:00 that day?

In the alternative, the ALJ found that even if Sneed raised a material fact question regarding whether Radio One informed her that it would terminate her employment on June 30, there is no material fact question regarding whether she knew or should have known that her termination "was not in question and was imminent."[32] We agree with the ALJ that:

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30 The ALJ noted the following examples of the language in the e-mails demonstrating objective evidence of termination: "Respondent: 'Tomorrow will be your last day . . . since it is a long holiday weekend, you can gather your personal stuff.' Complainant: 'That sounds good . . . '" R. D. & O. at 5 n.20. We also note additional examples: Respondent: "We will forward you a termination letter and a severance offer in the morning . . . ., A press release will also go out tomorrow by 1pm . . . ., I know you have rejected my verbal severance offer. . . .;" Complainant: "My lawyers [a]r[e] prepared to file a suit tomorrow by 2." M. S. D., Exh. B.

31 R. D. & O. at 5-6 (emphasis added).

32 *Id.* at 6.

> [t]here is no genuine issue of material fact that the totality of the circumstances establish that, through the communications on 29 Jun 06, Complainant received final, definitive, and unequivocal notice of a decision to terminate her, even if the severance package and timing was to be determined.[33]

Thus the June 29 communications started the 90-day limitations period and Sneed's complaint filed on the 91st day was untimely.

In opposition to this conclusion, Sneed argues that Liggins's proposal that Sneed consider a consulting relationship with Radio One is evidence that the fact of termination was "left open."[34] But this argument overlooks the obvious and dispositive fact that to be employed as a consultant for Radio One, Sneed's employment as the Chief Operating Officer would first have to be terminated. Nor are we convinced by Sneed's argument that the use of the term "game plan" to describe the procedure to be followed in announcing Sneed's termination in any way detracts from the definitive and unequivocal tenor of the statement that "[t]omorrow will be your last day."

CONCLUSION

We agree with the ALJ that Sneed has failed to raise a question of material fact regarding the issue whether she filed a timely SOX complaint. Consequently, we agree with the ALJ's recommendation to grant Radio One's Motion for Summary Decision and we **DISMISS** Sneed's complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

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33 *Id.*

34 Brief in Support of Appeal of Mary Catherine Sneed at 6 n.1.