U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

APOSTOLOS XANTHOPOULOS,

COMPLAINANT,

v.

MERCER INVESTMENT CONSULTING, SUBSIDIARY OF MARSH & MCLENNAN COMPANIES, INC.,

RESPONDENT.

ARB CASE NO. 2022-0032

ALJ CASE NO. 2021-SOX-00017
ALJ JODEEN M. HOBBS

DATE: September 28, 2023

Appearances:

For the Complainant:
Apostolos Xanthopoulos; *Pro Se*; Mount Prospect, Illinois

For the Respondent:
Alexa J. Laborda Nelson, Esq., and Edward T. Ellis, Esq., *Littler Mendelson, P.C.*; Philadelphia, Pennsylvania
Kelli C. Fuqua, Esq.; *Littler Mendelson, P.C.*; Austin, Texas

Before HARTHILL, Chief Administrative Appeals Judge, and PUST, Administrative Appeals Judge

DECISION AND ORDER

HARTHILL, Chief Administrative Appeals Judge:

This case arises under the whistleblower protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the

Sarbanes-Oxley Act (SOX).[1] This is Complainant Apostolos Xanthopoulos' (Xanthopoulos) second SOX case against Respondent Mercer Investment Consulting (Mercer), his former employer. In the first SOX case, Xanthopoulos alleged that Mercer unlawfully terminated his employment when he engaged in activity protected by SOX. The Administrative Review Board (ARB or Board) dismissed Xanthopoulos' first SOX case on June 29, 2020, because Xanthopoulos' initiating complaint with the United States Department of Labor (Department) Occupational Safety and Health Administration (OSHA) was not timely. In this second SOX case, Xanthopoulos alleges that Mercer blacklisted him in violation of SOX by interfering with his attempts to secure subsequent employment. Xanthopoulos also attempts to reargue his first, untimely SOX claim against Mercer.

A Department Administrative Law Judge (ALJ) dismissed Xanthopoulos' second SOX case. The ALJ denied Xanthopoulos' attempts to reargue his first SOX claim under the doctrine of res judicata, dismissed all but one of Xanthopoulos' blacklisting claims because they were not timely filed, and entered summary decision on Xanthopoulos' remaining blacklisting claim concerning a position at Charles Schwab because there was no evidence that blacklisting occurred. Xanthopoulos appealed the denial of his attempt to reargue his first SOX claim and the entry of summary decision on his claim concerning blacklisting at Charles Schwab to the Board on April 2, 2022.[2] For the reasons that follow, we affirm.

BACKGROUND

1. Xanthopoulos' Termination from Mercer and His First SOX Claim

Xanthopoulos worked for Mercer from 2013 to 2017.[3] He was hired by Bryon Willy.[4] Xanthopoulos alleges that he discovered that Mercer was manipulating investment portfolio ratings and knowingly disseminating those ratings to clients.[5]

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[1] 18 U.S.C. § 1514A, as implemented by 29 C.F.R. Part 1980 (2023).

[2] Xanthopoulos did not appeal the ALJ's dismissal of the other, untimely blacklisting claims. Xanthopoulos also originally claimed that he had been prevented from obtaining a new position with Mercer's parent company, Marsh & McLennan Companies, Inc. (Marsh & McLennan), in October 2020. Xanthopoulos voluntarily withdrew that claim, Decision and Order (D. & O.) at 2-3, and does not pursue it in this appeal.

[3] D. & O. at 5 (citing Deposition of Apostolos Xanthopoulos (Comp. Dep.) at 133).

[4] *Id.* (citing Comp. Dep. at 155; Deposition of Bryon Willy (Willy Dep.) at 132).

[5] *Xanthopoulos v. U.S. Dep't of Lab.*, 991 F.3d 823, 828 (7th Cir. 2021).

Xanthopoulos raised concerns about this conduct internally with Mercer beginning in 2014 and externally with the SEC beginning in 2015.[6] Xanthopoulos argues that Mercer retaliated against him for raising these concerns by terminating his employment in October 2017.[7]

Complainants alleging retaliation in violation of SOX must file a complaint with OSHA within 180 days of the date the violation occurred.[8] Xanthopoulos did not file a SOX complaint with OSHA until September 18, 2018, nearly a year after Mercer terminated his employment.[9] Accordingly, OSHA dismissed Xanthopoulos' complaint as untimely.[10] Xanthopoulos objected to OSHA's decision and the matter was assigned to an ALJ. Before the ALJ, Xanthopoulos argued that the limitations period should be equitably tolled because he mistakenly believed that his complaints to the SEC covered and preserved his SOX retaliation claim.[11] The ALJ disagreed and dismissed Xanthopoulos' complaint.[12]

Xanthopoulos appealed to the ARB, which affirmed the ALJ's decision.[13] Although the ARB recognized that tolling may be appropriate where "the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum," the ARB concluded that Xanthopoulos' SEC complaints did not set forth a SOX retaliation claim or seek SOX remedies.[14]

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6 *See* Complainant's Petition for Review (Petition) at 7.

7 *Xanthopoulos*, 991 F.3d at 829-30.

8 18 U.S.C. § 1514A(b)(2)(D); 29 C.F.R. § 1980.103(d).

9 *Xanthopoulos*, 991 F.3d at 830.

10 *Id.*

11 *Xanthopoulos v. Marsh & McLennan Cos.*, ALJ No. 2019-SOX-00008, slip op. at 2 (ALJ Mar. 22, 2019).

12 *Id.* at 2-3.

13 *Xanthopoulos v. Marsh & McLennan Cos.*, ARB No. 2019-0045, ALJ No. 2019-SOX-00008, slip op. at 5 (ARB June 29, 2020).

14 *Id.* at 3; *accord id.* at 5 ("Nothing in Complainant's SEC filings indicates that Complainant sought or wanted the SEC to investigate his discharge or restore his employment or wages to him. Thus, his SEC filings cannot constitute the precise statutory claim as contemplated by equitable principles. Further, it is clear that Complainant did not mistakenly file a SOX whistleblower claim with the SEC, but deliberately filed with the SEC a non-SOX claim for the purpose of remedying Respondent's wrongful conduct that he complained of and seeking a whistleblower award.").

Xanthopoulos then appealed to the Seventh Circuit Court of Appeals, which affirmed the ARB's decision.[15] Like the ARB, the Seventh Circuit determined that "Xanthopoulos sought not to vindicate his right to be free from retaliation under Sarbanes-Oxley in the [SEC filings] but rather to prosecute Mercer's securities fraud, a separate and independent remedy."[16]

2. Xanthopoulos' Blacklisting Claim and Second SOX Complaint

In 2019, Xanthopoulos interviewed for a position with Charles Schwab.[17] He interviewed with Romain Ramora, the hiring manager and deciding official, and with Andrei Egorov, Ramora's supervisor.[18] Xanthopoulos was not selected for the position.[19] He alleges that Charles Schwab did not select him because Willy passed negative information or information about his protected activity to Egorov through Xanthopoulos' former colleagues Juan Espina and Mark Raaberg.[20]

Xanthopoulos worked with Willy and Espina under Raaberg's management for six months in 2005 at the Federal Home Loan Bank of Chicago (FHLBC).[21] Xanthopoulos alleges that the FHLBC terminated his employment because he performed a study there that revealed accounting irregularities.[22]

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15 *Xanthopoulos*, 991 F.3d at 825.

16 *Id.* at 834 (internal quotations and citation omitted). The Seventh Circuit also reasoned that "even if we assume that Xanthopoulos filed [his SEC complaints] to cure the retaliation, the record suggests Xanthopoulos sought Dodd-Frank's anti-retaliation protections, not Sarbanes-Oxley's." *Id.*

17 D. & O. at 5 (citing Deposition of Andrei Egorov (Egorov Dep.) at 15, 17-18).

18 *Id.* (citing Comp. Dep. at 13-14; Egorov Dep. at 17-19, 23, 58); *see also* Egorov Dep. at 24-25.

19 D. & O. at 5 (citing Egorov Dep. at 11); Comp. Dep. at 29.

20 D. & O. at 4 (citing Complainant's Brief in Response to Motion for Summary Decision of Respondent Mercer Investment Consulting (Comp. MSD Opp. Br.) at 40-41; Comp. Dep. at 147); *see also* Petition at 7, 18.

21 D. & O. at 5 (citing Comp. Dep. at 31, 38, 75-76, 91).

22 Comp. Dep. at 75-76, 79-83.

By 2019, Espina had moved to a position with Charles Schwab.[23] Xanthopoulos' theory below was that Willy relayed negative information about him and his performance at Mercer, and/or information about his protected activity, to Espina and Raaberg sometime between 2014 and 2017 when Xanthopoulos and Willy (but not Espina or Raaberg) were working at Mercer,[24] and that Espina or Raaberg later passed that information to Egorov, or otherwise used their influence over Charles Schwab, to block his selection.[25]

Xanthopoulos filed a complaint with OSHA on January 29, 2020, alleging that Mercer, through Willy, unlawfully blacklisted him in violation of SOX.[26] OSHA found that the available evidence did not support Xanthopoulos' allegations and dismissed the complaint. Xanthopoulos objected to OSHA's findings and the case was assigned to an ALJ.

3. ALJ's Dismissal of Xanthopoulos' Attempt to Reargue First SOX Claim

Xanthopoulos' early filings with the ALJ in this second case suggested that he was attempting to reargue the wrongful discharge claim against Mercer that had been dismissed in his first SOX case.[27] Consequently, on July 26, 2021, the ALJ issued an Order to Show Cause directing Xanthopoulos to address why any allegations related to his first complaint should not be dismissed.[28] After receiving

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[23] D. & O. at 5 (citing Egorov Dep. at 30). Xanthopoulos also asserts that Raaberg worked with a company serving as a vendor to Charles Schwab. Complainant's Reply to Mercer Response Brief and Appendix of July 27, 2022 (Comp. Reply Br.) at 7; Comp. Dep. at 108. Although Raaberg may have also worked at Charles Schwab at some point in the past, there was no evidence that he worked there at or around the time that Xanthopoulos interviewed for the position there. D. & O. at 5 n.9 (citing Comp. Dep. at 108). There is also no evidence that Raaberg worked for Mercer. *Id.*

[24] Xanthopoulos only alleges that Willy shared information about him with Espina and Raaberg sometime while Xanthopoulos was working at Mercer between 2014 and 2017, i.e., two or more years before he interviewed with Charles Schwab in 2019. He does not argue that Willy shared information about him closer in time to the interview. *See* Comp. Dep. at 43-45.

[25] D. & O. at 4 (citing Comp. MSD Opp. Br. at 40-41; Comp. Dep. at 147); *see also* Petition at 7, 18.

[26] As noted above, Xanthopoulos' OSHA complaint also encompassed other claims that are not part of this appeal. *See* page 2 & n.2.

[27] *See* Order to Show Cause at 1-2.

[28] *Id.* at 2.

Xanthopoulos' and Mercer's responses, the ALJ dismissed all allegations regarding Xanthopoulos' first SOX Complaint as barred by the doctrine of res judicata.[29]

4. Discovery Before the ALJ

During the proceedings before the ALJ, Xanthopoulos, who is proceeding pro se, committed several discovery and procedural errors. Additionally, it appeared early on that Xanthopoulos intended to pursue discovery on issues not relevant to his blacklisting claim, including discovery on his dismissed wrongful discharge claim. Consequently, the ALJ closely regulated the proceedings. The ALJ's case management has become a point of contention on appeal, as Xanthopoulos accuses the ALJ of becoming frustrated with, and biased against, him because of his discovery and procedural mistakes and inexperience with litigation.

The discovery issues began when Xanthopoulos requested the ALJ issue fifteen witness subpoenas.[30] This exceeded the default number of depositions a party may take without seeking leave from the ALJ (ten).[31] Xanthopoulos also suggested on the subpoena forms that he intended for the deponents to produce their cell phones, included the ALJ's name in the caption as a plaintiff, set the deposition dates without consulting with Mercer's counsel, and set deposition dates as soon as one week after requesting the issuance of the subpoenas.[32] The ALJ issued an order on July 15, 2021, noting these flaws and instructing Xanthopoulos that he needed to comply with the Office of Administrative Law Judges (OALJ) Rules of Practice and Procedure (Rules).[33] The ALJ also warned that Xanthopoulos' failure to comply with the order could result in sanctions, including dismissal of his claim.[34]

On July 23, 2021, Xanthopoulos attempted to file with the ALJ six emails with thirty-eight attachments and dozens of links to external documents.[35] It was

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29 Order Dismissing Untimely Claims at 2-4.

30 *See* Order to Confer and Notice of Status Conference (Order to Confer) at 1.

31 *See* 29 C.F.R. § 18.64(a)(2)(i)(A).

32 Order to Confer at 1.

33 *Id.*

34 *Id.* at 3.

35 Order to Show Cause at 2.

not clear whether Xanthopoulos served Mercer's counsel with these materials.[36] Then, on July 27, 2021, Xanthopoulos sent the ALJ another voluminous set of documents via email.[37] Consequently, the ALJ issued orders on July 26, 2021, and July 28, 2021, advising Xanthopoulos that the filings would not be uploaded into the electronic docket, ordering that any document filed with the ALJ needed to be concurrently served on Mercer's counsel, and ordering that Xanthopoulos was not to copy anyone in the ALJ's office on such correspondence.[38]

On August 7, 2021, Xanthopoulos sent nineteen emails to various individuals and companies requesting affidavits commenting on Xanthopoulos' work performance.[39] In the email, Xanthopoulos suggested that the ALJ asked Xanthopoulos to solicit the affidavits, and stated that the recipients could communicate with the ALJ's law clerk ex parte.[40] In violation of the ALJ's instructions just ten days prior, Xanthopoulos copied the ALJ's law clerk and did not copy opposing counsel on the emails to the potential witnesses.[41]

The ALJ issued another order on August 12, 2021, expressing concern with the prejudice Xanthopoulos' invocation of the ALJ's name and authority in his communications with the potential witnesses might have on the their testimony.[42] The ALJ also noted Xanthopoulos' violation of the ALJ's orders requiring Xanthopoulos to not copy the ALJ's office on correspondence.[43] The ALJ warned Xanthopoulos that failure to comply with orders may result in the exclusion of evidence from the record, advised Xanthopoulos to abide by the OALJ Rules concerning integrity and ethical conduct, and warned Xanthopoulos that failure to comply with directions or to adhere to reasonable and ethical standards of conduct could result in his exclusion from the proceedings or dismissal of his complaint.[44]

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36 *Id.* at 2 n.1.

37 Order Rescheduling Status Conference and Directing Parties Not to File Routine or Discovery Materials at 1-2.

38 *Id.*; Order to Show Cause at 2 n.1.

39 Order Directing Complainant Not to Contact this Office Ex Parte at 2.

40 *Id.* Xanthopoulos sent a copy of the Order to Show Cause with each email. *Id.*

41 *Id.*

42 *Id.* at 3.

43 *Id.*

44 *Id.*

On August 6, 2021, the parties submitted competing position statements to the ALJ concerning their proposed depositions.[45] After a prehearing conference on August 25, 2021, the ALJ issued an order allowing Xanthopoulos to take two depositions (of Willy and Egorov) and Mercer to take one deposition (of Xanthopoulos).[46] The ALJ ordered that after taking these depositions, the parties were to file position statements regarding whether additional discovery was needed.[47]

Once these depositions were complete, Xanthopoulos requested seven additional depositions, including of Raaberg and Espina.[48] The ALJ denied Xanthopoulos' request and closed discovery. The ALJ concluded that Xanthopoulos' "reasons [for the additional depositions were] speculative at best for most of the proposed witnesses [including Espina and Raaberg] and harassing for another . . . ."[49]

5. ALJ's Entry of Summary Decision on Charles Schwab Blacklisting Claim

After discovery closed, Mercer moved for summary decision, arguing that there was no evidence that anyone at Mercer took any action to interfere with Xanthopoulos' effort to secure employment at Charles Schwab. The ALJ agreed and entered summary decision on March 18, 2022.

The ALJ concluded that there was no evidence that Willy relayed derogatory information to Espina or Raaberg, or that Espina or Raaberg then interfered with the selection process at Charles Schwab. The ALJ observed that Willy testified at his deposition that he did not recall corresponding with Raaberg since 2008, did not recall corresponding with Espina since 2009, did not know Egorov, was not asked

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45 Respondent's August 6, 2021 Letter to ALJ; Complainant's August 6, 2021 Letter to ALJ.

46 Order Establishing Initial Discovery Limits and Cancelling Hearing at 2.

47 *Id.* In a subsequent order, the ALJ restricted Willy's deposition to three-and-a-half hours, after Xanthopoulos signaled that he intended to raise questions that were irrelevant to Xanthopoulos' application to Charles Schwab. Order Limiting Amount of Deposition Time and Cancelling Conference at 2.

48 Order Closing Discovery and Setting Briefing Schedule at 1; Complainant's Position Statement at 2-4.

49 Order Closing Discovery and Setting Briefing Schedule at 1.

for a reference about Xanthopoulos by anyone at Charles Schwab, and did not share Xanthopoulos' written counseling with anyone other than Mercer's Human Resources and his superiors.[50] Similarly, the ALJ observed that Egorov testified at his deposition that he did not know Willy, did not recall discussing Xanthopoulos' performance at Mercer with Espina, did not get feedback regarding Xanthopoulos from anyone at Mercer, and was unaware at the time of the interview that Xanthopoulos had filed complaints with the SEC.[51] Thus, the ALJ stated that Xanthopoulos "was afforded an opportunity to conduct discovery which included the deposition of the person who [Xanthopoulos] alleged provided the derogatory information about his whistleblowing activities (Byron [sic] Willy) and the person who he alleged was tainted by the information supposedly supplied (Andrei Egorov). Neither deposition uncovered any facts that support Complainant's claim."[52]

The ALJ also determined that Xanthopoulos failed to present evidence to challenge Willy's and Egorov's testimony. The ALJ determined that Xanthopoulos' testimony about what he believed might have occurred was speculative and insufficient to create a dispute of fact.[53] The ALJ also rejected Xanthopoulos' assertions that Willy and Egorov lied in their depositions as speculative and unfounded.[54] Finally, the ALJ rejected Xanthopoulos' argument that he needed to take additional depositions, including of Espina and Raaberg, to refute Willy's and Egorov's testimony. The ALJ reiterated her earlier conclusion that Xanthopoulos' "reasons for seeking the additional discovery were speculative at best."[55]

Xanthopoulos appealed the ALJ's decision to the Board on April 2, 2022.[56]

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50 D. & O. at 5-6, 8 (citing Willy Dep. at 11-12, 104-05, 132).

51 *Id.* at 5 (citing Egorov Dep. at 47, 49, 63-64).

52 *Id.* at 9.

53 *Id.* ("Claimant has presented nothing, beyond his own assertions, to show that an agent of [Mercer] communicated his name to another employer with the object of preventing his employment; and he has not presented any evidence that [Mercer]'s alleged statements have affirmatively prevented him from obtaining employment.").

54 *Id.* (stating Xanthopoulos "offers nothing but speculation to substantiate this accusation").

55 *Id.*

56 An appellant in a SOX case must file a petition for review with the Board within 14 days of the date of the ALJ's decision. 29 C.F.R. § 1980.110(a). Xanthopoulos filed his Petition on April 2, 2022, fifteen days after the ALJ issued the D. & O. on March 18, 2022.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated the ARB the authority to issue agency decisions under SOX.[57] The ARB reviews the ALJ's denial of Xanthopoulos' attempt to relitigate his first, untimely SOX claim de novo.[58] The ARB also reviews the ALJ's grant of summary decision on his blacklisting claim de novo under the same standard the ALJ applies.[59]

DISCUSSION

1. Evidentiary Issues with Xanthopoulos' Appeal

At the outset, we note that there are two significant evidentiary issues with Xanthopoulos' appeal. First, Xanthopoulos often fails to cite to evidence in the record in support of the factual proffers in his filings with the Board. This, alone, could be a sufficient reason to reject his appeal.[60]

Due to a technical system miscalculation in this case, which has since been corrected, the Board accepted Xanthopoulos' Petition, issued a briefing schedule, and accepted the parties' briefs before becoming aware of the tardiness when Mercer raised it for the first time in its response brief. Although Mercer is correct that Xanthopoulos' Petition was one day late, given the unique and special circumstances of this case, and in the interest of justice and fairness, we have elected to consider the merits of Xanthopoulos' appeal.

[57] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

[58] *See Gladden v. The Proctor & Gamble Co.*, ARB No. 2022-0012, ALJ No. 2021-SOX-00012, slip op. at 8-9 (ARB May 9, 2023) (citation omitted).

[59] *See Feldman v. Risk Placement Servs., Inc.*, ARB No. 2020-0068, ALJ No. 2019-SOX-00052, slip op. at 4 (ARB Sept. 29, 2021) (citation omitted).

[60] *See May v. AGL Servs. Co.*, ARB No. 2022-0015, ALJ No. 2020-PSI-00001, slip op. at 6 (ARB Sept. 14, 2023); *see also Friend v. Valley View Cmty. Unit Sch. Dist. 365U*, 789 F.3d 707, 711 (7th Cir. 2015) ("We are not required to scour through hundreds of pages of deposition transcript in order to verify an assortment of facts, each of which could be located anywhere within the multiple depositions cited."); *McKinzy v. Internal Revenue Serv.*, 367 F. App'x 896, 897 (10th Cir. 2010) (dismissing appeal given appellant's "failure to point to any part of the record on which he relies"); *Moore v. F.D.I.C.*, 993 F.2d 106, 106 (5th Cir. 1993) (dismissing appeal because "[p]laintiffs' brief specifies no place in the record and identifies no proof to support statements [of fact]").

Second, Xanthopoulos relies on new evidence not supplied to the ALJ below. Among other things, he supplied two affidavits he prepared and signed himself and screenshots of an excel spreadsheet and a webpage.[61] Xanthopoulos also filed a "Supplement to Complainant's Reply to Mercer Response Brief and Appendix of July 27, 2022" (Comp. Supp. Br.), with another new affidavit and over 900 pages of apparently new material attached.

The Board generally does not consider materials presented for the first time on appeal.[62] When considering whether to consider new evidence, the Board relies on the standard contained in the OALJ Rules, which provides that "[n]o additional evidence may be admitted unless the offering party shows that new and material evidence has become available that could not have been discovered with reasonable diligence before the record closed."[63] Xanthopoulos has not argued that the new evidence supplied for the first time on appeal was not previously available and could not have been discovered with reasonable diligence before the record closed.[64] Consequently, the Board may properly decline to consider the new materials.

Despite these evidentiary issues, the Board has thoroughly reviewed the record and the new materials supplied by Xanthopoulos. Even considering these materials, we affirm the ALJ for the reasons set forth below.

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[61] Petition at 3-4; Comp. Br. at 53-54; Comp. Reply Br. at 15, 18. In one of the affidavits, Xanthopoulos refers to a conversation Xanthopoulos allegedly had with Espina in January 2022, which he asserts helps establish that (1) Espina and Willy remained in contact well past when Willy claims they did, and (2) that Raaberg may have spoken to Egorov about Xanthopoulos. Petition at 3, 14. Xanthopoulos referred to this conversation in his Opposition to Mercer's Motion for Summary Decision below, although he did not attest to the conversation in an affidavit at the time. Comp. MSD Opp. Br. at 15. It is not clear from the D. & O. whether the ALJ took the alleged conversation with Espina into consideration. The information contained in the remainder of the first affidavit, and all the information contained in the second affidavit, appear to be information Xanthopoulos did not share with the ALJ.

[62] *Smith v. Franciscan Physician Network*, ARB No. 2022-0065, ALJ No. 2020-ACA-00004, slip op. at 6 (ARB June 29, 2023) (citations omitted).

[63] *Id.* (quoting 29 C.F.R. § 18.90(b)(1)).

[64] *Cf.* Comp. Supp. Br. at 4 ("As told, review by the ARB may not include or consider this additional information I am submitting herein. I have no qualms. At the same time, events keep happening that obligate me to disclose this additional information.").

2. The ALJ Properly Entered Summary Decision

As noted above, the ARB reviews an ALJ's grant of summary decision de novo under the same standard the ALJ applies.[65] Summary decision is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law."[66] In considering a motion for summary decision, the ARB views the evidence, and makes all reasonable inferences, in the light most favorable to the non-moving party.[67]

If the moving party demonstrates an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation.[68] The non-moving party may not rest upon mere allegations, speculation, or denials, but must instead set forth specific facts on each issue upon which the non-moving party would bear the ultimate burden of proof.[69] If the non-moving party fails to show an essential element of their case, there can be no "genuine issue as to any material fact," since a complete failure of proof concerning an essential element necessarily renders all other facts immaterial.[70]

A. Xanthopoulos Did not Present Evidence that Mercer Blacklisted Him

As set forth above, Xanthopoulos alleges that Mercer violated SOX by blacklisting him and causing him to not be selected for a position with Charles Schwab. "[B]lacklisting occurs when an individual or a group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment."[71] "[B]lacklisting requires an objective action—

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65 *Feldman*, ARB No. 2020-0068, slip op. at 4 (citation omitted).

66 29 C.F.R. § 18.72(a).

67 *Perez v. Citigroup, Inc.*, ARB No. 2017-0031, ALJ No. 2015-SOX-00014, slip op. at 3-4 (ARB Sept. 30, 2019).

68 *Feldman*, ARB No. 2020-0068, slip op. at 4 (citation omitted).

69 *Id.* (citation omitted).

70 *Id.* at 4-5 (citation omitted).

71 *Beatty v. Inman Trucking Mgmt., Inc.*, ARB No. 2011-0021, ALJ Nos. 2008-STA-00020, -00021, slip op. at 6 (ARB June 28, 2012) (quotations and citation omitted).

there must be evidence that a specific act of blacklisting occurred."[72] "Subjective feelings on the part of a complainant toward an employer's action are insufficient to establish that any actual blacklisting took place."[73]

As explained above, Xanthopoulos' theory is that Willy relayed negative information about Xanthopoulos or information about Xanthopoulos' protected activity to Espina and/or Raaberg sometime between 2014 and 2017 while Xanthopoulos was working with Willy at Mercer. Xanthopoulos believes that Espina and/or Raaberg then, in turn, either relayed that information to Egorov or otherwise used their influence over the Charles Schwab company to ensure Xanthopoulos was not hired there several years later. We agree with the ALJ that there is no cognizable and competent evidence in the record to establish either link in this alleged derogatory chain. Accordingly, Xanthopoulos cannot prove that blacklisting occurred, and the ALJ's entry of summary decision was appropriate.

i. The First Link in the Alleged Derogatory Chain: Willy Relaying Information to Espina and/or Raaberg

As observed by the ALJ, Willy denied communicating with Espina or Raaberg after Xanthopoulos engaged in protected activity at Mercer, let alone sharing negative information about Xanthopoulos or information about Xanthopoulos' protected activity with them.[74] Xanthopoulos offers no cognizable, countervailing evidence in rebuttal to Willy's testimony. Instead, Xanthopoulos only offers conjecture about what he thinks occurred based on bits of information he received from Willy and others while working at Mercer.

In support of his claim, Xanthopoulos cites instances which led him to believe that Willy, Espina, and Raaberg remained in contact between 2014 and 2017.[75]

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[72] *Pickett v. Tenn. Valley Auth.*, ARB Nos. 2002-0056, -0059, ALJ No. 2001-CAA-00018, slip op. at 9 (ARB Nov. 28, 2003) (citation omitted).

[73] *Id.* (citation omitted).

[74] D. & O. at 5-6; *see also* Willy Dep. at 11-12.

[75] Petition at 7 ("All this time [between 2014 and 2017], Bryon Willy was indicating to me on several occasions and in several ways, that he was in communication with Espina and Raaberg . . . ."); Comp. Reply Br. at 9 ("Based on things that Willy was telling me during 2014-2017, Willy was in continuous communication about me and my alleged performance at Mercer, with Raaberg and Espina . . . ."); Comp. Dep. at 108 ("Throughout

Specifically, he asserts that: (1) Willy, Espina, and Raaberg each separately expressed at points over a thirteen- or fourteen-year span that Xanthopoulos did not "belong in the industry," which leads Xanthopoulos to believe that the three discussed Xanthopoulos amongst themselves during that period;[76] (2) Willy once complained to Xanthopoulos that Raaberg "made" Espina a Director at Charles Schwab before Espina's hiring there was announced, which Xanthopoulos believes Willy could have only learned from Espina;[77] (3) Willy shared information about Xanthopoulos with other individuals within Mercer, which leads him to conclude that Willy must have disparaged him to Raaberg and Espina as well; [78] and (4) after a lunch Xanthopoulos had with Espina in October 2014, Willy told Xanthopoulos he knew about the lunch and added that "Mark [Raaberg] says hi."[79] Xanthopoulos then surmises that "[s]ince we established that Willy, Espina and Raaberg were

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my history at Mercer, [Willy] would refer to conversations between himself, Espina and Mark all the time.").

[76] Petition at 3, 14; Comp. Br. at 21-22. According to Xanthopoulos, a recruiter told Xanthopoulos that Raaberg made the statement to a potential employer in 2008 or 2009, Willy made the statement to Xanthopoulos while Xanthopoulos worked at Mercer, and Espina made the statement to Xanthopoulos during a call in January 2022. Petition at 3; Comp. Dep. at 97-99, 110. Xanthopoulos believes Willy and Espina were parroting a phrase or sentiment that Raaberg had expressed about Xanthopoulos in the past, leading Xanthopoulos to conclude that the three actively discussed Xanthopoulos amongst themselves while Xanthopoulos was working at Mercer. Petition at 3, 14. Xanthopoulos has not explained why the fact that the three allegedly expressed a common sentiment regarding Xanthopoulos at separate points over a thirteen- or fourteen-year span implies, without more, that the three remained in communication during that span, rather than simply reaching their own, independent conclusions regarding Xanthopoulos based on their personal experiences working with him.

[77] Comp. Br. at 23; Comp. Dep. at 108, 117-18. Xanthopoulos admitted that he did not ask how Willy knew that Raaberg had allegedly "made" Espina a Director, Comp. Dep. at 118, and Xanthopoulos otherwise failed to explain why it is reasonable to deduce that Espina must have been the source of the information.

[78] Comp. Br. at 11-12; Comp. Dep. at 105, 115-16, 125-26. Specifically, Xanthopoulos asserts that his coworker at Mercer told him that she knew Xanthopoulos had prepared a study that created consternation at the FHLBC, just like he did at Mercer years later. Comp. Dep. at 105, 115-16. Xanthopoulos offered no evidence that Willy was the one who shared information about the FHLBC study with the coworker. Furthermore, even assuming Willy shared information about Xanthopoulos with others within Mercer, Xanthopoulos has not explained why it would be reasonable to infer that he must have also disparaged Xanthopoulos to "everyone," including Espina and Raaberg.

[79] Petition at 7; Comp. Dep. at 106-07.

talking about [Xanthopoulos], it is easy to conclude that they were at the very least talking about [his protected activity and history of identifying SOX violations]."[80]

To the contrary, tenuous evidence that Willy, Raaberg, and Espina may have remained in contact over a period of years is not evidence that Willy was actively disparaging Xanthopoulos to the other two or sharing information about Xanthopoulos' protected activity with them. Xanthopoulos' proffer that it is "easy to conclude" that the latter follows from the former is unreasonable, speculative, and unsupported by evidence in the record.[81]

Accordingly, we agree with the ALJ that there is no competent or cognizable evidence that Willy passed derogatory information or information about Xanthopoulos' protected activity to Espina or Raaberg. Xanthopoulos' speculation and conclusions to the contrary are not supported by the evidence and are not reasonable. Therefore, Xanthopoulos cannot establish the first link in the alleged derogatory chain.

ii. The Second Link in the Alleged Derogatory Chain: Espina and/or Raaberg Relaying Derogatory Information to Egorov or Otherwise Influencing the Hiring Decisions at Charles Schwab

Even if Xanthopoulos could establish a dispute of material fact as to whether Willy remained in contact with Espina and Raaberg, and as to whether Willy also passed negative information about Xanthopoulos to them, Xanthopoulos would still have to proffer evidence that Espina and/or Raaberg also subsequently passed that information to Egorov or otherwise affected the hiring process at Charles Schwab two or more years later. We agree with the ALJ that Xanthopoulos has failed to present evidence that could establish this second link in the alleged chain.

Before the ALJ, Xanthopoulos focused on Espina as the individual who he believed interfered with his selection at Charles Schwab. Xanthopoulos testified that Egorov suddenly placed Xanthopoulos on hold for approximately ten minutes

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80 Petition at 20.

81 *See REXA, Inc. v. Chester*, 42 F.4th 652, 665 (7th Cir. 2022) ("Simply put, these inferences are barely conceivable and certainly not reasonable, so they will not be drawn at summary judgment." (quotations and citations omitted)); *Charles v. Reichel*, 67 F. App'x 950, 953 (7th Cir. 2003) ("He must satisfy his burden with definite, competent evidence, not with mere speculation or unreasonable inferences." (quotations and citations omitted)).

during their phone interview.[82] Xanthopoulos speculated that someone, likely Espina, must have relayed negative information about Xanthopoulos to Egorov during the ten-minute break because, after the break, Egorov's tone towards Xanthopoulos changed and Egorov only asked one more question—whether Xanthopoulos previously worked at the FHLBC, which is where Xanthopoulos worked with Willy, Espina, and Raaberg.[83] Xanthopoulos acknowledges that he did not hear Egorov speak to anyone during the break, but assumes something adverse must have occurred during the break because Egorov's conduct was "uncharacteristic."[84] He conceded below that he had no other basis to conclude that Espina interfered during his interview, besides Egorov's "uncharacteristic" behavior and question about the FHLBC.[85]

As noted by the ALJ, Egorov denied receiving any information concerning Xanthopoulos' performance or his protected activity at Mercer from anyone.[86] Likewise, Egorov denied speaking with Espina during the break and denied knowing that Espina, Raaberg, and Willy worked together at the FHLBC.[87] In addition, Xanthopoulos states on appeal that he spoke with Espina in January 2022, and that Espina confirmed that he did not speak to Egorov about Xanthopoulos and did not even know that Xanthopoulos had interviewed with Egorov.[88] Consequently, Xanthopoulos acknowledges the speculative nature of his theory regarding the break in his interview, conceding now that he does not know when or how Espina may have served as the middleman in the alleged derogatory chain, and that "[a]nything could have happened."[89] Thus, Xanthopoulos' theory that Espina interfered with his interview at Charles Schwab is unsupported by any

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82 Comp. Dep. at 22-23.

83 *Id.* at 22-26, 43, 47.

84 *Id.* at 23; Comp. Reply Br. at 11.

85 Comp. Dep. at 43 ("[T]he link that I have made is Egorov's single question about the [FHLBC], if that's what—I mean, just to make your work easier, that's the basis.").

86 D. & O. at 5 (citing Egorov Dep. at 47, 63-64).

87 Egorov Dep. at 32.

88 Petition at 3, 14; Comp. Br. at 21-22.

89 Petition at 29; *accord id.* ("We do not know the exact manner in which Espina is suspected to have interfered, and we do not know if Espina did this on his own, through Mr. Raaberg, or at a steak dinner at *Outback* with Mr. Willy."); Comp. Br. at 37-38 (conceding that he may not have "hit it on the nose" with his first theory that Espina interrupted his interview).

evidence in the record, and any remaining speculation about Espina's involvement is unreasonable and is insufficient to create a dispute of material fact.

On appeal, Xanthopoulos has shifted his focus to Raaberg as the one who "probably . . . buried [him] to Egorov."[90] Xanthopoulos does not offer a clear explanation as to when, or under what circumstances, Raaberg might have relayed negative information to Egorov. It appears Xanthopoulos' theory that Raaberg served as the middleman between Willy and Egorov rests on the recent call Xanthopoulos alleges he had with Espina in January 2022.[91] During that call, Espina allegedly denied speaking with Egorov himself, but stated that "Mark [Raaberg] might have."[92] Xanthopoulos has not stated whether Espina elaborated on this comment, or whether Espina offered (or was asked for) any factual basis for it. Indeed, Xanthopoulos even concedes that Espina's proffer that Raaberg "might" have spoken with Egorov was "conjecture[ ]."[93] As with the remainder of Xanthopoulos' theories, the stray statement from Espina that a conversation between two other individuals "might" have occurred is unreasonable and unsubstantiated speculation.

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[90] Comp. Br. at 37-38; *accord* Petition at 18 ("Discovery so far, points to the possibility that Egorov communicated with Mark Raaberg about me, as opposed to or in addition to Juan Espina.").

[91] Petition at 20, 29; Comp. Br. at 37-38. Mercer argues the affidavits supplied by Xanthopoulos, including the one concerning his call with Espina, include hearsay that should not be considered by the Board. Brief of Respondent Mercer Investment Consulting LLC at 9 n.6. Although the OALJ's Rules of Evidence limit the admissibility of hearsay (29 C.F.R. §§ 18.801-.806), the regulations applicable to this SOX action state that "[f]ormal rules of evidence will not apply, but rules or principles designed to assure production of the most probative evidence will be applied." 29 C.F.R. §1980.107(d); *see also id.* § 1980.107(a) (stating that the OALJ's Rules apply "[e]xcept as provided in this part"). Consequently, ALJs and the Board need not disregard statements that may otherwise constitute hearsay. *See Barber v. Planet Airways, Inc.*, ARB No. 2004-0056, ALJ No. 2002-AIR-00019, slip op. at 8-9 (ARB Apr. 28, 2006) (interpreting same regulation under AIR 21).

[92] Petition at 3. Xanthopoulos has not been consistent in what Espina allegedly said about Raaberg communicating with Egorov. In the affidavit, Xanthopoulos declared that Espina told him "Mark might have" spoken with Egorov. *Id.* at 3. In his Petition, Xanthopoulos quoted Espina as allegedly stating "it was Raaberg that probably talked to Egorov." *Id.* at 5. In his Opposition to Respondent's Motion for Summary Decision below, he quoted Espina as allegedly saying "I did not talk to Egorov, but I don't know if Mark didn't." Comp. MSD Opp. Br. at 30.

[93] Comp. Br. at 21.

Xanthopoulos also speculates that, short of directly speaking with Egorov, Raaberg may have had influence over the hiring decisions at Charles Schwab generally, and may have used that power to preclude Xanthopoulos from being hired there (when or through who, Xanthopoulos does not specify).[94] Xanthopoulos believes Raaberg had such power or influence because: (1) Raaberg had been in the industry for years;[95] (2) Raaberg worked for an important vendor for Charles Schwab;[96] (3) Espina and another former coworker from the FHLBC who worked under Raaberg both later worked at Charles Schwab;[97] and (4) Willy allegedly told Xanthopoulos that Raaberg "made" Espina a Director at Charles Schwab.[98]

Xanthopoulos offered no evidence to substantiate that Raaberg's stature in the industry or role in a company that served as a vendor to Charles Schwab gave him the ability to influence Charles Schwab's hiring decisions. Xanthopoulos also offered no evidence that even if Raaberg did have such power, he used it in this case. Thus, as with Espina, Xanthopoulos has failed to offer evidence that could create a dispute of material fact as to whether Raaberg interfered with Xanthopoulos' potential employment at Charles Schwab.

Accordingly, we agree with the ALJ that Xanthopoulos has failed to present evidence that could raise a dispute of material fact that the alleged derogatory chain from Willy, to Espina and/or Raaberg, to Egorov existed. Accordingly, the ALJ's entry of summary decision was appropriate.

B. Xanthopoulos' Collateral Attacks on D. & O. Are Not Persuasive

Xanthopoulos also makes collateral attacks on the ALJ's entry of summary decision. Xanthopoulos contends that (1) Willy and Egorov were not credible witnesses; and (2) the ALJ became biased against Xanthopoulos and treated him unfairly because of his procedural errors and inexperience. We reject both arguments.

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94 *See* Petition at 7, 11; Comp. Reply Br. at 7.

95 Petition at 11; Comp. Dep. at 119-20.

96 Comp. Reply Br. at 7.

97 Petition at 11, 21.

98 Comp. Dep. at 108, 117-18; *see also* Petition at 11; Comp. Br. at 23.

i. Xanthopoulos' Attacks on Willy's and Egorov's Credibility

Xanthopoulos accuses Willy of committing perjury during his deposition when he testified that he did not recall corresponding with Espina after 2009.[99] As discussed in Section 2.A.i., above, Xanthopoulos asserts that Willy made clear to Xanthopoulos during Xanthopoulos' employment at Mercer between 2014 and 2017 that Willy was still in contact with Espina at that time.[100] Xanthopoulos also argues that Egorov is not credible because of his inability to recall the specifics of his interview with Xanthopoulos during his deposition.[101] Xanthopoulos argues that instead of accepting Willy's and Egorov's testimony at face value, the ALJ should have conducted a hearing to assess their credibility.[102] Xanthopoulos also argues that he should have been permitted to test the veracity of Willy's and Egorov's testimony by deposing Espina and Raaberg, the alleged middlemen in the derogatory chain.[103]

Xanthopoulos' attacks on Willy's and Egorov's credibility do not aid him in his bid to overturn the ALJ's entry of summary decision. "The mere possibility that

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99 *E.g.,* Petition at 5, 12. Xanthopoulos also asserts that Willy lied when he said that he did not discuss Xanthopoulos' performance reviews or counseling at Mercer with anyone other than his supervisors and Human Resources. *Id.* at 33; *see* Willy Dep. at 104-05. Xanthopoulos argues this is a lie because a former coworker from Mercer recently told Xanthopoulos that he knew from "coworkers and management at Mercer, that Mercer was trying to get [Xanthopoulos] fired because of work [Xanthopoulos] had performed a few years before he joined the firm in 2017," and that he knew that "Mercer was delaying firing [Xanthopoulos] because . . . [Xanthopoulos] had 'filed something.'" Petition at 3; *accord id.* at 5. Xanthopoulos does not state that the coworker named Willy as the source of the information or explain the link between the alleged fact that Mercer was "trying to get [Xanthopoulos] fired" with the alleged derogatory chain initiated by Willy leading to Xanthopoulos' non-selection at Charles Schwab years later. Xanthopoulos also asserts that Willy lied when he claimed he "did not know [Xanthopoulos] had filed something" with the SEC. Comp. Reply Br. at 11. Xanthopoulos misstates Willy's testimony. Willy testified at his deposition: "I am not aware of what was filed with the SEC. I am at a high level, I have a vague awareness that something was filed, but I can't comment on—on 12 SEC filings. I'm not aware." Willy Dep. at 7-8. Thus, Willy testified that he did not know specifically what was filed with the SEC or that Xanthopoulos had filed twelve complaints, but he admitted that he was aware something had been filed.

100 Xanthopoulos also states that in January 2022, Espina confirmed that he had been in contact with Willy as recently as 2014. Petition at 3.

101 *Id.* at 5; Comp. Br. at 33.

102 Petition at 9.

103 *E.g., id.* at 12, 14, 20; Comp. Br. at 7; Comp. Reply Br. at 16.

the fact finder might reject the moving party's evidence on credibility grounds is not enough to forestall summary judgment for the moving party."[104] "[W]hen challenges to witness' credibility are *all* that a plaintiff relies on, and he has shown no independent facts—no proof—to support his claims, summary judgment in favor of the defendant is proper."[105] Even if there are credibility concerns, "the nonmoving party must [still] present affirmative evidence in order to defeat a properly supported motion for summary judgment."[106]

Even if we accept that a factfinder might question Willy's or Egorov's credibility, Xanthopoulos still failed to present affirmative evidence in support of his claim that Willy shared information about Xanthopoulos with Espina or Raaberg and that Espina or Raaberg, in turn, shared that information with Egorov or otherwise impacted Xanthopoulos' potential employment at Charles Schwab. Neither witness's alleged lack of credibility can help Xanthopoulos forestall summary decision where he cannot otherwise establish an essential aspect of his blacklisting claim.

Xanthopoulos speculates that Espina and Raaberg might have rebutted the testimony proffered by Willy and Egorov, so he should have been allowed to depose them.[107] Xanthopoulos has not shown that either deposition would have altered the evidence or assisted Xanthopoulos in avoiding the entry of summary decision.

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104 *Coates v. S.E. Milk, Inc.*, ARB No. 2005-0050, ALJ No. 2004-STA-00060, slip op. at 10 (ARB July 31, 2007).

105 *Springer v. Durflinger*, 518 F.3d 479, 484 (7th Cir. 2008) (citing *Dugan v. Smerwick Sewerage Co.*, 142 F.3d 398, 406 (7th Cir. 1998)); *accord Schoonejongen v. Curtiss-Wright Corp.*, 143 F.3d 120, 130 (3d Cir. 1998) ("[I]f a moving party has demonstrated the absence of a genuine issue of material fact—meaning that no reasonable jury could find in the nonmoving party's favor based on the record as a whole—concerns regarding the credibility of witnesses cannot defeat summary judgment." (citation omitted)).

106 *Schoonejongen*, 143 F.3d at 130 (quotations and citation omitted).

107 *See* Comp. Reply Br. at 16 ("The Judge handicapped my case and endorsed the incidence of perjury by not allowing Espina to be deposed. Rationally, if one wants to know connectivity of sorts between points A and C, one checks point A (Willy) and point C (Egorov). If connectivity is not found, one checks point B, in-between (Espina)."). As set forth above in Background Section 4, given Xanthopoulos' discovery and procedural errors, the ALJ closely regulated discovery. She initially permitted Xanthopoulos to only depose Willy and Egorov, but gave Xanthopoulos the ability to demonstrate a need for additional depositions. Xanthopoulos requested seven additional depositions, including of Espina and Raaberg, which the ALJ denied. The ALJ concluded Xanthopoulos' proffered need for additional depositions, including of Espina and Raaberg, was "speculative at best."

To the contrary, as noted above, Xanthopoulos admits that Espina, in a conversation the two had while the case was pending with the ALJ, denied knowing that Xanthopoulos interviewed with Egorov and confirmed that he did not speak with Egorov about Xanthopoulos.[108]

Regarding Raaberg, Xanthopoulos asserts that although Espina denied speaking with Egorov himself, Espina told Xanthopoulos that Raaberg "might have" spoken with Egorov.[109] As noted above, Xanthopoulos relies heavily on this stray, unexplained, and unsubstantiated statement from Espina to inform his belief that Raaberg influenced the hiring decision at Charles Schwab.[110] Yet, as set forth above, Xanthopoulos concedes that Espina's proffer that Raaberg "might have" spoken with Egorov was "conjecture[ ]" on Espina's part.[111]

Consequently, Xanthopoulos has effectively conceded that it is unsubstantiated speculation at this stage that Espina or Raaberg would offer any contrary or countervailing testimony tending to establish that the alleged derogatory chain might have existed. Xanthopoulos' attempt to depose Espina and Raaberg would be nothing more than a fishing expedition.[112] Therefore, Xanthopoulos' unsupported belief that Willy and Egorov lacked credibility do not warrant reversing the ALJ's entry of summary decision.

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108 Petition at 3, 14.

109 *Id.* at 3.

110 *Id.* at 20, 29; Comp. Br. at 37-38.

111 Comp. Br. at 21.

112 *See Moore v. U.S. Dep't of Energy*, ARB No. 1999-0047, ALJ No. 1998-CAA-00016, slip op. at 4 (ARB June 25, 2001) ("[W]e note that a party is not entitled to postpone a ruling on a motion for summary judgment in order to engage in further discovery when that party has offered no more than speculation as to what facts might be uncovered and it is clear that further discovery would be no more than a fishing expedition." (citation omitted)); *see also Webb v. Trader Joe's Co.*, 999 F.3d 1196, 1204 (9th Cir. 2021) ("We cannot condone the use of discovery to engage in 'fishing expeditions' where, like here, it is obvious that Webb has no basis other than gross speculation [in support of her claim]." (quotations and citation omitted)); *Bastin v. Fed. Nat'l Mortg. Ass'n*, 104 F.3d 1392, 1396 (D.C. Cir. 1997) (finding discovery denial not an abuse of discretion where plaintiff was "unable to offer anything but rank speculation to support" her claim and discovery "would amount to nothing more than a fishing expedition").

ii. The ALJ Did Not Show Bias or Mishandle the Proceedings

Xanthopoulos asserts that his discovery oversteps and blunders, described above in Background Section 4, "turned the Judge out of favor towards [him] in this case."[113] According to Xanthopoulos, this led the ALJ to show "clearly favorable bias" towards Mercer.[114] Xanthopoulos has not articulated any basis for the ARB to conclude that the ALJ acted partially or with bias. ALJs are "presumed to act impartially,"[115] and the Board typically requires a party accusing an ALJ of bias to show some type of extra-judicial source of bias to support such a conclusion.[116] "Unfavorable rulings and possible legal errors in an ALJ's orders generally are insufficient to prove bias."[117] Xanthopoulos has not cited any extra-judicial source of bias in this case. Each of the actions and decisions upon which Xanthopoulos bases his claim that the ALJ showed bias were within the scope of regulating, managing, and adjudicating the proceedings.[118] Xanthopoulos may not agree with the ALJ's handling of the case, but Xanthopoulos has failed to meet his burden to demonstrate that the ALJ was biased.

Short of outright bias, Xanthopoulos also accuses the ALJ of becoming frustrated with him and denying him the adjudicative latitude to which he is entitled as a pro se party.[119] Although the ALJ closely regulated the proceedings, the steps she took to manage the case were warranted and well within the discretion afforded to ALJs, given the circumstances of the case.

Xanthopoulos points to four specific instances in which he believes the ALJ mishandled the proceedings and expressed frustration with Xanthopoulos. First, Xanthopoulos asserts the ALJ "[sped] up the process by limiting the number of deponents."[120] Specifically, Xanthopoulos argues that the ALJ erred by precluding

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113 Petition at 28.

114 *Id.* at 24; Comp. Br. at 21.

115 *Vudhamari v. Advent Global Sols.*, ARB No. 2021-0018, ALJ No. 2018-LCA-00022, slip op. at 4-5 (ARB Apr. 26, 2021) (citations omitted).

116 *March v. Metro-North Commuter R.R. Co.*, ARB No. 2021-0059, ALJ Nos. 2019-FRS-00032, -00035, slip op. at 22 (ARB Jan. 21, 2022) (citation omitted).

117 *Vudhamari*, slip op. at 5 (quotations and citation omitted).

118 *See id.*

119 Comp. Br. at 12-13.

120 *Id.* at 6.

him from deposing Espina and Raaberg. For the reasons discussed above, we disagree. ALJs have wide discretion to limit discovery and will be reversed only when their rulings were arbitrary or an abuse of discretion.[121] To establish that the ALJ abused her discretion in limiting discovery, Xanthopoulos must identify "with some precision" the information he expects he would have received through additional discovery and how that information would have altered the evidence.[122] Xanthopoulos must offer more than "mere speculation" as to what facts might be uncovered by additional discovery.[123] As explained above in Section 2.B.i., Xanthopoulos offered nothing more than "mere speculation" regarding Espina's and Raaberg's testimony and has not shown that deposing either witness would have allowed him to avoid summary decision.

Second, Xanthopoulos asserts that the ALJ falsely accused him of harassing a witness, which "intimidated him" into not presenting all his evidence in response to Mercer's Motion for Summary Decision.[124] This argument is misplaced.

The witness in question is Xanthopoulos' former colleague at Mercer. Xanthopoulos has repeatedly hinted at or outright asserted during these proceedings that the colleague and Willy had an extramarital affair.[125] When

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[121] *Jeanty v. Lily Transp. Corp.*, ARB No. 2019-0005, ALJ No. 2018-STA-00013, slip op. at 12 (ARB May 13, 2020) (citations omitted).

[122] *See Furlong-Newberry v. Exotic Metals Forming Co.*, ARB No. 2022-0017, ALJ No. 2019-TSC-00001, slip op. at 22 (ARB Nov. 9, 2022) (citation omitted); *accord McNiece v. Dominion Nuclear Conn., Inc.*, ARB No. 2015-0083, ALJ No. 2015-ERA-00005, slip op. at 7 (ARB Nov. 30, 2016) ("To establish that the ALJ abused her discretion in limiting discovery, McNiece must, at a minimum, show how further discovery could have permitted him to rebut DNC's contentions . . . ." (citation omitted)).

[123] *See Nieman v. S.E. Grocers, LLC*, ARB No. 2018-0058, ALJ No. 2018-LCA-00021, slip op. at 21 (ARB Oct. 5, 2020) (citation omitted).

[124] Petition at 29, 31; Comp. Br. at 12-13.

[125] Complainant's Response to Order to Confer at 7 ("Several colleagues had become uncomfortable with, and Mercer had frowned upon, an apparent non-business-type 'friendship' between [the colleague] and Willy."); Comp. MSD Opp. Br. at 7 ("Willy fired me . . . to cover-up the fact that he was essentially himself pushed out of Mercer because he maintained an open extra-marital affair with [the colleague]. . . ."); Comp. Dep. at 254-55 (stating that he had been informed that "Willy was maintaining an extramarital affair within Mercer"); Petition at 6 ("[The colleague], a Mercer co-worker with whom my boss, Bryon Willy had maintained an intra-office, extra-marital affair . . . ."). In addition, during the August 25, 2021 prehearing conference regarding discovery, Mercer's counsel asserted that Xanthopoulos had "sent documents to at least two current employers of these

Xanthopoulos sought to depose this colleague, the ALJ made clear that she would only permit Xanthopoulos to seek discovery that was relevant and cautioned him to "proceed . . . with the highest ethical standards and with integrity."[126] The ALJ also advised Xanthopoulos that any deposition must be "done professionally, ethically and for solely the purposes of establishing this case."[127] Despite this warning, in his proffer to the ALJ regarding his need for additional depositions, Xanthopoulos again insinuated that the colleague and Willy engaged in an affair, and suggested he would have to "delve into" the issue if permitted to depose the colleague.[128]

As a result, the ALJ found Xanthopoulos' reasons for deposing the colleague were "harassing," and denied his request for the deposition.[129] The ALJ's conclusion was fair, given Xanthopoulos expressed intention to "delve" into the alleged affair, which had no relevance to his blacklisting claim. It was also unreasonable for Xanthopoulos to feel "intimidated" by the ALJ's conclusion that Xanthopoulos' purpose in seeking to depose this witness was "harassing." The ALJ did not suggest that Xanthopoulos was generally engaged in harassing behavior or otherwise discourage him from presenting his case.

Third, Xanthopoulos asserts that the ALJ asked Xanthopoulos if he "would [ ] like to withdraw the other [Charles Schwab blacklisting] claim as well and be done with it," which he says "betray[ed] a wish to be done with the whole thing prematurely."[130] Xanthopoulos omits the context and misstates the meaning of the ALJ's statement. When Xanthopoulos initiated this second SOX action, he identified two claims: first, the Charles Schwab blacklisting claim, and second, a claim that he had been unlawfully denied another position at Mercer's parent company, Marsh &

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individuals in which he's reporting that female employees who he has on [his] witness list had extra-marital affairs while they were at Mercer back in 2015. And he's making contact with them in ways that they consider harassing or causes them concern." August 25, 2021 Hearing Transcript (Aug. 25 Tr.) at 29-30.

126 *Id.* at 32.

127 *Id.*

128 Complainant's Position Statement at 4 ("[The colleague] and Bryon [Willy] were seeing [sic] together all the time. As uncomfortable as that sounds to even delve into for anyone and especially me, it is important to recognize the witness-potential that [the colleague] may have, after having been made privy of almost everything I am trying to prove today . . . .").

129 Order Closing Discovery and Setting Briefing Schedule at 1.

130 Petition at 13.

McLennan.[131] At the August 25, 2021 prehearing conference, Xanthopoulos expressed that he did not want to pursue the Marsh & McLennan claim:

> [B]asically I will just volunteer by saying we can just focus on the blacklisting for Schwab. The Marsh and McLennan [sic] case changed into a complaint because I was guided by OSHA to expand my — it was suggested to me by somebody else to make that another blacklisting complaint. I list in several places that I do not qualify for that position. In all respects, I just qualify for some of the characteristics. So therefore we can just go ahead if it pleases you, Your Honor, to just take that out, the second one.[132]

Consequently, the ALJ stated she would order the claim withdrawn.[133] Later, in the same hearing, Xanthopoulos expressed a similar reluctance to proceed with the Charles Schwab blacklisting claim:

> But Mr. Hughes [from OSHA] is the one who suggested to me that I should file this blacklisting complaint. So to be 100 percent honest, this wasn't even my idea. It was Mr. Hughes' idea who suggested to me, but you have another complaint and please do this within six months.[134]

As a result, the ALJ questioned Xanthopoulos: "So if you were encouraged to file it, great. If you have changed your mind and don't want it to be filed, then let me know and we can withdraw the whole case and move on."[135] Despite his expressed reluctance, Xanthopoulos stated he did not wish to withdraw the case.[136]

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131 *See* page 2 & n.2 (describing the other claims Xanthopoulos originally brought, in addition to the Charles Schwab/blacklisting claim).

132 Aug. 25 Tr. at 6.

133 *Id.* at 6-7.

134 *Id.* at 14-15. In fact, Xanthopoulos expressed a similar reluctance to pursue the claim when he filed objections with OALJ. Complainant's April 15, 2021 Objections to Secretary's Findings at 1 ("It was not my original idea to file this blacklisting complaint.").

135 Aug. 25 Tr. at 15.

136 *Id.*

In proper context, it is clear that, by asking Xanthopoulos if he wished to withdraw his claim, the ALJ was not "betray[ing] [ ] a wish to be done with the whole thing prematurely," as Xanthopoulos suggests. Instead, the ALJ was responding to the fact that Xanthopoulos had withdrawn one of his claims and expressed reluctance to proceed with the other. She was justifiably seeking clarity regarding his position.

Finally, Xanthopoulos argues that the ALJ "openly invited Opposing Counsel to file a Motion to Dismiss."[137] Once again, Xanthopoulos has misstated the ALJ's meaning and omitted important context. During the August 25, 2021 prehearing conference regarding discovery limits, Mercer opposed Xanthopoulos taking several depositions and indicated that it believed he had no basis for his claim.[138] After establishing initial discovery limits, the ALJ stated:

> And then within 30 days [after the depositions], I will require both parties to either let me know their additional discovery plans or, [ ], I seem to hear that, you know, there may be an indication that [Mercer], after taking Mr. Xanthopoulos's deposition, may be filing something like a motion to dismiss. Again, if I didn't hear that correctly, I apologize.[139]

Counsel for Mercer confirmed that it was possible Mercer would file such a motion.[140] Thus, in context, it is clear that the ALJ was only repeating her understanding of what Mercer was possibly going to file, to ensure that expectations and dates for filings were clear. She did not "openly invite" the motion or encourage its filing, as Xanthopoulos suggests.

Thus, we do not find any merit to Xanthopoulos' claim that the ALJ mishandled the proceedings. Instead, the ALJ carefully and closely regulated the proceedings, consistent with the needs and circumstances of the case. As set forth in Background Section 4, above, the record reflects that Xanthopoulos repeatedly overstepped or mis-stepped with respect to his subpoenas, in his communications

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137 Comp. Br. at 40.

138 Aug. 25 Tr. at 10.

139 *Id.* at 23-24.

140 *Id.* at 24.

with witnesses, in his ex parte communications with the ALJ's staff, and with his filings with the ALJ. He was frequently warned by the ALJ to abide by the ALJ's orders and OALJ Rules, yet still overstepped and committed infractions.

Whether these issues were the result of Xanthopoulos' inexperience or otherwise, it was fair for the ALJ to closely regulate the proceedings and she did not treat Xanthopoulos unfairly as a pro se party. "While a pro se litigant must of course be given fair and equal treatment, he cannot generally be permitted to shift the burden of litigating his case to the courts, nor to avoid the risks of failure that attend his decision to forgo expert assistance."[141] Pro se complainants are equally bound to follow the rules of practice and procedure as complainants represented by counsel.[142] Although the ALJ issued several warnings and took an active role in overseeing discovery and the proceedings, she remained fair and impartial and took steps to manage the proceedings that were consistent with, and necessitated by, the circumstances of the case.

3. The ALJ Correctly Applied the Doctrine of Res Judicata to Preclude Xanthopoulos from Rearguing his First SOX Claim

As he did below, Xanthopoulos continues to reargue on appeal the merits of his first SOX retaliation claim against Mercer and attacks the ALJ's, the ARB's, and the Seventh Circuit's decisions to dismiss that claim as untimely. Xanthopoulos argues that he did not know that he had to file his SOX claim with OSHA and that he believed his SEC complaints preserved his SOX claim.[143] He also takes aim at the ARB's closing footnote asserting that Xanthopoulos had admitted that a "kind gentleman" told him that he needed to contact OSHA well before Xanthopoulos finally did so.[144]

We agree with the ALJ that the doctrine of res judicata bars Xanthopoulos' attempt to relitigate his first SOX claim. Under the doctrine, "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues

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141 *Coates*, ARB No. 2005-0050, slip op. at 9 (citation omitted).

142 *Jeanty*, ARB No. 2019-0005, slip op. at 12 (citations omitted).

143 Comp. Reply Br. at 18.

144 Comp. Br. at 48-49; *see Xanthopoulos*, ARB No. 2019-0045, slip op. at 5 n.6.

that were or could have been raised in that action."[145] Xanthopoulos does not dispute that there was a final judgment on the merits of the first SOX claim (the ARB's decision was affirmed by the Seventh Circuit); that the case involves the same parties or their privies (Xanthopoulos and Mercer); or that Xanthopoulos is attempting to raise the same cause of action that was litigated in the first case (SOX wrongful discharge claim). Instead, Xanthopoulos only argues that the ALJ, the ARB, and the Seventh Circuit made the wrong decision in the first case. Whether the prior decision was wrong is irrelevant.[146] This is precisely the type of re-argument that the doctrine of res judicata prevents. Accordingly, the ALJ correctly denied Xanthopoulos' attempt to reargue his first SOX claim.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the ALJ.[147]

SO ORDERED.

SUSAN HARTHILL
Chief Administrative Appeals Judge

TAMMY L. PUST
Administrative Appeals Judge

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[145] *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981), *clarified on other grounds by Rivet v. Regions Bank of La.*, 522 U.S. 470 (1998) (citations omitted); *see also Gladden*, ARB No. 2022-0012, slip op. at 9 ("A party seeking to apply the doctrine [of res judicata] must establish that (1) a court of competent jurisdiction entered a final decision on the merits in a previous action, (2) the current action involves the same parties or their privies in the previous action, (3) the current action raises claims that were litigated or could have been raised in the previous action, and (4) the cases involve the same cause of action or common nucleus of operative fact.") (citations omitted).

[146] *Moitie*, 452 U.S. at 398 (stating that "the res judicata consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." (citations omitted)).

[147] In any appeal of this Decision and Order that may be filed, we note that the appropriately named party is the Secretary, Department of Labor, not the Administrative Review Board.