U.S. Department of Labor

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

In the Matter of:

JOHN BAUCHE,

COMPLAINANT,

v.

MASIMO CORPORATION,

RESPONDENT.

ARB CASE NO. 2022-0035

ALJ CASE NO. 2022-SOX-00010

DATE: September 27, 2022

Appearances:

For the Complainant:
John Bauche; *Pro Se*; San Clemente, California

For the Respondent:
David J. Schindler, Esq., Robert J. Ellison, Esq., and Alice R. Hoesterey, Esq.; *Latham & Watkins LLP*; Los Angeles, California

Before HARTHILL, Chief Administrative Appeals Judge, and BURRELL and PUST, Administrative Appeals Judges; BURRELL, Administrative Appeals Judge, concurring in part and dissenting in part

DECISION AND ORDER OF REMAND

PUST, 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), as amended, and its implementing regulations.[1] Complainant John Bauche (Bauche) filed a complaint against Respondent Masimo Corporation (Masimo) alleging that Masimo terminated his employment and took other adverse action against him in violation of SOX. On April 1, 2022, a Department of Labor Administrative Law Judge (ALJ) issued an Order Granting Motion to Dismiss (D. & O.), which dismissed Bauche's complaint. We affirm the ALJ's decision in part, and vacate and remand in part.

BACKGROUND[2]

Bauche began working for Masimo as a Social Media Strategist on or about April 1, 2013.[3] Bauche asserts that on July 20, 2016, two investigators hired by Masimo confronted Bauche, "barricaded" him in an office, flashed fake law enforcement credentials to him, and began accusing him of stealing nearly $1 million from the company.[4] The investigators then "forcibly removed" Bauche from the office, followed him to his bank, and forced him to give $27,000 to the investigators.[5] The investigators then followed Bauche to his home, told Bauche that his employment with Masimo was terminated, and "threatened him and his family with physical harm should he report illegal actions perpetrated by Masimo."[6]

Bauche asserts that Masimo persisted in harassing him over the ensuing

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1 18 U.S.C. § 1514A; 29 C.F.R. Part 1980 (2022).

2 We have considered and accepted as true for purposes of resolving this appeal, the facts alleged by Bauche in his November 3, 2021 online whistleblower complaint to OSHA (OSHA Complaint) and his December 16, 2021 Objections to the Secretary's Findings (Objections) initiating the proceedings before the ALJ. Although not part of his administrative "complaint," considering Bauche's pro se status and the informal and liberal pleading requirements of these administrative proceedings, we have also considered and accepted as true the supplemented and expanded factual allegations articulated by Bauche in his Response and Objection to Respondent's Motion to Dismiss Complaint (Opp. to Motion to Dismiss). *See Evans v. U.S. Env't Prot. Agency*, ARB No. 2008-0059, ALJ No. 2008-CAA-00003, slip op. at 8 (ARB July 31, 2012); *see also Brown v. Whole Foods Mkt. Grp., Inc.*, 789 F.3d 146, 152 (D.C. Cir. 2015) ("We have previously held that a district court errs in failing to consider a *pro se* litigant's complaint in light of all filings, including filings responsive to a motion to dismiss." (internal quotations and citation omitted)); *Ketchum v. City of W. Memphis*, 974 F.2d 81, 82 (8th Cir. 1992) ("[W]e set out additional facts contained in Ketchum's opposition to the City's motion to dismiss, filed in the Court below. Because plaintiff is proceeding *pro se*, we treat facts set out in this filing as *de facto* amendments to the complaint.").

3 Opp. to Motion to Dismiss at 11.

4 *Id.* at 12-14; *accord* Objections at 2.

5 Opp. to Motion to Dismiss at 12; *accord* Objections at 2.

6 Opp. to Motion to Dismiss at 12; *accord* Objections at 2.

several years, under the pretense of seeking redress for his alleged theft from the company. According to Bauche, Masimo used its investigators' connections and relationships in law enforcement to cause the Federal Bureau of Investigation (FBI) and Department of Justice to wrongly investigate Bauche.[7] Allegedly spurred on by the false information supplied by Masimo, the FBI froze Bauche's personal and business bank accounts on November 28, 2016.[8] Then, on December 20, 2017, Bauche was indicted on five counts of mail fraud and one count of money laundering.[9] On July 9, 2019, during the pendency of the criminal action, Masimo also filed a civil lawsuit against Bauche in the Superior Court of California, seeking to recover the $1 million Bauche allegedly stole from the company and to prevent Bauche from disclosing Masimo's confidential business information.[10] Bauche also accuses Masimo of blacklisting him and interfering with his ability to obtain subsequent employment.[11]

Bauche maintains that Masimo's accusations that he committed fraud and stole from the company are false and pretextual. Affirmatively, Bauche asserts that Masimo's conduct was part of a concerted effort to: (1) create fraudulent grounds to recover $1 million under the employee theft provision of its insurance policy; (2) cover up its alleged insurance fraud and "related" securities fraud; and (3) preemptively retaliate against Bauche "[f]or fear of [Bauche] uncovering their fraud schemes."[12]

Bauche, who is self-represented in this case, filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) on November 3, 2021, accusing Masimo of retaliating against him in violation of SOX. On November 17, 2021, OSHA, acting on behalf of the Secretary of Labor, issued findings which concluded that Bauche's allegations did not make a prima facie showing of retaliation under SOX. Bauche filed objections to OSHA's findings on December 16, 2021, and requested a formal hearing with the Department of Labor's

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7 Opp. to Motion to Dismiss at 13; Objections at 2.

8 Opp. to Motion to Dismiss at 13; Objections at 2.

9 Opp. to Motion to Dismiss at 14; Objections at 2; Indictment, attached as Exhibit 10 to Opp. to Motion to Dismiss; *see also* 18 U.S.C. § 1341 (mail fraud); 18 U.S.C. § 1956 (money laundering). The U.S. government pursued the criminal charges against Bauche for nearly four years, before ultimately dismissing them on November 30, 2021, on the eve of trial. Opp. to Motion to Dismiss at 17; Order Dismissing Indictment with Prejudice, attached as Exhibit 14 to Opp. to Motion to Dismiss.

10 Opp. to Motion to Dismiss at 17; Civil Complaint, attached as Exhibit 12 to Opp. to Motion to Dismiss.

11 Opp. to Motion to Dismiss at 14; Objections at 2.

12 Opp. to Motion to Dismiss at 11-15, 32; *see also* Complainant's Opening Brief (Comp. Br.) at 8.

Office of Administrative Law Judges.

After the matter was assigned to an ALJ, Masimo filed a Motion to Dismiss Bauche's complaint on March 14, 2022. Masimo argued that Bauche's complaint was time-barred because he did not initiate contact with OSHA within 180 days of the occurrence of the alleged adverse actions, as required by SOX. Alternatively, Masimo argued that Bauche's complaint failed to state a claim for relief under SOX. Specifically, Masimo argued that Bauche did not allege that he engaged in any activity protected by SOX before he suffered the alleged adverse action, that the concerns Bauche articulated did not involve fraud against shareholders or otherwise fall within SOX's ambit, and that most of the alleged adverse actions were not actionable under SOX. On March 28, 2022, Bauche filed a Response and Objection to Respondent's Motion to Dismiss Complaint, along with several exhibits.

The ALJ granted Masimo's Motion to Dismiss on April 1, 2022. The ALJ agreed with Masimo that Bauche's claims were time-barred and that Bauche had not articulated a basis to equitably modify SOX's 180-day limitations period. Accordingly, the ALJ dismissed Bauche's complaint.[13] Bauche appealed the ALJ's decision to the Administrative Review Board (ARB or the Board) on April 15, 2022.

JURISDICTION & STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to review ALJ decisions under SOX.[14] The ARB reviews de novo an ALJ's order on a motion to dismiss.[15]

Under the rules governing proceedings before ALJs, "[a] party may move to dismiss part or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness."[16] To survive a motion to dismiss in an administrative proceeding before an ALJ, a complainant need only provide "fair notice" of his

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[13] In light of this dispositive ruling, the ALJ declined to address Masimo's alternative arguments. D. & O. at 5. Although Masimo urges the Board to consider these alternative arguments, considering our rulings herein, we decline to do so in the first instance on appeal. The ALJ may consider these alternative arguments, to the extent deemed necessary and appropriate, on remand.

[14] 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. 13,186 (Mar. 6, 2020).

[15] *Johnson v. The Wellpoint Cos., Inc.*, ARB No. 2011-0035, ALJ No. 2010-SOX-00038, slip op. at 5 (ARB Feb. 25, 2013) (citations omitted).

[16] 29 C.F.R. § 18.70(c).

claim.[17] A complainant provides "fair notice" by articulating: "(1) some facts about the protected activity, showing some 'relatedness' to the laws and regulation of one of the statutes in our jurisdiction, (2) some facts about the adverse action, (3) a general assertion of causation and (4) a description of the relief that is sought."[18] In ruling on a motion to dismiss, the ALJ and the ARB "must view the evidence, along with all reasonable inferences, in the light most favorable to the non-moving party."[19]

DISCUSSION

SOX provides that any employee who believes he has been discharged or otherwise discriminated against in violation of the statute must file a complaint with the Secretary of Labor "not later than 180 days after the date on which the violation [of SOX] occurs, or after the date on which the employee became aware of the violation."[20] However, the 180-day limitations period is not jurisdictional and is subject to equitable modification.[21]

Traditionally, the Board has recognized four principal circumstances in which equitable modification may occur:

> (1) respondent has actively misled the complainant regarding the cause of action; (2) complainant has in some extraordinary way been prevented from filing his or her action; (3) complainant has raised the precise statutory claim in issue but has done so in the wrong forum; and (4) respondent's own acts or omissions have lulled the complainant into forgoing prompt attempts to vindicate his or her rights.[22]

The Board has not considered these situations to be exclusive, and an inability to establish one of them is not necessarily fatal for an untimely claim.[23] However, the Board has stressed that equitable modification is granted only sparingly, and only

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17 *Evans*, ARB No. 2008-0059, slip op. at 9.

18 *Id.*

19 *Garvey v. Morgan Stanley*, ARB No. 2020-0034, ALJ No. 2017-SOX-00030, slip op. at 2-3 (ARB July 16, 2021) (citation omitted).

20 18 U.S.C. § 1514A(b)(2)(D); *see also* 29 C.F.R. § 1980.103(d).

21 *Lugg v. Lear Corp.*, ARB No. 2022-0008, ALJ No. 2021-SOX-00022, slip op. at 4 (ARB May 19, 2022) (citation omitted).

22 *Id.* (citation omitted).

23 *Id.* (citation omitted).

upon a showing that extraordinary circumstances prevented the complainant from timely filing his complaint.[24] In addition, the Board has recognized that "courts have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."[25] Bauche bears the burden of justifying the application of equitable modification principles.[26]

As the ALJ correctly observed, Bauche did not initiate contact with OSHA within 180 days of most of the adverse actions allegedly taken against him by Masimo.[27] It is undisputed that Bauche first contacted OSHA regarding his SOX claim on November 3, 2021—five years after his employment was terminated and he was referred to law enforcement, four years after he was criminally indicted, and two years after Masimo filed the civil lawsuit against him. Nevertheless, Bauche argued below that the limitations period should be equitably modified for three reasons. First, Bauche argued that he did not discover Masimo's fraud and its retaliatory cover-up related thereto until he was preparing for his criminal trial, shortly before he filed with OSHA. Second, Bauche argued that he had to delay contacting OSHA during the pendency of his criminal case to preserve his Fifth Amendment privilege to be free from self-incrimination. Finally, Bauche argued that Masimo's threatening and hostile conduct deterred him from filing his claim sooner.

In the D. & O., the ALJ concluded that Bauche's alleged lack of knowledge about Masimo's retaliatory motive and assertion of his Fifth Amendment privilege did not create grounds to equitably modify the limitations period.[28] For the reasons set forth below, we agree with these conclusions and affirm the ALJ. Although the ALJ did not address Bauche's final argument that Masimo's conduct deterred him from filing a complaint with OSHA sooner, we conclude that Bauche is not entitled to equitable modification on this basis, either. We have considered Bauche's filings with the ALJ and with the Board in their entirety, and, even construing the record "liberally in deference" to Bauche's unrepresented status,[29] his filings contain no credible factual allegations or legally sufficient arguments to create grounds to equitably modify the long-expired filing deadline.

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

[25] *Id.* (internal quotation and citation omitted).

[26] *See id.* (citation omitted).

[27] As discussed in Section 2, *infra*, one potential exception is the alleged blacklisting.

[28] D. & O. at 5.

[29] *Salyer v. Sunstar Eng'g*, ARB No. 2014-0055, ALJ No. 2012-STA-00023, slip op. at 3 n.3 (ARB Sept. 29, 2015) (quoting *Menefee v. Tandem Transp. Co.*, ARB No. 2009-0046, ALJ No. 2008-STA-00055, slip op. at 7 (ARB Apr. 30, 2010)).

In contrast, although it is clear from Bauche's factual allegations that most of the adverse actions Masimo allegedly took against him—including the termination of his employment, Masimo's efforts to have him criminally charged, and the civil lawsuit—are time-barred absent application of equitable modification principles, Bauche also pled that Masimo blacklisted him and impeded his ability to secure future employment. Bauche has not articulated the factual basis for this aspect of his claim, and, therefore, it is not clear from the record at this stage of the proceedings whether Bauche's "blacklisting" claim is actionable and timely under SOX. Accordingly, we remand to the ALJ to more adequately develop the record to assess Bauche's blacklisting claim.

1. Bauche Is Not Entitled to Equitable Modification of the Limitations Period

A. Bauche's Purported Lack of Knowledge about Masimo's Retaliatory Motive Does Not Toll the Limitations Period

A prospective SOX complainant must typically initiate contact with OSHA within 180 days of receiving "final, definitive, and unequivocal notice of the adverse employment action."[30] Bauche does not dispute that he had such notice at the time the alleged adverse action occurred in this case. As a result, we agree with the ALJ that Bauche's claim accrued, and the 180-day limitations period began to run, years before Bauche finally filed his SOX complaint with OSHA on November 3, 2021.[31]

Bauche contends that even if he was aware of the adverse action when it occurred, the limitations period should be equitably tolled until he discovered that the adverse action was motivated by Masimo's desire to cover up its fraud and preemptively retaliate against Bauche in anticipation of him uncovering and blowing the whistle on its misconduct.[32] According to Bauche, that discovery did not occur until October 29, 2021, just days before he filed with OSHA, when he finally "put [the] pieces together" concerning Masimo's insurance and securities fraud and its "nexus and interrelation" with the adverse action taken against him years earlier.[33] Even assuming a complainant's purported lack of knowledge regarding a respondent's retaliatory motive could be sufficient, in appropriate circumstances, to toll or modify the limitations period despite prior, unequivocal notice of the adverse

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30 *McManus v. Tetra Tech Constr. Inc.*, ARB No. 2016-0063, ALJ No. 2016-SOX-00012, slip op. at 3 (ARB Dec. 19, 2017) (quoting *Rollins v. Am. Airlines, Inc.*, ARB No. 2004-0140, ALJ No. 2004-AIR-00009, slip op. at 2-3 (ARB Apr. 3, 2007)).

31 *See* D. & O. at 5.

32 Comp. Br. at 11, 13; Opp. to Motion to Dismiss at 16, 23.

33 Comp. Br. at 6-7, 10, 20; *accord id.* at 8, 11, 13.

action itself,[34] we conclude that Bauche's assertion that he did not discover Masimo's fraud and the fraud's "interrelation" with the adverse action taken against him, until October 29, 2021, is meritless and rebutted by the record and Bauche's own assertions and factual allegations.

Masimo argues that Bauche appears to have pulled the alleged date of his epiphany, October 29, 2021, "out of thin air" to support his arguments in this appeal.[35] Indeed, Bauche never identified that specific date during the ALJ proceedings as the precise moment when he finally detected or discovered Masimo's alleged fraud and cover-up. Instead, he only vaguely asserted that he discovered this scheme at some point "in the course of the thorough investigation and defense of the criminal case . . . and in preparation for trial."[36] Bauche has not meaningfully or reasonably articulated what caused him to suddenly realize Masimo was engaged in fraud, a cover-up, or a retaliatory scheme on October 29, 2021, nor does Bauche explain why he could not have, with reasonable diligence, "put the pieces together" concerning Masimo's alleged wrongdoing far earlier in the multi-year defense of the criminal and civil proceedings against him.

In fact, the record and Bauche's assertions and allegations below flatly contradict Bauche's present assertion that he only pieced together Masimo's fraudulent and retaliatory scheme on October 29, 2021. Bauche acknowledged below that he "called out" Masimo for engaging in insurance and shareholder fraud in a filing in his criminal case on May 20, 2019, two-and-a-half years before he filed his SOX complaint with OSHA.[37] In that filing, Bauche explicitly accused Masimo of committing insurance and shareholder fraud, and of taking adverse action against him to "cover [it] up" and make him a "scape goat" for its wrongdoing.[38] These

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[34] For purposes of our decision today, we need not, and do not, opine on this precise legal issue. We note, however, that the issue of when a claim accrues and the limitations period begins to run may be distinct from the issue of when the limitations period, despite beginning to run, may be tolled or modified. *See Coppinger-Martin v. Solis*, 627 F.3d 745, 748-52 (9th Cir. 2010).

[35] Respondent's Response Brief at 14; *see also Phillips v. Norfolk S. Ry. Co.*, ARB No. 2015-0059, ALJ No. 2014-FRS-00133, slip op. at 3 n.5 (ARB Aug. 11, 2015) ("The Board does not generally consider arguments raised for the first time on appeal . . . nor evidence submitted for the first time on appeal." (citations omitted)).

[36] Opp. to Motion to Dismiss at 23.

[37] *Id.* at 17, 25.

[38] Opposition to Non-Parties Masimo Corporation and Patient Safety Movement Foundation *Ex Parte* Application for Protective Order and Other Appropriate Relief (Opp. to Protective Order) at 2, attached as Exhibit 32 to Opp. to Motion to Dismiss (stating that his criminal indictment was the "result of the unlawful efforts of Masimo . . . to cover up the insurance fraud [it] committed" against its carrier, and that Masimo "used Mr. Bauche as a

allegations track Bauche's allegations of insurance and securities fraud and his theory of retaliation in the present case,[39] and amply demonstrate that by 2019, Bauche already believed the adverse action taken against him was connected to Masimo's purported cover-up of its fraudulent scheme.[40]

Consistent with the allegations Bauche made in this filing in his criminal

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scape goat to hide [its] deficient internal controls from [its] shareholders."). Despite these prior statements, Bauche contends on appeal that "even though [he] had whistleblower suspicions early on, those suspicions were limited to Masimo's insurance fraud scheme (i.e., mail fraud) and did not have to do with Masimo's underlying securities fraud and violations of SEC rules and regulations (i.e. accounting fraud) . . . that were not made known to Mr. Bauche until October 29, 2021 . . . ." Comp. Br. at 7; *accord id.* at 23 (asking the Board to take judicial notice of his criminal and civil filings, where he asserts "there is no mention of any knowledge of any violations of [SOX] that are actionable and form the basis of Mr. Bauche's claims in" this case). To the contrary, Bauche's May 20, 2019 filing in his criminal case clearly accused Masimo of both insurance fraud and of "hid[ing] [its] deficient internal controls from [its] shareholders." Opp. to Protective Order at 2. These alleged hidden deficient internal controls are part of the basis for Bauche's accusation that Masimo committed "securities fraud" or violated SEC rules and regulations in this case. Opp. to Motion to Dismiss at 11 (defining Masimo's "securities fraud" as "**deficient internal accounting controls**, violations of SEC rules and regulations, tampering with financial records of a publicly-traded company, false statements made to the SEC, inaccurate disclosures made by Masimo's executives to the SEC, etc." (emphasis added)), 17 (acknowledging that Bauche's May 20, 2019, criminal filing "mention[ed] Masimo's deficient controls (i.e. violations of SEC rules and regulations, and considered **securities fraud** violations when coupled with Masimo's false disclosure control validations to the SEC filed by their CEO and CFO)" (emphasis added)). Additionally, Bauche argues that Masimo's insurance fraud constituted mail fraud, which is a separately enumerated category under SOX. *Id.* at 11, 13; 18 U.S.C. § 1514A(a)(1); *Reyna v. ConAgra Foods, Inc.*, 506 F. Supp. 2d 1363, 1380-83 (M.D. Ga. 2007) (finding insurance fraud could constitute mail or wire fraud under SOX). Thus, even if Bauche's initial concerns were limited solely to Masimo's alleged insurance fraud, Bauche still should have acted sooner to preserve and prosecute this aspect of his SOX claim.

[39] Opp. to Motion to Dismiss at 11 ("This action involves a complex, multi-faceted fraud scheme perpetrated by Masimo, through its 'private investigator,' and their connections in the government (i.e. conspiracy) to commit insurance fraud (i.e. mail fraud) and efforts to cover up its securities fraud violations . . . while trying to make Mr. Bauche the 'fall guy' in the process."), 32 ("Masimo orchestrated all of these adverse actions and this entire insurance fraud scheme in an attempt to silence Mr. Bauche and conceal its securities fraud violations while receiving payment on their fraudulent insurance claim . . . . All of this was accomplished using preemptive and anticipatory retaliation"); *see also* Objections at 2-3.

[40] *See Gonzalez v. Planned Parenthood of Los Angeles*, 759 F.3d 1112, 1115 (9th Cir. 2014) ("Although we normally treat all of a plaintiff's factual allegations in a complaint as true, we 'need not accept as true allegations that contradict matters properly subject to judicial notice or [attached to a complaint as an] exhibit.'" (citations omitted)).

case, Bauche also tacitly acknowledged below that he became aware of the basis for his SOX claim in or around 2019 when he was engaged in discovery in connection with his criminal case. In response to Masimo's motion to dismiss, Bauche stated that he "was not privy to much of the information that forms the basis for the claims at issue [in this case] until Masimo was forced to produce it after losing a motion for protective order" in the criminal case.[41] The criminal court denied the protective order on June 19, 2019.[42] Bauche asserted that, "[w]ith that order denying the protective order, the evidence that was then disclosed shined an even brighter light on Masimo's egregious conduct—including in coordination with the government."[43]

Additionally, Bauche asserted in his response below that the close proximity between his criminal filing "calling out" Masimo's fraud, and Masimo's subsequent civil lawsuit against him in July 2019, was "more than enough to prove retaliation in this action."[44] If Bauche believes that the timing and sequence of these events in mid-2019 was enough to prove that Masimo was retaliating against him for "calling out" its insurance and shareholder fraud, then these events should also have been enough to alert Bauche to his potential cause of action under SOX.

For these reasons, we reject Bauche's new and conclusory assertion on appeal that he did not have a basis to conclude that he was the victim of retaliation until October 29, 2021. Instead, the record and Bauche's own admissions and allegations conclusively demonstrate that Bauche was aware of Masimo's alleged fraud and cover-up and, thus, its purported reasons for taking adverse actions against Bauche, by 2019. Therefore, there is no factual basis to equitably toll or modify the limitations period in these circumstances.[45]

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41 Opp. to Motion to Dismiss at 4.

42 *Id.*; Order Accepting Report and Recommendation of United States Magistrate Judge and Overruling Objections, attached as Exhibit 1 to Opp. to Motion to Dismiss.

43 Opp. to Motion to Dismiss at 4. Despite these admissions, Bauche asserts that "[i]n July of 2019, Mr. Bauche didn't have all of the evidence obtained via subpoena from third parties during the investigation and defense of the criminal matter, and barely had reviewed any communications and documents in the 91,000+ pages of Masimo's discovery . . . ." Complainant's Reply Brief at 6. To the extent Bauche argues that he needed additional proof of Masimo's fraud or retaliatory motivations before he could file a complaint with OSHA, his argument fails. The fact that Bauche may not have had every document he believed he needed to prove his case does not mean that he did not have sufficient information to at least be on notice of, and to file an OSHA complaint concerning, his claim. *See Coppinger-Martin*, 627 F.3d at 750.

44 Opp. to Motion to Dismiss at 25.

45 *Hollander v. Brown*, 457 F.3d 688, 691 n.1 (7th Cir. 2006) ("[D]ismissal . . . on the basis of a limitations defense may be appropriate when the plaintiff effectively pleads

B. Bauche's Invocation of his Fifth Amendment Privilege Does Not Toll the Limitations Period

Bauche alleges that, upon discovering that he was the subject of a criminal investigation in November 2016, he retained a criminal defense attorney who advised him to invoke his Fifth Amendment privilege to be free from self-incrimination.[46] According to Bauche, his desire to preserve his Fifth Amendment privilege "prevented him from coming forward to report these whistleblower violations sooner."[47] Numerous federal district courts have determined that a complainant's decision to forestall filing a civil action in an effort to preserve Fifth Amendment rights, or for fear of otherwise adversely impacting a criminal case, does not create grounds to extend the applicable limitations period.[48] We agree with the ALJ and these courts, and conclude that Bauche's purported desire to invoke and preserve his right to be free from self-incrimination in the face of his criminal investigation and criminal charges is not a legally sufficient basis to equitably toll the filing period in this case.

C. Masimo's Alleged Threatening and Hostile Conduct Does Not Toll the Limitations Period

Finally, Bauche argued below that the limitations period should be modified because Masimo "actively misled [him] into inaction . . . through acts of harassment, intimidation, threats, abuse of power, the instigation of a malicious prosecution through its connections, and the frivolous civil lawsuit that it initiated against him

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herself out of court by alleging facts that are sufficient to establish the defense." (citation omitted)); *cf. Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980) ("When a motion to dismiss is based on the running of the statute of limitations, it can be granted only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled." (internal quotations and citation omitted)).

46 Opp. to Motion to Dismiss at 7-8, 13. The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend V.

47 Opp. to Motion to Dismiss at 26; *accord id.* at 8-9.

48 *Hardie v. CIT Bank*, No. GJH-20-2627, 2021 WL 3617199, at *7-8 (D. Md. Aug. 16, 2021); *Stoner v. Percell*, No. 3:13-CV-00762-CRS, 2014 WL 6611557, at *5 (W.D. Ky. Nov. 20, 2014); *Todd v. Baker*, No. 2:06-CV-0889, 2007 WL 188740, at *2 (S.D. Oh. Jan. 22, 2007); *Skinner v. Denny*, No. 3:06-CV-00537-RLH-(RAM), 2006 WL 8448180, at *2 (D. Nev. Dec. 8, 2006); *Appel v. City of St. Louis*, No. 4:05cv772 SNL, 2005 WL 8167879, at *6 (E.D. Mo. Dec. 14, 2005).

to destroy and silence him."[49] Unlike Bauche's other equitable modification arguments, the ALJ did not discuss this third argument in the D. & O. Nevertheless, our review of the record and pleadings leads us to conclude that the facts as alleged by Bauche cannot support a basis for equitably modifying the limitations period.[50] Even taking Bauche's allegations about Masimo's conduct as true and giving him the benefit of favorable inferences, Bauche cannot show that Masimo's alleged conduct, though of a serious nature, deterred him from reporting its alleged wrongdoing.

In *Farnham v. International Manufacturing Solutions*, the Board recognized that an employer's acts or threats that deter an employee from timely filing his complaint may, in appropriate and extraordinary circumstances, constitute sufficient grounds to equitably modify the limitations period.[51] However, "[t]o establish duress sufficient to toll the running of the limitations period, [a complainant] must do more than simply allege a subjective fear that the Respondents might retaliate against him. Instead, he must show some act or threat by the Respondents that precluded him from exercising his free will and judgment and prevented him from exercising his legal rights."[52]

As made clear in *Farnham*, an employee who, by his own conduct, demonstrates that he has not lost his "free will and judgment" will not be entitled to

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[49] Opp. to Motion to Dismiss at 24; *accord id.* at 16 (stating that Masimo took actions "to intimidate, threaten and harass Mr. Bauche to dissuade him from whistleblowing, thus equitably tolling all retaliatory actions in this matter."). Bauche has not reiterated this argument with great clarity on appeal. *See, e.g.,* Comp. Br. at 8 (stating that "[t]here has been no shortage of adverse actions taken against Mr. Bauche by Masimo to help prove contributing factor causation in Masimo's **ruthless attempts to dissuade Mr. Bauche from filing this action and bringing forth his claims**," but not expressly linking this conduct to his equitable modification arguments (emphasis added)). However, given the adjudicative latitude afforded to Bauche as a pro se litigant, the liberal pleading standards and the standards applicable to a motion to dismiss in these administrative proceedings, our obligation to consider the record as a whole in the light most favorable to Bauche as the non-moving party at this point in the proceedings, and our de novo standard of review, we have elected to consider the argument on appeal.

[50] It is a well-established appellate principle that appellate courts may "affirm the [lower] court on any basis supported by the record." *U.S. v. Am. Prod. Indus., Inc.*, 58 F.3d 404, 407 n.2 (9th Cir. 1995) (citation omitted); *accord McAdams v. McCord*, 584 F.3d 1111, 1113-14 (8th Cir. 2009) (citation omitted); *see also Bibeau v. Pac. Nw. Rsch. Found. Inc.*, 188 F.3d 1105, 1111 n.5 (9th Cir. 1999) (stating that "it is sometimes appropriate for an appellate court to [rule] on issues of law that the trial court did not consider," especially when applying a de novo standard of review, under which the trial court's judgment would not be entitled to deference anyway).

[51] ARB No. 2007-0095, ALJ No. 2006-SOX-00111, slip op. at 11 (ARB Feb. 6, 2009).

[52] *Id.* (citations omitted).

application of equitable modification principles.[53] Like Bauche here, the complainant in *Farnham* sought to salvage his untimely SOX claim by arguing that he feared retaliation from the respondent if he filed a complaint with OSHA. Among other things, the complainant pointed to his manager's purported connections to a Mexican drug cartel, his manager's criminal record, including a conviction for assault, and his manager's statement that "if anyone ever (expletive) with me…I've got friends."[54] Even so, the Board affirmed the ALJ's decision that the complainant failed to carry his burden of establishing that his employer's conduct "precluded him from exercising his free will and judgment."[55] As relevant to this appeal, the Board concluded that the complainant's actions preceding his initial contact with OSHA were inconsistent with the notion that he feared reprisal or retaliation if he filed a SOX claim.[56] Despite complainant's alleged fear, the complainant had instigated an FBI investigation of the respondent's business activities, discussed his plans to pursue a claim against the respondent with his former co-workers, filed a countersuit against the respondent in response to a civil action it filed against him, and complained to his Congressman about the respondent's business dealings.[57] The Board concluded that the complainant's "actions [spoke] louder than his words," and that these were "not the actions of an individual who has lost his free will and judgment."[58]

Like in *Farnham*, the actions Bauche took before finally filing his OSHA complaint, as articulated and reflected in his own filings below, amply demonstrate that he was not under such significant duress from Masimo's conduct as to "lose his free will and judgment." As noted above, during the time that Bauche alleges he was dissuaded from filing with OSHA, he actively participated in multiple legal interactions with and against Masimo in federal and state court and openly accused Masimo of the same fraud and wrongdoing as alleged in this case. Bauche litigated a defense to the criminal fraud and money laundering claims that Masimo allegedly orchestrated with the FBI, in which he boldly "called out" Masimo for engaging in fraud and using him as the scape goat for its own illegal activity—the same accusations he argues he was deterred from filing in this case.[59] Bauche similarly defended a civil action Masimo filed against him in state court under the same events. Months before Bauche filed with OSHA, he also contacted the Department

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53 *Id.*

54 *Id.* at 2-3.

55 *Id.* at 11.

56 *Id.*

57 *Id.*

58 *Id.*

59 Opp. to Motion to Dismiss at 17, 25; Opp. to Protective Order at 2.

of Justice Office of the Inspector General about Masimo's alleged misconduct.[60] As in *Farnham*, "[t]hese are not the actions of an individual who has lost his free will and judgment."[61] Instead, they reflect a willingness, if not eagerness, to challenge Masimo's alleged wrongdoing.[62] Accordingly, Bauche's pleadings and filings below, taken as true, establish that Bauche is not entitled to equitable modification of the

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[60] *See* Opp. to Motion to Dismiss at 11; June 28, 2021 Department of Justice Letter, attached as Exhibit 16 to Opp. to Motion to Dismiss.

[61] *Farnham*, ARB No. 2007-0095, slip op. at 11; *see also Franklin v. Warmington*, 709 F. App'x 373, 375 (7th Cir. 2017) (affirming district court decision that alleged death threats did not warrant modifying the limitations period, where plaintiff complained to police regarding threats shortly after they were made); *Morales v. Robinson*, No. 2:05-0509, 2007 WL 1074836, at *6 (S.D. W. Va. Apr. 6, 2007) (concluding that "plaintiff's allegations in her complaint conclusively establish that she was not deterred by [the defendant]'s alleged threats," where plaintiff promptly reported the defendant's wrongdoing to the defendant's employer and a prosecutor); *Moses v. Phelps Dodge Corp.*, 818 F. Supp. 1287, 1290 (D. Ariz. 1993) (declining to extend the limitations period due to alleged fear of reprisal, where "[p]laintiff does not appear to have been intimidated into silence, since she complained to her supervisors on numerous occasions about the harassment.").

[62] We also note that Masimo's alleged threats and hostile conduct occurred or commenced years before Bauche finally filed his complaint with OSHA. Bauche has not attempted to explain why he allegedly continued to feel deterred from filing with OSHA for so long or why, suddenly, he no longer felt under duress in November 2021. *See Vergara v. City of Chicago*, 939 F.3d 882, 887 (7th Cir. 2019) ("The problem with the plaintiffs' argument is readily apparent: They contend that the officers' threats, which stopped two weeks after the alleged constitutional violations, tolled the limitations period for the next three and a half years."); *Jaso v. The Coca Cola Co.*, 435 F. App'x 346, 358 (5th Cir. 2011) ("Proof of threats have been considered in tolling the statute of limitations only where the threats themselves continue up to the point that the plaintiff brings her action." (internal quotation and citation omitted)); *Warren v. United States*, 74 Fed. Cl. 723, 726-27 (Fed. Cl. 2006) ("Assuming *arguendo* that duress may toll the statute of limitations . . . , in this case, the Complaint has not demonstrated a sufficient factual basis for invoking that doctrine. . . . Plaintiff fails to state why he has been under a continuing threat for the past fifteen years, partly since Plaintiff has not been subject to [the defendant's] control since his discharge in 1991."); *Tompkins v. Union Pac. R.R. Co.*, No. 2:12-cv-01481 JAM-GGH, 2012 WL 4643099, at *3 (E.D. Cal. Oct. 2, 2012) ("If a plaintiff allows a claim to remain dormant for years and does not allege that any misrepresentations, misunderstandings, or threats occurred in those years, equitable estoppel will not apply. . . . Plaintiff has not alleged any facts showing that in the past eleven years, Defendant has harassed Plaintiff or intimidated him in order to discourage him from filing."). To the extent Bauche contends that he continued to feel deterred from filing with OSHA because the criminal and civil actions remained pending for years after Masimo's initial threats were made in 2016, he has not attempted to explain why he then filed his complaint with OSHA in November 2021, before either case had concluded.

limitations period.[63]

2. Bauche's Blacklisting Claim Is Remanded for Further Development

Among the other adverse actions that Bauche alleges Masimo took against him, Bauche accused Masimo of "blacklisting (intentionally interfering with Mr. Bauche's ability to earn a living and obtain future employment) through defamation and false criminal charges."[64] Aside from this brief accusation, Bauche has not elaborated on his blacklisting claim or explained the factual basis for it.

As stated above, a complainant's factual allegations ultimately must provide "fair notice" of his claim, including "some facts about the adverse action."[65] Although blacklisting is prohibited by SOX,[66] Bauche's bare and conclusory legal assertion that Masimo "blacklisted" him, without more, does not provide "fair notice" of his claim.[67] For example, although Bauche accuses Masimo of blacklisting him by "defaming" him, he has not articulated when the defamation occurred, who defamed him, to whom he was defamed, what statements comprised the defamation, why the statements were defamatory, or how the defamatory statements prevented him from obtaining other employment. Likewise, Bauche has not identified any specific employment position he believes he was denied because of

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63 *See Jones v. Bock*, 549 U.S. 199, 215 (2007) ("A complaint is subject to dismissal for failure to state a claim if the allegations, taken as true, show the plaintiff is not entitled to relief."); *Cancer Found., Inc. v. Cerberus Cap. Mgmt., LP*, 559 F.3d 671, 674-75 (7th Cir. 2009) ("[D]ismissal is appropriate when the plaintiff pleads himself out of court by alleging facts sufficient to establish the complaint's tardiness.").

64 Opp. to Motion to Dismiss at 14. Bauche made a similar, though more circumscribed, statement in his objections to OSHA's initial findings. Objections at 2 (accusing Masimo of "blacklisting (intentionally interfering with an employee's ability to obtain future employment).").

65 *Evans*, ARB No. 2008-0059, slip op. at 9.

66 29 C.F.R. § 1980.102(a).

67 *See Burnett v. Mortg. Elec. Registration Sys.*, 706 F.3d 1231, 1240 (10th Cir. 2013) (stating that allegations that contained "zero details or concrete examples" were "too conclusory, vague and confusing to give" fair notice of the claim (citations omitted)); *Williams v. Boeing Co.*, 517 F.3d 1120, 1131 (9th Cir. 2008) (stating that "general allegations that [plaintiffs] were discriminated against with regard to 'terms of employment' did not provide 'fair notice'" of the claim); *Jackson v. BellSouth Telecomm.*, 372 F.3d 1250, 1271 (11th Cir. 2004) ("The liberal standard of notice pleading still requires a plaintiff to provide the defendant with fair notice of the factual grounds on which the complaint rests.").

Masimo's conduct.[68] Indeed, it is not even clear whether Masimo's alleged "blacklisting" involved some identifiable, independent instance of Masimo disseminating false or damaging information about Bauche to a specific potential or prospective employer, or whether, instead, Bauche is merely asserting that his future employment prospects have been generally or potentially harmed because of the other discrete adverse actions Masimo is alleged to have committed in this case.[69]

Bauche's failure to articulate any facts in support of his blacklisting claim is particularly problematic in this case given the timeliness concerns discussed above. To the extent Bauche's blacklisting claim is based on some independent, discrete defamatory statement Masimo allegedly made to a prospective employer, his blacklisting claim may be timely if that defamatory statement was made within 180 days of Bauche filing his initial complaint with OSHA. On the other hand, if the alleged defamation or blacklisting occurred outside of the limitations period, or if the blacklisting claim is simply a derivative of the other alleged forms of adverse action, Bauche's blacklisting claim would likely suffer from the same timeliness issues as the other aspects of his case. As pled, we cannot yet assess the merits, legal sufficiency, or timeliness of Bauche's blacklisting claim.

Although Bauche has thus far failed to provide fair notice of his blacklisting claim, we nevertheless conclude that dismissal of that claim is not appropriate at this time. As the Board has previously explained, the complaint an employee must file to initiate a whistleblower retaliation claim with OSHA is not governed by formal pleading requirements.[70] These initial filings tend to be informal, are often filed without the assistance of counsel, and may not even be in writing, and it is presupposed that the complaints will be amplified by the ensuing investigations.[71] Likewise, a complainant's objections to OSHA's initial findings, which initiate the adversarial proceedings before an ALJ, may also be informal, and may not include the full range of factual allegations necessary to state a plausible retaliation claim.[72] For these reasons, the Board has stressed that although pleadings must ultimately provide "fair notice" of a claim, "'ALJs should [also] freely grant parties

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[68] To be clear, we do not intend to suggest that Bauche must recite every detail of the factual underpinnings for his blacklisting claim to provide fair notice of his claim. However, he must certainly do more than simply invoke the words "blacklisting" and "defamation."

[69] *See* Opp. to Motion to Dismiss at 14 (stating that the alleged blacklisting derived, at least in part, from the "false criminal charges.").

[70] *Evans*, ARB No. 2008-0059, slip op. at 6-7; 29 C.F.R. § 1980.103(b) ("No particular form of complaint is required. A complaint may be filed orally or in writing.").

[71] *Evans*, ARB No. 2008-0059, slip op. at 7; *see* 29 C.F.R. § 1980.104.

[72] *See* 29 C.F.R. § 1980.106; *see also Evans*, ARB No. 2008-0059, slip op. at 8.

the opportunity to amend their initial filings to provide more information about their complaint before the complaint is dismissed,' especially when 'it appears that a complaint may be saved by the allegation of additional facts.'"[73] "Otherwise, complainants would have to be mindful of the pleading standards when filing their complaint with OSHA, which would be inappropriate given the nature of the administrative whistleblower complaint process."[74]

Although Bauche supplemented his factual allegations with respect to many aspects of his claim in his response to Masimo's motion to dismiss, his allegations with respect to his blacklisting claim remain undeveloped and incomplete. It does not appear from the record that Bauche understood that he should, or needed to, articulate the factual bases for every aspect of his claim before the ALJ dismissed his complaint, and he even expressly stated in his response brief below that the additional factual allegations contained therein were "not meant to be all-inclusive, but rather a brief summary of some of the underlying material facts and others that will be fully developed with currently available evidence in Mr. Bauche's possession, as well as evidence yet to be subpoenaed."[75] At this stage of the proceedings and on the current record, we cannot rule out the possibility that Bauche may be able to articulate a sufficient factual predicate for a timely and actionable blacklisting claim, if given the opportunity to amend and supplement his pleadings.[76]

Accordingly, we remand to the ALJ to permit Bauche the opportunity to articulate the factual basis for his blacklisting claim. We do not discount the possibility that the ALJ may, on remand, correctly determine that Bauche's blacklisting claim should be dismissed for failure to state a claim, for untimeliness,

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[73] *McFadden v. Deutsche Bank/DB USA Core Corp.*, ARB No. 2022-0002, ALJ No. 2021-SOX-00023, slip op. at 4 (ARB Jan. 26, 2022) (quoting *Sylvester v. Parexel Int'l LLC*, ARB No. 2007-0123, ALJ Nos. 2007-SOX-00039, -00042, slip op. at 13 (ARB May 25, 2011); *Evans*, ARB No. 2008-0059, slip op. at 11)).

[74] *Id.* (internal quotations and citations omitted).

[75] Opp. to Motion to Dismiss at 11.

[76] Although we conclude that Bauche should have the opportunity to better articulate his blacklisting claim, we do not have the same concern regarding the other forms of adverse action alleged in this case. Bauche provided a detailed recitation of the factual bases for the remainder of the alleged adverse actions in his response to Masimo's motion to dismiss below. *Id.* at 11-18. From these supplemented allegations, we can, and did, conclude that Bauche's equitable tolling arguments, discussed in Section 1, *supra*, cannot be "saved by the allegation of additional facts." *McFadden*, ARB No. 2022-0002, slip op. at 4 (quoting *Evans*, ARB No. 2008-005, slip op. at 11). As discussed above, Bauche's supplemental allegations and materials provided with his response brief disproved his claim that he lacked knowledge of Masimo's fraud and retaliatory cover-up and that he was deterred by Masimo's conduct, and Bauche's Fifth Amendment argument is legally insufficient to justify application of equitable tolling principles.

or for some other reason recognized by the applicable procedural rules or legal precedent.[77] However, that determination can only be made after Bauche has had sufficient opportunity to better articulate his claim.[78]

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[77] *See* 29 C.F.R. § 18.70(c).

[78] We recognize that Bauche did not argue to the ALJ or the ARB that his blacklisting claim should be carved out for special or independent consideration with respect to Masimo's motion to dismiss on timeliness grounds. It is not clear why Bauche failed to do so, to the extent he believed that his blacklisting claim constituted an independent and timely basis for his SOX retaliation claim. *See* Burrell Concurrence and Dissent, *infra*, at 22 ("Complainant had the motivation to appeal the ALJ's dismissal of his claim but did not mention the ALJ's failure to address blacklisting in the slightest degree."). However, we note that it does not appear that the ALJ ever asked, or required, Bauche to supplement his allegations with respect to his blacklisting claim, or any other aspect of his claim, or warned Bauche of the potential consequences of failing to articulate the factual underpinnings for each aspect of his claim. We also note that Bauche's response to Masimo's motion to dismiss (which is the only opportunity Bauche had below to supplement his factual allegations) tends to track Masimo's motion to dismiss, which did not mention, or address, the potential timeliness of Bauche's blacklisting claim specifically. Likewise, Bauche's appellate briefs tend to track the ALJ's D. & O. which also did not mention, or address, the potential timeliness of Bauche's blacklisting claim. Considering these circumstances, and because of Bauche's pro se status, the liberal pleading standards and the standards applicable to a motion to dismiss in these administrative proceedings, our obligation to consider the record as a whole in the light most favorable to Bauche as the non-moving party at this point in the proceedings, and our de novo standard of review, we have elected to consider this issue on appeal. We also recognize, as the partial dissent points out, that Bauche did not explicitly request the opportunity to supplement or amend his allegations regarding his blacklisting claim. However, in the circumstances of this case, we conclude Bauche should still be afforded the opportunity to do so. In particular, we note that this case, if appealed, would likely be heard by the Ninth Circuit Court of Appeals, which has held that "[i]n dismissing for failure to state a claim under Rule 12(b)(6), a district court should grant leave to amend **even if no request to amend the pleading was made**, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Schmitt v. Kaiser Found. Health Plan of Wash.*, 965 F.3d 945, 960 (9th Cir. 2020) (internal quotations and citation omitted) (emphasis added); *see also* Opp. to Motion to Dismiss at 11 (acknowledging that his facts as alleged were not "all-inclusive," and suggesting that the facts could be "fully developed" with "currently available evidence in Mr. Bauche's possession . . . ."). In our view, the fact that "the ALJ may not have appreciated that Complainant was attempting to make a separate legal claim of blacklisting" is even more reason for this case to be remanded for the ALJ to consider the issue. *See* Burrell Concurrence and Dissent at 22 n.90.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the ALJ's decision in part, and **VACATE** and **REMAND** in part for further proceedings consistent with this decision.

SO ORDERED.

[redacted]

TAMMY L. PUST
Administrative Appeals Judge

[redacted]

SUSAN HARTHILL
Chief Administrative Appeals Judge

BURRELL, Administrative Appeals Judge, concurring in part and dissenting in part:

I concur with the majority that even if Complainant's claim of SOX retaliation stemming from his July 26, 2016 termination were tolled because he did not know of Masimo's purported retaliatory animus in terminating his employment, he acknowledges that he knew about the element he claims was missing as early as 2019—long before his November 3, 2021 complaint was filed with OSHA.[79] Further, Complainant's entire discussion of events from 2016-2021 centers upon allegations of Masimo's retaliatory conduct, and this is inconsistent with a claim for equity that he was not on notice to pursue his rights concerning his discharge until shortly before November 2021.

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[79] Neither this concurring and dissenting opinion nor the majority opinion decide whether Bauche's alleged late discovery of Masimo's alleged retaliatory motive satisfies grounds for equitable modification. Several courts have held that statutes of limitation begin to run when the plaintiff possesses facts sufficient to make out a prima facie case, not when the plaintiff obtains evidence that proves discriminatory motive. *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1216-17 (5th Cir. 1992); *Hill v. U.S. Dep't of Labor*, 65 F.3d 1331, 1336-37 (6th Cir. 1995); *Bennett v. Coors Brewing Co.*, 189 F.3d 1221, 1235-36 (10th Cir. 1999).

The majority affirms the ALJ's dismissal on several points but remands due to the ALJ's failure to address Complainant's allegations concerning blacklisting.[80] For the reasons discussed below, I would affirm the ALJ's dismissal.

First and foremost, Complainant did not appeal the ALJ's failure to address blacklisting to the ARB. This alone is grounds for deeming the matter waived or forfeited.[81]

Before the ALJ, in his response to Masimo's Motion to Dismiss, Complainant claims, in a mosaic of alleged harassment and intimidation stemming from the criminal and civil litigation in 2017-2019, that:

> . . . Mr. Bauche has suffered unfavorable personnel actions, all taken in preemptive and anticipatory retaliation, . . . which include but are not limited to . . . blacklisting (intentionally interfering with Mr. Bauche's ability to earn a living and obtain future employment) through defamation and false criminal charges.[82]

This is the entirety of his blacklisting claim. He does not develop this potential blacklisting with alleged facts supporting the claim.

Complainant's pro se status does not permit a one-sentence claim in response to a motion to dismiss.[83] True, a pro se complainant "must be held to less stringent

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80 The majority bases its remand on liberal pleading standards as set out in *Evans v. U.S. Env't Prot. Agency*, ARB No. 2008-0059, ALJ No. 2008-CAA-00003 (ARB July 31, 2012) *(Evans II)*. In 2015, the Department promulgated new OALJ Rules of Practice and Procedure expressly empowering parties to move to dismiss for failure to state a claim. 29 C.F.R. § 18.70(c). No party argues that these rules affect *Evans II*'s "fair notice" pleading standard. For the reasons set out below, I would affirm the ALJ's dismissal under *Evans II*'s "fair notice" standard or modern federal pleading standards under Fed. R. Civ. P. 12(b)(6).

81 29 C.F.R. § 1980.110(a) ("The parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections may be deemed waived."). "The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983).

82 Opp. Motion to Dismiss (MTD) at 14.

83 Prior to filing the claim with OSHA, Complainant was involved in protracted criminal and civil litigation. For purposes of this concurring and dissenting opinion, I do not consider whether his experience warrants reducing the special consideration given to pro se pleadings. *Davidson v. Flynn*, 32 F.3d 27, 31 (2d Cir. 1994).

standards than formal pleadings drafted by lawyers," and these pleadings are "to be liberally construed."[84] Nonetheless, a pro se litigant must still plead "more than labels and conclusions."[85] The rules of generous construction of pro se pleadings "do[ ] not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based."[86] The Seventh Circuit in *Briscoe v. LaHue*, recognized that:

> Of course, [a] pro se complaint is to be liberally construed, and should be dismissed for failure to state a claim only if it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." [*Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).] But even under the generous standard of *Haines*, conclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss.[87]

Complainant's one-sentence blacklisting claim is void of any factual allegations and appears to be cut-and-paste text from whistleblower definitional material. It simply states a conclusion that he suffered alleged blacklisting through defamation and false criminal charges. Complainant does not allege any facts supporting the claim, for example, that there was a prospective employer and that he was seeking employment but was rejected. Conclusory allegations are insufficient to avoid a motion to dismiss.[88] Complainant's theory appears to be that the criminal and civil litigation against him could result in potential blacklisting, if, in the future, he seeks employment, and the prospective employer learns of this material. As this does not provide notice of a claim, I would affirm the ALJ's dismissal.[89]

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84 *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

85 *Giarratano v. Johnson*, 521 F.3d 298, 304 n.5 (4th Cir. 2008).

86 *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

87 *Briscoe v. LaHue*, 663 F.2d 713, 723 (7th Cir. 1981).

88 *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation").

89 *Dunn v. BNSF Ry. Co.*, C17-0333, 2017 WL 3670559, at *10 (W.D. Wash. Aug. 25, 2017) (court agreeing that mark on employment record creating "potential for blacklisting" "alone does not create a 'plausible basis to support an allegation relating to blacklisting,' thus fail[s] to state a claim upon which relief can be granted."); *Bailiff v. Davenport Transp., Inc.*, No. 3:13–CV–308–GCM, 2013 WL 6229150, at *6 (W.D.N.C. Dec. 2, 2013) (Plaintiff's allegation "that an unnamed prospective employer was told a 'defamatory statement' at an unspecified time and place" was insufficient to avoid dismissal. "While the Plaintiff is not required to plead his entire case in the Complaint, he must still allege sufficient facts upon which to base a legal claim. Some information about the nature of the

Finally, if Complainant's claim of blacklisting were simply a case of poor drafting due to his pro se status, he could have asked the ALJ to allow him to amend his claim. He did not.[90] Complainant had the motivation to appeal the ALJ's dismissal of his claim but did not mention the ALJ's failure to address blacklisting in the slightest degree.

[redacted]

THOMAS H. BURRELL
Administrative Appeals Judge

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statement, or at least Plaintiff's *understanding* of the statement would be helpful to this determination. However, simply alleging the communication of a 'defamatory statement' is a bare legal conclusion and wholly insufficient to state a claim for blacklisting.").

[90] The majority cites to Ninth Circuit law preferring or requiring that courts give plaintiffs leave to amend even if not requested under certain circumstances. *Supra* note 78. On a case-by-case, this may be appropriate for pro se litigants who have pled a claim with a seemingly curable defect when considered on the balance of the case. *See, e.g.*, *Hall*, 935 F.2d at 1110 ("[T]he plaintiff whose factual allegations are close to stating a claim but are missing some important element that may not have occurred to him, should be allowed to amend his complaint"). Here, however, Complainant's one-sentence claim, read in the context of his motion to dismiss, is so bare and conclusory and encapsulated in a montage of accusations and allegations that the ALJ may not have appreciated that Complainant was attempting to make a separate legal claim of blacklisting.