U.S. Department of Labor

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

IN THE MATTER OF:

DAVID GEMOLL,

COMPLAINANT,

v.

MICROSOFT CORPORATION,

RESPONDENT.

ARB CASE NO. 2025-0016

ALJ CASE NO. 2024-SOX-00001
ALJ WILLIAM P. FARLEY

DATE: May 14, 2026

Before KAPLAN, BURRELL, and KIKO, Administrative Appeals Judges; KAPLAN, Concurring

DECISION AND ORDER

This case arises under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act (SOX)[1] and Section 1057 of the Consumer Financial Protection Act of 2010 (CFPA).[2] On June 1, 2022, Respondent Microsoft Corp. terminated Complainant David Gemoll's employment.[3] On August 2, 2023, Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA), alleging that he had been retaliated against in violation of SOX and the CFPA.[4] OSHA dismissed the claim as untimely. Complainant filed objections and requested a hearing before the Office of Administrative Law Judges (OALJ). Respondent filed a Motion for Summary Judgment, which the Administrative Law Judge (ALJ) granted on the basis that the complaint was not timely filed and equitable

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1 18 U.S.C. § 1514A; 29 C.F.R. Part 1980 (2025).

2 12 U.S.C. § 5567; 29 C.F.R. Part 1985 (2025). The CFPA is Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act).

3 Order Granting Motion for Summary Judgment (ALJ Order) at 3.

4 ALJ Order at 1.

modification was not warranted. Complainant appealed to the Administrative Review Board (ARB or Board). For the following reasons, we affirm.

BACKGROUND

Prior to filing his complaint with OSHA, Complainant contacted the Federal Bureau of Investigation (FBI) on October 28, 2022, to report numerous allegations, including that Respondent had: (i) significantly misreported revenue; (ii) stolen intellectual property; (iii) engaged in "whistleblower retaliation" against Complainant; and (iv) required Complainant and others to work weekly hours "in excess of 80 and maxing at 120+."[5]

On September 18, 2023, OSHA dismissed Complainant's complaint, finding that it was not filed within the 180-day period prescribed by SOX and the CFPA, and Complainant's explanation as to why he did not timely file the complaint did not justify the application of equitable tolling.[6] On October 18, 2023, Complainant objected to OSHA's findings and requested a hearing before an ALJ.

On October 14, 2024, Respondent filed a Motion for Summary Judgment.[7] After briefing by the parties, the ALJ issued an Order Granting Motion for Summary Judgment, finding that Complainant's complaint to OSHA was untimely and the circumstances did not warrant the application of equitable tolling. Specifically, the ALJ found that Gemoll believed Respondent was blacklisting him by February 2022 and Respondent terminated him on or around June 1, 2022, but he did not file a complaint with OSHA until August 2023.[8] The ALJ also rejected Complainant's argument that his report to the FBI in October 2022, constituted the precise statutory claim filed in the wrong forum, which is a well-established basis

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[5] Exhibit (Ex.) 1 to Gemoll Declaration (Decl.) at 1.

[6] *See* 18 U.S.C. § 1514A(b)(2)(D); 12 U.S.C. § 5567(c)(1)(A).

[7] Respondent's motion was styled as a Motion for Summary Judgment and the ALJ's Order was titled "ORDER GRANTING MOTION FOR SUMMARY JUDGMENT." Under the OALJ Rules of Practice and Procedure, the motion is properly styled as a Motion for Summary Decision. *See* 29 C.F.R. § 18.72.

[8] ALJ Order at 7. The ALJ also noted that Complainant alleged to OSHA that "on or around April 5, 2023 . . . Respondent blacklisted him from future employment opportunities." ALJ Order at 6. Complainant did not identify this issue in his Petition for Review, nor has he argued it before the Board. It is therefore waived. *See* 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.").

for courts and administrative agencies to equitably toll a filing deadline or statute of limitations.[9] On November 27, 2024, Complaint timely filed a petition for review with the Administrative Review Board.

DISCUSSION

1. Complainant's Communications with the FBI

In late October 2022, nearly five months after Respondent terminated his employment, Complainant reached out to the FBI and was put in touch with a special agent working in the Seattle office's Complex Financial Crimes Division.[10] Complainant would later explain to OSHA:

> There is an obvious connection between the Sarbanes Oxley Act and the Securities and Exchange Commission. . . .
> The FBI handles a majority of investigations for the SEC. . . .
> I was referred to an ex-FBI manager by my attorneys who put me in contact with the FBI Seattle White Collar Crimes Division.[11]

The FBI interviewed Complainant on November 8, 2022.[12] In advance of being interviewed, Complainant sent the FBI special agent an email in which he included what he described as "a fairly detailed timeline and a 'synopsis'" of his allegations, both of which were "kind of focused on the **retaliation crime** committed against me."[13]

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[9] *See, e.g.*, *Sch. Dist. of Allentown v. Marshall*, 657 F.2d 16, 20 (3d Cir. 1981) (hereinafter "*Allentown*"); *Komatsu v. NTT Data, Inc.*, ARB No. 2016-0069, ALJ No. 2016-SOX-00024, slip op. at 3 (ARB Mar. 13, 2018) (recognizing that, in "determining whether the Board should toll a statute of limitations, we have been guided by the discussion of equitable modification of statutory time limits in [*Allentown*].").

[10] Ex. 5 to Doherty Decl. (hereinafter "OSHA Email") at 8 (emphasis added).

[11] *Id.*

[12] The date of the interview has been given as both November 8, 2022, and November 3, 2022. We use the date stated in the ALJ Order. *See* ALJ Order at 1.

[13] Ex. 1 to Gemoll Decl. at 1 (emphasis added).

In the email, Complainant stated that he had identified for Respondent's leadership and its internal Office of Legal Compliance (OLC) four categories of issues related to allegations of: (i) significant revenue inconsistencies; (ii) theft of intellectual property from the Renault-Nissan-Mitsubishi Alliance (RNMA); (iii) whistleblower retaliation; and (iv) working more than 80 hours per week.[14] Complainant next provided two separate summaries of his allegations, one with six numbered items and the other with ten numbered items. This was followed by a section on "interesting facts," which contained roughly fifteen bullet points. The first summary is as follows:

> The 100K foot story boils down to these few points:
>
> l. MSFT Azure Engineering creates GTM product on stolen IP from an enterprise customer
> 2. MSFT mis-report revenue internally/externally . . . in direct violation of SOX/Dodd-Frank
> 3. MSFT Leaders secure larger budgets based on phantom revenue created by generating dual invoices, and increase their own salaries and bonuses as a result . . . in direct violation of SOX/Dodd-Frank
> 4. MSFT Leaders prevent sending enterprise customer to collections for non-payment of manual invoices, while continuing to report phantom revenue generated by automatic invoices as actual revenue . . . in direct violation of SOX/Dodd-Frank
> 5. **7+ MSFT Leaders threaten and retaliate against the Whistleblower . . . in direct violation of SOX/Dodd-Frank**
> 6. **MSFT Operations (HR, OLC, Compliance and Senior Leaders) fail to intervene to protect a financial Whistleblower in direct violation of SOX/Dodd-Frank[.]**[15]

The only reference to whistleblower retaliation comes in the fifth and sixth entries where Complainant refers to "the Whistleblower" and "a financial

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14 *Id.*

15 *Id.* at 1-2 (emphasis added).

Whistleblower" in the third person. Complainant then lists ten additional items, which he calls a "50K feet" summary. Only the final item mentions whistleblower retaliation, and it contains no specific information, stating only "Whistleblower retaliation (2020-2022)."[16]

The list as a whole, as supplemented by his explanations, appears to be related to activity that is criminal in nature. In a later filing with OSHA explaining why he originally filed with the FBI, Complainant repeatedly emphasized the perceived criminal nature of Respondent's conduct. Referencing the categories he included in his email to the FBI (including the categories of whistleblower retaliation and hours worked) Complainant described the issues as "underlying criminal conduct" which should have been known to Respondent and OLC.[17] Complainant expressly listed Respondent's "**likely criminal conduct**" under each category, which broadly corresponded to the categories he laid out in his email to the FBI special agent:

- Category C: Harassment, intimidation, and threatening working environment.
  - Likely criminal conduct:
    - Whistleblower retaliation in violation of Sarbanes Oxley and other
    - Shareholder fraud
    - Discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended
    - Obstruction of Justice
    - Conspiracy
    - Negligence
    - Failure to prevent criminal acts
- Category D: Unsafe working conditions.
  - Likely criminal conduct:
    - Discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended
    - Whistleblower retaliation in violation of Sarbanes Oxley and other[.][18]

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16 *Id*. at 2.

17 OSHA Email at 2.

18 *Id*. at 3.

As evidenced by the email itself, as well as Complainant's later explanation of the email, his communication to the FBI consisted entirely of perceived criminal wrongdoing.

2. Equitable Tolling

Respondent terminated Complainant's employment on or about June 1, 2022. Complainant filed his complaint with OSHA over a year later on August 1, 2023. Both SOX and CFPA have a 180-day deadline prescribed by statute.[19] Thus, on its face, the complaint filed 426 days after his termination was untimely.[20] The ARB has explained that whistleblower statutes of limitation are not jurisdictional and thus are subject to equitable modification including equitable tolling.[21]

In determining whether to toll a limitations period, the Board has recognized several principal situations in which equitable tolling may be warranted. Those include: "(1) when the movant has raised the precise statutory claim in issue but has done so in the wrong forum; (2) when the movant has in some extraordinary way been prevented from filing; and (3) when the movant has some excusable ignorance of the respondent's discriminatory act."[22] These principal situations are generally referred to as the *Allentown* factors after the Third Circuit decision in which they were articulated.[23] The Board has held "that the foregoing

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[19] *See* 18 U.S.C. § 1514A(b)(2)(D); 12 U.S.C. § 5567(c)(1)(A).

[20] Complainant did not describe in his correspondence with OSHA or in his briefing before the Board when or how he learned that the FBI was not the proper forum for his claim and that OSHA was the proper forum.

[21] *See, e.g. Turin v. Amtrust Fin. Servs., Inc.*, ARB No. 2011-0062, ALJ No. 2010-SOX-00018, slip op. at 8 (ARB Mar. 29, 2013) (recognizing that SOX's "limitations period is not jurisdictional, and therefore it is subject to equitable modification, i.e., equitable tolling and equitable estoppel.") (citing *Halpern v. XL Cap., Ltd.*, ARB No. 2004-0120, ALJ No. 2004-SOX-00054, slip op. at 4 (ARB Aug. 31, 2005)); *see also Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 154 (2013) ("[W]e have repeatedly held that filing deadlines ordinarily are not jurisdictional; indeed, we have described them as quintessential claim-processing rules.") (internal citations omitted).

[22] *Martin v. Paragon Foods*, ARB No. 2022-0058, ALJ No. 2021-FDA-00001, slip op. at 9 (ARB June 8, 2023) (internal citations omitted).

[23] *See Allentown*, 657 F.2d at 19-20.

circumstances are not exclusive, and a complainant's inability to satisfy one is not necessarily fatal for [his or] her untimely appeal."[24]

Complainant does not argue that he was in some extraordinary way prevented from filing or that he had some excusable ignorance of Respondent's discriminatory act. Accordingly, we only consider whether the precise claim in the wrong forum factor is applicable.

A. The ALJ's Analysis of Complainant's Wrong Forum Argument

To be entitled to equitable tolling under the wrong forum factor, Complainant must demonstrate that he raised the precise statutory claim but mistakenly did so in the wrong forum.[25] The ALJ concluded that Complainant did not make this showing. Although we agree with the ALJ's conclusion, we reach it for different reasons.

In determining that Complainant did not raise the precise statutory claim in the wrong forum, the ALJ focused on how the FBI relates to the field of whistleblower protection, noting that "the FBI does not have jurisdiction in the field of whistleblowing protections for an employee of a publicly traded company" and "the FBI does not have overlapping missions with OSHA."[26] The ALJ concluded that [t]here is no evidence of a whistleblowing complaint by Gemoll filed in any other forum that has anything to do with recovery for an employee whistleblower."[27] This analysis misses the mark as neither the SOX/CFPA regulations nor Board

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[24] *See, e.g., Smith v. Franciscan Physician Network*, ARB No. 2022-0065, ALJ No. 2020-ACA-00004, slip op. at 4 (ARB Jan. 13, 2023) (Order Denying Motion to Dismiss and Reestablishing Briefing Schedule) (citations omitted); *Mazenko v. Pegasus Aircraft Mgmt., LLC.*, ARB No. 2021-0032, ALJ No. 2019-AIR-00001, slip op. at 3 (ARB Sept. 7, 2021) (Order Accepting Complainant's Appeal and Setting Briefing Schedule) (internal citation omitted).

[25] *See, e.g.*, *Carbon v. Shire Pharms.*, ARB No. 2018-0064, ALJ No. 2018-SOX-00009, slip op. at 3 (ARB May 5, 2020) (Order Dismissing Complainant's Petition as Untimely) (stating that complainant "bears the burden of justifying the application of equitable tolling principles"); *Robles v. Mr. Bults, Inc.*, ARB No. 2025-0058, ALJ Nos. 2025-STA-00050, -00051, -00052, slip op. at 5 (ARB Feb. 20, 2026) (same) (citing *Martin*, ARB No. 2022-0058, slip op. at 9).

[26] ALJ Order at 7.

[27] *Id.*

precedent contain a requirement that the wrong forum have jurisdiction over whistleblower claims or have overlapping jurisdiction with OSHA.[28]

On appeal, both parties focus their briefing on the issue of whether OSHA and the FBI work together to enforce the employee protection provisions of SOX and the CFPA.[29] Respondent and Complainant both quote from OSHA's Whistleblower Investigations Manual in order to demonstrate that the FBI either was or was not an "appropriate" wrong forum.[30] Specifically, Complainant argues that because the FBI cannot provide him with personal remedies, his complaint to the FBI should be treated as one raised in the wrong forum and his claim should be equitably tolled.[31] Respondent, on the other hand, argues that equitable tolling under the wrong forum factor is only available when a complaint is mistakenly filed with an OSHA partner agency and "the partner agency has sent OSHA a referral rather than a courtesy copy" of the complaint.[32] As we have already stated, neither the SOX/CFPA regulations nor Board precedent require, as a prerequisite to applying equitable tolling principles under the wrong forum factor, that a specific partner agency formally refer to OSHA a complaint that has been mistakenly filed with the other agency. Thus, our analysis must focus not on whether the FBI was an "appropriate" wrong forum but on whether Complainant's raised the precise statutory claim when he complained to the FBI.

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[28] *See* 29 C.F.R. § 1980.103(d) ("The time for filing a complaint may be tolled for reasons warranted by applicable case law. For example, OSHA may consider the time for filing a complaint equitably tolled if a complainant mistakenly files a complaint with another agency instead of OSHA within 180 days after becoming aware of the alleged violation."); 29 C.F.R. § 1985.103(d) (same).

[29] Complainant cited OSHA's Whistleblower Investigations Manual in his argument responding to Respondent's motion for summary decision. Complainant's (Comp.) Response to Mot. for Summ. Dec. at 9-10.

[30] OSHA's whistleblower Investigations Manual, https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-03-011.pdf.

[31] Comp. Brief (Br.) at 13.

[32] Respondent's (Resp.) Br. at 9.

B. Complainant Did Not Raise the Precise Statutory Claim in the Wrong Forum

Whether an earlier filed complaint raises the precise statutory claim is fact-specific and varies from case to case.[33] When looking at Complainant's email to the FBI, we are not persuaded that it constitutes mistakenly raising the precise statutory claim in the wrong forum. As noted above, the email is a collection of roughly 50 list items and bullet points, most of which appear to be about criminal matters. A few bullet points mention retaliation claims and cite SOX and Dodd-Frank, but there is ambiguity when viewing these in light of the overall tenor of the email, as well as Complainant's subsequent explanation to OSHA. In the FBI email, for example, Complainant clearly stated that Respondent had engaged in a "retaliation crime against me." In his later description of the email to an OSHA representative, he expressly states that each of the categories in the email contained criminal wrongdoing, including the references to "retaliation" "in violation of SOX/Dodd-Frank."[34] Complainant reached out to the FBI because he wanted the FBI to investigate Respondent over what he believed to be criminal misconduct relating to perceived wire fraud, shareholder fraud, embezzlement, conspiracy, racketeering, among other allegations of criminal misconduct.[35] He also wanted the FBI to investigate Respondent for perceived crimes of retaliation, discrimination, and wage and hour violations. There is no indication that he was pursuing an OSHA-type anti-retaliation claim for employment-based remedies under Section 806 of SOX or Section 1057 of the Dodd-Frank Act (CFPA).

While corresponding with OSHA, Complainant stated he wanted to go to the FBI because he believed the matter would end up with the FBI, regardless of whether he first reported the criminal conduct to the FBI or the SEC, so he might as well "kill[] two birds with one stone" by filing with the FBI:

> Due to the fact the SEC focuses more acutely on **securities crimes and refers other crimes to the FBI, and the FBI generally handles the investigations for the**

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[33] For this reason, there is a risk to relying too heavily on precedent regarding raising the precise statutory claim in the wrong forum because each case depends heavily on the precise language used in the respective complaints, letters, and emails specific to those cases.

[34] OSHA Email at 2-3.

[35] *Id*.

> **SEC, it seemed like contacting the FBI directly was "killing two birds with one stone."**
>
> During my interview with the FBI, [the Senior Special Agent] explained how the FBI handles investigations for many other Federal agencies and those investigations can be triggered from either the requesting agency side or the FBI side. The way I understood his description was the agencies and the FBI worked closely together and kept each other informed when appropriate. I assumed the FBI would make the appropriate agencies aware of the complaint(s) and the investigation(s)."[36]

In other words, Complainant reached out to the FBI with the hope that doing so might kick off a criminal investigation or an SEC investigation against his employer's alleged "**securities crimes**" and "**other crimes**." As noted above, included in this list is the "retaliation crime."[37] It goes without saying that these crimes are not the precise statutory claim that Complainant now attempts to raise. In fact, not only is this not a case of a "precise claim in the wrong forum," but there does not appear to be a "wrong forum" at issue here. He contacted the FBI White Collar Crime Division to report criminal contact and seek possible SEC involvement regarding perceived securities crimes by Respondent.

This criminal focus is confirmed by the fact that nowhere in the email did Complainant mention, let alone ask for, make-whole remedies such as back pay, reinstatement, or any other remedy associated with the employee protection provisions of SOX and the CFPA. Failing to ask for personal remedies might not be necessary in a specific context when it is unambiguously implied that this is what is being requested. However, the failure to ask for personal remedies combined with

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[36] *Id*. at 7-8.

[37] In the FBI email, Complainant references his claim of retaliation as a "retaliation crime." In Complainant's response to the Motion for Summary Judgment, Complainant argued that "the language of § 1514A [SOX's employee protection provision] is broad enough to cover retaliation against an employee for making a complaint about financial fraud to the FBI." Comp. Response to Mot. for Summ. Dec. at 8. Congress provided at 18 U.S.C. § 1513(e), a criminal anti-retaliation provision, that it is an offense for a person to retaliate against a witness for contacting law enforcement. The prohibited criminal retaliation may include employment-based retaliation such as termination and other adverse actions. Complainant does not aver that he communicated to law enforcement before his alleged retaliation, but this defect is no greater than any of the other deficiencies that he asks us to overlook to support his claim for equitable modification.

the references to criminal enforcement reinforces the criminal nature of the email's allegations in this case.

Corroborating the fact that Complainant did not contact the FBI for personal remedies, but did so seeking criminal enforcement is the fact that the FBI email does not include any details about his termination and the supposed nexus between any protected activity (we note that Complainant did not specify in the FBI email what protected activity he allegedly engaged in) and Complainant's termination or any other retaliation.

Reviewing the email in its totality makes clear that Complainant's purpose when making his complaint with the FBI was to report what Complainant believed to be criminal misconduct. The email reads less like a whistleblower complaint, and more like an airing of criminal grievances.[38] In this sense, Complainant's email to the FBI bears similarity to the complaints that had been filed in *Xanthopoulos v. Marsh & McClennan*.[39] In that case, the Board held that a complainant's multiple submissions through the SEC's "tips, complaints and referrals" form (TCR Form) did not constitute the precise statutory claim. There, we stated:

> While Complainant informed the SEC as a part of his ongoing filings that he had been fired, his filings do not constitute the "precise statutory claim" "mistakenly" filed in the wrong forum. Specifically, Complainant's filings with the SEC do not set forth a SOX retaliation or discrimination claim seeking SOX remedies. Some of his filings do not mention his termination. In other filings, Complainant claims that his termination was retaliatory

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[38] *Cf. Butler v. Anadarko Petroleum Corp*., ARB No. 2009-0047, ALJ No. 2009-SOX-00001, slip op. at 4 (ARB Feb. 17, 2011) (finding that a complainant did not raise the precise statutory claim in the wrong forum where the "communication itself does not contain a whistleblower complaint, but rather a timeline of the events surrounding [the complainant's] grievance. For example, instead of concluding with a request for reinstatement and damages, [complainant] concludes that 'I am forwarding this to you, the FBI, because I believe this is a violation against the IRS, the SEC and the stockholders of Anadarko Corporation.' Testimony at 5. We agree with the ALJ and *Anadarko* that the FBI communication does not contain a valid SOX complaint to equitably toll Butler's filing requirement.").

[39] *Xanthopoulos v. Marsh & McClennan Cos. Inc.*, ARB No. 2019-0045, ALJ No. 2019-SOX-00008 (ARB June 29, 2020).

> but he did not seek employee-based remedies such as reinstatement, back pay, or other damages associated with the termination. Instead, Complainant makes a vague reference to serving the interest of the investing public.[2] The only monetary remedy mentioned in the filings relates to seeking a monetary award through the SEC's Whistleblower Program.[40]

We concluded that "[i]t is clear from Complainant's filings that he wanted the SEC to address the underlying problems Complainant identified."[41] The Seventh Circuit upheld this decision and added that:

> [T]he Board concluded that Xanthopoulos did not qualify for equitable tolling because the TCR Forms did not contain "the precise statutory claim," the Sarbanes-Oxley claims, alleged in his Complaint. In the Board's view, the "primary purpose" of the TCR Forms that Xanthopoulos submitted "was to right the underlying wrong" of fraud, not investigate retaliation. The Board reasoned Xanthopoulos "did not seek employee-based remedies such as reinstatement, back pay, or other damages associated with the termination." Nor did he later "indicate[ ] that [he] sought or wanted the SEC to investigate his discharge or restore his employment or wages to him." Finally, the Board noted that Xanthopoulos's statement that he was investigating filing suit for the sexual harassment case "concedes [his] awareness (1) that he must seek further legal action . . . in some forum other than the SEC and (2) that the SEC is not investigating these matters." Stated another way, the Board concluded that Xanthopoulos used the SEC's website to blow the whistle on Mercer's corporate securities fraud, not on Mercer's retaliation against Xanthopoulos.[42]

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40 *Id*. at 3.

41 *Id*. at 4.

42 *Xanthopolous*, *v. U.S. Dep't of Lab*., 991 F.3d 823, 833 (7th Cir. 2021).

We have long recognized that, when a complainant seeks equitable tolling on the basis of the wrong forum factor, it is not enough to merely detail individual components of the claim in the wrong forum.[43] Indeed, that a complaint lodged with an entity other than OSHA "involve[s] activity that may be relevant to a [whistleblower] claim," does not mean that the complaint is the precise statutory claim later raised with OSHA.[44] As the Supreme Court has recognized, "[o]nly where there is complete identity of the causes of action will the protections suggested by petitioner necessarily exist and will the courts have an opportunity to assess the influence of the policy of repose inherent in a limitation period."[45] While each case is context-specific, it is not necessarily dispositive that a complainant mentions retaliation in a letter or email to other agencies, whether it be the FBI, SEC, or the Environmental Protection Agency (EPA). It is common in these cases that complainants provide a narrative of grievances against the Respondent, and retaliation may be a background fact.[46] *Allentown*, the pivotal case cited frequently for equitable modification, is an illustrative example. In *Allentown*, a schoolteacher wrote a letter to the EPA in which he described his efforts to determine the presence of asbestos hazards in the school buildings. He also alleged retaliation by the School District and requested help or advice from the EPA.[47] The

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[43] *See, e.g. Lewis v. McKenzie Tank Lines, Inc.*, ALJ. No 1992-STA-00020 (Sec'y Nov. 24, 1992) (citation omitted) (finding that even though an EEOC complaint referenced a protected activity and an adverse action, the "EEOC complaint was not asserted under the STAA and thus did not involve the precise claim mistakenly raised in the wrong forum").

[44] *Udofot v. NASA/Goddard Space Ctr.*, ARB No. 2010-0027, ALJ No. 2009-CAA-00007, slip op. at 7 (ARB Dec. 20, 2011) (finding that equitable tolling was not warranted because the "claims filed with the EEOC and MSPB were clearly intended to address" statutes other than the Clean Air Act, even though they involved activity relevant to a Clean Air Act claim).

[45] *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 467 n.14 (1975); *see also Xanthopoulos*, 991 F.3d at 833 (requiring there to be a complete identity of the causes of action to warrant equitably tolling under the wrong forum *Allentown* factor).

[46] *See Xanthopoulos*, ARB No. 2019-0045, slip op. at 3 (finding that complainant's filings with the SEC did not constitute the precise statutory claim where the complainant, in the filings, did not "did not seek employee-based remedies such as reinstatement, back pay, or other damages associated with the termination."), *aff'd sub nom. Xanthopoulos*, 991 F.3d 823; *but see Sawyers v. Baldwin Union Free Sch. Dist.,* ALJ No. 1985-TSC-00001, slip op at 1 (Sec'y Oct. 5, 1988), 1998 WL 524371 (reversing an ALJ's dismissal on timeliness grounds because "[n]either the statute nor the regulations requires a complaint to include a prayer for relief.").

[47] *Hanna v. Sch. Dist. of Allentown*, ALJ No. 1979-TSC-00001, slip op. at 3 (Sec'y July 28, 1980).

ALJ assigned to the case concluded that the letter was not a claim under the Toxic Substances Control Act. The Secretary of Labor disagreed and concluded that the letter was timely as a complaint under the Act.[48] On appeal, the Third Circuit noted that whether the letter to the EPA constituted a complaint was not defended on appeal but "having read the letter to the EPA, we would hold that it does not constitute a complaint."[49] The fact that the complainant in the case mentioned retaliation was not enough to make it a precise claim in the wrong forum. Context matters and cases in which complainants seek to avail themselves of equitable tolling on the basis of filing in the wrong forum have to be evaluated on a case-by-case basis.

The ARB has stated on prior occasions that when "the claim is filed in the wrong forum, it should be measured against the same standards under which an OSHA complaint is measured for timeliness."[50] This language, however, is a starting point rather than an ending point. Although we do not impose more stringent pleading requirements on complainants who file in the wrong forum relative to those who properly file their complaints with OSHA, there are nonetheless necessary differences in how we—or an ALJ in the first instance—must evaluate such complaints. We evaluate the complaint purportedly filed in the wrong forum with the additional consideration of the equitable nature of what we are being asked to do. As the Court stated in *Xanthopolous*, equitable tolling is a rare occurrence and "[f]ederal courts have typically extended equitable relief only sparingly."[51] The statute of limitations was set by Congress with purpose,

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48 *Id*. at 3-4.

49 *Allentown*, 657 F.2d at 19.

50 *Butler*, ARB No. 2009-0047, slip op. at 5; *see also Mehra v. W. Va. Univ.*, ARB No. 2017-0058, ALJ No. 2017-LCA-00002, slip op. at 5 n.2 (ARB Nov. 21, 2019) (agreeing that a complaint initially filed in the wrong forum "is measured using the standards normally used to evaluate aggrieved party complaints which are informal, filed for the purpose of initiating an investigation, and are only required to set forth sufficient facts for the Administrator to determine whether there is cause to believe that a violation has been committed.").

51 *Irwin v. Dep't of Veterans Affs.*, 498 U.S. 89, 96 (1990); *Madison v. U.S. Dep't of Lab.*, 924 F.3d 941, 947 (7th Cir. 2019) (citing *Johnson v. Gonzales*, 478 F.3d 795, 799 (7th Cir. 2007)) ("Given the compelling showing that is required to successfully invoke equitable tolling and to show that an agency abused its discretion, it will be the rare case in which we will find that an agency's refusal to equitably toll a time limit was out of bounds."); *see, e.g., Jahanbin v. The Boeing Co.*, ARB No. 2024-0035, ALJ No. 2023-AIR-00023, slip op. at 9 (ARB Mar. 13, 2025) (quoting *Martin*, ARB No. 2022-0058, slip op at 9) ("Equitable tolling is a rare and 'extraordinary measure that applies only when plaintiff is prevented from

considering respective values for both complainants and respondents.[52] The complainant "bears the burden of showing he 'diligently' pursued the claim and 'some extraordinary circumstances' prevented him from filing his complaint within the statute of limitations."[53] Complementing these points is the goal of limiting open-ended searches by the Department to determine if emails, letters, and complaints filed long ago with other agencies can be fashioned into OSHA claims. Such a process would undercut both Congress' determination as to how such claims should be filed and processed and the goal of "promot[ing] justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared"[54]

In sum, Complainant's email to the FBI agent: (i) has significant overtones of criminal misconduct, (ii) does not clearly indicate the protected activity that Complainant claims to have engaged in, (iii) does not unambiguously specify an adverse employment action that Respondent took against him, (iv) does not explicitly allege a causal connection between a protected activity and a specific adverse action against him, and (v) does not include any request for reinstatement, backpay, or similar make-whole remedies that indicate Complainant is making an employment-type claim. Many of these missing details are central to a complaint of retaliation in violation of the employee protection provisions of SOX and the CFPA. Moreover, Complainant indicated that he went to the FBI for an investigation into criminal misconduct involving securities law violations, it was his belief that "the FBI generally handles investigations for the SEC," and there is "an obvious connection between the [SOX] and the [SEC]".[55] In the subsequent communications, he prefaced all of the conduct that he complained of, including the purported retaliation, as "likely criminal conduct." Taken together, these attributes are fatal to Complainant's claim that he raised the precise statutory claim in the wrong forum when he emailed the FBI in October 2022.

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filing despite exercising that level of diligence which could reasonably be expected in the circumstances.'").

[52] *See Ry. Express Agency, Inc.*, 421 U.S. at 463-64 ("[a]lthough any statute of limitations is necessarily arbitrary, the length of the period . . . reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.").

[53] *Sparre v. U.S. Dep't of Lab., Admin. Rev. Bd.*, 924 F.3d 398, 402-03 (7th Cir. 2019) (quoting *Blanche v. United States*, 811 F.3d 953, 962 (7th Cir. 2016)).

[54] *Ord. of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-49 (1944).

[55] *See supra* note 11 (citing to OSHA Email at 8).

Complainant may have been confused about what the FBI can or cannot remedy. Ignorance of law is not generally considered a basis for equitable tolling.[56] A trained attorney may look at his email and conclude that these are civil allegations not criminal, but this requires not only supplementing his communications with what he did not say but striking out what he did say. It is indisputable that Complainant was seeking criminal enforcement action as he has expressly stated that was his purpose, even for the retaliation claims under SOX/Dodd-Frank. Complainant later told both OSHA and the ALJ that he "assumed the FBI would make the appropriate agencies aware of the complaint(s) and the investigation(s)."[57] Even now, Complainant states in his brief to the Board: "Sarbanes-Oxley includes both criminal and civil remedies for the same conduct. It is unclear why the FBI would be unable to forward complaints to the SEC or OSHA."[58] These points acknowledge that the FBI email itself was not a civil complaint but, according to Complainant, ought to have been referred to other agencies for other remedies known or unknown.

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[56] *Komatsu*, ARB No. 2016-0069, slip op. at 4; *see also, e.g., Wakefield v. R.R. Ret. Bd.,* 131 F.3d 967, 970 (11th Cir. 1997) ("Ignorance of the law usually is not a factor that can warrant equitable tolling."); *Gatewood v. R.R. Ret. Bd.*, 88 F.3d 886, 890 (10th Cir. 1996) ("[W]e are aware of no authority . . . which suggests that ignorance of the law should warrant equitable tolling of a statute of limitations."); *Felder v. Johnson*, 204 F.3d 168, 172 (5th Cir. 2000) ("[M]ere ignorance of the law or lack of knowledge of filing deadlines does not justify equitable tolling . . . .") (citing *Fisher v. Johnson*, 174 F.3d 710, 714 n.13 (5th Cir. 1999)).

[57] Comp. Response to Mot. for Summ. Dec. at 10; Comp. Br. at 12-13. OSHA email at 7-8.

[58] Comp. Br. at 14.

CONCLUSION

For the foregoing reasons we conclude that Complainant's claim of retaliation in violation of SOX and the CFPA's employee protection provisions was not timely filed and Complainant has not established circumstances justifying the application of equitable tolling. The ALJ's Order Granting Motion for Summary Judgment is **AFFIRMED**, and the complaint is **DISMISSED**.

SO ORDERED.

THOMAS H. BURRELL
Administrative Appeals Judge

PHILIP G. KIKO
Administrative Appeals Judge

Judge Kaplan, Concurring

I concur in my colleagues' decision affirming the ALJ Order and dismissing the complaint due to its untimeliness. I reach this conclusion for different reasons than the Majority and write separately to emphasize a few points regarding the application of equitable tolling under the *Allentown* "wrong forum" factor.

1. The Precise Statutory Claim

As an initial matter, I am mindful that a complaint filed in the wrong forum "is measured using the standards normally used to evaluate aggrieved party complaints[.]"[59] The Majority acknowledges this precedent but asserts "there are nonetheless necessary differences in how we—or an ALJ in the first instance—must evaluate such complaints."[60] The Majority adds that complaints initially raised in the wrong forum must be evaluated with the "additional consideration of the equitable nature of what we are being asked to do."[61] What this additional equitable consideration looks like in practice is unclear and the Majority notes that the "complainant 'bears the burden of showing he 'diligently' pursued the claim and 'some extraordinary circumstances' prevented him from filing his complaint within the statute of limitations.'"[62] This, of course, is generally true of those who seek equitable tolling of a limitations period and should not be used as a backdoor through which to apply a heightened pleading standard or to require something different from complainants who initially file their complaint in the wrong forum.

It is also worth noting that under the SOX and CFPA regulations, OSHA "has a duty, if appropriate, to interview the complainant to supplement a complaint that lacked a prima facie claim."[63] Other agencies do not have a similar duty.

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[59] *Mehra*, ARB No. 2017-0058, slip op. at 5 n.2 (finding that complaint raised the precise statutory claim even though his complaint in the wrong forum cited the H-2A regulations instead of the H-1E regulations); *see also Butler*, ARB No. 2009-0047, slip op. at 4 ("When the claim is filed in the wrong forum, it should be measured against the same standards under which an OSHA complaint is measured for timeliness.").

[60] *See supra* at 14.

[61] *Id*.

[62] *Id*. at 14-15.

[63] *Sylvester v. Parexel Int'l LLC*, ARB No. 2007-0123, ALJ Nos. 2007-SOX-00039, -00042, slip op. at 12 (ARB May 25, 2011); *see also* 29 C.F.R. § 1980.104(e)(3); 29 C.F.R. § 1985.104(e)(3).

The practical effect of this is that a complainant who mistakenly files their complaint in the wrong forum is already disadvantaged relative to a complainant who properly files a complaint with OSHA and obtains the benefits of OSHA's pre-investigation supplementation. [64] To evaluate wrong forum complaints under a more exacting standard than that under which OSHA complaints are evaluated would be a break from our precedent and would needlessly work a further disadvantage on litigants, many of whom are attempting to navigate the administrative process without the benefit of counsel.

So what exactly is required of complainants alleging violations of the employee protection provisions of SOX and the CFPA? Under both sets of regulations, "no particular form of complaint is required."[65] This language was adopted in 2011 when the Department of Labor promulgated an Interim Final Rule (IFR) revising the SOX regulations.[66] Prior to 2011, the SOX regulations stated that "[n]o particular form of complaint is required, except that a complaint must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations."[67] In the 2011 IFR, the Department noted that this change "complement[ed] the ARB's decision in *Sylvester v. Parexel International, LLC*," a decision in which we expressly repudiated the idea that the pleading standards articulated in *Twombly* and *Iqbal* apply to SOX whistleblower complaints filed with OSHA.[68] This language was carried forward when the Department promulgated a Final Rule in 2015.[69] Similarly, when the CFPA regulations were first promulgated, the Department noted that "a complaint of retaliation filed with OSHA under CFPA is not a formal document and need not conform to the pleading standards for complaints filed in

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64 The same is true for a complainant who, rather than going first to OSHA, makes the mistake of filing his complaint in federal court, where a plaintiff's complaint is subject to the pleading standards of Rule 8, and a defendant "may immediately challenge the sufficiency of the pleadings through Rule 12, without waiting for any supplementation." *Sylvester*, ARB No. 2007-0123, slip op. at 12.

65 29 C.F.R. § 1980.103(b); 29 C.F.R. § 1985.103(b).

66 Procedures for the Handling of Retaliation Complaints Under Section 806 of the Sarbanes-Oxley Act of 2002, as Amended, 76 Fed. Reg. 68084 (Nov. 3, 2011).

67 29 C.F.R. § 1980.103(b) (2004).

68 Procedures for the Handling of Retaliation Complaints Under Section 806 of the Sarbanes-Oxley Act of 2002, as Amended, 76 Fed. Reg. 68084 (Nov. 3, 2011).

69 Procedures for the Handling of Retaliation Complaints Under Section 806 of the Sarbanes-Oxley Act of 2002, as Amended, 80 Fed. Reg. 11865 (Mar. 5, 2015).

federal district court articulated in [*Twombley*] and [*Iqbal*]."[70] That this is true for complainants who properly file their complaints with OSHA is undisputed. To the extent that the Majority suggests that something more is required of complainants who first lodge a complaint in the wrong forum, I disagree.

Because no particular form of complaint is required, even for complainants who mistakenly file in the wrong forum, there is no talismanic word or phrase that must be included in a misfiled complaint in order for the Board to conclude that it constitutes the precise statutory claim.[71] The Majority acknowledge as much and describes the inquiry into whether an earlier filed complaint raises the precise statutory claim as "fact-specific" and "var[ying] from case to case."[72] I agree and, as a result, would not fault Complainant for not requesting reinstatement, backpay, or other make-whole remedies in his initial email to the FBI special agent.[73] After all, our precedent is clear: a complaint filed in the wrong forum or with the wrong agency need not include a request for any particular remedy in order to constitute the precise statutory claim.[74]

Even in the forgiving light of this standard, Complainant's email to the FBI is arguably deficient. As the Majority points out, Complainant refers to "the Whistleblower" and "a financial Whistleblower" in the third person, does not specify what protected activity he allegedly engaged in, and does not state that Respondent

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[70] Procedures for Handling Retaliation Complaints Under the Employee Protection Provision of the Consumer Financial Protection Act of 2010, 81 Fed. Reg. 14374, 14377 (Mar. 17, 2016).

[71] *See Butler*, ARB No. 2009-0047, slip op. at 5 ("When the claim is filed in the wrong forum, it should be measured against the same standards under which an OSHA complaint is measured for timeliness.").

[72] *See supra* at 8.

[73] *See supra* at 10, 15.

[74] *Sawyers*, ALJ No. 1985-TSC-00001, slip op. at 1 (in which the Secretary reversed an ALJ's dismissal on timeliness grounds because "[n]either the statute nor the regulations requires a complaint to include a prayer for relief."). In *Xanthopoulos*, although the Board noted that the complainant had not requested reinstatement, back pay, or other damages associated with termination, we did not hold that such a request was a requirement or that failure to make it was dispositive. Additionally, unlike Mr. Gemoll, the complainant in *Xanthopoulos* expressly conceded his "awareness (1) that he must seek further legal action, including [on] the whistleblower complaint, in some forum other than the SEC and (2) that the SEC is not investigating these matters." *Xanthopoulos*, ARB No. 2019-0045, slip op. at 4.

took any specific adverse action against him.[75] With all of these missing elements, Complainant's FBI email is best understood as an inchoate airing of grievances in which an ALJ *could* have determined constituted the precise statutory claim but not one in which the ALJ erred when she did not find that it contained the precise statutory claim.[76]

2. Complainant's Mistake in Choice of Forum

Assuming for the sake of argument that Complainant's October 2022 email to the FBI constituted raising the precise statutory claim in the wrong forum, I would nonetheless affirm the ALJ Order. This is because equitable tolling under the *Allentown* wrong forum factor is available only when "the plaintiff has raised the precise statutory claim in issue but has *mistakenly* done so in the wrong forum."[77] Complainant has not demonstrated that his decision to file a complaint with the FBI was a mistake rather than a strategic choice.

In response to the OSHA investigator asking Complainant why he believed his complaint should be equitably tolled, Complainant provided multiple reasons including that Respondent's acts or omissions lulled him into foregoing prompt action to vindicate his rights.[78] Complainant elaborated on this by stating that he,

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[75] In contrast to his use of third person when speaking to the FBI, when Complainant later communicated with OSHA, he made clear that he was the whistleblower, stating "[t]here were four key categories in which I reported issues to OLC in accordance with SEC and/or SOX regulations to report internally first." *See* OSHA Email at 1. Additionally, to be the precise statutory claim, the complaint made with the FBI must be the same claim Complainant now raises, as "distinguished from every other." *See* Webster's Third New Int'l Dictionary (1993). The Complainant's use of the third person and lack of specificity makes reaching this conclusion that much harder.

[76] It should not go unmentioned that the record does not contain any material related to the meeting between Complainant and the FBI special agent, nor does it contain any subsequent communications between Complainant and the FBI. It is possible that this material would provide insight into Complainant's motivations and the exact nature of his complaint. Of course, Complainant bears the burden of producing these documents.

[77] *Allentown*, 657 F.2d at 20 (quoting *Smith v. Am. President Lines, Ltd.*, 571 F.2d 102, 109 (2d Cir. 1978)).

[78] OSHA Email at 8. Although Complainant provided this as a circumstance that would justify the application of equitable tolling, if true it would justify the application of equitable estoppel, a different and distinct doctrine used to modify a filing deadline. *See Martin*, ARB No. 2022-0058, slip op. at 8 ("Equitable tolling focuses on the [employee-complainant's] excusable ignorance of the employer's discriminatory act. Equitable

while still employed by Respondent, engaged counsel in order to "protect my employment and ensure the board of directors or executive leadership were fully aware of the scale and scope of the issues."[79] Complainant sought mediation with Respondent but later came to view the promises of mediation as a "tactic to stall any formal complaints [by Complainant] to government agencies."[80] Complainant told the OSHA investigator that:

> It is clear the promises of mediation were a tactic to stall any formal complaints to government agencies. My lawyers stated Microsoft would view any official complaint(s) as a hostile act and one that did NOT demonstrate my honest desire to protect my employment, mediate the personal financial issues and ensure the corporate criminal conduct was ended and cleaned up appropriately and legally.
>
> Approximately 300 days after termination, Microsoft is no longer interested in mediation." This is not a coincidence. In addition, I've since learned the manager who terminated me was also laid off or terminated April 2023 . . . again, approximately 300 days after my termination [81]

Respondent points to this statement as evidence that Complainant's email to the FBI was not a case of mistakenly selecting the wrong forum but a "strategic choice made in consultation with [Complainant's] counsel."[82] Complainant has countered this by alleging that his prior counsel's advice not to file a complaint was a reference to an EEOC charge that Complainant contemplated filing against Respondent.[83] Even if we accept Complainant's claim that he considered filing an EEOC charge but refrained from doing so on the advice of counsel, that would not

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estoppel, in contrast, examines the [employer or other] defendant's conduct and the extent to which the [complainant] has been induced to refrain from exercising his rights.").

79 OSHA Email at 8.

80 *Id*.

81 *Id*.

82 Resp. Br. at 8.

83 Comp. Reply Br. at 3.

rebut Respondent's argument.[84] After all, Complainant's statement to OSHA was that his then-counsel advised him against filing "*any* official complaint(s)[.]"[85]

Complainant's actions are not those of a litigant who put Respondent "on notice 'within the period set by the statute of limitations,'" but of one who made a strategic decision to forego a specific avenue of vindicating his rights under the employee protection provisions of SOX and the CFPA in the hopes that doing so would procure a better outcome by encouraging his former employer to participate in mediation.[86] Dissatisfied with the results of that choice, Complainant cannot now recast the strategic decision to refrain from filing a formal complaint with OSHA while instead pursuing an informal process with the FBI, as a case of mistakenly filing in the wrong forum.

3. Conclusion

A litigant sitting on his claims as he seeks to bring his former employer to the mediation table is a strategy that may or may not work out. What I can say with certainty, however, is that such a strategy is far from an "extraordinary circumstance" that "prevented timely filing" and warrants equitable intervention.[87] Complainant had legal avenues through which to vindicate his rights. Having foregone those, he cannot now turn to equitable avenues instead.

ELLIOT M. KAPLAN
Administrative Appeals Judge

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[84] I note that when asked by the OSHA investigator whether he had experienced any adverse actions that would fall within the 180-day SOX and CFPA limitations periods, Complainant responded: "My employment attorneys did not file the EEOC complaint as instructed, *or the other complaints* as instructed. I am attempting to understand why, as I discovered this yesterday." OSHA Email at 8 (emphasis added).

[85] Resp. Br. at 8.

[86] *Turgeau v. U.S. Dep't of Lab., Admin. Rev. Bd.*, 446 F.3d 1052, 1059 (10th Cir. 2006) (quoting *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 555 (1974)).

[87] *See Holland v. Florida*, 560 U.S. 631, 649 (2010) (recognizing that "a petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing) (internal marks omitted).