

**U.S. Department of Labor**

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



**IN THE MATTER OF:**

**JOHN BAUCHE,**

**ARB CASE NOS. 2023-0016  
2023-0031**

**COMPLAINANT,**

**ALJ CASE NOS. 2022-SOX-00010  
2022-SOX-00026**

**v.**

**ALJ CHRISTOPHER LARSEN**

**MASIMO CORPORATION,**

**DATE: July 31, 2024**

**RESPONDENT.**

**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 WARREN and ROLFE, Administrative Appeals Judges**

## **DECISION AND ORDER**

ROLFE, 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 is before the Administrative Review Board (ARB or Board) for the second time.<sup>1</sup> Complainant John Bauche (Bauche) alleges that Respondent Masimo Corporation (Masimo) took adverse action against

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<sup>1</sup> 18 U.S.C. § 1514A, as implemented by 29 C.F.R. Part 1980 (2024).

him in violation of SOX as part of a scheme to commit insurance fraud. Masimo counters that Bauche embezzled \$1 million from the company -- which he later admitted in signing a Pretrial Diversion Agreement with the United States Department of Justice (DOJ) -- and that his now-admitted criminal misconduct was the sole cause of any of its alleged acts of retaliation.

In orders dated October 18, 2022, December 22, 2022, and April 14, 2023, a Department of Labor Administrative Law Judge (ALJ) dismissed Bauche's claims.

For the reasons discussed below, we affirm the ALJ's decisions.<sup>2</sup>

## BACKGROUND

### 1. Initiation of *Bauche I* and the ARB's First Decision

The Board's first decision (*Bauche I*) details his employment with Masimo and the incidents giving rise to this appeal.<sup>3</sup> Masimo terminated Bauche's employment on July 20, 2016 and referred him to the FBI and DOJ upon allegedly discovering that he had embezzled nearly \$1 million from the company. The DOJ indicted Bauche on five counts of mail fraud and one count of money laundering. Masimo also sued Bauche in civil court to recover the money he allegedly stole.<sup>4</sup>

Bauche filed his first OSHA complaint on November 3, 2021, over five years after his termination, alleging that Masimo retaliated against him in violation of SOX by firing him, referring him for criminal prosecution, suing him, and "blacklisting" him.<sup>5</sup> On April 1, 2022, the ALJ dismissed Bauche's complaint as untimely because he did not contact OSHA within 180 days of the occurrence of the alleged adverse actions.<sup>6</sup>

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<sup>2</sup> The ALJ sealed the Pretrial Diversion Agreement in the preceding below. Although the ALJ relied on the agreement, he refrained from discussing its contents. We likewise seal the agreement and refrain from discussing its contents in this decision. In addition, we deny Bauche's various motions and requests, as discussed in further detail below.

<sup>3</sup> *Bauche v. Masimo Corp.*, ARB No. 2022-0035, ALJ No. 2022-SOX-00010 (ARB Sept. 27, 2022).

<sup>4</sup> All citations in this paragraph are to *Bauche I*, ARB No. 2022-0035, slip op. at 2-3.

<sup>5</sup> *Id.* at 3, 6-7.

<sup>6</sup> *Id.* at 4; see 18 U.S.C. § 1514A(b)(2)(D); 29 C.F.R. § 1980.103(d).

In a split decision, the ARB affirmed in part, and remanded in part. The majority agreed that Bauche's complaint was late with respect to most of the alleged adverse actions -- Bauche first contacted OSHA five years after his employment was terminated, four years after he was criminally indicted, and two years after Masimo sued him. The majority further found no grounds to equitably modify or toll the filing deadline. It remanded Bauche's blacklisting claim, however, solely to give Bauche the opportunity, under the motion to dismiss standard, to articulate a factual basis for it.<sup>7</sup>

Administrative Appeals Judge Tom Burrell dissented on that point, reasoning that Bauche forfeited the argument by not appealing it to the ARB and that, regardless, Bauche's "one-sentence blacklisting claim [was] void of any factual allegations and appear[ed] to be cut-and-paste from whistleblower definitional material."<sup>8</sup>

## **2. *Bauche II***

Meanwhile, on April 1, 2022 -- the same day the ALJ dismissed *Bauche I* -- Bauche filed a second OSHA complaint (*Bauche II*). Bauche identified three alleged instances of retaliation. First, he asserted that Masimo's ongoing civil lawsuit against him interfered with his ability to obtain subsequent employment. Second, he asserted that Masimo "caused" DOJ to publish a press release announcing his indictment, which further blacklisted him. Third, he alleged that Masimo refused to rehire him for a position for which he applied on January 3, 2022.<sup>9</sup>

Pursuant to a motion to dismiss filed by Masimo, the ALJ rejected Bauche's press release claim because his allegations were "simply insufficient to show the publication of the press release by a third party, or the third party's failure to suppress it, comprise a retaliatory act by Respondent."<sup>10</sup> The ALJ also dismissed the civil lawsuit claim because Bauche offered no facts that could establish the lawsuit

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<sup>7</sup> All citations in this paragraph are to *Bauche I*, ARB No. 2022-0035, slip op. at 6-15.

<sup>8</sup> *Bauche I*, ARB No. 2022-0035, slip op. at 20-21 (Burrell, J., concurring in part and dissenting in part).

<sup>9</sup> All citations in this paragraph are to Complainant John Bauche's Response and Objection to Respondent Masimo Corporation's Motion to Dismiss Complaint (Comp. Opp. to Motion to Dismiss) (*Bauche II*) at 6-12.

<sup>10</sup> Order Granting in Part, and Denying in Part, Motion to Dismiss with Leave to Amend (Dismissal Order) (*Bauche II*) at 5-6.

interfered with his ability to obtain employment and, regardless, the ALJ found the claim unquestionably time-barred.<sup>11</sup>

The ALJ initially retained the failure to rehire claim, however. The ALJ first acknowledged that he was “confident any reasonable, disinterested person, who had no information about this claim other than the documents Mr. Bauche has filed in opposition to the pending Motion, would be astounded by the allegation that Mr. Bauche sincerely and in good faith wished to go back to work for Respondent,” because his “own evidence . . . describes a relationship . . . as one that by January 3, 2022, had been damaged beyond all reasonable hope of repair.”<sup>12</sup> Nevertheless, the ALJ stated that he met the minimal pleading requirement to survive a motion to dismiss, “however implausible” his claim may be.<sup>13</sup>

On December 22, 2022, the ALJ granted summary decision on the remaining claim pursuant to a second motion filed by Masimo, concluding Bauche failed to present any *actual evidence* that his alleged protected activity contributed to the company’s decision not to rehire him.<sup>14</sup> Bauche asked the ALJ to infer that Masimo’s actions were retaliatory simply because its decision not to rehire him closely followed some of his alleged protected activity.<sup>15</sup> But the ALJ declined to draw that inference, “because the relationship between Mr. Bauche and his former employer had been hostile, contentious, and antagonistic for more than five years before Mr. Bauche applied for re-employment on January 3, 2022.”<sup>16</sup>

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<sup>11</sup> *Id.* at 6-7.

<sup>12</sup> *Id.* at 7.

<sup>13</sup> *Id.*

<sup>14</sup> Order on Complainant’s Motion to Seal and Order Granting Summary Decision (Summary Decision Order) (*Bauche II*) at 6, 8-9. In the Dismissal Order (*Bauche II*), the ALJ gave Bauche the opportunity to amend his claims with respect to the press release and civil lawsuit in a “concise statement” of facts. Dismissal Order (*Bauche II*) at 8. Bauche responded with a 28-page statement of facts, along with 76 exhibits comprising more than 750 pages. Bauche’s statement repeated many of his allegations from *Bauche I* and restated the allegations he made in his opposition to Masimo’s Motion to Dismiss in *Bauche II*. In the ALJ’s subsequent Summary Decision Order (*Bauche II*), the ALJ reaffirmed the dismissal of the claims with respect to the press release and civil lawsuit because Bauche failed to offer any new allegations or evidence supporting those claims. Summary Decision Order (*Bauche II*) at 7.

<sup>15</sup> Summary Decision Order (*Bauche II*) at 8.

<sup>16</sup> *Id.*

The ALJ also determined that Masimo offered clear and convincing evidence that it would not have rehired Bauche, even in the absence of his alleged protected activity.<sup>17</sup> The ALJ found the Pretrial Diversion Agreement “supports the notion that Masimo’s low opinion of Mr. Bauche’s trustworthiness . . . was based in fact.”<sup>18</sup> The ALJ concluded “that well-founded opinion would justify Masimo’s decision not to re-hire him, whether Mr. Bauche had engaged in protected activity or not.”<sup>19</sup>

### 3. *Bauche I* on Remand to ALJ

Shortly after granting summary decision in *Bauche II*, the ALJ on remand took up the blacklisting claim from *Bauche I*. Bauche filed a statement of facts in support of his blacklisting claim on January 31, 2023, asserting that the criminal prosecution, civil litigation, and DOJ press release all constituted separate instances of blacklisting.<sup>20</sup>

On April 14, 2023, however, the ALJ granted summary decision on Bauche’s remaining blacklisting claim, holding:

[H]aving given Mr. Bauche an opportunity further to articulate a factual basis for his blacklisting claim, I find he has merely re-alleged his long-standing grievances against Respondent. He has not alleged that Respondent, within 180 days of filing his complaint in this action, interfered in any way with Mr. Bauche’s seeking or obtaining employment.<sup>[21]</sup>

The ALJ further found Bauche’s criminal admissions independently barred his claim as a matter of law.<sup>22</sup>

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<sup>17</sup> *Id.* at 9.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Complainant Bauche’s Amended Statement of Facts Regarding Masimo’s Defamation & Blacklisting (Comp. Amended Statement of Facts) (*Bauche I*) at 3-5. Bauche also rehashed and relabeled his failure to rehire claim from *Bauche II* as another form of blacklisting. *Id.* at 5.

<sup>21</sup> Order Granting Motion for Summary Decision (*Bauche I*) at 4.

<sup>22</sup> *Id.* at 5.

Bauche filed a Petition for Review concerning *Bauche II* on January 5, 2023, and a Petition for Review concerning *Bauche I* on April 28, 2023. The Board consolidated them for review on July 17, 2023.<sup>23</sup>

### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated the ARB the authority to hear appeals from ALJ decisions and issue agency decisions under SOX.<sup>24</sup> The ARB reviews an ALJ's grant of summary decision de novo under the same standard the ALJ applies.<sup>25</sup>

Summary decision is appropriate where “there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law.”<sup>26</sup> If the moving party demonstrates an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation.<sup>27</sup> Although all reasonable inferences must be resolved in the light most favorable to the non-moving party, it may not rest upon mere allegations, speculation, or denials and must instead set forth specific facts on each issue upon which it bears the ultimate burden of proof.<sup>28</sup>

### DISCUSSION

On appeal, Bauche repeats the claims and arguments previously dismissed in *Bauche I* that Masimo retaliated against him by pursuing the civil lawsuit and causing his criminal indictment. He also argues that the DOJ press release

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<sup>23</sup> Bauche filed a third complaint with OSHA on March 5, 2023, which is now pending with the ALJ (ALJ Case No. 2023-SOX-00024) (*Bauche III*). Because *Bauche III* has not yet been resolved by the ALJ or appealed to the Board, we do not consider it in this appeal.

<sup>24</sup> 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); *see also* 29 C.F.R. § 1980.110.

<sup>25</sup> *Xanthopoulos v. Mercer Inv. Consulting*, ARB No. 2022-0032, ALJ No. 2021-SOX-00017, slip op. at 10 (ARB Sept. 28, 2023) (citation omitted).

<sup>26</sup> 29 C.F.R. § 18.72(a).

<sup>27</sup> *Xanthopoulos*, ARB No. 2022-0032, slip op. at 12 (citation omitted).

<sup>28</sup> *Id.* (citation omitted).

blacklists him from future employment and that Masimo’s failure to rehire him in January 2022 and its use of the Pretrial Diversion Agreement constitute additional instances of retaliation. Finally, for the first time, Bauche alleges another non-selection in June 2022 as an additional instance of retaliation.

After reviewing the parties’ briefs and the relevant record, we affirm the ALJ’s decision and reject Bauche’s claims that Masimo retaliated against him.<sup>29</sup>

## **1. The Law of the Case Doctrine Bars Bauche’s Civil Lawsuit and Criminal Indictment Claims as Discrete Forms of Retaliation**

Bauche continues to maintain that Masimo’s civil lawsuit and actions in referring him to federal authorities constitute discrete forms of retaliation.<sup>30</sup> The Board affirmed the ALJ’s dismissal of these claims as untimely in its first decision in *Bauche I*. Those rulings remain the law of the case, and thus we will not consider the civil litigation or criminal indictment outside of the context of Bauche’s blacklisting allegations.<sup>31</sup>

## **2. Blacklisting**

### *A. Civil Litigation & Criminal Indictment*

Bauche attempts to salvage his claims concerning the civil litigation and criminal charges by framing them as forms of blacklisting.<sup>32</sup> But even reconfigured, the claims remain untimely. The alleged blacklisting occurred when Masimo filed

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<sup>29</sup> Notably, Bauche’s Opening and Reply Briefs in both *Bauche I* and *Bauche II* were each filed late and, in some instances, in the wrong action. When alerted to the error, Bauche filed new briefs—albeit with substantive changes. The Board retains the inherent power to dismiss Bauche’s claims under these circumstances. Nevertheless, for the sake of completeness, the Board has considered each of Bauche’s briefs -- whether late or amended without leave -- in deciding this appeal. The Board cites to Complainant’s last-filed briefs herein.

<sup>30</sup> Complainant’s Opening Brief (Comp. Opening Br.) (*Bauche I*) at 22, 25-31; Comp. Opening Br. (*Bauche II*) at 29-30, 44, 47-49.

<sup>31</sup> *Manufactured Home Cmty., Inc. v. Cty. of San Diego*, 655 F.3d 1171, 1181 (9th Cir. 2011) (“The law of the case doctrine precludes a court from reconsidering an issue previously decided by the same court, or a higher court in the identical case.”) (inner quotation and citation omitted).

<sup>32</sup> Comp. Opening Br. (*Bauche II*) at 27-28, 44.

the lawsuit and referred Bauche to federal authorities -- not when he allegedly continued to feel the effects of these actions years later.<sup>33</sup> Regardless, even if timely, Bauche's blacklisting claims regarding the civil and criminal cases cannot survive Masimo's motion for summary judgment. To establish a claim under SOX, Bauche must demonstrate: 1) he engaged in an activity SOX protects; 2) Masimo discriminated against him in the terms and conditions of his employment; and 3) the protected activity was a contributing factor in the adverse action.<sup>34</sup>

Blacklisting is a form of adverse action. It "occurs when an individual or a group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment."<sup>35</sup> "[B]lacklisting requires an objective action -- there must be evidence that a specific act of blacklisting occurred."<sup>36</sup> In other words, "there must be some objectively manifest personnel or other injurious employment-related action by the employer against the employee . . . ."<sup>37</sup> "Subjective feelings on the part of a complainant toward an employer's action are insufficient to establish that any actual blacklisting took place."<sup>38</sup>

Even generously assuming civil litigation or referral to federal authorities regarding criminal wrongdoing an employee later admits somehow could constitute blacklisting, Bauche offered no evidence of any lost employment opportunity. He

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<sup>33</sup> See *Mehrotra v. Gen. Elec. Co.*, ARB No. 2022-0060, ALJ No. 2022-SOX-00014, slip op. at 6-7 (ARB Sept. 21, 2023) (When no direct notice of refusal to rehire exists, "the appropriate question for when the blacklisting for rehire claim accrues is when it was apparent or should have been apparent that a complainant's former employer was refusing to rehire them."). See also *Basic v. Spirit Aerosystems, Inc.*, ARB No. 2009-0015, ALJ No. 2008-AIR-00010, slip op. at 4-5 (ARB Oct. 21, 2010); *Eubanks v. A.M. Express, Inc.*, ARB No. 2008-0138, ALJ No. 2008-STA-00040, slip op. at 5-6 (ARB Sept. 24, 2009).

<sup>34</sup> 18 U.S.C. § 1514A(a), (b)(2)(C). See also 49 U.S.C. § 42121.

<sup>35</sup> *Xanthopoulos*, ARB No. 2022-0032, slip op. at 12 (quoting *Beatty v. Inman Trucking Mgmt., Inc.*, ARB No. 2011-0021, ALJ Nos. 2008-STA-00020, -00021, slip op. at 6 (ARB June 28, 2012)).

<sup>36</sup> *Id.* at 12-13 (quoting *Pickett v. Tenn. Valley Auth.*, ARB Nos. 2002-0056, -0059, ALJ No. 2001-CAA-00018, slip op. at 9 (ARB Nov. 28, 2003)).

<sup>37</sup> *Pickett*, ARB Nos. 2002-0056, -0059, slip op. at 10 (citation omitted).

<sup>38</sup> *Xanthopoulos*, ARB No. 2022-0032, slip op. at 13 (quoting *Pickett*, ARB Nos. 2002-0056, -0059, slip op. at 9).



asserted below that he generally suffered economic harm.<sup>39</sup> But he did not identify any specific position or opportunity that he was denied, which necessarily establishes that the lawsuit or referral did not cause any such lost opportunity. Bauche’s failure to offer any evidence that Masimo’s actions “affirmatively prevent[ed]” him from finding employment thus would preclude his blacklisting claim based on the litigation and indictment, even if it had been timely.<sup>40</sup>

*B. DOJ Press Release*

Bauche asserts that Masimo, through its “connections” with the FBI and U.S. Attorney’s Office, caused the DOJ to publish a press release regarding his indictment.<sup>41</sup> He similarly asserts that Masimo has the power to remove the press release.<sup>42</sup> Bauche contends the press release constitutes an additional form of blacklisting, because it “negatively impacts [his] ability to earn a living because of its defamatory allegations.”<sup>43</sup> We agree with the ALJ, however, that even if the claim were legally viable, Bauche similarly failed to offer any actual evidence to sustain it.

First, Bauche offered no evidence that Masimo caused the press release to be published or had the power to remove it. Bauche instead spends most of his argument attempting to establish the “connection” between Masimo’s private investigators and the FBI, DOJ, and U.S. Attorney who prosecuted his case.<sup>44</sup> Yet beyond the attempt to demonstrate a preexisting relationship existed between these parties, Bauche does nothing to establish the dynamic of that relationship somehow allowed Masimo to dictate the actions of the United States Department of Justice. And a mere connection does not rationally support the incredible inference that

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<sup>39</sup> Comp. Amended Statement of Facts (*Bauche I*) at 1; Comp. Statement in Response (*Bauche II*) at 19-20.

<sup>40</sup> See *Xanthopoulos*, ARB No. 2022-0032, slip op. at 12 (citation omitted); accord *Anderson v. Jaro Transp. Servs.*, ARB No. 2005-0011, ALJ Nos. 2004-STA-00002, -00003, slip op. at 6 (ARB Nov. 30, 2005).

<sup>41</sup> Comp. Opening Br. (*Bauche I*) at 15; Comp. Opening Br. (*Bauche II*) at 27-30.

<sup>42</sup> Comp. Opening Br. (*Bauche II*) at 40.

<sup>43</sup> *Id.* at 41; accord Comp. Opening Br. (*Bauche I*) at 15.

<sup>44</sup> Comp. Opening Br. (*Bauche II*) at 30-40.

Masimo possessed the raw power to direct the publication or removal of a press release on a federal agency's website.<sup>45</sup>

Second, and equally dispositive, Bauche once again offered no evidence that the press release interfered with any prospective employment opportunity. Bauche did not identify any specific position or opportunity he was denied.<sup>46</sup>

Finally, Bauche's claim is, again, categorically time-barred. DOJ published the press release on December 21, 2017, years before Bauche filed his OSHA complaints.<sup>47</sup> Bauche argues that the press release continues to harm his employment prospects as long as it remains available online.<sup>48</sup> But the act of blacklisting, if any, occurred when the press release was first published. The fact that Bauche allegedly continues to suffer its adverse effects years later does not keep his claim alive.<sup>49</sup>

Bauche also asserts that the DOJ "republished" the press release on February 1, 2022, within 180 days of his filing of his second OSHA complaint.<sup>50</sup> According to Bauche, DOJ added a notation to the top of the original press release stating: "UPDATE Pursuant to a motion by the government, the case against defendant John Bauche described in the news release below was dismissed by the

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<sup>45</sup> See *Xanthopoulos*, ARB No. 2022-0032, slip op. at 15 (rejecting blacklisting claim because "tenuous evidence" the alleged blacklister and the prospective employer were in contact "is not evidence that [alleged blacklister] was actively disparaging [complainant] to the other two or sharing information about [complainant's] protected activity with them.").

<sup>46</sup> Bauche asserts that the press release is the top Google search result for his name, and baldly speculates that potential employers have found this release and denied him employment as a result. *E.g.*, Complainant Bauche Response & Objection to Masimo Motion for Summary Decision (Comp. Response to Summary Decision) (*Bauche I*) at 68; Complainant Bauche Opposition to Masimo Motion for Summary Decision (Comp. Opp. to Summary Decision) (*Bauche II*) at 13-14. Yet, he offered no evidence that anyone actually searched his name, located the press release, and relied on the contents of the press release to choose not to employ or work with him. His unsubstantiated assertions about the alleged blacklisting do not suffice on summary judgment. See *Xanthopoulos*, ARB No. 2022-0032, slip op. at 13 (citation omitted).

<sup>47</sup> See 18 U.S.C. § 1514A(b)(2)(D); 29 C.F.R. § 1980.103(d).

<sup>48</sup> Comp. Opening Br. (*Bauche I*) at 15; Comp. Opening Br. (*Bauche II*) at 27.

<sup>49</sup> See *Mehrotra*, ARB No. 2022-0060, slip op. at 7; *Basic*, ARB No. 2009-0015, slip op. at 4-5; *Eubanks*, ARB No. 2008-0138, slip op. at 5-6.

<sup>50</sup> Comp. Opening Br. (*Bauche I*) at 15; Comp. Opening Br. (*Bauche II*) at 29.

court on November 30, 2021.”<sup>51</sup> Bauche offered no support for the notion that adding a minor update favorable to him renders his otherwise time-barred blacklisting claim timely. And with good reason: Bauche *requested* the update.<sup>52</sup> He cannot survive summary judgment by asserting that Masimo took an alleged adverse action by fulfilling his wishes.<sup>53</sup>

### 3. Failure to Rehire—January 2022

The ALJ determined that Bauche failed to offer evidence that his alleged protected activity contributed to Masimo’s decision not to rehire him for a position for which he applied in January 2022. On appeal, Bauche argues that the ALJ should have determined sufficient evidence existed to infer that his protected activity contributed to the non-selection, based on: (1) his self-assessment that he was well-qualified for the position; (2) the fact that Masimo did not notify him of his non-selection and allegedly later readvertised the position with a slight name change; and (3) the fact that the non-selection closely followed some of his alleged protected activity. We agree with the ALJ that this evidence is insufficient to survive Masimo’s motion for summary judgment.<sup>54</sup>

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<sup>51</sup> Exhibit (Ex.) 25 to Comp. Statement in Response (*Bauche II*).

<sup>52</sup> Comp. Opening Br. (*Bauche II*) at 39; Comp. Opp. to Summary Decision (*Bauche II*) at 11; Ex. 113 to Declaration of John Bauche in Opposition to Masimo’s Motion for Summary Decision (*Bauche I*).

<sup>53</sup> See *Nelson v. Pima Comm. Coll.*, 83 F.3d 1075, 1081 (9th Cir. 1996) (“mere allegation and speculation do not create a factual dispute” that supports denying summary judgment).

<sup>54</sup> Comp. Opening Brief (*Bauche I*) at 31-32; Comp. Opening Br. (*Bauche II*) at 50-51. Masimo’s decision not to rehire Bauche was only close in time to some of Bauche’s alleged protected activity. Bauche claims that his protected activity extends back over more than half a decade. The Ninth Circuit, in which this case arises, has determined that this type of significant gap makes it unreasonable to infer, from temporal proximity alone, that protected activity contributed to adverse employment action. *E.g.*, *Chang v. Straub Clinic & Hosp., Inc.*, 670 F. App’x 591, 592 (9th Cir. 2016) (finding three-year gap too long to support inference of causation); *Culver v. Qwest Commc’ns Corp.*, 306 F. App’x 403, 405-06 (9th Cir. 2009) (finding 10-month gap too long to support inference of causation); *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002) (finding 18-month gap too long to support inference of causation); see also *Brucker v. BNSF Ry. Co.*, ARB Nos. 2018-0067, -0068, ALJ No. 2013-FRS-00070, slip op. at 9 (ARB Nov. 5, 2020) (citation omitted) (“[T]he probative value of temporal proximity decreases as the time gap between protected activity and adverse action lengthens, particularly when other precipitating events have occurred closer to the time of the unfavorable action.”).

As the ALJ aptly summarized, Masimo had more than sufficient reason not to re-hire Bauche that had nothing to do with his alleged protected activity. Indeed, “Mr. Bauche’s own evidence in opposition to the pending Motion describes a relationship between Complainant and Respondent as one that by January 3, 2022, had been damaged beyond all reasonable hope of repair.”<sup>55</sup> By the time Bauche reapplied in January 2022, Masimo had accused him of embezzling, referred him for criminal charges, collected under the employee theft provision of its insurance policy, and sued him for his theft. Such behavior rarely leads to a job offer.<sup>56</sup>

Undaunted, Bauche still reapplied.<sup>57</sup> But the history between the parties logically precludes any reasonable factfinder from concluding -- based on nothing more than Bauche’s subjective assessment of the situation and the short lapse in time -- that Bauche’s alleged protected activity played any role in the decision.<sup>58</sup>

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<sup>55</sup> Dismissal Order (*Bauche II*) at 7.

<sup>56</sup> For his part, Bauche continues to accuse Masimo of stealing from him, harassing him, lying, and engaging in a multifaceted campaign to tag him as a scapegoat and publicly discredit and professionally destroy him. His allegations extend well beyond his whistleblower suit, and include, for example, allegations of nefarious connections between Masimo’s executives and political figures, including President Biden, and accusations that Masimo filed bogus lawsuits against competitors and employees. *E.g.*, Complainant Bauche Request for Judicial Notice of Masimo v Apple (Case 8-20-CV-00048) and USA v Bauche (Case 8-17-CR-00184-DOC) (*Bauche II*) at 2-5. For example, Bauche asked the Board to take judicial notice of the relationship between Masimo’s CEO and President Biden and members of the Biden family, asserting that Masimo’s CEO “clearly believes he can get away with anything given his close relationship to the President of the United States and his government connections that cross the line into the realm of public corruption.” *Id.* at 2. It’s not clear why Bauche believes re-employment with Masimo was a possibility under these conditions.

<sup>57</sup> Notably, Bauche filed an EEOC complaint against Masimo the same day he reapplied at the company.

<sup>58</sup> As noted, the ALJ also determined that the Pretrial Diversion Agreement “supports the notion that Masimo’s low opinion of Mr. Bauche’s trustworthiness . . . was based in fact.” Summary Decision Order (*Bauche II*) at 9. We agree with the ALJ. The Pretrial Diversion Agreement further supports the notion that the relationship between Bauche and Masimo was unsalvageable and further erodes Bauche’s argument that his non-selection was caused by his alleged protected activity. Bauche argues that the ALJ and the Board should not consider the Pretrial Diversion Agreement because it was inadmissible in these proceedings, was illegally obtained and used by Respondent, and was not in Respondent’s possession when Respondent made its decisions in this case and, therefore, could not have informed their decisions. *E.g.*, Complainant’s Petition for Review (*Bauche I*) at 3-5; Comp. Opening Br. (*Bauche I*) at 33-39; Complainant Bauche Request for Judicial Notice of Federal & State Laws Regarding Pretrial Diversion (*Bauche II*) at 1-2. For the reasons set

#### 4. Pretrial Diversion Agreement

Masimo offered Bauche’s Pretrial Diversion Agreement in support of its Motion for Summary Decision in *Bauche II*, asserting that the contents of the Agreement contradicted Bauche’s assertions that he was innocent of the criminal charges levied against him.<sup>59</sup> Bauche subsequently requested permission from the ALJ to amend his complaint in *Bauche I* to include a new retaliation claim regarding the Pretrial Diversion Agreement.

Bauche claimed that Masimo “illegal[ly]” obtained the Pretrial Diversion Agreement, and argued it “further support[ed] [his] claims regarding Masimo’s defamation, blacklisting, and public corruption connections within the FBI/USAO” and constituted another “retaliatory and adverse action[ ] against him in violation of SOX.”<sup>60</sup> The ALJ denied Bauche’s request to amend, stating that Bauche “cannot in good faith articulate a claim against Respondent for unlawful retaliation” based on the Pretrial Diversion Agreement.<sup>61</sup> Although the ALJ denied Bauche leave to amend, Bauche continues to assert on appeal that using the Pretrial Diversion Agreement constitutes an independent instance of retaliation.<sup>62</sup>

The ARB reviews an ALJ’s decision on a request to amend a complaint for an abuse of discretion.<sup>63</sup> Bauche has not attempted to argue the ALJ’s decision to deny his request for amendment was an abuse of discretion. Nor do we independently see such an abuse. Regardless, the mere use of the Pretrial Diversion Agreement in litigation does not appear to support a separate claim for retaliation independent of Bauche’s other claims.<sup>64</sup> Consequently, we will not disturb the ALJ’s decision.

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forth above, we would affirm the ALJ’s decisions, however, whether we considered the Pretrial Diversion Agreement or not.

<sup>59</sup> Supplemental Declaration of Robert J. Ellison in Support of Respondent Masimo Corporation’s Motion for Summary Decision (*Bauche II*) at 4-8.

<sup>60</sup> Complainant Bauche Motion for Extension of Time and Leave to Amend Complaint (*Bauche I*) at 1; Comp. Response to Summary Decision (*Bauche I*) at 82-96.

<sup>61</sup> Order Extending Time and Denying Leave to Amend (*Bauche I*) at 1.

<sup>62</sup> Comp. Opening Br. (*Bauche I*) at 31-39.

<sup>63</sup> *Carter v. BNSF Ry. Co.*, ARB No. 2021-0035, ALJ No. 2013-FRS-00082, slip op. at 14 (ARB Sept. 26, 2022) (citation omitted).

<sup>64</sup> Bauche fails to explain how using the Pretrial Diversion Agreement as evidence in this ongoing litigation is related to Masimo’s actions as it relates to his employment. See 18

## 5. Failure to Rehire—June 2022

For the first time on appeal, Bauche also refers to another position at Masimo for which he claims he was not selected, in June 2022.<sup>65</sup> The Board typically does not consider claims raised for the first time on appeal, and Bauche has offered no argument or justification for why the Board should consider the new claim here.<sup>66</sup>

## 6. Motion to Seal the Pretrial Diversion Agreement

Masimo requested the Board seal the Pretrial Diversion Agreement and portions of a declaration from Masimo’s counsel discussing it. Masimo received the Pretrial Diversion Agreement from the U.S. Attorney’s Office upon agreeing to maintain its confidentiality and stipulating it would seek to seal the document in any administrative proceedings.<sup>67</sup> Bauche has not objected to Masimo’s request to seal these materials.<sup>68</sup>

To seal judicial records from public view, “[a] court must identify compelling reasons supported by specific factual findings in order to outweigh the strong public policies favoring disclosure.”<sup>69</sup> It must “weigh relevant factors including the public interest in understanding the judicial process and whether disclosure of the

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U.S.C. § 1514A(a) (prohibiting employers from discriminating against employees “*in the terms and condition of employment*”) (emphasis added).

<sup>65</sup> Comp. Opening Br. (*Bauche I*) at 31.

<sup>66</sup> See *Smith v. Franciscan Physician Network*, ARB No. 2022-0065, ALJ No. 2020-ACA-00004, slip op. at 6 (ARB June 29, 2023) (citation omitted).

<sup>67</sup> Respondent Masimo Corporation’s Motion to Seal Portions of Exhibit H of the Concurrently Filed Appendix that Reference the Contents of Mr. Bauche’s Diversion Agreement (*Bauche I*) at 2; Respondent Masimo Corporation’s Motion to Seal Portions of Exhibit H of the Concurrently Filed Appendix that Reference the Contents of Mr. Bauche’s Diversion Agreement (*Bauche II*) at 2.

<sup>68</sup> Bauche did not object to the materials being sealed below or before the ARB, has vehemently insisted the Pretrial Diversion Agreement is confidential and should not have been disseminated in these and other proceedings, and moved to have the Pretrial Diversion Agreement sealed in the civil litigation. Bauche Request for Judicial Notice of Recent Events and Related Proceedings (*Bauche II*) at 2.

<sup>69</sup> *Furlong-Newberry v. Exotic Metals Forming Co.*, ARB No. 2022-0017, ALJ No. 2019-TSC-00001, slip op. at 26 (ARB Nov. 9, 2022) (internal quotations and citations omitted).

material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets.”<sup>70</sup>

The ALJ sealed the Pretrial Diversion Agreement and relevant declaration excerpts, explaining:

I find the reasons to seal these records outweighs the presumption of public access. This is because disclosure would frustrate the purpose of pre-trial diversion in criminal matters in the United States District Court. Pre-trial diversion allows persons charged with crimes to avoid a public criminal conviction under certain conditions. In this case, it appears the United States Attorney would not have produced the Diversion Agreement to Respondent without ensuring it would not be disclosed to the public. What is more, disclosure or republication of this, or any other, Diversion Agreement could impair the United States Attorney’s enforcement of the criminal laws of the United States and the administration of justice.<sup>[71]</sup>

The ALJ’s analysis is well-reasoned. We adopt it and seal the materials.<sup>72</sup>

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<sup>70</sup> *Id.* (internal quotations and citations omitted).

<sup>71</sup> Order Sealing Document from the Public Record (*Bauche I*) at 2; Order Sealing Document from the Public Record (*Bauche II*) at 2.

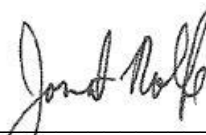
<sup>72</sup> During the pendency of this appeal, Bauche filed various requests for judicial notice with the Board, asking the Board to take notice of, among other things: (1) Masimo’s opposition to Bauche’s motion to seal the Pretrial Diversion Agreement in the civil litigation; (2) a letter from Politan Capital, purportedly a large shareholder in Masimo, to Masimo’s Board of Directors, and subsequent Board elections and revenue reports; (3) class action lawsuits filed against Masimo; (4) a stay entered in his criminal proceedings; (5) the criminal court’s response to Bauche’s objection to Masimo obtaining and using the Pretrial Diversion Agreement; (6) the Supreme Court decision in *Murray v. UBS Secs., LLC*, 144 S.Ct. 445 (2024); (7) federal and state laws regarding the confidentiality and use of information related to pretrial diversion programs; (8) the verdict in *Masimo v. Apple*, a case from the United States District Court for the Central District of California; and (9) alleged connections between the Biden family and Masimo’s CEO. We have reviewed Bauche’s materials; they do not impact our decision.

Bauche also filed a letter with the Board requesting the Board refer Masimo’s counsel to the California Bar for “misconduct” and “conduct an independent evaluation of these facts and render a decision on these clear instances of attorney misconduct . . .” The Board will not refer Masimo’s counsel to the California Bar in response to Bauche’s

**CONCLUSION**

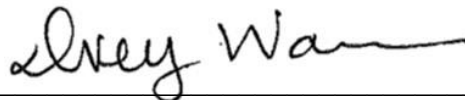
For the foregoing reasons, we **AFFIRM** the ALJ's dismissal of *Bauche I* and *II*; **DENY** Complainant's various motions and requests for judicial notice; and **GRANT** Masimo's motion to seal.<sup>73</sup>

**SO ORDERED.**



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**JONATHAN ROLFE**  
**Administrative Appeals Judge**



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**IVEY S. WARREN**  
**Administrative Appeals Judge**

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allegations of attorney "misconduct." Nothing Masimo's counsel has done would even remotely warrant such a referral.

Finally, in one of the many filings for judicial notice, Bauche requested the Board "rename" this case on remand to include several additional respondents. Because the Board affirms the ALJ's dismissal of these proceedings, we deny Bauche's request as moot.

<sup>73</sup> In any appeal of this Decision and Order, the appropriately named party is the Secretary, Department of Labor, not the Administrative Review Board.