No. 23-7798

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SHASHI MEHROTRA,

Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR,
GENERAL ELECTRIC CO., G.E. POWER, GENERAL ELECTRIC INTERNATIONAL, INC.,

Respondents.

On Petition for Review of the Final Decision and Order of the United States Department of Labor's Administrative Review Board

RESPONSE BRIEF OF THE ACTING SECRETARY OF LABOR

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STATEMENT OF JURISDICTION

This case arises under the employee protection provisions of the Sarbanes-Oxley Act ("SOX"), 18 U.S.C. § 1514A, and its implementing regulations, 29 C.F.R. § 1980. The Secretary of Labor ("Secretary") had jurisdiction over Shashi Mehrotra's ("Mehrotra") complaint filed with the Occupational Safety and Health Administration ("OSHA"), alleging that his former employer, General Electric Co. ("GE"),[1] retaliated against him. *See* 18 U.S.C. § 1514A(b)(1)(A). The Department of Labor's Administrative Review Board ("ARB") issued a Decision and Order ("D&O") on September 21, 2023, affirming an Administrative Law Judge's ("ALJ") dismissal of Mehrotra's untimely complaint. *See Mehrotra v. General Electric Co.*, ARB No. 2022-0060 (ARB Sept. 21, 2023), App. 0496. Mehrotra filed a timely petition for review with this Court on November 14, 2023. *See* 49 U.S.C. § 42121(b)(4)(A).[2] This Court has jurisdiction because Mehrotra lived and

[1] Mehrotra worked in the GE Power division at GE. Administrative Review Board Decision & Order ("D&O"), App. 0498. He alleges that after his termination, he applied unsuccessfully for jobs at GE, GE Power, and General Electric International. OSHA Findings and Complaint, App. 0001-07. The three respondents are collectively referred to as "GE." Documents in the Respondents' Joint Supplemental Appendix, filed in this Court by the GE Respondents on May 3, 2024, are cited in this Brief as "App." followed by a page number.

[2] SOX whistleblower actions are governed by the rules and procedures of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121(b). *See* 18 U.S.C. § 1514A(b)(2)(A).

worked in New York at the time of the alleged violation. OSHA Findings and Complaint, App. 0001-07.

STATEMENT OF THE ISSUES

(1) Whether the ARB correctly determined that Mehrotra's complaint was time-barred because he knew (or had reason to know) of his layoff and GE's failure to rehire him more than 180 days before he filed the complaint; and

(2) Whether the ARB acted within its discretion in holding that Mehrotra did not provide a sufficient basis for equitable estoppel of the limitations period.

STATEMENT OF THE CASE

A. Nature of the Case

The whistleblower protections of SOX "prohibit[] publicly traded companies from retaliating against employees who report what they reasonably believe to be instances of criminal fraud or securities law violations." *Murray v. UBS Securities, LLC*, 144 S. Ct. 445, 449 (2024) (citing 18 U.S.C. § 1514A). An individual who believes that they are a victim of such retaliation may file a complaint with OSHA. 18 U.S.C. § 1514A(b)(1)(A); Secretary's Order No. 08-2020, Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 85 Fed. Reg. 58,393 (Sept. 18, 2020) (delegating the Secretary's responsibilities to receive and investigate complaints under SOX to OSHA). Actions for relief must "be commenced not later than 180 days after the date on which the violation occurs, or after the date on which the employee became

aware of the violation," 18 U.S.C. § 1514A(b)(2)(D), subject to tolling "for reasons warranted by applicable case law." 29 C.F.R. § 1980.103(d). Based on an investigation, OSHA will then either dismiss the complaint or order relief. *See* 49 U.S.C. § 42121(b)(2)(A); 29 C.F.R. § 1980.105(a)(1).

Either party may "file any objections" to OSHA's order and obtain a de novo hearing before an ALJ. 29 C.F.R. § 1980.106(a); 29 C.F.R. § 1980.107(b). The ALJ's determination is subject to review by the ARB, which generally issues the final decision of the Secretary of Labor subject to the Secretary's discretionary review. 29 C.F.R. § 1980.110; Secretary's Order No. 01-2020, Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 85 Fed. Reg. 13,186 (Mar. 6, 2020). A party aggrieved by the Secretary's final order may obtain review in the courts of appeals for the circuits in which the alleged violation took place or in which the complainant resided. 49 U.S.C. § 42121(b)(4)(A).

B. Factual and Procedural History

Mehrotra started working for GE around 1998. Conference Call Transcript, App. 0369. In 2018, he reported a compliance violation that he alleges led to his eventual selection for termination and GE's refusal to rehire him. D&O, App. 0498. On April 29, 2019, he was notified via letter that on June 21, 2019, he would be laid off as part of a reduction in force. App. 0369. The letter stated: "This is to

confirm our recent conversation with regard to the reduction in force being undertaken in our organization and its effect upon your employment. I sincerely regret the necessity of informing you that as of the end of June 21, 2019, you will be placed on layoff." Ex. G, GE Motion to Dismiss with Exhibits ("GE MTD"), App. 0138. Indeed, on June 21, Mehrotra was laid off. App. 0369.

According to Mehrotra, after his layoff, his status at GE was retroactively changed to short-term disability leave, so he received full pay until the end of 2019. Complainant's ARB Brief, App. 0448. On January 1, 2020, GE placed him into a "Protected Service Period," which, according to Mehrotra, "postponed [his] break in service date" until June 30, 2020, allowing him "to accrue pension [benefits] based on length of service until" that date (or later, if he were to have gotten a new position at GE during that period). *Id*. at 0448, 0452. During this time, he applied for numerous jobs at GE, but did not get any of them. App. 0369.

Mehrotra initiated several internal complaints at GE regarding his layoff and the company's failure to rehire him. Petitioner's Brief ("Pet. Br.") at 4-5. On September 23, 2019, a GE investigator informed Mehrotra that an investigation in response to one of his complaints had determined that his layoff was not retaliatory; when GE included the investigation report in a submission to OSHA later on, Mehrotra learned that the report misrepresented his accomplishments as an employee, in his view. *See* Complainant's Letter to ALJ and Attachments, App.

0014. On March 16, 2020, having unsuccessfully applied for at least 50 jobs at GE, Mehrotra filed an internal complaint with the company alleging that the company was improperly failing to support him in finding a position within GE. App. 0369-70; Ex. J, GE MTD, App. 0149. The complaint was closed on March 26, 2020: a GE investigator determined that of the three rejections that Mehrotra complained about in particular, there was a more qualified candidate for two of the jobs and he did not satisfy the qualifications for the third. *Id*. The same day, Mehrotra emailed a GE official and explained that his goal in initiating the investigation had been to "expose the hardships and helplessness of a person after raising compliance issues," but the investigation had not "treated [him] fairly." Attachment 21 to Complainant's Response to GE Motion to Dismiss with Attachments, App. 0297; *see* App. 0372, 0377. On June 23, 2020, Mehrotra filed another complaint with GE "raising concerns he [was] being retaliated against in [the] job recruiting/selection process . . . due to his prior raising of compliance concerns," and using the term "blacklisting" for the first time. Ex. I, GE MTD, App. 0144; *see* App. 0384-85.

On December 17, 2020, Mehrotra filed a SOX whistleblower complaint with OSHA. App. 0370; OSHA Findings and Complaint, App. 0002. He alleged that GE fired him and prevented him from being rehired for "reporting a serious compliance violation by two senior GE managers." App. 0006. On January 6, 2022, OSHA dismissed his complaint as untimely filed. App. 0002.

1. Proceedings Before the ALJ

On February 2, 2022, Mehrotra objected to OSHA's dismissal and requested a hearing before the Office of Administrative Law Judges. ALJ Notice of Docketing, App. 0040. GE moved before the ALJ to dismiss the complaint as untimely filed. GE MTD, App. 0044. The ALJ held a hearing on the motion to dismiss via conference call on May 31, 2022, at which he determined that the complaint was untimely and that equitable relief from the requirement to timely file was inappropriate. First, the ALJ explained that because the OSHA complaint was filed on December 17, 2020, only claims that occurred after June 20, 2020, 180 days before December 17, could be timely. App. 0370. The ALJ determined that Mehrotra filed the complaint "almost a year" too late to encompass his layoff, based on the layoff date of June 21, 2019. *Id*. at 0370-71. For the refusal-to-rehire claim, the ALJ granted that "maybe even half a dozen" of the rejections "could fall within the statute of limitations." *Id*. at 0371. However, Mehrotra "knew or should have known that there was an issue" by March 2020, based on the number of rejected job applications. *Id*. at 0387. In addition, his March 16 "internal complaint"—explaining that he believed he was "being mistreated because [he'd] applied for 50 jobs" and "ha[d]n't received them"—showed that he could be "charged with knowledge" of GE's refusal to rehire at that point. *Id*. at 0371. Second, the ALJ explained that equitable relief might be appropriate if an

employer "encourages the employee not to file a complaint" and then, "in reliance on that, the employee waits and doesn't act," but that was not the situation in this case. *Id*. at 0375.

On August 9, 2022, the ALJ issued an Order Granting Respondent's Motion to Dismiss and Dismissing Claim ("Order"), incorporating the transcript of the May 31, 2022 hearing into the Order. App. 0416. The ALJ issued a Supplemental Order on August 11, 2022, amending his prior order to include a Notice of Appeal Rights. App. 0421-22.

2. Proceedings Before the ARB

Mehrotra timely petitioned for review by the ARB. D&O, App. 0499. On September 21, 2023, the ARB issued a Decision and Order affirming the ALJ's order. *Id*. at 0497-98. At the outset, the ARB noted that although the ALJ had titled his order an order on a motion to dismiss, he had considered evidence GE submitted with the motion to dismiss and hearing testimony, effectively converting the motion to dismiss into a motion for summary judgment. *Id*. at 0499. With regard to Mehrotra's claims, the ARB first determined that both Mehrotra's termination claim and his claim of blacklisting accrued more than 180 days before he filed a complaint with OSHA, so the complaint was time-barred. *Id*. at 0502-03. The ARB explained that "the limitations period begins to run from the date that a complainant learns of the employer's final decision." *Id*. at 0501. (citing *Delaware*

State College v. Ricks, 449 U.S. 250, 259 (1980)). Thus, Mehrotra had to file his complaint regarding his termination by October 26, 2019, 180 days after he was notified of the reduction in force on June 21, 2019, which he failed to do. *Id*. at 0502. The ARB affirmed the ALJ's determination that "it should have been apparent" to Mehrotra that GE had refused to rehire him by "March 2020": "While Mehrotra did not use the term 'blacklist' until a later date, the substance of his complaint with GE was one alleging that the company had refused to rehire him." *Id*. at 0503. Mehrotra's refusal-to-rehire claim was therefore untimely as well. Second, the ARB held that equitable estoppel was not warranted, because Mehrotra could not show that GE hid the fact of discrimination from him or tricked him into forgoing his claim. *Id*. at 0505-07.

SUMMARY OF ARGUMENT

Under SOX, Mehrotra was required to file his complaint "not later than 180 days after the date on which the violation occur[red], or after the date on which [he] became aware of the violation." 18 U.S.C. § 1514A(b)(2)(D). Under applicable case law based on *Ricks*, a claim under SOX accrues when an adverse employment "decision [is] made and communicated" to an employee, not when "one of the effects" of such a decision occurs. 449 U.S. at 257-58; *Coppinger-Martin v. Solis*, 627 F.3d 745, 749 (9th Cir. 2010) (applying this standard to SOX). As the ARB has explained: "It is not the date that the termination or adverse act is

felt or takes effect which starts the clock. Rather, it is the date that the employee has final, definitive, and unequivocal notice of the adverse action." *McManus v. Tetra Tech Constr. Inc*., ARB No. 2016-063, 2017 WL 9534726, at *2 (ARB Dec. 19, 2017). *See also Trivedi v. General Electric*, ARB No. 2022-0026, 2022 WL 18357960, at *5 (ARB Aug. 24, 2022) ("The statute of limitations begins to accrue at the time the Plaintiff knows or should have known of the harm suffered as a result of the employer's discriminatory [or retaliatory] conduct.") (quotation omitted) (alteration in original).

In this case, Mehrotra was notified that he would be laid off as part of a reduction in force on April 29, 2019. *See* Pet. Br. at 4. This was over 180 days before Mehrotra filed a SOX complaint with OSHA on December 17, 2020—in fact, it was over a year beforehand. Therefore, Mehrotra's claim of a retaliatory layoff is time-barred.

With regard to Mehrotra's failure-to-rehire claim, the ARB affirmed the ALJ's conclusion that "it was apparent to Mehrotra—or should have been apparent" that GE had decided not to rehire him by "March 2020." App. 0503. This determination was correct: by that point, he had already been rejected from 50 jobs, and the "substance of his [March 16] complaint" to GE was "that the company had refused to rehire him." *Id.* at 0503. Because March 16, 2020 was

over 180 days before Mehrotra filed his complaint with OSHA, this claim was untimely as well.

The ARB did not abuse its discretion in determining that there were no equitable grounds to excuse Mehrotra's untimely filing. Mehrotra did not establish that GE acted wrongfully to delay him from filing his complaint or that extraordinary circumstances preventing him from filing. App. 0504. Mehrotra argues that through pursuing complaints through OSHA and internal GE channels, he learned information that would have led him to file earlier, if he had known it. Specifically, he learned that his personnel file, in his view, did not reflect his accomplishments (including via charging that he had plagiarized from the internet), and that his former manager, who he previously believed to be solely responsible for scuttling his efforts to get rehired, had been uninvolved in his job applications. Even assuming this information was wrongfully withheld from Mehrotra, it had no effect on his ability to timely file. The limitations period began when he had reason to know of the adverse employment decisions. The fact that he subsequently gained more information about the circumstances of those adverse decisions which put them in a different light, in his view, had no effect on his responsibility to file his complaint on time—especially because he suspected that he was being retaliated against before he learned this information.

ARGUMENT

A. Standard of Review

Judicial review of the dismissal of a SOX whistleblower complaint is governed by the Administrative Procedure Act, 5 U.S.C. § 706(2). *See* 18 U.S.C. § 1514A(b)(2)(A); 49 U.S.C. § 42121(b)(4)(A). Under that "deferential standard of review," this Court "will uphold a decision by the ARB if it is not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' . . . or 'unsupported by substantial evidence.'" *Bechtel v. Admin. Rev. Bd.*, 710 F.3d 443, 445-46 (2d Cir. 2013) (quoting 5 U.S.C. § 706(2)(A) & (E)).

As the ARB explained, the ALJ in this matter determined this case on GE's motion to dismiss but considered evidence submitted with the motion, effectively converting the motion to dismiss into a motion for summary judgment. App. 0499. Thus, the ALJ and ARB effectively concluded that the case presented no genuine issue of material fact and, as a matter of law, Mehrotra's claims related to his layoff and GE's refusal to rehire him were untimely. The Court reviews the ARB's legal determinations de novo, *see Aleutian Capital Partners, LLC v. Scalia*, 975 F.3d 220, 229 (2d Cir. 2020), granting some deference to the ARB's interpretation of the statute it administers. *See Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 220 (2d Cir. 2014); *see also Northrop Grumman Sys. Corp. v. Admin. Rev. Bd.*, 927 F.3d 226, 232 (4th Cir. 2019). The Court reviews the ARB's denial

of Mehrotra's claim of equitable estoppel for abuse of discretion. *See Ahmed v. Holder*, 624 F.3d 150, 155 (2d Cir. 2010).

B. The ARB Correctly Concluded That Mehrotra's Complaint was Untimely

For limitations purposes, a violation of an anti-discrimination law such as SOX occurs "when the discriminatory decision has been both made and communicated to the complainant." *Coppinger-Martin*, 627 F.3d at 749 (citing 29 C.F.R. § 1980.103(d)). This rule was established in *Delaware State College v. Ricks*, in which the Supreme Court held that a college professor's Title VII claim arose when he was denied tenure, not when his employment ended a year later:

> "It appears that termination of employment at Delaware State is a delayed, but inevitable, consequence of the denial of tenure. . . . [T]he only alleged discrimination occurred—and the filing limitations periods therefore commenced—at the time the tenure decision was made and communicated to Ricks. That is so even though one of the *effects* of the denial of tenure—the eventual loss of a teaching position—did not occur until later."

449 U.S. 250, 257-58 (1980). *See, e.g.*, *Wu v. Good Samaritan Hosp. Med. Ctr.*, 815 F. App'x 575, 579 (2d Cir. 2020) (summary order) ("Although plaintiff's employment at the Hospital ended on August 19, 2015, she received her notice of termination on May 15, 2015, and her [Title VII] claims accrued on that date."); *Washington v. Cty. of Rockland*, 373 F.3d 310, 319 (2d Cir. 2004) ("As with all discrimination claims, plaintiffs' [race discrimination] claims accrued when they knew or should have known of the discriminatory action."); *see also Flaherty v.*

Metromail Corp., 235 F.3d 133, 137 (2d Cir. 2000). The federal courts and the ARB apply *Ricks* to SOX and other whistleblower claims. *See, e.g.*, *Kaufman v. Perez*, 745 F.3d 521, 529 (D.C. Cir. 2014) (explaining that alleged retaliatory actions "were not themselves actionable" because they were merely "consequences" of an earlier memorandum that announced changes to an employee's duties); *Rzepiennik v. Archstone-Smith, Inc*., 331 F. App'x 584, 589 (10th Cir. 2009) (summary order); *McManus v. Tetra Tech Constr. Inc.*, ARB No. 2016-063, 2017 WL 9534726, at *2 (ARB Dec. 19, 2017).

Moreover, it is discovery of the employer's decision to take an adverse employment action, not the reasons for the decision, that starts the limitations period. As the Ninth Circuit has explained, under SOX, "a plaintiff's claim accrues when the plaintiff learns of the 'actual injury,' i.e., an adverse employment action, and not when the plaintiff suspects a 'legal wrong,' i.e., that the employer acted with a discriminatory intent." *Coppinger-Martin*, 627 F.3d at 749 & n.1 (collecting cases from other circuits); *see also Cerbone v. Int'l Ladies' Garment Workers' Union*, 768 F.2d 45, 48–49 (2d Cir. 1985) (quoting *Miller v. Int'l Tel. & Tel. Corp.*, 755 F.2d 20, 24 (2d Cir. 1985)) (explaining, in an age discrimination case, that "ordinarily the applicable period starts to run on the employer's commission of the unlawful act and is not tolled 'pending the employee's realization that the conduct was discriminatory'"); *Martin v. Paragon Foods*, ARB No. 2022-0058,

2023 WL 4560920, at *5 n. 63 (ARB June 8, 2023) ("[T]he clock does not begin to tick when [complainant] learned of a possible motive for his termination, but rather when he received unequivocal notice of his termination.") (citation omitted).[3]

Under SOX, an employee must file her complaint "not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation." 18 U.S.C. § 1514A(b)(2)(D). Mehrotra filed his complaint with OSHA on December 17, 2020. App. 0503. Therefore, GE could be liable only for violations that occurred on or after June 20, 2020, 180 days prior to Mehrotra's filing date. Mehrotra's alleged violations fall short of that date.

1. Mehrotra's layoff claim accrued over a year before he filed

Mehrotra was notified on April 29, 2019 that he would be laid off on June 21, 2019. App. 0369. Following *Ricks*, the ARB correctly determined that the limitations period began to run on April 29, 2019, when he learned of the layoff. App. 0502. Mehrotra was therefore required to file his complaint by October 26, 2019, 180 days later. As he did not file until December 17, 2020, over a year late, his complaint was untimely.

[3] In the SOX context, intent or motive does not refer to an "animus-like 'retaliatory intent' requirement," but merely "the intent to take some adverse employment action against the whistleblowing employee 'because of' his protected whistleblowing activity." *Murray*, 144 S. Ct. at 453-54.

In his brief, Mehrotra argues that the ALJ erred in determining his termination date, because his Protected Services Period ended on June 30, 2020, within the limitations period for his complaint. Pet. Br. at 15-16. This question—whether "termination" should be considered the end of the Protected Services Period (when his GE pension benefits stopped accruing) or the end of active service for an employer—is irrelevant. As explained above, GE's alleged violation occurred when Mehrotra learned of the decision to terminate him, not when it took effect. *Ricks*, 449 U.S. at 257; *Coppinger-Martin*, 627 F.3d at 749; *Flaherty*, 235 F.3d at 137. Like his last day of work, the end of Mehrotra's Protected Services Period—even if it was extended by GE—was merely a "delayed, but inevitable, consequence" of GE's earlier decision to terminate him. *Ricks*, 449 U.S. at 257-58.

Mehrotra also argues that *Ricks* is inapposite because unlike the university in *Ricks*, GE continued to retaliate against him after he received his layoff notice. Pet. Br. at 24. Yet *Ricks* merely sets out the rule for determining when a claim accrues. The ARB correctly applied *Ricks* both to his layoff and, as explained below, to the alleged retaliatory action that followed his layoff notice—GE's alleged refusal to rehire him.

2. Mehrotra's refusal-to-rehire claim accrued on March 16, 2020

Mehrotra also alleges that GE refused to rehire him in retaliation for his protected activity.[4] This claim, too, is time barred. Mehrotra applied to numerous other jobs at GE—"as many as 70"—but was rejected from all of them. App. 0369. The ARB affirmed the ALJ's determination that Mehrotra was aware (or should have been aware) that he was being excluded from future jobs at GE by March 16, 2020 at the latest, when he filed an internal complaint with GE. App. 0503. As the limitations period begins when an employee learns of the adverse action, *Coppinger-Martin*, 627 F.3d at 749, the clock started by March 16 at the latest. Mehrotra did not file his complaint until December 17—276 days later. Thus, the claim is untimely.

The ALJ and ARB correctly determined that Mehrotra was on notice of his exclusion from future employment by March 16, 2020. As the ALJ explained, Mehrotra knew or should have known about the complained-of conduct by March 16, 2020 for two reasons. First, Mehrotra should have realized he was being

[4] In the decision under review, the ARB called this Mehrotra's "blacklisting" claim. In his brief, Mehrotra uses the term "blacklisting" to refer to GE officials' misrepresentations about his record as a GE employee. *See* Pet. Br. at 13, 27. "Blacklisting" typically refers to efforts by a third party (often a former employer) to bar a job applicant from working for potential employers. *See Loparex, LLC v. MPI Release Techs., LLC*, 964 N.E.2d 806, 811 (Ind. 2012) (discussing the history of state anti-blacklisting statutes). For clarity, this brief avoids the term, except in quotations from the record.

excluded from being rehired by that time because he had already applied for fifty jobs at GE—and done so after complaining that his initial layoff was retaliatory. *See* App. 0387 (explaining that after "at least 50" denials, "a reasonable person in Mr. Mehrotra's shoes knew or should have known that there was an issue"); *id*. at 0402 ("[Y]ou had made 50 applications by [March 16, 2020] and you hadn't received a job offer back. . . . [Y]ou clearly knew something was wrong."). Second, on March 16, 2020, Mehrotra made an "internal complaint to GE," through the corporate ombudsman, "about not getting a job." *Id*.; *see* App. 0148. That complaint was further evidence indicating that he believed "he was not being treated properly and being retaliated against because he had applied for these 50 jobs and he hadn't received them." App. 0380. Thus, as the ARB explained, "it was apparent to Mehrotra—or should have been apparent—that he was allegedly blacklisted for rehire at the time he felt there was reason to complain to GE about the company repeatedly not rehiring him, i.e., in March 2020." App. 0503.

Given these facts, the ARB's legal conclusion was a straightforward application of *Ricks*. After fifty unsuccessful applications and a complaint that he had not been rehired, Mehrotra "knew or should have known" that there was a bar to being rehired. *Washington*, 373 F.3d at 319. His knowledge (or imputed knowledge) started the limitations period, which expired before he filed his complaint. *Cf. Cohen v. City of New York*, 574 F. App'x 28, 29 (2d Cir. 2014)

(summary order) (explaining that an employment discrimination claim accrued when employee "knew or should have known" of the alleged "discriminatory acts") (citation omitted).

Contrary to Mehrotra's arguments, this holding is consistent with *Nat'l R. R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). In that case, the Supreme Court considered the "continuing violation" doctrine, under which "a court may review a claim involving a mix of timely and time-barred conduct as part of one violative pattern of activity." *Daly v. Citigroup Inc.*, 939 F.3d 415, 428 (2d Cir. 2019). The *Morgan* Court "rejected the continuing violation doctrine in the employment discrimination context when the alleged violation involves discrete acts, rather than an ongoing discriminatory policy." *Id.* at 428–29 (citing *Morgan*, 536 U.S. at 114-15). Instead, "[e]ach incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable" violation, giving rise to a separate limitations period. *Morgan*, 536 U.S. at 114.

In this case, assuming Mehrotra's allegations are true, the relevant discrete act was GE's decision not to rehire him. Each individual rejection was merely a delayed consequence of that decision. *Cf. Kaufman*, 745 F.3d at 529 (quoting *Ricks*, 449 U.S. at 257-58) ("[T]he ARB correctly identified these subsequent actions [altering an employee's duties] as 'delayed, but inevitable, consequence[s]' of the decision embodied in the [prior] memo, and thus not themselves

actionable."). Mehrotra contends that, following *Morgan*, the four rejections he received within the limitations period were timely. Pet. Br. at 20. Yet by the time he received those rejections, he already should have known that GE had decided not to rehire him—the alleged adverse employment decision. He cannot revive his claim by manufacturing a new "delayed, but inevitable, consequence" of GE's decision. *Ricks*, 449 U.S. at 257-58. In addition, because the violation was a discrete act, Mehrotra's citations to cases regarding the timeliness of claims of continuing violations are unavailing. *See* Pet. Br. at 21-23 (citing *Mandel v. M & Q Packaging Corp*, 706 F.3d 157, 166-170 (3d Cir. 2013)).

3. Other discrete actions did not restart the clock

Mehrotra argues that GE committed two other violations after June 20, 2020—a "sham investigation" into his layoff and "block[ing]" his complaint of corporate misconduct from reaching GE's board of directors—that constitute violations of SOX. Pet. Br. at 17-18. Neither of these alleged actions rises to the level of an adverse action under SOX or restarts the limitations period on his layoff and refusal to rehire claims.

GE's investigation was not itself an adverse action. The internal investigation into the layoff decision was a "method of collateral review of an employment decision," which the Supreme Court held in *Ricks* "does not toll the running of the limitations periods." *Ricks*, 449 U.S. at 261. It would obviate the

rule that an internal investigation into allegations of discrimination does not toll the limitations period if the investigation itself could be an adverse action that starts a new limitations period. *See also Francois v. New York City Dep't of Educ.*, No. 21-601, 2021 WL 4944458, at *2 (2d Cir. Oct. 25, 2021) (summary order) (citing *Morse v. Univ. of Vermont*, 973 F.2d 122, 125 (2d Cir. 1992)) ("[A]n administrative review of an alleged discriminatory decision is not itself a discriminatory act for purposes of the statute of limitations.").

With regard to Mehrotra's allegation that GE did not elevate his complaint to the board of directors, it is unclear what harm he alleges he suffered as a result of this action or how he believes this could be regarded as an adverse action in violation of SOX. And, in any event, any decision not to elevate his complaint to the board of directors would have been a discrete act and would not have extended the statute of limitations for his termination and refusal to hire claims. *See Morgan*, 536 U.S. at 114.

C. The ARB's Determination Not to Excuse Untimeliness Under Equitable Estoppel was Not an Abuse of Discretion

SOX's implementing regulations provide that "[t]he time for filing a [SOX whistleblower] complaint may be tolled for reasons warranted by applicable case law." 29 C.F.R. § 1980.103(d). The ARB tolls complaints according to its doctrines of "equitable tolling" and "equitable estoppel." *Martin*, 2023 WL 4560920 at *4. *Cf. Pearl v. City of Long Beach*, 296 F.3d 76, 81 (2d Cir. 2002)

(explaining that jurisdictions differ in their use of this terminology). Equitable tolling operates to extend the limitations period if a complainant has been prevented by extraordinary circumstances from filing the claim by the deadline, for example, by filing it in the wrong forum or via "excusable ignorance" of the claim. *Martin*, 2023 WL 4560920 at *4 (quotations and citations omitted). Equitable estoppel applies if a respondent has "induced" a complainant "to refrain from exercising his rights." *Id.*; *see Schwebel v. Crandall*, 967 F.3d 96, 102–03 (2d Cir. 2020) (quoting *Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 725 (2d Cir. 2001)) ("[E]quitable estoppel is properly invoked where the enforcement of the rights of one party would work an injustice upon the other party due to the latter's justifiable reliance upon the former's words or conduct."). In the decision below, the ARB explained that Mehrotra's arguments fell under equitable estoppel, not equitable tolling. App. 0504-05. The ARB found that equitable estoppel was not warranted. *Id.* Mehrotra challenges this determination on appeal. Pet. Br. at 24-25.

A complainant bears the burden to establish that equitable estoppel is warranted. *Martin*, 2023 WL 4560920 at *4. A complainant may be entitled to equitable estoppel if a respondent "prevent[s] the [complainant] from filing a timely complaint" via efforts "beyond the wrongdoing upon which the claim is grounded." *Id*. (quotations and citations omitted). "Equitable estoppel applies when

a respondent or defendant prevents a complainant from suing in time by, for example, promising not to plead the limitations defense or by presenting fabricated evidence to negate any basis for a claim." *Id.* (quotations and citations omitted). *Cf. Pearl*, 296 F.3d at 82 (quoting *Keating v. Carey*, 706 F.2d 377, 382 (2d Cir.1983)) (explaining that under equitable estoppel, "when the defendant fraudulently conceals the wrong, the time does not begin running until the plaintiff discovers, or by the exercise of reasonable diligence should have discovered, the cause of action").

Equitable estoppel is not warranted if the complainant knows about the underlying adverse employment action, but not that it was retaliatory. *See Martin*, 2023 WL 4560920, at *5 ("[D]eception as to motive supports equitable estoppel only if it conceals the very fact of discrimination; equitable estoppel is not warranted where an employee is aware of all of the facts constituting discriminatory treatment but lacks direct knowledge of the employer's subjective discriminatory purpose."). This is consistent with the legal principles governing the limitations period: a complainant's knowledge of motive is not required for a claim to accrue in the first place. *See Coppinger-Martin*, 627 F.3d at 749; *Cerbone*, 768 F.2d at 48–49; *see also Pearl*, 296 F.3d at 84 ("[W]e have made an important distinction between fraudulent concealment of the existence of a cause of action and fraudulent concealment of facts that, if known, would enhance a plaintiff's

ability to prevail as to a cause of action of which the plaintiff was previously aware.").

In this case, the ARB acted within its discretion in determining that equitable estoppel was not warranted. GE did not conceal that Mehrotra had been fired and subsequently not hired. Moreover, Mehrotra suspected retaliation from the beginning. Regarding his layoff, he consistently indicated in his representations to the ARB and to the ALJ that "at the time he was selected for the RIF, he knew his whistleblowing contributed to his selection." App. 0505. For example, Mehrotra wrote in his objections to OSHA's findings that he "filed an internal grievance with GE on June 21, 2019" because he "suspected" he "may not have been treated fairly in being selected for the RIF" due to his "whistleblower report." *Id*. at 0505 n. 55. Not only did Mehrotra know about the layoff, which was all that was required for the limitations period to run, but he suspected it was retaliatory, as well.

Regarding Mehrotra's refusal-to-rehire claim, the ARB explained that "the limitations period . . . began to run once Mehrotra realized there was something preventing him from getting rehired." App. 0506. Even though Mehrotra did not need to know the reason why he was not being hired in order for the limitations period to run, as with his termination claim, Mehrotra suspected retaliation from the start. The ARB explained that from the beginning of his administrative

litigation, Mehrotra asserted that "starting when he was terminated in 2019, he thought his former direct supervisor might provide negative feedback about his application[s] because of [his] whistleblowing." App. 0507. Mehrotra suspected that retaliation was preventing him from being rehired at GE, even if he thought that it just came from his former manager and not other officials at the company. Mehrotra knew what he needed to know to file a claim.

1. GE did not conceal facts from Mehrotra that affected his ability to timely file

On appeal, Mehrotra primarily argues that GE concealed facts from him that would have shown him that his layoff and GE's failure to rehire him were retaliatory, or that themselves constituted independent adverse employment actions. First, he learned from the OSHA investigation that GE officials, in his view, misrepresented his contributions as an employee in internal reports about his layoff and rejected job applications, including a "charge" that some of his claimed contributions to the company had been plagiarized. *See* Pet. Br. at 31-34; App. 0393-96. Second, Mehrotra learned via an internal GE investigation that his former manager was not involved in the decisions not to rehire him, showing him that other officials at the company might be responsible for his rejections, not just the manager. Pet. Br. at 37. In Mehrotra's view, these facts made it more likely that GE had retaliated against him, and he argues that he did not have a claim under SOX until he discovered them.

However, this argument relies on an invalid premise—that a complainant must discover that protected whistleblowing activity was the cause of an adverse employment action before the claim accrues for limitations purposes. As explained above, the limitations period commenced when Mehrotra learned of the adverse actions complained of—the decisions to terminate him and not to rehire him—not the reasons for those decisions. *See Coppinger-Martin*, 627 F.3d at 749; *Martin*, 2023 WL 4560920, at *5. Thus, even assuming GE concealed those facts from Mehrotra, GE would not be equitably estopped from asserting the limitations period as a defense.

Granted, there could be cases in which it would be an abuse of discretion for the ARB to refuse to extend its equitable doctrines where an employer concealed vital evidence from an employee. But this is not one of them. Here, nothing Mehrotra discovered had any effect on whether he could file a SOX claim. Mehrotra discovered GE's investigation reports on February 11, 2011, via GE's submissions to OSHA in response to his complaint. Pet. Br. at 5-6. Clearly, he did not need to know the facts contained in those reports to file his complaint: he filed the complaint *before* learning them. Likewise, Mehrotra certainly could have filed a SOX complaint when he thought that only his former manager was responsible for scuttling his job applications. That theory would have been sufficient under SOX: the contributing-factor causation standard is satisfied if a retaliatory manager

"poisoned" the ultimate decision-maker against a whistleblower. *Lockheed Martin Corp. v. Admin. Rev. Bd.*, 717 F.3d 1121, 1137 (10th Cir. 2013). *See, e.g.*, *Booker v. Exelon Generation Co., LLC*, ARB No. 2022-0049, 2023 WL 6799444, at *13 n. 181 (ARB Sept. 21, 2023) ("An employer can be liable on the cat's-paw theory if a non-decisionmaker's act proximately caused the adverse action."); *Rudolph v. Nat'l R.R. Passenger Corp*., ARB No. 11-037, 2013 WL 1385560 at *12 (ARB Mar. 29, 2013) ("[T]he complainant need not prove that the decision-maker responsible for the adverse action knew of the protected activity if it can be established that those advising the decision-maker knew."). Therefore, his discovery that his former manager was not involved in considering his job applications had no effect on his ability to timely file.

Mehrotra attempts to characterize the evidence he discovered in various ways—as adverse actions, "facts of discrimination," or "operative facts"—but none of these characterizations change the analysis. Mehrotra contends that the statements about his employment record in GE's reports of its internal investigations of his layoff and rejected job applications constitute adverse employment actions under SOX, because they misrepresented his accomplishments as an employee, including by indicating that he plagiarized. *See* Pet. Br. at 27-31. This is what Mehrotra terms "acts of blacklisting." *Id*. at 27. While it is true that under some circumstances, a "poor performance evaluation could very well deter a

reasonable worker from complaining" and thus constitute an adverse action, *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 92 (2d Cir. 2015), here, Mehrotra has simply attempted to conjure up new claims by repackaging his failure-to-rehire claim with evidence he obtained from the OSHA investigation. The crux of these alleged adverse actions is that GE officials circulated negative information about Mehrotra within GE that prevented him from being hired back. *See* Pet. Br. at 27 ("[T]his was done to create a false record . . . to repel a hiring manager considering a job offer."); *id*. at 30 ("These GE acts qualify as 'unfavorable personnel actions' because they were detrimental to Mehrotra's effort to get rehired."). This is merely his failure-to-rehire claim, under a "cat's-paw" theory that non-decisionmakers caused his job applications to be rejected by influencing decisionmakers. *Cf. Booker*, 2023 WL 6799444, at *13 n. 181. If Mehrotra's argument were accepted, then nearly every employee who had a failure-to-rehire claim would have an additional "blacklisting" claim, based on later discovery of whatever reason was given internally to deny her job application. Equitable estoppel is not warranted on this basis. *See Martin*, 2023 WL 4560920, at *4 (quotation omitted) (explaining that deception only supports equitable estoppel if it was "beyond the wrongdoing upon which the claim is grounded").

Similarly, Mehrotra attempts to characterize the facts he discovered though the OSHA investigation as "facts of discrimination" that warrant equitable

estoppel, rather than evidence of the "employer's subjective discriminatory purpose," which does not. Pet. Br. at 32-33 (quoting *Martin*, 2023 WL 4560920, at *5). This distinction falls flat. Discrimination, under SOX, refers to the adverse action itself, i.e., a firing or refusal to rehire. *See Murray*, 144 S. Ct. at 453-54 (explaining that the term "discriminate" in the statute "is meant to capture . . . adverse employment actions" and does not "impose[] an additional requirement that the whistleblower plaintiff prove the employer's 'retaliatory intent' or animus"). As explained above, it is clear from Mehrotra's briefing that the relevance of the facts he discovered, in his view, was that they were evidence that he was not rehired because of his protected whistleblowing activity. These were facts relevant to causation, not whether Mehrotra suffered an adverse action.

Mehrotra also contends that he lacked the "operative" or "evidentiary" facts that would have allowed him to plead a nonconclusory complaint until later in the investigation process, citing to caselaw about complaints in federal litigation. Pet. Br. at 34-35. Yet SOX complaints are not subject to the pleading standards of litigation in federal court. *Cf. Martin*, 2023 WL 4560920, at *5 ("[N]either the statute nor its implementing regulations indicate that a complainant must acquire evidence of retaliatory motive before proceeding with a complaint") (citation omitted); *Saporito v. Progress Energy Serv. Co.*, ARB No. 2011-040, 2011 WL 6114496, at *5 (ARB Nov. 17, 2011) ("We do not require the 'facial plausibility

standards' used in the federal courts."). They need only allege that they engaged in protected activity that contributed to an adverse action. 29 C.F.R. § 1980.104(e). Discovering the facts is what OSHA's investigation is for.

2. Mehrotra's reliance on GE's investigation process does not constitute a basis for equitable estoppel

Finally, Mehrotra argues that GE should be equitably estopped from asserting the limitations bar because he relied on statements from HR officials that the investigations did not surface evidence that he was retaliated against, as well as the integrity of GE's internal investigations. Pet. Br. at 40. However, equitable estoppel is only warranted based on a respondent's efforts "beyond the wrongdoing upon which the claim is grounded." *Martin*, 2023 WL 4560920 at *4 (quotation omitted). An employer is not required to admit fault or lose the protections of the limitations period. Mehrotra's reliance on GE's internal investigation process did not toll the limitations period either. *See Snyder v. Wyeth Pharmaceuticals*, ARB No. 2009-008, 2009 WL 6496735 at *6 (ARB Apr. 30, 2009) ("[C]ollateral procedures do not toll the limitations period"); *Morse*, 973 F.2d at 125 ("[A]n internal administrative review of [a defendant's] allegedly discriminatory decision has no effect on when the statute of limitations period begins to run.").

CONCLUSION

The ARB correctly affirmed the dismissal of Mehrotra's complaint because he failed to file his SOX complaint within the 180-day limitations period and because he did not demonstrate that equitable estoppel was merited. For this and all of the foregoing reasons, this Court should affirm the ARB's Decision and Order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of 2d Cir. Local R. 32.1(a)(4)(A) because it contains 7,130 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using Microsoft Word for Microsoft 365.

Date: May 8, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2024, I electronically filed the foregoing Response Brief of the Acting Secretary of Labor with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate ACMS system, and I served a copy of the Response Brief by United Parcel Service on the following party:

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I certify that all other participants in the case are registered ACMS users and service will be accomplished by the appellate ACMS system.

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