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In Yang, New York Court Dismisses Whistleblower Case Over Inability to Prove Causation

February 23, 2016

In September 2015, the 2nd Circuit Court of Appeals decided Berman v. Neo@Ogilvy LLC, holding that the Dodd-Frank Act protects whistleblowers who report securities violations to their employers. At the time *Berman* was decided, only the 5th Circuit had ruled on the question of whether a whistleblower who reported concerns to superiors within the company would be afforded the protections of the Dodd-Frank Act's anti-retaliation provision, and the 5th Circuit had reached the opposite conclusion. This made the *Berman* decision a welcome development for Dodd-Frank whistleblowers and their counsel.

Last month, in *Yang v. Navigators Group, Inc.*, the United States District Court for the Southern District of New York decided the case of Jennifer Yang, a whistleblower who was seeking the protections of the Dodd-Frank Act and the Sarbanes-Oxley Act after she had internally reported securities-related concerns to her superiors at Navigators Group. Though the district court applied the expanded definition of protected activity provided by *Berman*, Judge Nelson S. Roman granted Navigators motion for summary judgment, holding that Yang failed to establish a *prima facie* case of retaliation under both Sarbanes-Oxley and Dodd-Frank.

In this post, we'll take a look at *Yang* and what other financial whistleblowers can learn from this case.

Reviewing the Sarbanes-Oxley Whistleblower Claims

Plaintiff Jennifer Yang worked for Navigators Group as Chief Risk Officer from June 2012 to October 2012. On numerous occasions during her brief tenure at the company, Yang raised securities concerns to upper management. In October 2012, Navigators terminated Yang, citing performance issues. Yang contended that she was terminated in retaliation for raising her concerns.

Yang brought forth two claims under Sarbanes-Oxley. The court analyzed and dismissed each in turn.

First, Yang alleged that she had complained to management about "misrepresentations of 'market risk without proper disclosure,' which was 'illegal and constituted shareholder fraud.'" Yang proffered 14 documents that purported to show that she had raised her legal concerns with her superiors. The court found that though the documents did demonstrate that Yang had raised concerns about the adequacy of Navigators' risk models, her complaints did not explicitly or implicitly state that the subject of her concerns constituted fraud or other illegal activity. The court concluded that Yang "could not produce admissible evidence" to support her claim.

Second, Yang alleged "that there were misrepresentations made related to the nature and existence of Defendant's risk management protocols, and specifically that certain risk management committees failed to meet." In reviewing Yang's second Sarbanes-Oxley claim, the court found that Yang had produced sufficient evidence to show that she had engaged in protected activity. However, the court stated that Yang did not provide any evidence to support the contention that her internal complaints directly contributed to her termination two weeks later. The court highlighted that close temporal proximity between protected activity and an adverse personnel action is often insufficient, by itself, to establish that the protected activity caused the protected action. In Yang's case, the defendant stated that she had been terminated following a "terrible" presentation she gave after she engaged in protected activity. The court found that Yang had proffered no evidence to refute Navigators' stated rationale for the termination.

Reviewing the Dodd-Frank Whistleblower Claims

The court briefly addressed Yang's claims under the Dodd-Frank Act, only to conclude that the two deficiencies that were fatal to her Sarbanes-Oxley claims were also fatal to her claim under Dodd-Frank. In short, because the protected activity Yang was relying on to establish her Dodd-Frank claim was the same protected activity that formed the basis of her Sarbanes-Oxley claim, the court's determination that she had failed to introduce sufficient evidence of a causal connection between that activity and her termination was also fatal to her Dodd-Frank claim.

Yang demonstrates that though the 2nd Circuit has expanded the definition of protected activity under Dodd-Frank to include internal reporting, whistleblowers under Sarbanes-Oxley and Dodd-Frank still face significant barriers to recovery. The 2nd Circuit's *Berman* decision marked a significant step in the right direction by broadening the definition of protected activity for Dodd-Frank whistleblowers, but whistleblowers must still be prepared to provide compelling evidence demonstrating that their protected activity contributed to the adverse action taken against them.