

Sarbanes-Oxley Whistleblower Prevails on Appeal [VIDEO]

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In an unpublished decision in *Yang v. Navigators Grp., Inc.*, the Second Circuit recently clarified a SOX plaintiff's burden at the summary-judgment stage.

Takeaways for Whistleblowers

- A plaintiff's self-serving testimony alone is sufficient to preclude summary judgment by creating a genuine issue of material fact regarding protected activity.
- Where a plaintiff and his or her former employer provide contradictory explanations for the plaintiff's termination, the plaintiff has adequately placed causation into dispute so as to preclude summary judgment.

Background

Jennifer Yang was hired as chief risk officer for Navigators Group, Inc., in June, 2012, after working for more than five years at another large insurance company. At Navigators, Ms. Yang reported directly to the CFO.

The same year that Ms. Yang was hired, she says, she notified her superiors multiple times of misconduct that amounted to "fraud" or "shareholder fraud." First, Ms. Yang notified the CFO of certain misrepresentations that constituted "fraud" or "shareholder fraud." Ms. Yang later emailed the CEO because she was "so concerned" about untrue statements that were being made to Navigators' board of directors and rating agencies, which, she testified, constituted "shareholder fraud." Finally, Ms. Yang informed Navigators' general counsel that the company's SEC filings misrepresented its risk-management programs and risk subcommittees. Navigators claims that none of Ms. Yang's disclosures mentioned that the conduct was "illegal" or constituted "fraud" or "shareholder fraud."

Ms. Yang was fired in November, 2012, less than two weeks after her disclosure to the general counsel. Navigators claims that her termination resulted from a "disorganized and incoherent presentation" that she made to the company's senior executives in late October, 2012, as well as from general performance issues. Ms. Yang testified, however, that such issues were never brought

to her attention, and that she was told that she simply failed to mesh with “Navigators’ culture” and to take a “hands on” approach to her duties there.

Ms. Yang filed suit in the U.S. District Court for the Southern District of New York, claiming that Navigators violated section 806 of SOX by discharging her in retaliation for her protected disclosures. *Yang v. Navigators Grp., Inc.*, 155 F. Supp. 3d 327 (S.D.N.Y. 2016), *vacated*, 2016 WL 7436485. Navigators filed a motion for summary judgment, which the district court granted. Ms. Yang appealed, and the U.S. Court of Appeals for the Second Circuit vacated and remanded the district court’s grant of summary judgment

On appeal, Ms. Yang disputed two conclusions reached by the district court: first, that she did not engage in protected activity; and second, that she failed to demonstrate that her protected activity was a “contributing factor” in Navigators’ decision to fire her.

Sarbanes-Oxley Protected Whistleblowing

The district court found that Ms. Yang had not engaged in protected activity because she provided insufficient evidence, besides her “own deposition testimony and statements made in her own Declaration,” to demonstrate that she reported potential shareholder fraud to her superiors.

The Second Circuit, however, found that the district court’s exclusion of Ms. Yang’s testimonial evidence was inappropriate because that evidence was admissible. Since the district court was reviewing Navigators’ summary-judgment motion, moreover, “the testimony should have been viewed in the light most favorable to Yang.” The Second Circuit concluded that Ms. Yang’s testimony alone was sufficient to create a genuine issue of material fact regarding her protected activity, thereby precluding summary judgment.

Contributing-Factor Causation

The district court also found that Ms. Yang failed to establish that her protected conduct was a “contributing factor” in Navigators’ decision to fire her. The district court conceded that the temporal proximity of less than two weeks between Ms. Yang’s final disclosure and her firing raised an inference of contributing-factor causation. This inference was weakened, however, because of the “purportedly terrible presentation” that Ms. Yang gave during those two weeks. That presentation, the district court found, constituted a “legitimate intervening basis” for Ms. Yang’s termination, meaning that Ms. Yang had to provide evidence “linking her termination to her complaint.” The district court found that none of Ms. Yang’s evidence accomplished this, and so credited Navigators’ claim that it fired her for performance issues.

On appeal, the Second Circuit pointed out that summary judgment is precluded where there are “disputed facts as to the intervening basis.” Ms. Yang and her former supervisors provided conflicting explanations of her October, 2012, presentation and of the other reasons for her termination. While Navigators cited general performance issues, Ms. Yang testified that the reason she was given was her failure to fit into corporate culture and to take a hands-on approach to her job. At the summary-judgment stage, these disputes must be resolved in favor of Ms. Yang. Thus, the Second Circuit concluded, Ms. Yang “adequately placed these issues in dispute,” thereby precluding summary judgment on the issue of contributing-factor causation.

National Law Review, Volume VII, Number 16

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