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# [***Ulrich v. Moody's Corp.***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RCS-H6S1-F04K-J21T-00000-00&context=)

United States Court of Appeals for the Second Circuit

January 11, 2018, Decided

No. 17-1060-cv

**Reporter**

721 Fed. Appx. 17 \*; 2018 U.S. App. LEXIS 679 \*\*; 2018 WL 357539

PAUL C. ULRICH, Plaintiff-Appellant, v. MOODY'S CORPORATION, MOODY'S INVESTORS SERVICE, INC., Defendants-Appellees.

**Notice:** PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

**Prior History:** **[\*\*1]**Appeal from a judgment of the United States District Court for the Southern District of New York. (Vernon S. Broderick, Judge; Michael H. Dolinger, Magistrate Judge).

[*Ulrich v. Moody's Corp., 2017 U.S. Dist. LEXIS 50438 (S.D.N.Y., Mar. 31, 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N7D-XV71-F04F-03NP-00000-00&context=)

**Core Terms**

district court, summary judgment, amended complaint, fail to object, magistrate's, ***antitrust***, amend, report and recommendation, appellate review, de novo, pro se, recommendation, requirements, challenging, termination, defamation, parties', argues, malice

**Case Summary**

**Overview**

HOLDINGS: [1]-As to the [*Sarbanes-Oxley Act*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GHB1-NRF4-401B-00000-00&context=) and Dodd-Frank Act claims, the pro se employee unsuccessfully argued that his case was distinguishable from the Liu Meng-Lin decision; [2]-He was an overseas permanent resident working for a foreign subsidiary of the defendant, and the alleged wrongdoing and protected activity took place outside the United States; [3]-As to his defamation claim, the district court did not apply the incorrect definition of malice to overcome the qualified privilege; [4]-He waived any challenge to the dismissal of his breach of contract claim; [5]-He lacked ***antitrust*** standing; [6]-Nothing in the record supported the requisite causal connection between his age and either his low pay or eventual termination; [7]-The district court acted well within its discretion in denying leave to amend.

**Outcome**

Judgment affirmed.

**LexisNexis® Headnotes**

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

[***HN1***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RCS-H6S1-F04K-J21T-00000-00&context=&link=LNHNREFclscc1)[] **Standards of Review, De Novo Review**



An appellate court reviews de novo a district court's dismissal of a complaint pursuant to [*Fed. R. Civ. P. 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=), construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

[***HN2***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RCS-H6S1-F04K-J21T-00000-00&context=&link=LNHNREFclscc2)[] **Standards of Review, De Novo Review**



An appellate court reviews orders granting summary judgment de novo, assessing whether the district court properly concluded that no genuine dispute existed as to any material fact and the moving party was entitled to judgment as a matter of law.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

[***HN3***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RCS-H6S1-F04K-J21T-00000-00&context=&link=LNHNREFclscc3)[] **Standards of Review, Abuse of Discretion**



An appellate court reviews the denial of leave to amend a complaint for abuse of discretion.

Banking Law > ... > Banking & Finance > Guidelines & Best Practices > ***Regulatory*** Conversion

Labor & Employment Law > Discrimination > Retaliation > Statutory Application

[***HN4***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RCS-H6S1-F04K-J21T-00000-00&context=&link=LNHNREFclscc4)[] **Guidelines & Best Practices, Regulatory Conversion**



The anti-retaliation provision of the Dodd-Frank Act does not apply extraterritorially.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

[***HN5***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RCS-H6S1-F04K-J21T-00000-00&context=&link=LNHNREFclscc5)[] **Standards of Review, Abuse of Discretion**



There is no abuse of discretion in denying leave to amend where the plaintiff has amended complaint once, did not submit a proposed second amended complaint, and the defendant has already moved to dismiss.

**Counsel:** Paul C. Ulrich, APPELLANT, Pro se, Central, Hong Kong.

FOR APPELLEES: Kenneth J. Turnbull, Morgan, Lewis & Bockius LLP, New York, New York; Joseph A. Nuccio, Morgan, Lewis & Bockius LLP, Princeton, New Jersey.

**Judges:** PRESENT: JOHN M. WALKER, JR., REENA RAGGI, RAYMOND J. LOHIER, JR., Circuit Judges.

**Opinion**

**[\*18]** **SUMMARY ORDER**

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the March 31, 2017 judgment of the district court is AFFIRMED.

Plaintiff Paul Ulrich, proceeding *pro se*, appeals from the dismissal of so much of his complaint against his former employer, Moody's Corporation and Moody's Investor Services, Inc. (collectively, "Moody's"), as alleged violations of the Sarbanes-Oxley ("SOX"), Dodd-Frank, and Sherman ***Antitrust*** *Acts*, and defamation and breach of his employment contract; and from the award of summary judgment to Moody's on claims of discrimination and retaliation under the [*Age Discrimination in Employment Act ("ADEA")*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJ11-NRF4-4109-00000-00&context=). *See* [*Ulrich v. Moody's Corp., No. 13-CV-8 (VSB), 2014 U.S. Dist. LEXIS 138082, 2014 WL 4977562 (S.D.N.Y. Sept. 30, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5D83-MMH1-F04F-04S4-00000-00&context=) (granting dismissal in part); [*Ulrich v. Moody's Corp., No. 13-CV-8 (VSB), 2017 U.S. Dist. LEXIS 50438, 2017 WL 1232709 (S.D.N.Y. Mar. 31, 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N7D-XV71-F04F-03NP-00000-00&context=)**[\*\*2]** (awarding summary judgment on remaining claims). We assume the parties' familiarity with the facts and the record of prior proceedings, which we reference only as necessary to explain our decision to affirm.

[***HN1***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RCS-H6S1-F04K-J21T-00000-00&context=&link=clscc1)[] "We review *de novo* a district court's dismissal of a complaint pursuant to [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=), construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." [*Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:456H-9WR0-0038-X4H7-00000-00&context=). [***HN2***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RCS-H6S1-F04K-J21T-00000-00&context=&link=clscc2)[] We review orders granting summary judgment *de novo*, assessing whether the district court properly concluded that no genuine dispute existed as to any material fact and the moving party was entitled to judgment as a matter of law. *See* [*Sotomayor v. City of N.Y., 713 F.3d 163, 164 (2d Cir. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:585K-7DH1-F04K-J0NW-00000-00&context=). [***HN3***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RCS-H6S1-F04K-J21T-00000-00&context=&link=clscc3)[] We review the denial of leave to amend a complaint for abuse of discretion. *See* [*Anderson News,* ***[\*19]*** *L.L.C. v. Am. Media, Inc., 680 F.3d 162, 185 (2d Cir. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:55B2-3Y71-F04K-J0RP-00000-00&context=).



Upon independent review of the record, and for the reasons stated in the magistrate judge's March 31, 2014 Report and Recommendation ("R&R"), and the district court's September 30, 2014 and March 31, 2017 orders, we conclude that the district court properly ordered dismissal and summary judgment.

In challenging dismissal of his SOX and Dodd-Frank claims, Ulrich argues that his case is distinguishable from [*Liu Meng-Lin v. Siemens AG, 763 F.3d 175, 183 (2d Cir. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5CX2-YDY1-F04K-J00G-00000-00&context=) (holding**[\*\*3]** that [***HN4***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RCS-H6S1-F04K-J21T-00000-00&context=&link=clscc4)[] anti-retaliation provision of Dodd-Frank does not apply extraterritorially). We are not persuaded because, although Ulrich, a United States citizen who sometimes interacted with Moody's United States managers, did allege more connection with the United States than was evident in *Liu*, he was nevertheless an overseas permanent resident working for a foreign subsidiary of Moody's, and the alleged wrongdoing and protected activity took place outside the United States. In these circumstances, [*Liu*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5CX2-YDY1-F04K-J00G-00000-00&context=) compelled dismissal.



As to defamation, Ulrich argues that the district court applied the incorrect definition of malice to overcome the qualified privilege. He is wrong. *See* [*Ulrich v. Moody's Corp., 2014 U.S. Dist. LEXIS 138082, 2014 WL 4977562, at \*9*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5D83-MMH1-F04F-04S4-00000-00&context=) (stating that under Hong Kong law, malice requires plaintiff to show that "statements were intended to injure him, *or* that the speaker lacked an honest belief in the truth of the statement" (emphasis added)). Moreover, contrary to Ulrich's assertions, the record does not support his contention that statements made in his performance reviews were knowingly false. As for his breach of contract claims, Ulrich waived any challenge to dismissal by failing to object, despite appropriate warnings, to the R&R's recommendation**[\*\*4]** that they be dismissed based on Ulrich's status as an at-will employee under New York law. *Cf.* [*Small v. Sec'y of Health & Human Servs., 892 F.2d 15, 16 (2d Cir. 1989)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8TC0-003B-53Y0-00000-00&context=) ("[A] *pro se* party's failure to object to a magistrate's report and recommendation . . . does not operate as a waiver of the right to appellate review of the district court's adoption of the magistrate's recommendation unless the magistrate's report explicitly states that failure to object . . . will preclude appellate review."). Finally, Ulrich's *Sherman Act* claims were properly dismissed for lack of ***antitrust*** standing. *See* [*Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C., 711 F.3d 68, 76-81 (2d Cir. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:57RN-1YH1-F04K-J05H-00000-00&context=) (discussing requirements for ***antitrust*** injury).

In challenging summary judgment on his [*ADEA*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJ11-NRF4-4109-00000-00&context=) claims, Ulrich faults the district court's presentation of the facts. On our own review, we identify no error in the district court's careful and fair recitation of the evidence presented on summary judgment. Nothing in the record supports the requisite causal connection between Ulrich's age and either his low pay or eventual termination. *See* [*Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 180, 129 S. Ct. 2343, 174 L. Ed. 2d 119 (2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4WJH-T0S0-TXFX-121B-00000-00&context=); [*Gorzynski v. JetBlue Airways, Corp., 596 F.3d 93, 106, 111 (2d Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XV5-85M0-YB0V-D059-00000-00&context=). Further lacking is any evidence admitting a finding that Moody's reliance on well-documented negative feedback about Ulrich's job performance and insubordination was a pretext for retaliatory suspension and termination. *See, e.g.,* [*Schnabel v. Abramson, 232 F.3d 83, 87-88 (2d Cir. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:41M9-S2K0-0038-X1GS-00000-00&context=).

Finally,**[\*\*5]** the district court acted well within its discretion in denying leave to amend. Ulrich had already been afforded opportunity to amend—and did so in response to Moody's first motion to dismiss. Nothing suggests further amendment would cure the deficiencies in Ulrich's amended complaint. *See* [*Yerdon v. Henry,* ***[\*20]*** *91 F.3d 370, 378 (2d Cir. 1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-1F50-006F-M140-00000-00&context=) (identifying [***HN5***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RCS-H6S1-F04K-J21T-00000-00&context=&link=clscc5)[] no abuse of discretion where plaintiff had amended complaint once and did not submit proposed second amended complaint, and defendants had already moved to dismiss).



We have considered Ulrich's remaining arguments and conclude that they are without merit. Accordingly, we AFFIRM the judgment of the district court.

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