

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Name of the Claimant/Counter-Respondent
Cathy A. Shankle

Case Number: 01-01054

Name of the Respondent/Counter-Claimant
UMB Bank/Scout Brokerage Services, Inc

Hearing Site: St. Louis, Missouri

REPRESENTATION OF PARTIES

Claimant/Counter-Respondent Cathy A. Shankle ("Shankle") was represented by Clyde E. Craig, Esq., located in St. Louis, Missouri.

Respondent/Counter-Claimant UMB Bank/Scout Brokerage Services, Inc. ("UMB") was represented by Mary Beth Ortals, Esq. of the firm of Greensfelder, Hemker & Gale, P.C., located in St. Louis, Missouri.

CASE INFORMATION

Statement of Claim filed: March 2, 2001.

Claimant signed the Uniform Submission Agreement: February 21, 2001.

Statement of Answer and Counterclaim filed by Respondent on or about: May 1, 2001.

Respondent signed the Uniform Submission Agreement: April 23, 2001.

Amended Statement of Answer and Counterclaim filed by Respondent: November 7, 2001.

Claimant's Reply to the Amended Counterclaim filed: November 12, 2001.

CASE SUMMARY

On September 2, 1997, Cathy A. Shankle applied for a position as an investment officer for UMB Bank/Scout Brokerage Services, Inc. Shankle was interviewed four times over a period of a month with various personnel of Respondents. Such interviews included two meetings with her future supervisor, Drew Ellis, Senior Vice President and Regional Sales Manager of Scout's eastern region ("Ellis"). Shankle, who had been a registered representative ("RR") with two other financial institutions, accepted an offer of employment. Among the benefits that she accepted were:

1. A 50 million dollar book of business (approximate) which had been under the stewardship of Ellis.
2. The standard UMB Bank/Scout Brokerage Services Investment Representative

Compensation Plan.

On September 17, 1997, Shankle signed an Employment Agreement to be a RR for UMB.

After her hire, Respondent discovered that Shankle had misrepresented her level of education, both on her employment application and resume (stating that she possessed a degree when in fact she had not received a degree). As time went on, it was apparent that Shankle would not have a sterling employment record with Respondent. In Shankle's first year of employment she was reprimanded for not disclosing a commission load and for not being in her office during office hours. During the next year, Shankle was reprimanded for failure to execute a trade, failure to open a new account, failure to return phone calls, taking actions that were discretionary in non-discretionary accounts and depositing money in the wrong customer account.

On December 21, 1999, two trade tickets ordering distributions from two separate clients' IRAs were faxed from Ms. Shankle's office to UMB.

Soon thereafter UMB received a phone call from one of the clients, Doris Obermeyer. Obermeyer complained that she received a distribution from her IRA that she had not authorized. UMB subsequently examined the second trade that was received on the same fax. That trade was also found to be unauthorized.

After a contentious meeting with Claimant, Ellis terminated Shankle's employment on December 29, 1999.

UMB participated in the Medallion Signature Guaranty Program, which provides for the guarantee of investors' signatures. In its investigation of Shankle, UMB determined that the second customer's IRA Distribution form contained a forged signature. Subsequent to Shankle's discharge, UMB determined that another client's signature was forged.

UMB's method of guaranteeing its client's signature appeared to be that it simply accepted any document with a client's signature as long as it came from a broker's office. No representative of UMB physically observed the client signing.

On January 12, 2002, UMB Bank/Scout Brokerage Services, Inc. filed a Form U-5 with the NASD. UMB was required to explain the nature of its internal review of Claimant because it had indicated in paragraph 15 of the U-5 that it "is or at termination was, [investigating] the individual under internal review for fraud or wrongful taking of property or violating investment related statutes, regulations, rules or industry standards of conduct."

In its explanation, UMB asserted:

Received calls from customers that trades were not being executed per their instructions. Also customers advised that financial consultant was not returning phone calls. Review revealed 3 trades were placed liquidating partial (sic) IRA

positions. Two IRA distribution forms appeared to not contain genuine customer signatures. Confirmed with customers that instructions were not given to....

Around this time, Shankle, desperate to find out more information concerning the U-5 and the reasons for her termination, phoned UMB's Senior Director of Compliance, Jeffrey Maxwell ("Maxwell"). A recording of said conversation was accepted into evidence. At no time during this phone conversation and at no other time did Shankle assert that her termination was directly or indirectly due to her gender.

On June 29 2000 Scout received a Notice of Charge of Discrimination from the EEOC. Attached thereto is Shankle's Charge of Discrimination executed June 26, 2000, alleging inter alia:

1. Women do not receive the better promotions as do men
2. Men receive guaranteed commissions for larger amounts and longer periods of time than women
3. Women do not receive the same or similar resources or management support as do men
4. Accounts were taken from women and given to men without reason
5. Men were evaluated much less harshly than women
6. I was replaced by a man. So far all the women who have left the company in the last year have been replaced by men
7. I believe my reputation was damaged as well when the company filed only on the word of my supervisor a claim with the National Association of Securities Dealers against my license. The charged (sic) was unfounded.

On February 22, 2001, Shankle filed her statement of Claim with the NASD alleging that she was subjected to discrimination by Respondent based on her gender and retaliation in violation of Title VII of the Civil Rights Act of 1964 and the Missouri Human Rights Act, and defamation of character on the Form U-5.

On May 1, 2001, Respondent UMB Bank/Scout Brokerage Services, Inc. answered Shankle's Statement of Claim and filed a Counterclaim against Shankle. Respondent also asserted the following affirmative defenses:

1. Claimant has failed to state a claim upon which relief can be granted;
2. Respondent's actions were done for legitimate, non-discriminatory reasons and, therefore, are not actionable;
3. Respondent's actions were proper pursuant to its own policies, NASD rules and regulations and the law and, therefore, are not actionable;
4. Respondent terminated Claimant based on her failure to perform her job duties in a satisfactory manner and, therefore, discharge was justified;
5. Each allegedly defamatory statement is true and, thus, absolutely privileged under the First and Fourteenth Amendments to the United States Constitution;
6. Each allegedly defamatory statement is otherwise absolutely privileged;

7. Each allegedly defamatory statement is qualifiedly privileged, and such statements were made in good faith;
8. Claimant authorized Respondent's communications with the NASD and released Respondent from any liability related to such communications and, therefore, has waived and is estopped from any claim with respect to those communications;
9. Claimant's claims are time-barred;
10. Claimant failed to exhaust her administrative remedies;
11. Claimant failed to mitigate her damages; and
12. Claimant's damages are limited because Respondent learned additional bases which would have provided legitimate, non-discriminatory reasons for terminating Claimant after her discharge, and Respondent would have terminated her in any event had it known about the additional instances of wrongdoing.

In its Counterclaim, Respondent contended that Shankle sold \$50,000.00 worth of a mutual fund and purchased an annuity incurring a significant tax cost. UMB settled that claim with the aggrieved customer for \$7,000.00. In addition, Respondent asserted that another customer complained about a \$4,000.00 check, which had been given to Shankle to open two IRAs. The transaction never occurred, the check was misplaced, and UMB had to settle that claim with the aggrieved customers for \$1,827.00. Thus, Respondent sought to recover both the \$7,000.00 and the \$1,827.00.

RELIEF REQUESTED

Claimant/Counter-Respondent Shankle requested:

Compensatory Damages	Determined by arbitrator.
Punitive Damages	Determined by arbitrator.
Interest	Determined by arbitrator.
Attorneys' Fees	Determined by arbitrator.
Other Costs	Determined by arbitrator.
Other Monetary/Non-Monetary Relief if any:	Reinstatement.

Shankle asserted that total damages were approximately \$350,000.00.

UMB requested that the Statement of Claim be dismissed in its entirety and that it be awarded costs and expenses, including attorneys' fees for defending the claim. In addition, UMB requested compensatory damages of \$8,827.00, plus costs and expenses, including attorneys' fees, on its counterclaim.

Shankle requested judgment in her favor on the claims made in the counterclaim, plus costs and attorneys' fees incurred in defense of the counterclaim.

OTHER ISSUES CONSIDERED AND DECIDED

Pursuant to Rule 10212[c] and a stipulation executed by the parties on or about April 25, 2001, this matter was heard by a single public arbitrator.

Arbitrator Leah M. Balk, Esq. finds as follows:

OVERVIEW

Claimant contends that she was discriminated against on account of her gender. She claims she received disparate treatment relative to male Scout employees. She claims she was discriminated against in terms of:

- a. her wages;
- b. promotions;
- c. facilities, support and privileges;
- d. assignment and non-assignment of customer accounts; and
- e. her termination of employment.

Claimant also alleges defamation of character by virtue of the allegations made in the U-5 Scout filed subsequent to her termination.

THE LAW

In order for Claimant to prevail, she must first establish a prima facie case of discrimination. If she does so, Respondents must articulate a legitimate non-discriminatory reason for their actions. The Claimant then must prove that the employer's articulated reasons are pretextual. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973).

In order for Claimant to clear her first hurdle she must show:

1. she is a member of a protected class;
2. she was subjected to adverse employment action;
3. her employer treated similarly situated male employees more favorably; and
4. she was qualified to do the job.

1. Did Claimant meet her burden of proof with regard to her allegations

Wage Discrimination:

Claimant alleged during the interview process that she asked for a guaranteed commission in excess of what was provided for under the standard Scout Brokerage Services Investment Representative Compensation Plan. She contends that Ellis responded, "we never have and we never will." At the conclusion of the interview process, Claimant accepted the standard salary/commission structure. To support her position that women did not get guaranteed commissions in excess of those provided for under the Compensation Plan, and men did, Claimant obtained anecdotal information regarding the other RR's from various sources. Claimant introduced evidence regarding the other RRs in the form of Claimant's Exhibit 29. Exhibit 29 reveals that of the six female RRs in the office, 4 had no promise of guaranteed

commissions, one female employee had guaranteed commissions and one female had a forgivable draw. Thus $1/3^{\text{rd}}$ of the females had arrangements that deviated from the standard compensation plan.

Based on somewhat conflicting testimony, giving Claimant the benefit of the doubt, about 15 men had some deviation from the standard commission pay structure and nine men did not. Thus $3/8$ of the men had no deviation and $5/8$ did.

The picture is somewhat muddled by the fact that Claimant in fact did not receive the standard pay structure. Through inertia or clerical oversight, Claimant received the generous \$24,000 annualized guaranteed commission for 18 months instead of three, thus earning her an additional \$9,000.00.

Nevertheless, Claimant has made a prima facie case that there is disparate treatment between the pay structure male RRs receive compared to female RRs.

Promotions:

Claimant asserts that men were promoted disproportionately more often than women. This assertion depends on the use of a pool of employees that includes investment banking employees and employees working in customer and broker support, such as clerks and compliance personnel. The only relevant pool to consider is the pool of employees similarly situated to Claimant, that is, RRs working in retail sales.

Claimant complained that she could not get a clear answer from Ellis concerning the criteria that would be applied by Respondents in making promotion decisions. She claimed other women worked for years without promotion while men were frequently promoted. Again relying on Claimant's Exhibit 29 and her testimony, it appears that the ratio of men promoted is close to the ratio of women promoted ($2/3$ in each case). Thus Claimant has failed to make a prima facie case of disparate treatment with regard to promotions.

Unequal Facilities, Support and Privileges:

Claimant introduced no concrete evidence supporting her claim that her facilities (meaning the physical structure and amenities of her office) differed materially from male brokers. That claim is denied.

Claimant did testify at length concerning the lack of up-to-date, functioning computer equipment. Claimant claimed that her office desktop computer would only work sporadically. She claims at one point she went three months without her computer. She claims her printer was inadequate and that an adequate printer was not provided until May of 1998. Claimant claims she did not have access to the Internet until March or April of 1998. Claimant explained that without the Internet, she could not access her client's accounts. She also asserted that only the male brokers in the office obtained Prosper and Blueprint, software that enabled a broker to access their client's accounts and perform asset allocation analyses. Claimant has made a prima facie case of disparate treatment with respect to technical support.

Claimant also asserts that only the male brokers had sales assistants and female brokers did not. However, Claimant always had a sales assistant, except for a period of time after she fired her sales assistant Tracy Wetteroff. A review of Claimant's testimony and the testimony of other witnesses during her case in chief does not support the proposition that male RRs had sales assistance and female RRs did not. Claimant has failed to make a prima facie case of disparate treatment with respect to sales assistance.

Assignment and Non-Assignment of Customer Accounts:

Claimant testified that when she was hired, she was to receive Ellis's customer accounts. She learned that Ellis chose to retain a dozen or so accounts for himself. Claimant contended that those accounts were high net worth individuals and that she only received the smaller accounts for herself. Claimant also testified that she had procured a new customer account that was for a high net worth individual but that she was not permitted to keep that customer for herself. Claimant also testified that other female brokers had had high net worth clients removed from their care. Certainly if Respondents are systematically depriving female brokers access to high net worth individuals, this could be construed as a conspiracy or at least a concerted effort to keep female brokers from achieving the kind of sales figures they needed to advance. Reaching certain sales levels is a prerequisite to obtaining sales assistants and obtaining valuable software and is a criterion Respondents evaluate when considering promotions. Claimant has made a prima facie case of disparate treatment with respect to account assignments.

Claimant's termination:

Claimant claims that the employment of male RRs was not terminated for offenses of the same severity as those leading up to the termination of Claimant's employment.

Claimant produced Rodney Chapple who testified that he had been a vice president for Respondents during his tenure and that he inadvertently sold 2000 more shares than a client of his possessed, resulting in his client having a short position of 2000 shares. Mr. Chapple characterized this botched transaction as a trade error. Mr. Chapple was not disciplined, although he was financially charged for the error.

Claimant produced Ellis who testified that

“there were a number of customer service issues, other job performance issues, such as returning customer phone calls, executing orders on a timely basis. Triggering events which led her to her termination were unauthorized transactions and forms which we believe to have signatures which were not genuine.”

For a point of comparison Claimant introduced several documents concerning a former registered representative of Respondents, Michael McGavran. A memorandum was introduced showing that McGavran entered into a unsolicited trade without the appropriate letter of nonsolicitation on file. Additionally, a mutual fund not on Scout's recommended list was sold as solicited. McGavran's U-5 did not indicate that McGavran was under internal review for fraud or wrongful taking of property. The reasons given for McGavran's permitted resignation were “administrative

errors including but not limited to: - missing paperwork/documents needed to complete file - lack of follow up on referrals/leads - punctuality - failure to follow up on customer's instructions for money movement."

Claimant asserts that the two trades Respondent characterizes as unauthorized were in fact authorized, and that the termination of her employment therefore can only be viewed as motivated by gender discrimination. In support of her position that the trades were authorized, she produced the two customers for whom the alleged transactions occurred.

Claimant first produced Joseph Devine, the customer with an alleged forged signature authorizing an IRA Distribution. However, Mr. Devine denied that he authorized a second distribution for tax year 1999. He denied signing the distribution form used to execute the trade and stated that the signature thereon was not his. He confirmed the veracity of the affidavit he signed indicating that the selling of \$4,000 of Kemper-Dreman High Return fund was unauthorized.

Claimant then produced Doris Obermeyer in support of her position that the IRA distribution that occurred in her account was authorized. However, Ms. Obermeyer testified that the transaction was unauthorized. In fact, a letter was produced that Claimant wrote to the NASD explaining the circumstances surrounding the \$6,900 distribution in which she states "I placed the trade for \$6,900 so that Doris would be able to take her remaining \$6,900 RMD in 1999." Ms. Obermeyer flatly denied the veracity of this statement as well as virtually every other statement contained in that letter to the NASD.

Claimant has failed to make a prima facie case of gender discrimination with respect to the termination of her employment. The other instance of broker misconduct that resulted in a resignation is less severe than the two unauthorized trades placed in Claimant's customers' accounts. Mr. Chapple was produced and testified that he accidentally sold 2,000 more shares than the client possessed. However, Chapple owned up to his mistake and the mistake was not as grievous as knowingly making unauthorized distributions from customers' IRA accounts. Claimant's mischaracterization of the circumstances surrounding the distribution in Ms. Obermeyer's account casts doubt on the credibility of her testimony.

2. Did Respondent offer legitimate non-discriminatory explanations for the challenged conduct and did Claimant show these explanations to be pretextual?

Wage Discrimination (Variances in standard commission schedule):

There appears to be a slight advantage to the male registered representatives when it comes to those who were able to negotiate a variance from the standard commission structure. However, upon closer examination, many brokers who received a guaranteed commission in excess of the standard structure were working in territories without an established client base. For example, Mr. Chappell, who had previously worked for Key Investments, received a guarantee plus a percent of commissions. However, the president of Scout, recognizing that Chappell had been making between five and six thousand per month at Key offered him the guarantee because

Chappell would be assuming a position that had been vacant. In fact most of the RRs in the western territories received better up front payouts because these were not established territories. This has to be contrasted with the Claimant who inherited a fifty million-dollar book of business. In addition she knew she was bringing over her own book of business. The situations are not comparable. The only other pattern that is discernable is that employees who start out on the bank side of the business, do not get a variance in the standard pay structure when they switch to the brokerage side of the business. In fact, Respondents' most prolific and successful broker, a male, started out on the bank side and did not receive any variance of the pay structure when he switched to the brokerage side. Finally, Claimant cannot argue that she was not the beneficiary of a variance from the standard pay structure when in fact she received an additional nine thousand dollars from Respondents over and above that to which she was entitled. Even if Respondents did not intend for her to have these monies, Respondent never asked for the nine thousand dollars back. Thus Claimant had a *de facto* variance from the standard pay structure. Claimant introduced no credible evidence that the Respondents' explanations were pretextual. This claim is denied.

Computer Equipment and Software:

Respondent met its burden of proof in pointing out that in addition to a desktop computer, Claimant was also given a laptop. Moreover, though Claimant alleges that she did not have software essential to the performance of her duties, she admitted on cross examination that she did indeed procure much of the software that she needed from a friend, implying that she was not able to receive the equipment she needed through the proper channels. However, that friend is Rick Ferrill, the employee who is in charge of distributing software and computer equipment. There is nothing suspicious about receiving equipment and software from the individual whose job is to do such. Claimant complained that when her desktop computer was down or when she did not have Internet access, she had to walk into the bank and fax the order to Kansas City. Claimant omitted mentioning that she could have also picked up the telephone and instructed Kansas City to execute an order. Finally, Claimant complained that male RRs received Prosper, a highly coveted computer software program before female RRs. However, Susan Normansell testified that most of the RRs who received the computer software before her were female. Documents produced by the Respondent clearly show that the Claimant was in attendance at sales meetings that delivered instruction in various computer programs. While one can be sympathetic with the Claimant's computer problems, the events as she described do not constitute gender discrimination. This claim is denied.

Non-Assignment or Diversion of Customer Accounts:

Claimant charged that Ellis retained control over the high-end, high-net-worth clients. However, Ellis produced Respondents' Exhibit 2 and explained his reasons for keeping each of the accounts listed thereon. Four of the accounts were members of Ellis' family. One account was for a customer going through bankruptcy. Ellis thought it unfair to give this complex matter to Claimant. One account was for a friend from Ellis' pre-Scout Brokerage days who resided in Indiana. One account was in probate and Ellis was working closely with the estate's attorney. One account was for a poor client residing in Ferguson who was going through a difficult divorce. One was for his best friend. Another was for an elderly gentleman whom he took to the

symphony. Another was a retiree from Boeing. High-net-worth individuals do not hold these accounts. Rather each client has a personal nexus to Ellis, and Ellis's actions did not have a discriminatory motive. Claimant's claim of gender discrimination with respect to account assignments is denied.

CLAIMANT'S CLAIM OF DEFAMATION

Did the following three sentences contained in plaintiff's U-5 libel Claimant?

"Review revealed 3 trades were placed liquidating partial (sic) IRA positions.
Two IRA distribution forms appeared to not contain genuine customer signatures.
Confirmed with customers that instructions were not given to...."

In order for Claimant to prevail she must show the following:

- (1) A defamatory statement (false and defamatory);
- (2) Publication to someone other than Claimant;
- (3) Fault; and
- (4) Harm of a pecuniary nature

Are the Statements Defamatory?

Missouri law requires a claimant who has alleged that she has been libeled professionally to show that the words used directly "tend to injure or prejudice the plaintiff in her profession by imputing want of knowledge, skill, capacity or fitness to perform and must impute fraud want of integrity or misconduct. Klein v. Victor, 903 F. Supp. 1327 (E.D. Mo. 1997). Certainly attributing the crime of forgery to Claimant damages her reputation.

Respondents slyly argue that the statements in the U5 are true and do not accuse Claimant of forgery. But a statement is defamatory if any one of the interpretations that a reasonable person would make would tend to injure Claimant's reputation. **INDIRECT** accusations that "obviously and naturally" allege the commission of a crime are also defamatory. Bauer v. Ribaudon, 926 S.W.2d 38, 42 (Mo. App. E.D. 1996). A reasonable interpretation of the aforementioned sentences would impute to Claimant the crime of forgery.

Respondents contend that not only are the statements truthful, but they are protected as being qualifiedly privileged. Certainly the defense of qualified privilege is one that is used by brokerages when sued by ex-employees. However, if a Form U-5 is phrased in a fashion for the specific purpose of damaging an employee's career, then the privilege does not apply. Fahnestock & Co., Inc. v. Waltman, 935 F.2d 512 (2nd Cir. 1991). In this case, there was testimony that Ellis intended that Claimant never work in this business again.

Thus the statements are defamatory and the qualified privilege exception does not apply.

Is there a Publication?

In this case, the U-5 was broadcast to the entire securities community. Thus the publication element of defamation has been met.

Are Respondents at Fault?

Respondents are at fault because their method of guaranteeing their clients' signatures violates the tenets of the U.C.C. and the standards espoused by the Securities Transfer Association. U.C.C. Section 8-312 states that a guarantee of signature is a warranty with respect to the signature of an endorser of a security or an originator of an instruction regarding a security that at the time of signing:

1. the signature was genuine
2. the signer was the appropriate person to sign; and
3. the signer had legal capacity to sign.

The method of guaranteeing signatures employed by Respondents could not possibly assure that any signature was genuine.

According to the testimony of Maxwell, Respondents participated in the Medallion Signature Guarantee Program operated by the Securities Transfer Association. This organization instructs its participants to obtain verification of identities from independent sources. It also recommends that signatories sign in front of the guarantor. As stated earlier, Respondents permitted anyone purporting to be a broker to send a signature in by interoffice mail or by regular mail to Kansas City to be guaranteed. Respondents completely ignore the import of U.C.C. Section 8-312 by creating a program that would make it impossible to say with certainty that a signature was genuine, that the signer was the appropriate person to sign and that the signer had legal capacity to sign.

Respondents themselves, curiously, have cited a Missouri opinion that seals their fate. In *Roth v. Roth*, 571 S.W.2d 659 (Mo. App. E.D. 1978) the court noted that when a customer's signature is endorsed, not in the presence of the broker, such is evidence of negligence. Thus Respondents' own negligence contributed vastly to the problems of the customers Devine, Obermeyer and Hobbs.

By failing to offer a guarantee that was in compliance with the U.C.C. or with the Medallion program, Respondents are at fault in publishing the aforementioned statements in Claimant's Form U-5.

Was there Harm of a Pecuniary Nature?

Claimant testified that because of the allegations of forgery, she was afraid to apply for another RR position. This is reasonable. She also testified that many firms refused to interview her because of the allegations in the Form U-5. Because of the libelous allegations in the Form U-5, Claimant was unable to work in her chosen field for a period of five months.

Thus Claimant has met her burden of proof. Respondents have libeled Claimant.

CLAIMANT'S CLAIM OF RETALIATION

Respondents correctly note that at no time prior to the filing of her EEOC complaint, did Claimant complain that she was subjected to gender discrimination or retaliation. Certainly her termination from employment cannot be said to be an act of retaliation. However, retaliation can be said to occur if the employer takes action against the employee for filing the claim of discrimination. See Title VII 42 U.S.C. Section 2000e-3(a). Moreover post-employment actions by an employer can constitute discrimination under Title VII if they hurt a plaintiff's employment prospects. Passer v. American Chemical Society, 935 F2d 322 (D.C. Cir. 1991).

In this case, during closing argument, Respondents' counsel admitted that they only filed their Counterclaim because Claimant filed her claim of gender discrimination.

Ms. Ortals relates:

I will point out in terms of our counterclaim that it's quite evident by virtue of the time that elapsed that Scout did not pursue that. Incidentally there was some testimony from Mr. Chapple that once he quit his employment, they didn't come after him for the extra thousand dollars that he owed on the trade error that he made, and quite frankly Scout wouldn't have gone after Ms. Shankle for the in excess of \$8,000 that---that she caused them to lose by reimbursements to Mr. Mizuki in the amount of \$7,000 close to -- close to another \$2,000 to the Haydens and their accountant, but if somebody sues you, you generally sue them back....

Even if such an admission had not been made, retaliation can be inferred by examining the treatment of other professionals who were discharged or resigned. As Ms. Ortals admits, another broker no longer in the employ owed a sum of money to Respondents but that Respondents forgave the debt.

Other courts have ruled that counterclaims filed subsequent to an employee's termination can constitute retaliation. See E.E.O.C. v. Outback Steakhouse of Florida, 75 F. Supp 2d 756 (N.D. Ohio 1999). Such is the case here.

FINDINGS

The arbitrator finds that the Claimant has met her burden of proof with regard to her claims of libel. The arbitrator finds that the Respondents' defenses with regard to libel lack merit. The arbitrator finds that Claimant failed to mitigate her damages by seeking employment outside of her field or by seeking adequate medical help to mitigate her psychological distress. Consequently, the arbitrator is awarding Claimant a lump sum of \$37,500.00. This amount is not based on an exact numerical calculation of Claimant's monthly take home pay because soon after Claimant was terminated the stock market began its still continuing bear market. While Claimant

submitted evidence on what she believes she would have earned on a monthly basis, it is speculation to assume that Claimant would have earned these sums during the time she was out of work. Thus I have made a rough assignment of approximate lost wages for the time Claimant was out of work less money that she could have earned had she worked in another field. In addition, I am awarding the Claimant \$25,000 for the embarrassment, mental anguish, anxiety and humiliation she suffered. Bandau v. State of Kansas, 75 E.P.D. ¶ 45906.

Other damages awarded are stated below.

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, the Arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent/Counter-Claimant UMB Bank/Scout Brokerage Services, Inc. is liable for and shall pay to the Claimant/Counter-Respondent, Cathy A. Shankle, the sum of \$37,500.00 as compensatory damages;
2. In addition, Respondent/Counter-Claimant UMB Bank/Scout Brokerage Services, Inc. is liable for and shall pay to the Claimant/Counter-Respondent, Cathy A. Shankle, the sum of \$25,000.00 for the embarrassment, mental anguish, anxiety and humiliation she suffered. In deciding to award these damages, the arbitrator considered Bandau v. State of Kansas, 75 E.P.D. ¶ 45906 and determined that the authority existed for an award of damages;
3. Respondent/Counter-Claimant UMB Bank/Scout Brokerage Services, Inc. is also liable for and shall pay to the Claimant/Counter-Respondent, Cathy A. Shankle, the sum of \$5,000.00 for the retaliation Respondents committed against her;
4. Furthermore, Respondent/Counter-Claimant UMB Bank/Scout Brokerage Services, Inc. is liable for and shall pay to the Claimant/Counter-Respondent, Cathy A. Shankle, the sum of \$7,000.00 as attorneys' fees. In deciding to award attorneys' fees, the arbitrator considered the arguments of the parties, as well as the pleading filed on their behalf, and determined that authority existed for an award of attorneys' fees to the Claimant/Counter-Respondent, Cathy A. Shankle;
5. The Arbitrator recommends the expungement of all reference to the alleged forgery or unauthorized signatures from the registration records of Cathy A. Shankle maintained by the NASD Central Registration Depository ("CRD") based on the defamatory nature of the information contained in Cathy A. Shankle's Form U-5 filed by Respondent/Counter-Claimant UMB Bank/Scout Brokerage Services, Inc.;
6. The counterclaims filed by Respondent/Counter-Claimant UMB Bank/Scout Brokerage Services, Inc. are dismissed and denied;
7. Except for those costs and expenses specifically awarded, including attorneys'

- fees, the parties shall bear their own costs of arbitration; and
8. Any and all relief not specifically addressed herein is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Dispute Resolution will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee	= \$ 300.00
Counter-claim filing fee	= \$ 500.00

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. Accordingly, UMB Bank/Scout Brokerage Services, Inc. is a party.

Member surcharge	= \$1,500.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$2,500.00

Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed: None.

Forum Fees and Assessments

The Arbitrator has assessed forum fees for each session conducted. A session is any meeting between the parties and the arbitrator, including a pre-hearing conference with the arbitrator, that lasts four (4) hours or less. Fees associated with these proceedings are:

Four (4) Pre-hearing sessions with a single arbitrator @ \$450.00 = \$1,800.00

Pre-hearing conferences:	October 25, 2001	1 session
	April 8, 2002	1 session
	April 22, 2002	1 session
	May 9, 2002	1 session

Thirteen (13) Hearing sessions @ \$450.00 = \$5,850.00

Hearing Dates:	April 24, 2002	2 sessions
	April 25, 2002	2 sessions
	April 26, 2002	2 sessions
	May 28, 2002	2 sessions
	May 29, 2002	2 sessions
	May 30, 2002	3 sessions

Total Forum Fees = \$7,650.00

The Arbitrator has assessed \$7,650.00 of the forum fees to Respondent/Counter-Claimant UMB

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Bank/Scout Brokerage Services, Inc.

FEE SUMMARY

Claimant/Counter-Respondent Cathy A. Shankle is solely liable for:

Initial Filing Fee	= \$ 300.00
<u>Less payments</u>	<u>= \$ 1,425.00</u>
Refund Due from NASD Dispute Resolution	= \$ 1,125.00

Respondent/Counter-Claimant UMB Bank/Scout Brokerage Services, Inc. is solely liable for:

Filing Fee	= \$ 500.00
Member Fees	= \$ 4,600.00
<u>Forum Fees</u>	<u>= \$ 7,650.00</u>
Total Fees	= \$12,750.00
<u>Less payments</u>	<u>= \$ 4,350.00</u>
Balance Due NASD Dispute Resolution	= \$ 8,400.00

All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10330(g) of the Code.

ARBITRATION PANEL

Leah M. Balk, Esq. - Public Arbitrator, Presiding Chairperson

Arbitrator's Signature



Leah M. Balk, Esq.
Public Arbitrator, Presiding Chairperson


Signature Date

7/3/02 Mdu
Date of Service (For NASD Dispute Resolution office use only)