

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Kim Marie Vescova (Claimant) v. Southwest Securities, Inc. n/k/a SWS Securities, Inc., Southwest Securities Group, Inc., Brokers Transaction Services, Inc. n/k/a SWS Financial Services, Inc., Michael Aspler, Robert Mitchell, and Mark Kern (Respondents)

Case Number: 02-07470

Hearing Site: New York, New York

Nature of the Dispute: Associated Person v. Members, Non-Member, and Associated Persons.

REPRESENTATION OF PARTIES

Claimant Kim Marie Vescova ("Vescova") hereinafter referred to as "Claimant":
Lawrence Solotoff, Esq., Solotoff & Solotoff, Great Neck, NY.

Respondents Southwest Securities, Inc. n/k/a SWS Securities, Inc. ("SWS Securities"), Southwest Securities Group, Inc. ("SWS Group"), and Brokers Transaction Services, Inc. n/k/a SWS Financial Services, Inc. ("BTS"): Arthur H. Ruegger, Esq., Sonnenschein Nath & Rosenthal, New York, NY.

Respondent Michael Aspler ("Aspler") appeared *pro se*.

Respondent Mark Kern ("Kern") appeared *pro se*.

Respondent Robert Mitchell ("Mitchell") did not make an appearance in this matter.

SWS Securities, SWS Group, BTS, Aspler, Kern, and Mitchell are hereinafter collectively referred to as "Respondents."

CASE INFORMATION

Statement of Claim filed on or about: December 10, 2002.

Claimant signed the Uniform Submission Agreement: December 6, 2002.

Motion to Dismiss filed by Respondents SWS Securities and BTS on or about: March 7, 2003.

Respondent SWS Securities signed the Uniform Submission Agreement: January 22, 2003.

Respondent BTS signed the Uniform Submission Agreement: March 28, 2003.

Statement of Answer and Motion to Dismiss filed by Respondent Aspler on or about:
March 7, 2003.

Respondent Aspler did not sign the Uniform Submission Agreement.

Statement of Answer and Motion to Dismiss filed by Respondent Kern on or about:
March 4, 2003.

Respondent Kern signed the Uniform Submission Agreement: March 6, 2003.

Respondents SWS Securities, SWS Group, and BTS did not file a Statement of Answer.

Respondent Mitchell did not file a Statement of Answer or sign the Uniform Submission Agreement.

CASE SUMMARY

Claimant asserted the following causes of action: violation of Title VII of the Civil Rights Act of 1964; violation of the New York State Human Rights Law; violation of the New York City Administrative Code; violation of the Violence Against Women's Act; reckless/intentional infliction of emotional stress; negligent hiring, supervision, and training; and sexual harassment.

Unless specifically admitted in the Motion to Dismiss, Respondents SWS Securities and BTS denied the allegations made in the Statement of Claim.

Unless specifically admitted in his Answer and Motion to Dismiss, Respondent Aspler denied the allegations made in the Statement of Claim.

Unless specifically admitted in his Answer and Motion to Dismiss, Respondent Kern denied the allegations made in the Statement of Claim.

RELIEF REQUESTED

Claimant requested compensatory damages in the amount of \$10,000,000.00; punitive damages; back pay; front pay; lost benefits; pecuniary loss; pre-judgment interest; post-judgment interest; attorneys' fees; and costs and expenses; and such other relief deemed just and proper.

Respondents SWS Securities and BTS requested that Claimant's claims be dismissed in their entirety and that they be awarded costs and reasonable attorneys' fees.

Respondent Aspler requested that the claim be dismissed against him in its entirety.

Respondent Kern requested that the claim be dismissed against him in its entirety.

OTHER ISSUES CONSIDERED AND DECIDED

Upon review of the file and the representations made on behalf of the Claimant, the undersigned arbitrator (the "Panel") determined that Respondents Robert Mitchell and SWS Group, Inc. have been properly served with the Statement of Claim and received due notice of the hearing and that arbitration of the matter would proceed without said Respondents present, in accordance with the NASD Code of Arbitration Procedure (the "Code").

Respondents Aspler, Mitchell, and SWS Group did not file with NASD Dispute Resolution properly executed Uniform Submission Agreements but are required to submit to arbitration pursuant to the Code and are bound by the determination of the Panel on all issues submitted.

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

ARBITRATORS' REPORT

This arbitration is brought pursuant to Title VII of the Civil Rights Act of 1964, New York Human Rights Law, Violence Against Women's Act, and The City of New York Administrative Code for sex discrimination of, and creation of a hostile work environment for, the Claimant Kim Marie Vescova ("Vescova"), as well as retaliation, by the Respondents SWS Securities, Inc. f/k/a Southwest Securities, Inc. ("SWS Securities"), SWS Securities Group, Inc., f/k/a Southwest Securities Group, Inc. ("SWS Group"), SWS Financial Services, Inc. f/k/a Brokers Transaction Services, Inc. ("BTS"), Michael Aspler ("Aspler"), Robert Mitchell ("Mitchell"), and Mark Kern ("Kern"). Non-statutory claims include intentional infliction of emotional distress, and negligent hiring, supervision and training. Vescova requests compensatory and punitive damages, back pay, front pay, interest, declaratory and equitable relief, attorney's fees, costs and disbursements.

The parties were directed to arbitrate these claims by Stipulation and Order dated January 7, 2003 in civil action 99 CIV 6257 in the U.S. District Court, Eastern District of New York. All parties, except Mitchell, appeared and participated in the arbitration. The corporate defendants were represented by counsel; Aspler and Kern appeared *pro se*. Mitchell was properly served with the statement of claim, notice of initial prehearing scheduling conference, and other notices, but he did not appear and is in default.

Subsequent to the direction to arbitrate the claims in the civil action, Respondents SWS Securities, SWS Group and BTS filed an Answer and Counterclaim dated December 10, 2003 in which a counterclaim for breach of Article IX of the Independent Registered Representative Agreement ("IRR Agreement"), a covenant by Vescova to indemnify BTS for damages resulting from Vescova's activities, is alleged. The gist of

the counterclaim (Answer and Counterclaim, ¶¶59-63) is that this arbitration and the prior claims in the civil action are "the result of [Vescova's] activities" and, therefore, she must pay BTS's counsel fees and expenses defending these claims. Vescova objected to the submission of this counterclaim to arbitration; the submission for determination is covered by ¶1 of the parties' submission agreements: "The undersigned parties hereby submit the present matter in controversy ... and all related counterclaims ... which may be asserted, to arbitration...." We interpret the word "activities" to mean Vescova's activities as a registered representative, not her prosecution of the civil action and this arbitration. Therefore, we dismiss the counterclaim in its entirety, with prejudice. Vescova made an application at hearing to amend her complaint to allege a claim for retaliation based on the counterclaim; that application is denied as academic.

During the period from November 1997 to October 1998, Vescova was a Series 7 registered representative who worked in the Hicksville, New York, branch office of BTS pursuant an IRR Agreement with BTS effective November 5, 1997 which defined the nature of the relationship between them in Article VIII as "that of a company and an independent contractor." BTS, whose headquarters are in Dallas, Texas, had similar arrangements at the time with some 600-plus independent registered representatives throughout the country. Respondents contended that the status of independent contractor does not afford Vescova the benefits of Title VII. We find, however, that BTS was Vescova's "employer" and she was an "employee" of BTS within the provisions of Title VII. The economic realities of the relationship warrant this finding. BTS, an Office of Supervisory Jurisdiction as defined in NASD Rule 3010, had extensive rights and obligations under the detailed provisions of the IRR Agreement, confirmed by the testimony and documentary evidence, to register, as well as to terminate the registration of Vescova's Series 7 license with BTS, and to supervise and control her work and outside activities, where and how her work is done, how she is paid, her working hours, and other terms and conditions of her duties as a licensed broker registered with BTS. Vescova generated retail stock commission business, was dependent on BTS for approval of new accounts, clearing and other services, and was paid by BTS a share of commissions she generated. BTS furnished Form 1099 to Vescova showing \$26,944.54 nonemployee compensation for 1998.

Vescova worked in the BTS office in Hicksville under the supervision of Aspler, branch office manager, and Kern, office sales manager. There were seven registered representatives working out of the Hicksville office at one time or another during this period: Vescova, Aspler, Kern, Mitchell, Harry Bond, Glenn Ostrowski, and David Taormina. During her employment, Vescova was assisted by Lina Ahmee Whitehill ("Whitehill"), the other plaintiff in the civil action. Whitehill was not a registered representative; she made cold-calls and performed various clerical duties for Vescova and others in the office, and was paid wholly or partly in cash by Vescova and Aspler or his conduit, MBA Strategies, Ltd. Whitehill testified that she did not receive a salary or other compensation from BTS.

The BTS Hicksville office was not effectively managed and supervised by BTS. Despite the fact that Aspler, a Series 7 registered representative, did not obtain the Series 24 license until 1998, he was the nominal branch manager in charge of the management and operation of the office. His management was ineffective or non-existent. Aspler testified that he carried a licensed concealed weapon in the office (a rather unusual practice) because he was concerned about theft of cash. There was credible testimony that Kern, also a Series 7 registered representative and the sales manager during his brief stint in the office (February to March 1998), also carried a concealed weapon. The branch had a part-time compliance officer on premises, David Taormina, a New York City police officer, who left with Kern in March 1998 to form another firm. There were non-registered cold-callers in the office who were paid wholly or partly in cash and personal check by the registered representatives they assisted. That this office would not have survived an audit by NASD Regulation needs no elaboration. The office was not a success and was closed by BTS in December 1998 because of operational problems, unseasoned registered representatives, and low production, according to Sue Peden, the CEO of BTS.

Vescova testified that she was subjected to unwelcome physical, verbal and non-verbal abuse principally by Aspler, Kern and Mitchell. Vescova testified to sexual harassment and activities that created a hostile work environment for her, materially and adversely affecting her ability to work and the terms and conditions of her employment: Aspler slapped her on the buttocks, and bit her on the buttocks as she bent down in front of an office machine; Mitchell slapped her on the buttocks, grabbed her breasts and asked for milk, pulled down her pants, exposed his genitals, mooned office personnel, made offensive sexual comments emphasizing male body parts; Kern assaulted her, brandished a gun, and exhibited violent behavior in the office. Vescova testified that Kern followed her home at night and to the office in the morning, ostensibly to protect her from harm because she had obtained a large account transferred from Duke & Co., Kern's former employer, that became the subject of a dispute between them. She said Kern told her he was working for the mob, there was a contract out for her, and he would protect her. She also stated there was much sexual banter in the office; there is evidence that everyone participated to some extent in this activity which is offensive and unacceptable in any business environment. As branch manager, Aspler made no effort to stop this intolerable conduct, or to report it to the BTS home office for investigation and resolution.

Vescova testified that one night she was in the office doing paperwork on the former Duke account and that Kern, the only other person in the office, confronted her with a demand he handle the account, became enraged at her, threw her down on a desk outside her office, pinned her arms down, pulled down her stockings, and raped her, ejaculating on the floor. She said she retreated to her office in shock and locked the door. She said Kern stood outside her office saying, "Wasn't that fun?" Vescova testified that Kern threatened to kill her if she told anyone. Vescova did not report the alleged rape to the police. We find that Vescova's testimony was not sufficient to prove rape.

Vescova testified she complained repeatedly to Aspler, branch manager, and Sue Peden, the CEO of BTS in Dallas ("Peden"), and others in Dallas, about the offensive conduct in the office, to no avail. Vescova's numerous phone calls to Peden were noted on Vescova's desk blotter; Peden produced her phone logs which showed a number of calls received from Vescova, but not the substance of her complaints. BTS had a written policy concerning sexual harassment, but it was not communicated to Vescova or anyone else in the office, and no one in the office was trained in dealing with sexual harassment complaints. In fact, Sue Peden, the CEO of BTS, testified that she had no training in sexual harassment or retaliation. Vescova testified that in October 1998, Vescova was told to resign or her license would be "marked" which she understood to mean that she would not be hired by another firm in the industry. She left BTS in October 1998, ostensibly voluntarily, and is no longer employed in the securities industry.

We find that responsibility for the unwelcome and offensive physical and verbal abuse by Aspler, Kern and Mitchell can be imputed to BTS on two grounds: Aspler had supervisory authority over Vescova, and BTS was negligent for not providing a procedure for complaint and resolution, as well as doing nothing about the alleged harassment once the complaints were communicated to Aspler and Peden. BTS should have been galvanized into action when the first complaint was made to Peden by Vescova, dispatching compliance and human resources officers from Dallas to Hicksville to investigate the incidents Vescova complained of, as well as the other problems concerning the management and operation of this office. We are impressed that BTS did not take Vescova's complaints seriously because we conclude, based on the evidence and arguments of counsel, BTS officials believed independent contractor registered representatives are not employees and, therefore, are not entitled to the protections of Title VII. We find that the conduct of the individual respondents, Aspler, Kern and Mitchell, in the BTS Hicksville branch office was outrageous, carried out with reckless disregard for the consequences, and that it was a significant cause of Vescova's emotional distress, which continues to the present as we observed during the hearing. We also find that this conduct can be imputed to BTS because of its negligent disregard of, and failure to respond to, Vescova's complaints.

Vescova testified that she sought employment in other industry firms, but her testimony was not sufficiently supported by documentary evidence, such as resumes, letters, emails, applications, memos of phone calls, and the like. During her employment by BTS, she also had a side business rescuing and selling dogs, and this activity apparently has continued to the present time. We are not convinced that Vescova made serious and continuous efforts to obtain employment with other brokerage or financial services firms in order to mitigate damages. We note that since Vescova left BTS, she married Harry Bond, a former IRR in the BTS Hicksville office and a witness in this case, they have three children, and reside in Richmondville, New York.

From November 30, 1998 to April 16, 1999, Vescova consulted Seymour H. Block D.O., a psychiatrist, seven times for a total of nine hours. Based on Vescova's version of the offensive conduct, Dr. Block's diagnosis was post-traumatic stress disorder, anxiety caused by having experienced a traumatic event, and life threatening fear. Dr. Block testified the symptoms include anxiety, hopelessness, depression, avoidance of family and friends, bad dreams and recollections, impaired sleep, and difficulty concentrating. Dr. Block did not complete the diagnosis protocol and did not prescribe a treatment regimen or medication because Vescova stopped coming to him. Dr. Block testified that in his experience the majority of women do not report rape, sexual assault and molestation to police because of avoidance of the stressor. Based on his limited consultations with Vescova, Dr. Block's prognosis is that the incidents are an indelible memory, she will have difficulty sustaining positive relationships, she will be over-protective of children, and will have impaired sleep and recurring dreams of the incident.

We were presented with serious challenges assessing the credibility of the witnesses, none of whom is disinterested in the outcome of this case. Although Vescova's testimony at the hearing was in some respects inconsistent and at variance with her prior descriptions of events that occurred some six years ago, we credit her present version of the events in dispute. Except for the sexual banter, respondents' witnesses denied that any incidents alleged took place. Their testimony was neither credible nor persuasive. We find that Vescova was physically and verbally abused by Aspler, Kern and Mitchell and that this offensive conduct is sufficient to create an abusive work environment for purposes of Title VII liability. Based on the foregoing findings, we conclude that BTS discriminated against Vescova by allowing a climate of sexual harassment in the Hicksville office thereby creating a hostile work environment for her. We also find that BTS retaliated against Vescova by threatening to "mark" her license unless she voluntarily terminated her registration with BTS. We do not find individual liability against the individual respondents for Title VII violations.

We find that Vescova is entitled to an award of compensatory damages for the Title VII violations, and because we find the sex discrimination to have been intentional, an award of punitive damages. 42 U.S.C. § 1981a(b)(1); *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999).

An award of back pay for Title VII violations is an equitable remedy. Although Vescova did not use reasonable diligence to find suitable other employment, in our discretion we award back pay equal to the amount of Vescova's nonemployee compensation for 1998 based on our judgment that she would have earned at least this sum if she had continued to work in the branch, free from abuse, for a year following the termination of her employment.

Front pay is also an equitable remedy, to be awarded as a matter of discretion, but not on speculation. As in the back pay situation, Vescova had to exercise reasonable

diligence to mitigate damages by seeking suitable alternative employment. We do not believe Vescova was unable to seek other employment because of her alleged emotional injuries, and we reject this claim. We find a total failure to mitigate in any manner. Further, there was no testimony of future economic loss on which to base an award of front pay. Therefore, Vescova's request for front pay is denied.

Vescova is entitled to an award of counsel fees and expenses. We have examined her attorney's submission and the corporate Respondents' opposition thereto and we award a total of \$150,000.00 as attorney's fees plus \$8,449.05 for disbursements. Although Vescova's two attorney team prosecuted this case competently, diligently and professionally, we find that some of the time spent on this case by Vescova's attorneys was not reasonably expended given the nature of the claim. Further, we find that the hourly rates requested by Vescova's attorneys are significantly higher than the market rate for the area and time period in which the work was done. Therefore, in our discretion, we have reduced the time spent to a total of 600 hours, excluding travel time, and the hourly rate for both attorneys to \$250.00.

Accordingly, we make the following award in favor of Claimant Kim Marie Vescova:

AWARD

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

1. Respondent SWS Financial Services, Inc. (referred to above as "BTS") is solely liable for compensatory damages for Title VII violations in the sum of \$200,000.00 without interest to the date of this Award;
2. Respondent SWS Financial Services, Inc. (referred to above as "BTS") is solely liable for punitive damages in the sum of \$100,000.00 without interest to the date of this Award;
3. Respondent SWS Financial Services, Inc. (referred to above as "BTS") is solely liable for back pay pursuant to Title VII, \$26,944.54 plus interest from October 4, 1999 (the date of filing of the civil action) to the date of this Award;
4. Respondent Aspler is solely liable for compensatory damages for negligent supervision, physical assault and verbal abuse, and intentional infliction of emotional distress in the sum of \$100,000.00 without interest to the date of this Award;

5. Respondent Kern is solely liable for compensatory damages for negligent supervision, physical assault and verbal abuse, and intentional infliction of emotional distress in the sum of \$25,000.00 without interest to the date of this Award;
6. Respondent Mitchell is solely liable for compensatory damages for physical assault and verbal abuse, and intentional infliction of emotional distress in the sum of \$25,000.00, without interest to the date of this Award;
7. Respondent SWS Financial Services, Inc. (referred to above as "BTS") is solely liable for attorney's fees and disbursements in the sum of \$150,000.00 plus \$8,449.05 for expenses without interest to the date of this Award; and
8. This Award is in full settlement of all claims and counterclaims and requests for relief submitted to this arbitration and disposes of all pending motions and applications. All other claims for relief and all applications not specifically determined in this Award are denied in their entirety.

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	= \$ 600.00
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Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firms that employed the associated persons at the time of the events giving rise to the dispute. Accordingly, Southwest Securities, Inc. n/k/a SWS Securities, Inc. is a party.

Member surcharge	= \$3,350.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$5,500.00

Member fees are assessed to each member firm that is a party in these proceedings or to the member firms that employed the associated persons at the time of the events giving rise to the dispute. Accordingly, Brokers Transaction Services, Inc. n/k/a SWS Financial Services, Inc. is a party.

Member surcharge	= \$3,350.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$5,500.00

Forum Fees and Assessments

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

One (1) Pre-hearing session with a single arbitrator @ \$450.00 = \$ 450.00
Pre-hearing conference: July 15, 2004 1 session

One (1) Pre-hearing session with Panel @ \$1,200.00 = \$ 1,200.00
Pre-hearing conference: December 15, 2003 1 session

Sixteen (16) Hearing sessions @ \$1,200.00 = \$19,200.00
Hearing Dates: August 2, 2004 2 sessions
August 3, 2004 2 sessions
August 4, 2004 2 sessions
August 5, 2004 2 sessions
August 6, 2004 2 sessions
August 24, 2004 2 sessions
August 25, 2004 2 sessions
September 13, 2004 2 sessions

Total Forum Fees = \$20,850.00

The Panel has assessed \$20,850.00 of the forum fees jointly and severally against SWS Securities, SWS Group and BTS.

Fee Summary

1. Claimant is solely liable for:

<u>Initial Filing Fee</u>	= \$ 600.00
<u>Total Fees</u>	= \$ 600.00
<u>Less payments</u>	= \$ 1,800.00
Refund Due Claimant	= \$ 1,200.00

2. Respondent SWS Securities is solely liable for:

<u>Member Fees</u>	= \$ 9,600.00
<u>Total Fees</u>	= \$ 9,600.00
<u>Less payments</u>	= \$ 9,600.00
Balance Due NASD Dispute Resolution	= \$ 0.00

3. Respondent BTS is solely liable for:

<u>Member Fees</u>	= \$ 9,600.00
<u>Total Fees</u>	= \$ 9,600.00
<u>Less payments</u>	= \$ 9,600.00
Balance Due NASD Dispute Resolution	= \$ 0.00

4. Respondents SWS Securities, SWS Group and BTS are jointly and severally liable for:

<u>Forum Fees</u>	= \$20,850.00
<u>Total Fees</u>	= \$20,850.00
<u>Less payments</u>	= \$ 5,500.00
Balance Due NASD Dispute Resolution	= \$15,350.00

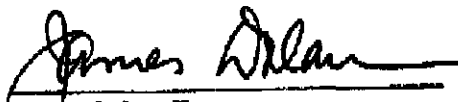
All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10330(g) of the Code.

ARBITRATION PANEL

James Dolan, Esq.	-	Public Arbitrator, Presiding Chairperson
Boyd H. Scheff	-	Public Arbitrator
John A. Scudiero	-	Public Arbitrator

Concurring Arbitrators' Signatures

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument is which is my award.



James Dolan, Esq.
Public Arbitrator, Presiding Chairperson

Signature Date

Boyd H. Scheff
Public Arbitrator

Signature Date

John A. Scudiero
Public Arbitrator

Signature Date

October 27, 2004

Date of Service (For NASD Dispute Resolution use only)

ARBITRATION PANEL

James Dolan, Esq.	-	Public Arbitrator, Presiding Chairperson
Boyd H. Scheff	-	Public Arbitrator
John A. Scudiero	-	Public Arbitrator

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James Dolan, Esq.
Public Arbitrator, Presiding Chairperson

Signature Date

Boyd H. Scheff
Boyd H. Scheff
Public Arbitrator

10/27/04
Signature Date

John A. Scudiero
Public Arbitrator

Signature Date

October 27, 2004

Date of Service (For NASD Dispute Resolution use only)

ARBITRATION PANEL

James Dolan, Esq.	-	Public Arbitrator, Presiding Chairperson
Boyd H. Scheff	-	Public Arbitrator
John A. Scudiero	-	Public Arbitrator

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James Dolan, Esq.
Public Arbitrator, Presiding Chairperson

Signature Date

Boyd H. Scheff
Public Arbitrator

Signature Date

John A Scudiero
John A. Scudiero
Public Arbitrator

John A Scudiero 10/9/04
Signature Date

October 27, 2004
Date of Service (For NASD Dispute Resolution use only)