

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Patrick J. Moore, Claimant vs. McDonald Investments, Inc. and Randal J. Wilhelmsen,
Respondents

Case Number: 03-01572

Hearing Site: Portland, Oregon

Nature of Dispute: Associated Person v. Member and Associated Person

REPRESENTATION OF PARTIES

For Claimant:

Roger Hennagin, Esq.
Roger Hennagin, P.C.
Lake Oswego, Oregon

For Respondent McDonald Investments, Inc.:

Thomas V. Dulcich, Esq.
Schwabe, Williamson & Wyatt, P.C.
Portland, Oregon

For Respondent Randal J. Wilhelmsen:

Mark S. Davidson, Esq.
Williams, Kastner & Gibbs PLLC
Seattle, Washington

CASE INFORMATION

Statement of Claim filed: February 28, 2003

Amended Statement of Claim filed: April 28, 2004

Claimant's Uniform Submission Agreement signed: February 28, 2003

Statement of Answer filed by Respondent McDonald Investments, Inc.: April 30, 2003

Respondent McDonald Investment Inc.'s Uniform Submission Agreement signed:
March 21, 2003

Statement of Answer filed by Randal J. Wilhelmsen: April 30, 2003

Respondent Randal J. Wilhelmsen's Uniform Submission Agreement: March 15, 2003

CASE SUMMARY

In his Initial and Amended Statements of Claim, Claimant alleged breach of employment contract, wrongful discharge, defamation, intentional interference with employment contract, and intentional interference with prospective financial advantage.

Respondents denied the allegations of wrongdoing as set forth in the Claimant's Initial and Amended Statements of Claim.

RELIEF REQUESTED

Claimant requested compensatory damages in the sum of \$1,500,000.00.

Respondents requested dismissal of the Claimant's Statement of Claim in its entirety, costs and attorney's fees.

OTHER ISSUES CONSIDERED AND DECIDED

On July 7, 2003, the Parties agreed that Arbitrator Keith A. Ketterling should serve as the Chair of the Arbitration Panel.

On April 6, 2004, Claimant dismissed his claims against Respondent Randal J. Wilhemsen with prejudice.

On April 28, 2004, the Panel granted Claimant's Motion to Amend the Statement of Claim.

On May 11, 2004, Respondent McDonald Investment, Inc. filed a Motion to Dismiss.

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

FINDINGS AND CONCLUSIONS

1. **Breach of Contract.** The contract was an employment at will contract that was subject to a duty of good faith and fair dealing. Respondent McDonald Investment, Inc. (hereinafter referred to as McDonald) has broad leeway in making termination decisions under such an agreement. The Panel finds that Claimant did not meet his burden of proof that his termination was made in bad faith.
2. **Wrongful Discharge.** The conduct which led to Claimant's termination is not a factor that is entitled to special protection as an important public policy concern. The Panel does not believe that the evidence established that Claimant was terminated for seeking to comply with suitability rules, or, that Respondent McDonald's instructions forced Claimant to violate those rules.
3. **Defamation.** Respondent McDonald is entitled to qualified immunity for statements made on Claimant's U-5. Because of the qualified immunity, the Claimant had to establish that Respondent McDonald had no reasonable basis to believe the truth of the statements made on the U-5. Claimant did not meet that burden. The Panel does find that Claimant did not intentionally mis-code his rep number on orders, and that he promptly corrected the problem when it was brought to his attention. However, Respondent McDonald's President, nonetheless, expressed concern about the rep code issue, and the Panel cannot find that Respondent McDonald had no reasonable basis to believe the improper use of rep codes was not one of the reasons for the termination. The Panel finds that the other stated reason for termination in the U-5 was not false.
4. **Intentional Interference with Business Advantage.** The Claimant needed to establish an improper means, or, an improper purpose for his termination in order to prevail on this claim. Claimant did not meet that burden of proof. It is true that there is no evidence that Claimant violated any applicable rules or laws while he was employed by Respondent McDonald. The Panel notes specifically that Respondent McDonald admitted that Claimant did not violate any suitability rules. However, this was an at will employment relationship, and the Panel cannot say that Respondent McDonald acted improperly in terminating the Claimant.
5. While the Panel does not find in Claimant's behalf on his claims, the Panel does believe that the management practices of Respondent McDonald could have been better handled. Respondent McDonald's senior management and compliance staff effectively predetermined the resulting termination through premature judgments, poor communication, and lack of patience. Had Respondent McDonald's management practices been better, the employment relationship could have been preserved. Accordingly, all forum fees are assessed to Respondent McDonald Investment Inc.

AWARD

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

- 1) Claimant's claims are denied in their entirety.
- 2) The parties shall bear their respective costs, including attorney's fees.
- 3) All other relief requested and not expressly granted is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

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

Initial claim filing fee	= \$ 500.00
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Member Fees

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events that gave rise to the dispute, claim, or controversy. Accordingly, the member firm McDonald Investment, Inc. is a party and the following fees are assessed:

Member Surcharge	= \$ 2,800.00
Pre-Hearing Process Fee	= \$ 750.00
<u>Hearing Process Fee</u>	<u>= \$ 5,000.00</u>
Total Member Fees	= \$ 8,550.00

Adjournment Fees

The following adjournment fees are assessed:

December 1-3, 2003 adjournment requested by Respondents. The Panel waived the adjournment fee.

Forum Fees and Assessments

The Panel assessed a forum fee for each pre-hearing conference or hearing session conducted. A pre-hearing conference and hearing session is any meeting between the parties and the Panel. The following fees are assessed:

(3) Pre-hearing conference sessions with the Panel @ \$1,200 .00/session			= \$3,600.00
Pre-hearing conference:	July 22, 2003	1 session	
	October 21, 2003	1 session	
	March 15, 2004	1 session	
(7) Hearing sessions @ \$1,200.00/session			= \$8,400.00
Hearings:	June 7, 2004	3 sessions	
	June 8, 2004	2 sessions	
	August 17, 2004	2 sessions	
Total Forum Fees			= \$12,000.00

The Panel assessed \$12,000.00 of the forum fees to Respondent McDonald Investment, Inc.

Fee Summary

1. Claimant is charged with the following fees and costs:

Initial Filing Fee	= \$ 500.00
<u>Less payments</u>	<u>= \$(1,800.00)</u>
Refund Due Claimant	= \$(1,300.00)
2. Respondent McDonald Investment, Inc. is charged with the following fees and costs:

Member Fees	= \$ 8,550.00
<u>Forum Fees</u>	<u>= \$12,000.00</u>
Total Fees	= \$20,550.00
<u>Less payments</u>	<u>= \$(9,300.00)</u>
Balance Due NASD Dispute Resolution	= \$11,250.00

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

ARBITRATION PANEL

Keith A. Ketterling, Esq.	-	Non-Public Arbitrator, Presiding Chair
Robert S. Banks, Jr., Esq.	-	Public Arbitrator
Clyde Fahlman	-	Public Arbitrator

Arbitrator's Signature


Keith A. Ketterling, Esq.
Chair, Non-Public Arbitrator

8.29.04
Signature Date

Robert S. Banks, Jr., Esq.
Public Arbitrator

Signature Date

Clyde Fahlman
Public Arbitrator

Signature Date

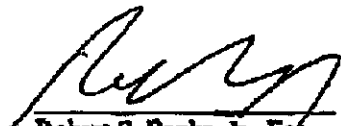
8/30/04
Date of Service

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Public Arbitrator

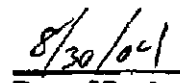
Signature Date



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Clyde Fahlman
Public Arbitrator

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Public Arbitrator



Signature Date

Date of Service