

**Award**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

Dorothea LeFlore, Lily Cai, Christina D. Calvert, Nemiaya L. Ward, and Dawn M. Whitaker  
Claimants v. Solomon Smith Barney, Inc., a/k/a Smith Barney, Inc., n/k/a Citigroup Global  
Markets, Inc., Judy R. Ackerman, and Lisa A. Detanna Respondents

Case Number: 03-04782

Hearing Site: Los Angeles, California

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Nature of the Dispute: Associated Persons v. Member and Associated Persons

**REPRESENTATION OF PARTIES**

For Claimants:

Alvin L. Pittman, Esq.  
Law Offices of Alvin L. Pittman  
Los Angeles, California

For Respondents:

Robert S. Shwartz, Esq.  
Orrick, Herrington & Sutcliffe LLP  
San Francisco, California

**CASE INFORMATION**

Statement of Claim filed: June 30, 2003

Uniform Submission Agreement signed by Claimant Dorothea LeFlore: July 7, 2003

Uniform Submission Agreement signed by Claimant Lily Cai: August 8, 2003

Uniform Submission Agreement signed by Claimant Christina D. Calvert: July 30, 2003

Uniform Submission Agreement signed by Claimant Nemiaya L. Ward: July 14, 2003

Uniform Submission Agreement signed by Claimant Dawn M. Whitaker: July 11, 2003

Joint Statement of Answer filed by Respondents: October 1, 2003

Uniform Submission Agreement signed by Respondent Solomon Smith Barney, Inc., a/k/a Smith Barney, Inc., n/k/a Citigroup Global Markets, Inc.(hereinafter referred to as "Citigroup Global Markets, Inc." or "Smith Barney"): June 16, 2003

Uniform Submission Agreement signed by Respondent Judy R. Ackerman: October 1, 2003

Uniform Submission Agreement signed by Respondent Lisa A. Detanna: October 1, 2003

### **CASE SUMMARY**

Claimants alleged employment discrimination on the basis of race, gender, and disability, failure to accommodate, retaliation, constructive wrongful discharge in violation of public policy, and invasion of privacy.

Respondents denied the allegations of wrongdoing set forth in the Claimants' Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

Claimants requested unspecified compensatory damages, unspecified punitive damages, pre-judgment interest, and costs, including attorney's fees.

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

### **OTHER ISSUES CONSIDERED AND DECIDED**

On March 5, 2004, Claimant Dorothea LeFlore and her counsel signed a Waiver Agreement expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

On March 18, 2004, Claimant Lily Cai and her counsel signed a Waiver Agreement expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

On March 12, 2004, Claimant Christina D. Calvert and her counsel signed a Waiver Agreement expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

On March 13, 2004, Claimant Nemiaya L. Ward and his counsel signed a Waiver Agreement expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

On April 26, 2004, Claimant Dawn M. Whitaker and her counsel signed a Waiver Agreement expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

Pursuant to the Code of Arbitration Procedure IM-10100, the waivers of the Claimants shall constitute and operate as a waiver for all member firms and associated persons (including terminated or otherwise inactive member firms or associated persons) against whom the Claim has been filed.

On October 5, 2005, prior to the commencement of the hearing, the parties reported that Claimant Nemiaya L. Ward had settled his claims against the Respondents. On the basis of this report, the claims of Nemiaya L. Ward are hereby dismissed with prejudice.

On October 5, 2005, the first day of the hearing, Respondents moved to dismiss Claimants' claims in their entirety. The Panel denied the motion without prejudice to Respondents renewing that motion at the conclusion of the Claimants' case-in-chief.

At the same time, Claimants moved in limine to exclude Respondents from presenting any documents that were willfully withheld from Claimants during the course of Pre-Hearing Discovery. The Panel denied the motion.

On October 10, 2005, Claimants moved to compel Respondents to provide further responses to California Judicial Counsel Form Interrogatories—Employment Law and to further respond to Claimants' Document Requests. These motions also sought evidentiary sanctions. Claimants' Motions were voluntarily withdrawn at the conclusion of the hearing.

On October 10, 2005, Respondents moved to quash a subpoena duces tecum that was served on counsel for Citigroup Global Markets, Inc. less than 5 days before the arbitration commenced on October 5, 2005. The Panel denied Respondents' motion as to the documents sought in Categories 3, 4, 5 & 13 of Claimants' subpoena duces tecum and granted the motion to quash as to the remaining categories.

At the conclusion of Claimants' case in chief, Respondents renewed their motion to dismiss all of Claimants' claims set forth in their pleading. The Panel resolved the motion as follows: Count 1 for Employment Discrimination (Race/Ethnicity) on behalf of each of the Claimants against all Respondents—Denied; Count 2 for Gender Discrimination on behalf of Claimants Lili Cai, Christina D. Calvert and Dawn M. Whitaker against all Respondents—Granted; Count 3 for Employment Discrimination (Disability) on behalf of Claimants Lili Cai, Christina D. Calvert and Dawn M. Whitaker—Granted as to Lili Cai and Denied as to the remaining Claimants; Count 4 for Discriminatory Harassment (Race/Ethnicity) on behalf of all Claimants against all Respondents—Denied; Count 5 for Retaliation on behalf of all Claimants against all Respondents—Granted as to Dawn M. Whitaker only, Denied as to the remaining Claimants; Count 6 for Constructive Discharge on behalf of all Claimants against all Respondents—Granted as to all Respondents other than Citigroup Global Markets, Inc.; Granted as against Dawn M. Whitaker and Lili Cai; Denied as to the remaining Claimants; Count 7 for Invasion of Privacy on behalf of Christina D. Calvert against Respondents Citigroup Global Markets, Inc. and Lisa Detana—Denied.

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**

### **Dawn M. Whitaker**

Claimant Dawn M. Whitaker ("Whitaker") began working as a Registered Assistant for respondent Solomon Smith Barney, Inc., a/k/a Smith Barney, Inc., n/k/a Citigroup Global Markets, Inc. ("Smith Barney") in its Beverly Hills Branch Office, Branch 554, on March 23, 2001. She is a licensed securities sales broker holding both Series 7 and Series 65 licenses. Whitaker apparently started her career in the securities industry in 1998 when she began working for Morgan Stanley Dean Witter where she was the assistant to a purportedly prominent broker by the name of Judy Resnick ("Resnick"). Whitaker essentially ran Resnick's enterprise because Resnick was frequently traveling outside of the office promoting her business. At some point between 1998 and 2001 two other brokers, Lisa Detanna ("Detanna") and Susan Dehen ("Dehen"), joined Resnick to form the Resnick Group (sometimes hereinafter referred to as "the Group").

In early 2001, the Resnick Group joined Smith Barney in return for which Resnick was paid \$1 million. Because Resnick considered Whitaker to be such a valuable member of the Group, Resnick paid her \$35,000, or 5% of her net from the \$1 million she received from Smith Barney (\$700,000 x .05) as a bonus representing Whitaker's "share" of the Resnick Group. In addition, the Resnick Group lobbied Smith Barney to hire Whitaker with the rest of the Group.

Whitaker's principal claim is that she was constructively terminated from her employment because of her race and/or national origin—black/African-American. The incident Whitaker claims forced her to resign began in early October of 2002 when Whitaker was instructed by Resnick to liquidate her (Resnick's) entire portfolio of investments so that those investments could be rebalanced. Whitaker did as she was instructed and Resnick's accounts were liquidated on October 7, 2002.

On or about November 4, 2002 Detanna was meeting with Resnick at Resnick's home in Ojai, California to go over her ("Resnick's") accounts. In the course of these discussions, while Whitaker was on the phone with Detanna, it came to Resnick's attention that Whitaker had liquidated all of her accounts. Evidently Resnick did not recall her previous instructions. In any event, upon learning this Resnick became extremely upset. Whitaker then heard Resnick yell in an angry voice, and referring to Whitaker: "I am going to kill her." Detana told Whitaker not to worry and said she and Whitaker could talk about the misunderstanding when she (Detana) came back from a client meeting.

That same day, Whitaker resigned from Smith Barney without talking to Detana and made clear in written correspondence that she had no intention of coming back regardless of whether the firm, Resnick, or anyone else wanted her. Prior to this, Whitaker never had any thoughts of leaving Smith Barney.

"Constructive discharge" occurs when an employee leaves his/her employment under circumstances where the actions of the employer essentially force the employee out. To prove a constructive discharge, the employee must present evidence establishing that the employer

intentionally created or knowingly permitted conditions so intolerable that they effectively force the employee to resign. *Mullins v. Rockwell International Corp.* (1997) 15 Cal.4<sup>th</sup> 731, 737; *Turner v. Anheuser-Busch* (1994) 7 Cal.4<sup>th</sup> 1238, 1248.

This panel determined on Respondents' motion to dismiss, following the presentation of Claimants' case, that no reasonable person could have construed the statement attributed to Resnick above as a genuine "death threat". In light of Whitaker's testimony that before this statement she would have continued working at Smith Barney and had no prior thought(s) of leaving the firm, there is no evidence whatsoever that Whitaker had no choice but to resign her employment. Accordingly, the panel granted respondent's motion to dismiss this aspect of Whitaker's claims on October 26, 2005.

However, it is worth adding that there is no evidence whatsoever that Resnick's comment was racially motivated in any way, manner or form. Therefore, even if this panel were to conclude that Whitaker was "constructively terminated", Whitaker would still not be entitled to any relief because she was not the victim of an underlying tort or breach of contract. *Turner*, 7 Cal.4<sup>th</sup> at 1251-52.

Whitaker also claims she was the victim of unlawful harassment while employed at Smith Barney. To prevail on this claim, Whitaker must prove that she was subjected to verbal or physical conduct premised on race, the conduct was unwelcome, and it was sufficiently severe or pervasive to alter the conditions of her employment. *Vasquez v. County of Los Angeles*, 349 F.3d 634, 642 (9<sup>th</sup> Cir. 2004); *Etter v. Veriflow Corp.* (1998) 67 Cal.App.4<sup>th</sup> 457, 465-66. Whitaker must therefore necessarily establish that her work environment was subjectively and objectively abusive or hostile. If the claimant, in the first instance, does not herself perceive that her work environment is abusive or hostile then she can hardly claim the employer's conduct, whatever it may have been, altered the conditions of her employment. See *Sheffel v. Los Angeles County Dept. of Soc. Services* (2004) 109 Cal.App.4<sup>th</sup> 153, 161.

Whitaker admitted that "but for" Resnick's statement to the effect that "I am going to kill her" she would have continued working at Smith Barney, and indeed never had any prior thought(s) of leaving her employment. It reasonably appears therefore that Ms. Whitaker's other experiences on-the-job at Smith Barney did not substantially or materially affect her ability to carry out her duties in the workplace. Accordingly, her claim on this count fails by her own admissions as a matter of law.

Whitaker similarly claims to have been a victim of racially motivated retaliation. State and federal law require a retaliation claimant to prove he/she engaged in a protected activity e.g. protested unlawful discrimination, and was subjected to adverse employment action. In addition, the claimant must prove a discernible causal link between the protected activity and the job action. *Vasquez*, 349 F.3d at 646; *Akers v. County of San Diego* (2002) 95 Cal.App.4<sup>th</sup> 1441, 1453-54.

There is no evidence Whitaker ever protested on her own behalf, or on behalf of anyone else, that she perceived any discriminatory action(s) being perpetrated in Smith Barney's Branch 554. Just as importantly, even if there was such evidence, she was never subjected to any

adverse employment action by Smith Barney. She simply quit her job. Therefore, her retaliation claim fails as well.

Whitaker further appears to claim that she was subjected to racially discriminatory treatment in connection with her decision to express breast milk after she returned from maternity leave in July 2002. Whitaker points to evidence that a Caucasian woman commandeered a locking private office on the sixth floor to express her breast milk. However, Whitaker was offered a private office on the 7<sup>th</sup> floor (where the Resnick Group was officed) to do the same. While it is undisputed that this office did not have a locking door, the evidence is uncontradicted that the branch administrator purchased a curtain for the office's interior window so that Whitaker, and her colleague Christina D. Calvert (another claimant in this action), could have a private place to pump breast milk. For reasons that are not entirely clear, Whitaker chose not to use this office, instead choosing to pump in her car.

While it could be that a *prima facie* case of discriminatory treatment is made out under the burden shifting formula of *McDonald Douglas Corp. v. Green*, 411 U.S. 792 (1973) based on the disputed fact that the 6<sup>th</sup> floor office had a locking door that Smith Barney permitted a Caucasian woman to use, Smith Barney had a non-discriminatory reason for offering the 7<sup>th</sup> floor office to Whitaker—it was more conveniently located to where Whitaker herself had an office. At this juncture, Whitaker's burden is to prove with specific and substantial evidence that the decision to offer her a private office on her floor to express her breast milk was motivated by a discriminatory animus. *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4<sup>th</sup> 1031, 1038; *Morgan v. Regents of the University of California* (2000) 88 Cal.App.4<sup>th</sup> 52, 69. There is simply no credible evidence that reaches this level.

Indeed, it is problematic whether this issue is even remediable as a matter of unlawful discrimination because there is no evidence that the material terms or conditions of Whitaker's employment were adversely affected by Smith Barney's alleged failure to provide her with a locking office to express breast milk. Rather, it appears this issue is one of "reasonable accommodation" in the context of California's version of the American's with Disability Act—Cal. Gov. Code § 12940(k). There is no evidence, however, that Smith Barney's effort to accommodate Whitaker above was unreasonable. Thus, Whitaker's theories of relief in this vein are also unavailing to her cause.

Lastly, Whitaker's statement of claim states a claim for gender-based discrimination. However, she presented no evidence during her case in chief to support this claim. Therefore, the panel dismissed this claim upon Respondents' motion to dismiss.

Accordingly, Whitaker shall take nothing on her claims against Smith Barney, Judy Ackerman and Lisa Detanna.

**Christina D. Calvert**

Claimant Christina D. Calvert ("Calvert") was hired as an Investment Associate ("IA") by Smith Barney in its Beverly Hills branch and started working on March 31, 2001. She previously worked as a sales assistant for Resnick and Detanna at Morgan Stanley Dean Witter where they worked together as the Resnick Group. Calvert is of Hispanic origin but in her application to Smith Barney she identified herself as Caucasian. As an IA at Smith Barney, Calvert was in training to become a stockbroker i.e. Financial Consultant ("FC").

During her employment with Smith Barney, Calvert worked directly for Detanna and another FC by the name of Susan Dehen ("Dehen"). Calvert, Detanna, Dehen and Whitaker ultimately worked together as part of the Resnick Group on the 7<sup>th</sup> floor of Smith Barney's Beverly Hills office. Along with her salary, Calvert was paid 1% of Detanna's and Dehen's commissions as part of her business arrangement in moving from Morgan Stanley to Smith Barney.

Shortly after starting at Smith Barney, Calvert learned she was pregnant. She announced this event sometime in early June 2001. In the same month there were complaints about Calvert's work. Specifically, she was reportedly not making the number of customer cold calls that Smith Barney required of its trainee brokers. However, these complaints were apparently oral and Calvert was not subjected to any formal write up or discipline. Furthermore, Calvert admitted to Detanna that she did not like making these calls. In fact, in an effort to assist Calvert, Detanna ran some advertisements and seminars to help develop "warm leads" for Calvert to contact. Calvert incredibly never took advantage of the opportunities Detanna tried to create for her.

In August 2001, Calvert was sent to Smith Barney's formal FC training school in Hartford, Connecticut and after she returned she took an unspecified amount of leave. Sometime in October 2001, Calvert claims to have had a number of conversations with Susan Dehen that had racial overtones. Specifically, there was a conversation relating to spicy foods where Dehen allegedly asked her about the wisdom of eating spicy food while she was pregnant. Before Calvert could respond, Dehen said that it was probably okay for her to eat spicy food because her baby was Mexican. Calvert also claims Dehen asked her if she spoke Spanish when there was a client on the phone speaking Spanish and further that Dehen complained about lazy Mexicans when her cleaning lady missed some mold in Dehen's bathroom.

Calvert also claims she overheard Detanna make racist comments about Whitaker during this same time frame—in particular, that after Detanna learned Whitaker was pregnant she asked: "Why do black people have children out of wedlock or with different fathers?" Calvert also accused Detanna of saying that Whitaker should have an abortion because she had 2 other children.

Calvert left on maternity leave on November 23, 2001 and returned on March 4, 2002. After returning from maternity leave, Calvert claims Detanna told her at some unspecified time that the reason she (Calvert) could not schedule a meeting with the branch manager Tom Mahan ("Mahan") was because he was having a "black problem". Calvert also claims Detanna

complained to her about her Hispanic maid because she had asked for a raise.

A further series of incidents after Calvert returned from maternity leave revolved around her desire to pump breast milk. Calvert apparently inquired about a private place to pump breast milk after she learned through the "grapevine" that a Caucasian FC had pumped, or was pumping, breast milk in a private office with paper taped over the window. She claims to have gone to the Branch Administrator, Judy Ackerman ("Ackerman") about using the same place to express her breast milk. Calvert claims Ackerman told her that Mahan would never approve the use of such "prime real estate" for her to pump.

Calvert then claims she told Ackerman that she could pump in her car and Ackerman responded that was a good idea. However, Calvert also testified that Ackerman gave her access to a locking conference room to pump her breast milk in March 2002. Evidently this conference room was unsatisfactory to Calvert because some managers had keys and many employees customarily used this room as a short cut to return to their offices from the break room. These conditions made Calvert "anxious" about someone walking in on her or disrupting her by jiggling the locked door. Calvert then contacted Beth Fehmel ("Fehmel") in Smith Barney's Human Resources Department about a place to pump. Fehmel told Calvert she would contact Ackerman about the situation.

At some point, Ackerman offered Calvert a supply room in which to pump. Since this was not acceptable, Ackerman offered a private office on the 7<sup>th</sup> floor where Ackerman put curtains up over the interior window to give Calvert some needed privacy. Calvert used this office but claims Detanna walked in on her several times and repeatedly interrupted her by calling while she was pumping. According to Calvert, these conditions also made it difficult for her to pump.

In fact, there was only one occasion when Detana interrupted Calvert pumping. On that occasion a client had been waiting for information from his file for roughly 45 minutes, Detanna knocked on the office door where Calvert was pumping, Calvert answered, and Detanna cracked the door to inquire about that particular client's affairs. Calvert thereafter apparently pumped breast milk in her car but it is unclear precisely when and over what period of time.

On July 25, 2002, Calvert voluntarily terminated her "business relationship" with Dehen due to an unspecified disagreement. At the same time, Detanna agreed to contribute an additional 1% of her commissions to Calvert to make up for Calvert's loss of the commission split from Dehen. On July 26, 2002, Calvert went out on a 90-day disability leave authorized by her doctor. Calvert claims that at the time she went on leave she had not been given a tension free place to express her breast milk—although there is no testimony or other evidence she was still breastfeeding at that time. In addition, there is no competent evidence her condition, whatever it may have been, had anything to do with her breast-feeding, or any other workplace, issues. Calvert never returned to work after her leave expired. Smith Barney administratively terminated her some time later in accordance with its standard operating procedures.

While she was on leave, Calvert learned from Whitaker that Detanna had shown Calvert's disability authorization to a client in an effort to determine from what disabling illness



Calvert was suffering. Detanna testified that because she was concerned about Calvert's welfare, she asked a client who happened to be a physician whether he was familiar with the physician who signed off on Calvert's leave prescription. During the 16 months Calvert was employed by Smith Barney, she was never disciplined or demoted and received all of the benefits, including compensation, to which she was entitled.

Calvert claims she was constructively discharged because of her race, Hispanic, that she was harassed, retaliated against and subjected to a hostile work environment, because of her gender, as well as her race, and that her privacy rights were unlawfully invaded.

"Constructive discharge" occurs when an employee leaves his/her employment under circumstances where the actions of the employer essentially force the employee out. To prove a constructive discharge, the employee must present evidence establishing that the employer intentionally created or knowingly permitted conditions so intolerable that they effectively force an employee to resign. *Mullins*, 15 Cal.4<sup>th</sup> at 737; *Turner*, 7 Cal.4<sup>th</sup> at 1248.

A harassment claimant must prove, among other things, that she was subjected to verbal or physical conduct premised on race; that the conduct was unwelcome; and that the conduct was sufficiently severe or pervasive to alter the conditions of the claimant's employment. *Vasquez*, 349 F.3d at 642; *Etter*, 67 Cal.App.4<sup>th</sup> at 465-66.

The circumstances described above do not begin to approach a level where Calvert would have no alternative but to leave her employment. Indeed, they do not even reach a level of severity or pervasiveness to be indicative of a "hostile work environment" such that there was a material alteration in the terms or conditions of her employment. Generously speaking, there were a total of six incidents of racist remarks by Calvert's co-workers over a period of approximately 13 months while Calvert was actually on the job and not on maternity leave. At least two of those remarks were not even directed at Calvert.

"[T]he law does not exhibit 'zero tolerance' for offensive words and conduct. Rather, the law requires the plaintiff to meet a threshold standard of severity or pervasiveness." *Etter*, 67 Cal.App.4<sup>th</sup> at 467. Likewise, the "FEHA's prohibitions are not a 'civility code' and are not designed to rid the workplace of vulgarity." *Sheffel*, 109 Cal.App.4<sup>th</sup> at 161. The circumstances here are conceptually indistinguishable from those present in *Vasquez*, 349 F.3d 634, 642-44, and particularly *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1036 (9<sup>th</sup> Cir. 1990) where no hostile work environment existed even when the employer posted racially offensive cartoons, made racially offensive slurs, targeted Latinos when enforcing rules, provided unsafe vehicles to Latinos, did not provide adequate police backup to Latino officers, and kept illegal personnel files on plaintiffs because they were Latino. It follows that if the terms and conditions of claimant's employment are not materially altered by the alleged workplace misconduct, then it can hardly be said she had no reasonable alternative but to leave her employment. Calvert was not constructively discharged and neither was she severely or pervasively harassed such that conditions of her employment were materially altered.

Calvert also claims to have been a victim of racially motivated retaliation. State and federal law require a retaliation claimant to prove he/she engaged in a protected activity e.g.

protested unlawful discrimination and was subjected to adverse employment action. In addition, the claimant must prove a discernible causal link between those two events. *Vasquez*, 349 F.3d at 646; *Akers*, 95 Cal.App.4<sup>th</sup> at 1453-54.

In Calvert's case, while it is possible she complained about discriminatory treatment in relation to her breast milk expressing concern, the fact remains she was never subjected to any adverse employment action by Smith Barney. She simply went out on disability leave for reasons that are unclear and never returned.

Calvert, like Whitaker, further claims she was discriminated against in connection with her desire to express her breast milk after she returned from maternity leave in March 2002. Calvert similarly points out that a Caucasian woman commandeered a locking private office on the sixth floor to express her breast milk. However, Calvert was first given a locked conference room to pump. This accommodation was nevertheless unsatisfactory because Calvert was "anxious" about the fact that some managers had keys and other personnel would jiggle the door because they often would use this conference room as a short cut to return to their offices. In response to these concerns, Calvert was given a private office on the 7<sup>th</sup> floor (where the Resnick Group was officed) to use. While it is undisputed this office did not lock, the evidence also established the branch administrator, on her own, purchased a curtain for the interior window so that Calvert and Whitaker could have a private place to pump.

On one occasion, Calvert was interrupted by Detanna while pumping in this office and this evidently made Calvert jittery about using this locale. However, Calvert's testimony that people jiggling the locked door of the conference room made her tense while pumping leaves the distinct impression that her tension would have been no less even if there was a lock on the 7<sup>th</sup> floor office she was provided. Practically speaking, Calvert and Whitaker could have put a—DO NOT DISTURB UNDER ANY CIRCUMSTANCES—sign on the door of that office and had the branch administrator pass around an explanatory interoffice memorandum. Instead they chose an unreasonable course and pumped in their respective vehicles. Smith Barney took reasonable steps to accommodate Calvert in respect to her maternal needs. Her refusal to accept, or reasonably adapt to, those accommodations does not tend to prove she was a victim of unlawful harassment or discrimination.

Calvert next claims that her privacy was unlawfully invaded by Detanna's telling a client the name of the doctor who put her on disability. An essential element of an invasion of privacy claim is conduct by the defendant constituting a "serious" invasion of the claimant's right to privacy. *Hill v. NCAA* (1994) 7 Cal.4<sup>th</sup> 1, 39-40. In Calvert's case, it can hardly be said that a co-worker's inquiry about the identity of the doctor who put her on disability is a "serious" invasion of Calvert's privacy.

Lastly, Calvert's statement of claim, like Whitaker's, seeks relief for gender-based discrimination. However, she presented no evidence during her case in chief to support this claim. Therefore, the panel dismissed this claim upon Respondents' motion to dismiss.

Accordingly, Calvert shall take nothing on her claims against Smith Barney, Judy Ackerman and Lisa Detanna.

**Doretha LeFlore**

Claimant Doretha LeFlore ("LeFlore") began working for Smith Barney as a receptionist in 1995. She was initially hired at Branch 196 that had approximately 40 employees. Branch 196 later merged with Branch 554 in 1998 where LeFlore became the sole receptionist for an office with roughly 150 employees. LeFlore's performance appraisals for the years 1998 through 2000 were solid to say the least—she was highly rated in virtually every category and was rated an overall "2" on a scale of 1-5, with 1 being the highest.

In April 2000, Smith Barney brought in a new branch manager by the name of Tom Mahan ("Mahan") to take the helm in Branch 554. Not long after Mahan assumed his position, he promoted a Registered Sales Assistant by the name of Judy Ackerman ("Ackerman") to the position of Branch Administrator. Ackerman's responsibilities as the Branch Administrator included overseeing and administering the branch sales assistants as well as the branch receptionist i.e. LeFlore. LeFlore and her position were previously supervised by Sharon McConnell, the Branch Operations Manager.

On November 4, 2000, Mahan sponsored, at his own expense, a retreat of sorts to Palm Springs, California for the non-broker staff of Branch 554 i.e. sales assistants, cashiers, receptionist etc. The event took place at a motel owned and operated by the parents of the Assistant Branch Manager, Stuart Cross ("Cross"). LeFlore, who was scheduled to go on a two (2) week vacation following this event, rode to Palm Springs with Ackerman in her (Ackerman's) car. LeFlore and Ackerman arrived in Palm Springs around 3-4 p.m. and checked in together. Nemiaya Ward ("Ward") a cashier at Smith Barney, who like LeFlore is black, arrived sometime later that same day.

There were a total of 5 blacks in attendance at this event—3 employees and 2 guests. However, not all of Branch 554's staff attended. At some point during the late afternoon or early evening, LeFlore claims to have overheard someone say "this is private property—I'm going to call the police" or words to this effect. When the object of these comments responded "I'm with Smith Barney and Nemiaya Ward" or words to this effect, he was allowed to enter the facility. It turned out the person who was subjected to the foregoing comments was a guest of Ward, who is also black. The person responsible for these remarks was the proprietor of the motel, Cross's father, who is white.

Afterwards LeFlore claims that the Smith Barney managers at the party kept to themselves and appeared to be talking about and pointing to the 5 blacks, including LeFlore, who were sitting together. Evidently, Cross's father came over to speak with those managers, and he pointed toward LeFlore's and Ward's group. At no time, according to LeFlore, did a single manager come over to interact with or speak to the group of blacks with whom she was sitting.

At this point LeFlore told her group this was not her idea of a fun weekend and said she was going to leave. She returned to her room to pack and saw Mahan as she was walking out carrying her luggage. She then told Ackerman she was leaving because she felt the environment was hostile to blacks. Ackerman responded that it was "okay" with her for LeFlore to leave. LeFlore then unceremoniously took a bus home and ultimately left on her two (2) week vacation,

apparently the next day.

The Monday afterwards Ward complained to either Mahan or Ackerman about what happened over the weekend. When he was asked what he wanted done he said a simple apology would do. He never got one and this upset him, as well as LeFlore when she returned from vacation and learned no apology was forthcoming.

A month later, in December 2000, Mahan fired a black FC/broker by the name of Roger Smith. The reason for Smith's termination apparently had to do with an account of his where the client's business manager had been forging checks. Even though it was also management's responsibility to verify client signatures, Smith was terminated nevertheless. When LeFlore learned that Smith was being fired—which she learned because she processed the parking passes and learned his was being revoked—she reacted by claiming “they fire blacks here”. When Mahan learned about this comment, admitted it upset him and expressed the belief it was inappropriate for LeFlore to express herself in such terms.

Two months later, in February 2001 Cross published a newsletter asking for suggestions for the branch to celebrate St. Patrick's day. When LeFlore learned that Cross' newsletter failed to mention Martin Luther King Day or Black History Month, she was incensed and complained to management, including Cross. Around the same time an employee by the name of Delores Wells overheard Mahan and Ackerman discussing LeFlore. In this conversation, and apparently others she overheard before and after this particular one, Mahan and Ackerman accused LeFlore of being a liar and troublemaker.

In June 2001, LeFlore, Ward, Cross and Smith Barney's Human Resource Generalist for the Western Region, Beth Fehmel (“Fehmel”), met together about LeFlore's Black History Month Complaint and the incident in Palm Springs the previous year. It was at this meeting that LeFlore accused Cross of being a racist. During Fehmel's visit to the Branch, but apart from her meeting with LeFlore et al. above, she also met with Mahan, McConnell and Lynn Mozilo, the former HR Generalist, about conditions in the Branch. At that meeting, Fehmel learned that both Mahan and McConnell considered LeFlore and Ward to be “troublemakers”.

Sometime in the middle of June 2001, a white broker by the name of Besty Davis complained about LeFlore's performance on the switchboard. This is the same broker who evidently called Ward an “incompetent MF” in 1999 but was never warned or disciplined about this kind of misconduct in the workplace. In July 2001, Ackerman counseled LeFlore about her performance on the switchboard and placed a memorandum in her personnel file—although this memo was not intended to be, nor was it, in the nature of a formal warning or discipline.

Not long after this, in September 2001, LeFlore learned about complaints by a number of brokers regarding her handling of the switchboard. Some of these complaints were about things such as the amount of time clients were put on hold before they were offered voice mail or another means of leaving a message. One of the complaints had to do with Ackerman's failure to notify LeFlore she was on vacation and because of this LeFlore did not handle a call to Ackerman properly. In addition, there were unsupported complaints about LeFlore eating at her desk and spending an undue amount of time on personal calls while on the switchboard. LeFlore

was “coached” by Ackerman and McConnell about these concerns, although there was no formal discipline or warning. Nevertheless, written notes were placed in LeFlore’s personnel file, but she did not learn about them until discovery in this action. It is important, however, that LeFlore could not have been, and was not, responsible for callers being placed on hold for the amount of time the several complaints reported. LeFlore was nevertheless blamed.

In November 2001, there was an incident in the cashier’s cage where the operations department supervisor, an individual by the name of John Jacquette (“Jacquette”) took approximately \$200-\$300 in cash that had been collected in the Branch by the staff for a Thanksgiving celebration. Apparently Jacquette took the money on a Sunday to use for cab fare. The second hand testimony was that he intended to replace the money the next day, Monday. However, Ackerman inexplicably returned the money out of her own personal funds. Jacquette was the only Caucasian member of the operations staff in the cashier department and the evidence is that he was never warned, disciplined or terminated for conduct Mahan candidly admitted was evidence of “monumentally bad judgment”.

After LeFlore learned about this incident, she began to talk about what she referred to as “a double standard” in the Branch—one standard for white/Caucasian personnel and another for blacks/minorities.

LeFlore apparently had no further problems on the job until she received her performance appraisal on March 8, 2002. LeFlore was surprised to see that she rated a “3” in every performance category, leaving her with an overall rating of “3” in contrast to her previous ratings in the “2” category. She was especially frustrated by this review because she never received any warning or notice that her performance was declining. Nevertheless, her “3” rating reflected that she was “on track” in all rating categories and was a good, solid performer. Notably, on the same day that LeFlore received her evaluation, Ward received his and was rated a “2” even though he received warnings about excessive personal calls to a “chat line” and was, according to the uncontradicted testimony, accused of sexually harassing another male employee in the office.

Thereafter, LeFlore was distraught about her evaluation and demanded that Smith Barney justify her being rated a “3” as opposed to a “2”. She contacted Fehmel on March 9 and demanded an investigation into her allegations of racial discrimination in the Branch. She even invited management to survey the Branch about her performance and further suggested they survey several “substantial producers”.

LeFlore later learned about a conversation between Mahan, on the one hand, and Detanna and Dehen, on the other, where Mahan criticized them for writing a praiseworthy letter to LeFlore and giving her a gift as a token of their appreciation for her hard work and service as the firm’s only receptionist. LeFlore also overheard Mahan telling another Smith Barney employee on March 18 that after Fehmel’s investigation was concluded, he intended to get rid of her. This made LeFlore extremely upset and caused her to leave work early that day. On March 28, 2002 LeFlore went out on disability leave and never returned to work.

Mahan then conducted a survey of the personnel in the branch about LeFlore’s

performance. His survey produced mixed results—the great majority of feedback was very positive, a small minority was negative, and the remainder was adequate. LeFlore was ultimately notified while she was still out on “disability” that her rating would not be changed and neither would her raise be increased. At the same time, Fehmel notified LeFlore on April 18, 2002 that her investigation disclosed no evidence of racial discrimination in the Branch.

On April 27 LeFlore complained for the first time that she was a victim of retaliation. On May 21 Fehmel responded and invited LeFlore to dialogue about returning to work and related matters. On June 3, 2001 LeFlore filed a discrimination complaint with the EEOC. Smith Barney administratively terminated LeFlore effective December 30, 2004, over 18 months after LeFlore left on disability leave.

LeFlore claims she was discriminated against and harassed because of her race and sex, retaliated against because of her various complaints about discrimination at Smith Barney and constructively discharged in consequence of the foregoing.

“Constructive discharge” occurs when an employee leaves his/her employment under circumstances where the actions of the employer essentially force the employee out. To prove a constructive discharge, the employee must present evidence establishing that the employer intentionally created or knowingly permitted conditions so intolerable that they effectively force an employee to resign. *Mullins*, 15 Cal.4<sup>th</sup> at 737; *Turner*, 7 Cal.4<sup>th</sup> at 1248.

A harassment claimant must prove, among other things, that she was subjected to verbal or physical conduct premised on race; that the conduct was unwelcome; and that the conduct was sufficiently severe or pervasive to alter the conditions of the claimant’s employment. *Vasquez*, 349 F.3d at 642; *Etter*, 67 Cal.App.4<sup>th</sup> at 465-66.

In LeFlore’s case the evidence is insufficient to prove that she had no reasonable alternative, under the conditions described above, but to permanently leave her employment with Smith Barney. While the conditions of LeFlore’s employment may have been stressful to her, they do not rise to the level of being objectively intolerable. Indeed, Smith Barney attempted to address with LeFlore, after she went out on disability leave, the requirements and alternatives for her return to work. Notwithstanding that Mahan expressed an intent to “get rid” of LeFlore, he never carried out his stated intention and it would be sheer speculation whether he would have done, or been able to do, so had LeFlore remained on the job or returned to work. LeFlore apparently decided during the course of her leave to pursue legal action against Smith Barney instead of returning to work. This voluntary decision does not make her departure from her employment a constructive discharge.

LeFlore’s harassment claim is equally unconvincing. There is no evidence that LeFlore was subjected to any verbal or physical conduct based on her race or sex. Indeed, the only incidents that arguably involved “race” (Palm Springs and the Newsletter) occurred more than 1 year before LeFlore went out on leave—ostensibly due to her performance evaluation. Notably, LeFlore injected herself into these incidents as opposed to suffering as a victim. In addition, Nemiaya Ward, a black male, who was formerly a claimant in this action, received a rating of “2” on the same day LeFlore received her “3” rating notwithstanding that he was accused of

sexually harassing another employee, had numerous personal problems that affected his work and was written up for excessive personal calls during working hours to a local “chat line”.

Likewise, the evidence does not support the conclusion that the “complaints” about LeFlore’s performance on the switchboard, and for which she was never formally warned or disciplined, were based on her race or sex. She was the office receptionist, and spent most of her day on the switchboard. Even though LeFlore was apparently blamed for things she could not have done, there is no evidence the complainants, or management, made any racially derogatory comments in connection with those complaints. Indeed, it is more likely than not that the complaints were misguided for no other reason than that LeFlore happened to be the receptionist—meaning that whoever was serving in that position, black or white, could and would have been the victim of misguided and uninformed complaints about reception services. Indeed, one of the complainant’s was a female/black FC, a fact that tends to support the conclusion that receptionist service was not plainly a black and white issue.

LeFlore’s retaliation claim, however, is a different story. State and federal law require a retaliation claimant to prove she engaged in a protected activity e.g. protested unlawful discrimination and was subjected to adverse employment action. In addition, the claimant must prove a discernible causal link between those two events. *Vasquez*, 349 F.3d at 646; *Akers*, 95 Cal.App.4<sup>th</sup> at 1453-54. In this case, it is unquestionable that LeFlore vigorously and persistently protested a number of events she considered to be discriminatory over a lengthy period of time. She protested the events that occurred in Palm Springs in November 2000 multiple times through and including June of 2001. She protested the termination of Roger Smith in December 2000 and the slight she felt as result of the absence of any mention of Black History Month or Martin Luther King’s Birthday in Cross’s firm newsletter. Then in November 2001 LeFlore complained about the double standard she believed existed in the Branch in relation to the incident with Jacquette and the Thanksgiving fund he helped himself to without any consequences.

As an apparent result of these complaints, LeFlore was labeled by Branch management as a liar and troublemaker. She was also inexplicably monitored by a sales assistant who made a note in her personnel file that LeFlore was 3 minutes late returning from her lunch break. She was not given a performance evaluation in 2001 and when she was finally given her evaluation in 2002, her ratings in every category dropped one full point from a 2 to a 3 representing a decline of 33%. Furthermore, the Branch Manager Mahan was unashamed about his intention to get rid of LeFlore, ostensibly because of her complaints, which he admittedly found upsetting. Mahan also went so far as to upbraid FCs Dehen and Detanna for complimenting LeFlore and giving her a gift —conduct that could be construed to discourage letters of commendation for LeFlore and thus discourage her, and others like her, from complaining about what they perceive as discriminatory conduct at the firm.

Thus, that LeFlore was a victim of retaliation is readily apparent. On the other hand, it is not so clear that she suffered any “adverse employment action” as required under the law. This is because LeFlore was not terminated, did not suffer a pay cut or a demotion or transfer in job responsibilities. The panel nevertheless finds LeFlore was, in fact, subjected to a “hostile work environment” that began after she complained about the Palm Springs incident, continued

thereafter and became more acute after her 2002 performance evaluation. Altogether these conditions made the performance of LeFlore's duties more difficult. See *Kortran v. Cal. Youth Auth.*, 217 F.3d 1104, 1116-17 (9<sup>th</sup> Cir. 2000)(Fisher Dissenting). Furthermore, because other personnel in the Branch, specifically Detana and Dehen, were overtly discouraged by management from rewarding LeFlore by writing positive letters that would be included in her personnel file, ostensibly because of LeFlore's complaints, we find this behavior analogous to disseminating a negative performance evaluation and, as such, can reasonably be construed as "adverse employment action" within the meaning of state and federal retaliation jurisprudence. See *Hashimoto v. Dalton*, 18 F.3d 671, 675-76 (9<sup>th</sup> Cir. 1997).

We therefore find in favor of LeFlore on her retaliation claim against Smith Barney only. Her damages, however, are limited to the emotional distress she suffered on the job in consequence of the various trials and tribulations that resulted from and followed her several and persistent complaints about discrimination in the Smith Barney workplace.

Accordingly, we award LeFlore \$20,000.00 against Smith Barney.

LeFlore's claims, however, against Judy Ackerman and Lisa Detanna are hereby dismissed.

### **Lily Cai**

Lily Cai ("Cai") was hired by Smith Barney in October 1999 as a trainee broker, FC associate (financial consultant associate). Cai studied on the job for her securities and insurance licenses and took and passed her Series 7, 63, 65 and California Insurance Licenses in December 1999. Before going to training in Hartford, Connecticut Cai received approximately 1 hour of interrupted in-branch training regarding operations matters such as margin call management. At no time did Cai receive any training in the handling of client checks. Cai then went to Hartford for training in January 2000 where she finished at the top of her class. When Cai returned from Hartford she received no further training whatsoever. She was assigned a production number and began to develop a book of business.

Cai immediately began to work to build a client base. She did so by joining several Chambers of Commerce, writing articles and leading seminars. In addition, she appeared on radio to provide market quotes. Cai made modest progress in her efforts to build her business. In 2000, she earned \$45,000 consisting of \$36,000 in guaranteed base salary and \$9,000 in commissions, including bonus.

The year 2001 was dramatically more successful. In both February and March Cai was commended in writing by regional management for her outstanding performance in production. Cai achieved these results even though she became pregnant sometime in 2000 and went on maternity leave from April through June of 2001.

Notably before Cai went on leave she asked Stu Cross for an available office with a Wilshire Boulevard view. Cross told Cai she could not have the office because she was not senior enough. However, when Cai returned from maternity leave in July the office she wanted



was occupied by a less senior FC who Cai believes was Caucasian but was, in fact, Hispanic. Cai reported to Cross what she believed to be the inequity of the office allocation and he told her it was an HR/discrimination issue, but ultimately it was Mahan's call as to who received a particular office.

In March 2002, Smith Barney formally rewarded Cai for her "exemplary" performance in 2001. Specifically, Cai was granted membership in Smith Barney's "Blue Chip Council" which recognizes the accomplishments of brokers with less than five (5) years of experience based on their commission revenues, asset base and client service. As part of this honor Cai received a plaque for her office, a lapel pin and the right to attend a special education conference in San Antonio, Texas for three days in June.

Shortly after having these honors bestowed on her, Cai was the victim of a vindictive complaint by her customer Virginia Tsai ("Tsai"). Tsai's complaint charged Cai with making unauthorized purchases of mutual fund shares with altered checks. Tsai apparently turned on Cai, after a nearly two-year relationship, when Cai refused to spend significant portions of her business day discussing Tsai's non-financial personal and family problems.

Smith Barney's 2002 investigation of Tsai's complaint revealed that there was a telephone call between Tsai and Cai on each of the days Tsai maintained there was an unauthorized transaction. Thus the Smith Barney investigation concluded there were no unauthorized trades in Tsai's account. At the same time, it came to light that until March 2001 Tsai gave Cai partially written checks to hold so that she (Tsai) could more readily transfer funds into her Smith Barney account to take advantage of higher than average interest rates. However, the checks Cai held were properly deposited in accordance with Tsai's instructions. More importantly, Cai was never initially trained at Smith Barney regarding the handling of client checks and once she did learn in March 2001 that what she was doing for Tsai was improper she promptly stopped.

Around this same time in 2002, Smith Barney was one of the underwriters in an initial public offering ("IPO") and Cai received an allocation of shares to offer her "preferred" clients. Although the shares were not restricted, Smith Barney apparently instructed its brokers to advise clients who were invited to participate in the IPO that they had to promise to hold the new stock for at least 30 days. Cai did as she was instructed and one of her clients, a Dr. Greenblatt, decided to renege on his promise not to sell. When Cai told him that if he did so he would never again have an opportunity to participate in an IPO through Smith Barney he said he did not care. Cai therefore had no choice but to execute Dr. Greenblatt's sell order. When the fact that Dr. Greenblatt immediately sold his IPO shares came to Mahan's attention, he called Cai into a meeting in his office sometime in April 2002 and told her he was going to take away her commission on both sides of the transaction. Cai left the meeting with Mahan in a state of disbelief and composed an e-mail the next day to address what had occurred. However, before she sent the e-mail, Mahan came to her office and told her he had reconsidered his threat and would allow her to keep her commission.

Roughly another month went by and on May 17, 2002 Cai was summoned to a meeting

with Mahan, Cross and Philip Kent (the branch compliance officer) where she was told she had been guilty of a pattern of bad judgment in her work as a financial consultant. Two customer transactions, in addition to the previously resolved Tsai complaint, were raised. One transaction involved a client who invested \$47,500 in a Smith Barney municipal bond fund. Evidently, had this client invested another \$2,500 he would have received a price break on the sales charge. However, after having been advised of that "breakpoint" the client still elected not to invest the additional \$2,500.

The other transaction involved an elderly client who chose to sell some Smith Barney mutual fund shares and purchase, instead, Smith Barney Capital Preservation fund shares. Cai apparently made a mistake and put in an order to purchase A shares rather than exchanging the mutual fund shares for L shares. However, this mistake was caught before the sales ticket was processed and so the client was never harmed.

Cai received no coaching or counseling, warning, or any other discipline in connection with any of the foregoing incidents. Instead, one week later on May 24, 2002 Cai was called into Mahan's office and told she was being fired because Smith Barney found her business judgment to be lacking. Also present at this meeting were Phil Kent and Greg Tevis, Western Division Counsel for Smith Barney at its headquarters in New York, who participated by phone.

In an e-mail Mahan wrote to himself about this very meeting the next working day he recounted that Cai was terminated for "poor business judgment" based on the two customer transactions described above and Cai's naïve desire to serve her client's interests by holding Tsai's checks—a practice Cai promptly ended after learning for the first time, more than a year earlier, was improper.

In stark contrast to Cai, a Caucasian FC by the name of Jim Jackson received a written warning after he admitted executing an unauthorized trade in a client's account. Less than a year later, Jackson received a letter of caution from Mahan for violating Smith Barney internal policies when he falsely signed in as an attendee of a firm compliance presentation. Jackson was then finally terminated 9 months later after he again engaged in unauthorized trading in a client's account.

John Jacquette, also a Caucasian, who was in charge of the cashier's cage, took money out of the safe that did not belong to him, never replaced it himself, and was never disciplined, warned or counseled about his conduct. On the other hand, Roger Smith was promptly fired when both he and management failed to discover that forged checks were being drawn on one of Smith's customer's accounts. Notably Mr. Smith never received any written warning or discipline prior to his termination. Mr. Smith is black.

Within 90 days of her termination, Cai found a job with Washington Mutual as a financial consultant. However, her earnings were considerably less than what she was on track to earn had she been allowed to remain at Smith Barney. According to Smith Barney's projections, Cai would have earned \$114,794 in 2002. In actuality, Cai was paid \$37,980 by Smith Barney and she earned another \$24,400 while working at Washington Mutual. Altogether Cai earned \$62,380 in 2002.

Cai, however, got back on track in 2003, apparently after getting a job with Bank of America Investments. Cai earned \$134,000 in 2003; \$187,000 in 2004; and \$150,000 through the end of September this year, 2005, notwithstanding that she had another baby and took maternity leave.

Cai claims to have been discriminated against and harassed because of her race, gender, and purported disability, retaliated against, and constructively discharged. The panel dismissed Cai's constructive discharge claim because she was, in fact, terminated. We also dismissed her sex and disability discrimination claims because she presented no evidence to support either of them.

Cai's harassment claim is not supported by substantial evidence because there is no evidence she was subjected to verbal or physical conduct premised on race. *Vasquez*, 349 F.3d at 642; *Etter*, 67 Cal.App.4<sup>th</sup> at 465-66. Likewise, her retaliation claim is not well supported because there no evidence tending to prove Cai complained about discrimination in the branch. The only incident that might be construed as such would be Cai's complaint about a particular office she requested that was given to a less qualified and less senior Hispanic FC while she was out on maternity leave. However, we do not believe Cai considered this to be such a complaint and nor do we believe that Smith Barney reasonably should have treated it as such.

There is, however, substantial evidence to support Cai's claim that she was terminated from her employment because of her race and/or national origin. In support of a claim for unlawful race or national origin discrimination the claimant must prove (1) she was a member of a protected class; (2) she was qualified for her position; (3) she suffered adverse employment action i.e. termination; and (4) some other evidence that suggests a discriminatory motive for the job action. *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4<sup>th</sup> 317, 355. The employee's burden of proving her prima facie case is quite minimal and Cai has undoubtedly sustained hers—she is Chinese, was an honored staff member having achieved membership in Smith Barney's Blue Chip Council, and was terminated for infractions that were far less serious than other personnel who were Caucasian. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1062 (9<sup>th</sup> Cir. 2002).

The burden of production then shifts to the employer to show a legitimate, non-discriminatory reason for Cai's termination. *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4<sup>th</sup> 189, 203. Smith Barney has satisfied its burden in this respect in as much as Cai was an at-will employee and the subject of at least one customer complaint and one mistake with respect to the handling of the exchange of a client's mutual fund shares.

The burden now returns to Cai to prove with specific and substantial evidence that the decision to terminate her was motivated by a discriminatory animus. *Cucuzza*, 104 Cal.App.4<sup>th</sup> at 1038; *Morgan*, 88 Cal.App.4<sup>th</sup> at 69. We conclude the evidence does so prove. In particular, the fact that a Caucasian FC was given two warnings before being terminated for a second incident of unauthorized trading stands in harsh contrast to Cai's professional mistakes, which were relatively minor, resulted in no harm to any client, and were most likely a function of her rookie status and inadequate training. Indeed the most serious infraction of which Cai was guilty was holding incomplete checks as an accommodation to her client, Ms. Tsai. However, immediately

upon learning in March 2001 that this practice violated Smith Barney policy, Cai stopped. Moreover, this practice ended more than a year before Cai was terminated. In further contrast to Cai's rookie mistakes, the Caucasian supervisor of the Cashier Department, John Jacquette, was not even written up, much less disciplined or terminated, for knowingly taking money out of the safe that did not belong to him. Smith Barney offered no evidence to explain or justify this remarkable disparity in treatment of its fiduciary staff. Its failure to offer any evidence in this vein leads this panel to conclude that had it done so, such evidence would have been unfavorable. See *Cal. Evid. Code* §§ 412 & 413. Coupled with the fact that a black FC, Roger Smith, was terminated without warning over his, combined with management's, neglect to discover forgeries in a customer's account, convinces us that Cai was the victim of unlawful discrimination that resulted in her termination.

As noted above, Cai was projected to earn \$114,794 in 2002. Cai was paid \$37,980.00 by Smith Barney and she earned another \$24,400.00 while working at Washington Mutual. Altogether Cai earned \$62,380.00 in 2002. Therefore, her lost earnings as a result of her wrongful termination total \$52,414.00 plus pre-judgment interest at the rate of 7% simple interest per annum, commencing on May 24, 2002 through the date of this award. In addition, we award Cai \$25,000 as compensation for the emotional distress she undoubtedly suffered as a result of being terminated. This component of the award, however, is without interest. The total award in favor of Cai, which is assessable against Smith Barney only, is therefore \$77,414.00, plus the interest set forth above.

Cai's claims against Judy Ackerman and Lisa Detanna are hereby dismissed.

**AWARD**

After considering the pleadings, testimony, evidence presented at the hearing, and the post-hearing submissions, the Panel decided in full and final resolution of the issues submitted for determination with respect to each of the Claimants as follows:

1. Claimant Nemiaya L. Ward's claims are dismissed with prejudice.
2. Claimant Dawn M. Whitaker's claims are denied in their entirety.
3. Claimant Christina D. Calvert's claims are denied in their entirety.
4. Respondent Citigroup Global Markets, Inc. is liable and shall pay to Claimant Dorothea LeFlore \$20,000.00 in compensatory damages.
5. Respondent Citigroup Global Markets, Inc. is liable and shall pay to Claimant Lily Cai \$77,414.00 in compensatory damages.
6. Respondent Citigroup Global Markets, Inc. is liable and shall pay to Claimant Lily Cai interest on the amount of \$52,414.00 at the rate of 7% simple interest per annum, commencing on May 24, 2002 through the date of this award.
7. Respondent Citigroup Global Markets, Inc. is liable to and shall pay Claimants Doretha LeFlore and Lili Cai the sum of \$231,000.00 in attorney's fees pursuant to California Government Code § 12965(b).
8. Respondent Citigroup Global Markets, Inc. is liable to and shall pay Claimants Dorothea LeFlore, Lily Cai, Christina D. Calvert, Nemiaya L. Ward, and Dawn M. Whitaker the sum of \$1,112.50 as reimbursement for the adjournment and administrative fees Claimants paid in connection with this arbitration proceeding only.
9. This Award shall bear interest at the rate of 10% per annum on any balance that remains unpaid thirty (30) days after receipt hereof, unless a motion to vacate has been filed with a court of competent jurisdiction. If this award is the subject of a motion to vacate that is subsequently denied, this award shall bear interest at the rate of 10% per annum on any balance that remains unpaid from date of the court's order denying said motion to vacate.
10. All other relief requested and not expressly granted, including Claimants' request for punitive damages, 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 = \$ 250.00

**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 Citigroup Global Markets, Inc. is a party and the following fees are assessed:

Member Surcharge	= \$1,500.00
Pre-Hearing Process Fee	= \$ 750.00
Hearing Process Fee	= \$2,200.00
<b>Total Member Fees</b>	<b>= \$4,450.00</b>

**Adjournment Fees**

The following adjournment fees are assessed:

July 11-15, 18-22, and 25-29, 2005 adjournment  
requested by Claimants = \$1,000.00

The Panel assessed the adjournment fee to Claimants jointly and severally.

**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 Chair or the parties and the Panel. The following fees are assessed:

One (1) Pre-hearing conference session with a single arbitrator @ \$450.00/session = \$ 450.00  
Pre-hearing conference: May 4, 2005 1 session

One (1) Pre-hearing conference session with the Panel @ \$1,000.00/session = \$ 1,000.00  
Pre-hearing conference: October 25, 2004 1 session

Twenty-four (24) Hearing sessions @ \$1,000.00/session = \$24,000.00

Hearings:	October 5, 2005	2 sessions
	October 6, 2005	2 sessions
	October 7, 2005	2 sessions
	October 10, 2005	2 sessions
	October 11, 2005	2 sessions
	October 12, 2005	2 sessions
	October 14, 2005	2 sessions
	October 24, 2005	2 sessions

October 25, 2005	2 sessions
October 26, 2005	2 sessions
October 27, 2005	2 sessions
October 28, 2005	2 sessions

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<b>Total Forum Fees</b>	<b>= \$25,450.00</b>
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The Panel assessed the entire balance of the forum fees, in the amount of \$25,450.00, to Respondent Citigroup Global Markets, Inc. pursuant to *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4<sup>th</sup> 83 and because Claimants are, in the main, the prevailing parties.

#### **Administrative Costs**

Administrative costs are expenses incurred because a party requested additional services beyond the normal administrative services. These additional services include, but are not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, security, and sundry other requests.

Claimants requested 225 photocopies @ \$0.50:	= \$ 112.50
Respondents requested 45 photocopies @ \$0.50	= \$ 22.50

#### **Fee Summary**

1. Claimants are charged jointly and severally with the following fees and costs:

Filing Fee pursuant to <i>Armendariz v. Foundation Health Psychcare Services, Inc.</i> 24 Cal.4 <sup>th</sup> 83	= \$ 200.00
Adjournment Fee	= \$ 1,000.00
<u>Administrative Costs</u>	<u>= \$ 112.50</u>
Total Fees	= \$ 1,312.50
Less payments by Claimants	= \$ (1,000.00)
<u>Less payments by Citigroup Global Markets, Inc.</u>	<u>= \$ (200.00)</u>
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 112.50</b>

2. Respondent Citigroup Global Markets, Inc. is charged with the following fees and costs:

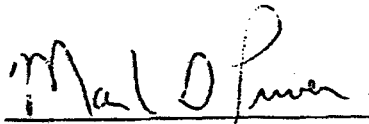
Member Fees	= \$ 4,450.00
Balance due for Claimants' Filing Fee pursuant to <i>Armendariz</i>	= \$ 50.00
Forum Fees	= \$25,450.00
<u>Administrative Costs</u>	<u>= \$ 22.50</u>
Total Fees	= \$29,972.50
Less payments	= \$ (5,500.00)
<u>Less unused mediation deposit</u>	<u>= \$ (1,550.00)</u>
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$22,922.50</b>

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**

<b><i>Mark S. Priver</i></b>	-	<b><i>Public Arbitrator, Presiding Chair</i></b>
<b><i>Thomas R. Watkins</i></b>	-	<b><i>Public Arbitrator</i></b>
<b><i>Robert E. Jenks</i></b>	-	<b><i>Public Arbitrator</i></b>

**Concurring Arbitrators' Signatures**



Mark S. Priver  
Chair, Public Arbitrator

12/21/2005  
Signature Date

\_\_\_\_\_  
Thomas R. Watkins  
Public Arbitrator

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Robert E. Jenks  
Public Arbitrator

\_\_\_\_\_  
Signature Date

December 22, 2005  
Date of Service



NASD Dispute Resolution  
Arbitration No. 03-04782  
Award Page 24 of 24

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.

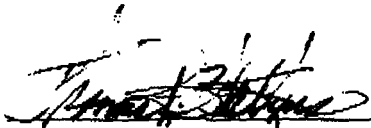
ARBITRATION PANEL

<b>Mark S. Priver</b>	-	<b>Public Arbitrator, Presiding Chair</b>
<b>Thomas R. Watkins</b>	-	<b>Public Arbitrator</b>
<b>Robert E. Jenks</b>	-	<b>Non-Public Arbitrator</b>

Concurring Arbitrators' Signatures

\_\_\_\_\_  
Mark S. Priver  
Chair, Public Arbitrator

\_\_\_\_\_  
Signature Date

  
\_\_\_\_\_  
Thomas R. Watkins  
Public Arbitrator

12-22-2005  
\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Robert E. Jenks  
Public Arbitrator

\_\_\_\_\_  
Signature Date

December 22, 2005  
\_\_\_\_\_  
Date of Service

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**

<b><i>Mark S. Priver</i></b>	-	<b><i>Public Arbitrator, Presiding Chair</i></b>
<b><i>Thomas R. Watkins</i></b>	-	<b><i>Public Arbitrator</i></b>
<b><i>Robert E. Jenks</i></b>	-	<b><i>Public Arbitrator</i></b>

**Concurring Arbitrators' Signatures**

\_\_\_\_\_  
Mark S. Priver  
Chair, Public Arbitrator

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Thomas R. Watkins  
Public Arbitrator

\_\_\_\_\_  
Signature Date

  
\_\_\_\_\_  
Robert E. Jenks  
Public Arbitrator

12/21/05  
Signature Date

December 22, 2005  
Date of Service