

AWARD
NASD Dispute Resolution

In the Matter of the Arbitration Between

Claimant

Benjamin T. Weinberg

v.

04-04077

Denver, Colorado

Respondent

Lincoln Financial Advisors Corporation

Nature of Dispute: Associated Person v. Member

REPRESENTATION OF PARTIES

Benjamin T. Weinberg ("Claimant") was represented by Jeffrey J. Scott, Esq., of Scott & Associates, Denver, Colorado.

Lincoln Financial Advisors Corporation ("Respondent") was represented by Sandra L. Spencer, Esq., of White & Steele, P.C., Denver, Colorado.

CASE INFORMATION

The Statement of Claim was filed on or about June 8, 2004. The Submission Agreement of Claimant was signed on or about June 8, 2004.

The Statement of Answer was filed by Respondent, Lincoln Financial Advisors Corporation, on or about August 2, 2004. The Submission Agreement of Respondent, Lincoln Financial Advisors Corporation, was signed on or about June 23, 2004.

CASE SUMMARY

Claimant asserted causes of action including the following: respondeat superior, defamation, breach of NASD conduct rules, breach of Colorado contract and Colorado common law, negligence and failure to supervise. The causes of action related to Claimant's allegation that he was improperly dismissed from his employment with Respondent on May 9, 2003. Claimant also alleged that Respondent falsely, intentionally, recklessly and maliciously defamed him on his Form U-5 by stating that he had failed to meet the requirements of the Regional Director of Financial Planning and would not execute a waiver and general release upon termination.

Respondent denied the allegations set forth in the Statement of Claim and asserted defenses including the following: Claimant failed to state a claim upon which relief can be granted; if any

loss, injury, or detriment occurred as alleged in the Statement of Claim, the loss, injury, damages or detriment was caused or contributed to by the actions of Claimant; Claimant's defamation claim is barred by C.R.S. § 8-2-114; Respondent's statements in the Form U-5 are truthful or substantially true; and Claimant consented to the language of the Form U-5 and cannot now complain of same.

RELIEF REQUESTED

Claimant requested an award in the amount of actual damages to be determined at the hearing, plus punitive damages, interest, attorneys' fees, costs, an expungement of the defamatory comments on his Form U-5 and any other relief the panel deemed just and equitable.

Respondents requested that the claims asserted against it be denied in their entirety and that it be awarded its costs and attorneys' fees.

OTHER ISSUES CONSIDERED & DECIDED

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. In either case, the parties have agreed to receive conformed copies of the award while the originals remain on file with NASD Dispute Resolution ("NASD").

AWARD

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

1. Claimant's claims, each and all, are hereby denied and dismissed with prejudice in their entirety;
2. To the extent not specifically awarded or otherwise provided for above, all other claims and requests for relief by any party hereto, including punitive damages, are denied with prejudice; and
3. Other than the Forum Fees noted below, the parties shall each bear all other costs and expenses incurred by them in connection with this proceeding, including but not limited to attorneys' fees.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Dispute Resolution will retain the non-refundable filing fee for each claim:

Initial claim filing fee = \$ 250

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. In this matter, the member firm is Lincoln Financial Advisors Corporation.

Member surcharge = \$ 1,500
Pre-hearing process fee = \$ 750
Hearing process fee = \$ 2,200

Forum Fees and Assessments

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

One (1) Pre-hearing session with the Chairperson x \$ 450 = \$ 450

Pre-hearing conference: 01/31/2005 1 session

One (1) Pre-hearing session with Panel x \$ 1,000 = \$ 1,000

Pre-hearing conference: 10/19/2004 1 session

Six (6) Hearing sessions with Panel x \$ 1,000 = \$ 6,000

Hearing Dates: 02/08/2005 2 sessions
02/09/2005 2 sessions
02/10/2004 2 sessions

Total Forum Fees = \$ 7,450

The Arbitration Panel has assessed \$ 3,725 of the forum fees to Benjamin T. Weinberg.

The Arbitration Panel has assessed \$ 3,725 of the forum fees to Lincoln Financial Advisors Corporation.

FEE SUMMARY

Claimant, Benjamin T. Weinberg, is liable for:

Initial Filing Fee	= \$ 250
<u>Forum Fees</u>	= \$ 3,725
Total Fees	= \$ 3,975
<u>Less payments</u>	= \$ 1,250
Balance Due NASD Dispute Resolution	= \$ 2,275

Respondent, Lincoln Financial Advisors Corporation, is liable for:

Member Fees	= \$ 4,450
<u>Forum Fees</u>	= \$ 3,725
Total Fees	= \$ 8,175
<u>Less payments</u>	= \$ 4,450
Balance Due NASD Dispute Resolution	= \$ 3,725

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

ARBITRATION PANEL

William R. Rapson, Esq. - Public Arbitrator, Presiding Chair
Arthur E. Otten, Jr., Esq. - Public Arbitrator
Jess Burton Cohen- Non-Public Arbitrator

Concurring Arbitrators:

William R. Rapson, Esq.
Public Arbitrator, Presiding Chair

Signature Date

Arthur E. Otten, Jr., Esq.
Public Arbitrator

Signature Date

Concurring as to Award Dissenting as to Expungement Relief:

Jess Burton Cohen
Non-Public Arbitrator

Signature Date

Concurring Opinion –Arbitrator Cohen:

I concur with the finding that there was no defamation and therefore no recovery by the Claimant. The case was pled and tried on the single issue of whether or not the Respondent defamed the Claimant, and the panel is unanimous in finding there was no defamation. However, there are issues I think need to be addressed and therefore a need for a concurring opinion.

Claimant, Benjamin Weinberg, was employed by Respondent, Lincoln Financial Advisors, as a Regional Director of Financial Planning (RDFFP) from late 2001 until May 2003. His duties were to provide support, financial plans, and analysis to the financial planners (producers) who worked through Lincoln. The evidence was clear that the revenues produced by the producers were vital to the success of Lincoln.

The evidence also showed that some producers very much-liked Claimant's work, some thought it was satisfactory, and some thought it was unsatisfactory to the point that four of the top producers in the organization would not work with Claimant.

Since the producers could leave and go elsewhere if they were not satisfied with the support, and since the company wanted to keep the producers and recruit another who had a conflict with Claimant, the company claimed it had reason to terminate Claimant.

The company processed Claimant's leaving as a discharge, and filed a form U5 with the NASD that stated that he was discharged and gave as a reason, "not meeting the requirements of the RDFFP position." Claimant claimed that the publication of this in a public record, the CRD, defamed him and kept him from getting suitable work in the securities industry.

Claimant was a superbly educated man in his late thirties. He has a BA, MBA and LLB from the University of Colorado, and also held a computer-training certificate from Microsoft. Since May of 2003, he had interviewed unsuccessfully with two financial companies and did a consulting contract for a financial planner. He is presently employed as a manager of the wine department of a liquor store.

The evidence showed that during the past seven years Lincoln terminated about 20 percent of its employees. These were producers who did not produce sufficient revenues to meet the required

quotas for revenue. All were allowed to voluntarily resign except for one who was forging signatures. The producers who were allowed to voluntarily resign were not producing sufficient revenue, producing such revenue was a requirement of their position, and they were not therefore meeting the requirements of their position. Yet, all, except the forger, were allowed to voluntarily resign. Of the non-criminals, only Claimant was processed as a discharge for not meeting the requirements of his job.

Claimant claimed that this effectively blackballed him from getting a suitable position in the securities industry and produced an expert who testified to that effect.

The evidence also showed that Claimant was discharged partially because of an e-mail from a senior executive at Lincoln who stated that Claimant had done poorly on a personnel evaluation tool called the 360 exam and ordered him fired. The Respondent originally produced an affidavit from the executive saying Claimant was not performing his job because he had ones and twos on his 360 exam and this was clearly unsatisfactory since the target response was seven.

However, Claimant's scores on the exam, if correctly read, were not ones and twos but were mostly between five and one half and seven. On first glance it appears Claimant scores are ones or two because of the methodology of the report. For example, to determine if a person is performing a task, it asks if he is good, average, or bad. If he is good is he very good or just good. The number of people saying he is very good might be one and the number saying he is good might be two. Then for those who said average it shows one said above average, one said below average, and two said average. For those saying bad, it shows one saying bad and one saying very bad. The numbers on first glance are the ones and twos expressing the number of people in each category. A quick glance, such as that given by a busy executive, not familiar with the test, might lead you to conclude the results were a lot of ones and twos, when in reality the result was a seven since there were as many ones and two for good as for bad, and the other ones and twos were clustered around average giving you an average score. When I first read Respondent's trial brief and the 360 report what I saw was a lot of ones and twos, and when I read the affidavit I could see how he arrived at this conclusion. Only at the trial was I educated on how to correctly read the 360 report.

The Respondent tried to introduce another affidavit from the Lincoln executive saying that this was just a typographical error. However, that affidavit was produced just before trial, when Respondent's counsel was closely examining the evidence, and after damage had already been done to Claimant. It is reasonable to assume the first affidavit was the true one. That a busy executive had skimmed the test, come to the wrong conclusion, and made a mistake that was very damaging to Claimant. As a trier of fact, I think that the attempt to cure this after someone other than a paralegal had looked at the affidavit is very weak. I think the original affidavit was correct, and is the strongest piece of evidence Claimant has. The executive was apparently too busy to come to the hearing, and was unavailable for cross-examination on this issue.

However, having said all that, I cannot find that the evidence shows that Claimant was defamed.

Respondent said he did not meet the requirements of his position, and he didn't. He needed to work with and satisfy the needs of the producers, and that did not happen.

The evidence may show discrimination in that he was the only non-felon not allowed to voluntarily resign. There may be evidence of lack of due process, wrongful discharge, or lack of equal protection. Those causes of action may still exist, but they were not pled or determined in this case. It should be noted that Claimant's attorney did not know the matters alluded to in this opinion when he drafted the complaint, and thus I don't think he is barred from raising them in another matter. However, that is my own opinion and not that of the panel. It is also my opinion, though we did not need to get to the issue of damages in this case, that Claimant is a well qualified, relatively young man, who did not try very hard to get a job in the securities industry. His claim for damages, if we would have gotten to it, was not for a lifetime compensation, but for severance pay for a limited time.

The issue of wrongful discharge, that is whether a person who is fired for some reasons, some valid and some not, and where the non-valid reason is given as the main reason in the affidavit and is used in the e-mail ordering his firing, and then one valid reason is put on record; is an issue that just did not arise in a defamation case where the valid reason is the one claimed as defamatory.

Respondent claimed there were other reasons for terminating claimant. It is not necessary to discuss them here, but in my opinion they do not dispose of the case, and were not relevant to or decided in the defamation case.

A second reason for this opinion deals with the issue of expungement. NASD rules allow arbitrators to expunge the CRD if it is defamatory. In this case, I think the remarks made in the CRD while not defamatory, are discriminatory, unfair, and made with the intent to injure. I think Claimant's CRD should be expunged as a matter of fairness.

2/24/05
Date of Service (NASD use only)

FEE SUMMARY

Claimant, Benjamin T. Weinberg, is liable for:

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ARBITRATION PANEL

William R. Rapson, Esq. - Public Arbitrator, Presiding Chair
Arthur E. Otten, Jr., Esq. - Public Arbitrator
Jess Burton Cohen- Non-Public Arbitrator

Concurring Arbitrators:

William R. Rapson / rg
William R. Rapson, Esq.
Public Arbitrator, Presiding Chair

March 28, 2005
Signature Date

Arthur E. Otten, Jr., Esq.
Public Arbitrator

Signature Date

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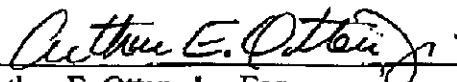
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Signature Date

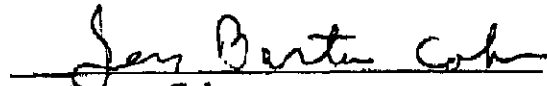


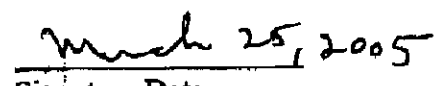
Arthur E. Otten, Jr., Esq.
Public Arbitrator

3/23/05

Signature Date

Concurring as to Award Dissenting as to Expungement Relief:


Jess Burton Cohen
Non-Public Arbitrator


Signature Date

Concurring Opinion - Arbitrator Cohen: "

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