

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant

Charles D. Erickson  
vs.

Case #  
92-02150

Name of Respondent

Kidder, Peabody & Co., Incorporated

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**REPRESENTATION**

For Claimant: Jeffrey L. Liddle, Esq., from the law firm of Liddle & Robinson, located in New York, New York.

For Respondent: George A. Stohner, Esq., from the law firm of Morgan, Lewis & Bockius, located in New York, New York.

**CASE INFORMATION**

Statement of Claim was filed on July 2, 1992.

Claimant's Submission Agreement was signed on June 15, 1992.

Statement of Answer was filed by Respondent, Kidder, Peabody & Co. Inc. on August 14, 1992.

Respondent, Kidder, Peabody & Co's Submission Agreement was signed on August 13, 1992.

**HEARING INFORMATION**

Pre-Hearing Conferences:

July 13, 1993	-	One session
July 20, 1993	-	One session
February 3, 1994	-	One session
March 8, 1994	-	One session
June 1, 1994	-	One session
June 20, 1994	-	One session
October 12, 1995	-	One session

Hearing Dates/Sessions:

July 14, 1993	-	One session
July 23, 1993	-	Two sessions
July 30, 1993	-	Two sessions
August 11, 1993	-	Two sessions
September 9, 1993	-	Two sessions

September 27, 1993 - Two sessions

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September 29, 1993	-	Two sessions
November 5, 1993	-	Two sessions
December 6, 1993	-	Two sessions
January 6, 1994	-	Two sessions
January 7, 1994	-	Two sessions
January 21, 1994	-	Two sessions
February 4, 1994	-	Two sessions
March 4, 1994	-	Two sessions
April 7, 1994	-	Two Sessions
April 20, 1994	-	One session
May 3, 1994	-	One session
May 10, 1994	-	One session
June 10, 1994	-	Two Sessions
July 26, 1994	-	Two sessions
September 27, 1994	-	One session
September 28, 1994	-	Two sessions
October 4, 1994	-	Two sessions
October 7, 1994	-	Two sessions
October 12, 1994	-	One session
October 13, 1994	-	One session
November 8, 1994	-	One session
November 22, 1994	-	One session
December 7, 1994	-	One session
December 8, 1994	-	One session
December 14, 1994	-	One session
April 12, 1995	-	One session
April 17, 1995	-	One session
April 18, 1995	-	Two sessions
April 20, 1995	-	One session
May 15, 1995	-	Two sessions
June 6, 1995	-	One session
July 17, 1995	-	One session
July 18, 1995	-	One session
July 24, 1995	-	One session
September 19, 1995	-	One session
September 20, 1995	-	One session
September 28, 1995	-	One session
October 13, 1995	-	Two sessions

Hearing Location: National Association of Securities Dealers, Inc.'s offices located at 33 Whitehall Street, New York, New York.

### CASE SUMMARY

Charles D. Erickson ("Claimant") alleges that he had been employed by Kidder Peabody & Co., Incorporated ("Respondent") in its Utility Finance Group, from 1964 until July 1990 when his employment was terminated. Claimant in his Statement of Claim alleges: i) wrongful termination based on age discrimination and ii) interference with prospective advantage, injurious falsehood and defamation as a result of statements made by Respondent which appeared in the Wall Street Journal and in his Form U-5 and remain part of his permanent record in the securities industry. Claimant states that the U-5 claims that he was fired because he "failed to meet performance standards expected of Managing Directors." Claimant contends that this was malicious falsehood intended to injure his reputation as an investment banker.

Claimant further alleges that his years at Respondent's firm, were marked by consistently distinguished performance which generated millions of dollars in revenue for Respondent. Claimant contends that he developed a new product for Respondent which produced over \$10 billion in revenue and resulted in his being named "Man of the Year" in 1986. Claimant asserts that his compensation packages and promotion record reflects this consistent, superior performance. Claimant alleges that even in January 1990, he received an excellent performance evaluation and bonus recommendation from the Manager of the Finance Group. Then a few months later, after he had turned fifty, he was summarily terminated. Claimant also charges that two other employees who were in their fifties were terminated from their positions in the Utility Finance Group and that by the end of 1990 every professional employee in the Utility Finance Group who was over fifty years old had been fired. It is Claimant's contention that his age was the dispositive factor in his termination from Respondent's firm, and that such termination was in violation of state, federal and local laws.

Respondent alleges that although in 1984 Claimant created an investment instrument which generated substantial investment banking business for Respondent, and Claimant was named "Man of the Year" as a result, the instrument was designed to take advantage of a tax loophole which was later plugged by the Tax Reform Act of 1986. Respondent argues that the evolving utilities industry was concerned with more generalized advice from investment bankers regarding mergers and acquisitions and strategic thinking and that Respondent believed that the level of Claimant's contact within the utilities industry would have been enough to enable him to provide more broad-based investment services to meet the changing needs of the industry. Respondent contends that since Claimant came from a traditional financing background, he was either unable or disinclined to adapt and his compensation fell from a high of \$550,000 in 1985 to \$250,000 in 1989. Respondent states that in 1990, it became clear that Claimant was becoming a liability to the firm, when two of his clients indicated they did not want him to attend meetings with the Utilities Group. Respondent also states that, Claimant was terminated on June 28, 1990 because of his lack of performance.

As affirmative defenses, Respondent asserts that the claims failed to state a claim; that Claimant is unable to prove a *prima facie* case under the Age Discrimination In Employment Act (ADEA) 29 U.S.C. section 623(a)(1), and 626(b), or the other statutes relied upon; that Claimant's charges are barred by the applicable statute of limitations and are otherwise barred by the doctrines of waiver and estoppel; and that Claimant has failed to mitigate the alleged damage by seeking comparable work with reasonable due diligence.

### **RELIEF REQUESTED**

Claimant requests that the panel award him the following relief:

**Claim I: Age Discrimination:**

- a) Back pay through the date of the rendering of the award in this proceeding;
- b) Reinstatement or, in the alternative, front pay reflecting the compensation he would have earned from the date of the award until such date, if any, by which he may reasonably be expected to obtain comparable employment;
- c) The value of lost fringe benefits in an amount to be determined by the Arbitrators;
- d) Reasonable attorney's fees, and
- e) Costs and disbursements.

**Claim II: Defamation:**

- a) General damages in the amount of \$1,000,000;
- b) An award in the amount of the actual damage to his potential earnings stream.
- c) An order directing Respondent to file a corrected Form U-5 reflecting the fact that he was terminated without cause and an award of costs and disbursements.

Respondent requests that the claims be dismissed with prejudice. Further, Respondent objects to any request for attorneys' fees as being outside the scope of the arbitration agreement.

### **OTHER ISSUES CONSIDERED & DECIDED**

The parties have agreed that the Award in this matter may be executed in counterpart copies. The parties have agreed to receive conformed copies of the Award while the originals remain on file with the NASD.

During the course of the hearings, the panel issued a Confidentiality Order, which by its terms, prohibited the disclosure (by parties and their witnesses) of documents that Respondent produced and designated as "confidential." After the conclusion of the case, and prior to the delivery of the Award to the parties, Claimant sought to have a Confidentiality Order removed. After reviewing all submissions filed by the parties, this Panel denied Claimant's request.

### **AWARD**

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

1. Claimant's claim of age discrimination is denied. The Respondent carried its burden of showing that claimant failed to meet the evolving standards of a managing director at Respondent's firm. The Panel accepted Respondent's reasons for the termination.
2. The charge that Claimant was defamed by Respondent in an article printed in the Wall Street Journal on April 3, 1992 is dismissed. There was no showing that Respondent made the statements to the Wall Street Journal.
3. Claimant's complaint that Respondent defamed him by the statements it made in a Form U-5,

filed with the securities industry is dismissed. The U-5 sets forth an evaluation of Claimant's

performance that is consistent with the facts as presented to the panel. Since Claimant is an NASD registered person, Respondent was required to make the U-5 evaluation under NASD rules. Moreover, the panel was unable to find any defamatory meaning from the U-5 statement. Finally, under New York law, no cause of action for defamation attaches to the discharge of an employee at-will.

4. It is the decision of the Panel that all forum fees be assessed against Kidder, but that each party is to bear the fees and expenses of their respective counsel and other expenses associated with this arbitration.

#### **FORUM FEES**

Pursuant to Section 44(c) of the *Code of Arbitration Procedure*, the following Forum Fees are assessed as follows:

1. Forum fees in the amount of \$68,100.00 for sixty-six (66) hearing sessions at \$1,000.00 per session ( $66 \times \$1,000.00 = \$66,000.00$ ) and seven (7) pre-hearing conferences at \$300.00 per session ( $7 \times \$300.00 = \$2,100.00$ ) are assessed against the Respondent as stated in paragraphs 2 and 4;

2. Respondent, Kidder, Peabody & Co. Inc., is further assessed a non-refundable surcharge of \$500.00 pursuant to Section 45 of the Code. Respondent deposited \$9,800.00 with NASD. Therefore, the total fee due by Respondent is \$58,800.00.

3. Claimant is assessed a \$500.00 non-refundable filing fee. Claimant deposited \$9,461.21 with NASD. Therefore, Claimant is due a total refund of \$8,961.21.

4. Respondent shall satisfy the fees assessed by remitting to Claimant \$8,961.21 and remitting the balance of \$49,838.79 to the NASD.

Fees are payable to the National Association of Securities Dealers, Inc.

**ARBITRATORS' SIGNATURES**

Richard S. Peskin, Esq.	-	Industry Chairperson
Joel Hirstreet	-	Industry Panelist
Andrew D. Hudders, Esq.	-	Industry Panelist

Concurring Arbitrator's Signature

\_\_\_\_\_  
Richard S. Peskin, Esq.

NASD's Date of Decision: \_\_\_\_\_

**AFFIRMATION**

I, \_\_\_\_\_, do hereby affirm pursuant to Article 7505 of the Civil Procedure Law and Rules, that this is my decision in the above captioned matter.

\_\_\_\_\_  
Richard S. Peskin, Esq.

**ARBITRATORS' SIGNATURES**

Richard S. Peskin, Esq.	-	Industry Chairperson
Joel Hirstreet	-	Industry Panelist
Andrew D. Hudders, Esq.	-	Industry Panelist

Concurring Arbitrator's Signature

\_\_\_\_\_  
Joel Hirstreet

NASD's Date of Decision: \_\_\_\_\_

**AFFIRMATION**

I, \_\_\_\_\_, do hereby affirm pursuant to Article 7505 of the Civil Procedure Law and Rules, that this is my decision in the above captioned matter.

\_\_\_\_\_  
Joel Hirstreet

**ARBITRATORS' SIGNATURES**

Richard S. Peskin, Esq.	-	Industry Chairperson
Joel Hirstreet	-	Industry Panelist
Andrew D. Hudders, Esq.	-	Industry Panelist

Concurring Arbitrator's Signature

\_\_\_\_\_  
Andrew D. Hudders, Esq.

NASD's Date of Decision: \_\_\_\_\_

**AFFIRMATION**

I, \_\_\_\_\_, do hereby affirm pursuant to Article 7505 of the Civil Procedure Law and Rules, that this is my decision in the above captioned matter.

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Andrew D. Hudders, Esq.