

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

O. Beirne Chisolm

93-02622

Name of Respondents

Kidder, Peabody & Co., Incorporated
Kidder Peabody Asset Management, Inc.
George V. Grune

REPRESENTATION

For Claimant O. Beirne Chisolm ("claimant") appeared Jeffrey L. Liddle, Esq. of the law firm Liddle, O'Connor, Finkelstein, & Robinson located in New York, New York.

For Respondents Kidder, Peabody & Co., Incorporated ("KP&C"), Kidder, Peabody Asset Management, Inc. ("KPAM"), and George V. Grune ("Grune"), (collectively referred to as "respondents"), appeared Sarah A. Kelly, Esq. of the law firm of Morgan, Lewis & Bockius located in Philadelphia, Pennsylvania.

CASE INFORMATION

The Statement of Claim was filed on July 2, 1993. The Statement of Amended Claim was filed on October 20, 1993. Claimant's Submission Agreement was signed on June 28, 1993.

The Joint Statement of Answer was filed by Respondents Kidder, Peabody & Co., Inc., Kidder Peabody Asset Management, Inc., and George V. Grune on October 19, 1993. The Joint Statement of Answer to the Amended Claim was filed by Respondents on November 23, 1993. Respondents Kidder, Peabody & Co., Inc., Kidder, Peabody Asset Management, Inc. and George V. Grune's Submission Agreements were signed on October 22, 1993.

HEARING INFORMATION

Pre-Hearing Conference:	June 17, 1994	-	One Session
Hearing Dates/Sessions:	May 6, 1996	-	Two Sessions
	March 26, 1996	-	Two Sessions
	March 25, 1996	-	One Session
	February 27, 1996	-	Two Sessions
	January 30, 1996	-	Two Sessions
	January 29, 1996	-	One Session
	November 10, 1995	-	Two Sessions
	November 8, 1995	-	Two Sessions
	October 18, 1996	-	Two Sessions
	September 29, 1995	-	Two Sessions
	September 27, 1995	-	Two Sessions
	September 19, 1995	-	Two Sessions
	September 13, 1995	-	Two Sessions
	September 12, 1995	-	Two Sessions
	September 8, 1995	-	Two Sessions
	August 11, 1995	-	Two Sessions
	June 26, 1995	-	Two Sessions
	June 20, 1995	-	Two Sessions
	May 16, 1995	-	Two Sessions
	December 13, 1994	-	Two Sessions
	December 12, 1994	-	Two Sessions
	October 11, 1994	-	Two Sessions
	September 16, 1994	-	One Session

The hearings were held at the offices of the National Association of Securities Dealers, Inc. located in New York, New York.

CASE SUMMARY

Claimant alleged that he began his first period of employment with Kidder, Peabody & Co., Inc. ("KP&C") in April 1957 and that in 1958 he was one of two people who started KP&C's first investment management business. Claimant further asserted that at the end of 1961, he left KP&C to join Clark Dodge, Inc., and started its investment management business, and that he was in charge of this operation

for 13 years. Claimant also asserted that he was named President and Director of Clark Dodge Management ("CDM"), the subsidiary of Clark Dodge, Inc., in January 1974. Claimant stated that in June 1974, KP&C acquired CDM, and that as a result he became employed again by KP&C as a Vice President but continued as the President of CDM.

Claimant contended that in 1976, KP&C merged CDM with the investment management business he had helped start 16 years earlier, renaming it Webster Management, Inc. ("WMI"). Claimant further asserted that he became an Executive Vice President at WMI and that it was renamed Kidder Peabody Asset Management ("KPAM") in late 1990. Claimant further contended that he was a leader in developing KP&C's Investment Advisory Business from 1974 through 1990 including the successful development of new business and investment strategies, hiring and retention of the portfolio management team and other personnel in compliance, supervision and administration.

Claimant also contended that in December 1989, Grune, then about 34 years old became the executive at WMI responsible for KPAM, and that Grune proceeded to transfer Claimant's responsibilities to younger employees. Claimant alleged that on May 22, 1990, Grune became President of WMI and the same day Grune removed Claimant from all investment responsibility for mutual funds, an area he had been instrumental in founding and developing. Claimant further alleged that he was notified of this change when Grune announced at a staff meeting that David Hartman ("Hartman"), who was 20 years Claimant's junior, would perform daily management of the mutual fund investments, a role the Claimant had filled for more than a decade. Claimant also alleged that Grune announced that Barbara Doty, who was about 15 years younger than Claimant, would be in charge of a new division for "Individual Business", and that Russell Johnson, who was about 20 years younger than Claimant, would supervise a third new division on "Individual Marketing", and furthermore, that Grune himself would head a new "Investment Division" and a new Investment Committee, from which Claimant was excluded. Claimant asserted that Grune told the staff that Claimant would report to him.

Claimant asserted that following the May 22 meeting, Grune isolated him from developments, leaving Claimant to learn from his former staff the latest responsibilities he had lost. Claimant further asserted that Grune transferred to Robert Jones, who was in his early 30's, Claimant's responsibilities for supervising mutual fund administration and accounting, and that Grune took away Claimant's authority to approve expense vouchers and advances in the absence of WMI's President. Claimant contended that in December 1990, Grune eliminated Claimant's title of Executive Vice President renaming it Senior Vice President. Claimant further asserted that three younger employees and two older employees who had also been Executive Vice Presidents were given the same title. Claimant argued that by February 1991, the previous management of WMI, including Claimant, then age 62, and others largely in their 40's and 50's, had been replaced by, or had their responsibilities transferred to, younger staff largely in their 30's and 40's.

Claimant contended that on February 14, 1991, Grune met with him and stated that Claimant

would not be paid any bonus for the previous year, although bonus compensation constituted about half of Claimant's total compensation. For example, for the year 1988, Claimant's total compensation was \$265,000.00, his bonus was \$155,000.00 and his base salary was \$110,000.00. Furthermore, Grune indicated that Claimant's base salary would be cut. Claimant further contended he had worked in reliance on receiving his bonus compensation and it could not be taken away from him retroactively.

Claimant contended that at the February 14 meeting, Grune told him that he should slow down and limit his activities, and that Claimant responded that he was not interested in reducing his work activities and that he was fully capable of carrying out his duties, however, Grune insisted that Claimant would be required to slow down. Claimant also contended that this statement made by Grune to Claimant is particularly important evidence of age discrimination because Grune was Claimant's immediate superior and that Grune's statements at this meeting reveal that, in Grune's view, Claimant was too old to do his job and should work part-time at reduced compensation because of his age.

Claimant subsequently filed an Amended Statement of Claim against KP&C and KPAM alleging that, in retaliation for his making an age discrimination claim, KP&C and KPAM delayed and denied full indemnification to Claimant for his legal expenses in connection with an SEC inquiry into a transaction which took place prior to the termination of Claimant's filing of his federal age discrimination lawsuit. Claimant further alleged that he retained Henry J. Steinglass, Esq., ("Steinglass") as his counsel with respect to an SEC inquiry concerning the purchase of certain bonds by a KPAM employee in September 1990. In response, a letter dated September 17, 1991 from Thomas A. Dubbs, Vice President and Associate General Counsel of KP&C, to Steinglass, stated that it "will indemnify [Claimant] to the extent set forth in Section 6.4 of the By-Laws of Kidder, Peabody." Therefore, in October 1991, Claimant alleged that Steinglass, as requested in Mr. Dubbs' letter of September 17, 1991, submitted bills directly to KP&C totalling \$4,800.00, for which he received payment from KP&C on November 8, 1991.

Claimant also alleged that in November 1991, he started an age discrimination lawsuit against KP&C and KPAM in state court and filed a charge of age discrimination with the EEOC. Claimant asserted that Steinglass subsequently submitted to KP&C additional bills for services rendered in connection with the SEC inquiry. Claimant further asserted that Mr. Dubbs stated that KP&C would not pay Steinglass' outstanding or future bills for services rendered in connection with the SEC inquiry, however, Mr. Dubbs stated that KP&C would consider indemnifying Claimant for the legal fees of Ira Sorkin, Esq. or a different lawyer if he or she would be "insulated" from Claimant's discrimination lawsuit. Claimant further alleged that on February 5, 1992, in a telephone conference with Steinglass, Mr. Dubbs stated that Claimant's filing of the federal lawsuit was "one factor in the mosaic" which led KP&C to refuse further reimbursement for Steinglass' legal fees in the SEC inquiry. Claimant asserted that in 1992 the SEC concluded its inquiry and no charges were brought against Claimant, however, he incurred legal expenses in connection with the SEC inquiry.

Claimant asserted that following receipt of Steinglass' October 28, 1992 letter, KP&C informed Steinglass that it was giving further consideration to the issue of indemnity and would inform him when it reached a final decision. Claimant contended that by letter dated January 5, 1993, David Rivera, Assistant Vice President and Assistant General Counsel of KP&C, wrote to Steinglass stating that KP&C needed two more weeks to review "certain legal issues" and would arrive at a "final position." Claimant also contended that on March 4, 1993, Mr. Dubbs informed Steinglass in a telephone conversation that, having conducted extensive research of Delaware law, KP&C had concluded that it must indemnify Claimant for his legal expenses relating to the SEC inquiry, however, Mr. Dubbs stated that KP&C was reviewing how much of these expenses it was willing to pay.

Claimant alleged that KP&C's final decision with respect to indemnification was communicated by Mr. Dubbs to Mr. Steinglass by telephone on May 12, 1993, in which Mr. Dubbs confirmed that KP&C would not reimburse Claimant in full for his legal expenses on the SEC inquiry but would make some reductions. Therefore, Claimant believes that KP&C and KPAM have delayed and denied full indemnification of Claimant's legal expenses relating to the SEC inquiry because he made claims seeking redress for age discrimination.

Respondents Kidder Peabody & Co. Inc., Kidder Peabody Asset Management and George Grune, maintained that in December 1989, Grune assumed management responsibility within KP&C for its wholly-owned subsidiary WMI, which was renamed KPAM in late 1990. Respondents further maintained that by that time, KP&C had made a business decision to shift the focus and structure of its assets management business away from individual portfolio or account management to mutual fund management and "wrap-free" investment management, and that Grune was given responsibility to carry out this restructuring. Respondents also maintained that Grune changed, reassigned and created responsibilities in the course of this restructuring, and that although Grune's approach was at times at odds with the practices and approaches of prior management, this change in focus was related to respondent's legitimate business strategy. Furthermore, Respondents maintained that at no time did any one make any decision concerning Chisolm's responsibilities, compensation or employment that they were not entitled to make for legitimate business reasons and that Chisolm's responsibilities were not significantly altered.

Respondents contended that Chisolm inflated his management responsibilities at KPAM, and he was responsible for at least two major organizational management responsibilities, both of which he performed poorly. Respondents further contended that Chisolm was responsible for KPAM's securities compliance function, which he held until he resigned, at which point that responsibility was reassigned. Respondents asserted that Chisolm's successor in that function discovered that the securities compliance files were disorganized and not up-to-date, demonstrating that Claimant had virtually ignored this responsibility. Furthermore, Respondents maintained that in 1989, Chisolm, in his role of mutual fund administrator, decided to change the custodian of certain of the mutual funds and that Chisolm had the responsibility for ensuring that a computer system was set up at the new institution to ensure a smooth and instantaneous changeover, however, this did not occur. Respondents contended that as a result of Chisolm's conversion, KPAM had to

send a notice and apology to its mutual fund customers explaining why their accounts were not reflecting, or were reflecting errors in daily interest accrual and that this serious problem obviously caused KPAM considerable expense and severe embarrassment.

Respondents contended that Claimant was treated at all times in a fair and non-discriminatory manner, consistent with the legitimate business purposes of Respondent KPAM, and that Claimant voluntarily resigned and took early retirement from his employment effective March 1, 1991. Respondents further contended that in 1990, under the direction of KPAM's new president Grune, KPAM dissolved four of its six existing non-money market funds because of their lack of success. Respondents also maintained that Chisolm also functioned, in significant part, as manager of a portfolio of investments for several individual and several small institutional clients and that his responsibilities in this area did not change at all, however, recognizing the refocusing of KPAM's business, many of the individual portfolio managers at KPAM voluntarily resigned during 1990 and 1991, taking their accounts to other companies. Respondents deny that any of one of these employees was constructively discharged or forced to resign because of their age.

Respondent maintained that Grune decided, as part of the re-structuring, to assign daily investment management responsibility for KPAM's money market mutual funds to one individual, and he assigned that responsibility to Hartman, one of the three individuals including Chisolm, who was rotating that responsibility. Respondents further maintained that aside from removing this responsibility from Chisolm, which took less than 20% of his time, Grune did not otherwise significantly alter Chisolm's responsibilities. Respondent also maintained that when WMI was renamed KPAM in late 1990, Grune attempted to conform KPAM's structure of officer titles to KP&C's by eliminating the title of Executive Vice President, and therefore, Chisolm along with several other employees who held the title of Vice President of KP&C, became Senior Vice Presidents of KPAM. Respondent contended that Grune did re-route the necessary approval process for expenses and advances, in an effort to gain greater control of KPAM's expenses, however, Chisolm still had authority to approve expenses and advances for employees in the fund administration group.

Respondent contended that Chisolm's bonus compensation for 1989 was reduced from his previous year's amount in large part because of the problems experienced in the mutual fund custodian conversion. Respondent further contended that Chisolm knew that he was not entitled to, nor had been promised, any bonus for 1990, because bonus payments to employees are within KPAM's discretion, and among the factors to be considered in deciding whether and how much bonus compensation an employee is paid are the performance and profitability of both the company and the employee. Respondents maintained that the decision not to pay Chisolm a bonus for 1990 was based both on the difficult financial circumstances on Wall Street in 1990 and on Chisolm's own productivity that year, and not on Chisolm's age. Furthermore, Respondents maintained that at no time did Grune tell Chisolm that he should slow down, to the contrary, Grune told him that if he wished to earn more in bonus compensation, he would have to increase his productivity.

Respondents maintained that it is not true that Chisolm's responsibilities were reduced dramatically, and any reduction in his pay was directly related to the profitability of the portfolios he managed, and that these decisions were not based on age, and that none of these facts constitute a basis for constructive discharge. Furthermore, Respondents maintained that these allegations, even if true, would not meet the standard necessary to transform a voluntary resignation into a constructive discharge.

Respondents maintained that in the Fall of 1990, Chisolm approached Grune and told him that he would like to resign at the end of that year, and requested Grune guarantee him a bonus of \$250,000.00 for 1990 and to grant him a special severance payment of \$250,000.00 if he resigned. Grune responded that he was not interested in having Chisolm leave, but that he was likewise not willing to meet Chisolm's financial demands.

Respondents filed an answer to Claimant's Amended Statement of Claim in which they denied that they had in any way retaliated against Chisolm because of his filing of an age discrimination claim. Respondents maintained that they did not retaliate against Chisolm by not reimbursing him for attorney's fees incurred in connection with an SEC investigation. Furthermore, Respondents also maintained that they refused to pay Chisolm's reasonable attorney's fees in connection with the SEC investigation, but merely disputed the whether the amount of Chisolm's attorney's fees was reasonable. Respondents contended that they requested that, in exchange for such a payment, Chisolm agree to sign a release would include a confidentiality provision, however, they maintained that this is a legitimate non-discriminatory requirement.

RELIEF REQUESTED

Claimant requested:

1. \$186,000.00 "back pay" for the period from January 1, 1989, through February 27, 1991, and thereafter at the rate of \$22,083.00 per month through the date of the arbitration award, plus the value of lost fringe benefits in an amount to be determined after the arbitration hearing (less actual earnings since his termination);
2. Double "back pay" for willful age discrimination;
3. "Front pay" in an amount to be determined after the hearing that reflects his lost future earnings (less expected earnings);
4. \$1,000,000.00 for mental and emotional anguish;
5. With respect to bonuses, claimant requested:

- A. \$186,000.00 for bonuses earned since 1989;
 - B. \$46,500.00 (25%) as statutory liquidated damages for wilful withholding of compensation;
- 6. Pre-award interest pursuant to New York CPLR 5001;
 - 7. \$28,822.01 in legal expenses relating to the SEC inquiry;
 - 8. Reasonable attorneys fees and disbursements associated with this proceeding.

Respondent requested:

- 1. That the Statement of Claim be dismissed with prejudice;
- 2. Dismissal based on statute of limitations;
- 3. Dismissal of Claimant's request for punitive damages and liquidated damages, because New York law does not authorize such damages;
- 4. Dismissal of claims relating to alleged mental anguish;
- 5. Dismissal of claims for attorney's fees as they are outside the scope of the arbitration agreement.

COSTS

Claimant was assessed and paid miscellaneous costs of \$45.00, \$7.00, \$19.50 and \$43.75 which shall be retained by the NASD. Claimant was also assessed a postponement fee of \$1,000.00 which has been paid and shall be retained by the NASD

Respondents were assessed and paid miscellaneous costs of \$45.00, \$4.00 and \$73.25 which shall be retained by the NASD. Respondents were also assessed a postponement fee of \$1,000.00 which has been paid and shall be retained by the NASD.

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 the 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. The claims of Claimant O. Beirne Chisolm against Respondents Kidder, Peabody & Co., Inc., Kidder, Peabody Asset Management, Inc., and George V. Grune are dismissed in their entirety.
2. The parties shall bear their respective attorney's fees and costs.

FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the arbitrators have determined that the NASD shall retain the \$500.00 non-refundable filing fee previously deposited by Claimant and have assessed the following forum fees:

1 pre-hearing session	= \$ 300.00
43 sessions x \$1000.00	= \$43,000.00
 Total Forum Fees	 = \$43,300.00
 Minus Claimant's \$19,150.00 deposit	 = \$24,150.00
Minus Respondents' \$18,150.00 deposit	= \$ 6,000.00
 Total now due	 = \$ 6,000.00


The arbitrators have determined that Respondents Kidder Peabody Asset Management, Inc. and Kidder Peabody & Co., Inc. shall bear the entire cost of arbitration jointly and severally.

Respondents Kidder Peabody Asset Management, Inc. and Kidder Peabody & Co., Inc. be and hereby are jointly and severally liable for the sum of \$43,300.00 - \$18,150.00 = \$25,150.00 representing the of the total amount of forum fees assessed less the amount previously paid. Therefore, Respondents are jointly and severally liable and shall reimburse claimant the sum of \$19,150.00 representing the amount claimant previously deposited with the NASD. Respondents be and hereby are jointly and severally liable and shall pay to the NASD the sum of \$6,000.00 representing the amount of forum fees still outstanding.

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

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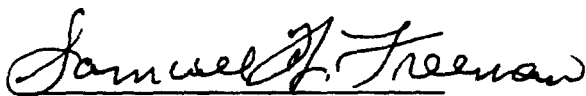
ARBITRATORS' SIGNATURES


Samuel H. Freeman, Esq.
Public Arbitrator

Rebecca A. Novak, Esq.
Public Chairperson

Vicki Z. Holleman, Esq.
Industry Arbitrator

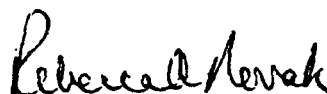
I, Samuel H. Freeman, Esq., do hereby affirm pursuant to Article 7507 of the Civil Practice Law and Rules, that this is my decision in the above-captioned matter.


Samuel H. Freeman, Esq.

Date of Decision: August 6, 1996

ARBITRATORS' SIGNATURES


Samuel H. Freeman, Esq.
Public Arbitrator



Rebecca A. Novak, Esq.
Public Chairperson

Vicki Z. Holleman, Esq.
Industry Arbitrator

I, Rebecca A. Novak, Esq., do hereby affirm pursuant to Article 7507 of the Civil Practice Law and Rules, that this is my decision in the above-captioned matter.



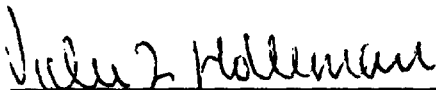
Rebecca A. Novak, Esq.

Date of Decision: August 6, 1996 _____

ARBITRATORS' SIGNATURES

Samuel H. Freeman, Esq.
Public Arbitrator

Rebecca A. Novak, Esq.
Public Chairperson



Vicki Z. Holleman, Esq.
Industry Arbitrator

I, Vicki Z. Holleman, Esq., do hereby affirm pursuant to Article 7507 of the Civil Practice Law and Rules, that this is my decision in the above-captioned matter.



Vicki Z. Holleman, Esq.

Date of Decision: August 6, 1996