

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Raymond J. DiRussa

92-04232

Name of Respondents

Dean Witter Reynolds Inc.
James F. Higgins
Robert J. Dwyer
Lawrence J. Solari, Jr.

REPRESENTATION

For Claimant: Mark F. Kluger, Esq. of Barry & McMoran, Newark, New Jersey.

For Respondents: Carol S. Bernheim, Esq. of Epstein Becker & Green, New York, New York.

CASE INFORMATION

Statement of Claim filed: December 11, 1992.

Claimant's Submission Agreement signed on: November 18, 1992.

Joint Statement of Answer filed by Respondents Dean Witter Reynolds, Inc., James Higgins, Lawrence Solari and Robert Dwyer on: March 10, 1993.

Statement of Answer filed by Respondent Philip Purcell on: March 10, 1993.

Respondent Dean Witter Reynolds, Inc.'s Submission Agreement signed on: March 10, 1993.

Respondent Philip Purcell's Submission Agreement signed on: March 10, 1993.

Respondent James Higgin's Submission Agreement signed on: March 10, 1993.

Respondent Robert Dwyer's Submission Agreement signed on: March 10, 1993.

Respondent Lawrence Solari's Submission Agreement signed on: March 10, 1993.

HEARING INFORMATION

Pre-Hearing Conference: December 14, 1994 / One Session

Hearing Dates / Sessions: June 21, 1994 / Two Sessions.
July 18, 1994 / Two Sessions.
August 15, 1994 / Two Sessions.
September 22, 1994 / Two Sessions.
November 1, 1994 / Two Sessions.
November 7, 1994 / Two Sessions.
December 21, 1994 / Two Sessions.

Hearing Location: Offices of the National Association of Securities Dealers, Inc. located in New York City, New York.

CASE SUMMARY

Claimant alleged that Respondents intentionally and wilfully discriminated against Claimant on the basis of age. Claimant further alleged that he took over the Ridgewood New Jersey Branch office for Respondent Dean Witter Reynolds, Inc. ("Dean Witter") in 1980 and that he performed his job in a competent and conscientious manner. Claimant next alleged that on May 8, 1992 he was informed by Respondent Lawrence Solari ("Solari") that he would be removed from his position as manager of Dean Witter's Ridgewood, New Jersey office based upon the loss of three Account Executives from that office. Claimant alleged that he was informed by Respondent Solari that the decision came from Respondent Robert Dwyer ("Dwyer"), the National Director of Sales. Claimant further alleged that he was informed by Respondent Solari that the firm wanted Claimant to retire. Claimant alleged that when he refused to retire he was informed by Solari that Respondents wanted him out of the Ridgewood office as soon as possible and that he was then offered the position of Account Executive in either the Paramus or Morristown office. Claimant further alleged that he was refused such a position in the Wayne, New Jersey office, the same town in which he resided and that Claimant eventually accepted the position in the Morristown office. Claimant alleged that the three Account Executives that left the Ridgewood office did so because they were offered better compensation packages at another firm and the Respondents refused to give Claimant the authority to take steps to retain the three Account Executives. Additionally, Claimant alleged that younger managers had lost Account Executives who were far better producers than the three that left Claimant's office but were not removed from their positions. Claimant further alleged that Respondent James Higgins ("Higgins") had made statements that high-ranking employees of Respondent Dean Witter were asked to retire because of their ages and were offered incentive compensation to retire. Claimant alleged that at the time of his removal he was 58 years of age, two months from his 59th birthday and that he was replaced by an individual who was 44 years of age. Claimant

alleged that Respondents intentionally, knowingly and wilfully discriminated against Claimant on the basis of his age in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §620 et seq. Further, Claimant alleged that Respondents intentionally, knowingly, and wilfully discriminated against Claimant on the basis of his age in violation of the New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. 10:5-1 et seq.

Respondents Dean Witter, Higgins, Dwyer and Solari maintained that in September 1980 Claimant was reassigned as Branch Manager of Respondent Dean Witter's Ridgewood, New Jersey office and that his official title was Senior Vice President Northeast Region. Respondents also maintained that Claimant remained in that position until early May 1992 when he was transferred by Respondents Solari and Dwyer to Respondent Dean Witter's Morristown, New Jersey office as a Senior Vice President/Account Executive due to his overall performance as head of the Ridgewood office. Respondents then maintained that, as a Branch Manager, Claimant was responsible for the overall performance of the Ridgewood, New Jersey office and that Claimant was judged more by the office's performance as compared to competitors within the same geographic area than by his personal performance. Respondents maintained that commencing in or around 1987 the performance of the Ridgewood, New Jersey office steadily declined. Respondents further maintained that, based upon information provided by the McLagan Partners Incorporated Private Investor Performance Monitor ("McLagan"), Respondent Dean Witter's share of total revenue in the Ridgewood area declined from 5.51% in 1987 to 4.65% in 1991; its branch rank dropped from 9 out of 12 to 11 out of 13; and its revenue per account executive dropped from 67.20% to 56.50%. Respondents also maintained that as a result of the declining performance, in mid-February, 1992, Respondent Solari, at Respondent Dwyer's request, asked Claimant to provide him with a report as to how Claimant intended to upgrade the staff of the Ridgewood office and return it to the levels of production attained in the mid to late 1980's. Respondents maintained that Claimant failed to provide an adequate response to Respondent Solari's request as the response was devoid of any specifics as to how Claimant was going to arrest the Ridgewood office's steady decline. Respondents further maintained that when the three Account Executives left the Ridgewood office, it was at a time when retaining Account Executives was a top priority for all Branch Managers. Respondents maintained that it was the departure of the three Account Executives, as well as Claimant's failure to provide a plan to rectify the inadequate performance, the Ridgewood office's inadequate performance, plus Claimant's inappropriate conduct with his supervisors and subordinates, that contributed to Claimant's transfer to the position of Senior vice President/Account Executive. In addition, Respondents maintained that Claimant's age had nothing to do with his transfer, but rather was based solely on business related factors.

Respondents asserted the following defenses: (1) All actions taken by Respondents with respect to Claimant were nondiscriminatory, based upon sound business judgment, were neither arbitrary nor capricious, and were made in good faith and in compliance with the Age Discrimination in Employment Act of 1967 and the New Jersey Law Against Discrimination. (2) All actions taken by Respondents with respect to Claimant were for good cause, and based upon reasonable factors other than Claimant's age within the meaning of the ADEA and NJLAD. (3) If Respondents

engaged in any of the unlawful acts alleged in Claimant's Statement of Claim it did not do so willfully, knowingly and/or intentionally. (4) Respondents' employment practices were proper, permissible and justified, and founded upon nondiscriminatory, legitimate business reasons. (5) Respondent Higgins was not a proper party to this proceeding due to his lack of direct involvement in Claimant's reassignment. (6) At all relevant times to this action, Respondents acted lawfully and in good faith and without intent to deny Claimant any rights under state or federal law and denies the allegations of unlawful conduct as alleged in the Statement of Claim and had reasonable grounds for believing the allegations in the Statement of Claim are nonviolative of any law. (7) Respondents' nondiscriminatory reasons for its actions regarding Claimant were not a pretext for discrimination. (8) Respondents had no intent to discriminate against Claimant. (9) The arbitration panel is without authority to award liquidated and/or punitive damages in this proceeding. (10) Claimant is not entitled to an award of attorneys' fees or costs.

Respondent Philip J. Purcell ("Purcell") maintained that, apart from being named as a Respondent, he was not even mentioned in Claimant's Statement of Claim and that he had no connection with any of the matters set forth in Claimant's Statement of Claim. Respondent Purcell denied all material allegations made by Claimant insofar as they pertained to him. Respondent Purcell adopted with respect to himself all of the allegations, denials, and defenses set forth in the Statement of Answer submitted on behalf of Respondents Dean Witter, Higgins, Dwyer and Solari. Respondent Purcell also maintained that Claimant's Statement of Claim did not allege any conduct by Respondent Purcell nor any conduct that could give rise to any claim against him and that he was named as a Respondent in this matter solely for purposes of harassment. Respondent Purcell Moved to Dismiss.

RELIEF REQUESTED

Claimant requested:

1. Reinstatement to the position of Branch Manager in the Ridgewood Office with back pay and interest and/or prospective lost wages and all employment benefits plus interest including but not limited to bonuses, pension, stock options and deferred compensation pursuant to the ADEA and NJLAD in the amount of \$3 million'
2. Statutory liquidated damages plus interest pursuant to the ADEA in the amount of \$3 million;
3. Compensatory damages for stress, humiliation, pain and suffering pursuant to the NJLAD in the amount of \$1 million;
4. Punitive damages pursuant to the NJLAD in the amount of \$10 million;
5. Attorneys fees and costs of suit pursuant to the ADEA and NJLAD; and

6. Such other relief as may be deemed equitable and just.

Respondents Dean Witter, Higgins, Solari and Dwyer requested:

1. Claimant's Statement of Claim be dismissed in its entirety.
2. Costs and reasonable attorneys' fees be assessed against Claimant.

Respondent Purcell requested:

1. Claimant's Statement of Claim be dismissed in its entirety.
2. Costs and reasonable attorneys' fees be assessed against Claimant.

OTHER ISSUES CONSIDERED & DECIDED

Respondent Purcell filed a Motion to Dismiss Claimants Claim against him. The panel granted Respondent Purcell's Motion and dismissed Claimant's claim against Respondent Purcell.

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. \$200,000 joint and several against Respondents Dean Witter and Solari for compensatory damages, including lost wages and pain and suffering.
2. \$20,000 compensatory award against Respondent Solari individually.
3. Claims against Robert Dwyer and James Higgins dismissed.
4. Claimants claims for punitive damages are denied.
5. Other relief requested denied.
6. The panel recommends that a copy of this award be placed in Respondent Solari's personnel file and that Respondent Dean Witter review with Solari appropriate conduct expected of management in these circumstances.

FORUM FEES

Pursuant to Section 44c of the Code of Arbitration Procedure, the following Forum Fee(s) are assessed.

15 sessions X \$1,500 = \$22,500 minus hearing session deposit of \$1,500 = net \$1,600 due.

Forum fees Assessed Against:

1. Respondent Dean Witter is assessed the sum of \$22,500 which represents the total forum fees due. Respondent Dean Witter is liable and shall pay to the NASD the sum of \$22,500.

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

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NASD Award #92-04232

Concurring Arbitrators' Signatures


Name

Industry Chairperson

Vicki Z. Holleman, Esq.

Name

Industry Panelist



Bill T. Singer, Esq.

Name

Industry Panelist

Bernard B. Beal

Date of Decision: March 14, 1995

STATE OF:

SS:


COUNTY OF:

On this day of , 1995, before me personally appeared **Vicki Z. Holleman, Esq.** known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

STATE OF: N.Y.
COUNTY OF: N.Y.

SS:

On this 13 day of March , 1995, before me personally appeared **Bill T. Singer, Esq.** known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.



HUGH ROSS
Notary Public, State of New York
No. 02R05021613
Qualified in New York County 95
Commission Expires Dec. 20, 1995

STATE OF:

SS:

COUNTY OF:

On this day of , 1995, before me personally appeared **Bernard B. Beal** known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

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NASD Award #92-04232

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Vicki Z. Holleman, Esq.

Name

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Bill T. Singer, Esq.

Name

Industry Panelist

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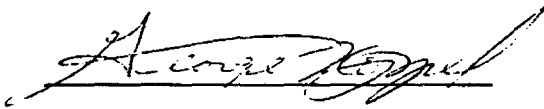
NASD Award #92-04232

STATE OF: *New York*

SS:

COUNTY OF: *Kings*

On this *9th* day of *November*, 1995, before me personally appeared **Vicki Z. Holleman, Esq.** known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.



GEORGE KOPPEL
Notary Public, State of New York
No. 24-4691583
Qualified in Kings County
Commission Expires January 31, 1996

STATE OF:

SS:

COUNTY OF:

On this day of , 1995, before me personally appeared **Bill T. Singer, Esq.** known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

STATE OF:

SS:

COUNTY OF:

On this day of , 1995, before me personally appeared **Bernard B. Beal** known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

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NASD Award #92-04232

STATE OF:

SS:

COUNTY OF:

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STATE OF:

SS:

COUNTY OF:

On this day of , 1995, before me personally appeared **Bill T. Singer, Esq.** known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

STATE OF: *NEW YORK*

SS:

COUNTY OF: *NEW YORK*

On this *14* day of *MARCH* , 1995, before me personally appeared **Bernard B. Beal** known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

Andrew Russell

ANDREW RUSSELL
Notary Public, State of New York
No. 02RUS034752
Qualified in New York County
Commission Expires Oct. 17, 19*96*