

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Maher (Matt) and Deborah Shammass

93-05373

Name of Respondents

Prudential Insurance Co. of America;
Michael Emery;
Edward Dublis

REPRESENTATION

For Claimants: Maher Shammass ("Shammass") and Deborah Shammass were represented by Mary A. Owens, Esq. of Flickinger & Associates, P.C., located at Grand Rapids, Michigan.

For Respondents: Prudential Insurance Co. of America ("Prudential") and Michael Emery ("Emery") were represented by John M. Lichtenberg, Esq. of Dickinson, Wright, Moon, Van Dusen & Freeman, located at Grand Rapids, Michigan. Edward Dublis ("Dublis") was represented by Robert A. Buchanan, Esq. of Law, Weathers & Richardson, P.C., located at Grand Rapids, Michigan.

CASE INFORMATION

Statement of Claim filed: December 15, 1993.

Claimant's Submission Agreement signed on: December 15, 1993.

Statement of Answer filed by Respondents Prudential and Emery on: March 15, 1994.

Respondent, Prudential's Submission Agreement signed on: March 10, 1994.

Respondent, Emery's Submission Agreement signed on: March 7, 1994.

Statement of Answer filed by Respondent Dublis on: March 15, 1994.

Respondent, Dublis' Submission Agreement signed on: March 4, 1994.

HEARING INFORMATION

Pre-Hearing Conference: October 13, 1994 for One (1) session
April 18, 1995 for One (1) session.

Hearing Dates/Sessions: October 26, 1994 for Two (2) sessions;
October 27, 1994 for Two (2) sessions;
November 2, 1994 for Three (3) sessions;
November 3, 1994 for Two (2) sessions;
December 12, 1994 for Two (2) sessions;
December 13, 1994 for Two (2) sessions;
April 24, 1995 for Two (2) sessions;
April 25, 1995 for Two (2) sessions;
May 17, 1995 for Two (2) sessions;
May 18, 1995 for Two (2) sessions;
June 5, 1995 for Two (2) sessions;
June 6, 1995 for Two (2) sessions.

Hearing Location: Grand Rapids, Michigan.

CASE SUMMARY

Claimant Shammas alleged that Respondent Prudential, through its agents Dublis and Emery, discriminated against Shammas, in the terms, conditions, and privileges of employment. Shammas specifically alleged that:

1. On August 7, 1989, Shammas began employment with Prudential as a commissioned insurance salesperson. On April 29, 1991, Shammas was promoted to sales manager at Prudential's Grand Rapids office. As sales manager, part of Shammas' compensation was determined by the sales volume of the salespersons under him;
2. Until August of 1992, Respondent Dublis was the Grand Rapids branch manager. As branch manager, Dublis engaged in a course of discriminatory acts directed at Shammas. Specifically, Dublis accused Shammas of not fulfilling employment duties which were never assigned. In addition, Dublis assigned lesser-performing sales agents to Shammas;
4. Although Shammas personally approached Dublis and asked him to stop the harassment, Dublis continually ridiculed and mocked Shammas' Arabic accent,

religion, and national origin in both private conversations and before co-workers. Dublis' discriminatory conduct caused other co-workers to mock and harass Shammas;

5. In July 1992, Shammas wrote to Prudential complaining of the sexual, religious, racial and national origin discrimination, and harassment. Prudential stated it would perform a confidential investigation. However, Prudential and Dublis did not maintain the confidentiality of the investigation which furthered the hostility towards Shammas;

6. Although as a result of Prudential's investigation Dublis was transferred to another office, and Respondent Emery became branch office manager, Emery did not take steps to end the harassment. Emery continued the hostility and discriminatory conduct directed at Shammas; and

7. As a result of the hostile environment, Shammas has suffered intense personal anguish, physical stress-induced problems, and the denial of opportunities for advancement.

Based upon the above allegations, Shammas alleged the following claims: discrimination on the basis of national origin; discrimination on the basis of religion; discrimination on the basis of race; sexual harassment; intentional infliction of emotional distress; retaliatory discrimination; constructive discharge; and loss of consortium. Shammas asserts these claims against Prudential under the doctrine of respondeat superior.

Respondents Prudential and Emery denied any wrongdoing against Shammas. Prudential and Emery specifically alleged the following:

1. The selection of sales agents for Shammas' staff was not discriminatory, nor was Shammas' compensation affected by the selection. Shammas was provided with a two year guaranteed salary which was approximately equal to his most recent earnings as a sales agent. Further, the assignment of sales agents is geared towards balancing the interests within the whole District, not towards the interests of one sales manager;

2. Prior to mid-1992, Shammas participated willingly in the activities which he now charges as discriminatory;

3. In May 1992, when Shammas questioned Dublis about his mistreatment of

Shammas, Shammas' complaint was limited solely to Dublis' mocking Shammas' accent;

4. In mid-July, Emery, the Vice-President of the region, was sent to the Grand Rapids office for review. Shammas stated to Emery that he was not being treated unfairly by Dublis. Further, Shammas did not report to Emery any problems involving other staff members, and did not detail alleged acts of discrimination;

5. On July 23 Shammas wrote to the President of Prudential concerning the alleged problems he had under Dublis' management. This was the first notice Prudential had of the problems indicated. Prudential immediately conducted an investigation which resulted in the demotion of Dublis and the assignment of Emery to the Grand Rapids office;

6. Emery did not engage in the alleged misconduct. Specifically, Emery requested Shammas' input regarding the sole assignment of an agent to Shammas' staff. As a result of Shammas' input, this agent was not assigned to Shammas' staff. Emery did not offer this opportunity to other sales managers. In addition, Emery told several staff members not to engage in improper conduct directed towards Shammas; and

7. During the fall of 1992, Shammas failed to fulfill his duties as sales manager. When confronted about his performance, Shammas blamed his poor performance on mistreatment. However, Shammas could not provide specifics to Emery so corrective measures could be taken.

Respondent Dublis denied the material allegations contained in the Statement of Claim, asserting that:

1. Dublis was unaware of Shammas' national origin or religion. Further, Dublis stated it was of no consequence in his treatment of Shammas;

2. Dublis was not solely responsible for the sales agents assigned to Shammas. Recruiting was an inherent responsibility of a sales manager;

3. On one occasion, Dublis repeated a phrase stated by Shammas without the intent to mock, but in an attempt to be humorous. When Shammas confronted Dublis regarding this incident, Dublis apologized and never repeated the phrase again; and

4. Dublis did not continually mistreat Shammas. Specifically, Dublis did not accuse Shammas of not completing assignments never given to him, nor did Dublis

start a pattern of ridicule.

RELIEF REQUESTED

Claimants requested an entry of an award against Respondents in excess of \$10,000.00, plus costs, interest, and attorney's fees.

Respondent Prudential and Emery requested that the claim be dismissed in its entirety.

Respondent Dublis requested that the claim be dismissed in its entirety.

OTHER ISSUES CONSIDERED & DECIDED

At the close of Claimants' proof, Respondents asserted a Motion for Directed Verdict. After hearing argument, the Panel deferred consideration of the Motion until the completion of the hearing. The decision of the Panel renders any decision on the Motion moot.

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. All claims asserted against the Respondents are denied;
2. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein; and
3. Any relief not specifically awarded is hereby denied.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are

assessed: Two (2) pre-hearing conference sessions x \$300.00 = \$600.00; Twenty-five (25) hearing sessions x \$600.00 per session = \$15,000.00; Total Forum Fees = \$15,600.00.

The National Association of Securities Dealers, Inc. shall retain the \$250.00 filing fee and the \$600.00 hearing session deposit previously paid by Claimants Maher and Deborah Shammass. In addition, Claimants Maher and Deborah Shammass are liable for and shall pay to the NASD the sum of \$15,000.00 as forum fees.

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

Concurring Arbitrators' Signatures

Name

Date

/s/ Martin B. Breighner, Esq.

August 3, 1995

Martin B. Breighner, Esq.

Public Arbitrator

/s/ Michele Verlinden

August 3, 1995

Michele Verlinden

Industry Arbitrator

DISSENT OF PUBLIC ARBITRATOR

BENJAMIN A. KERNER

The issue in this case is whether Prudential and/or its supervisors were guilty of "hostile environment" type discrimination based on Claimant's national origin. All five parties, by their three attorneys, argued and presented evidence within the framework of an implied recognition that Michigan law would apply. Of course, there were also appropriate references and deference paid to federal law, where the parties believed that Michigan courts would look to federal authority. See, i.e., Borman v State Farm and Casualty Co., 198 Mich App 675 (1994).

The arbitrators, being employed under the Rules of the National Association of Securities Dealers Arbitration forum for the resolution of disputes between securities brokers and, in this case, a licensed securities dealer, are not bound to apply either Michigan or federal law and are free to exercise their own judgment as to the appropriate standards for assessing liability, as well as to apply their own lights to sort through the evidence as triers of fact. Under the Michigan

standard,¹ there clearly is liability by the Prudential Life Insurance Company, by Mike Emery, and by Ed Dublis for creating a hostile environment, and thereby violating Claimant's Michigan right to a workplace free of discrimination based on national origin.

The standard for liability under Michigan Law for a "hostile environment" discriminatory work environment includes the following elements:

1. The employee must belong to a protected group.
2. The employee has been subjected to unwelcome harassment.
3. The harassment complained of was based on his national origin.
4. The harassment complained of adversely affected a term or condition of employment. This requirement is usually interpreted as requiring a showing of:
 - Creating a hostile, abusive, or offensive work environment; or
 - Adversely affecting the employee's ability to perform his job.²
5. The employee suffered compensable damages as a result of the discrimination.

In addition, in regard to a corporate defendant against whom liability is asserted, the civil rights Claimant must show:

6. That responsible officials of the corporation knew or should have known of the harassment occurring against him.
7. That the corporation failed to take adequate and timely corrective steps to stop the harassment.

(1) Here the evidence is undisputed that Claimant was born in Beirut, Lebanon, and is an

¹ The Elliott Larsen Civil Rights Act, MCL 37.2101 et. seq. and cases interpreting that statute.

²See, Boutrose v Canton Regional Transit Authority, 997 F2d 198 (6th C.A. 1993); Davis v Monsanto Chemical Co., 858 F2d 345 (6th C.A. 1988).

ethnic Arab. Claimant came to the United States with his parents at age 18, but because he attended British primary schools in the former Palestine, speaks a clipped and distinctive (BBC) form of English. There is little question that as a Lebanese immigrant, he is a member of a protected group, protected on the basis of the national origin.

(2) The evidence in this case establishes without a shadow of a doubt that the Claimant was subjected to unwelcome harassment. "In order to constitute harassment, this conduct must be unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive." Henson v City of Dundee, 682 F2d 897 (8th C.A. 1982). Here, the Claimant experienced a barrage of unwelcome harassing behavior that can be characterized as follows: (a) raw jokes at his expense, (b) name-calling such as "camel jockey," "friggin' foreigner," "Moslem terrorist," and others, (c) mimicking of his accent and intentionally mispronouncing his first name; (d) mimicking practices associated with his country of origin, particularly religious practices which, it is apparent, other agents in the Grand Rapids District Office associated with Mr. Shammass' being an Arab (and being presumably a Moslem). An example of such mimicry was his former boss Ed Dublis' getting down on his knees and invoking Allah on Dublis' office carpet. This was intended to mimic the Moslem mid-day prayer ritual.

Mr. Shammass did not solicit or incite any of these instances of harassment, as far as I can tell. He took it "on the chin" for the first two years of these psychological assaults. Thereafter, he increasingly let it be known that he did not like the mimicking, did not like the jokes, did not like the name-calling; and he requested of Prudential top management that action be taken to stop the abuse.

(3) The nature of the harassing conduct against Mr. Shammass was based on his national origin as a Lebanese. At hearing, Defendant Dublis, in particular, attempted to show that the comments against Mr. Shammass were merely one variant of a generalized joking, boisterous, "locker-room atmosphere" in the Grand Rapids District Office and that, for instance, Mr. Dublis was equally the butt of jokes on account of his distinctive Brooklyn accent.

I have no difficulty in believing the testimony of Mr. Dublis in which he recounted how agents occasionally made fun of him and posted signs about the proper pronunciation of words. But the nature of the comments directed to Mr. Dublis were clearly fun-loving and appreciative. The comments directed to Mr. Shammass were critical and abusive. This form of harassment continued, from one week to the next, month after month: These comments were not the occasional good-natured ribbing that a person from another part of the country sustained from *his subordinates*.

The reason for the jokes against Mr. Shammass was not some individual quirk of Mr. Shammass'

[i.e., a bald head]. The reason for the harassing remarks and conduct against Mr. Shammas was his national origin.

(4) Furthermore, it cannot be doubted that the abusive treatment directed to Mr. Shammas by members of the staff as well as management of the Grand Rapids District Office had a serious detrimental effect on the terms and conditions of his employment. Without going into a full rendition of all the evidence in the case, two examples will show the point. Among the jokes made at Mr. Shammas' expense were those involving use of the Arab language to express vulgar epithets³. There is some testimony to the effect that Mr. Shammas may have taught one vulgar expression to Mike Emery. However, the epithet was taken up in a perverse and abusive manner by others, including a Sales Manager on a level with Mr. Shammas in the organization. Sales Manager Lonnie Huff taunted Mr. Shammas with the Arabic vulgarity by popping into his office and uttering the phrase at odd moments.

The second example showing that Mr. Shammas' environment was offensive (and by repetition, became abusive) was the failure of Mr. Shammas' supervisors and colleagues to honor the proper pronunciation of his name. The manner in which his name was mispronounced was clearly intended to (and did) draw attention to his Arab ethnicity, his foreign origins: The continual and exaggerated mispronunciation of his name, as confirmed by Sales Manager John Bigarie, carried with it the message of palpable ill-will. It was, in effect, an ethnic slur.

The caselaw indicates that an objective standard must be used to determine whether a hostile work environment exists.⁴ Thus, whether Mr. Shammas was or was not paranoid, or suffered from a paranoid personality disorder, as asserted by Defendants' expert, is irrelevant. Mr. Shammas was the object of nationality-based harassment of a severe and demeaning type. A person of ordinary sensibilities, a reasonable person would find the harassment visited upon Mr. Shammas created a hostile and offensive work environment.

(6) The facts show that responsible officials of Prudential knew of the harassment of Mr. Shammas. It is apparent from the recitation of events towards the end of Mr. Shammas' tenure that AVP Rick Strater learned of significant wrong-doing, even after Mr. Emery became District Manager. Mr. Emery felt he did not have the authority to remedy such wrong-doing other than by verbal warnings. Mr. Strater did not insist that more serious disciplinary action be taken. Of course, the abusive treatment of Mr. Shammas continued.

³ The Arabic phrase "Ayre Feek" can be translated as "Fuck you."

⁴ See, e.g., Radtke v Everett, 442 Mich 368, 501 NW2d 155 (1993).

(7) Despite having taken the dramatic step in August 1992 of removing Ed Dublis from the Grand Rapids office, Prudential failed to take *effective* action thereafter against the continuing hostilities directed to Mr. Shammas.

(5) The victim of this illegal harassment suffered compensable harm. The joking at Mr. Shammas' expense was not innocuous, but had the potential to and did contribute to a temporary mental disorder [major depression]; loss of capacity to work; serious side-effects on the family life of the victim; and at least a temporary re-routing of the victim's career path. These are all compensable damages under the Elliott Larson Civil Rights Act.

Deborah Shammas, likewise, suffered compensable harm in connection with her claim for loss of consortium. Loss of consortium is nothing less or more than the intangible losses of society and affection that frequently afflict one spouse when the other is seriously injured. Such damages may be recovered, in a proven case, when the primary injury arises under Michigan's civil rights statute. See, Eide v Kelsey-Hayes, Co., 431 Mich 26, 427 NW2d 488 (1989). Mrs. Shammas testified with powerful emotion about the withdrawal of her husband from their ordinary activities and about the reductions in his energy and interest in family life. I would recompense these losses.

CONCLUSION

For these reasons, I would find liability against Prudential Life Insurance company, Ed Dublis, and Mike Emery for violation of Mr. Shammas' Michigan right to a workplace free of harassment on the basis of national origin.

The specific species of civil rights violation here at issue is unfamiliar to most lawyers. There happen to be few reported cases of national origin discrimination, at either the federal or the State level. However, it is clear from this case that the nature and effect of national origin harassment can be just as severe as the most vicious race discrimination or the most insidious sex discrimination. There is no doubt in my mind that the conduct of Prudential supervisors towards Mr. Shammas, conduct known to Prudential and uncorrected by Prudential, warranted the imposition of damages here.

/s/ Benjamin A. Kerner
Benjamin A. Kerner
Public Arbitrator

Dated: August 3, 1995

For NASD Use Only
Date of Decision: August 9, 1995