

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Charles T. Barlow, Jr.

94-00904

Name of Respondent

J.J.B. Hilliard, W.L. Lyons, Inc.

REPRESENTATION

For Claimant Charles T. Barlow, Jr. ("Claimant"): Robert A. Klingler, Esq. of the law firm of Robert A. Klingler, Co., L.P.A., Cincinnati, Ohio

For Respondent J.J.B. Hilliard, W.L. Lyons, Inc. ("Respondent"): Janet P. Jakubowicz, Esq. of the law firm of Greenebaum Doll & McDonald, PLLC, Louisville, Kentucky

CASE INFORMATION

Statement of Claim filed: March 8, 1994

Claimant's Submission Agreement signed on: February 28, 1994

Claimant's Reply to Counterclaim filed: June 20, 1994

Statement of Answer and Counterclaim filed by Respondent on: June 7, 1994

Respondent's Submission Agreement signed by Kenneth L. Wagner, Senior Vice President of J.J.B. Hilliard, W.L. Lyons, Inc. on: May 20, 1994

HEARING INFORMATION

Pre-Hearing Conferences with one Arbitrator:

December 21, 1994 - one session

December 22, 1994 - one session

April 6, 1995 - one session

April 19, 1995 - one session

= 4 pre hearing conferences

Hearing Dates/Sessions:

April 18, 1995 - one session

May 15, 1995 - two sessions

May 16, 1995 - two sessions

May 17, 1995 - two sessions

May 24, 1995 - three sessions

May 25, 1995 - two sessions

May 31, 1995 - three sessions

June 1, 1995 - three sessions
June 2, 1995 - one session
August 7, 1995 - two sessions
August 8, 1995 - three sessions
August 9, 1995 - two sessions
August 10, 1995 - three sessions
August 11, 1995 - one session
September 6, 1995 - three sessions
September 7, 1995 - three sessions
September 8, 1995 - one session
September 14, 1995 - two sessions
September 15, 1995 - one session
September 18, 1995 - two sessions
September 19, 1995 - three sessions
September 20, 1995 - one session
October 30, 1995 - three sessions
October 31, 1995 - two sessions
November 1, 1995 - two sessions
November 2, 1995 - two sessions
November 3, 1995 - one session
November 6, 1995 - three sessions
= 59 hearing sessions

Hearing Locations: The Seelbach Hotel and The Hyatt, Louisville, Kentucky

CASE SUMMARY

Claimant alleged, among other things, that after working for 3-1/2 years for Respondent, he was terminated in violation of the Americans With Disabilities Act (ADA), 42 U.S.C. Section 12103(2)(a), in that Respondent terminated him in order to avoid having to pay future medical expenses for his wife, Denise Barlow, who was disabled, and was chronically ill. Claimant alleged that Respondent was self-insured, and would be responsible for \$100,000 per year of medical claims made by Claimant's wife. Claimant contended that the stated reason for termination; that is, that Respondent's Office Manager had found a missing registered bond in a stack of papers in Claimant's office, was a pretext to disguise the actual reason for Claimant's termination. Claimant further alleged that Respondent breached a contract with him, to wit; that his employment was insured as long as he performed his job well and that he would not be discharged except for good cause.

Claimant alleged that the U-5 prepared by Respondent contained false and defamatory statements about Claimant. Claimant alleged that the allegations that he had made unauthorized trades were indeed defamatory and were published without privilege, and with malice or with negligence or reckless disregard for the truth. Claimant alleged that Respondent's publication of the defamatory statements had injured Claimant's professional and business reputation, causing him mental pain, suffering, humiliation and disgrace. Claimant alleged that because of Respondent's alleged

defamatory statement, he was unable to find employment in the securities industry. Claimant alleged that Respondent's actions were intentional and reckless and were of such a degree that they were outrageous.

Respondent, in addition to its specific and general denials found in response to the Claimant's Statement of Claim, listed as affirmative defenses the following:

Claimant had failed to state a claim upon which relief could be granted;

Claimant failed to comply with administrative prerequisites mandated under the ADA Section 706 of Title 7, 42 U.S.C. Section 2000-E-5;

That Claimant's spouse was not disabled as defined in ADA;

The alleged defamatory statements and communications are privileged;

Claimant is estopped from asserting the claim set forth in his Statement of Claim; and

That the alleged defamatory statements are true.

Respondent requested that the Claimant's claim be dismissed in its entirety, and counterclaimed that Claimant was given three bonds in January 1993 by a paralegal for transfer from the name of a decedent into the names of her heirs. Respondent alleged that the transfer was to have been completed on two of three bonds, but it was not until June 1993 that it was discovered that one of the transfers had not been effectuated. Respondent alleged that the Office Manager of Claimant's office found the missing bond in Claimant's office and that because of Claimant's breach of his duties to abide by the operational procedures of Respondent, he was terminated. Respondent counterclaimed that Claimant had defamed Respondent's firm.

Claimant denied all allegations of wrongdoing asserted by Respondent in its counterclaim and specifically maintained, among other things, that any statements he made concerning Respondent's termination of his employment were true. Claimant further maintained that he was privileged to make any statements he may have made concerning the circumstances for his termination.

RELIEF REQUESTED

Claimant requested an award against Hilliard Lyons for \$30,000.00 in lost past income and benefits, \$100,000.00 for lost future income and benefits, \$1,000,000.00 for mental anguish, humiliation and loss of reputation, \$3,500,000.00 in punitive damages,

\$2,800.00 for direct costs, attorney's fees in the amount of \$144,449.40, attorney costs in the amount of \$10,933.54, expert fees in the amount of \$13,725.

Respondent requested that Claimant's claim be dismissed in its entirety, compensatory and punitive damages on its counterclaim in an amount to be determined at the arbitration hearing, its costs and expenses incurred, and a reasonable attorney's fees.

OTHER ISSUES CONSIDERED & DECIDED

The Panel conducted an in-camera review of an audit conducted by the NASD on July 8, 1993. It was determined that the audit, as produced by Respondent, would be admitted into evidence.

A handwritten report of a "bond incident" which was written in January 1994 was ordered by the Panel to be produced to Claimant. In addition, a typed copy of a letter written by Mr. Lawrence Middleton to Kenneth L. Wagner, General Counsel for Respondent, was also ordered to be produced as was Mr. Wagner's letter to the National Association of Securities Dealers.

Respondent made a Motion to Strike Count 3 of the Complaint and which alleged defamation which is denied.

Respondent moved to deny Claimant's permission from presenting evidence relating to Hilliard Lyon's treatment of employees which were not similarly situated to him, alleging that the case of Mitchell v. Toledo Hospital, 964 F.2d 577 (6th Cir., 1992) set forth criteria which was not met by Claimant. Respondent also moved to present evidence of Claimant's misconduct learned both before and after his employment with Hilliard Lyons. The case of McKennon v. Nashville Banner Publishing Co., 115 S.Ct. 879 (1995) was initially cited by Respondent for its reasoning. Both parties were asked to brief these issues and the briefs were received by the Panel on August 25, 1995.

Respondent reiterated its Motion to Dismiss the Claim of Defamation since the information contained in the U-5 was privileged information.

At the close of Claimant's proof, Respondent made a Motion for a Directed Verdict which was denied by the Panel.

A Motion to present an affidavit from a former customer of Claimant's was made by Respondent. The Affiant would not agree to attend the hearing and since she was out of the jurisdiction, could not be served with a subpoena. The Affiant refused to testify by telephone. Evidence was permitted regarding the contents of the affidavit, but that testimony came from persons other than the Affiant. The Affidavit itself was not permitted into evidence.

The Panel was advised by Respondent that Respondent decided to withdraw its counterclaim against Claimant.

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 and post hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. That Respondent J.J.B. Hilliard and W.L. Lyons, Inc. is liable to Claimant Charles T. Barlow, Jr. and shall pay to Claimant the sum of \$227,072.00; no pre judgment interest is awarded on this amount.
2. That Claimant's claim for punitive damages is denied in its entirety.
3. That the parties shall bear their respective costs, including attorney's fees, except as forum fees are assessed below.
4. That any and all claims not specifically addressed are denied in their entirety.

FORUM FEES

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

(4 pre hearing conferences x \$300) + (59 hearing sessions x \$1,000
= \$60,200

Forum Fees Assessed Against: Respondent is assessed forum fees in the amount of \$54,180, however, Respondent is entitled to offset this amount with its hearing session deposit of \$800 so that the amount due from Respondent as forum fees is \$53,380. Claimant is assessed forum fees in the amount of \$6,020, however, Claimant is entitled to offset this amount with his \$1,000 hearing session deposit previously filed. Therefore, Claimant shall pay forum fees in the amount of \$5,020.

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

Concurring Arbitrators' Signatures
Name

Public/Industry

Robert D. Herschman, Esq. - Chairperson

Public Arbitrator

Amelia F. Adams, Esq.

Public Arbitrator

Elijah T. Kirk

Industry Arbitrator

Date Award Served by the NASD:

January 26, 1996

Concurring Arbitrators' Signatures
Name

Public/Industry

Robert D. Herschman, Esq. - Chairperson

Public Arbitrator

Amelia F. Adams, Esq.

Public Arbitrator

Elijah T. Kirk

Industry Arbitrator

Date Award Served by the NASD:

January 26, 1996