

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the matter of the Arbitration Between

Name of Claimant

Pauline "Scotty" Neilson

NASD Arbitration
No.94-01345

Name of Respondents

Van Kasper & Company
F. Van Kasper
Thomas Bedford

REPRESENTATION

For Claimant: Beth E. Aspedon, Esq. , and J. Brittain Habegger, Esq. of Fitzgerald Abbott & Beardsley - Oakland, California

For Respondents: Peter J. Boutin, Esq., Julie L. Taylor, Esq. and Kelly J. Moynihan, Esq. - Keesal, Young & Logan - San Francisco, California

CASE INFORMATION

Statement of Claim filed: April 8, 1994

Claimant's Submission Agreement signed: March 31, 1994

Joint Statement of Answer filed by Respondents: August 10, 1994

Submission Agreement signed by Respondent Van Kasper & Company : July 14, 1994

Submission Agreement signed by Respondent Thomas Bedford: July 13, 1994

Undated Submission Agreement signed by Respondent F. Van Kasper

HEARING INFORMATION

Hearing Dates / Sessions:	Prehearing - February 15, 1995	One Session
	Prehearing - March 16, 1995	One Session
	Prehearing - March 27, 1995	One Session
Hearing Sessions:	April 5, 1995	Two Sessions
	April 6 1995	Two Sessions
	April 7, 1995	Two Sessions
	May 22, 1995	Two Sessions
	May 23, 1995	Two Sessions
	May 24, 1995	Two Sessions
	May 25, 1995	Two Sessions
	May 26, 1995	Two Sessions

Hearing Location: San Francisco, California

CASE SUMMARY

ISSUES ADDRESSED:

This Decision determines the following causes of action alleged in the Statement of Claim: discrimination based on age and physical disability, wrongful termination and breach of the covenant of good faith and fair dealing, negligent and intentional infliction of emotional distress, and conversion.

PROCEDURAL BACKGROUND:

On March 31, 1994 Claimant filed a Statement of Claim with the NASD against Respondents, alleging disability discrimination, age discrimination, breach of contract (constructive discharge), conversion, and intentional and negligent infliction of emotional distress. Respondents thereafter submitted to the jurisdiction of the NASD, and filed an answer and a motion to dismiss. (In pre-hearing proceeding, that motion was denied.)

A hearing was held in this matter on April 5, 6, and 7 and May 22 through 26, 1995. All parties were accorded a full opportunity to present testimony, documentary evidence, and argument. Closing arguments were heard by the panel on May 26, 1995, and the panel thereafter examined extensive case law submitted by the parties. The matter is now ripe for resolution.

FACTUAL BACKGROUND:

Claimant Pauline "Scotty" Neilson [hereinafter "Claimant"] was hired by Respondent Van Kasper, on behalf of his corporation, Respondent Van Kasper & Co., [hereinafter "VK & Co."] in February 1988. At that time Claimant was 68 years of age. She brought with her a significant clientele which she had built up over many years in the brokerage industry.

Claimant went to work at the Lafayette (later Walnut Creek) branch of VK & Co. in 1990, Respondent Tom Bedford became manager of that branch. He and Claimant liked and

respected each other and worked together well.

The evidence showed that VK & Co. hires brokers to work full time only, and expects each broker to achieve a minimum of \$150,000 in gross production annually. This is because the overhead per broker in this full service brokerage is approximately \$171,000 annually, which at the standard payout rates requires production of approximately \$340,000 per broker for the firm to make money. (That is in fact the average gross of a VK & Co. broker.) Claimant failed to meet the \$150,000 minimum in any year, although she worked full time. Although Mr. Kasper had serious doubts about Claimant's ability to become a productive broker, Mr. Bedford chose to keep her on his staff.

In March of 1991 Claimant suffered heart problems and then a stroke. She was hospitalized and then placed in a nursing facility to recuperate. Mr. Bedford visited Claimant in both places and assured her that her job was waiting. Claimant was on full disability through the State of California and later through VK & Co.'s long-term disability carrier, Paul Revere Insurance, the remainder of 1991. In late 1991 Claimant's doctor released her to work a few hours a week. (She had kept in contact with many customers from the hospital and then from her home; Mr. Bedford put all their accounts under his trading number so their holdings could be traded and serviced.) Claimant came into the office on approximately four dates from November 23 till the end of December 1991, for two hours at a time.

Claimant's doctor then increased the number of hours she could work to twelve per week. In January and February 1993 Claimant came into the office on approximately 10 dates for two to four hours. However, during this time she remained on long term disability under the Paul Revere policy. Claimant felt she was making a recovery and Mr. Bedford accommodated her schedule, although she had little if any production.

In March Claimant was traumatized by a serious accident when a car ran into her home. This exacerbated her medical condition. She obtained a letter from her doctor returning her to full disability on March 31, and stopped coming to work. In May she underwent a period of voluntary hospitalization. She thereafter came to the office once, on May 18, 1992.

On May 21, 1992, at Mr. Van Kasper's direction, Mr. Bedford obtained Claimant's resignation. He stated that it was Respondents' feeling that Claimant was not making progress toward a full recovery, and VK & Co. management was adamant that it would not employ a broker part-time. Mr. Kasper stated that there were two reasons for this policy: one involved concerns about adequate supervision; the other was the necessity for a level of gross production which the company felt a part-time broker could not achieve.

Despite the resignation, Claimant remained on full disability under the Paul Revere plan, until benefits under it were exhausted in September 1992. On June 12, 1992, Mr. Bedford gave Claimant a personal check for her share of the commissions on the trades he had made for her clients while she was ill. During June Claimant made a number of trades for her clients under Mr. Bedford's number, for which she was compensated as an independent contractor.

In August, 1992, Mr. Bedford conveyed to Claimant a set of conditions developed by the firm's compliance department. It was represented that if Claimant agreed to these conditions, she might be able to return to the firm on a part-time basis. Claimant rejected these conditions. In September 1992 she joined the firm of Cypress Capital as a broker on an independent contractor basis. VK & Co. made no effort to retain any of her customers and approximately 90% of them went with her.

POSITIONS OF THE PARTIES:

Claimant: Claimant argues that Respondents discriminated against her on the basis of her age and her physical disability. She argues that she was a qualified broker and that Respondents failed to adequately accommodate her disabilities. She claims that Respondents' conduct breached the covenant of good faith and fair dealing¹ and constituted negligent and intentional infliction of emotional distress. She also contends that Respondents wrongfully converted commissions which she should have been paid during the period of her disability.

Respondent: Respondents contend that they are being punished for having tried to be reasonable and accommodating to the Claimant. They deny that they discriminated against Claimant on the basis of age or disability. They contend that they are entitled to require brokers to work full time, and that Claimant was unqualified because she could not come to work. Respondents argue that they are not required to allow Claimant to work part time or at home. Respondents deny any tortious conduct. They argue that Claimant's claims for emotional distress are preempted. They deny any conversion of any funds or accounts belonging to her.

ISSUES CONSIDERED AND DECIDED

Age Discrimination:

The panel finds no evidence whatsoever that Respondents discriminated against Claimant due to her age. She was in the protected class (age 40 and over) when hired. She was kept on staff despite three years of extremely poor production. Respondent VK & Co. employs a number of other brokers in the protected class. There is no evidence to even suggest that Respondents engaged in discrimination on the basis of age.

Discrimination Based on Physical Handicap:

Both the Americans with Disabilities Act and the similar California law (Government Code SS 12940 et seq.) are designed to prevent discrimination in the workplace against disabled but otherwise qualified individuals who can perform the essential functions of a job, with or without reasonable accommodation. There is no question that Claimant suffered a medical condition which became permanently disabling, and there is no question that this led to adverse employment action: the request for her resignation.

There are two issues to be determined with regard to whether Respondents' conduct toward Claimant was unlawful under the ADA or California law. The first is whether Claimant was a "qualified" employee under the law: That is, a disabled person who could nevertheless perform the essential functions of her job. With regard to Claimant's ability and aptitude, there is no question that she was a qualified broker. Respondents do not contend otherwise. Their

¹Claimant has withdrawn her claim for breach of her employment contract (i.e. wrongful termination.)

contention is, rather, that Claimant was unable to come to work on any regular basis, and therefore was not "qualified" under applicable case law.

At the time Claimant's resignation was requested, she had worked only a few hours on approximately 14 to 16 days between November 1991 (her first partial release from her doctor) and March 1992. As of March 31, 1992, her doctor had returned her to full disability status. She never obtained another release which indicated she could work, even part time. Thus, at the time of the requested resignation, to Respondent's knowledge Claimant was completely disabled and could perform none of her job duties. Further, she was receiving long-term disability payments at this time and had reported both to the State of California and the Paul Revere Insurance company that she was totally and continuously disabled from March 1991 onward. She never made any effort to change this status or to return any disability payments.

The discrimination statutes do not exist to protect employees who are totally disabled and cannot work. The cases generally hold that someone claiming full disability benefits cannot also claim the protection of the ADA or equivalent state law. See, e.g., Kennedy v. Applause, No. CV 94-5344 (U.S.D.C., C.D. Ca., 1994). Therefore, it appears that Claimant was not a "qualified" employee under applicable law.

Claimant contends that she was a qualified employee who needed only the "reasonable accommodation" of being allowed to work part time. Assuming that Claimant is correct about being "qualified", the question is whether it is reasonable to require Respondents to allow Claimant to work a part time schedule.

Generally, it would seem that there is no reason a broker could not work part time; it is not the same type of work as, for example, operation of a machine in a factory which required full coverage on every shift. Apparently many brokers do work part time in the type of independent contractor status in which Claimant is now engaged. However, VK & Co. is not set up to supervise independent brokers. It is a full service brokerage with a compliance department designed to supervise employees who work in the office full time. The uncontradicted evidence showed that the per broker fixed overhead was over \$171,000 per year. To allow Claimant to work part time would have virtually assured that Claimant would never cover the fixed costs of employing her, let alone allow the company to make any profit through her efforts. The fact that Respondents had tolerated Claimant's low production in the past did not require them as a matter of law to do so indefinitely. In light of all the evidence, it is not reasonable to force Respondents to accommodate Claimant's disability by allowing her to work part time.

For these reasons, the panel finds that Respondents' actions toward Claimant did not violate the laws against discrimination on the basis of physical handicap.

Covenant of Good Faith and Fair Dealing:

Although Claimant has withdrawn her contractual claim for wrongful termination, she still contends that Respondents breached the implied covenant of good faith and fair dealing which existed in their contract of employment with her. Generally, this claim is based on the alleged uncertainty and turmoil which Claimant felt about her employment status, particularly when she was asked to resign, and then continued to negotiate with Mr. Bedford about the possibility of continuing her employment on some basis other than as a full time broker.

There is no question that Claimant was upset by the uncertainty of her position and by

the request that she resign. However, as found above, this request by Respondents was not unlawful or unreasonable, given Claimant's inability to come to work on any regular basis. She, in fact, contributed to much of that uncertainty by coming to work only sporadically, and remaining on full disability, even when released for part-time work by her doctor. It is true that both before and after her resignation, Claimant and Mr. Bedford continued to try to "work something out;" Mr. Bedford liked Claimant very much and truly wanted to accommodate her if that was possible. However, Mr. Bedford was not the final authority in the company, and others in management were neither as willing or eager as he was to continue an association with Claimant. The conditions of employment suggested to Claimant in August were part of any effort to allow her to remain associated with VK & Co. on a basis acceptable to her, management and the compliance department. There was nothing improper with Respondents offering the conditions as a basis for discussion. Claimant was free to reject them, as she did.

While these continued discussions and the inconsistency between Mr. Bedford's attitude and that of others in the company may have been unpleasant for Claimant, the panel cannot find any evidence that Respondents in any way dealt with Claimant unfairly or in bad faith. Mr. Bedford's attempts to accommodate Claimant were not mandated by law; they were an attempt to accommodate a favored employee and friend. No violation of the covenant of good faith and fair dealing is found.

Negligent and Intentional Infliction of Emotional Distress:

Claimant relies on many of these same facts in contending that Respondents' conduct constituted either the negligent or intentional infliction of emotional distress. There is no real dispute that, subjectively, Claimant did suffer emotional distress, partly due to her uncertainty about her work situation. The issue is whether Respondents are liable under applicable law for that distress.

The law in California is, generally, that where emotional distress (usually merely termed "stress") is caused by working conditions, a claim must be filed under the state workers' compensation system. Any tort cause of action is preempted to the extent that it duplicates a workers' compensation claim. The cases hold that only where conduct is "outrageous" and so far beyond the normal employment relationship that "no civilized human being could be expected to endure it" is there a non-preempted tort claim by an employee for emotional distress. An example of such outrageous conduct might be intentional discrimination on the basis of race or gender or age.

In the present case, the panel has not found Respondents' conduct to be discriminatory or outrageous. To the extent that workplace conditions may have exacerbated Claimant's medical condition, the matter of determining and allocating the harm caused would have to be handled through the workers' compensation system. (Although, presumably, Claimant could not contend that she was totally disabled through non-work-related medical problems and entitled to workers' compensation benefits at the same time.) As to Respondents' conduct after Claimant's resignation, they were under no special duty toward her, and their conduct in placing conditions upon her proposed part time employment was not in any way wrongful. Thus, Claimant's claims for the infliction of emotional distress must fail.

Conversion:

Claimant does not claim that Respondents wrongfully converted any of her accounts when she left VK & Co. for Cypress Capital. She agrees, as the evidence shows, that Respondents made no effort to hold her clients and the 90% of them followed her to her new position.

What Claimant does claim is that Respondents wrongfully withheld commissions on trades made in her customers' accounts while she was ill and on disability. Leaving aside the difficult questions of whether Claimant could legally claim any commissions while she collected disability (and Mr. Bedford was actually putting her clients' trades through for her), Claimant produced no evidence that there were any trades for which she was not compensated. Mr. Bedford wrote her a personal check for trades he made in accounts while she was ill. VK & Co. paid her for trades in June of 1993 as an independent contractor. Both of these payments were made despite the fact that Claimant remained on disability. Claimant produced no confirmations, account statements, or evidence of any other type that any other trades were made in her customers' accounts during the period of her disability. The panel cannot simply assume that such trades were made. Therefore, no claim for conversion is established.

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. Each and every claim of Claimant, Pauline Neilson, against Respondent, Van Kasper & Co., is dismissed.
- 2.. Each and every claim of Claimant, Pauline Neilson, against Respondent, F. Van Kasper is dismissed.
3. Each and every claim of Claimant, Pauline Neilson, against Respondent, Thomas Bedford is dismissed.
4. The parties shall each bear its own costs and fees, including attorneys' fees.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the NASD shall retain all fees and deposits.

Claimants are assessed fees for one session @ \$600.00, less the previously deposited hearing session of \$600.00, leaving a balance due of \$0.00.

Respondents are jointly and severally assessed forum fees for fifteen sessions @ \$600/session (\$9,000) and for the 3 prehearing conferences @ \$300/session (\$900), totalling a total balance due of \$9,900.00 , to be made payable to the National Association of Securities Dealers, Inc.

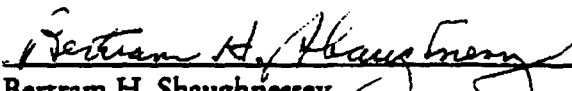
ARBITRATORS

<u>Name</u>	<u>Public / Industry</u>
Nancy Roberts Lonsdale	Public
Anne Hennegar	Industry
Bertram H. Shaughnessey	Public

Concurring Arbitrators' Signatures

Nancy Roberts Lonsdale

Anne Hennegar



Bertram H. Shaughnessey

Date of Decision:

Date Served: 07/11/95