

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

William S. Gray

Claimant,

v.

No. 95-01185

Smith Barney, Inc.,

Therese M. Obringer, and

A. George Saks

Respondents.

REPRESENTATION OF PARTIES

Claimant William S. Gray ("Claimant") was represented by Jonathan Kord Lagemann, Esq. of Law Offices of Jonathan Kord Lagemann located in New York, New York.

Respondents Smith Barney, Inc. ("Smith Barney"), Therese M. Obringer ("Obringer"), and A. George Saks ("Saks") (collectively referred to as "Respondents") were represented by David S. Friedman, Esq. of Smith Barney, Inc. located in New York, New York and H. Nicholas Berberian, Esq. of Neal Gerber Eisenberg located in Chicago, Illinois.

CASE INFORMATION

The Statement of Claim was filed on or about March 7, 1995.

Claimant's Submission Agreement was signed on March 1, 1995.

Respondents' Joint Statement of Answer was filed on or about June 26, 1995.

NASD Regulation, Inc. Office of Dispute Resolution has no record that Respondents submitted properly executed submission agreements.

Respondents' Brief in Support of Motion for Summary Dismissal of Gray's Statement of Claim was filed on or about October 10, 1996. Claimant's Memorandum of Cases and Authorities was filed on or about October 28, 1996. Respondents' Reply Brief was filed on or about November 7, 1996.

Claimant's Motion for Sanctions was filed on or about July 2, 1996. Respondents' Opposition to Motion for Sanctions and Cross Motion for Sanctions was filed on or about

July 11, 1996. Claimant's Supplemental Motion for Sanctions was filed on or about October 4, 1996.

HEARING INFORMATION

The telephonic pre-hearing conferences were held on May 29, 1996 for one (1) session and October 22, 1996 for one (1) session.

The hearings were held on:

September 10, 1996 for two (2) sessions;
September 11, 1996 for two (2) sessions;
September 12, 1996 for two (2) sessions;
October 28, 1996 for two (2) sessions;
October 30, 1996 for two (2) sessions;
December 11, 1996 for two (2) sessions;
December 12, 1996 for two (2) sessions;
December 13, 1996 for two (2) sessions;
February 24, 1997 for two (2) sessions;
February 25, 1997 for two (2) sessions;
February 26, 1997 for two (2) sessions; and
February 27, 1997 for one (1) session.

The hearings were held in Southfield, Michigan.

CASE SUMMARY

Claimant William S. Gray was a Branch Manager of Respondent Smith Barney's Metropolitan Detroit office (the "Detroit office"). Respondent Therese M. Obringer was employed as Respondent Smith Barney's Divisional Counsel in Birmingham, Michigan. Respondent A. George Saks was Respondent Smith Barney's General Counsel and chief legal officer.

Claimant contended that this was a case in which a branch office manager consulted in-house counsel about how he should act with respect to reports of sexual harassment in his office. Claimant asserted that, as a result of following the advice of in-house counsel, Claimant was told that his employment would be terminated if he did not accept suspension or demotion and pay a \$50,000 fine. Claimant maintained that, having done no wrong, he left Smith Barney. Claimant alleged that Smith Barney either fired Claimant for following its own corporate legal advice, or gave Claimant legal advice amounting to malpractice.

Claimant alleged that, during the fall of 1993, Arlene Kelly ("Kelly") visited the Detroit office in connection with her duties as a marketing sales coordinator. Claimant contended that Kelly advised Claimant that Donald Dempsey ("Dempsey"), a registered representative in the Detroit office, offered Kelly money to take off her blouse. Claimant maintained that Kelly told him about this incident, but wanted to keep the incident confidential. Claimant asserted that Claimant called Respondent Obringer and told her what Kelly had said. Claimant alleged that Respondent Obringer told him to take no action until she told him what to do. Claimant contended that, in or about late November 1993, Heather Rowland ("Rowland") told Patricia Darby ("Darby"), Claimant's Administrative Assistant, that Dempsey had been calling Rowland to request sexual favors. Claimant asserted that, in or about early December 1993, Darby told Claimant about the "Rowland-Dempsey situation." Claimant alleged that Rowland asked him to promise secrecy and Claimant promised. Claimant contended that he contacted Respondent Obringer about the Rowland-Dempsey situation and that Obringer told Claimant that he should do nothing until Obringer advised him what to do.

Claimant maintained that after Marlene Marks ("Marks"), a secretary in the Detroit office, told Claimant that she wanted to file a complaint against Dempsey, Claimant contacted Respondent Obringer for advice. Claimant asserted that Respondent Obringer told him to contact Human Resources. Claimant alleged that after two Human Resources generalists visited the Detroit offices, Claimant was instructed to require Dempsey to receive counseling with regard to conduct and with respect to female employees. Claimant contended that, on or about May 1994, Respondent Smith Barney changed its mind and instructed Claimant to fire Dempsey.

Claimant maintained that, on or about May 30, 1994, he was instructed to report to Joseph Plumeri's ("Plumeri") office and that Plumeri told Claimant that he had done everything right. Claimant asserted that, on June 20, 1994, Claimant was summoned to Plumeri's office again and that Plumeri told him that he had handled the Dempsey situation improperly. Claimant alleged that Plumeri told Claimant that his employment at Smith Barney was contingent on Claimant accepting suspension from management for 30 days and paying a \$50,000.00 fine, or in the alternative, Claimant would be permitted to resign from management, be suspended for 30 days and still pay a \$50,000.00 fine. Claimant contended that he resigned from Smith Barney on June 29, 1994. Claimant maintained that Smith Barney coded his U-5 termination with the following explanation: "The firm advised Mr. Gray of its decision to take disciplinary action against him relating to failure to enforce certain Human Resource related policies, after which he left the firm."

Respondents denied all liability to Claimant in the Joint Statement of Answer. Respondents alleged that Claimant was not terminated, but merely disciplined by Smith Barney. Respondents also denied that Claimant was even "constructively discharged." Respondents maintained that, although Claimant was not terminated and although Respondent Smith

Barney was not legally required to provide Claimant with any reasons, Respondent Smith Barney had ample reasons to discipline or terminate Claimant. Respondents alleged that Claimant was negligent in his supervision of Dempsey in that Claimant did not take appropriate corrective action with respect to Dempsey's actions. Respondents contended that, in any event, Claimant's employment relationship with Smith Barney was terminable-at-will. Respondents alleged that Respondent Obringer never advised Claimant that he was forbidden from investigating the sexual harassment charges or that he should not discipline Dempsey. Respondents asserted that with respect to Claimant's defamation claims, both the libel and slander claims were without merit because Smith Barney did not defame Claimant.

Respondents asserted various affirmative defenses including: (1) that Claimant's Statement of Claim fails to state causes of action against Respondents upon which relief can be granted; (2) that Claimant's employment was never terminated by Smith Barney; (3) that Claimant's employment was terminable at the will of Smith Barney; (4) that any damages which Claimant suffered is the result of the Claimant's own actions and decisions and is not the result of any act or decision on the part of Respondents, and therefore, the Claimant cannot recover any damages against Respondents; (5) that the Claimant has failed to mitigate his damages; (6) with respect to the malpractice claims, that Respondent Obringer and Respondent Saks did not owe any "duty of due care" to Claimant; (7) with respect to the malpractice claims, any malpractice was not the cause-in-fact of any damages; (8) that with respect to the malpractice claims, the Claimant was at fault; (9) that with respect to the libel claims, the Claimant consented in the U-5 form; and (10) that with respect to the slander claim, the Claimant failed to identify either the name of the alleged defamer or the specific content of the alleged defamatory statement.

RELIEF REQUESTED

Claimant William S. Gray requested a decision awarding not less than \$3,500,000 in damages, interest, costs, attorney's fees and punitive damages of not less than \$10,500,000. Claimant also requested that all costs of this proceeding be assessed against Respondents.

Respondents Smith Barney, Inc., Therese M. Obringer, and A. George Saks requested that the Statement of Claim be denied in its entirety and that they be award their full costs and their reasonable attorney fees.

OTHER ISSUES CONSIDERED & DECIDED

- (1) Claimant's Motion to Bar was denied.
- (2) Respondents' Motion for Summary Dismissal was denied.

- (3) Claimant's Motion to Strike "At Will" Defense was denied.
- (4) Claimant's Motion for Protection of Witness' Constitutional Rights was denied.
- (5) Claimant's Motion to Preclude Respondents from Offering Late Produced Documents was denied.
- (6) Claimant's Motion for Sanctions is granted to the extent reflected in paragraphs 2 and 3 of the award.
- (7) All costs of the stenographic reporter shall be borne by the party who obtained the stenographic reporter.
- (8) Respondents Smith Barney, Inc., Therese M. Obringer, and A. George Saks did not file with NASD Regulation, Inc. Office of Dispute Resolution properly executed submissions to arbitration but are required to submit to arbitration pursuant to §10301 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim, appeared and testified at the hearing are bound by the determination of the arbitration panel on all issues submitted.
- (9) 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 original(s) remain on file with NASD Regulation, Inc. Office of Dispute Resolution.

AWARD

After considering the pleadings, the testimony, and the evidence presented, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

- (1) That Respondents Smith Barney, Inc., Therese M. Obringer, and A. George Saks are jointly and severally liable for and shall pay to Claimant William S. Gray the amount of Two Hundred Ninety Two Thousand Sixty Two Dollars and No Cents (\$292,062.00), which sum is inclusive of interest to the date of the award;

- (2) That Respondents Smith Barney, Inc., Therese M. Obringer, and A. George Saks are jointly and severally liable for and shall pay to Claimant William S. Gray the amount of Ten Thousand Dollars and No Cents (\$10,000.00) as sanctions in connection with the panel's granting Claimant's Motion for Sanctions for failure to comply with the panel's discovery orders. In deciding to award this sum as sanctions, the panel considered the arguments of the parties, the submissions filed, and Section 10324 of the NASD Code of Arbitration Procedure, and determined that authority existed for an award of sanctions to the Claimant William S. Gray;
- (3) That Respondents Smith Barney, Inc., Therese M. Obringer, and A. George Saks are jointly and severally liable for and shall pay to Claimant William S. Gray the amount of Two Thousand Two Hundred Ninety Two Dollars and Fifty One Cents (\$2,292.51) as sanctions for Claimant's counsel fees and expenses for October 29, 1996. In deciding to award this sum as sanctions, the panel considered the arguments of the parties, the submissions filed, and Section 10324 of the NASD Code of Arbitration Procedure, and determined that authority existed for an award of sanctions to the Claimant William S. Gray;
- (4) That Respondent Smith Barney, Inc. shall amend the Form U-5 for Claimant William S. Gray, as well as other applicable regulatory forms, to indicate that, as a result of this arbitration proceeding, the resignation of Claimant William S. Gray must be checked as "voluntary"; and
- (5) That other than forum fees, which are addressed below, all other claims and requests for relief not specifically awarded here are, and each of them, hereby dismissed in their entirety with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$1,500 per hearing session and \$300 for each pre-hearing conference, if any. There were twenty-three (23) hearing sessions x \$1,500 = \$34,500 in forum fees. There were two (2) pre-hearing conferences x \$300 = \$600 in forum fees. Total forum fees = \$35,100. Pursuant to §10205(b) of the Code, a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §10205(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$500 and shall **retain** the hearing session deposit in the amount of \$1,500 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Claimant.

Pursuant to §10205(c) of the Code, Claimant William S. Gray is liable for and shall pay to NASD Regulation office of Dispute Resolution forum fees in the amount of \$16,050. Pursuant to §10205(c) of the Code, Respondents Smith Barney, Inc., Therese M. Obringer, and A. George Saks are liable for and shall pay to NASD Regulation Office of Dispute Resolution forum fees in the amount of \$17,550. Pursuant to §10205(c) of the Code, Respondents Smith Barney, Inc., Therese M. Obringer, and A. George Saks are liable for and shall pay to NASD Regulation Office of Dispute Resolution its costs incurred in coping a portion of the hearing transcripts for the arbitrators in the amount of \$93.75. Pursuant to §10333 of the Code, Respondent Smith Barney, Inc. is liable for and shall pay its member surcharge in the amount of \$500.

Fees are payable to NASD Regulation, Inc. Office of Dispute Resolution.

Concurring Arbitrators' Signatures:

\s\ Carole M. Crosby, Esq.
Carole M. Crosby, Esq.
Chairperson
Public Arbitrator

March 11, 1997
Dated:

\s\ Thomas C. Girardot
Thomas C. Girardot
Panelist
Industry Arbitrator

March 11, 1997
Dated:

Arbitrator's Signature, dissenting in part and concurring in part:

I concur as to the award of sanctions and concur as to amending of the U-5 and other required forms, but dissent on the amount of the award set forth in paragraph 1 above.

\s\ Barry Goldman, Esq.
Barry Goldman, Esq.
Panelist
Public Arbitrator

March 11, 1997
Dated:

For NASD Regulation use only:
Date award served on the parties: March 17, 1997