

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Ernest L. Moye

95-03152

Name of Respondent

Prudential Securities, Inc.

REPRESENTATION

For Claimant appeared Kelly Scanlon, Esq. from the law firm of Scanlon & Sansone, located in Pittsburgh, Pennsylvania.

For Respondent appeared Steve Walowitz, Esq. from the law firm of Mayer, Brown & Platt located in New York, New York.

CASE INFORMATION

Statement of Claim filed: June 28, 1995

Amendments to the Statement of Claim filed: July 12, 1995; August 7, 1995 ; September 20, 1995

Claimant's Submission Agreement signed on: February 21, 1995

Claimant's response to Counterclaim filed: February 5, 1996

Statement of Answer and Counterclaim filed by Respondent on: January 23, 1996

Respondent's Submission Agreement signed on: January 22, 1996

HEARING INFORMATION

Hearing Dates/Sessions:	July 17, 1996	2 Sessions
	July 18, 1996	2 Sessions
	July 19, 1996	2 Sessions
	July 23, 1996	2 Sessions
	August 20, 1996	2 Sessions
	August 21, 1996	2 Sessions
	September 4, 1996	2 Sessions
	September 5, 1996	2 Sessions
	* September 6, 1996	2 Sessions

Hearing Location: Pittsburgh, Pennsylvania

CASE SUMMARY

Claimant alleged that he was fired by Respondent, Prudential Securities, Inc. ("Prudential"), for "whistle blowing." Claimant alleged that he was terminated on June 30, 1995, for filing an NASD arbitration, the week before complaining about Prudential's use of extraordinary pressure on trainees in order to increase their sales.

Claimant, alleged that he worked for Prudential as a Financial Advisor in Training ("FAIT"). Claimant alleged that he, as well as others in his FAIT class, were threatened with termination for "low production" and a reflection of such on their U-5's. Claimant alleged that his manager, Gregory Glenn ("Glenn") stated that any month Claimants FAIT class rank fell below average was "grounds for immediate termination." Claimant alleged that two weeks prior to his termination, during his review with Glenn, that Glenn had no complaints about his performance and that his class rank of 3.0 was exactly average. Claimant alleged however, that he was terminated two weeks later and that the reason for his termination, as reflected on his U-5, was low production.

Claimant alleged that he and other FAITs in the Pittsburgh branch office were cut off from unassigned accounts which everyone at Prudential depended on to get started, and that classmates outside the Pittsburgh branch office had the advantage of an inherited client base. Claimant further alleged that every other trainee was given a mentor who gave assistance in the form of accounts, qualified leads and guidance; however, he never received such assistance. Claimant alleged that the "FAIT First Year Minimum Expectations" grew exponentially and that above-average production was mathematically impossible in the absence of the above-mentioned assistance that was given to other FAITs.

In addition, Claimant alleged that Prudential's "asset accumulation" requirement for FAIT's carried a built in racial bias in that white households, from which many FAITs solicited business, are five times richer than his African-American clientele.

Finally, Claimant alleged that three of his clients were arbitrarily denied access to new offerings. Claimant alleged that although he placed the first order to buy certain new issues, the branch allocated its entire commitment to select brokers with later and smaller orders. Claimant alleged that allocating "hot issues" to brokers instead of individual investors and concealing priority by time-stamping order tickets in bulk violated the NASD Rules of Fair Practice.

Respondent maintained that Claimant was hired on or about November 30, 1993, as a candidate in Prudential's FAIT program. Respondent maintained that in connection with his employment Claimant executed a FAIT agreement in which he acknowledge that he was employed "at will and that PSI may terminate [his] employment at any time, with or without cause, and PSI shall have no further obligations to [him] thereafter." In addition, Respondent maintained that Claimant also agreed that if his employment terminated within four years of his passing the Series 7 exam, Prudential would not have been fully compensated for the investment it made in Claimant's training. Respondent alleged that Claimant agreed that if he was terminated within four years, and he joined a competitor, he would pay Prudential an amount equal to \$39,000.00, reduced by \$2,437.00 for each full quarter year of employment following the date he passed his Series 7 exam.

Respondent maintained that during the two year FAIT program, FAIT's are paid pursuant to Prudential's standard compensation schedule for FAIT's. Respondent maintained that under this schedule FAITs are paid a guaranteed salary for the first year of the program while they learn Prudential's operations and developed their skills and that thereafter, the salary is reduced as the FAIT's commissions earnings increase. Respondent maintained that it paid Claimant a base salary of \$3000.00 per month for the first year of employment and in the second year, Claimant base salary was reduced, according to schedule to 2400.00 per month verses the commissions he generated.

Respondent maintained that individuals in the FAIT program are required to demonstrate their ability to perform in three areas: (1) assets under management; (2) gross business production; and (3) new account openings. Respondents maintained that FAITs are ranked nationally into five quintiles, in comparison with their entering class, on the basis of these three areas with the fifth quintile being lowest quintile. Respondent maintained that as a general rule, failure to demonstrate positive performance, as reflected by rankings in the fourth or fifth quintile in any of these categories, would result in termination of the FAITs' employment with PSI.

Respondent maintained that in or about April 1994, Glenn became branch manager of the Pittsburgh branch where Claimant was employed. Respondent maintained that in September 1994 Glenn conducted a meeting with all of the FAITs to review their performance and at the end of the meeting suggested that any FAIT that was not performing well or was dissatisfied with his or her work should consider working else where. Respondent maintained that Claimant's ranking for cumulative assets under management place him in the bottom fourth quintile for the months of August and September 1994. Respondent maintained that on September 24, 1994, Claimant sent Glenn a letter requesting that he be released from the FAIT agreement he had signed. Respondents maintained that in response Glenn reminded Claimant that he was still bound by the agreement and that Prudential could not release him from his obligations, unless Claimant left the industry.

Respondent further maintained that Glenn offered his support to Claimant to assist him with his work, but also prepared a statement for Claimant's signature in which Claimant recognized that he was still bound by the FAIT agreement. Respondent maintained that Claimant signed the agreement and agreed to commit himself to his work; however, Claimant's overall performance did not improve. Respondent maintained that as of the end of October 1994, Claimant's cumulative assets under management placed him in the bottom fifth quintile and that for the month of October 1994, Claimant ranked in the fourth quintile for two of the three areas of performance. Respondent maintained that as a result, on November 3, 1994, Glenn advised Claimant that he was not meeting the objectives set by the FAIT program, and that if Claimant's performance did not improve substantially, Prudential would be forced to place Claimant on probation with the possibility of termination.

Respondent maintained that on November 9, 1994, Claimant drafted a letter to Prudential's former Northeast regional director claiming that Glenn's treatment of him was discrimination and that Glenn's failure to evenly distribute the accounts of former Financial Advisors to FAITs has a discriminatory impact on the FAITs in the branch. Respondent further maintained that Claimant argued that the reason he had fewer assets under management was because his client base was African-American.

Respondent maintained that no one at Prudential ever directed Claimant as to the ethnic or racial make-up of his client base. Respondent maintained that all FAITs were given the same tools with which to generate production and that none are steered toward any market segment based on racial, ethnic, or any other grounds. Respondent further maintained that FAITs obtain new accounts primarily through "cold calling" in which the race of the respective client is unknown to the FAIT.

Respondent maintained that Prudential's Employee Relations department investigated Claimant's allegations through its field offices manager, Christopher Trapani ("Trapani"). Respondent maintained that after his investigation, Trapani concluded that there was no basis for Claimant's allegations of discrimination, and so advised Claimant in a memo dated December 16, 1994. Respondent maintained that Trapani also explained to Claimant that Prudential's FAIT account tracking system distinguished between new and transferred accounts and assets and further explained that new accounts and asset accumulation were only two of three categories on which rankings were based.

Respondent maintained that for the month of November 1994, Claimant's monthly rankings improved so little, that his overall cumulative performance remained the same and that Glenn again advised Claimant that he was concerned with Claimant's performance, and reminded him that if his performance

did not improve, he would be subject to termination. Respondent maintained that in response, Claimant wrote to Trapani in January 1995, and complained that he did not have a mentor while other in the branch did. Respondent maintained that mentors were only assigned for the first 18 weeks of the program and that he was assigned a mentor when he began the program; however in January 1995 Claimant was in his thirtieth week.

Respondent maintained that in February 1995, in an attempt to assist Claimant, Glenn distributed over \$400,000.00 in assets to Claimant upon the departure of one of the branches highest producers. Respondent maintained that although this distribution raised Claimant's assets slightly, Claimant's own production did not increase his performance rankings on a cumulative basis.

Respondent maintained that Glenn met with Claimant in March 1995, and advised him that his job performance was poor, and that his continued poor performance could result in his termination. Respondent maintained that Glenn offer Claimant a week off with pay so that Claimant could contemplate his future in the securities business, which Claimant accepted.

Respondent maintained that the following week, on March 13, 1995, Glenn and Claimant met again to discuss Claimant's future. Respondent maintained that Claimant expressed his preference to leave Prudential, if Prudential would agree not to enforce the terms of the FAIT agreement. Respondent maintained that Glenn reiterated that it was not Prudential's policy to relieve a FAIT from his contract where the FAIT planned to join a competitor of Prudential.

Respondent maintained that despite repeated warnings Claimant's performance did not improve and that by the end of May 1995, Claimant cumulative ranking indicated that he was in the fifth quintile in assets under management. Respondent maintained that Claimant did not focus on improving his performance in June 1995, and instead forwarded a draft statement of claim to Trapani dated February 21, 1995, and asserted that Glenn had cut off the FAIT's access to unassigned accounts, ignoring the fact that Glenn had transferred accounts and assets to him in February 1995.

Respondents maintained that Prudential's, Vice President and Associate General Counsel, Victor Schwimmer ("Schwimmer"), investigated Claimant's allegations and sent Claimant a letter dated June 19, 1995, advising him that the investigation showed no wrongdoing whatsoever. Respondent maintained that after receiving Schwimmer's letter, Claimant contacted Schwimmer and informed him that he believed his clients had been arbitrarily denied access to new syndicate offering in violation of NYSE rules. Respondent maintained that Claimant asserted that although he had been first to submit tickets for a hot issue syndicate offering, his clients were not awarded the shares. Respondent maintained that based on his investigation, Schwimmer concluded that the allocation of shares was neither discriminatory on the basis of race or retaliatory.

Respondents maintained that by the end of June 1995, Claimant's production still had not improved, and consequently, in accordance with Prudential's practice and customs, and the repeated warnings given to Claimant, Prudential terminated Claimant's employment effective June 30, 1995. Respondent maintained that at about the same time Prudential terminated at least 7 other FAITs throughout the region for poor performance, all of whom were white.

Respondent counterclaimed that on August 14, 1995, Claimant joined Charles Schwab & Co., Inc. in Pittsburgh. Respondent alleged that shortly thereafter Claimant breached his FAIT agreement with Prudential by soliciting Prudential clients within a 100 mile radius of Prudential's Pittsburgh branch office. Respondent alleged that by joining a competitor of Prudential within the time period specified in the FAIT agreement, Claimant has, under the FAIT agreement, become obligated to reimburse Prudential for the costs expended in providing Claimant with training and other benefits, an amount totaling \$24,378.00.

Claimant maintained that he did not solicit any Prudential clients upon his termination and denied that he intentionally interfered with Prudential's contractual relationships by contacting Prudential customers. Claimant denied that he has an obligation to pay Prudential \$24,378.00 under the FAIT agreement since Claimant's manager agreed to release Claimant from the FAIT agreement when Claimant had another offer of employment from Merrill Lynch.

RELIEF REQUESTED

Claimant requested reinstatement of his position at Prudential and damages in the amount of \$5,000,000.00, attorneys' fees and costs. In addition, Claimant requested that Respondent's counterclaim be denied in its entirety.

Respondent requested that all claims asserted by Claimant be dismissed in their entirety. In addition, Respondent's counterclaim requested:

1. The sum of \$24,378.00, based on Paragraph 4(b)(I) of the FAIT agreement;
2. The cost of collection and of the proceeding, including reasonable attorneys' fees, filing fee for Prudential's counterclaim, and all other incidental expenses incurred by Prudential in connection with the counterclaim, based on Paragraphs 4(b)(II) and 5 of the FAIT agreement;
3. The damages incurred by Prudential as a result of Claimant's wrongful solicitation of Prudential's clients, based on Paragraphs 1(b) and 5 of the FAIT Agreement;
4. The damages incurred by Prudential as a result of Claimant's tortious interference with Prudential's contractual relationships, based on Paragraphs 1(b) and 5 of the FAIT Agreement and applicable law;
5. An injunction prohibiting Claimant from tortiously interfering with Prudential's contractual relationships, based on Paragraphs 1(b) and 5 of the FAIT Agreement and applicable law; and,
6. Such other relief as the arbitrators deem fit.

OTHER ISSUES CONSIDERED & DECIDED

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. All claims asserted against Respondent, Prudential Securities, Inc., by Claimant, Ernest L. Moye are denied in their entirety;
2. Respondent, Prudential Securities, Inc.'s, counterclaim is denied in its entirety;
3. The parties shall bear their respective costs, including attorneys' fees;
4. All other requests for relief are denied.

FORUM FEES

Pursuant to Rule 10205(c) of the Code of Arbitration Procedure, the following Forum Fee(s) are assessed:

Total Forum Fees:	\$18,000.00	(18 Sessions x \$1,000.00)
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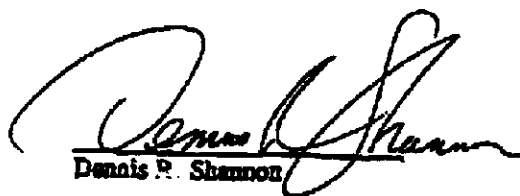
1. Claimant, Ernest Moye, is assessed the amount of \$9,000.00, representing one-half of the total forum fees due, less \$1,000.00 previously deposited, leaving \$8,000.00 due. Claimant, Ernest Moye, is liable and shall pay to the NASD the sum of \$8,000.00.
2. Respondent, Prudential Securities, Inc., is assessed the amount of \$9,000.00, representing one-half of the total forum fees due, less \$600.00 previously deposited, leaving \$8,400.00 due. Respondent, Prudential Securities, Inc., is liable and shall pay to the NASD the sum of \$8,400.00.

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

ARBITRATORS' SIGNATURES

Thomas C. Wagner, Esq.

Harry E. Gerhard, Jr.


Dennis R. Shannon

Date of Decision: January 20, 1997

ARBITRATOR'S SIGNATURE

Thomas C. Wagner, Esq.

Harry E. Osborn, Jr.

Dennis R. Shannon

Date of Decision: January 20, 1997