

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Donald P. Smith,

Claimant and Counter-Respondent,

v.

Case Number 96-02040

Dean Witter Reynolds, Inc.,

Respondent and Counter-Claimant.

REPRESENTATION OF PARTIES

Claimant and Counter-Respondent Donald P. Smith ("Claimant") was represented by L. Jerome Stanley, Esq. of L. Jerome Stanley, P.C. located in Baton Rouge, Louisiana.

Respondent and Counter-Claimant Dean Witter Reynolds, Inc. ("Respondent" or "Dean Witter") was represented by Patricia A. Bollman, Esq. of Gill Bollman located in Covington, Louisiana.

CASE INFORMATION

The Statement of Claim was filed on or about May 11, 1996.

Claimant's Submission Agreement was signed on May 10, 1996.

Respondent's Statement of Answer and Counterclaim was filed on or about July 5, 1996.

Respondent's Submission Agreement was signed on June 26, 1996 by Ralph P. Schiavo, Vice President of Dean Witter Reynolds, Inc.

Claimant's Answer to Counterclaim was filed on or about July 18, 1996.

Claimant's Post-Hearing Brief was filed on or about June 19, 1997.

Respondent's Post-Hearing Brief was filed on or about June 19, 1997.

HEARING INFORMATION

The pre-hearing conference was held on May 23, 1997 for one (1) session.

The hearing was held on May 27, 1997 for two (2) sessions, May 28, 1997 for two (2) sessions, and May 29, 1997 for two (2) sessions. The hearing was held in New Orleans, Louisiana.

CASE SUMMARY

Claimant alleged that he was employed as a securities broker with Respondent Dean Witter in its Baton Rouge, Louisiana branch office. Claimant contended that, upon his return from Dean Witter's training program in New York, he was diagnosed with Lymphoma and was subjected to a litany of tests which were conducted to determine the extent to which the cancer had spread. Claimant asserted that the time necessary for tests and radiation therapy prevented him from soliciting clients and placed him behind his production schedule. Claimant alleged that Wade Randolph ("Randolph"), Dean Witter's branch manager, and Dean Witter were aware that the Claimant had been diagnosed with cancer and that this necessitated daily radiation therapy. Claimant maintained that his cancer and the pressures of falling behind his production schedule set into motion a chain of events culminating in a state of clinical depression which ultimately affected his work at Dean Witter. Claimant alleged that during this entire period his initial draw of \$2,500 per month continued to decrease month by month.

Claimant asserted that he requested that Dean Witter accommodate his medical condition by allowing him to go back to his original draw of \$2,500 per month. Claimant contended that Randolph sidestepped the issue and advised Claimant to put his request in writing and submit it to Dean Witter's Regional Manager. Claimant asserted that Dean Witter denied Claimant's request without explanation and without questioning him as to the effects of his medical condition on his ability to perform his job or how Dean Witter might be able to accommodate that condition. Claimant maintained that, because Dean Witter refused to make any accommodations to allow Claimant to remain and perform at his job, Claimant was left with no alternative but to resign.

Claimant alleged that, under the Americans with Disabilities Act of 1990 ("ADA"), Dean Witter had an affirmative duty to make reasonable accommodation of Claimant's disability. Claimant contended that Dean Witter's actions toward him were an example of the kind of activity the ADA was specifically enacted to prevent.

Respondent Dean Witter denied all liability to Claimant in the Statement of Answer. Respondent alleged that, throughout the course of Claimant's radiation treatments, Claimant was

able to perform substantially all of his job responsibilities on a modified schedule. Respondent contended that Randolph told the Claimant that he should make his health his number one priority, that he should adjust his schedule as necessary to accommodate his illness, and that when Claimant was not in the office Randolph would handle Claimant's customers. Respondent asserted that, when Claimant's radiation treatments ended, Claimant informed Randolph that his cancer was in remission and Claimant resumed his normal work schedule. Respondent maintained that, after Claimant requested that Dean Witter raise his salary and the request was denied, Claimant voluntarily resigned from Dean Witter to accept an offer of employment from PaineWebber. Respondent alleged that it accommodated Claimant throughout his surgery and subsequent treatments. Respondent contended that it honored the terms of its employment agreement with the Claimant, allowing the Claimant to miss whatever time was necessary, and assisting his clients when he was away from the office. Respondent asserted that, despite this, Claimant chose to resign from Dean Witter for employment at another brokerage firm and the lure of a substantial signing bonus.

Respondent made the following affirmative defenses including: (1) the Statement of Claim fails to state a cause of action upon which relief can be granted; (2) the claims are time barred by prescriptions, laches or the applicable statute of limitations; (3) the recovery of punitive damages is not warranted under the facts, is not authorized by law, and is constitutionally impermissible; (4) the claims are time barred by the doctrines of waiver, estoppel, acquiescence, ratification, and laches; (5) the claimant does not have a requisite disability within the meaning of the Americans with Disabilities Act of 1990.

In its Counterclaim, Respondent alleged that, in connection with Claimant's employment with Dean Witter, Claimant and Dean Witter entered into an Account Executive Employment Agreement. Respondent contended that Paragraph 4 of the Agreement states:

"In the event of a voluntary termination or termination for cause, either of which occurs within three years from the date the Employee signs this Agreement, the Employee will pay Dean Witter the amount of \$28,000.00 representing the expense incurred by Dean Witter in training the Employee. If the Employee is employed by Dean Witter for more than one year after signing this Agreement, this Agreement will be reduced by ten percent (10%) of the total gross commissions which have been generated by the Employee."

Respondent maintained that the Claimant was employed by Dean Witter for more than one year, but less than three years. Respondent alleged that, pursuant to the terms of the Agreement, Claimant is obligated to pay Dean Witter 28,000, less 10% of total gross commissions, which amounts to damages in the amount of \$18,083.20.

In his Response to the Counterclaim, the Claimant denied all liability to Respondent. Claimant alleged that he was forced to resign because Dean Witter refused to respond to the Claimant's

request for reasonable accommodation of his disability as is required by the ADA. Claimant contended that, due to Dean Witter's refusal to make reasonable accommodations, Claimant was, in effect, constructively discharged by Dean Witter. Claimant maintained that, under the terms of the employment contract, Claimant is not indebted to Dean Witter for training expenses.

RELIEF REQUESTED

Claimant requested compensatory and punitive damages in the amount of \$300,000.00. In addition, Claimant requested an award of interest from the date of arbitration demand until date of payment, all costs, including expert witness expenses, reasonable attorney fees, and all other fair and equitable relief available.

Respondent requested that the Claim be dismissed in its entirety with prejudice at Claimant's cost. In its Counterclaim, Respondent requested damages as follows: (1) the amount of \$18,083.20; (2) interest at the legal rate of 10%; (3) costs of this arbitration; and (4) any and all further relief which this panel deems just.

Claimant requested that the panel dismiss all claims set forth in the Counterclaim at its costs and grant Claimant all relief to which he is entitled.

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 original(s) remain on file with NASD Regulation, Inc. Office of Dispute Resolution.

AWARD

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

- (1) That the Statement of Claim is hereby dismissed in its entirety with prejudice;
- (2) That the Counterclaim is hereby dismissed in its entirety with prejudice;
- (3) That the parties shall bear their own respective attorneys' fees and costs; and
- (4) That other than forum fees, which are addressed below, all other claims and requests for relief not specifically enumerated are hereby dismissed in their entirety with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$750 per hearing session and \$300 for each hearing session before a single arbitrator. There was one (1) pre-hearing session x \$300 = \$300 in forum fees. There were six (6) hearing sessions x \$750 = \$4,500 in forum fees. Total forum fees = \$4,800. 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 \$750 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by Claimant. Pursuant to §10205(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the postponement fee in the amount of \$750 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Respondent.

Pursuant to §10205(c) of the Code, the Claimant is liable for and shall pay forum fees in the amount of \$1,500 (1/2 total forum fees - hearing session deposit). Pursuant to §10205(c) of the Code, the Respondent is liable for and shall pay forum fees in the amount of \$2,250 (1/2 total forum fees). Pursuant to §10205(c) of the Code, the Respondent is further liable for and shall pay the non-refundable filing fee in the amount of \$500 assessed in connection with the filing of the Counterclaim.

Pursuant to §10333 of the Code, the Respondent is also liable for its member surcharge assessed in connection with this matter in the amount of \$350.

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

Concurring Arbitrators' Signatures

\s\ Ann Blaess Kimball, Esq.

Ann Blaess Kimball, Esq.

Chairperson

Public Arbitrator

July 11, 1997

Dated:

\s\ Simon F. Savoie, Jr., CPA

Simon F. Savoie, Jr., CPA

Panelist

Public Arbitrator

July 11, 1997

Dated:

\s\ Mobley E. Cox, Jr.

Mobley E. Cox, Jr.

Panelist

Industry Arbitrator

July 11, 1997

Dated:

For NASD Regulation use only:

Date award served on the parties: July 14, 1997