

N.A.S.D. AWARD**NASD Regulation, Inc. Office of Dispute Resolution**

In the Matter of the Arbitration Between

Name of Claimant

Branda Rose

96-02274

Names of Respondents

Lehwald Orosey & Pepe, Inc.
LOP Capital Markets, Inc.
Henry W. Lehwald, John Orosey, and
Gerard J. Pepe

REPRESENTATION

For Claimant: Jack R. Elliott, Esq. of Broad & Cassel, Orlando, Florida.

For all Respondents: Gary A. Chernay, North Palm Beach, Florida.

CASE INFORMATION

Statement of Claim filed: May 24, 1996.

Amended Statement of Claim filed: June 28, 1996.

Second Amended Statement of Claim filed: August 15, 1997.

Claimant's Submission Agreement signed on: March 22, 1996.

Statement of Answer and Counterclaim of Respondent Lehwald, Orosey & Pepe, Inc. ("LOP") filed: November 1, 1996.

Respondent LOP's Response to Amended Statement of Claim filed: July 10, 1997.

Respondent LOP's Submission Agreement/Corporate Acknowledgment signed on: October 8, 1996 by Gerald J. Pepe on behalf of the firm.

Respondents' joint Response and Motion to Dismiss Second Amended Statement of Claim filed: January 28, 1998.

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Claimant's Response to Respondent LOP's Counterclaim filed: November 18, 1996.

Respondents LOP Capital Markets, Inc., Henry W. Lehwald ("Lehwald"), John G. Orosey ("Orosey") and Gerald J. Pepe ("Pepe") did not file properly executed Submission Agreements.

HEARING INFORMATION

On December 16, 1996 the arbitration panel conducted a telephonic pre-hearing conference which lasted one (1) session. Thereafter, the Chairperson conducted telephonic conferences lasting three (3) sessions on the following dates: February 13, 1997; October 14, 1997; and, January 23, 1998.

On May 26, 27, 28 and 29, 1998, hearings lasting eight (8) sessions were conducted in Boca Raton, Florida.

CASE SUMMARY

Claimant alleged that she filed a claim against the Respondents for sexual harassment, retaliation and spoliation; that while employed by LOP or one of its successor companies, she was subjected to hostile work environment sexual harassment; that she complained about the hostile work environment sexual harassment to Respondent Henry Lehwald, one of the principals of LOP and/or its successor companies, and that shortly thereafter she was told that she did not "fit in" and was terminated. Claimant maintained that she believes that the Respondents' stated reason for her termination, that she had not made any sales in the relatively brief time she was employed by LOP, was plainly and demonstratively false; that other male employees who were hired at the same time as Claimant, or earlier, were given more time than was given to Claimant to perform; that it became clear during the course of this arbitration that certain personnel records that would have established the falsity of Respondents' stated reason for its termination of Claimant had been destroyed, despite EEO regulations requiring that records of the kind described were required to be kept. Claimant further alleged that she was not the only female employee of LOP to complain of sexual harassment; that LOP was also sued by Barbara Britton, a former employee who made many of the same allegations regarding hostile work environment sexual harassment and retaliation.

Respondents maintained that the evidence presented during the hearing of this matter did not rise to a sufficient level of proof or fact to sustain the Claimant's claims of both sexual harassment and a work place environment violative of the EEOC guidelines. Respondents contended that the Claimant must prove by the greater weight of the evidence that the actions that took place towards her and the work place conditions were offensive to a reasonable female in that work place; that during the nine weeks the Claimant was present, that is the only relevant time frame, no one else complained of the work place, no one else was offended by the Christmas party as Claimant alleged, and the only reason the Claimant brought this action was in retaliation for her being discharged. Respondents alleged that the Claimant only had one complaint, and that was immediately taken care of by Respondent Lehwald on December 7, 1993 and that Claimant was not dismissed for retaliation as she claimed, but for an inability to be a "commissioned sales person" and that Claimant's prior record of "lack of achievement" confirms LOP's opinion. Respondents further alleged that the claim for spoliation of or destruction of evidence must fail since the only documents allegedly destroyed were personal notes of Ron Turner and that there is no evidence that LOP had any knowledge of the existence of those documents or of their destruction, if at all, and, even if the documents were required to be kept and were destroyed, the penalty can only be

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assessed against the employer, not the individual owners of the business. Further, Respondent LOP asserted a counterclaim against the Claimant for unearned draws that were paid by LOP to Claimant because, Respondents alleged, the Claimant never made a single sale to any customer, and thus never earned any commissions. Respondent LOP contended that, as such, Claimant has been unjustly enriched by her draws and should repay said draws back to LOP in accordance with the signed promissory note which was attached to Claimant's employment agreement.

The Claimant denied the allegations contained in Respondent LOP's counterclaim as untrue and maintained that the promissory note allegedly executed by her does not obligate Claimant to repay the draws because the amount owed is not set forth in the promissory note.

RELIEF REQUESTED

Claimant requested an award against Respondents for reinstatement, \$228,000.00 in back pay, interest allowed by law, front pay, compensatory and punitive damages, costs, attorneys' fees, accounting fees, expert witness fees and such other relief as the arbitration panel may deem just and proper.

Respondents requested a dismissal of the claim and that the arbitrators enter an award in favor of LOP and against the Claimant for the amount of Claimant's draws plus applicable interest, court costs, arbitration costs, attorneys' fees and for all other relief that the panel may deem just and proper.

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 NASD Regulation, Inc.

Respondents LOP Capital Markets, Lehwald, Orosey and Pepe did not file with NASD Regulation, Inc. Office of Dispute Resolution properly executed Submission Agreements but are required to submit to arbitration pursuant to Rule 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.

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. Respondents LOP, LOP Capital Markets, Lehwald, Orosey and Pepe are found not liable and, therefore, all claims against them are hereby dismissed.

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2. Claimants requests for reinstatement, back pay, interest, front pay, compensatory and punitive damages, costs, attorneys' fees, accounting fees and expert witness fees are hereby denied.
3. Respondent LOP's counterclaim is hereby denied.
4. Respondents' requests for interest, court costs, arbitration costs and attorneys' fees are hereby denied.
5. Respondents shall pay to the Claimant, jointly and severally, the sum of \$750.00 which represents reimbursement of the hearing session deposit which was previously deposited by the Claimant.

FORUM FEES

Pursuant to Rule 10332(b) of the Code, a hearing session is any meeting between the parties and the arbitrators, including a pre-hearing conference with an arbitrator, which lasts four hours or less.

Pursuant to Rule 10205(c) of the Code, the arbitrators have assessed forum fees in the amount of \$7,650.00 (One (1) pre-hearing conference (panel) x \$750.00 + three (3) pre-hearing conferences (Chairperson only) x \$300.00 + eight (8) hearing sessions x \$750.00).

1. Respondents LOP, LOP Capital Markets, Lehwald, Orosey and Pepe are assessed forum fees, jointly and severally, in the amount of \$7,650.00 for which NASD Regulation, Inc. shall retain the \$750.00 previously deposited by the Claimant and the \$300.00 previously deposited by LOP in partial satisfaction thereof, leaving a balance due to NASD Regulation, Inc. by Respondents of \$6,600.00.

OTHER FEES

1. Pursuant to Rule 10305 of the Code, Claimant has paid to NASD Regulation, Inc. the claim filing fee of \$500.00.
2. Pursuant to Rule 10305 of the Code, Respondents have paid to NASD Regulation, Inc. the claim filing fee of \$500.00 for the counterclaim.
3. Pursuant to Rule 10333 of the Code, Respondent LOP has paid to NASD Regulation, Inc. the member surcharge of \$350.00.
4. Pursuant to Rule 10333 of the Code, Respondent LOP Capital Markets shall pay to NASD Regulation, Inc. the member surcharge of \$350.00.

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

ARBITRATION PANEL

Concurring Arbitrators' Signatures

 /s/
Michael Lukasiwich, Esq.

Public/Chairperson

 /s/
Elizabeth L. Clark

Public/Panelist

 /s/
Lanny M. Leff

Industry/Panelist

Date of Decision: August 5, 1998