

NASD AWARD

NASD Regulation, Inc., Office of Dispute Resolution

In the Matter of the Arbitration Between

Name of Claimant

Michael Newman

96-03187

Name of Respondent

Dean Witter Reynolds, Inc.

REPRESENTATION

For Claimant Michael Newman ("Newman"): Ronald Shindler, Esq. of Fowler White Burnett Hurley Banick, Miami, Florida.

For Respondent Dean Witter Reynolds, Inc. ("DWR"): Bradford D. Kaufman, Esq. of Steel Hector & Davis, LLP, West Palm Beach, Florida.

CASE INFORMATION

Statement of Claim received: July 25, 1996.

Amended Statement of Claim filed: November 19, 1996.

Claimant's Submission Agreement signed on: June 25, 1996.

Statement of Answer to Amended Statement of Claim and Counterclaim filed: December 19, 1996.

Respondent's Submission Agreement/Corporate Acknowledgment signed on: October 2, 1996 by Lorena J. Kern on behalf of the firm.

HEARING INFORMATION

The arbitration panel conducted pre-hearing conferences lasting three (3) sessions on the following dates: July 18, 1997 (panel); February 25, 1998 (panel); and, March 2, 1998 (Chairperson only).

On October 7, 8, 9, 1998 and November 23, 24 and 25, 1998, the evidentiary hearing lasting ten (10) sessions was conducted in Boca Raton, Florida.

Page 2

NASD Award #96-03187

CASE SUMMARY

Claimant alleged that Respondent acted wrongfully during the process of recruiting him from the competition in New York City to work for Respondent in Florida; that Respondent agreed to pay Claimant \$150,480.00 in the form of a four year forgivable note; that Respondent determined the amount of the note and the method of its calculation; that Respondent became familiar with the nature of Claimant's business during the recruiting process; that Claimant did not misrepresent his production; that Claimant and Respondent entered into an agreement concerning certain terms of Claimant's employment; that among other things, the parties agreed that Claimant could conduct his securities business as he had with his prior employer and that Respondent would support him in his efforts; and, that Respondent misrepresented the terms of Claimant's employment and, thereafter, breached its agreement with Claimant.

Claimant next alleged that shortly after he began his employment with Respondent, Respondent fired its local branch manager and Claimant was told that Respondent's new office, where Claimant was to work, was not going to open; that Claimant learned that he would not receive the forgivable loan, as agreed; that thereafter, Claimant retained counsel who filed a complaint on his behalf with Respondent's president; that after an exchange of correspondence in which the parties simply stated their positions with respect to the facts, Respondent sent Claimant a letter which gave him three hours to respond to Respondent's only compromise offer or else resign or be fired; and, that under the circumstances Claimant had no choice but to concede to Respondent's demand and also sign a release. Claimant alleged that the release was invalid because of duress.

Claimant further alleged that he was discriminated against because of his religion, and further that he was subject to a hostile work environment in violation of Title VII of the Civil Rights Act of 1964, as amended, and the Florida Civil Rights Act; that the working conditions became intolerable in the branch office and that Respondent continued to violate its agreement with Claimant; that as a result, Claimant made arrangements to relocate back to an office of Respondent in New York; that after Claimant's transfer was approved by Respondent's New York branch manager and Claimant's clients' accounts were transferred by Respondent from Florida to New York, Claimant was told that Respondent's regional manager would not accept his transfer. Claimant, therefore, alleged that he was constructively terminated by Respondent.

Respondent denied all allegations of wrongdoing contained in the Statement of Claim and maintained that prior to the date on which the Claim was filed, Claimant signed a General Release in favor of Dean Witter which released Respondent from liability for each and every allegation in the Claim. Respondent further maintained that Claimant affirmatively misrepresented his trailing 12 months' gross commissions during his recruitment, and, therefore, was not entitled to an additional bonus. Respondent contended that Claimant was an employee at will who could be terminated at any time and whose various complaints regarding his working conditions did not state a legal claim. Finally, Respondent asserted that it was not liable to Claimant under Title VII because Claimant was not subject to a hostile work environment or a constructive discharge, and because Claimant failed to complain or utilize DWR's widely-

Page 3

NASD Award #96-03187

disseminated complaint procedure for violations of its EEOC policy. Respondent asserted a counterclaim against Claimant seeking repayment of the balance of Claimant's promissory note in favor of DWR, as well as interest, attorney's fees and costs.

Claimant denied any liability to Respondent on its counterclaim.

RELIEF REQUESTED

Claimant requested the following Award: recovery of \$90,965.00, which represents the balance of the forgivable loan; lost commissions and further compensation in excess of \$875,000.00; moving expenses; punitive damages; reasonable attorneys' fees and expenses; forum fees and expenses; and, dismissal of the counterclaim.

Respondent requested that the relief requested by the Claimant be denied in its entirety; that the Statement of Claim be dismissed in its entirety; that it be awarded relief on its counterclaim in the amount of \$75,000.00; that it be awarded \$37,517.00 in attorney's fees; and, that Claimant be assessed all forum fees and costs.

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.

During the evidentiary hearing, the parties agreed that the Arbitrators have the authority to award attorneys' fees and further agreed to submit the issue of entitlement to attorneys' fees to the panel for determination.

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. Respondent DWR is found liable and shall pay to the Claimant the sum of \$227,000.00 inclusive of pre-judgment interest.
2. Respondent DWR is found liable and shall pay to the Claimant punitive damages in the amount of \$200,000.00 pursuant to Title VII, U.S.C. Section 2000 and the Florida Civil Rights Act.
3. Respondent DWR is found liable and shall pay to the Claimant attorneys' fees and costs in the amount of \$50,000.00, pursuant to Title VII and Florida Civil Rights Act, Florida Statutes Section 760 et seq.

Page 4

NASD Award #9603187

4. Respondent's request for attorneys' fees is hereby denied.
5. Respondent's counterclaim is hereby denied.
6. All other claims are hereby denied.
7. Respondent shall pay to Claimant the sum of \$5,500.00 representing reimbursement of the hearing session deposits made by the Claimant.

FORUM FEES

Pursuant to Rule 10205(b) of the Code of Arbitration Procedure ("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 arbitration panel has assessed forum fees in the amount of \$12,300.00 (two (2) pre hearing conferences (panel) x \$1,000.00 + one (1) pre-hearing conference (Chairperson only) x \$300.00 + ten (10) hearing sessions x \$1,000.00).

1. Respondent is assessed forum fees in the amount of \$12,300.00 for which NASD Regulation, Inc. shall retain the \$1,000.00 previously deposited by the Respondent and \$5,500.00 previously deposited by the Claimant in partial satisfaction thereof leaving a balance due to NASD Regulation, Inc. by Respondent of \$5,800.00.

OTHER FEES

1. Pursuant to Rule 10332 of the Code, Claimant has paid to NASD Regulation, Inc. the claim filing fee of \$500.00.
2. Pursuant to Rule 10332 of the Code, Respondent has paid to NASD Regulation, Inc. the counterclaim filing fee of \$500.00.
3. Pursuant to Rule 10333 of the Code, Respondent has paid to NASD Regulation, Inc. the member surcharge of \$500.00.
4. Respondent has paid to NASD Regulation, Inc. an administrative fee of \$40.00.

Page 5
NASD Award #96-03187

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

ARBITRATION PANEL

Concurring Arbitrators' Signatures

 /s/
Rebecca J. Covey, Esq. Public/Chairperson

 /s/
Burt R. Rose Public/Panelist

 /s/
Alvin Spier Industry/Panelist

Date of Decision: January 25, 1999