

AWARD OF DISMISSAL
NASD Regulation, Inc.

In the Matter of the Arbitration Between

Name of Claimant

Cheri Larrydale

vs.

97-00142

Name of Respondent

Dean Witter Reynolds, Inc.

REPRESENTATION

Claimant Cheri Larrydale ("Claimant") appeared *pro se*.

Respondent Dean Witter Reynolds, Inc. ("Respondent") was represented by Kathlene Pontone, Esq., Suzanne W. Decker, Esq., and Gina S. Lindekugel, Esq., Miles & Stockbridge, Baltimore, Maryland, and by Lyndelle Phillips, Esq., Morgan Stanley Dean Witter, Inc., New York, New York.

CASE INFORMATION

Statement of Claim filed: January 10, 1997

Claimant's Submission Agreement signed on: March 18, 1997

Statement of Answer and Counterclaim filed by Respondent on: April 23, 1997

Respondent's Submission Agreement signed on: April 18, 1997

HEARING INFORMATION

Pre-Hearing Conference: July 10, 1997/one session
July 29, 1997/one session
November 16, 1998/one session
March 1, 1999/one session

Hearing Dates/Sessions: January 19, 1999/two sessions
January 20, 1999/two sessions
January 21, 1999/two sessions
February 22, 1999/one session
February 23, 1999/two sessions
February 24, 1999/two sessions
February 25, 1999/two sessions
March 8, 1999/two sessions
March 9, 1999/one session

Hearing Location: Doubletree Hotel, Baltimore, Maryland

CASE SUMMARY

Claimant alleged race and gender discrimination by Respondent. Claimant contended that she was an account executive in Respondent's Annapolis, Maryland office. She alleged that at all times during her employment she was performing her duties in a satisfactory manner, and that when she was discharged on or about June 7, 1994, she was terminated because of her race (black) and/or gender. Claimant contended that throughout her employment with Respondent at the Annapolis office, she had been harassed and subject to racial slurs or epithets, and that she had been given disciplinary write-ups (or at least had incident reports submitted to her personnel file) in circumstances where other employees would not have received such treatment by Dean Witter management. Claimant disputed the circumstances of the incidents recorded in her personnel file, as well as the events surrounding her termination. Claimant requested that as a remedy for the Respondent's discrimination against her she be awarded damages, attorney fees and costs.

Respondent denied any discrimination or improper treatment of the Claimant. Respondent contended that Claimant was lawfully terminated for reasons unrelated to her race or gender. Specifically, Respondent contended that Claimant had been written up or counseled on a number of occasions about abusive or disruptive behavior towards other branch office employees. More specifically, Respondent maintained there is documentation from several branch office employees about incidents involving Claimant, in which others described impatient, rude or confrontational behavior.

In addition to denying the occurrence of discrimination, Respondent interposed counterclaims in this matter. Respondent argued first that under the terms of the account executive agreement signed by the Claimant in 1992 in connection with her hiring by Respondent, Claimant had agreed that:

In the event of 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 to Dean Witter the amount of \$28,000, 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 amount will be reduced by ten percent (10%) of the total gross commissions which have been generated by the Employee. The liquidated damages will not constitute liquidated damages for other breaches of this Agreement or losses to Dean Witter.

Apparently contending that Claimant was terminated in 1994 for cause (since it was undisputed that she had not resigned), Respondent sought an award from Claimant in the amount of \$17,157, representing its calculation of the \$28,000 mentioned in the contract less an appropriate reduction based on Claimant's production while employed by Respondent. Claimant argued in response to the counterclaim that since Respondent had apparently failed to advise some regulatory authorities that she was no longer employed with Respondent, or had in fact actually

renewed registrations of hers after her separation from Respondent, she was arguably still an employee, and not subject to Respondent's counterclaim for training costs.

Respondent also counterclaimed against Claimant for \$200 in civil penalties, arguing that Claimant had, without the consent of other individuals, tape recorded one conversation at the Respondent in which she was informed of her termination from employment, and another telephone conversation with an employee of Respondent. Claimant contended that during the meeting her tape recorder was in open view of all present (thereby arguing that the assembled individuals had implicitly consented to the taping). Claimant denied recording a telephone conversation as alleged by Respondent. Claimant additionally contended that she did not know at the time that it was unlawful in the State of Maryland to tape record a conversation without the consent of those involved.

RELIEF REQUESTED

In her Statement of Claim, Claimant demanded compensation for lost wages in the amount of \$50,000 and compensatory damages in the amount of \$150,000, as well as attorney fees, and costs of the proceeding.

Respondent requested that the Claimant's claims be dismissed in their entirety.

Respondent demanded \$17,157 in damages, plus interest and costs as to its counterclaim for breach of contract. Respondent additionally demanded an award of \$200 plus attorney fees and costs for Respondent's counterclaim alleging Claimant's alleged violation of the Maryland Wiretapping and Electronic Surveillance Act. Claimant requested that both counterclaims be dismissed in their entirety.

OTHER ISSUES CONSIDERED & DECIDED

On the first day of the hearing, the parties agreed that a stenographic transcript of proceedings would be the official record, rather than a tape recording. Subsequently, Claimant contended that the transcript of hearing sessions January 19-21 contained errors or omissions, and the tape recording of sessions was resumed for all dates on and after February 22, 1999. The panel subsequently determined, based on the request of Claimant and with the consent of Respondent, that the official record in this proceeding would consist of the exhibits received in evidence, along with the transcript of hearing sessions January 19-21, and tape recordings of hearing sessions February 22-March 9, 1999.

Claimant rested her case on March 8, 1999, at which time Respondent presented a motion to dismiss the claim. Respondent rested its case concerning its counterclaims, relying on the evidence submitted to the panel during Claimant's case in chief. As to the Claimant's allegations of discrimination, the Claimant presented a number of witnesses during her case in chief, including management representatives of Respondent who testified concerning disciplinary action and treatment of Claimant in general. After hearing argument from both parties concerning Respondent's motion, the panel informed the parties that the matter would be taken under consideration, and that the parties would be advised of an award or decision, as well as the

panel's determination as to whether Respondent would be required to present a defense to Claimant's case in chief.

The panel heard evidence that on June 7, 1994, as documented by Respondent's files, Claimant became impatient and angry with a sales assistant and an assistant office manager concerning an order for supplies. Memos to Claimant's file contended that she eventually grabbed or pulled a piece of paper out of the hands of the assistant office manager in an apparent display of anger. Respondent contended that Claimant was thereafter fired because of the behavior on that date and the history of earlier episodes and documentation. Some of the employees or former employees, called at the hearing as witnesses for Claimant, confirmed the accuracy of such documentation.

Having considered all of the evidence, including testimony and exhibits relating to the claim of discrimination and Respondent's defenses, as well as the substance and credibility of all witnesses' testimony, the panel has determined that the evidence does not indicate discrimination against the Claimant. Accordingly, the panel dismissed the claims, and decided that neither additional hearing sessions nor additional argument by the parties is required.

AWARD

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

1. That the Statement of Claim be and hereby is dismissed, as the evidence did not establish that Claimant was discharged, harassed or otherwise discriminated against because of her race or gender; and
2. That any of the remaining claims of Claimant are denied; and
3. That the counterclaim of Respondent for breach of contract is denied, since the evidence did not establish a breach of the agreement between the parties; and
4. That the counterclaim for tape recording by Claimant is denied since the evidence did not establish any willful violation of law by Claimant; and
5. That any of the remaining claims of Respondent against Claimant are denied; and
6. That each party bear its own costs and disbursements with the exception of forum fees as specifically addressed below; and
7. That any and all relief not specifically addressed herein is denied.

OTHER COSTS

Pursuant to Rule 10333 of the Code of Arbitration Procedure ("Code") Respondent Dean Witter has been assessed a member surcharge of \$500.00, which has been paid.

FORUM FEES

Rule 10205(b) of the Code defines a hearing session as any meeting between the parties and the arbitrators, including a prehearing conference, which lasts four (4) hours or less. Therefore, pursuant to Rule 10205(c) of the Code, the following forum fees are assessed:

| | |
|---|--------------------|
| 4 prehearing sessions (full panel) x \$750.00 = | \$ 3,000.00 |
| 16 hearing sessions x \$750.00 = | <u>\$12,000.00</u> |
| Total Forum Fees = | \$15,000.00 |

Forum Fees are assessed at \$2,000 to Claimant and \$13,000.00 to Respondent.

Claimants filing fee and hearing session deposit were preliminarily waived due to financial hardship. Therefore, the \$500.00 filing fee and the \$2,000.00 forum fees are now due from Claimant.

The NASD shall retain Respondent's filing fee of \$500.00. Respondent shall receive credit for the \$600.00 hearing session deposit previously submitted to the NASD, leaving net forum fees due from Respondent of \$12,400.00.

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

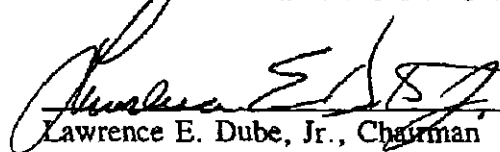
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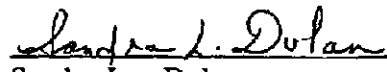
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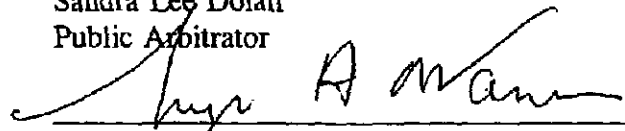
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CONCURRING ARBITRATORS' SIGNATURES


Lawrence E. Dube, Jr., Chairman
Public Arbitrator


Sandra Lee Dolan
Public Arbitrator


George H. Warner
Industry Arbitrator

Date Decision Served by NASD Regulation: April 12, 1999