

Judge vacates fees granted in FINRA arbitration

But upholds \$675K wrongful termination award

By: Eric T. Berkman ☉ September 27, 2018



An arbitration panel erred in awarding attorneys' fees to a broker in a wrongful termination and defamation case she successfully brought against the securities firm that fired her, a U.S. District Court judge has decided.

The broker, Cheryle Anne Brady, claimed her assistant made trades without client consent or her permission, and she ordered him to remedy the situation.

The employer, Ameriprise Financial Services, terminated Brady after she allegedly falsely claimed during an internal investigation that the clients had actually authorized the trades.

However, Ameriprise, maintaining that Brady approved the transactions, reported to FINRA that she was terminated "for cause" due to unauthorized trading.

When a FINRA arbitration panel awarded her \$675,000 for wrongful termination and another \$123,000 in attorneys' fees, Ameriprise sought to vacate in federal District Court.

Regarding the fee award, Ameriprise pointed out that its arbitration agreement with Brady provided only for statutory attorneys' fees and that G.L.c. 93A, §11, the fee-shifting statute that comprised part of Brady's claim, did not apply in the case.

Judge Douglas P. Woodlock agreed.

"The Panel did not have authority to award attorney fees pursuant to M.G.L.c. 93A, §11," Woodlock wrote. "The Supreme Judicial Court of Massachusetts has made clear that §11 covers 'individuals acting in a business context in their dealings with other business persons ...' and 'does not provide a remedy for disputes arising out of an employer-employee relationship. ...'"

Woodlock did uphold the \$675,000 wrongful termination award, rejecting Ameriprise's arguments that because one of the arbitrators was a plaintiffs-side employment lawyer, it did not have an impartial panel.

The 27-page decision is *Ameriprise Financial Services, Inc. v. Brady*, Lawyers Weekly No. 02-446-18. The full text of the ruling can be found [here](#).

Reasonable award

Peter M. Bizinkauskas of Taunton, who represented the fired broker in the arbitration, said though he respected Woodlock's decision, he maintained the fee award was reasonable. In addition to his client requesting fees, Ameriprise requested counsel fees in its own claim to recover balances due on loans the broker had taken out from the company. The promissory notes stated the broker would be responsible for any costs Ameriprise incurred collecting on them.

"Ms. Brady's argument during the arbitration for attorneys' fees was that since both parties requested attorneys' fees ... the arbitrators could have reached a reasonable conclusion that [a] de facto parties' arbitration agreement included the award of attorneys' fees to the prevailing party," Bizinkauskas said, noting that the arbitrators dismissed Ameriprise's claim.

Regarding Woodlock's affirmation of the rest of the award, Bizinkauskas said that it is damaging for a broker to have a FINRA Form U5 — the form broker-dealers use to register and terminate associates — state that he or she has been terminated for cause.

"The results of [this case] illustrate that justice may be reached in this forum," he said.

Boston attorney John A. Mangones, who represented the broker in U.S. District Court, said the law is unsettled on whether an arbitration panel can award attorneys' fees absent statutory authority or express agreement, when both parties request fees during a proceeding.

The judge sidestepped the issue here, Mangones said, but the evidence showed that the final figure Ameriprise submitted to the panel for counsel fees included both its counterclaims and defense of Brady's tort claims.

"We were disappointed that the court did not view this as a mutual request for fees on Ms. Brady's claims, but we presently do not intend to challenge the decision," he said.

Ameriprise's attorneys did not respond to requests for comment. But Christine R. Fitzgerald, a Boston attorney who represents clients in FINRA arbitrations and serves as an arbitrator herself, said it was noteworthy that Woodlock refused to overturn the tort award based on Ameriprise's contention that one of the panel members, a plaintiffs-side employment lawyer, was biased.

Ameriprise did not object to that particular arbitrator at the time and did not provide concrete evidence of actual partiality, arguing only that the arbitrator would have a pro-plaintiff bias as a plaintiffs' lawyer, Fitzgerald noted.

Still, she said, if a lawyer is handling a FINRA arbitration and is concerned about the possibility of bias, it is important to look into potential panelists beyond the information FINRA provides.

"A Google search or going to a law firm web page will tell you more than the bio that FINRA publishes," Fitzgerald said, adding that each side is asked whether it accepts the composition of the panel at the first appearance.

"You really need to take the time before you answer 'yes' to find out whether there's any reason you may have concerns with any of the arbitrators," she said.



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Terminated 'for cause'

Brady claimed her sales assistant, Bryan Noyes, "went rogue" in June 2016, engaging in securities trades for clients without consulting them as required.

She said she learned of the trades soon after, questioned Noyes, and ordered him to "fix this."

Ameriprise, however, concluded after an internal investigation that Brady directed Noyes to make the trades and, on Sept. 7, 2016, fired her and filed a U5 termination form with FINRA stating that she was fired for cause because of unauthorized trading.

In October 2017, at the close of FINRA's investigation, Brady signed a letter conceding that she had lied to Ameriprise's compliance department during its internal investigation before she was fired. She had apparently told compliance that she had talked to the clients the day of each trade and told Noyes to make the trades, while later telling her assistant manager that he entered the trades without her knowledge.

Pursuant to the arbitration provision in her employment agreement, Brady brought claims before FINRA for defamation and wrongful termination. Ameriprise, in response, sought to recover unpaid balances for loans Ameriprise had made her against her salary, an apparently common practice in brokerage firms.

The panel awarded Brady \$675,000 in wrongful termination damages and \$123,000 in attorneys' fees while ordering that the US be changed to state that Brady was terminated "without cause" and that there was no credible proof that she had authorized the trades in question, which ultimately benefitted the clients.

Ameriprise then filed an action in U.S. District Court to vacate the ruling.

Award in error

Woodlock upheld the wrongful termination award, unpersuaded by Ameriprise's assertion that because it did not learn of arbitrator David Summer's plaintiffs-side employment work until after the award, it was deprived of a fair opportunity to strike him on the basis of partiality beforehand.

"[Ameriprise] relies on general allegations about [Summer's] areas of expertise and practice," the judge said. "The case law that Ameriprise attempts to marshal to support its claim calls for a more personal connection than Ameriprise has offered here."

Besides, Woodlock said, Summer's practice "was discoverable by the most basic method of contemporary 'due diligence': a Google search."

The judge did find, however, that the panel had no authority to award Brady attorneys' fees. First, he said, the fact that both parties requested in their respective statements of claim that the other side pay its fees did not — contrary to Brady's argument — constitute a mutual agreement that fees be available, particularly since Ameriprise disputed throughout the proceeding that Brady would be entitled to fees.

Woodlock also noted that the arbitration provision in Brady's employment agreement clearly stated that each side in a dispute would be responsible for their own legal costs unless awarded as part of a statutory remedy. And Chapter 93A, the fee-shifting statute that Brady cited as forming part of her claim, does not apply to employment disputes.

Further, Woodlock said, the panel expressly awarded Brady fees pursuant to G.L.c. 251, §10, which does not give arbitrators such authority.

"In light of the above, I find that the award of attorney fees ... may be said to have been made in manifest disregard of the law," he concluded in vacating the award.

Ameriprise Financial Services, Inc. v. Brady

THE ISSUE: Did an arbitration panel err by awarding attorneys' fees to a broker in a wrongful termination and defamation case she successfully brought against the securities firm that fired her?

DECISION: Yes (U.S. District Court)

LAWYERS: Nicholas M. O'Donnell of Sullivan & Worcester, Boston; Michael S. Taaffe and Charles A. Wood Jr., of Shumaker, Loop & Kendrick, Sarasota, Florida (petitioner employer)

Peter M. Bizinkauskas of Taunton; John A. Mangones of Godbout Law, Boston (respondent employee)

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10 Milk Street, Suite 1000,

Boston, MA 02108

(617) 451-7300

