

# **AWARD FOR EMPLOYEE FOR BREACH OF EMPLOYEE SEPARATION AGREEMENT**

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## **AWARD OF ARBITRATOR**

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the agreement entered into by the above-named parties dated \_\_\_\_\_, \_\_\_\_\_, and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARD as follows: \$13,846.00 for Claimant.

### **FACTS**

Claimant began employment with Respondent on January 2, 1990. His last position with Respondent was Director of Branch Operations.

It is undisputed that Claimant was a good employee and had no discipline or performance problems documented in his employment record.

Claimant reported directly to [Elliott DiMauro]. As time went on in Claimant's tenure with Respondent, he became increasingly disenchanted with the owner of Respondent, [Jack Gallo]. By early 1997 Claimant, had decided to resign from Respondent. He informed his supervisor Mr. [Elliott DiMauro] of his decision.

It is unclear who initiated the discussion, but Mr. [Elliott DiMauro] and Claimant discussed severance pay for Claimant. However, it is undisputed that the discussion was after Claimant announced his plans to resign. Claimant suggested six months of guaranteed severance pay and an additional six months if he was unable to locate another position. He also requested a mutual release.

Mr. [Elliott DiMauro] discussed a severance agreement with Respondent's owner, [Jack Gallo], who agreed on behalf of the Respondent that it would offer Claimant a severance agreement. Mr. [Elliott DiMauro] cannot recall whether Mr. [Jack Gallo] inquired whether Claimant intended to work for Respondent's competitor, [Rival Bank], which was owned and operated by former Respondent employees.

At some undetermined point before Respondent provided Claimant the severance agreement to sign, Mr. [Elliott DiMauro] asked Claimant directly whether he intended to begin employment with [Rival Bank]. Claimant responded that he had no specific job offers and that he had several irons in the fire. Mr. [Elliott DiMauro] also testified that Claimant was "vague" and stated that he did not have a job anywhere. Mr. [Elliott DiMauro] also testified that if Claimant had informed him that he was going to work for [Rival Bank] that he "thinks" he would have felt differently. He also testified that it would have been "more difficult" to get Claimant the severance pay.

It was widely rumored throughout Respondent that Claimant was going to work for [Rival Bank] before he signed the agreement. Nonetheless, Mr. [Elliott DiMauro] apparently did

not follow up to confirm this information after Mr. Claimant's "vague" response. Instead, he prepared an employment separation agreement dated February 21, 1997. Conspicuous by its absence is any reference to Claimant working for [Rival Bank] or any of Respondent's former employees, including Mr. [Dennis Finch] or [Ed Green].

Mr. [Lennie Briscoe], the manager in charge of security, auditing and loss prevention, testified that he directly asked Claimant whether he would be going to work for [Dennis] and [Ed] ([Dennis Finch] and [Ed Green]) and that Claimant denied any such plan. Claimant cannot recall this exchange. There was no testimony or other evidence to suggest that Mr. [Lennie Briscoe] shared this information with Mr. [Elliott DiMauro] or Mr. [Jack Gallo].

Based on the above record, this Arbitrator concludes that Claimant made no representation, material or otherwise, regarding his plans to work or not work for [Rival Bank]. If not working for Respondent's competitors was so important, Respondent could have provided for this in the separation agreement. Finally, Respondent had significant incentive to offer severance without a specific non-compete: it got a complete release from Claimant and his cooperation (which he gave) for a year.

Claimant signed the employment separation agreement on February 21, 1997. He testified that at the time he signed the agreement he had no other offers of employment and made no decisions where he intended to work. It is probably no stretch to assume that Mr. Claimant had a pretty good idea that he would be working for [Rival Bank] at the time he signed the February 21, 1997 agreement. He received an offer of employment on February 28, 1997 and began employment on March 3, 1997.

Respondent issued one paycheck and then at Mr. [Jack Gallo]'s direction, ceased performing under the contract because Claimant entered into the employ of Respondent's competitor, [Rival Bank]. The balance due and owing under the severance agreement is \$13,846.00.

Respondent claims that it was entitled to cease all payments under the agreement because:

1. Claimant disclosed information he obtained in a trust committee meeting regarding a discount on trust fees for [Jack McCoy].
2. Claimant fraudulently induced the contract by misrepresenting his intentions with respect to [Rival Bank] or, in the alternative, failed to disclose his intentions regarding [Rival Bank].
3. Claimant innocently misrepresented his intentions with respect to [Rival Bank].
4. The agreement was founded upon a mutual mistake as to (a) Claimant's employment plans and (b) whether plaintiff got a complete release.
5. Claimant breached his duty of loyalty to [Rival Bank] by signing an affidavit prepared by Mr. [Jack McCoy].

6. Claimant violated the non-disparagement clause in the separation agreement.
7. Claimant violated the covenant of good faith and fair dealing inherent in the employment separation agreement.

As will be more fully set forth below, the Arbitrator rejects each and every reason cited above.

### **CLAIMANT'S CLAIM**

For the reasons stated below, the Arbitrator denies Respondent's request for rescission and rejects the Respondent's justifications for failing to make the payments called for under the employment separation agreement.

#### **I. BREACH OF CONFIDENTIALITY**

Respondent asserts that Claimant breached confidentiality and this breach discharged the Respondent's duties to make payments under the contract. The alleged breach was Claimant's execution along with Mr. [Dennis Finch] and Mr. [Ed Green] of an affidavit which indicates that Respondent had agreed to discount trust administration fees for Mr. [Jack McCoy].

Respondent asserts that such information is "confidential" under common law and no doubt relies on Claimant's admission that the business of the trust committee is "confidential." The fact that Claimant stated that it was his understanding that the trust committee's business was confidential does not mean that the information was "confidential" as defined by Michigan common law.

The Arbitrator finds that the information at issue is not confidential in that it was apparently known by Mr. [Jack McCoy] before he requested the affidavit. The arbitrator assumes that if Respondent had given [Jack McCoy] a discount, it would have informed [Jack McCoy] of same. There was no evidence in the record that Respondent did not grant the discount. Thus, confirming what had already been communicated it did not place Claimant in violation of any common law duty.

#### **II. EMPLOYMENT SEPARATION AGREEMENT INDUCED BY FRAUD**

The Arbitrator rejects this justification because Claimant was truthful in his responses to inquiries by Mr. [Elliott DiMauro]. Further, there was no evidence in the record that Mr. [Jack Gallo] even considered Claimant's employment plans in determining to pay severance. Rather it appears that Mr. [Jack Gallo] agreed to pay severance in exchange for a release and Claimant's cooperation for one year following the separation agreement. It is undisputed that Claimant did render the required cooperation during the term specified in the employment separation agreement.

### **III. MISREPRESENTATION**

Similarly, the Arbitrator rejects the misrepresentation claim based on the undisputed testimony that Claimant did not misstate his intentions with respect to [Rival Bank].

### **IV. MUTUAL MISTAKE**

This justification is rejected in that Claimant's employment or non-employment with [Rival Bank] was not a premise of the employment separation agreement. Thus, there was nothing to be mistaken about.

Further, there was no mutual mistake about the scope of Claimant's release of Claimant. Claimant certainly was not mistaken, its agents drafted the document.

Further, the release was clear and if Claimant did not comprehend the scope of the release, he should have.

### **V. BREACH OF LOYALTY**

The Arbitrator finds that there is no breach of the duty of loyalty by executing an affidavit setting forth facts equally within the knowledge of Respondent's employees and the Respondent's customer where there is no competent evidence in the record, to suggest that the facts stated in the affidavit are untrue.

### **VI. VIOLATION OF NON-DISPARAGEMENT CLAUSE**

The Arbitrator finds that there was no disparagement occasioned by Claimant's execution of an affidavit confirming facts equally within the knowledge of Respondent's employees and the Respondent's customer where there is no competent evidence in the record, to suggest that the facts stated in the affidavit are untrue.

### **VII. COVENANT OF GOOD FAITH AND FAIR DEALING**

For the reasons set forth in connection with Respondent's Breach of Loyalty, Violation of Non-Disparagement Clause, the Arbitrator rejects this defense as well.

### **COUNTERCLAIM**

Respondent also filed a counterclaim against Claimant based on a check which bounced in August 1995. Claimant allowed the Respondent to pay the check after conferring with the customer and his supervisor [Ed Green] and made similar decisions approximately 30 times per day. Unfortunately for the Respondent, the customer was unable to cover the check and later filed for bankruptcy. However, it now appears clear that the Respondent will be able to recover an undetermined portion of that check.

The Arbitrator hereby rules for Claimant on Respondent's counterclaim in that:

1. The timing of the Respondent's assertion of this claim is highly suspect given that Claimant was never disciplined or in any way penalized for his business decision to pay the check, Mr. [Ed Green] was not disciplined or in any way penalized for approving in advance Mr. Claimant's decision and no other employees have been disciplined for making similar business decisions.
2. Respondent admits that the customer's agent, [Ross Geller], lied to Mr. Claimant regarding the ability of the customer to make good on the check.
3. [Lennie Briscoe] testified that Claimant violated no Respondent policies in allowing the Respondent to pay the check.
4. Respondent has failed to state a claim against Claimant. Scott v Security Title Ins & Guarantee Co, 72 P2d 143, 147 (1937); Perkins v Hersey, 77 Mich 504 (1889); Ogallah Elevator Co v Harrison, 154 P 1016, 1017 (Cone 1916); Carpenter v Carpenter, 56 P2d 305, 313 (Or 1936); People v O'Dell, 10 Mich App 95, 99 (1968); 3 Am Jur 2d, Agency, § 216.

#### **COSTS AND ATTORNEY FEES**

Pursuant to the agreement of the parties at the arbitration management conference, each party will bear their own costs and attorney fees. Further, the parties will split the cost of the arbitrator.

This Award is in full settlement of all claims and counterclaims submitted by either party against the other in this arbitration.

DATED: \_\_\_\_\_

SIGNED: \_\_\_\_\_  
James K. Fett