

**Award**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

Margarita M. Botero-Johnson, Claimant v. Merrill Lynch, Pierce, Fenner & Smith Incorporated  
and Gregory M. Lee, Respondents

Case Number: 04-07398

Hearing Site: Phoenix, Arizona

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Nature of the Dispute: Associated Person v. Member and Associated Person

**REPRESENTATION OF PARTIES**

For Claimant:

Armand Salese, Esq.  
Law Offices of Armand Salese  
PLLC  
Tucson, Arizona

For Respondents:

Terry E. Sanchez, Esq.  
Linda S. Goldman, Esq.  
Munger, Tolles & Olson LLP  
Los Angeles, California

**CASE INFORMATION**

Statement of Claim filed: October 20, 2004

Claimant's Uniform Submission Agreement signed: November 9, 2004

Joint Statement of Answer filed by Respondents: January 19, 2005

Amended Statement of Answer filed by Respondents: September 22, 2005

Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated's Uniform Submission  
Agreement signed: January 24, 2005

Respondent Gregory M. Lee's Uniform Submission Agreement signed: November 9, 2004

### **CASE SUMMARY**

Claimant alleged gender discrimination and sexual harassment in violation of Title VII of the Civil Rights Act of 1964, intentional interference with prospective economic advantage, retaliation in violation of the Arizona Employment Protection Act, and wages due under Arizona statute.

Respondents' Initial and Amended Statements of Answer denied the allegations of wrongdoing set forth in the Claimant's Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

Claimant requested unspecified compensatory damages, unspecified punitive damages, and costs, including attorney's fees.

Respondents' Initial and Amended Statements of Answer requested dismissal of the Claimant's Statement of Claim in its entirety.

### **OTHER ISSUES CONSIDERED AND DECIDED**

On August 18, 2005, the parties stipulated that Respondents be allowed to file an Amended Statement of Answer that added only an affirmative defense of Release. The Panel approved the stipulation on August 30, 2005.

On September 22, 2005, Respondents' filed Motions for Summary Adjudication and In Limine. On September 30, 2005, Claimant filed Oppositions thereto. The Panel heard the parties' respective arguments with regard to the motions during a pre-hearing conference on October 19, 2005. After due deliberation, the Panel ruled as follows: 1) Respondents' Motion for Summary Adjudication was granted as to Claimant's claims arising out of her employment up to March 26, 2001, and denied Respondents' Motion for Summary Adjudication with respect to the remainder of her claims; and, 2) Respondents' Motions In Limine were denied.

The parties agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

### **FINDINGS**

The Claimant has failed to prove by a preponderance of the evidence:

- (1) That her employment by Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated was terminated by Respondents for reasons, in whole or in part, related to her gender;
- (2) That Respondents maintained a work environment hostile to women;
- (3) That Respondents' decision to discharge Claimant was a retaliation for reporting wrongdoing by another employee in violation of the Arizona Employment Protection Act;
- (4) Intentional and wrongful interference with her employment contract with Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated; or,
- (5) Violation of Arizona statutes regulating payment of wages.

The Respondents' reasons for discharging Claimant proved to be credible, and those reasons were not prohibited by any law or contract. Since all relief requested by Claimant was based on alleged violation of law which have not been proved, the Arbitration Panel finds no basis for granting any of the relief requested by Claimant. Therefore, all of Claimant's requests for damages or other relief, including a request for an award of attorney's fees and punitive damages, are denied.

### **AWARD**

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

- 1) Claimant's claims are denied in their entirety.
- 2) The parties shall bear their respective costs, including attorney's fees.
- 3) All other relief requested and not expressly granted, including Claimant's request for punitive damages, is denied.

**FEES**

Pursuant to the Code, the following fees are assessed:

**Filing Fees**

NASD Dispute Resolution received or will collect the non-refundable filing fees for each claim as follows:

Initial claim filing fee = \$ 250.00

**Member Fees**

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events that gave rise to the dispute, claim, or controversy. Accordingly, the member firm Merrill Lynch, Pierce, Fenner & Smith Incorporated is a party and the following fees are assessed:

Member Surcharge	= \$1,500.00
Pre-Hearing Process Fee	= \$ 750.00
<u>Hearing Process Fee</u>	<u>= \$2,200.00</u>
<b>Total Member Fees</b>	<b>= \$4,450.00</b>

**Forum Fees and Assessments**

The Panel assessed a forum fee for each pre-hearing conference or hearing session conducted. A pre-hearing conference and hearing session is any meeting between the parties and the Chair or the parties and the Panel. The following fees are assessed:

Three (3) Pre-hearing conference session with the Panel @ \$1,000.00/session = \$ 3,000.00

Pre-hearing conference:	April 4, 2005	1 session
	October 12, 2005	1 session
	October 19, 2005	1 session

Thirteen (13) Hearing sessions @ \$1,000.00/session = \$13,000.00

Hearings:	October 31, 2005	2 sessions
	November 1, 2005	2 sessions
	November 2, 2005	2 sessions
	November 3, 2005	2 sessions
	November 4, 2005	2 sessions
	December 19, 2005	2 sessions
	December 20, 2005	1 session

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<b>Total Forum Fees</b>	<b>= \$16,000.00</b>
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1. The Panel assessed \$8,000.00 of the forum fees to Claimant Margarita M. Botero-Johnson.

2. The Panel assessed \$8,000.00 of the forum fees jointly and severally to Respondents Merrill Lynch, Pierce, Fenner & Smith Incorporated and Gregory M. Lee.

**Fee Summary**

1. Claimant Margarita M. Botero-Johnson is charged with the following fees and costs:

Filing Fee	= \$ 250.00
Forum Fees	= \$ 8,000.00
Total Fees	= \$ 8,250.00
Less payments	= \$(1,800.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 6,450.00</b>

2. Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated is charged with the following fees and costs:

Member Fees	= \$ 4,450.00
Less payments	= \$(4,450.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 0.00</b>

3. Respondents Merrill Lynch, Pierce, Fenner & Smith Incorporated and Gregory M. Lee are charged jointly and severally with the following fees and costs:

Forum Fees	= \$8,000.00
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$8,000.00</b>

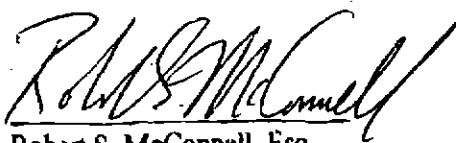
All balances are payable to NASD Dispute Resolution and are due upon the receipt of the Award pursuant to Rule 10330(g) of the Code.

NASD Dispute Resolution  
Arbitration No. 04-07398  
Award Page 6 of 6

**ARBITRATION PANEL**

<i>Robert S. McConnell, Esq.</i>	-	<i>Public Arbitrator, Presiding Chair</i>
<i>Eugene R. Nielson</i>	-	<i>Public Arbitrator</i>
<i>Lee R. Barbakoff</i>	-	<i>Non-Public Arbitrator</i>

**Concurring Arbitrators' Signatures**



Robert S. McConnell, Esq.  
Chair, Public Arbitrator

December 23, 2005

Signature Date

\_\_\_\_\_  
Eugene R. Nielson  
Public Arbitrator

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Lee R. Barbakoff  
Non-Public Arbitrator

\_\_\_\_\_  
Signature Date

December 23, 2005  
Date of Service

ARBITRATION PANEL

*Robert S. McConnell, Esq.*  
*Eugene R. Nielson*  
*Lee R. Barbakoff*

-  
-  
-

*Public Arbitrator, Presiding Chair*  
*Public Arbitrator*  
*Non-Public Arbitrator*

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Robert S. McConnell, Esq.  
Chair, Public Arbitrator

Signature Date

*Eugene R. Nielson*  
Eugene R. Nielson  
Public Arbitrator

*12-23-05*  
Signature Date

Lee R. Barbakoff  
Non-Public Arbitrator

Signature Date

*December 23, 2005*  
Date of Service

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**Eugene R. Nielson**  
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Signature Date

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Signature Date

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<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 0.00</b>

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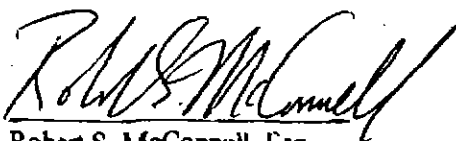
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<i>Robert S. McConnell, Esq.</i>	-	<i>Public Arbitrator, Presiding Chair</i>
<i>Eugene R. Nielson</i>	-	<i>Public Arbitrator</i>
<i>Lee R. Barbakoff</i>	-	<i>Non-Public Arbitrator</i>

Concurring Arbitrators' Signatures



Robert S. McConnell, Esq.  
Chair, Public Arbitrator

December 23, 2005  
Signature Date

\_\_\_\_\_  
Eugene R. Nielson  
Public Arbitrator

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Lee R. Barbakoff  
Non-Public Arbitrator

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Signature Date

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Date of Service

ARBITRATION PANEL

<i>Robert S. McConnell, Esq.</i>	-	<i>Public Arbitrator, Presiding Chair</i>
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<i>Lee R. Barbakoff</i>	-	<i>Non-Public Arbitrator</i>

Concurring Arbitrators' Signatures

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Robert S. McConnell, Esq.  
Chair, Public Arbitrator

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Signature Date

*Eugene R. Nielson*  
Eugene R. Nielson  
Public Arbitrator

*12-23-05*  
Signature Date

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Lee R. Barbakoff  
Non-Public Arbitrator

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Signature Date

*December 23, 2005*  
Date of Service