

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Edward H. Koehler, Jr.

93-02903

Name of Respondent

Merrill Lynch, Pierce, Fenner & Smith, Inc.

REPRESENTATION

For Claimant: Edward H. Koehler, Jr. ("Koehler") was represented by Murray Fogler, Esq. and C. Thomas Kruse, Esq. of McDade & Fogler, L.L.P., located in Houston, Texas.

For Respondent: Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") was represented by Russell B. Starbird, Esq. of Gibbs & Bruns, L.L.P., located in Houston, Texas.

CASE INFORMATION

Statement of Claim filed: July 27, 1993.

Claimant's Submission Agreement signed on: July 15, 1993.

Statement of Answer filed by Respondent on: September 13, 1993.

Respondent's Submission Agreement signed on: September 7, 1993 by Thomas W. Smith, First Vice President, Merrill Lynch, Pierce, Fenner & Smith, Inc.

HEARING INFORMATION

Pre-Hearing Conference: February 22, 1994 for one (1) session before One (1) arbitrator;
February 28, 1994 for One (1) session before One (1) arbitrator.

Hearing Dates/Sessions: March 1, 1994 for Two (2) sessions;
March 2, 1994 for Two (2) sessions;
March 3, 1994 for Two (2) sessions.

Hearing Location: Houston, Texas.

CASE SUMMARY

Claimant Koehler alleged that Respondent Merrill Lynch failed to pay him the full amount of a bonus to which he was entitled after Koehler's termination on November 18, 1988. Koehler specifically alleged that:

1. In 1988, Koehler was employed by Merrill Lynch as an investment banker in the position of director. According to an oral agreement between the parties and industry custom and practice, Koehler was paid a salary, but most of his compensation was in the form of a bonus at the end of the calendar year that was based on the fees he generated;
2. In January of 1988, Koehler was promoted to Director and his superiors assured him that he would continue to be employed by Merrill Lynch so long as his performance remained satisfactory, creating an oral contract of continued employment for an indefinite time;
3. Despite an unusually productive year, Merrill Lynch terminated Koehler without warning and without valid reason, paying Koehler a small portion of the total year-end bonus that he was entitled to, and breaching the oral agreement between the parties; and
4. Alternatively, Koehler performed services for Merrill Lynch which were extremely valuable. Merrill Lynch failed to pay Koehler the fair market value of these services and was unjustly enriched.

Respondent Merrill Lynch denied any liability to Koehler, alleging that:

1. There was no specified term of employment in writing nor was there any verbal assurance that Koehler's employment would continue for any specific period of time. His employment was at will and therefore terminable by either party without cause. However, Koehler's employment was terminated because he failed to perform his duties satisfactorily for a variety of reasons;
2. Koehler was relieved of his duties at Merrill Lynch on November 17, 1988, but remained on payroll with the associated benefits, until April 1, 1989. In addition, Koehler accepted a year-end bonus for 1988 in an amount commensurate to his contribution to Merrill Lynch for that year;
3. Any alleged oral agreement by Merrill Lynch to employ Koehler for a specific

period of time is unenforceable because it does not satisfy the requirements of the Statute of Fraud because it could not be performed within a year;

4. By accepting the bonus tendered in 1988 and the monthly payments through April 1989, Koehler has waived any complaint, or in the alternative, Koehler is estopped to assert that Merrill Lynch's termination of him was wrongful;

5. The Statement of Claim is barred by the statute of limitations; and

6. Koehler suffered no damages, or the damages are too speculative to recover.

RELIEF REQUESTED

Claimant requested entry of an award against Respondent in the total sum of between \$500,000.01 and \$5,000,000.00 for lost earnings, reasonable attorneys' fees; pre- and post-judgment interest and costs. In the alternative, Koehler requested the fair value of his services which unjustly enriched Merrill Lynch.

Respondent requested that the arbitrators deny Koehler any recovery and that Merrill Lynch recover its attorneys' fees in defending itself against this meritless claim.

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 the NASD.

AWARD

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

1. The Statement of Claim is hereby dismissed and denied in its entirety;

2. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein.

FORUM FEES

Pursuant to Section 44c of the Code of Arbitration Procedure, the following Forum Fees are assessed: Two (2) Pre-Hearing conferences with One (1) arbitrator x \$300.00 per session = \$600.00; Six (6) Hearing sessions x \$1,000.00 per session = \$6,000.00; Total forum fees = \$6,600.00.

The National Association of Securities Dealers, Inc. shall retain the \$500.00 claim filing fee and the \$1,000.00 hearing session deposit previously filed by the Claimant, Edward H. Koehler, Jr. Claimant Edward H. Koehler, Jr. is liable for and shall pay to the NASD additional forum fees in the sum of \$2,300.00. Respondent Merrill Lynch, Pierce, Fenner & Smith is liable for and shall pay to the NASD forum fees in the sum of \$3,300.00.

Fees are payable to the National Association of Securities Dealers, Inc.

Concurring Arbitrators' Signatures

Name

Date

/s/ Thomas D. Taya, Esq.
Thomas D. Taya, Esq.
Industry Arbitrator
Chairperson

March 17, 1994

/s/ Nick Sacaris
Nick Sacaris
Industry Arbitrator

March 18, 1994

/s/ Gil A. Baumgarten
Gil A. Baumgarten
Industry Arbitrator

March 18, 1994

For NASD Use Only

Date of Service of Award: B-25-94