

**NASD REGULATION, INC.**

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In the Matter of the Arbitration Between

Name of Claimants

Merrill Lynch Pierce Fenner & Smith Inc  
Thomas W. Hauser  
Susan M. Kastle

96-01967

Name of Respondents

Terri Blair  
Lawrence W Forlenza

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**REPRESENTATION**

For Claimants Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), Thomas Hauser ("Hauser") and Susan Kastle ("Kastle") collectively "claimants", and for Third-Party Respondent Lawrence Forlenza ("Forlenza") appeared John W. Zeiger, Esq. and Stuart G. Parsell, Esq. of the firm Zeiger & Carpenter, Columbus, Ohio.

For Respondent Terri Blair ("respondent") appeared Jeff Boyd, Esq., Tony Merry, Esq. and Lisa Chatterton, Esq. of the firm McCarthy, Palmer, Volkema, Boyd and Thomas, Columbus, Ohio.

**CASE INFORMATION**

Statement of Claim filed: May 7, 1996.

Claimant Merrill Lynch's Submission Agreement signed on: May 6, 1996.

Claimant Hauser's Submission Agreement signed on: May 6, 1996.

Claimant Kastle's Submission Agreement signed on: May 6, 1996.

Third-Party Respondent Forlenza's Submission Agreement signed on: October 21, 1996.

Respondent's Submission Agreement signed on: September 25, 1996.

Statement of Answer, Counterclaim and Third-Party Complaint filed by Respondent on: September 26, 1996.

Reply to Counterclaim filed by Claimants on: October 28, 1996.

Statement of Answer filed by Third-Party Respondent on: October 28, 1996.

### HEARING INFORMATION

Hearing Dates/Sessions: March 12, 1997/Two Sessions  
March 13, 1997/Three Sessions

The hearing was held at Doubletree Guest Suite Hotel in Columbus, Ohio.

### CASE SUMMARY

Claimants alleged that respondent began working for Claimant Hauser in May 1993 as a sales associate. Claimants alleged that it is a policy at Merrill Lynch that all non-exempt employees record and certify on time cards the actual number of hours worked per week. Claimants also alleged that the Columbus office in which respondent worked also had a policy which required administrative assistants to obtain approval from management before working in excess of an established limitation on overtime hours. Claimants asserted that Merrill Lynch believed respondent's certification of her overtime hours to be accurate and paid respondent accordingly.

Claimants asserted that respondent received an annual base salary of \$27,167.14 in 1994. Claimants also asserted that, pursuant to a calendar year long contract, respondent was to receive supplemental compensation in 1995 of \$700.00 per month and one half of one percent of the first eight hundred thousand dollars of Hauser's production during 1995, one percent of Hauser's production between eight hundred thousand dollars and one million dollars and one and one half percent of Hauser's production over one million dollars. Claimants also alleged that, pursuant to written policy in effect at Merrill Lynch in 1995, an administrative assistant's supplemental compensation is suspended during sick leave.

Claimants alleged that respondent suffered a serious head injury in the office's cafeteria on July 25, 1995 which required hospitalization and an extensive period of rehabilitation. Claimants alleged that respondent's supplemental compensation was suspended but that Hauser personally supplemented respondent's pay in the amount of \$525.00 per month during respondent's entire sick leave. Claimants also alleged that Merrill Lynch agreed to certify respondent's head injuries as work related thereby assuring her compensation under Ohio's workers' compensation system.

Claimants alleged that respondent returned to work at a reduced number of hours as Hauser's administrative assistant on November 6, 1995. Claimants also alleged that respondent, although working reduced hours, was paid for a full day and claimed that respondent's supplemental compensation was fully reinstated. Claimants alleged that respondent advised co-workers that she was keeping records of events that occurred during the work day in case she decided to file a lawsuit against Merrill Lynch.

Claimants maintained that respondent demonstrated almost immediately that she was not able to handle her responsibilities as an administrative assistant and acted unprofessionally towards her co-workers and customers. Claimants alleged that respondent's continuing unprofessional conduct began hurting Merrill Lynch's relationship with Hauser's customers. Claimants maintained that respondent was rude and argumentative and would often become emotional. Claimants also alleged that respondent advised co-workers that she could not handle the pressures of her position as an administrative assistant.

Claimants alleged that, by early December 1995, Hauser and Merrill Lynch management determined that respondent's performance and attitude remained unsatisfactory and that management decided to reassign respondent to a less stressful position. Claimants alleged that Merrill Lynch received correspondence dated December 19, 1995 from respondent's attorney claiming that respondent had been improperly treated and threatening claims under the American with Disabilities Act and also stating that, because

respondent work more overtime than she had certified on her time card. respondent had claims under the Fair Labor Standards Act.

Claimants alleged that respondent was informed of the decision to reassign her on January 2, 1996. Claimants maintained that respondent was given a choice of filling in during the absence of other administrative assistants until another permanent administrative position compatible with her needs became available or working as part of the administrative staff of Ken Harl ("Harl"), a district administrative manager in Columbus. Claimants alleged that respondent protested but nonetheless accepted the position with Harl. Claimants also asserted that, because of respondent's protest, Merrill Lynch subsequently offered to allow respondent to continue working with Hauser as his administrative assistant. Claimants alleged that respondent replied that she would think about it but work with Harl in the interim. Claimants asserted that, although her responsibilities changed, respondent's compensation was not reduced.

Claimants alleged that respondent's contract for supplemental compensation as Hauser's administrative assistant expired at the end of 1995. Claimants also alleged that, due to the lawsuit threatened by respondent's attorney, Merrill Lynch increased respondent's base salary so it equaled her 1995 base salary plus the full supplemental compensation. Claimants asserted that Merrill Lynch received correspondence from respondent's attorney dated January 5, 1996, charging that respondent's reassignment was in retaliation for his December 1995 letter threatening suit and offering to have respondent resign for a proposed settlement of \$100,000.00.

Claimants stated that on February 28, 1996, respondent filed a lawsuit in the United States District Court for the Southern District of Ohio in contravention of the arbitration clause in her Form U-4. Claimants maintained that respondent's suit alleged unlawful retaliation in response to her overtime and handicap claims and also asserted Fair Labor Standards Act violations, Family and Medical Leave Act violations, handicap and sex discrimination under Ohio law, wrongful discharge, intentional infliction of emotional distress, defamation, invasion of privacy and violations of the Ohio Whistleblower Statute.

Respondent maintained that the Columbus office of Merrill Lynch under the direction of third party respondent Forlenza was an old boy's club where only healthy white men could succeed. Respondent alleged that she was recognized by Merrill Lynch as a competent, energetic and hard working employee and alleged that she had achieved the position of sales associate and was destined, prior to her head injury, for further advancement in the securities industry.

Respondent alleged that she was confronted with the old boy's club atmosphere during her hospitalization, rehabilitation and gradual return to work. Respondent also alleged that Merrill Lynch's promises to her that her employment and compensation would continue were never kept. Respondent asserted that she was treated as an outcast when she returned to work and labeled mentally ill. Respondent alleged that, when she retained counsel and formally complained about her mistreatment, Merrill Lynch retaliated against her. Respondent maintained that she was involuntarily demoted and not reassigned as claimants alleged.

Respondent also asserted that claimants did not accurately state Merrill Lynch's overtime policy in the Statement of Claim and maintained that, although Merrill Lynch expects and requires its sales associates to work more than 40 hours per week, Merrill Lynch's policy is that hours in excess of 35 hours per week generally should not be recorded on time cards. Respondent alleged that Claimant Kastle altered a time card on at least one occasion to delete overtime hours which had been recorded by a Merrill Lynch employee.

Respondent also alleged that the calendar year contract that claimants refer to in the Statement of Claim is between Hauser and Merrill Lynch and that respondent is not a party to this contract. Respondent also

asserted that she was not aware of any written policy providing for suspension of supplemental compensation during sick leave. Respondent maintained that Merrill Lynch's written policy provides for full compensation during illness and further maintained that Harl advised her that her compensation would continue undiminished throughout her disability. Respondent alleged that several days after making this statement, Harl advised her that due to a new policy at Merrill Lynch, only respondent's base salary would continue.

Respondent also maintained that she was encouraged by her co-workers to sue Merrill Lynch and alleged that she advised her co-workers that she had no desire to sue. Respondent maintained that many of the problems with Merrill Lynch's customers occurred while she was on disability leave and that she was assigned to correct the problems when she returned to work. Respondent asserted that many of the incidents alleged in the Statement of Claim are false and represent continuous efforts by claimants to falsely portray respondent as unstable. Respondent also alleged that, although Merrill Lynch technically acknowledged that she could only work a limited schedule, it was expected that she would function as she had before her injury and, not only correct mistakes that had been made in her absence, but also work a 50 hour week. Respondent alleged that she was frustrated by Merrill Lynch's attitude toward her. Respondent alleged that Hauser and Merrill Lynch were only dissatisfied with the limitations her medical condition placed on her.

Respondent maintained that the Statement of Claim failed to state a claim upon which relief could be granted and that it was barred by the doctrines of laches, waiver and estoppel. Respondent also maintained that the Statement of Claim is barred by illegality and the equitable doctrine of unclean hands. Respondent counterclaimed that, upon returning to work Claimants Hauser and Kastle were openly hostile toward her. Respondent claimed that Kastle's harassment was direct and merciless and that Kastle falsely stated that respondent had been mentally ill even before her head injury. Respondent also claimed that Kastle directed other Merrill Lynch employees to alter respondent's time card. Respondent claimed that Merrill Lynch never conducted an investigation into the allegations of discrimination set forth by her attorney in his correspondence with Merrill Lynch.

Respondent alleged violations of the Fair Labor Standards Act for Merrill Lynch's failure to pay her for overtime worked in excess of 40 hours and for the retaliation by Merrill Lynch in terminating her employment as a sales associate, reducing her salary and demoting her. Respondent also alleged violations of the Family and Medical Leave Act and the provisions of the Ohio Revised Code regarding discrimination against the handicapped. Respondent asserted violations of the Ohio Revised Code with regard to sex discrimination, wrongful discharge and intentional infliction of emotional distress. Respondent also alleged violations of Ohio law for defamation, invasion of privacy and for retaliation for whistleblowing. Respondent further alleged that the hostile atmosphere toward her and the numerous violations of law committed by Merrill Lynch and its agents and employees are the product of the management policies of third-party respondent Forlenza.

Claimants responded to respondent's counterclaim and denied the allegations of misconduct alleged by respondent in her counterclaim. Claimants admitted that respondent was a third-party beneficiary of the contract between Hauser and Merrill Lynch. Claimants alleged that respondent's counterclaim failed to state a claim upon which relief could be granted and maintained that respondent's alleged handicap impaired her performance. Claimants maintained that the realignment of respondent's job duties were

necessary and constituted a reasonable accommodation of her alleged handicap. Claimants alleged that all alleged defamatory statements are privileged and are opinions which are not actionable. Claimants also asserted that all alleged defamatory statements are true or substantially true.

Third-party respondent Forlenza denied all allegations of misconduct and alleged that he had no part in the determination to accommodate respondent by realigning her job duties. Forlenza also asserted that respondent's counterclaim failed to state a claim upon which relief could be granted. Forlenza also maintained that respondent's alleged handicap substantially impaired her performance making the realignment of her duties necessary. Forlenza also maintained that the realignment of respondent's duties was reasonable. Forlenza asserted that any alleged defamatory statements were privileged and opinions which are not actionable and also asserted that any alleged defamatory statements are true or substantially true.

### **RELIEF REQUESTED**

Claimants requested in their Statement of Claim an adjudication that respondent's claims as set forth in her civil lawsuit are without merit. Claimants also requested a declaration that claimants are not liable for damages to respondent, reimbursement from respondent of all supplemental compensation that Merrill Lynch paid respondent, under threat of lawsuit, from January 1, 1996 to the date of the panel's ruling and all costs and attorneys fees.

Respondent, in her Answer, requested an adjudication that the Statement of Claim is without merit, costs and attorneys fees and such other relief as the panel deems just and proper.

In the Statement of Counterclaim and third-party Statement of Claim, respondent requested unpaid overtime, an equal amount as liquidated damages, legal damages and equitable relief, including front pay, back pay, compensatory damages, an equal amount as liquidated damages, attorneys fees, costs and all other appropriate relief for violation of the Fair Labor Standards Act and for retaliation in violation of the same, all in an amount of \$300,000.00. Respondent also requested compensation denied by claimants, monetary damages, front pay, back pay, an equal amount as liquidated damages, attorneys fees, costs and all other appropriate relief for violation of the Family and Medical Leave Act and for retaliation in violation of the same, all in an amount of \$300,000.00. For violation of the Ohio Revised Code relating to sex and handicap discrimination, respondent requested compensatory damages in the amount of \$300,000.00, punitive damages in the amount of \$1,000,000.00, attorneys fees, costs and all other appropriate relief. Respondent requested compensatory damages in the amount of \$500,000.00, punitive damages in the amount of \$500,000.00, attorneys fees, costs and all other appropriate relief for wrongful discharge, intentional infliction of emotional distress, defamation, invasion of privacy and negligent supervision. Respondent requested legal damages and equitable relief, including front pay, back pay, compensatory damages, liquidated damages, attorneys fees, costs, interest and all other appropriate relief for violation of Section 4113.52 of the Ohio Revised Code, attorneys fees, pre-judgment and post judgment interest and such other relief as the panel deems just and equitable.

Third-party respondent Forlenza requested dismissal of the Third-Party Statement of Claim in its entirety, all costs and expenses including attorneys fees and such other relief as deemed just and proper.

In their reply to respondent's counterclaim, claimants requested that the counterclaim be dismissed with prejudice, all costs and expenses, including attorneys fees and such other relief as deemed just and proper.

**OTHER ISSUES CONSIDERED AND DECIDED**

At the beginning of the proceedings, respondent dismissed her counterclaims against Hauser and Kastle.

Respondent also dismissed numerous counterclaims against Merrill Lynch.

At the conclusion of the hearing, third-party respondent Forlenza moved for his dismissal based on the lack of any evidence in the record upon which a claim could be based.

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 original remains on file with NASD Regulation Inc.

**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 panel finds that absolutely no credible evidence was presented which would support a claim against third-party respondent Lawrence W. Forlenza and therefore dismiss Forlenza from this case with prejudice;
2. The panel finds that respondent failed to meet her burden of proof as to each and every allegation made against Merrill Lynch and the individual claimants and therefore denies respondent's claims in their entirety;
3. Claimant Merrill Lynch' claim for return of the additional compensation paid to respondent by Hauser and by Merrill Lynch from January 1996 to the present is denied;
4. Each party is to bear their own attorneys fees.

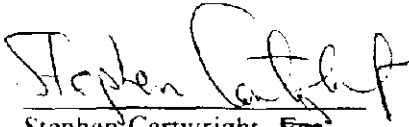
**FORUM FEES**

Pursuant to Rule 10205 of the Code of Arbitration Procedure, the panel has determined that NASD Regulation, Inc. shall retain the \$500.00 non-refundable filing fee submitted by claimants, the \$500.00 non-refundable filing fee submitted by respondent and have assessed the following Forum Fees assessed:

5 sessions X \$1500.00	=	\$7500.00
minus claimants' hearing session deposit	-	\$600.00
minus respondent's hearing session deposit	-	<u>\$1500.00</u>
TOTAL OUTSTANDING		\$5400.00

Claimant Merrill Lynch be and hereby is liable and shall pay to NASD Regulation, Inc. the sum of \$3750.00 which represents one half of the forum fees assessed. Claimant has previously deposited \$600.00 and owes \$3150.00

Respondent be and hereby is liable for the sum of \$3750.00 representing one half of the forum fees assessed. Respondent has previously deposited \$1500.00 and therefore owes \$2250.00.

  
Stephen Cartwright, ~~Esq.~~


I, Stephen Cartwright, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

  
Stephen Cartwright, ~~Esq.~~

Date of Decision: May 1, 1997

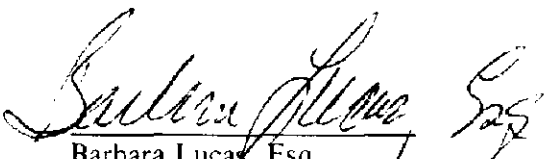
  
W. Sean Kelleher, Esq.

I, W. Sean Kelleher, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

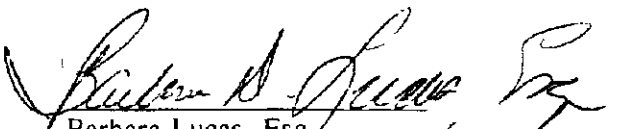
  
W. Sean Kelleher, Esq.

Date of Decision: \_\_\_ May 1, 1997 \_\_\_



  
Barbara Lucas, Esq.

I, Barbara Lucas, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

  
Barbara Lucas, Esq.

Date of Decision: May 1, 1997