

## AWARD

### NASD REGULATION, INC., OFFICE OF DISPUTE RESOLUTION

In the matter of the Arbitration Between

Name of Claimant(s)

Lee H. Pearce

v.

Arbitration No.  
96-03608

Name of Respondent(s)

Merrill Lynch, Pierce, Fenner & Smith, Inc.  
James Tenuto  
Michael Vorst  
John Folsom  
Linda Stirling

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### REPRESENTATION

For Claimant: Thomas R. Gill, Esq. and Judith Hartwig, Esq., Employment Law Center Incorporated, San Diego, California

For Respondent: Terry E. Sanchez, Esq. Munger, Tolles & Olson, Los Angeles, California

### CASE INFORMATION

Statement of Claim filed: August 17, 1996

Claimant's Submission Agreement signed: August 15, 1996

Joint Statement of Answer filed: January 16, 1997

Respondents' Submission Agreements signed as follows:

Merrill Lynch, Pierce, Fenner & Smith: December 27, 1996  
James Tenuto: December 3, 1996

Michael Vorst: November 27, 1996  
John Folsom: December 16, 1996  
Linda Stirling: December 16, 1996

### **HEARING INFORMATION**

Pre-hearing telephone conferences were held as follows:

September 3, 1997	-	1 session
January 19, 1998	-	1 session

The evidentiary hearing was held in San Diego, California, as follows:

February 25, 1998	-	2 sessions
February 26, 1998	-	2 sessions
February 27, 1998	-	1 session

### **CASE SUMMARY**

Claimant alleged breach of contract, breach of implied covenant of good faith and fair dealing, fraud, employment discrimination (disability - FEHA and ADA), wrongful discharge in violation of public policy (FEHA and ADA), wrongful withholding of benefits in violation of public policy, intentional and negligent infliction of emotional distress and negligent supervision.

Respondent denied the allegations of the claim, and stated that Claimant was an at-will employee who was terminated for poor performance. Respondents also stated that Claimant's remedy for his claims for intentional and negligent infliction of emotional distress and for negligent supervision would be California's Worker's Compensation Act. Respondents also asserted that the claims for intentional and negligent infliction of emotional distress and for negligent supervision are barred by the one-year statute of limitations in California Code of Civil Procedure Section 340(3).

### **RELIEF REQUESTED**

At hearing, Claimant requested damages of \$59,000.00 per year from August 1995 to the present.

Respondents requested dismissal of all claims.

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

The undersigned panel convened a telephone hearing on January 19, 1998, to hear oral argument on Respondents' motion to dismiss. The claims for employment discrimination pursuant to FEHA and ADA, wrongful discharge in violation of FEHA and ADA, and intentional and negligent infliction of emotional distress were unopposed and were dismissed as withdrawn. After deliberation, the panel dismissed the claims for fraud and wrongful withholding of benefits, leaving for hearing claims for breach of contract, breach of implied covenant of good faith and fair dealing, and for negligent supervision.

The parties agreed to receive conformed copies of the Award while the originals remain on file with NASDR, Inc.

### **FINDINGS**

When Claimant was hired by Merrill Lynch in August of 1987, neither the written policies of Merrill Lynch, nor the employment or personnel practices of Merrill Lynch, nor the practices in the securities brokerage industry gave rise to any express or implied contract requiring Merrill Lynch to terminate the employment of Claimant only for cause or requiring Merrill Lynch to give Claimant notice of termination or to grant him a probationary period or opportunity to improve. During the eight-year term of Claimant's employment, none of the aspects of the relationship gave rise to any such contract, and the employment remained terminable at will in August of 1995 when Merrill Lynch terminated Claimant. Absent from Claimant's evidence is any hint that he was ever told at any time that he had permanent employment or that he would be retained as long as he did a good job or that he was given any other assurance of continued employment. Claimant's performance during most of the term of his employment was marginal or below average, and monthly performance reports kept him advised of that fact. The additional training and his promotion to Senior Financial Consultant were not rewards for or recognition of exceptional or meritorious performance. Claimant bore the ultimate burden of proving that he had an implied contract and was terminated wrongfully under its terms. He failed to satisfy that burden of proof.

In November and December of 1994, Claimant's job was in jeopardy due to inadequate performance over several years. Management was working with him on various proposals in efforts to preserve his job. As one possible method of salvaging his job, Claimant was considering requesting a transfer from the La Jolla office to the San Diego downtown office. Respondents Folsom and Stirling, successful Financial Consultants in the San Diego office, had recently entered into a written partnership agreement to pool or share their production, to jointly acquire and service clients with the assistance of other personnel assigned to their team, and to divide commissions between the two of them. Folsom and Stirling told Claimant that if Claimant transferred to the San Diego office and performed certain logistical client-management services for them, they would give him the opportunity to work with some of their relatively inactive clients in exchange for half of any additional commissions that Claimant generated on those accounts. They did not agree to enter into

a new partnership with Claimant or agree that Claimant would be entitled to a percentage of the income of their existing partnership. Merrill Lynch's managers at its La Jolla and San Diego offices discussed the proposal with Claimant and with Folsom and Stirling and transferred Claimant to the San Diego office effective January 1, 1995, with some trepidation. Claimant was to continue to service some existing clients and seek to acquire new accounts of his own and also seek to add to his income by working with some of the clients of Folsom and Stirling.

Following Claimant's transfer, in January of 1995, the Folsom-Stirling partnership turned over to Claimant at least fifteen of its inactive accounts having aggregate account assets between \$100,000.00 and \$250,000.00. Claimant devoted approximately fifteen hours to investigating the fifteen accounts and determined that he was unable to increase the activity or assets in these accounts. Accordingly, he asked for additional accounts to work on, but Folsom and Stirling were dissatisfied with Claimant's performance and did not turn over any additional accounts to him. During the seven and one-half months that Claimant worked with Folsom and Stirling, Claimant spent approximately one hour per day five days per week performing for them technical-computer services and other client maintenance services. Folsom and Stirling did not breach any express or implied agreement with Claimant in refusing to turn over to him additional accounts or in failing to provide him with assistance in developing the fifteen or so accounts.

Claimant was not damaged by any lack of proper supervision by Merrill Lynch which caused or contributed to Claimant's failure to perform acceptably. If, as claimed by claimant, Merrill Lynch owed Claimant a duty of reasonable care in reviewing his performance and informing him of any deficiencies so that he could improve, Merrill Lynch fulfilled such obligation. Merrill Lynch measured performance of its Financial Consultants by advising each Financial Consultant monthly of how his or her performance compared with that of other Financial Consultants in the same office. Claimant was constantly aware of how he was measuring up in these comparisons and made daily entries in his day-timer calendar keeping track of his performance.

#### **AWARD**

The arbitrators, having considered the pleadings, the testimony and the evidence presented at the hearing, have determined in full and final resolution of the issues submitted for determination as follows:

1. All claims of the parties are dismissed with prejudice on its merits.
2. The parties shall bear their respective costs, including attorney's fees.

#### **FORUM FEES**

Pursuant to Section 10205 of the Code of Arbitration Procedure, the NASDR shall retain

Claimant's \$500.00 non-refundable filing fee. Forum fees are assessed as follows:

2 pre-hearing telephone conferences @ \$300/session	\$ 600.00
5 hearing sessions @ \$1000/session	<u>\$5,000.00</u>
Total:	<u>\$5,600.00</u>

Claimant's one-half share	\$2,800.00
Credit for deposit	<u>(\$1,000.00)</u>
Balance Due:	<u>\$1,800.00</u>

Respondents' one half-share	<u>\$2,800.00</u>
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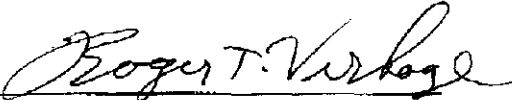
**Fees are payable to the National Association of Securities Dealers Regulation, Inc.**

Concurring Arbitrators Signatures:

Date signed:

\_\_\_\_\_  
Franklin G. Allen  
Presiding Chairperson  
Public Arbitrator

\_\_\_\_\_  
Judith A. Gust  
Public Arbitrator

  
\_\_\_\_\_  
Roger T. Verhage  
Securities Industry Arbitrator

\_\_\_\_\_  
3/27/98

Date served: 4/3/1998

Claimant's \$500.00 non-refundable filing fee. Forum fees are assessed as follows:

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

Concurring Arbitrators Signatures:

Date signed:

  
Franklin G. Allen  
Presiding Chairperson  
Public Arbitrator

3/25/98

\_\_\_\_\_  
Judith A. Gust  
Public Arbitrator

\_\_\_\_\_  
Roger T. Verhage  
Securities Industry Arbitrator

Date served: 4/3/1998