

N.A.S.D. REGULATION AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Name of Claimant

Marya Teri Konars

96-03674

Name of Respondents

Merrill Lynch, Pierce, Fenner & Smith, Inc.,
James Tenuto, and
Robert Donia

REPRESENTATION OF PARTIES

For Claimant: Judith Hartwig, Esq., Law Offices of Thomas R. Gill, San Diego, California.

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

CASE INFORMATION

Claimant's Statement of Claim was filed on or about August 21, 1996.

Claimant's Submission Agreement was signed on August 20, 1996.

The Joint Statement of Answer was filed on or about November 14, 1996.

The Submission Agreement for Merrill Lynch was signed on October 21, 1996.

James Tenuto's Submission Agreement was signed on December 3, 1996.

Robert Donia's Submission Agreement was signed on October 29, 1996.

HEARING INFORMATION

Pre-hearing conferences were held on:	September 12, 1997	one session;
	March 27, 1998	one session.

The hearing was held in San Diego, California on:	April 28, 1998	two sessions;
	April 29, 1998	two sessions;
	April 30, 1998	two sessions;
	June 12, 1998	two sessions.

CASE SUMMARY

Claimant alleges she had an implied in fact contract with Respondent Merrill Lynch that it would abide by its own policies and procedures, provide her with adequate training, adequately supervise its employees, pay all commissions earned by her and terminate her only for good cause. Said contract included an implied in law covenant of good faith and fair dealing that neither party would take any action that would deprive the other of the benefits of the contract. Claimant alleges Merrill Lynch breached the contract and the covenant of good faith and fair dealing by, *inter alia*,

- 1) failing to follow its own policies and procedures when it subjected her to gender and disability discrimination;
- 2) failing to provide her with adequate training and equal training opportunities;
- 3) negligently supervising its employees;
- 4) failing to pay all commissions due her;
- 5) setting unachievable goals so as to ensure her failure and then giving her an inadequate opportunity to achieve those goals when compared with other employees; and
- 6) terminating her without good cause.

Claimant further alleges Respondents Merrill Lynch, James Tenuto and Robert Donia discriminated against her on the basis of gender and disability, and intentionally and negligently inflicted emotional distress upon her. Claimant further alleges Respondent Merrill Lynch negligently supervised its employees by, *inter alia*,

- 1) failing to ensure its employees were not subjected to gender or disability discrimination;
- 2) failing to ensure its employees were given adequate training and equal training opportunities;
- 3) failing to ensure its managers honored the terms of the contracts between Merrill Lynch and its employees;
- 4) permitting its managers to set unachievable goals so as to ensure failure and giving an inadequate opportunity to achieve those goals; and
- 5) failing to ensure its managers terminated employees only for good cause.

In sum, Claimant alleges: breach of contract; breach of implied covenant of good faith and fair dealing; employment discrimination (gender) in violation of FEHA and California constitution; employment discrimination (disability) in violation of FEHA; wrongful discharge in violation of Family and Medical Leave Act; wrongful discharge in violation of public policy; intentional infliction of emotional distress; negligent infliction of emotional distress; and negligent supervision. Claimant alleges as a result of the above breaches, discrimination and negligence, she has suffered loss of wages, commissions and benefits, emotional distress and has incurred medical and legal expenses.

Respondents filed their answer, denying the material allegations of Claimant's Statement of Claim and contending that Claimant was employed at will and, in any event, that it had properly terminated Claimant for poor performance. Respondents deny that they discriminated against Claimant in any matter.

Respondents deny all of Claimant's allegations and assert they had good cause to terminate her.

RELIEF REQUESTED

Claimant requested a "make whole" award in an amount to be determined by the panel.

Respondents requested that each and every claim be dismissed and further request an award of costs and attorneys' fees.

OTHER ISSUES CONSIDERED & DECIDED

The parties agreed to receive conformed copies of the award while the original remains on file with NASD Regulation, Inc., Office of Dispute Resolution.

AWARD

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

1. Each and every claim asserted in the Statement of Claim is denied as to all respondents;
2. Each side to bear their own costs and attorneys' fees.

FORUM FEES

Forum fees are calculated at the rate of \$600 per hearing session. There were 10 sessions x \$600 = \$6,000 in forum fees. Pursuant to §10332(b) of the NASD Regulation, Inc., Office of Dispute

Resolution Code of Arbitration Procedure (the "Code"), a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less. Pursuant to § 10332(c) of the Code, Claimant is assessed \$2,400 and the Respondents are assessed jointly and severally \$600. All other forum fees are waived.

Pursuant to §10332(c) of the Code, the panel has determined that Claimant must file with NASD Regulation the \$500 non-refundable filing fee.

Pursuant to Rule 10333 of the Code, Respondent Merrill Lynch has paid to NASD Regulation, Inc. the \$350 member surcharge previously invoiced.

Fees are payable to the NASD, Regulation, Inc.

Jane S. Wyer, Esq.

Public / Industry

Public Arbitrator
Presiding Chair

James H. Mayer, Esq.

Public Arbitrator

Gwendolyn J. Bandt

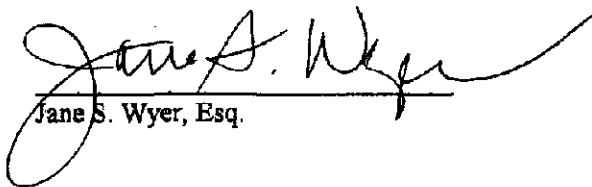
Industry Arbitrator

the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less. Pursuant to § 10332(c) of the Code, Claimant is assessed \$2,400 and the Respondents are assessed jointly and severally \$600. All other forum fees are waived.

Pursuant to § 10332(c) of the Code, the panel has determined that Claimant must file with NASD Regulation the \$500 non-refundable filing fee.

Pursuant to Rule 10333 of the Code, Respondent Merrill Lynch has paid to NASD Regulation, Inc. the \$350 member surcharge previously invoiced.

Fees are payable to the NASD, Regulation, Inc.


Jane S. Wyer, Esq.

Public / Industry

Public Arbitrator
Presiding Chair

James H. Mayer, Esq.

Public Arbitrator

Gwendolyn J. Bandt

Industry Arbitrator

Date Served:
JUL 07 1998

the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less. Pursuant to § 10332(c) of the Code, Claimant is assessed \$2,400 and the Respondents are assessed jointly and severally \$600. All other forum fees are waived.

Pursuant to §10332(c) of the Code, the panel has determined that Claimant must file with NASD Regulation the \$500 non-refundable filing fee.

Pursuant to Rule 10333 of the Code, Respondent Merrill Lynch has paid to NASD Regulation, Inc. the \$350 member surcharge previously invoiced.

Fees are payable to the NASD, Regulation, Inc.

Jane S. Wyer, Esq.


James H. Mayer, Esq.

Gwendolyn J. Bandt

Public / Industry

Public Arbitrator
Presiding Chair

Public Arbitrator

Industry Arbitrator

Date Served:

JUL 07 1998

the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less. Pursuant to § 10332(c) of the Code, Claimant is assessed \$2,400 and the Respondents are assessed jointly and severally \$600. All other forum fees are waived.

Pursuant to §10332(c) of the Code, the panel has determined that Claimant must file with NASD Regulation the \$500 non-refundable filing fee.

Pursuant to Rule 10333 of the Code, Respondent Merrill Lynch has paid to NASD Regulation, Inc. the \$350 member surcharge previously invoiced.


Fees are payable to the NASD, Regulation, Inc.


Jane S. Wyer, Esq.

Public / Industry

Public Arbitrator
Presiding Chair

James H. Mayer, Esq.

Public Arbitrator



Gwendolyn J. Bandt

Industry Arbitrator

Date Served:
JUL 07 1998