

AWARD
NASD Dispute Resolution, Inc.

In the Matter of the Arbitration Between

Name of Claimant

Patrick Corrigan

and

99-00681

Minneapolis, Minnesota

Name of Respondent

Merrill Lynch Pierce Fenner & Smith, Inc.

REPRESENTATION OF PARTIES

Patrick Corrigan ("**Claimant**") was represented by John D. Thompson, Esq. and Daniel Q. Poretti, RIDER BENNETT EGAN & ARUNDEL, LLP, Minneapolis, MN

Merrill Lynch Pierce Fenner & Smith, Inc. ("**Respondent**") was represented by Mary E. Stumo, Esq. and Jacqueline R. Rolfs, Esq., FAEGRE & BENSON LLP, Minneapolis, MN

CASE INFORMATION

The Statement of Claim was filed on or about February 16, 1999. Claimant's Memorandum in Opposition to Motion for Partial Summary Judgment was filed on or about April 9, 2001. Submission Agreement of Claimant Patrick Corrigan was signed on February 12, 1999.

Respondent Merrill Lynch Pierce Fenner & Smith, Inc. filed its Statement of Answer on or about May 4, 1999. Motion for partial Summary Judgment was filed on or about March 9, 2001. Submission Agreement of Respondent Merrill Lynch Pierce Fenner & Smith, Inc. was signed on April 23, 1999 by Joycelyn E. McGeachy.

CASE SUMMARY

Claimant, Patrick Corrigan, for his Summary of Claims, states and alleges as follows:

Claimant, Patrick Corrigan, has alleged age discrimination and retaliation, breach of contract, promissory estoppel, and statutory violations against his former employer, Respondent, Merrill Lynch. Corrigan was a long-time, loyal Merrill Lynch employee who rose to Director of Private Investments, where he carved out a unique and highly profitable niche within a particular aspect of Merrill Lynch's business known as the Private Equity Group. Consistent with his loyalty to Merrill Lynch, in November of 1995, Corrigan informed the company that

he was planning to retire at the end of 1997. In early 1997, Bill Riddle, co-head of the Private Equity Group, specifically promised to compensate Corrigan for successfully transitioning his book of business to other members of the group by the end of the year, and thereby ensure that Merrill Lynch would retain its preeminent position in the marketplace. According to Merrill Lynch's own literature, private equity placements in particular depend on the reputation and experience of the top managers involved, given that the investments tend to be illiquid, involve less efficient markets, require long term horizons, and may carry higher risks, and Mr. Corrigan's reviews consistently reflect that he was preeminent in his field.

Instead of being compensated for successfully transitioning his book of business, however, in January 1998, Merrill Lynch informed Corrigan that his bonus for 1997 would be \$257,500.00, with no stock. This figure was less than he had received in 1995 (\$230,000.00 with \$60,000.00 in stock), although his production for 1997 was higher. Moreover, it did not compensate him at all for transitioning his impressive book of business. Corrigan told Merrill Lynch that he wanted to remain with the Private Equity Group until the compensation dispute was resolved. Merrill Lynch removed Corrigan from the group February 9, 1998. Merrill Lynch offered Mr. Corrigan a bonus of \$270,000 for 1998 (for deals from 1997 that would close in 1998), if he would sign a release of any or all legal claims. Corrigan refused. Merrill Lynch to date has not paid Corrigan any bonus of deals closed in 1998.

Mr. Corrigan was 65 at all times relevant to this matter, and federal as well as Minnesota state law prohibits the disparate treatment of individuals over the age of 40 based upon their age. It is abundantly clear that Merrill Lynch has unfairly and improperly treated Mr. Corrigan in terms of compensation. Merrill Lynch's refusal to provide comparative information regarding others in the Private Equity Group can only lead to the assumption that other, younger employees, who have not outperformed Mr. Corrigan, were in fact compensated at higher levels. Merrill Lynch engaged in illegal retaliatory actions in response to Mr. Corrigan's repeated claim of age discrimination, including but not limited to refusing to compensate him appropriately for his transition efforts, removing him from the Private Equity Group, refusing to follow corporate compensation and performance practices, and determining to not give him any bonus for 1998, after he refused to sign a release of all legal claims. Merrill Lynch breached its oral contract to financially compensate Corrigan for the value of his book of business and his efforts to transition that business to others within the Private Equity Group. Merrill Lynch's promises to Mr. Corrigan regarding his efforts to smoothly transition his book of business, in the alternative, are enforceable under the doctrine of promissory estoppel; Merrill Lynch made definite and explicit promises to Corrigan that he would receive compensation for his efforts to smoothly transfer his book of business to other members of the group over the course of 1997, Corrigan performed in reasonable reliance on those promises, and injustice can only be avoided by enforcing the promises. Merrill Lynch has also violated Minn. Stat. § 181.13 and § 181.14, with its refusal to pay Corrigan for the wages due and owing for his efforts in 1997, particularly compensation

owed for the large amount of business he generated in 1997 that closed in 1998, which Merrill Lynch has refused to compensate at all.

Respondent Merrill Lynch's Summary Of Defenses

This Summary of Defenses responds specifically to the allegations made in Claimant's February 11, 2000 Summary of Claims. Merrill Lynch reserves the right to make additional arguments and raise additional defenses in response to evidence introduced or arguments made at the arbitration hearing.

Until he retired in February 1998, Claimant was a salesperson in Merrill Lynch's Private Equity Group, a part of Merrill Lynch's Corporate Institutional Client Group ("CICG").¹ As a salesperson in CICG, Claimant was paid an annual salary and was eligible to receive year-end bonuses through the Variable Incentive Compensation Plan ("VICP"). VICP payments were not directly tied to the amount of product Claimant sold, but were based on numerous quantitative and qualitative factors, including competitor pay levels, revenue, production credits, controllable contribution, pre-tax profit, economic profit, market share, achievement of expense targets, performance rating, team review, client relationships, and support of the Merrill Lynch principals. See St. of C. Ex. 1 at 3. VICP payments were tied to Company performance; therefore, payments for a given year could not be determined and were not paid until January or February of the following year.

Claimant was paid his full salary and VICP payment for 1997. In 1998, Claimant was paid his full salary through his retirement date. However, because Claimant retired from the Private Equity Group in February 1998, he was not entitled to any VICP payment for work performed in the first few weeks of 1998. Indeed, in February 1998, there would have been no way to assess either his performance or the performance of CICG and Merrill Lynch for 1998.

Prior to his retirement, Claimant asked his manager, Bill Riddle, if he could be compensated for work that he did in 1997 on deals that closed in 1998. In response, Merrill Lynch offered to pay Claimant \$260,000 in February 1998, slightly more than the \$257,500 VICP payment he received for 1997. This payment was not required or permitted under the VICP program and there was no precedent in the Private Equity Group for making such a payment to a departing employee. To avoid future disputes over Claimant's compensation, Merrill Lynch conditioned payment of the \$260,000 on Claimant signing a general release. Claimant deemed both his \$257,500 1997 VICP payment and the extra \$260,000 payment unacceptable and sued Merrill Lynch for age discrimination, retaliation, breach of contract,

¹ Claimant held a unique position at Merrill Lynch, because in addition to his work for CICG, he was also allowed to work out of the Middle Markets Group, which was part of the Private Client side of Merrill Lynch. Claimant was paid straight commissions for his work in Private Client, and that compensation is not at issue in this arbitration.

promissory estoppel, and failure to pay wages under Minn. Stat. § 181.13 or § 181.14.

Age Discrimination

Claimant asserts that "Merrill Lynch's refusal to provide comparative information regarding others in the Private Equity Group can only lead to the assumption that other, younger employees, who have not outperformed Mr. Corrigan, were in fact compensated at higher levels." Summary of Claims at 2. In fact, comparative information provided by Merrill Lynch conclusively establishes that compensation decisions within the Private Equity Group were not driven by age. Some individuals younger than Claimant earned more than he did; other individuals younger than Claimant earned substantially *less* than he did. There are several instances where individuals of the same age earned vastly different amounts. If Claimant's speculation that age drove compensation in the Private Equity Group were fact, compensation would decrease with age. It does not, and Claimant's age discrimination claim therefore fails.

Retaliation

Claimant alleges that "Merrill Lynch engaged in illegal retaliatory actions in response to Mr. Corrigan's repeated claim of age discrimination, including but not limited to refusing to compensate him appropriately for his transition efforts, removing him from the Private Equity Group, refusing to follow corporate compensation and evaluation practices, and determining to not give him any bonus for 1998, after he refused to sign a release of all legal claims." Summary of Claims at 2. To establish retaliation, Claimant must prove that he engaged in statutorily protected conduct, that he suffered an adverse employment action, and that there is a causal connection between his conduct and the adverse employment action. Hubbard v. United Press International, Inc., 330 N.W.2d 428, 444 (Minn. 1983). Claimant cannot establish the required causal connection, because all of those actions he complains of occurred *before* he alleged that he had been discriminated against because of his age.

Breach of Contract and Promissory Estoppel

Claimant bases his breach of contract and promissory estoppel claims on the allegation that Bill Riddle "specifically promised to compensate Corrigan for successfully transitioning his book of business to other members of the group by the end of the year." Summary of Claims at 1. There no evidence to suggest that Mr. Riddle ever made such a promise. Indeed, when forced to identify this "specific promise," Claimant could state only that Mr. Riddle said that it was important that the transition of accounts go smoothly, that Claimant would be compensated for the transition, and that the amount of compensation would depend on how smoothly the transition was effectuated. Cl.'s Supp. Resp. & Obj. to Resp.'s Info Req. at 5. Riddle never promised Claimant that he would be compensated for the "value of his book of business." Summary of Claims at 2. Given the nature of the Private Equity business,

Claimant had no "book of business" to sell. Nor did Riddle or anyone else at Merrill Lynch promise to pay Corrigan a specific amount of money for his work in 1997. Claimant's belief that the amounts Merrill Lynch paid or offered to him were inadequate does not give rise to a breach of contract or promissory estoppel claim.

Statutory Claims

Finally, Claimant alleges that Merrill Lynch violated Minn. Stat. § 181.13 or 181.142 by refusing to pay him "for the wages due and owing for his efforts in 1997, particularly compensation owed for the large amount of business he generated in 1997 that closed in 1998." Summary of Claims at 3. Whether wages are earned for purposes of the wage statutes is a matter of contract or employer policy. Meyer v. Mason Publishing Co., 372 N.W.2d 403, 404-05 (Minn. Ct. App. 1985); Holman v. C. P. T. Corp., 557 N.W.2d 740 (Minn. Ct. App. 1990). Merrill Lynch paid Claimant for his work in 1997 and 1998 in accordance with its policies. Claimant received his full salary and a handsome VICP payment for 1997. That was all he was entitled to under Merrill Lynch's policies, and he therefore cannot establish a statutory failure to pay wages.

RELIEF REQUESTED

In his original pleading, Claimant did not specify specific amounts of damages being sought. At the hearing, Claimant requested an award in the total amount of \$4,550,000 as follows:

- Compensation for deals closed in 1997 = \$750,000
- Compensation for deals closed in 1998 = \$1,000,000
- Compensation for transition effort = \$800,000
- Sanctions = \$2,000,000

In addition, Claimant requested an award of attorneys' fees, costs, and disbursements, including costs assessed by the NASD.

Respondent requested that the claims asserted in this matter be dismissed and that it be awarded its' costs, attorneys' fees and disbursements for defending against Claimant's claims.

² Section 181.13 governs payment of wages when an employer discharges an employee. Section 181.14 governs payment of wages when an employee resigns. In 1994, Claimant announced his intention to resign in 1998. By July 1997, he had selected February 10, 1998 as his last day in the Private Equity Group. Nonetheless, his Statement of Claim alleges that he was "forced to step down from his position with the Merrill Lynch Private Equity Group on February 10, 1998." St. of Cl. at 2. If Claimant truly believed that he was "forced" to leave the Private Equity Group, he would have pled his statutory wage claim under Section 181.13, which applies to discharged employees. By pleading his claim under both section 181.13 and section 181.14, Claimant essentially concedes that his departure from the Private Equity Group was voluntary.

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 original(s) remain on file with the NASD Dispute Resolution, Inc. (the "NASD").

AWARD

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

1. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. shall be and hereby is liable for and shall pay to Claimant Patrick Corrigan the sum of \$765,000 (**Seven Hundred Sixty Five Thousand Dollars**) as compensatory damages.
2. Interest at the Minnesota statutory rate is awarded on the above stated sum from May 1, 1997 to May 1, 2001.
3. That to the extent not specifically awarded or otherwise provided for above, all other claims and requests for relief by any party hereto are denied with prejudice.
4. Other than the Forum Fees noted below, the parties shall each bear all other costs and expenses incurred by them in connection with this proceeding, including but not limited to attorneys fees.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Dispute Resolution, Inc. will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee = \$500.00

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. In this matter, the member firm is Merrill Lynch Pierce Fenner & Smith, Inc.

Member surcharge	= \$1,200.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$2,000.00

Adjournment Fees

Adjournments requested during these proceedings:

Hearing Date(s) scheduled to begin on February 29, 2000 adjournment requested by Claimant	= \$ 600.00
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Forum Fees and Assessments

The Arbitration Panel assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

Two (2) Pre-hearing session(s) with a single arbitrator x \$300.00	= \$600.00
Pre-hearing conference(s): February 17, 2000 1 session	
September 12, 2000 1 session	

Three (3) Pre-hearing session(s) with Panel x \$1,000.00	= \$3,000.00
Pre-hearing conference(s): August 11, 1999 1 session	
February 29, 2000 1 session	
January 4, 2001 1 session	

Fifty (50) Hearing sessions x \$1,000.00	= \$50,000.00
Hearing Date(s): October 2, 2000 3 sessions	
October 3, 2000 2 sessions	
October 4, 2000 2 sessions	
October 5, 2000 3 sessions	
October 6, 2000 3 sessions	
October 9, 2000 2 sessions	
October 10, 2000 3 sessions	
October 11, 2000 3 sessions	
December 4, 2000 2 sessions	

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December 5, 2000	3 sessions
December 6, 2000	3 sessions
December 7, 2000	3 sessions
March 26, 2001	2 sessions
March 27, 2001	3 sessions
March 28, 2001	3 sessions
March 29, 2001	3 sessions
March 30, 2001	2 sessions
April 2, 2001	2 sessions
April 3, 2001	2 sessions
April 4, 2001	2 sessions
April 5, 2001	2 sessions
<u>April 6, 2001</u>	<u>2 sessions</u>

Total Forum Fees

= \$53,600.00

The Arbitration Panel has assessed \$26,800.00 of the forum fees to Patrick Corrigan.

The Arbitration Panel has assessed \$26,800.00 of the forum fees to Merrill Lynch Pierce Fenner & Smith, Inc.

Administrative Costs

Administrative costs are expenses incurred due to a request by a party for special services including, but not limited to, additional copies of arbitrator awards beyond those provided without charge, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

Merrill Lynch Pierce Fenner & Smith, Inc. reimbursement to NASD Dispute Resolution, Inc. for costs of flipcharts, etc.

\$1,735.00

Fee Summary

Claimant, Patrick Corrigan, shall be and hereby is liable for:

Initial Filing Fee	= \$ 500.00
Adjournment Fee	= \$ 600.00
<u>Forum Fees</u>	<u>= \$26,800.00</u>
Total Fees	= \$27,900.00
<u>Less payments</u>	<u>= \$ 2,100.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$25,800.00

Respondent, Merrill Lynch Pierce Fenner & Smith, Inc., shall be and hereby is liable for:

Member Fees	= \$ 3,800.00
Administrative Costs	= \$ 1,735.00
<u>Forum Fees</u>	<u>= \$26,800.00</u>
Total Fees	= \$32,335.00
<u>Less payments</u>	<u>= \$ 3,800.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$28,535.00

All balances are due to NASD Dispute Resolution, Inc.

Concurring Arbitrators:

/s/ Douglas J. Nesbit
Douglas J. Nesbit
Public Arbitrator, Presiding Chair

May 14, 2001
Signature Date

/s/ Lavon Phillips
Lavon C. Phillips, Esq.
Public Arbitrator

May 7, 2001
Signature Date

/s/ Daniel E. Murphy
Daniel E. Murphy
Non-Public Arbitrator


May 15, 2001
Signature Date

Respondent, Merrill Lynch Pierce Fenner & Smith, Inc., shall be and hereby is liable for:

Member Fees	= \$ 3,800.00
Administrative Costs	= \$ 1,735.00
<u>Forum Fees</u>	<u>= \$26,800.00</u>
Total Fees	= \$32,335.00
<u>Less payments</u>	<u>= \$ 3,800.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$28,535.00

All balances are due to NASD Dispute Resolution, Inc.

Concurring Arbitrators:



Douglas J. Nesbit
Public Arbitrator, Presiding Chair

05/14/01

Signature Date

Lavon C. Phillips, Esq.
Public Arbitrator

Signature Date

Daniel E. Murphy
Non-Public Arbitrator

Signature Date

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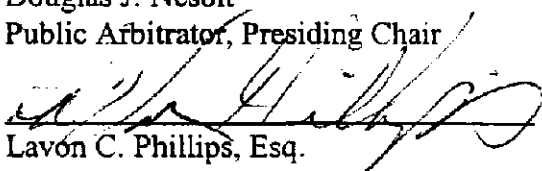
Respondent, Merrill Lynch Pierce Fenner & Smith, Inc., shall be and hereby is liable for:

Member Fees	= \$ 3,800.00
Administrative Costs	= \$ 1,735.00
<u>Forum Fees</u>	= \$26,800.00
Total Fees	= \$32,335.00
<u>Less payments</u>	= \$ 3,800.00
Balance Due NASD Dispute Resolution, Inc.	= \$28,535.00

All balances are due to NASD Dispute Resolution, Inc.

Concurring Arbitrators:

Douglas J. Nesbit
Public Arbitrator, Presiding Chair



Lavon C. Phillips, Esq.
Public Arbitrator

Signature Date

05-7-01

Signature Date

Daniel E. Murphy
Non-Public Arbitrator

Signature Date

NASD Dispute Resolution, Inc.

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Respondent, Merrill Lynch Pierce Fenner & Smith, Inc., shall be and hereby is liable for:

Member Fees	= \$ 3,800.00
Administrative Costs	= \$ 1,735.00
<u>Forum Fees</u>	= \$26,800.00
Total Fees	= \$32,335.00
<u>Less payments</u>	= \$ 3,800.00
Balance Due NASD Dispute Resolution, Inc.	= \$28,535.00

All balances are due to NASD Dispute Resolution, Inc.

Concurring Arbitrators:

Douglas J. Nesbit
Public Arbitrator, Presiding Chair

Signature Date

Lavon C. Phillips, Esq.
Public Arbitrator

Signature Date

Daniel E. Murphy

Daniel E. Murphy
Non-Public Arbitrator

5/15/01

Signature Date