BEFORE THE THIRD-STAGE HEARING PANEL
ESTABLISHED UNDER SECTION 7.11(3) OF THE
STIPULATION OF SETTLEMENT
CREMIN V. MERRILL LYNCH CLASS ACTION LITIGATION

NANCY THOMAS,

Claimant,

v.

MERRILL LYNCH, PIERCE,
FENNER & SMITH INC.,

Respondent.

DECISION AND AWARD

Third Stage Hearing Panel:

Richard S. Peskin, Esq., Chair
Mary A. Lau, Esq., Member
Susan T. Mackenzie, Esq., Member

Appearances for the Parties:

For Claimant:
Liddle & Robinson, LLP,
By: Jeffrey L. Liddle, Esq.
Michael E. Grenert, Esq.

For Respondent:
Morgan Lewis & Bockius, LLP,
By: Andrew J. Schaffran, Esq.
Debra Morway, Esq.

This action is before the Third-Stage Hearing Panel in the above matter pursuant to Section 7.11(3) of the Stipulation of Settlement in the matter of *Cremin, et al. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, U.S. District Court (E.D. Illinois) Case No.: 96-C-3773 ("the *Cremin* Suit"). The Panel, having considered the submissions of the parties, the evidence presented at the hearing, applicable law and relevant provisions of the Settlement Stipulation governing this proceeding, and being fully advised, issues its Decision and Award, with an order concerning attorneys' fees and costs.

Administrative Record and Third-Stage Hearing

Pursuant to the Stipulation of Settlement, Claimant filed her initial Statement of Claim on April 5, 1999 and the above Panel was duly appointed to hear the claims. In connection with and prior to the commencement of the Third-Stage Hearing, the Panel viewed almost 30 hours of videotaped presentations of expert witness testimony, statistical evidence and oral argument by counsel addressing class-wide claims of gender discrimination in the compensation system for financial consultants and in promotions to management positions.[1] The Third-Stage Hearing began on September 13, 2004 and the Panel heard presentation of testimony and evidence on September 14, 20, 21 and 30, 2004, December 20 and 21, 2004, April 8, 19, 21 and 22, 2005, June 7, 9, 10,13, 15, and 16, 2005, July 11 and 12, 2005, August 4 and 5, 2005, September 7 and 8, 2005, December 12 and 13, 2005, March 10, 2006, June 16, 26 and 29, 2006, and on September 18, 20, 21, 26, 28 and 29, 2006.[2] The Panel received preliminary briefs on issues of law from the parties on October 20, 2006. The Panel heard closing arguments on October 24, 2006. All hearing sessions were open to the public and the press. The Panel received final post hearing briefs from the parties on November 17, 2006. During the final hearing session on October 20, 2006, the parties waived the requirement of Section 7.11(9) of the Stipulation of Settlement on issuance of an Award within 14 days of the close of the Third Stage Hearing.

Background Facts

Claimant Nancy Thomas ("Claimant" or "Thomas") worked for Merrill Lynch as a financial consultant ("FC") from June 1982 to February 2000 other than a two month period in 1990.[3]

Respondent Merrill, Lynch, Pierce, Fenner & Smith, Inc. ("Respondent" or "Merrill Lynch") is a full service investment firm operating multiple offices nationwide. During the time period under review each office employed a group of FCs who provided traditional brokerage sales services to clients. The branch offices also employed various operations, compliance and administrative employees, including sales assistants, ("SAs" or "CAs") who provided direct administrative support to the FCs.

FCs were responsible for bringing clients to Respondent, managing client accounts, selling financial services and generating revenues from transactions. Respondent compensated FCs on a commission basis depending on production "credits"

[1] The Panel ruled that the class-wide statistical evidence videotaped presentations and expert reports were a part of the official Third-Stage Hearing record.

[2] The administrative record of this proceeding is adopted in its entirety and incorporated as part of the official record of the Third-Stage Hearing. The parties also stipulated to conducting the Third-Stage Hearing during limited hours and on not more than two consecutive days in any week in order to accommodate Claimant's health condition.

[3] Claimant received a BA in English from Brown University in 1977 and held a series of sales positions between 1977 and 1982.

generated by client transactions. FCs in all offices received a standard percentage of client commissions earned in a given year. Respondent maintained minimum performance standards for production by FCs. FCs falling below the minimum standards received a reduced, "penalty box" percentage of earned production credits. Each office manager, however, established office benchmarks and contests for obtaining certain production credits and office criteria for distribution of IPOs and accounts from departing brokers.

In June 1982, Respondent hired Claimant as an FC in its Fifth Avenue Financial Center branch office in New York City ("Fifth Avenue"), then managed by Frank Collins. She completed Respondent's training program and started production in January 1983. Claimant was initially very successful, achieving a second quintile ranking in her first and second years of production.[4] She qualified for the Executive Club, was appointed the office's mutual funds coordinator, and received other awards and acknowledgements of her success. By May 1986, Mr. Collins gave Claimant a private office due to her high production levels.

In 1985, Claimant began to focus on financial planning and insurance products available to firm clients, one of the first FCs to do so. She provided training classes in the insurance products to other FCs. Her focus on long range planning for clients had the effect of depressing her short term production results, but she continued to be ranked in the top three quintiles.

In the summer of 1986, Mr. Collins, who received a promotion, left the Fifth Avenue office. John West became the new Branch Manager.

In October 1987, the financial markets suffered a significant downturn, or "crash". Although her production was likely impacted more significantly than other FCs because her clients' assets were tied into long range planning products and therefore could not be actively traded, Claimant maintained her commitment to financial planning. In March 1988, Respondent rewarded Claimant for her efforts and appointed her as one of 18 FCs to serve on its nationwide Financial Planning Advisory Board.

In September 1988, Claimant became engaged to another FC on the Financial Planning Advisory Board and decided to move to Atlanta, Georgia. She was hired by Tom Wessels, manager of Respondent's Atlanta Buckhead Complex. Respondent

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[4] Respondent maintained a system for evaluating and ranking the production of FCs based upon length of service ("LOS"). The system was designed to compare the performance of FCs with similar LOS in Respondent's offices throughout the country. During Claimant's tenure, Respondent compared FCs with the same LOS year by year for the first five years of service. After five years, Respondent ranked FCs with LOS of 6 to 9 years as a group, and those with LOS of 10-plus years as a group.

Within each LOS group, Respondent divided the FCs into five production "quintiles." The top 20 percent at each LOS level were considered the first quintile producers, and the bottom 20 percent were the fifth quintile producers. Among other factors, Branch Managers also ranked FCs on the total client assets managed, and in some instances, on the number of new accounts opened over a given period of time.

approved Claimant's request to transfer her New York accounts to the Atlanta branch office, where Claimant began working in November, 1988. In connection with her move to Atlanta, Respondent also reduced Claimant's LOS standing by one year. [5]

By the end of December, 1988, Claimant's production level dropped to a level that placed her in quintile 5 and reduced her compensation to a "penalty box" payout level. During the first quarter of 1989, Claimant and her fiancé ended their engagement. Claimant remained in Atlanta. Claimant's reduced payout status continued throughout 1989.

In the February-March, 1989 time period, David McWilliams succeeded Mr. Wessels as the Branch Manager of the Atlanta Buckhead office. On or about March 9, 1989, Mr. McWilliams requested a special payment of $3,000.00 for Claimant (which she received) to offset problems she was encountering in increasing her production levels. Claimant's account development and production levels improved during 1989, and Claimant's year end review for 1989 from Mr. McWilliams was positive. In that review Mr. McWilliams commented that Claimant's hard work in 1989 would pay off in 1990.

In October, 1989, Claimant apparently sought medical advice for the first time for flu-like symptoms that she had experienced since the early part of the year without a full recovery.

In the first quarter of 1990, Claimant continued to develop new accounts and to increase her production levels. In March, 1990, Mr. McWilliams awarded Claimant a private office in recognition of her performance.

In April, 1990, Claimant became involved in a dispute with a recently-assigned client over information needed to complete an application for a transaction. Following a series of conversations between Claimant and the client and his sister, the client complained to Mr. McWilliams about Claimant's treatment of them. Mr. McWilliams arranged a meeting with the client, his sister and Claimant on April 18, 1990 to discuss their complaints. Based on his view that Claimant was rude and disrespectful to the clients in that meeting and that her conduct toward them constituted a violation of the Company's "Standards of Conduct" permitting immediate termination, Mr. McWilliams terminated Claimant the following day. Despite this basis for Claimant's discharge, Mr. McWilliams characterized the reason for Claimant's termination as "lack of performance" in a filing to the Georgia Department of Labor regarding Claimant's unemployment insurance application. The entry on Claimant's U-5 form indicated that her termination from the Atlanta office was "voluntary."

Within two weeks after her termination from the Atlanta branch office, Claimant had contacted Mr. West about rehiring her at the Fifth Avenue Branch. Mr. West made an

[5] A reduced LOS is beneficial because the FC is compared to less experienced FCs for production quintile rankings, or at least the FC's placement in the higher LOS groupings with the most senior and experienced FCs as comparators is delayed.

offer to Claimant to return to New York and she accepted. At Claimant's request, she began working in the Fifth Avenue Branch on June 11, 1990. Claimant received a second one-year reduction in her LOS upon her transfer back to New York.

In September 1990, Mr. West advised Claimant that he could not maintain the $40,000.00 annual draw (advance commission compensation) he had promised her because her production was too low to support it. He reduced her draw to $36,000.00, but waived approximately $2,000.00-$3,000.00 of a prior debt Claimant owed Respondent. At the end of 1990, Claimant wrote Mr. West and manager John Woodlock: "Thanks so much for all your help and support. In an otherwise not so good year, you've made things more comfortable than I expected. There have been some nice surprises! Hope 1991 is a better year for all of us."

Following her return to New York, Claimant experienced a high turnover in CAs.[6] Claimant's first CA left after three months, her second CA voluntarily left after one month and she was assigned a third CA in early November 1990, but he was terminated by the end of the year. In January 1991 Claimant was assigned a fourth CA. On or about March 5, 1991 Claimant wrote a four-page complaint about that CA to Mr. West and Sal Campione, the office administrative manager. On March 18, 1991, Claimant was assigned to her fifth CA, who was reassigned three days later to fill in for a manager's assistant on maternity leave. In April 1991, Claimant began to work with a sixth CA, who left for medical reasons in August, 1991. On or about August 14, 1991, Claimant was assigned her seventh CA.

Between May and July, 1991, Claimant arrived at the office and found a package on her desk that contained a dildo, lubricating cream and a sexually crude poem or poems. She reported this incident to Mr. West who, after investigating the incident, was unable to establish the source of the package.

By the end of 1991, her first full year after returning to New York, Claimant had not significantly increased her book of business and remained in quintile 5, with a penalty box rate of compensation. Claimant continued her emphasis on financial planning for clients and on developing consults accounts, both heavily promoted by Respondent at the time.

On or about September, 30, 1991, Claimant's treating physician, Dr. Alan W. Mead, wrote a letter stating that Claimant was under his care for "chronic Epstein-Barr syndrome. She has been advised to limit her activities and get adequate rest." Claimant provided a copy of that letter to Mr. West.

In January, 1992, Claimant contacted Catherine Casey, a Human Resources representative, about her problems with CAs, and also raised concerns about what she perceived as discriminatory distribution of client accounts when FCs left the firm. In February 1992, Claimant contacted Pat Cirillo, in-house counsel for Respondent, to

[6] The evidence before the Panel indicates that Claimant shared all of her CAs with other FCs in accord with office policy.

discuss problems she was having with her current CA. Shortly thereafter, Ms. Cirillo arranged for the assignment of a new assistant, Ben Quarles, to Claimant.

On or about February 18, 1992, Mr. West requested a penalty box exception for Claimant from the Human Resources Department, based on the timing of certain production credits in 1991 and on Claimant's time and effort on consults accounts. Respondent granted Claimant the exception as requested by Mr. West on April 20, 1992.

In early June 1992, Claimant found a photograph, left anonymously on her desk, depicting what appeared to be human genitalia. The photograph ultimately turned out to be a picture of a worm reproduced from a New York Times article. Claimant reported the incident to Mr. West. At a sales meeting on June 9, 1992, Mr. West addressed the subject of sexually explicit comments, jokes, and innuendos, stating among other things that such behavior was "unacceptable". Claimant, who did not attend the meeting, met afterward with Mr. West, and expressed that she was satisfied with the way the incident had been handled by him.

During 1992, Respondent initiated a new planning product, "financial foundations". By the end of the year, Claimant was ranked second in the office in completing financial foundation plans. Although her performance improved in 1992, particularly as measured by the number of new accounts opened, Claimant remained in quintile 5 in production and in assets. Claimant continued to focus her business development efforts on products Respondent was then promoting.

During 1992, Claimant also continued to seek medical treatment for her Epstein-Barr condition. Thereafter, Claimant generally kept Mr. West advised of her medical condition and treatments.

At the beginning of 1993, Claimant completed an anonymous employee opinion survey, to which she attached a lengthy narrative discussing her unhappiness with her termination in Atlanta, her experience with CAs after her return to New York, and her concerns about discriminatory account distributions. On or about April 1, 1993, Claimant wrote to Robert Sherman, the head of Respondent's Eastern Sales Division, about the employee survey and her personal experiences in the preceding years. In that letter, Claimant acknowledged that she was responsible for the consequences of her decision to move to Atlanta, but expressed concern about the support she had received since returning to New York and her interest in receiving "restitution" for what she viewed as unfair and discriminatory treatment. Claimant also indicated that she was concerned about retaliation. Tom Donovan, an Eastern Sales Division representative who reported to Mr. Sherman, contacted Claimant on or about June 11, 1993 to follow up on Claimant's letter to Mr. Sherman.

On June 16, 1993, Claimant wrote a 29-page letter, with 10 attached exhibits, to Charles Connelly, Respondent's head of security. In that letter, Claimant provided a detailed account of her employment history with Respondent, and requested "restitution" for what she viewed as a wrongful termination from her position in Atlanta, unfair

treatment with respect to CA assignments, inappropriate incidents involving the dildo package and the worm picture, and distribution of accounts in favor of male FCs. Mr. Connelly contacted Claimant immediately thereafter.

Between June 16, 1993 and the beginning of August, 1993, Claimant submitted additional letters and held a series of meetings with Mr. Connelly and Ms. Cirillo regarding her complaints, request for restitution and calculation of damages. Ms. Cirillo conducted a series of interviews with the various managers, including Mr. West, and other individuals identified by Claimant. Ms. Cirillo's contemporaneous notes indicate that she reviewed Mr. West's account distribution practices but, due to the lack of information and the number of man hours required to conduct a more thorough analysis, she did not conduct any additional review or analysis of account transfers at that time.

On August 3, 1993, Mr. Connelly and Ms. Cirillo met with Claimant for approximately two hours to review the information they had gathered from other sources about her complaints. During that meeting, among other issues Claimant raised a previously reported U.S. District Court decision involving a female FC's claim of discriminatory account distributions in one of Respondent's Massachusetts branch offices. At the end of the meeting, Mr. Connelly and Ms. Cirillo advised Claimant of their conclusion that Mr. West's account distribution system was fair, and that none of her other complaints warranted further action. Thereafter Claimant asked for reconsideration of her complaints, particularly with regard to the account distribution system. In a letter dated September 24, 1993, Ms. Cirillo and Mr. Connelly both reiterated that they had looked into her claims that female FCs did not get a fair share of accounts distributed by management, and found no discrimination.

After receiving the September 24, 1993 letter, Claimant prepared a letter to Respondent's Vice President and General Counsel, complaining about the inadequate investigation conducted by Mr. Connelly and Ms. Cirillo, and reiterating her complaints about her termination in Atlanta and the discriminatory account distribution system in her branch office. In that letter Claimant also stated that sexual harassment issues are "under control at present." On November 17, 1993, Assistant General Counsel Thomas A. Smith responded to Claimant and stated that he had been asked to "conduct an independent review of the work done by Mr. Connelly and Ms. Cirillo."

On or about January 24, 1994, Claimant filed her first formal charge of discrimination against Respondent with the United States Equal Employment Opportunity Commission ("EEOC"), focusing almost exclusively on discriminatory account distributions favoring male FCs. On January 25, 1994, Claimant advised Mr. Smith that she had filed a charge "to protect her rights". Mr. Smith did not respond to Ms. Thomas. On March 31, 1994 outside counsel submitted Respondent's answer to Claimant's January 24, 1994 EEOC complaint, denying any unlawful discrimination.

Between January, 1994 and December, 1996, Claimant filed additional claims of discrimination in various forums. For example, or about October 19, 1995, Claimant, together with two other female FCs, filed a claim with the NASD, asserting

discriminatory distribution of client accounts. That claim was amended in April, 1996. On or about May 15, 1996, the NASD severed the three claims and directed each claimant to refile an individual claim. In October, 1996, Claimant filed a new charge of discrimination with the EEOC against Respondent, the NYSE and the NASD, protesting the requirement to arbitrate statutorily-based claims of employment discrimination.

From 1994 to 1996, Claimant's work performance improved, at one point qualifying her for production quintile 4. Mr. Quarles left Respondent's employment at the end of 1995. After a brief period with another CA, Claimant was assigned to work with CA Jane Vishnev.

In January, 1996, Claimant consulted with a specialist in chronic fatigue syndrome ("CFS"), Dr. Susan Levine. By the end of 1996, Claimant indicated in a Christmas letter to friends and family that she was back to running four miles three times a week and felt better than she had in the eight prior years.[7]

On or about January 1, 1997, Ralph DeSalvo succeeded Mr. West, who had retired at the end of December 1996, as Branch Manager of the Fifth Avenue office. Other FCs with low production in the Fifth Avenue office were "released" at the time Mr. DeSalvo took over the Branch, but Claimant was not released or asked to leave.

On or about January 27, 1997, Claimant filed a third EEOC charge against Respondent, alleging retaliation by Respondent for having filed her earlier charges. On February 27, 1997, the ***Cremin*** class action suit was filed in the United States District Court for the Northern District of Illinois. Claimant was a named class representative in that action.

On February 9, 1997 and on March 19, 1997, Claimant had two separate accidents while skiing. Claimant's health deteriorated and Claimant continued to see Dr. Levine and an energy healer throughout 1997. On October 15, 1997, Claimant consulted with a neurologist, Dr. Frank Petito, to determine if there was a connection between her ski accidents and the deterioration in her health. She did not follow up with Dr. Petito after the initial visit nor schedule an MRI as recommended by him.

Mr. DeSalvo required all FCs to submit a proposed business plan at the beginning of each calendar year, setting forth the FC's production goals and expectations for the coming year. At the beginning of 1998, Claimant and Mr. DeSalvo became involved in a dispute over Claimant's proposed 1998 business plan, that Mr. DeSalvo initially rejected. After negotiations between Claimant's attorneys and Respondent's attorneys, Mr. DeSalvo agreed to grant Claimant an extension of time for submission of her 1998 business plan.

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[7] In that same Christmas letter, Claimant also noted that during 1996, she lost two major clients representing almost 10% of her business.

On or about April 17, 1998, Claimant filed a fourth charge of discrimination with the EEOC, alleging further retaliation for her participation in the *Cremin* suit and her other complaints.

On June 17, 1998, the Stipulation of Settlement was executed by the class representatives and Respondent. In September, 1998, Claimant filed a request for mediation of her claims pursuant to the Stipulation of Settlement. By the end of 1999, attorneys for Claimant and Respondent were engaged in formal negotiations for a separation agreement. On February 16, 2000, Claimant and Respondent formally entered into a separation agreement and pursuant to its terms, Claimant resigned from employment with Respondent on February 18, 2000.[8]

Pending Claims By Claimant

In her initial Statement of Claim, Claimant asserted that she suffered from the wrongful conduct alleged by the class, particularly with respect to allocation of client accounts and other business opportunities, and lack of administrative support, and she asserted additional claims as well. Based upon the evidence offered and admitted at the Third-Stage Hearing and the issues presented by the parties in closing statements and briefs, the following claims presented by Claimant are now before the Panel for consideration[9]:

1. Class-wide claims of discrimination in compensation and working conditions affecting compensation based upon gender in violation of Title VII.

2. Individual claims of gender-based discrimination in compensation and working conditions affecting compensation in violation of Title VII, the New York State and City Human Rights Laws, and federal and state Equal Pay statutes.

3. Individual claims of sexual harassment/hostile environment.

4. Individual claims of retaliation for complaints of discrimination.

5. Individual claims of constructive discharge.

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[8] In this Decision and Award, the Panel did not make any setoff or other adjustment that might be contemplated by the parties pursuant to the separation agreement.

[9] Claimant asserted additional claims for assault, battery, intentional infliction of emotional distress/outrage, negligent infliction of emotional distress, negligent retention of employees, negligent supervision, prima facie tort, interference with business opportunity/expectancy, interference with contract, interference with prospective advantage, interference with business relationship, defamation, discharge in violation of public policy, fraudulent inducement, fraud, invasion of privacy, false imprisonment, breach of contract, breach of covenant, promissory estoppel, contract implied in fact, equitable estoppel, nonfeasance, misfeasance, bad faith performance, breach of covenant of good faith and fair dealing, and undue reliance. The Panel has considered each of these claims and finds that none was prosecuted by Claimant, and further finds that there is no evidentiary support in the record for a finding in favor of Claimant on any of these claims. Accordingly, the Panel denies relief on the claims enumerated in this footnote.

6. Individual claims for violations of the Americans with Disabilities Act.

Panel Findings and Conclusions

Applicable Limitations Periods for Claimant's Claims and Relief

The Panel has considered the arguments of both parties regarding the applicable relief period, including legal theories such as the continuing violation doctrine, and finds the record does not support an extension of the applicable limitations period on any of Claimant's pending claims. Section 7.2(6) of the Stipulation of Settlement sets the applicable statutes of limitations for various claims, generally restricting relief to the "class period" beginning on January 1, 1994. The one express exception in Section 7.2(6) is the Section 7.2 (6)(c) provision for claims of sexual harassment "if they were the subject of a timely (EEOC) charge filed by the individual claimant." Claimant's January 24, 1994 filing with the EEOC did not state a claim for sexual harassment. The Stipulation does not provide for any other exception. Nor on the basis of the record proof in this proceeding does any "continuing violation" theory preserve claims that accrued before the class period. *Bazemore v. Friday*, 478 U.S. 385 (1986), cited in *Cherosky v. Henderson*, 330 F.3d 1243, 1248 (9th Cir. 2003).

The Panel nonetheless considered evidence predating January 1, 1994 as background in support of Thomas' timely claims. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 112 (2002), *citing, United Airlines, Inc. v. Evans*, 431 U.S. 533, 558 (1977).

Class Claims of Discrimination in Compensation, Including Account Distribution

The Panel also received and reviewed written reports prepared by the parties' expert witnesses for the statistical evidence hearing. The Panel confirms its prior ruling, in which it granted collateral estoppel effect to the *Sumner* decision, and its finding of a pattern and practice of discrimination with regard to the compensation system, including account distributions.[10]

The Panel's finding of a pattern and practice of discrimination as to compensation decisions creates a rebuttable presumption that specific decisions regarding distribution of accounts and application of the compensation system to Claimant were the product of illegal gender discrimination. Respondent bears the burden of persuasion that compensation decisions and practices affecting Claimant individually while she was an FC were based upon lawful reasons. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Robinson v. Metro-North Commuter R. R. Co.*, 267 F.3d 147 (2d Cir. 2001). On other claims of gender-based discrimination in working conditions not addressed in *Sumner*, for example assignment of assistants and distribution of IPOs,

[10] The Panel permitted further argument on the effect of its collateral estoppel ruling, addressed by the parties in their closing briefs on legal issues.

Claimant bears the burden of proof under the applicable *McDonnell Douglas* analytic framework.

Claimant's Individual Claims of Discrimination in Compensation and Working Conditions Based upon Gender in Violation of Title VII, the Equal Pay Act and New York State and New York City Anti-discrimination Statutes

Respondent has failed to meet its burden to establish that impermissible discrimination based on gender was not a factor in the distribution of accounts to Claimant during the relevant time period.[11]

Under the system in effect during the class period and until the Company imposed a company-wide system in June, 1998 as a result of the class-action settlement, FCs were ranked and compensated on the basis of production credits generated by the financial services they provided to clients. However, the actual distribution of accounts of departing brokers in the Fifth Avenue office during this time period, as described by Mr. West and Mr. DeSalvo and others, was based in substantial measure on the discretion of individual branch managers. In addition, producing sales managers were involved in the decision on distribution of accounts from departing brokers and transferred accounts were used as "motivators". Personal relationships among FCs in the office and customer requests were additional considerations. Another factor, quintile standing, was significant but that factor, too, was subject to discretionary changes by branch managers. For example, at times Mr. DeSalvo only permitted FCs in quintiles 1, 2 and 3 to receive transfers. But in one instance in July 1999, Mr. DeSalvo awarded Sales Manager George Sula, who was going back into production at LOS 0, substantial accounts of departing brokers.

Claimant remained in quintile 5, the lowest ranking group, other than a brief period in 1998 when she moved into quintile 4. Respondent asserts that this gender-neutral factor, quintile standing based solely on production credits, accounted for the differential and was a gender neutral and not a gender-based factor.

Based on its review of the statistical presentations, the Panel finds that in the Fifth Avenue office there were "statistically significant disparities in earnings between female and male FCs...not explained by non-discriminatory factors." *Sumner* at 7. Claimant, as well as other female FCs in the office, were adversely affected in their compensation by this discrimination. To be sure, a few high producing female FCs in the Fifth Avenue office on occasion received substantial accounts distributed from departing brokers. However, the record establishes that overall, the system of distribution of accounts in effect in the Fifth Avenue office during the class period was consistent with the classwide pattern and practice of discrimination, whether measured by LOS or overall comparisons between males and females. The fact that a few individual female FCs did well is not controlling where, as here, the record supports that the compensation system in place in

[11] The Panel finds that in this case, the relief available under Title VII, the Equal Pay Act, and under New York State and New York City antidiscrimination statutes is the same.

this office was "tainted by pervasive discrimination which impaired the ability of women to earn equal pay for equal work." *Sumner* at 12.

On the other hand, Claimant failed to meet her burden of proof to establish that the assignment of sales assistants to her was discriminatory or based on gender. To be sure, upon her return to the New York office Claimant had a series of CAs in a short period of time. However, the issue of assignment of CA's was by all accounts a problem for every broker in the office. Furthermore, during the class period, Claimant worked with two assistants, Ben Quarles and Jane Vishnev, for extended periods of time and she was satisfied with their work. Claimant commended Mr. Quarles in writing and gave him excellent performance reviews. Claimant also subsequently described Ms. Vishnev as one of the best CAs she worked with during her career with Respondent. There was an insufficient showing that male brokers were treated differently than female brokers with regard to the assignment of CAs, or that Claimant was singled out for disparate treatment on the basis of her gender.

Similarly, Claimant has failed to meet her burden of proof to demonstrate that IPOs, handled by the retail coordinators, were distributed to FCs on the basis of impermissible, gender-based factors.

Claimant's Individual Claims of Sexual Harassment/Hostile Work Environment

Claimant has failed to establish that she was subjected to sexual harassment and a hostile working environment during the class period. To prevail on a claim of sexual harassment/hostile environment pursuant to Title VII, Claimant must establish that the conduct she cites was unwelcome and that it was sufficiently severe or pervasive to make a reasonable person in her protected class believe that her conditions of employment or working environment had been so altered as to become hostile or abusive. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). Title VII is not a "general civility code for the American workplace" but rather "[t]he prohibition of harassment on the basis of sex... forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80-81 (1998). An employer may be liable for a supervisor's misconduct in creating a hostile environment even where it is not "at fault" but an employer may avoid liability by affirmatively demonstrating that it has exercised reasonable care to prevent and correct harassing behavior. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). However, "...isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

Claimant in testimony cited only two minor incidents of sexually harassing conduct after January 1, 1994. These two incidents, not reported to management at the time, fail to establish a sufficiently severe or pervasive hostile environment.

Claimant acknowledged in a November 17, 1993 letter to Respondent's general counsel that she was not complaining about sexual harassment because she felt the

situation was "under control at the present." Furthermore, Claimant failed to present a valid claim of a continuing violation with regard to the incidents of harassing conduct cited by her prior to the class period.[12] *Morgan, supra,* at 112; *Lightfoot v. United Carbine Corp.*, 110 F.3d 898 (2d Cir. 1997).

Claimant's Individual Claims of Retaliation for Complaints of Discrimination

The Panel finds that Claimant engaged in protected activity by opposing unlawful employment practices cognizable under Title VII, and that Respondent took action against Claimant based on her complaints that was likely to dissuade other employees from engaging in protected activity.

Under Title VII, an employer may not discriminate against an employee who opposes an unlawful employment practice under the statute, or because that employee has made a charge, testified, assisted, or participated in an investigation, proceeding, or hearing under the statute. 42 U.S.C.A. § 2000e-3(a). Claimant has the initial burden of establishing a prima facie case of retaliation under the *McDonnell Douglas* test, and must show that she was engaged in a protected activity, that she suffered an adverse employment decision, and that there was a causal connection between the protected activity and the adverse decision.

In 2006, the United States Supreme Court expanded the definition of an "adverse action" of retaliation, holding that conduct could constitute harm if it had the effect of discouraging a reasonable employee from making a discrimination complaint. *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006). The Supreme Court ruled that there was no "bright light" rule for determining whether or not an employer's conduct constitutes illegal retaliation because, as a practical matter, not all adverse actions are specifically related to terms and conditions of employment. The harm must be "significant" and not "trivial", based on an objective standard of examining whether a "reasonable employee" would view the retaliatory harm as significant. That determination requires a careful case-by-case analysis of the context in which the alleged retaliation occurred. *Id.* at 2415. An employer's attempts to correct an adverse action do not necessarily protect it against liability. *Holloman v. New York City Department of Corrections*, 2006 U. S. Dist. Lexis 52424 (E.D.N.Y. July 31, 2006).

The Panel finds that during the class period and following Claimant's participation in the *Cremin* class action litigation, Claimant was subjected to disparate treatment constituting retaliation under Title VII.

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[12] Claimant cited the May, 1991 dildo incident, the 1991 sex call information, the June, 1992 worm picture incident, the June, 1993 postcard of a bare-breasted Hawaiian woman, a December, 1993 incident when pornographic cartoon jokes were found on the copier, and telephone conversations of a male FC concerning his sexual exploits that Claimant overheard. The Panel questions whether these incidents are sufficiently severe or pervasive to constitute actionable harassment, but in any event, they occurred outside the relief period and they are not part of a continuing violation.

During, and before, the class period, Claimant's branch managers were well aware of Claimant's complaints of discrimination. Ms. Cirillo interviewed Mr. West in the preparation of her report about Claimant's claims in 1993, and he was contacted by counsel in preparation of Respondent's answer to Claimant's January, 1994 EEOC complaint. Mr. DeSalvo acknowledged having been "briefed" by Respondent's legal department about Claimant shortly after he arrived in January, 1997, and he was made aware that she and others had filed claims in the *Cremin* matter at the end of February 1997. Mr. DeSalvo also testified that he had "numerous" discussions with in-house counsel about Claimant and her complaints.

The testimony of other FCs, managers and support staff in the office confirmed that Mr. DeSalvo was at times abrasive and condescending toward Claimant. A former administrative manager recalled one meeting in which Claimant was "getting very upset to the point where she was in tears." That manager also noted that he almost never saw Mr. DeSalvo working with Claimant "in a constructive way", although Mr. DeSalvo frequently worked with individual male brokers about strategy and improving their books of business. Mr. DeSalvo also gave others the impression that Claimant was a "thorn in his side" because of the lawsuit.

Additionally, Claimant was increasingly isolated in the office --in essence made a pariah-- after filing her claims. Management's treatment of Claimant discouraged others from associating with her. There was a sense that "being fair and nice" to Claimant was a "problem" to management. Several female FCs variously described Claimant as being "put out to pasture" and "just like making a mouse run around through a maze chasing a piece of cheese that was never going to be there." At least two female FCs described meetings where no one would sit next to Claimant for fear of being associated with her by management. One FC described feeling that if she were to "speak out... you are going to get the same treatment."

Claimant was moved from a preferred location near her CA, and subsequently placed in the "bull pen" with rookie FCs, despite the fact that there was no written policy and no "hard rule" with regard to when any FC other than a rookie was placed in the bull pen. No other long-term FC was assigned to the bull pen or other remote location as was Claimant after she asserted complaints and filed claims of discrimination. One FC described Claimant's work area as surrounded by "boxes and empty desks and empty computers."

The Panel finds on this non-class claim, Claimant met her initial burden of establishing a *prima facie* case of retaliatory discrimination and Respondent failed to establish that there was a legitimate business reason for the retaliatory treatment of Claimant under review, treatment that the record establishes was more than "normally petty slights, minor annoyances." *White, supra,* at 2414-15. Respondent has failed to establish that the treatment of Claimant was based on considerations other than the fact that she filed her complaints of discrimination.

However, the Panel finds that Claimant failed to establish that her meetings with legal and compliance officers of Respondent constituted retaliation. Those meetings were the result of Respondent's legitimate efforts to cooperate with an ongoing SEC investigation of one of Claimant's clients. Similarly, Claimant failed to establish that Respondent's directive to her to cease sending "quarterly preferred reports" to her priority clients was a form of retaliation and not, as Respondent demonstrated, the result of a change in companywide policy regarding communications to investors.

Claimant's Individual Claims for Constructive Discharge

The Panel finds that Claimant's resignation from employment with Respondent on February 16, 2000 did not constitute a constructive discharge. [13]

In order to establish a constructive discharge, a non-class claim, Claimant has the burden of proving that the actions of Respondent deliberately rendered Claimant's employment conditions so intolerable that, objectively, a reasonable person would have been compelled to resign. *Petrosino v. Bell Atlantic*, 385 F.3d 210 (2d Cir. 2004).While a pattern of actionable retaliation for complaints of discrimination can create sufficiently intolerable conditions to support a finding of constructive discharge, such proof alone will not establish a constructive discharge. *Mandel v. Champion International Corp.*, 361 F. Supp.2d 320, 326-327 (S.D. N.Y. 2005).

The Panel finds that Claimant did not establish that her decision to resign was a constructive discharge. Claimant did experience retaliation for her complaints of discrimination as discussed above. However, the conditions that Claimant cited while wrongful and warranting relief in this case, were not so intolerable as to cause an objective person to feel compelled to resign.[14]

Moreover, Claimant began to anticipate and plan her departure from employment with Respondent as early as mid-1998, but she did not resign at that time. Throughout 1998 and 1999, Claimant communicated to friends, clients and co-workers the fact that she intended to leave Respondent's employ but did not do so until February 18, 2000. The Panel also finds that other reasons contributed to this decision, including Claimant's deteriorating health, loss of major clients, and her interest in writing a book.[15]

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[13] Claimant resigned pursuant to a negotiated separation agreement which provided, among other things, that Claimant preserved the right to argue that the separation was a constructive discharge, and Respondent preserved the right to argue that it was not. The Panel's finding on this claim is not based upon that agreement.

[14] In fact, the evidence shows that during the last two years of her employment, Claimant received support from Human Resources and Respondent's attorneys regarding concessions on the content and timing of her business plan.

[15]Even if Claimant proved that she suffered a constructive discharge (which she did not), there is insufficient evidence to support an award of post-termination damages. Claimant made virtually no effort to secure other employment following her resignation. By late 2000 or early 2001, Claimant concluded that she was not physically capable of working and by her own account she continued to be disabled from any employment through the end of this Third-Stage Hearing.

Claimant's Individual Claims for Violations of the Americans With Disabilities Act

The Panel finds that Claimant has failed to establish that Respondent violated the Americans with Disabilities Act ("ADA")[16] by failing to make reasonable accommodations for the Epstein-Barr/Chronic Fatigue condition from which Claimant suffered, at a minimum throughout the period from January 1, 1994 to the date of her resignation from employment in February, 2000.[17]

To prevail on this claim, Claimant must show that she was qualified and able to perform the essential functions of her job with or without reasonable accommodations, and, to the extent that she required and requested reasonable accommodations, Respondent denied such accommodations.

Prior to 1998, Claimant's requests for accommodation of her chronic health conditions consisted primarily of a request to work a flexible schedule that allowed her to report to work at a later time, and allowed time off for medical appointments. Respondent granted these accommodations.

In early 1998, Claimant apparently experienced a worsening of her condition. She requested a letter from Dr. Levine, her treating physician, to seek further accommodations of her condition from Respondent, including a "supportive environment" and generally less stress. In April, 1998, Dr. Donald H. Gemson, Respondent's Medical Director, began a series of attempts to obtain more detailed information on Claimant's physical condition and her accommodation requests. Ultimately, almost a year later, on or about April 21, 1999, Dr. Levine and Dr. Gemson conferred by telephone. Claimant's correspondence with Dr. Levine between April, 1998 and April, 1999 indicates that Claimant sought accommodations including a private office, a good assistant, a modified work schedule, less stress, and an increase from the penalty box payout to the regular percentage payout for FCs.[18] Claimant's physician failed to provide any medical support for these requested accommodations.

Dr. Levine did not testify at the hearing. Dr. Gemson testified that he did not and could not recommend any of the accommodations requested by Claimant other than the modified work schedule she had been granted.

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[16] The standard of proof and relief available under federal, state and local laws in this area are substantially the same.

[17] The parties do not appear to dispute that Claimant had a condition that constitutes a disability under the ADA.

[18] Respondent contends that Claimant and her treating physician impeded the "interactive" process of identifying reasonable accommodations, thereby precluding her right to additional accommodations. While the evidence does indicate that Dr. Levine was somewhat unresponsive to contacts from Claimant and Respondent's physician during this period, there is evidence that Claimant and her attorneys engaged in ongoing efforts to clarify and support Claimant's request for accommodations. In any event, the Panel does not find it necessary to make a finding on this issue to resolve Claimant's claims under the ADA.

The determination of "reasonable accommodations" under the ADA requires a fact specific, case by case assessment. What is reasonable must be viewed in the context of the FC position and the essential functions and requirements of that position.

The Panel finds that Respondent did not fail to provide reasonable accommodations in violation of the ADA. The Panel agrees with Respondent's contention that a private office and a "better" administrative assistant are not reasonable accommodations in this context. Similarly, Claimant's request for a supportive environment free of unreasonable pressure is too vague and subjective. The FC position is inherently stressful and the ability to work in a stressful environment could be considered an essential job function.

Damages

The Panel finds that Claimant has prevailed on her claim of gender-based discrimination in compensation and her claim of retaliation.

In determining the appropriate relief and damages, the Panel reviewed and considered the evidence and models presented by Jerry I. Goldman, Ph.D., and Bernard Siskin, Ph.D., as well as evidence relating to damages in the testimony of witnesses and in other exhibits. The Panel also considered factors other than discrimination and retaliation that the Panel finds affected Claimant's production, including the effects of her chronic medical condition and reduced hours, loss of major clients, and the business services Claimant elected to pursue.[19]

The Panel finds that Claimant is entitled to damages for economic losses during the relevant period, including back pay for lost compensation and benefits, and interest under applicable law, in the amount of $320,000.00.

The Panel further finds that Claimant is entitled to an award in the amount of $100,000.00 as compensation for emotional distress.[20]

The Panel finds an insufficient basis for an award of punitive damages.[21]

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[19] Claimant contends that the retaliatory conduct of Respondent caused and/or exacerbated her medical condition. Claimant did not call any treating physician or other health care provider, nor any expert witness, to establish a nexus between Respondent's conduct toward Claimant and Claimant's medical condition.

[20] An award of emotional distress damages need not be based on medical or expert testimony although such evidence can be persuasive. *Plunkett v. NYU Downtown Hosp.*, 801 N.Y.S.2d 354 (N.Y.A.D. 2nd Dept. 2005).

[21] The *Contardo* decision cited by Claimant is distinguishable on the facts as well as applicable law. The Panel has also considered subsequent decisions of the U.S. Supreme Court regarding the appropriate standard for an award of punitive damages.

AWARD

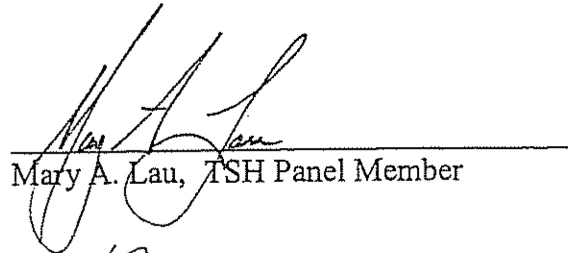
- Claimant prevails on her claim of gender-based discrimination in compensation and on her claim of retaliation. All other claims not granted are denied and dismissed.

- Respondent is directed to pay to Claimant the sum of $420,000.00 in damages.

- Claimant as a prevailing party is awarded attorneys' fees and costs consistent with the above Decision and Section 7.11(11) of the Stipulation of Settlement. The Panel directs the parties to meet and confer to attempt in good faith to stipulate to an appropriate award of attorneys' fees and costs. If the parties are unable to agree within sixty (60) days of the date of this Decision and Award, the parties shall submit motions and their respective arguments on the issue. The Panel retains jurisdiction solely for the purpose of determining the fees and costs to be awarded to Claimant.

Dated this 28th day of February, 2007.

Richard S. Peskin, Chair, TSH Panel



Mary A. Lau, TSH Panel Member

Susan T. MacKenzie, TSH Panel Member