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Compensations, Benefits A \$3,790,900

For the plaintiff:

William I. Edlund  
Allan N. Littman

For the defendant:

Christine M. Choi  
Michael J. Fortunato  
Amy M. Fritsky

JAMS

Hon. James Warren ,  
retired

**RESULT DATE:** Dec. 6, 2010

Bradford Shaffer v. Merrill Lynch, Pierce, Fenner & Smith Inc., and Chair and Committee Members, Management, Development and Compensation Committee, Board of Directors of Merrill Lynch & Co. Inc. (11000059206) 11-JV\_184

**FURTHER DESCRIPTION:** Wage and Hour, Restraints on Competition

**ARBITRATION:** \$3,790,900

**ATTORNEY:** Plaintiff - William I. Edlund, Allan N. Littman (Bartko, Zankel, Tarrant & Miller, San Francisco).  
Defendant - Christine M. Choi, Michael J. Fortunato, Amy M. Fritsky (Fortunato & Harbison, Pa.).

**TECHNICAL:** Defendant - Gregory Wood, securities industry, Henderson, Nev..

**FACTS:** Plaintiff Bradford Shaffer was a financial advisor, who had worked for Merrill for over 20 years. He was in a dispute with another Financial Advisor about his agreement to split commissions with her.

Shaffer was dissatisfied with the resolution that ended the dispute and decided to leave the firm. Shaffer left and went to work for a competitor. Merrill then forfeited his awards in Deferred Benefit Plans, which provided automatic forfeiture for working with a competing financial service company. Shaffer demanded all of his awards - \$1,626,900, and Merrill refused to pay him anything. Shaffer then demanded JAMS Arbitration for the Awards and also claimed that he was entitled to tort and punitive damages under Civil Code section 52.1 (the Bane Civil Rights Act), because Merrill knowing that it was illegal, enforced the covenant not to compete and denied Shaffer, by threats and economic coercion, his statutory employment rights.

Judge Warren had hearings on discovery and two dispositive legal issues; whether California law applied (not New York law) and whether Business and Professions Code section 16600 made it illegal for Merrill to forfeit Shaffer's awards in the Deferred Benefit Plans when a financial advisor when to work for a competitor.

**CONTENTIONS: PLAINTIFF'S CONTENTIONS:** Plaintiff contended that the forfeitures were illegal and void, that section 16600 had been part of California's jurisprudence for decades, and that Merrill and its Committee of Directors knowingly violated section 16600, including its defense in the arbitration. Shaffer also contended that Merrill interfered by threats, intimidation, and coercion with Shaffer's employment rights and that he was entitled to tort and punitive damages and attorney fees under Code section 52.1.

**DEFENDANTS' CONTENTIONS:** Merrill contended that New York law applied and that under both New York and California law, the covenant against competition was valid and lawful. Merrill also contended that section 52.1 required threats or physical violence and that the plans' forfeiture provisions were merely speech. Merrill further claimed that the restraint was imposed in good faith and was not directed to Shaffer but was nationwide, and that Shaffer was free to leave Merrill at any time.

**SETTLEMENT DISCUSSIONS:** Merrill offered \$500,000 before the arbitrator ruled on section 16600. Shaffer demanded \$3.4 million. Merrill then offered \$750,000 for Shaffer signing a full release of all rights. That offer was rejected.

After the award on the merits, Shaffer offered to settle the attorney fees and costs liability for \$729,786. Merrill offered \$97,338 after hearing, the arbitrator awarded Shaffer fees and costs of \$1,164,000 for a total award of \$3,790,900.

Shaffer filed a separate lawsuit, now pending in the Federal Court, for constructive discharge, gender/sex discrimination and related claims.

**RESULT:** Total award of \$2,626,900 (\$1,626,900 economic; \$750,000 non-economic; \$250,000 punitive). The award included his rights under the plan, which entitle him to stock awards that remain subject to vesting schedules rather than an immediate payment. The value of the rights varies with the stock price of Bank of America.

Judge Warren found in a 56-page award that Merrill engaged in unprofessional litigation tactics that constituted active and ongoing aggressive conduct to enforce an illegal covenant. He ruled that Merrill had engaged in wrongful, oppressive and fraudulent conduct, replete with many examples, which coercively deprived Shaffer of his employment rights. He found that Merrill's conduct was professionally and morally reprehensible and was contrary to the corporate culture that Merrill says it follows. In his final award, Judge Warren determined that Civil Code section 52.1 did not require physical violence or threats of violence (as argued by Merrill) and that it applied to Merrill's conduct which (contrary to Merrill's argument that it was in good faith and merely speech) constituted coercive threats to violate section 16600. The arbitrator ruled that Merrill exerted economic and psychological force in connection with carrying out its threats, and, as a result, Shaffer suffered emotional distress for which the arbitrator awarded \$250,000, and because Merrill deprived Shaffer of his money by conduct that was oppressive and fraudulent, awarded \$750,000 punitive damages. The total compensatory and punitive damages were \$2,626,900.

**OTHER INFORMATION:** The attorney fees award was \$1 million, plus 1.25 enhancement over a reasonable lodestar of \$525,000 (\$131,500). Total costs requested were \$34,465 and \$32,815 was allowed.

