# Merrill Lynch - Can 900 Women Be Wrong?

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*A group of female financial consultant employees at Merrill Lynch filed a class action lawsuit suit against Merrill Lynch charging, "gender discrimination in wages, promotions, account distributions and other areas of employment." Initially, only one of the female financial consultants filed the legal suit against Merrill Lynch. However, the suit grew to eight and it is estimated that as many as 900 women could join the class action discrimination suit. The class action suit was intended to seek damages for wrongdoings and to enhance Merrill Lynch's diversity initiatives to correct any illegal issues. This case is appropriate for a Human Resources Management and Business Law class.*

## THE BACKGROUND OF MERRILL LYNCH

Merrill Lynch is among the world's leading financial management and advisory companies. Merrill Lynch employs more than 14,000 Financial Consultants in over 640 offices worldwide. It is estimated that Merrill Lynch has approximately $1.5 trillion in total private client assets and has offices in 35 countries. Merrill Lynch is organized into three interrelated businesses. These are Global Markets and Investment Banking Group (GMI), Global Private Client Group (GPC), and Merrill Lynch Investment Managers (MLIM). [See Exhibit 1]

## THE CASE

Sue Ellen Hall joined Merrill Lynch as a part of their training program for brokers in 1982. Since that humble beginning, she had attained the level of broker and assistant vice president. She had managed between $70 to $85 million in assets annually and her efforts had produced approximately $500,000 of yearly profits for the company. She had a MBA from Northeastern University and attained a "very respectable work record." With credentials such as these, Sue Ellen felt she should have earned a level of trust. However, she felt this was not the situation. Sue Ellen felt that the company culture of this office "was such that female brokers were passed over for the plum accounts and perks." Furthermore, she felt that the good "old-boy network in its most blatant manifestation" was working in full effect at this office.

In her private life, Sue Ellen had a husband and children. However, the fact that she had a

family, although rewarding in a personal sense, had been a challenge in her professional life. When Sue Ellen learned that she was pregnant with her fourth child, she was quite apprehensive about informing her boss of 13 years, Mike Williams.

Mike had often spoken unfavorably concerning the number of children in Sue Ellen's family. On one occasion, Mike stated that he "wished women could combine family and career, but that he did not think it was possible." On another occasion, he stated that Sue Ellen was denied a transfer because Mike felt she might be "too busy raising her children instead of nurturing her book of customer accounts." Ironically, Sue Ellen felt this was not his attitude with male brokers. She felt Mike encouraged male employees to have children because he felt it improved their performance as brokers.
In another situation, Sue Ellen had learned of an opening at a branch office in California. When she spoke to Mike about the position, he informed her that he would not consider her for the transfer until she let him know whether she was going to have another child. Mike wanted to reassure the branch manager in California that she did not intend to have any more children.

However, Sue Ellen could not postpone informing Mike concerning her pregnancy. While in Mike's office during a casual discussion, Sue Ellen informed him that she was pregnant. He responded by telling her that if she decided to come back to work after the pregnancy, "she should forget that she had children and a husband." At a later time, Mike then began pressuring Sue Ellen to transfer her accounts that she had cultivated over her tenure to other brokers at Merrill Lynch. In fact, he threatened to "change her support staff if she would not transfer her accounts after she gave birth to her child."

Unfortunately, Sue Ellen encountered medical problems during her pregnancy and her physician recommended she take time off from work on a leave of absence. As prescribed by Merrill Lynch's paid leave policy, Sue Ellen was eligible to receive 26 weeks of paid illness leave. In the beginning, Sue Ellen obtained benefits for her maternity leave based on her 1993 income. However, after 13 weeks, her status was switched to "paid illness leave" by Merrill Lynch. As a result of this status change, Sue Ellen's benefits were recalculated basing it on her 1994 income. This amount was less than her income in 1993 due in part "to the stock market retreat." As a result, Sue Ellen received lower benefits. She believed "they saw a way to save themselves some money."

To further complicate matters, after her pregnancy and while she was still on bed-rest during her maternity leave, Mike again started asking her to transfer her client's accounts to other brokers. As an enticement for Sue Ellen to relinquish her accounts, Mike stated that Merrill Lynch would pay her "half of her 1994 taxable income to transfer her accounts." He called her a few days later to see if she had made a decision. Upon learning

that Sue Ellen did not want to completely end her career at Merrill Lynch, Mike offered her a "part-time position" at Merrill Lynch as another inducement if she relinquished her accounts. He also stated that her incentive plan for financial consultants would vest if she would turn over her accounts.

After feeling worn-down by the pressure and relying on these assurances, Sue Ellen agreed to relinquish her accounts that she had nurtured over her 13-year tenure. Mike informed her that Merrill Lynch was reviewing the specifics of the position and that she should begin working with the operations manager to inform her clients of the change of brokers. However, she was to assure the clients that even though they were receiving a new broker, she would still be working with the account. Sue Ellen worked with the operations manager to achieve this change until only a few accounts were left.

Sue Ellen returned to work on a Friday and was informed that she had been fired. However, Mike did not inform Sue Ellen of her termination in person. Instead, Mike's secretary informed Sue Ellen that she had been fired. Sue Ellen felt this was strange because she was supposed to begin a new position with the company the next week. The secretary stated that she would keep the paper work until Monday. After a difficult weekend, Sue Ellen tried to reach Mike and was informed that he would contact her. However, after a two-day period, she did not receive a call. Finally, the secretary informed her that the paper work had been put in the previous Friday to terminate her position. Confused and upset, Sue Ellen questioned what she had done to deserve this type of treatment. However, she ultimately decided there was no other option but to sue the company and hope other women would not have to go through this type of treatment. Sue Ellen filed a formal charge against Merrill Lynch later.

Another female broker, Joan Respar, started working at Merrill Lynch's office in New York. She brought five years of solid experience in the securities industry from another company and was well respected in the industry. Although she had been hired by the previous vice president at that office as a broker, Sal Antanucci took over the position as the resident vice president and became Joan's boss. She stepped in as a cash management account team leader and within the first year, began a college student internship program at that office. However, Joan felt her experiences were also met with a number of challenges and concerns.

As a condition of employment in her contract, she was required to perform at a higher Length of Service designation (LOS) than similarly situated males or males hired at the company with more experience. The LOS is an internal rating system used to set production requirements for brokers. By requiring her to attain a high LOS, it effectively required her to achieve higher production and asset rates. Joan felt that she was "dealing with a bar

that was four times her height" and "that the men working at the company were dealing with a bar that came up to their ankles."

Joan requested on three occasions that her LOS be lowered and was denied each time. However, Joan felt that it was not unusual for male brokers to lower their LOS designations upon request.

Furthermore, as a new hire, Joan felt that she did not receive the standard new hire support or training. She was denied business cards, stationery, and computer system training. All of which are provided to male new hires. On several occasions she had to perform secretarial duties going once for six weeks without assistance. This was due to the fact that she was given unsatisfactory or non-existent administrative support. Joan felt these acts may have led her potential clients to question her ability as a broker.

Joan also felt she did not receive other necessary support male brokers received. Large accounts from departing brokers were never given to her. Yet, many male brokers received more than half their accounts in that manner. Joan went to her supervisor and discussed these concerns. He responded by saying, "I could let you die here – if you do not get in line". After this conversation, some of her accounts were reassigned to other brokers.

However, as a resourceful person, Joan formed an alliance with Alex Dowson, a vice president at the office and an old acquaintance. Their agreement allowed her to work on a small percentage of Alex's accounts and the gross commissions as well as assets would be shared equally. This situation soon ran into difficulties. Alex wanted to resume a former personal relationship and Joan did not. She was involved with someone and did not appreciate Alex's advances.

In addition to making advances at work, Alex also called her at home. Joan asked a male friend to kindly ask Alex not to call her at home unless necessary. Alex then ended their business partnership. In addition, he then made ethnic slurs about Joan's Argentine friend. When Joan reported this to the office vice-president, she was forced to "give up all claims on the commissions and assets in the partnership." This was true even though she had generated more business than Alex.

Joan reported this situation to Hammed Hathba, the vice president; Jack Werner, administrative manager; Pat Bigario, the sales manager; and Joseph Jones, operations manager. These company officers did not give her concerns the proper attention.

Frustrated with her current plight, Joan "filed a claim of sexual discrimination and harass-

ment against Merrill Lynch with the National Association of Securities Dealers (NASD)." Joan then requested a transfer to another office. This transfer request was based in part on the advice of her physician due to her stressful work environment. However, the transfer request was denied. The reason given for the denial was poor performance. Interestingly enough, she had never received a poor evaluation with the company in the past.

After the situation did not get any better, Joan resigned and later sought legal action.

**THE U-4 DILEMMA**

Both Sue Ellen Hall and Joan Respar faced an obstacle called a U-4 statement. This is a document for all brokers required by the Securities and Exchange Commission. It effectively required them, as well as other employees in the securities business, to have their cases settled through binding mandatory arbitration. This meant that they could not seek redress for their claims in federal court. The United States Supreme Court "approved the use of mandatory arbitration in the work place." Companies utilized it because it reduced legal costs.

Interesting enough, information was obtained noting that "the arbitrators sided with securities firms 93 out of the last 97 claims brought against New York Stock Exchange members during the past five years." In another note of interest, the General Accounting Office's survey in 1994 discovered that approximately "89% of New York Stock Exchange arbitrators were older white males."

Sue Ellen sought assistance from the law firm Howell & Bernstein. This firm had successfully represented a sexual discrimination claim against another Wall Street firm.

The firm had noted that U-4 statements that brokers were required to sign contained an exception clause that allowed class action suits. If the individuals who brought the suit could get their case certified as a class action suit, they could "circumvent the mandatory arbitration process and proceed directly into federal court."

Sue Ellen brought the sexual discrimination case against Merrill Lynch and was later joined by Joan and six other female financial consultants as plaintiffs. It was estimated that eventually more than 900 other female employees of Merrill Lynch could join the class action. As a note of interest, the estimated number of 900 women respondents is unusually high, according to Professor Jack Caffey of the Fordham University School of Law. Normally, there is about a 3 percent response to a class action suit. In this situation, the response was normally estimated to be about 30 percent.

## THE MERRILL LYNCH RESPONSE

Merrill Lynch did not admit any wrongdoing. Although the attorneys for the plaintiff class representatives stated this type of discrimination was a "systemic" problem, Merrill Lynch commented that there was "absolutely no evidence to suggest that there was any systematic discrimination." However, the company stated "it was committed to investigating every claim" and "that it would take action if it found any instances of inappropriate behavior."

Merrill Lynch had received noted attention in the past specifically concerning its treatment of women. In fact, Merrill Lynch was acknowledged and identified by *Mother's In The Workplace* magazine for its maternity policy and its flexible working schedule.

Lastly, Merrill Lynch felt its policy respected "the dignity of each individual, whether an employee, shareholder, client, or member of the general public." At Merrill Lynch, the company supported "an environment where people of different backgrounds could reach their fullest potential with equal access to opportunities."

## SETTLEMENT DISCUSSIONS

Both parties had started settlement discussions. They both sought an outcome with the best possible solution. However, there was one question that Merrill Lynch and the plaintiff class representatives must answer prior to taking any action. *Can 900 women be wrong?*

## DISCUSSION QUESTIONS

### Employees Decision to Sue

1. Discuss Title VII of the Civil Rights Act of 1964 and why it would be applicable in this situation.
2. Identify legal areas under Title VII of the Civil Rights Act of 1964 that could provide liability concerns to Merrill Lynch and provide a legal analysis supported by facts for each concern.
3. Identify other issues that may cause concern for Merrill Lynch.

### Decision Time for Merrill Lynch

1. Merrill Lynch had 900 female employees join the class action lawsuit. If the company decided to settle the case with the plaintiffs, what are some of the items that may be contained in the settlement agreement?

2. Should the trial proceed to court, discuss how the court of public opinion would view Merrill Lynch and its sexual discrimination lawsuit.

## EXHIBIT 1

Merrill Lynch is organized into three interrelated business:

- **Global Markets and Investment Banking Group (GMI)**
  - Encompasses Merrill Lynch's institutional securities and advisory business
  - Offers worldwide Client Facilitation and Trading Services
  - Provides Full range of Investment Banking services worldwide
- **Global Private Client Group (GPC)**
  - Provides advice-based wealth management services and products
  - Offers a broad range of products and services
- **Merrill Lynch Investment Managers (MLIM)**
  - Offers a wide range of investment capabilities
  - Provides expertise through a variety of investment vehicles such as mutual funds

**Source:** Merrill Lynch & Co., Inc. – Investor Relations, http://www.ir.ml.com/about.cfm

## EXHIBIT 2

Title VII, The Pregnancy Discrimination Act, Sexual Harassment, and the Equal Pay Act

**Title VII Legal Provision**
Title VII of the Civil Rights Act of 1964, makes it "unlawful to discriminate against any individual in the terms, conditions, or privileges of employment"....."on the basis of race, color, religion, national origin, and gender, at any stage of the employment process." In order to typically succeed in a gender discrimination suit, the plaintiff must prove "that gender was a determining factor in the employer's decision to hire, fire, or promote him or her." This will generally be determined by the surrounding circumstances.

**The Pregnancy Discrimination Act of 1978 (Amends Title VII)**
Title VII of the Civil Rights Act of 1964, "makes it unlawful to discriminate against any individual on the basis of sex, including on the basis of pregnancy, childbirth, or related medical conditions." As a result, it "expands the definition of gender discrimination to include discrimination based on pregnancy." "Women affected by pregnancy, childbirth, or related medical conditions must be treated for all employment-related purposes, including the receipt of benefits under employee-benefit programs-the same as other persons not so affected but similar in ability work."

**Sexual Harassment**
Sexual Harassment, as noted by Title VII, can take two forms. These are quid pro quo and hostile-environment. Quid pro quo is normally interpreted to mean "something in exchange for something else." It occurs when "job opportunities, promotions, salary increases," and so on "are given in return for sexual favors." The United States Supreme Court has stated that hostile-environment harassment transpired when "the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Generally, the employer will be held liable only if it knew or should have known about the harassment and failed to take immediate remedial action.

**The Equal Pay Act of 1963**
The Equal Pay Act of 1963 was enacted as an amendment to the Fair Labor Standards Act of 1938. This act "makes it unlawful for an employer on the basis of sex to pay lower wages or fringe benefits to employees of one sex than it does to similarly situated employers of the other sex." In essence, it "prohibits gender-based discrimination in the wages paid for similar work on jobs." It focuses on job content rather than job description.

**Sources:** Court Case Document: Indictment, Title VII of the Civil Rights Act, and West's Legal Environment of Business, 2004. Harris v. Forklift Systems, 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed. 2d 295 (1993).

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The Pregnancy Discrimination Act of 1978 (Amends Title VII) 42 U.S.C. Section 2000e(k)

The Equal Pay Act of The Fair Labor Standards Act, 29 U.S.C. Sections 206 and 207.

Retaliation in Violation of Title VII, specifically 42 U.S.C. Sectione-3

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