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|  | SUPERIOR COURT OF NEW JERSEYAPPELLATE DIVISIONDOCKET NO. A-001548-12T4 |
| MARYLYNN SCHIAVI, PLAINTIFF vs.AT&T CORPORATION, DEFENDANT | Civil ActionOn appeal from the Superior Court, Law Division, Morris County.Sat below: Honorable Judge Donald S. Coburn, J.S.C. and a jury |

 ORAL ARGUMENT REQUESTED

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**BRIEF OF PLAINTIFF – APPELLANT MARYLYNN SCHIAVI**

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Table of Contents

[TABLE TO APPENDIX iv](#_Toc355085531)

[TABLE OF AUTHORITIES vi](#_Toc355085532)

[PRELIMINARY STATEMENT 1](#_Toc355085533)

[STATEMENT OF FACTS 4](#_Toc355085534)

[PROCEDURAL HISTORY 15](#_Toc355085535)

[LEGAL ARGUMENT 18](#_Toc355085536)

[POINT I: THE TRIAL COURT ERRED WHEN IT FAILED TO RULE AS A MATTER OF LAW THAT AT&T HAD AN OBLIGATION TO RECORD PLAINTIFF AS RESIGNED 18](#_Toc355085537)

[POINT II. 33](#_Toc355085538)

[THE TRIAL COURT ERRED BY 33](#_Toc355085539)

[SUPPRESSING KEY AND RELEVANT EVIDENCE 33](#_Toc355085540)

[POINT III AT&T WITNESSES DENIED THE MEANING OF THEIR PRIOR WRITTEN COMMUNICATIONS AND WERE ALLOWED TO INTERPRET THE SEPARATION AGREEMENT BASED ON THEIR PERSONAL OPINION 41](#_Toc355085541)

[POINT IV 46](#_Toc355085542)

[THE TRIAL COURT’S JURY INSTRUCTIONS ON EXTRINSIC 46](#_Toc355085543)

[EVIDENCE DEFIED THE APPELLATE COURT’S RULING IN THIS CASE AND MISLED THE JURY 46](#_Toc355085544)

[POINT V 54](#_Toc355085545)

[THE TRIAL COURT ERRED WHEN IT FAILED TO INTERPRET PREVIOUSLY ADJUDICATED, UNAMBIGUOUS TERMS OF THE AGREEMENT (PARAGRAPHS 9 AND 10) AND WHEN IT ENFORCED PARAGRAPH 8 WHICH IS AN ILLEGAL PENALTY CLAUSE 54](#_Toc355085546)

[CONCLUSION 62](#_Toc355085547)

### TABLE TO APPENDIX

|  |  |  |
| --- | --- | --- |
| **DOCUMENT**  | **PAGE** | **EXHIBIT** |
| Appellate Court Ruling, April 29, 2011 | a1-14 |  |
| Opinion and Order by Hon. Judge David Rand, May 12, 2009 | a15-25 |  |
| Copy of Wall Street Journal article:“Hanging Up: AT&T Now is Facing Erosion in Key Sector: It’s Business Customers – Slow Growth, Except in Debt, Marks the Months of the Armstrong Reign – Now, Talk of Restructuring”  | a26-31 | PE 3 for ID |
| E-mail from MaryLynn Schiavi to 11 AT&T managers and senior executives, Aug. 13, 2000.  | a32-34 | PE4 |
| E-mail requesting opportunity to resign from MaryLynn Schiavi to Maureen Brennan, Sept. 14, 2000  | a35 | PE 7 |
| First Page of Draft Separation Agreement reads: “employment was terminated” (paragraph 1)  | a36 | PE 8 |
| E-mail – final request for opportunity to resign from MaryLynn Schiavi to Maureen Brennan, Sept. 15, 2000  | a37 | PE 9 |
| E-mail promising to record Schiavi as resigned from Brennan, Sept. 15, 2000.  | a38 | PE 10 |
| Final Separation Agreement, Sept.19, 2000  | a39-47 | PE 12 |
| AT&T Employee Handbook instructions for documenting exiting employees.  | a48 | PE 14 |
| File folder documenting plaintiff as “resigned” -- prepared as per AT&T Employee Handbook instructions.  | a49 | DE 4 / PE 15 |
| AT&T Form titled: “Request for Payments for Employees Terminating Service” – Documents Schiavi’s resignation status.  | a50 | PE 16 |
| Letter from AT&T Attorney C. Michelle Kirk, June 3, 2003 advising plaintiff “it is AT&T’s position” that the Agreement does not preclude her from working for a contractor to AT&T.  | a51 | PE 17 |
| E-mail from Linda Stoynoff to Susan Greshler dated December 16, 2005 instructing Greshler to add plaintiff to the “Do Not Hire” list. | a52 | PE 18 |
| 2-Page Purchase order no. 143475  | a53-54 | PE19 |
| E-mail from Ellen Jackson dated June 6, 2006 to human resources personnel: Kathleen Larkin, Linda Stoynoff, Susan Soares, Susan Greshler, Colette Thomas, and Rosanne Sargent.  | a55-56 | PE 21 |
| Letter from AT&T Attorney Judith Kramer, July 12, 2006.  | a57-58 | PE 24 |
| Transcript of voicemail from Judith Kramer | a59 | PE 25 for ID |
| E-mail from AT&T Attorney Judith Kramer, July 20, 2006.  | a60 | PE 26 |
| E-mail from Maureen Brennan to plaintiff dated September 14, 2000, 6:31 p.m.  | a61 | PE 31 |
| Plaintiff’s Proposed Jury Instructions (8 pages)  | a62-69 |  |
| Application for Pre-trial Ruling on Evidence | a70-73 |  |
| Copy of EEOC Press Release dated Oct. 26, 2011 titled: “AT&T Settles EEOC Age Discrimination Lawsuit.”  | a 74 |  |
| Letter to John Curley, AT&T General Counsel from plaintiff, June 20, 2006.  | a75-76 | PE33 for ID |
| Defendant’s letter dated October 23, 2008 to plaintiff’s regarding her motion to add to her claim.  | a77-79 |  |
| Plaintiff’s fax to the Hon. Judge David Rand dated November 13, 2008 withdrawing motion to add to her claim.  | a80 |  |
| Copy of letter sent by e-mail and certified mail from Rhona Lava dated June 16, 2006  | a81 |  |
| Stay of Judgment pending appeal  | a82 |  |

### TABLE OF AUTHORITIES

 **Pages**

Conway v. 287 Corporate Center Associates,
187, N.J.,259,(2006.............................25,46,50

Duddy v. Government Employees Ins. Co. (GEICO),
421 N.J. Super. 214, 217-218 (App. Div. 2011).........19

Driscoll Const. Co.Inc. v. State
371 NJ Super. 304, 316, 318 (App. Div 2004)........28,51

Kearny PBA Local #21 v. Kearny,
81 N.J. 208, 221 (1979)...............................46

Lanzet v. Greenbert,
126 N.J. 168, 192 (1991)..............................60

McLaren v. Marmon-Oldsmobile Corp.,
95 N.J.L. 520, 524, (1921) ...........................18

Township of White v. Castle Ridge
Development Corp.,419 N.J.
Super. 68, 74 (App. Div. 2011).....................18,19

### PRELIMINARY STATEMENT

Plaintiff-Appellant MaryLynn Schiavi respectfully asks the Appellate Court to rule as a matter of law and based on weight of evidence that Defendant-Respondent AT&T breached the Separation Agreement dated September 19, 2000 and tortuously interfered in her business relationship when it changed her employment records from “resigned” to “terminated for cause” and added her name to the “Do Not Hire” list in December 2005. The change to her records resulted in the premature loss of her $104,000 a year job in February 2006 working as a writer, producer and on-air reporter on a project at AT&T, employed by Logistic Solutions Inc., a contractor to AT&T.

Once key evidence was authenticated, the Court, not the jury, should have interpreted the Agreement since all that remained were questions of law: Did the parties agree to recognize plaintiff as “resigned” in September 2000? If so, did AT&T have an obligation to “record” plaintiff as resigned? Did the Agreement preclude plaintiff from working for a contractor to AT&T?

In June of 2003, AT&T Attorney C. Michelle Kirk told plaintiff in writing that “it was AT&T’s position” that the Agreement did not preclude plaintiff from working for a contractor to AT&T. In May of 2009, the Hon. Judge David Rand ruled that the Agreement **“did not contemplate the situation in which plaintiff worked as the employee of another company on premises at AT&T and therefore did not expressly preclude Ms. Schiavi from accepting said employment.**”

AT&T’s obligation to record plaintiff as “resigned” was clear once the documentary evidence was authenticated which included: the written promise from AT&T human resources manager Maureen Brennan to “record” plaintiff as resigned and the determination by AT&T Attorney Judith Kramer in July of 2006 that plaintiff was erroneously coded as “terminated for cause” which led directly to her untimely dismissal from a project working for a contractor to AT&T in February 2006. In addition to Kirk’s communication that the Agreement did not preclude her from working for a contractor to AT&T, evidence supporting plaintiff’s position includes: plaintiff’s refusal to enter into any agreement or accept payment from AT&T unless she was “officially resigned;” Brennan’s response to her: “in connection with this Agreement I am willing to record your separation from AT&T as a resignation;” the revised and final Agreement that only referred to plaintiff as resigned; two internal AT&T documents prepared in 2000 that “record” plaintiff as resigned; an e-mail from Linda Stoynoff documenting that plaintiff’s coding had changed by December 2005 to “terminated for cause” after Brennan sighted plaintiff at AT&T and Stoynoff’s instruction to add plaintiff to the “Do Not Hire” list; a letter from AT&T Attorney Judith Kramer in July of 2006 informing plaintiff that she was dismissed from her job with Logistic Solutions because she was classified as “terminated for cause;” Kramer’s follow-up e-mail stating that she was correcting the coding to show that plaintiff had “resigned” in 2000 and her instruction to human resources to remove plaintiff’s name from any lists used in connection with the “terminated for cause” coding. Even assuming it was appropriate for a jury to interpret the Agreement, the following harmful errors precluded a just verdict: the Court disallowed critical evidence and effectively suppressed evidence by not allowing evidence to be read aloud to the jury thus empowering Brennan, Kirk and Kramer to deny the meaning of statements they authored prior to litigation; rejection of plaintiff’s proposed jury instructions regarding extrinsic evidence; and the Court’s repeated message that testimony held greater weight than documentary evidence. The Court also erred for failing to rule as a matter of law on unambiguous contract terms (Paragraphs 9 and 10) previously adjudicated and dismissed in May of 2009 and enforcing paragraph 8, a provision that is an illegal penalty clause.

### STATEMENT OF FACTS

Plaintiff MaryLynn Schiavi worked as a full time writer and communications manager for AT&T from August 1995 until July 2000 when she and approximately 250 AT&T employees were involuntarily transferred to a revenue recovery taskforce called “Raiders of the Lost Revenue” and assigned to work as essentially bill collectors for the next 18 months charged with collecting $100 million that was 180 days outstanding in AT&T’s Business Services division.

Within two weeks, plaintiff wrote a three-page letter on August 13, 2000 to 11 members of management, including the chief executive officer about what she perceived to be mismanagement of the company, citing outdated technology, antiquated processes, and irresponsible human resource management decisions that resulted in poor employee morale. (a32-34 PE 4)

The facts related to why plaintiff was dismissed are sharply in dispute. While all of the facts relating to plaintiff’s dismissal may never be fully revealed, **nonetheless, AT&T, agreed to enter into a Separation Agreement with plaintiff on September 19, 2000 acknowledging her “resignation” status with the company.** (a39-47 PE12)

At the time of her dismissal in 2000, plaintiff considered AT&T’s decision to end her employment to be wrongful and negotiated for three and a half weeks with Brennan by e-mail requesting the opportunity to resign at least six times in 11 separate e-mails. Two of the communications were entered into evidence, one dated September 14, 2000 (a35 PE7) and a second dated September 15, 2000 (a37 PE9/9A).

**Plaintiff refused to sign draft agreement**

AT&T presented plaintiff with a DRAFT Separation Agreement on September 14, 2000 (a36 PE 8) which stated in paragraph 1: “Employee understands and agrees that her employment with the Company was terminated.” Plaintiff refused to sign the proposed Agreement because it did not reflect the resignation status she had been requesting throughout the negotiations. Plaintiff responded by e-mail to Brennan:

“My initial reaction is to accept the terms of your offer, but only if my termination is reclassified as a resignation…”

“So I would ask you and your legal counsel to consider again allowing me to resign.” (a35 PE7)

 In a final e-mail to Brennan plaintiff wrote:

“I have made a firm decision about the action I must take. **I am asking once again that you allow me to officially resign from AT&T or else I will not accept any payment from you, and I cannot, in all good conscience, agree to the terms you have set forth…**

I am asking you to give me the opportunity to officially resign, and I will need your final answer by Monday morning, September 18th, 10 a.m.”

**“My termination was a mistake. If you allow me to resign you can correct this mistake.”**

(a37 PE 9), (emphasis added)

Brennan responded four hours later by e-mail:

**“…in connection with this agreement I am willing to record your separation as a resignation…”**

In addition, although a resignation does not normally allow you to qualify for unemployment compensation, I can agree not to oppose your application for unemployment benefits.

(a38 PE10), (emphasis added)

Plaintiff also asked for her resignation notice to be distributed to her former organization. Upon receiving Brennan’s promise to record her as resigned plaintiff submitted her resignation notice (a83 PE 11). Plaintiff wrote,

“Effective immediately I hereby tender my resignation from AT&T. I have learned a lot in the five years with the company. I enjoyed being a member of the team of people within the company who helped bring the world into the Internet age.”

(a83 PE11)

Plaintiff was then presented with a revised and final Separation Agreement with changes that assured plaintiff that AT&T recognized her as “resigned”:

DRAFT: 1. Employee understands and agrees that her employment with the Company **was terminated** at the close of business on August 21, 2000.

FINAL 1. Employee understands and agrees that her employment with the Company **ended** at the close of business on August 21, 2000.

DRAFT 5. Employee and the company each agree to refrain from disparagement of the other.

FINAL 5. Employee and the company each agree to refrain from disparagement of the other. This includes but is not limited to the following: Employee should direct inquiries from her prospective employers to Maureen Brennan.

Ms. Brennan will relay to those prospective employers only that **Employee resigned**, the dates of Employee's employment, the positions held and her salary.

Employer also agrees not to oppose Employee's claim for unemployment benefits. This paragraph also includes, but is not limited to an agreement by employee not to disparage AT&T to the media, including but not limited to, the Star Ledger.

ADDED TERM: 17. Eight (8) days after Employee signs this Agreement, AT&T will distribute Employee’s **resignation notice** to members of Raymond Tringali’s organization.

It was Brennan’s response to plaintiff’s unyielding request for an “official resignation” and the revised language of the Agreement that confirmed for her she had successfully negotiated a resignation. Plaintiff also confirmed this in her cross-examination. (6T, Pg.61:09-15)

**AT&T Recorded Plaintiff as “Resigned” in Two Internal Documents**

While defendant initially argued that it never promised to record plaintiff in its internal records as resigned, defendant submitted two internal AT&T forms into evidence that prove that plaintiff was recorded as resigned in 2000. The documents include a form (a50 PE 16) titled “Request for Payments for Employees Terminating Service” and a handwritten file folder (a49 PE 15/DE4) which includes plaintiff’s name and identifying information that records her separation as “resigned August 21, 2000.” The handwritten file folder contains all of the information required by the AT&T Handbook instructions (a48 PE 14) including: plaintiff’s social security number, name of supervisor, alternate supervisor. The above-mentioned form (a50 PE16) also states that the “reason” for employee’s separation from the company must match the ‘Employee Data Change Request’ (EDCR) Form, which according to testimony by AT&T Attorney Judith Kramer is the form/mechanism by which AT&T changes an employee’s official coding in its human resources data base.

(14T, Pg. 10:9-12)

**2003: AT&T Attorney C. Michelle Kirk Interprets Separation Agreement**

On May 27, 2003, two and a half years after departing AT&T as a full time employee, plaintiff contacted AT&T’s legal department to ensure that nothing prevented her from accepting employment with an AT&T contractor. In response she received a letter from AT&T Attorney C. Michelle Kirk dated June 3, 2003, which states:

I have reviewed your Agreement and **it is AT&T’s position that while the Separation Agreement precludes you from working for AT&T as either an employee or a contractor, it would not preclude you from working for a contractor that happens to perform work for AT&T.** Should you accept such a position and be assigned to any work involving AT&T, I must remind you that you agreed to refrain from disparaging AT&T; this would include comments by you on your opinion about AT&T or the circumstances surrounding your termination.

(a51 PE 17) (emphasis added).

**October 2005 – Plaintiff is hired by a contractor to AT&T**

On October 17, 2005 Plaintiff was hired by Logistic Solutions Inc., to work as a writer, producer and on-camera reporter on an AT&T project called AT&T Internet Security News Network (ISNN). Barbara Laing, an AT&T manager and executive producer of the ISNN project testified that she told plaintiff the project was likely to last two to three years or longer. (9T, Pg.48:08-16)

In October 2005, plaintiff was given high level security clearance by AT&T since her work required her to interview on camera Internet security personnel in the most restricted area of the AT&T complex. Maureen Brennan testified that, approximately one week after plaintiff began working on the project she saw plaintiff in the company cafeteria and reported to human resources personnel that plaintiff should not be working at AT&T.
(13T, Vol. 1, Pg. 50:03-10).

At the direction of human resources executive director Ellen Jackson, human resources director Linda Stoynoff looked into the AT&T data base and found that plaintiff was coded “terminated for cause” then directed records clerk Susan Greshler to add plaintiff to the “Do Not Hire” list. Stoynoff wrote in an e-mail (a52 PE 18) dated December 16, 2005:

Maureen Brennan saw MaryLynn Schiavi in the cafeteria and thought she had been terminated for cause in 2000. Ellen [Jackson] told me to check it out. I looked in the data base and she was terminated for cause. **Do you know why she is not on the do not hire list? Please add her.**

 The moment plaintiff’s name was added to the “Do Not Hire” list, she was made instantly ineligible to work for a vendor to AT&T, or to “have access to AT&T premises or systems” according to AT&T Attorney Judith Kramer, in a letter she sent to plaintiff on July 12, 2006 (a57-58 PE 24).

Despite assurances from her supervisors who were highly pleased with her work (9T, 21:11-13), plaintiff was dismissed from the project on February 22, 2006. Laing told plaintiff at the time of her dismissal “We have to let you go and we can’t tell you why.”

Laing testified that she only dismissed plaintiff because she was directed to do so by human resources manager Margaret Hungerford (9T, Pg.35:16-36:02)and that since 2006 there have been at least four positions on the project which could have been filled by plaintiff. (9T, Pg 48:17-Pg.50:09).

In the months following her abrupt dismissal from her assignment with Logistic Solutions, plaintiff contacted AT&T human resources and legal to find out why her position ended, (a75-76 PE33 for ID)and was told in three communications from Rhona Lava (a81 PE23)and Kathleen Larkin that the job ended because it was temporary. It wasn’t until she received a letter from AT&T Attorney Judith Kramer dated July 12, 2006, that she was finally told the truth,

Under AT&T's employment practices, **employees who are terminated for cause are ineligible for future employment at AT&T as an employee or a contractor in a position in which they would be assigned to work on AT&T's premises or have access to AT&T systems. Based upon this employment practice your temporary contract position with AT&T through Logistic Solutions was concluded on February 22, 2006…**

(a57-58 PE 24) (Emphasis added).

Upon receiving this letter, plaintiff faxed a copy of the Brennan e-mail promise to record plaintiff as resigned and the final Separation Agreement to Kramer. Upon reviewing the documents Kramer concluded that plaintiff had been erroneously coded as “terminated for cause” and sought to correct the error. Kramer then sent a follow-up e-mail to plaintiff on July 20, 2006 and told her that she was correcting the mistakes. Kramer wrote:

Hello, this is a copy of the e-mail I sent to one of our HR folks earlier today. Based upon the documentation you found and provided to me, it appears that **your prior termination from AT&T was improperly coded**. I’ve also requested another HR person to process the corrected EDCR, retroactive for 2000. Thanks.

(a60 PE 26) (Emphasis added).

The e-mail Kramer forwarded is dated July 20, 2006, from Judith Kramer to Susan Greshler. It says:

Hello. Pursuant to our discussion, we are in the process of doing a corrected Employee Data Change Request (EDCR) to show that Ms. MaryLynn Schiavi resigned from AT&T as of August 21, 2000 rather than a termination for cause under the coding previously used.

Based upon this correction, **please have Ms. Schiavi’s name and social security number removed from any lists pertaining to a no rehire policy based upon the termination for cause coding** that is used by AT&T and ProcureStaff.

Ms. Schiavi does still have a legal settlement agreement in place in which she agreed that “she will not apply for or seek employment with the Company at any time thereafter.”

(a60 PE60) (Emphasis added).

Plaintiff made a request to Kramer for reinstatement of her work on the project and/or compensation for the earnings she lost. Kramer told her that she had already made a request on her behalf but it was denied.

(5T, Pg. 17:20-Pg.18:19)

**Executive Director Ellen Jackson Tells an Entirely Different Story about How Plaintiff was Discovered Working as a Contractor**

 In June 2006, the same Ellen Jackson referred to in the Linda Stoynoff e-mail dated December 16, 2005 sent an e-mail (a55-56 PE 21) to six human resources personnel stating an entirely different reason for how plaintiff was discovered working at AT&T. Instead of attributing the source of the discovery to Brennan, Jackson claimed plaintiff was discovered because of **“an on-going review where we check the DNH (Do Not Hire list) against our NPWs (Non-payroll workers) to make sure we haven’t/don’t rehire them as contractors. MaryLynn surfaced as a contractor as part of this effort.”** The e-mail was addressed to: Roseanne Sargent, Colette Thomas, and Executive VP of HR, Kathleen Larkin, and copied to: Linda Stoynoff, Susan Soares, and Susan Greshler stating that plaintiff was “terminated for cause” in 2000 and was on the AT&T Do Not Hire list. Jackson’s e-mail makes no mention of Maureen Brennan as the source of the information about how plaintiff was discovered working for a contractor to AT&T. In her e-mail, Jackson said,

Just wanted to compile the facts as I know them in one place to provide background for Kathleen’s response. MaryLynn Schiavi was assigned to the so-called Revenue Raiders redeployment around the ’00-01 time frame. Susan Soares headed up this effort back then.

MaryLynn Schiavi was terminated for cause. Maureen Brennan was the HR leader involved. My recollection is that she refused to go to Short Hills to work, but I don’t know for certain. Sue Soares is likely to remember and we could also call Maureen as well. Because MaryLynn was terminated for cause, she was on our Do Not Hire list.

**Early last year we tightened up our process and initiated an ongoing review** where we check the DNH list against our NPWs to make sure we haven’t/don’t rehire them as contractors. **MaryLynn surfaced as a contractor as part of this effort.**

(a55-56 PE 21) (Emphasis added).

### PROCEDURAL HISTORY

Plaintiff filed this lawsuit on December 22, 2006 to enforce the September 19, 2000 Agreement (a39-47 PE12) alleging breach of contract, tortuous interference in a business relationship, breach of good faith and fair dealing, intentional infliction of emotional distress, fraud and defamation. Defendant’s answer included a counterclaim asserting that plaintiff breached the non-disparagement (5) and confidentiality (6) clauses of the Agreement.

Plaintiff was represented by William Jones of Simio & Jones of Morristown, New Jersey who sought to be relieved of his counsel duties in May 2008 and was released by the Hon. Judge David Rand leaving plaintiff with no counsel 60 days prior to the end of discovery. She then self-represented since she could not find counsel whom she could afford.

From August 2008 until October 2008, plaintiff conducted seven depositions and on January 2, 2009 argued before Judge Rand in opposition to defendant’s motion for summary judgment. Rand ruled in favor of the defendant dismissing the case and awarding AT&T almost $64,000 which included attorneys’ fees and return of the $19,900 in severance pay that was given to plaintiff upon signing the Separation Agreement in 2000.

In January 2009, plaintiff retained Attorney Noel C. Crowley to represent her in a motion for reconsideration of the fees only to the trial court and an appeal to the New Jersey Appellate Division for a reversal of the summary judgment. Crowley successfully argued before Rand in May 2009, who reversed his own decision to award attorneys’ fees. He also reduced the amount of the return of severance pay by $1,000 as per the Separation Agreement to $18,900. In his May 12, 2009 decision Rand said in his opinion,

The Agreement between Ms. Schiavi and AT&T could have contemplated the situation where Ms. Schiavi was employed as an independent contractor for another company with a temporary contract at AT&T. **However the Agreement did not address this type of situation and** **did not expressly preclude Ms. Schiavi from accepting said employment.**

(a22-23 Rand Opinion, Pg 8-9).

Mr. Crowley then argued before the Appellate Court on Sept. 27, 2010 and on April 29, 2011, the Court rendered its decision (a1-14 Appellate Opinion) in favor of the plaintiff, reversing summary judgment and remanding the case to the lower court for trial. The Appellate Court also dismissed Defendant’s counterclaim as moot. A trial was held on May 1-9, 2012. The jury found no cause of action and instead, found plaintiff in breach of paragraphs 5, 6, 9 and 10 of the Agreement. The Court awarded defendant AT&T a $35,000 judgment against her. Plaintiff’s counsel, Mr. Noel C. Crowley, filed a post-trial motion for Judgment Notwithstanding the Verdict and/or a New Trial on May 29, 2012. Beginning in June 2012, plaintiff has self-represented since she can no longer afford counsel. She filed a reply brief and argued before Judge Donald Coburn on June 27, 2012 for JNOV and/or a new trial which was rejected by the Court. AT&T filed a motion for a Judgment on Verdict in September 2012 and plaintiff filed a reply brief and argued before the Hon. Judge Donald S. Coburn on October 22, 2012. Coburn awarded AT&T $15,000 in attorneys’ fees and the entire return of the severance paid to plaintiff in 2000 which was $19,900.

References to the transcripts are as follows:

1T May 1, 2012 (pretrial conference/motions)

2T May 2, 2012 Vol. 1 (trial)

3T May 2, 2012 Vol. 2 (trial)

4T May 2, 2012 Vol. 3 (trial)

5T May 2, 2012 Vol. 4 (trial)

6T May 3, 2012 Vol. 1 (trial)

7T May 3, 2012 Vol. 2 (trial)

8T May 3, 2012 Vol. 3 (trial)

9T May 7, 2012 Vol. 1 (trial)

10T May 7, 2012 Vol. 2 (trial)

11T May 7, 2012 Vol. 3 (trial)

12T May 7, 2012 Vol. 4 (trial)

13T May 8, 2012 Vol. 1 (trial)

14T May 8, 2012 Vol. 2 (trial)

15T May 8, 2012 Vol. 3 (trial)

16T May 9, 2012 Vol. 1 (trial / jury charge)

17T May 9, 2012 Vol. 2 (Verdict)

### LEGAL ARGUMENT

## POINT I: THE TRIAL COURT ERRED WHEN IT FAILED TO RULE AS A MATTER OF LAW THAT AT&T HAD AN OBLIGATION TO RECORD PLAINTIFF AS RESIGNED

The trial court erred when it failed to rule as a matter of law that AT&T breached the Separation Agreement dated September 19, 2000 (a39-47 PE12) when plaintiff’s employment records were changed by AT&T personnel in 2005 to show that she was ‘terminated for cause’ instead of ‘resigned’ and added her name and social security number to the “Do Not Hire” list used by AT&T and ProcureStaff Inc. in connection with the “terminated for cause” coding. The changes to plaintiff’s employment records made her instantly ineligible to work as the employee of a contractor to AT&T and sullied her reputation with ProcureStaff Inc., an separate company owned by Volt Inc. that handles the on-boarding process for temporary employees working for companies across the nation.

Based on established case law, unambiguous terms of an agreement are to be interpreted by the court. According to McLaren v. Marmon-Oldsmobile Corp., 95 N.J.L. 520, 524 (1921): "In a written contract, where there is no ambiguity in its terms, its interpretation is a matter of law for the judge and should not be left to the jury.” According to Township of White v. Castle Ridge Development Corp., 419 N.J. Super. 68, 74 (App. Div. 2011), "Whether a contract provision is clear or ambiguous is a question of law.” According to Duddy v. Government Employees Ins. Co. (GEICO), 421 N.J. Super. 214, 217-218 (App. Div. 2011), "The interpretation of contracts and their construction are matters of law for the court subject to de novo review.”

**The Separation Agreement recognized plaintiff as “resigned”**

Brennan’s response (a38 PE10) to plaintiff’s unequivocal and repetitive requests (a35 PE 7) and (a37 PE 9) for “resignation” status would lead any reasonable person to believe that there was a meeting of the minds between plaintiff and Brennan that led the formation of the final Agreement. Plaintiff relied on Brennan’s response and the revised language of the final Separation Agreement that only referred to plaintiff as “resigned” and did not include any reference whatsoever to “terminated for cause” status. **The final version of the Agreement changed in significant ways from the draft**:

DRAFT: 1. Employee understands and agrees that her employment with the Company **was terminated** at the close of business on August 21, 2000.

(a36 PE8)

FINAL 1. Employee understands and agrees that her employment with the Company **ended** at the close of business on August 21, 2000.

(a39 PE12)

DRAFT 5. Employee and the company each agree to refrain from disparagement of the other.

FINAL 5. Employee and the company each agree to refrain from disparagement of the other. This includes but is not limited to the following: Employee should direct inquiries from her prospective employers to Maureen Brennan.

**Ms. Brennan will relay to those prospective employers only that Employee resigned,** the dates of Employee's employment, the positions held and her salary.

Employer also agrees not to oppose Employee's claim for unemployment benefits. This paragraph also includes, but is not limited to an agreement by employee not to disparage AT&T to the media, including but not limited to, the Star Ledger.

(a40-41 PE12)

**Added Term: 17**. Eight (8) days after Employee signs this Agreement, **AT&T will distribute Employee’s resignation notice** to members of Raymond Tringali’s organization.

(a46 PE12) (emphasis added).

**Brennan’s trial testimony contradicted her deposition**

The Court should have taken into consideration that Brennan’s trial testimony diametrically opposed her deposition testimony when questioned about her response to plaintiff promising to “record” her separation from AT&T as a resignation.

In her trial testimony, Brennan claimed that she never “recorded” plaintiff as resigned and that **“record” meant to her “convey.”** However she said the exact opposite when she was deposed four years earlier, testifying that she did **ensure that plaintiff’s resignation was recorded on AT&T internal forms.** At trial, when asked if she entered plaintiff’s resignation status on a form or in an AT&T database she said, **“I didn’t write it down anywhere.”** Plaintiff’s counsel asked, “Doesn’t the word record mean to enter into some kind of registry?” Brennan’s response was, **“Not to me it doesn’t.”**

When presented with a copy of her response to plaintiff

(a38 PE10) dated September 15, 2000, Brennan testified:

 Maureen Brennan

What I was agreeing to here is to convey to any employer who called asking for MaryLynn’s – why she left AT&T – I would say she resigned and also offer her the opportunity to tell her colleagues that she resigned.

 Noel Crowley

But the letter – the statement says – I will allow you – **I will record you as resigned. The word is record – is it not?**

Maureen Brennan

**Yes it is record**.

 Noel Crowley

**Record means enter into the information into some kind of registry. No?**

 Maureen Brennan

**Not to me it doesn’t.** I personally never I did never – I never had a part of my job recording anything into a system which your saying in here to me is – **record could be the same as convey. Convey is what I meant** here as far as talking to employers who called to ask about MaryLynn’s separation from employment. I would to say to those future employers that she resigned per her request. (emphasis added)

 Noel Crowley

Did you have to write it down anywhere? Maybe in a notepad?

 Maureen Brennan

**I didn’t write it down anywhere.**

 Noel Crowley

And so you’re saying in this letter – that was the end of it as far as you were concerned?

 Maureen Brennan

About conveying her separation – umm, Ms. Schiavi was going to tell employers to call me personally with my number and if something I were to remember to do – if somebody was calling to ask about her separation from AT&T – I didn’t have to write it down.

 Noel Crowley

Now you gave a deposition in this matter on August 7, 2008.

Could you take custody of this copy of the transcript if you will. And I will invite you to look at page 19.

So, I’m going to ask you to look at page 19. So I’m going to ask you to look at page 19 starting with line 13 and ask you if…you were asked these questions by Ms. Schiavi at your deposition and gave these answers.

**[Noel Crowley reads from Maureen Brennan’s deposition that was conducted by plaintiff]**

19:13 to 20:02

Q. So when you sent this e-mail to me saying that you would record my separation as a resignation or my termination, however you want to look at it, what did that mean to you? What were you going to do? What actions were you going to take?

A. Recording your separation as a resignation. Right. So that would just be recording it and then refrain from any discussion with employers calling for references about your separation from employment.

Q. **So where was this going to be recorded,** in your mind?

A. **On separation forms that are done by AT&T for employees.**

Q. **Where was this going to be recorded?**

A. **There's a form for any change of action for all employees that are done.**

Q. The employee data change -- **so you would have had to make an employee data change request?**

A. I'm not sure what the name of the form was. It's been quite a few years, and I've never completed one myself, **but there is a form that when there is a change, it's completed on the form.**

Q. Who would have completed that in 2000? You were a C band manager. You would have completed it; right?

A. Not necessarily. There was a lot of people in H.R. that everybody had different roles. My role was not to do forms.

Q. So then when you said you would record me as resigned, how did you make that happen? Who did you talk to? How did you make that happen?

A. I don't remember who I talked to.

Q. Okay. But you know that you did record me as resigned?

There was an objection.

A. I don't remember seeing the form to tell you the truth. It's not that I didn't do it.

Q. So as part of a negotiation, you promised me that you were going to record me as resigned, but you don't remember how you made that happen?

After an objection you said…

A. I don't. I don't remember.

Q. **But you're a moral and honest person, and you would have made that happen if you promised it?**

A. **I certainly would.**

Q. Were you asked those questions and did you give those answers?

A. Yes I did.

(13T, Pg. 30:02-35:08) (emphasis added).

During negotiations, with striking clarity plaintiff set forth her terms to Brennan and was ready to walk away with not a penny of severance pay unless she was “allowed to officially resign.” Brennan’s response to plaintiff on September 15, 2000 was an assurance that she would be recognized as a resigned employee.

Based on Conway v. 287 Associates, 187 N.J. 259 (2006), the New Jersey Supreme Court ruled that access to the property to be sold was an essential term of the agreement, even though it was not included in the four corners of the Agreement. Applying the same logic, **an “official resignation” was the essential term for plaintiff** which she made clear when she wrote:

I am asking once again that you allow me to resign from AT&T or else I will not accept any payment from you, and I cannot in all good conscience agree to the terms you have set forth.

(a37 PE9)

**Plaintiff’s coding in the AT&T database should have matched the AT&T internal form “Request for Payments for Employees Terminating Service” – Plaintiff’s Exhibit 16**

 On January 2, 2008, arguing before the Hon. Judge David Rang, the Defense claimed that despite Brennan’s response and the revised language of the Agreement, it never promised to “record” plaintiff as resigned. However, the AT&T internal form titled: “Request for Payments for Employees Terminating Service” (a50 PE16) signed by Ray Tringali, former vice president of marketing, AT&T Business Services, states that the reason for employee’s separation from the company must match the **Employee Data Change Request** (EDCR) Form. And the stated reason forplaintiff’s separation is: **“Resignation.”** As AT&T Attorney Judith Kramer testified, the EDCR is the form by which AT&T changes an employee’s coding in HADM, the human resources data base. (14T, 10:9-12)

Kathleen Larkin, executive vice president of human resources, AT&T, was asked at trial: “If someone was to be recorded as having resigned, where would you expect that information to be logged or entered into the AT&T data system?” Larkin said, “In the old AT&T, prior to the merger, the database was known as HADM.” (11T, Pg. 40:09-41:09)

At trial, Ray Tringali, the former vice president of marketing for AT&T Business Services who signed the “Request for Payment” form (a50 PE16) recording plaintiff as resigned, struggled to answer questions about what it meant.

 Noel Crowley

And under termination information you’re supposed

to – the next question called for is reason, followed by a colon. And what information is provided there? What does it say under reason?

 Ray Tringali

**It says resignation**.

 Noel Crowley

**Okay.** **So the reader of this is supposed to conclude,**

**Are they not, that Ms. Schiavi resigned her employment at AT&T?**

An objection by the Defense counsel was overruled.

Noel Crowley

Can I get an answer from you?

Ray Tringali

I -- you have to --

 **The Court**

**If I read that form I’d think the person resigned, correct?**

 Ray Tringali

**If you read that form, yeah fine.**

(a50 PE16) (12T, Pg. 41:04-20)

AT&T claims that it did not promise plaintiff resignation status, yet the Agreement only refers to her as resigned. If the Agreement was written in a way that did not accurately reflect the true terms of the contract, the Court should have held AT&T accountable as a matter of law based on Driscoll Construction Co. v. State 371 NJ Super. 304, 318 (App. Div. 2004) (“Any possible ambiguity in the terms of the Agreement, are to be strictly construed against the drafter of the agreement”).

**Erroneous “terminated for cause” coding lands plaintiff on “Do Not Hire” list in 2005, not paragraph 1**

Defendant argued that plaintiff’s coding had nothing to do with her placement on the “Do Not Hire” list in December of 2005. Instead it latched on to paragraph 1 of the Agreement which was a standard clause included in AT&T’s contracts until 2011 when it was found to be discriminatory to older workers by the Equal Opportunity Employment Commission (EEOC), an issue that will be addressed under Point II.

Paragraph 1 states in part, “employee agrees not to apply for or seeking employment with the Company at any time thereafter.” (a39 PE12)

In her July 20, 2006 e-mail, Kramer makes evident that it was the erroneous “terminated for cause” status, and not paragraph 1 of the Agreement (a39 PE12),that prompted AT&T human resources personnel to add plaintiff to the “Do Not Hire” list in December 2005. (a52 PE18)

Kramer wrote to AT&T human resources personnel, **“Please have Ms. Schiavi’s name and social security number removed from any lists pertaining to a no-rehire policy based upon the termination for cause coding that is used by AT&T and ProcureStaff.”** (a60 PE26)

**The Trial Court understood that if Agreement did not preclude plaintiff from working for a contractor to AT&T, then AT&T breached the Agreement when it ended her contract in 2006 and breached the doctrine of good faith and fair dealing**

Early on in the trial, the Court explained to the Defense counsel that if the Agreement did not preclude plaintiff from working for a contractor to AT&T and AT&T ended her position solely because she came back to work as the employee of Logistic Solutions, a contractor to AT&T, then AT&T would be in breach of the Agreement and the doctrine of good faith and fair dealing.

(7T, Pg. 3:02-Pg.7:10)

The trial Court should have concluded from Kramer’s communication to plaintiff and the determinations made by Kirk and the Hon. Judge David Rand on May 12, 2009 (a22-23) that nothing in the Agreement precluded plaintiff from working for a contractor to AT&T. The trial Court admitted at the conclusion of the case, that very often breach of contract cases are settled by the Court, not a jury.

**“These are hard cases, breach of contract cases. They’re complicated and I think interesting. Very often Judges have to resolve them. There’s been a lot of law on that…”**

(17T, Pg. 5:03-17)

**Plaintiff’s employment with Logistics Solutions Inc. was put in jeopardy after Brennan communicated that plaintiff was “terminated for cause” in 2000**

When plaintiff was hired to work on the AT&T ISNN project as an employee of Logistic Solutions Inc. in mid-October 2005, she was granted by AT&T itself high-level security access that gave her entrance to the most secure area within the AT&T Bedminster facility because she was required to conduct on-camera interviews with the company’s security experts in the Network Operations Center (NOC), the nerve-center of the company’s worldwide communication network. There was no impediment based on paragraph 1 to plaintiff’s acquiring high level security clearance. In fact she was given a higher level security clearance than 99 percent of AT&T employees.

Plaintiff’s employment with Logistic Solutions Inc. was put in jeopardy only after Maureen Brennan sighted plaintiff on the premises in late October 2005 and reported to various human resources personnel and through communications by human resources executive director Ellen Jackson, that plaintiff had been “terminated for cause” in 2000 which led to her inclusion on the “Do Not Hire” list.

In her letter dated July 12, 2006, AT&T Attorney Judith Kramer made no mention of paragraph 1 being an impediment to plaintiff’s employment with an AT&T contractor, instead she told plaintiff that the reason she lost her job with Logistic Solutions was based on the “terminated for cause” classification. Kramer said,

Under AT&T’s employment practices, employees who are terminated for cause are ineligible for future employment at AT&T as an employee or a contractor in a position in which they would be assigned to work on AT&T’s premises or have access to AT&T systems. **Based upon this employment practice your temporary contract position with AT&T through Logistic Solutions was concluded on February 22, 2006.**

(a57-58 PE 24) (emphasis added).

Upon reading the Brennan e-mail and the Agreement, Kramer concluded plaintiff’s coding was in error. When Kramer e-mailed Susan Greshler, her instructions were very clear cut:

**“please have Ms. Schiavi’s name and social security number removed from any lists pertaining to a no rehire policy based upon the termination for cause coding that is used by AT&T and ProcureStaff.**

Ms. Schiavi does still have a legal settlement agreement in place in which she agreed that “she will not apply for or seek employment with the Company at any time thereafter.”

(a60 PE26)

Kramer’s communication makes positively clear the relationship between the “terminated for cause” coding and inclusion on the **“lists pertaining to a no-rehire policy”** while at the same time acknowledging that plaintiff agreed to paragraph 1 of the Agreement (a39 PE12) **which can only mean that to Kramer, in July of 2006, prior to this litigation, paragraph 1 had nothing to do with inclusion on the “Do Not Hire” list.**

## POINT II.

## THE TRIAL COURT ERRED BY

## SUPPRESSING KEY AND RELEVANT EVIDENCE

**A. Court disallowed the oral reading of key evidence**

Throughout the trial, the Court disallowed the oral reading of documents admitted into evidence, making it difficult if not impossible for plaintiff’s counsel to highlight the significance of the documentary evidence and to impeach AT&T’s witnesses who simply denied the plain meaning of the words they authored prior to this litigation. The Court’s rationale was that the documents were in evidence and the jury could read them when deliberating.

Through his direct statements and by making it impossible for the necessary attention to be paid to the documentary evidence, the Court sent a consistent message to the jury that testimony held greater value than the documentary evidence which in this case was central to understanding how the Separation Agreement was formed, i.e., the e-mail exchanges between plaintiff and Brennan and how the Agreement and the Brennan promise to “record” were interpreted by AT&T’s in-house counsel Kirk and Kramer, again, prior to litigation.

On the first day of trial, the Court sent a direct message to the jury that documentary evidence was of a lesser value than testimony which surely led to the jury’s lack of attention to documents authored by Brennan, Kirk and Kramer:

“…**I’m going to stop the reading of documents.** If I have ordered them in evidence as I have in these, the jury will see them in the end. You can make your arguments in the end. **Now is the time for facts.** It’s not the time to put the whole show together apparently.”

(5T, Pg. 17:13-18). (emphasis added)

The Court also prevented plaintiff from reading a critical communication from AT&T Attorney Judith Kramer (a57 PE 24). Again the Court said, **”Let’s stop reading from the documents and just get factual testimony.”**

(5T, Pg. 15:04–05) (emphasis added)

Beginning with his opening statement and continuing through his examination of witnesses, plaintiff's counsel was prevented from reading documents entered into evidence. The effect resulted in sparing hostile witnesses from being confronted by their own written statements offered to impeach their testimony. A chief beneficiary of the Court’s ruling was Kramer who was shielded from accountability for her own prior statements. Plaintiff’s counsel presented Kramer with the letter she wrote to plaintiff dated July 12, 2006 (a57 PE24) and the e-mail she sent to plaintiff on July 20, 2006 stating that plaintiff had been erroneously coded as “terminated for cause” and she was correcting the coding and removing plaintiff from any “no-rehire” lists used by AT&T and Procurestaff in connection with the termination for cause coding. Since the jury had no idea what was actually said in Kramer’s communications (a57 PE24) and (a60 PE26) Kramer was able to testify that the communications meant something entirely different than what was actually written. Unless the jury was taking copious and careful notes, it could not have figured out the significance of Kramer’s communications to plaintiff in 2006.

(14T, Pg.7:02-12:09)

By not allowing oral reading of the documents at the time the witnesses were being questioned about the contents of the documents, it could have only served to confuse the jury. It is likely that much of the time, they didn’t even know what information was contained in the documents that were being referenced.

When plaintiff was questioned by her attorney Noel Crowley about how the final Agreement was formed, the Court disallowed the reading of plaintiff’s Exhibit 8 which was the draft Agreement and plaintiff’s response to Brennan in an e-mail dated September 14, 2000:

My first reaction is to accept your offer but only if my departure from AT&T is reclassified as a resignation…

If I remain in ‘terminated’ status, this will result in a negative mark on my work record for the rest of my life. So I would ask you and your legal counsel to consider again allowing me to resign.

(a35 PE7)

While both the draft agreement and plaintiff’s e-mail in response to the draft were allowed into evidence, the Court disallowed the oral reading of either, forcing the jury to wait until the end of the trial before it even had the option to learn what was contained in the documents. At the end of the trial, with 30 documents in evidence, could the jury have sorted through the documents and figured out who said what and when? The Court’s ruling could have only contributed to a disjointed presentation at trial.

The Court even disallowed the plaintiff to explain or sum up the contents of her e-mail. Plaintiff maintains that the Court’s ruling led to confusion and an inability for plaintiff’s counsel to highlight important facts with regard to how the Agreement was formed, while allowing AT&T to rely on statements that were directly contrary to the witnesses’ own prior sworn testimony. The following demonstrates the Court’s outrageous decision to disallow the reading of documents, a ruling which could have only confused the jury:

MR. CROWLEY: Okay, how did you respond to the draft of the agreement as indicated in this letter?

PLAINTIFF: Well this is an e-mail from me to Maureen Brennan, Ray Tringali, Kathleen Earley and Deborah Boger.

THE COURT: Don’t read it.

PLAINTIFF: Okay, what?

THE COURT: Don’t read it.

PLAINTIFF: Oh.

THE COURT: We’re not going to read all the documents. If the documents come into evidence they’ll be before the jury.

MR CROWLEY: can you sum up for us what –

(4T, Pg. 28:01-31:03) (emphasis added).

There was a discussion about marking exhibits into evidence, followed by the Court’s explanation to the jury of his interpretation of parole evidence:

MR. CROWLEY: Can I invite the witness to say – what prompted her to write this letter? And this is not parole evidence. This is a history of how they arrived at the agreement.

The COURT: I understand that.

MR CROWLEY: And –

The COURT: And the jury will have P7 before it. They can figure it out.

Mr. CROWLEY: Surely she can be allowed to tell her story about how the matter proceeded?

THE COURT: She did – just did tell her story. She got P-8 which I’ve allowed into evidence. And the jury will see both of them.

(4T, Pg. 28:01-31:03) (emphasis added).

Because of this ruling early on in the trial, plaintiff’s counsel was hesitant to have any of the witnesses read the documentary evidence.

**B. Court disallows press release published by Equal Employment Opportunity Commission (EEOC)**

AT&T argued that the no-rehire clause (paragraph 1) was designed and crafted to spare the company with ever again having to endure plaintiff’s presence in any capacity. The reality, however, is that Paragraph 1 was a standard feature of AT&T's Separation Agreement and General Release form. Representing it as a provision customized for plaintiff was a blatant misrepresentation of the facts. Plaintiff's position in this regard was conveyed to the Court in sidebar discussion in which counsel sought authorization to use a particular document in the cross-examination of an AT&T witness, Kathleen Larkin.

(11T, Pg. 27:24-30:25) )

The document was an October 26, 2011 press release (a74) published by the EEOC announcing settlement of a lawsuit filed in New York and California charging that AT&T discriminated against "a class of retired AT&T workers by denying them opportunity for reemployment" as part of a standard form of release for all participants in various programs for "early retirement or enhanced severance programs." The press release that counsel sought to use at trial was displayed at sidebar (11T, Pg. 27:24-30:25)

While the press release described a clause prohibiting reemployment in separation agreements relating to retirement pension plans and not to individual terminations, it fully demonstrated that AT&T imposed prohibitions on reemployment on vast numbers of former employees who were not the target of a handful of AT&T employees’ animosity. The jury also would have learned that AT&T’s “no-rehire” policy has now been discontinued as part of a settlement with the EEOC.

**C. The Court disallowed the introduction of a Wall Street Journal article that could have explained the motives of certain AT&T employees in 2005**

Plaintiff’s counsel attempted to introduce a copy of a Wall Street Journal article that appeared on the front page three days before AT&T’s CEO Michael Armstrong, Executive Vice President Rick Roscitt and other members of management received plaintiff’s letter on August 13, 2000. Plaintiff sought to introduce the WSJ article not to prove the veracity of the contents, but to show the state of mind of management that received similar criticisms from plaintiff in her letter. Plaintiff’s counsel introduced in his opening statement the idea that plaintiff’s blunt assessment of the mismanagement of the company in 2000, might shed some light on the motive by Brennan and perhaps others in human resources, to change plaintiff’s records and get her dismissed. The Court ruled that the WSJ article would be prejudicial. (a26-31)(4T, Pg. 16:13-Pg.18:18)

**D. The Court disallowed Kramer voicemail transcript which demonstrated Kramer was conducting her own investigation of the facts and whether plaintiff had “negotiated a resignation” in 2000**

A voicemail from Kramer to plaintiff was entered into discovery long before trial, but the Court disallowed the transcript to be entered into evidence. The message from Kramer would have enlightened the jury to the fact that an employee can negotiate a resignation, contrary to statements made by Brennan and the defense counsel. Kramer said in her voice mail on or around July 16, 2006:

“Hello Ms. Schiavi this is Judy Kramer from AT&T’s law division returning your e-mail to me yesterday as well as your phone call on Friday. **As I said in my letter your termination code is a termination for cause and that is what triggered many of these things.** However I am trying to reach back to former employees you mentioned **to see if they have any recollection that you negotiated a resignation.** The Agreement is silent on that. It basically says that you agree that your termination date is August 21, 2000 but it doesn’t say one way or another if it was a termination resignation or some other form of termination – anyway I am hoping to get the answers in the next day or two. If you need to reach me…[phone number].”

(a59 PE 25 for ID)

## POINT IIIAT&T WITNESSES DENIED THE MEANING OF THEIR PRIOR WRITTEN COMMUNICATIONS AND WERE ALLOWED TO INTERPRET THE SEPARATION AGREEMENT BASED ON THEIR PERSONAL OPINION

All of the witnesses for defendant who testified on the meaning and interpretation of the parties' agreement declared it to be their understanding that when plaintiff agreed she would not "apply for or seek employment with the Company at any time," that meant she would not accept employment with an AT&T contractor.

Even the attorney witnesses, Kirk and Kramer, who had previously expressed exactly the opposite view in written documents brazenly denied that their written statements meant what they said. Kirk wrote to Plaintiff in June 2003:

“…**it is AT&T’s position that while the Separation Agreement precludes you from working for AT&T as either an employee or a contractor, it would not preclude you from working for a contractor that happens to perform work for AT&T.** Should you accept such a position and be assigned to any work involving AT&T, I must remind you that you agreed to refrain from disparaging AT&T…”

(a51 PE17)

When Kirk took the stand, she claimed “what she meant” in the June 2003 letter was that plaintiff could only take a job working for a contractor to AT&T off site, not on-site. But nowhere in her letter does she make this distinction. She also testified that what she wrote should have been understood because plaintiff was really “terminated for cause” and had a “no rehire” clause in place. Kirk testified:

Q. Again going back to your letter you’re assuring Ms. Schiavi that the contract would not preclude her from working for a contractor who happens to perform work for AT&T. That’s what your letter says, correct?

A. Correct.

Q. Your letter doesn’t say anything at all about whether it depends on whether it’s on site or off site, does it?

A. The letter doesn’t say that but it’s in con – but it’s clearly understood because you can’t divorce the letter from the context of the circumstances and the context – the fact that it’s, you know, in the context of somebody who was terminated from a site and they have a no rehire clause in this 2000 agreement.

Q. And again, you’re telling us it’s clearly understood?

(12T, Pg.28:14–4).

When AT&T attorney Judith Kramer took the stand, she continued to employ the same strategy – to simply deny the meaning of what she wrote in July 2006, prior to this litigation.

For five months Plaintiff sent numerous communications to AT&T after she was dismissed from her job with Logistic Solutions Inc, on Feb 6, 2006. She received a total of three communications, only one was allowed into evidence (a81 PE 23) from AT&T human resources business partner Rhona Lava that informed Plaintiff that she lost her job on the AT&T project because the job was temporary. On July 12, 2006, Kramer admitted the reason plaintiff was dismissed:

Under AT&T's employment practices, employees who are terminated for cause are ineligible for future employment at AT&T as an employee or a contractor in a position in which they would be assigned to work on AT&T's premises or have access to AT&T systems. Based upon this employment practice your temporary contract position with AT&T through Logistic Solutions was concluded on February 22, 2006…

(a57-58 PE 24) (emphasis added).

Upon receiving the letter from Kramer, Plaintiff faxed a copy of the Brennan promise to resign and a copy of the final Separation Agreement and Kramer concludes that Plaintiff did, in fact, negotiate a resignation and that the ‘terminated for cause’ coding was erroneous:

Hello. This is a copy of the e-mail that I sent to one of our HR folks earlier today. Based upon the documentation you found and provided to me, it appears that your prior termination from AT&T was improperly coded. I’ve also requested another HR person to process the corrected EDCR, retroactive for 2000. Thanks.

(a60 PE 26).

Kramer testified that when she made the determination that plaintiff was erroneously coded as resigned, she did so because plaintiff was insistent that she negotiated a resignation in 2000 (14T, Pg. 10:21 – 11:05). So Kramer led the jury to believe that instead of making a determination based on her knowledge and years of experience in labor law, she simply acquiesced to plaintiff’s demand to be coded as resigned.
(14T, Pg.9:07-Pg.12:12)

She also led the jury to believe that it was paragraph 1, and not the “terminated for cause” status, that prevented plaintiff from working for the employee of a contractor to AT&T:

Q. And what impact would changing Ms. Schiavi’s internal coding have on her ability to work at AT&T in any capacity?

A. It really had no impact because **she was still subject to the no rehire provision from her settlement agreement.** And she was paid money in consideration of that agreement not to seek re-employment.

(14T, Pg. 11:11-17)

Kramer’s e-mail to Susan Greshler dated July 20, 2006, directly contradicts Kramer’s trial testimony,

“please have Ms. Schiavi’s name and social security number **removed from any lists pertaining to a no rehire policy based upon the termination for cause coding that is used by AT&T and ProcureStaff.**

Ms. Schiavi does still have a legal settlement agreement in place in which she agreed that “she will not apply for or seek employment with the Company at any time thereafter.”

(a60 PE26)

As mentioned above, this shifting testimony was not made clear to the jury based on the trial Court’s rulings. Since plaintiff’s counsel was unable to read aloud the witness’s own words, she was able to easily shirk what she actually said many years ago. (14T, Pg. 7:02-Pg12:12)

The evidence thus tendered to the jury consisted on the plaintiff's side of documents authored by AT&T's own witnesses, written prior to the emergence of a legal contest and before there were any partisan interests to distort either side's rendition of the facts. Opposing testimony, all of it from persons currently or previously employed by AT&T, consists of attitudes and beliefs about the meaning of words that are altogether contrary to the plain meaning of those words as they appear in the documents the witnesses purported to interpret. In several cases, the words particular witnesses sought to misinterpret were the witnesses' own words.

## POINT IV

## THE TRIAL COURT’S JURY INSTRUCTIONS ON EXTRINSIC

## EVIDENCE DEFIED THE APPELLATE COURT’S RULING IN THIS CASE AND MISLED THE JURY

In its decision in this case on April 29, 2011, the Appellate Division ruled, “On appeal, Schiavi contends that extrinsic evidence of the events surrounding the formation of the Agreement was admissible with or without a finding of ambiguity. Thus, the Agreement was improperly construed, and the undisputed evidence proved that AT&T was in breach of the Agreement. We agree.”

When the Appellate Court remanded this case to trial, it stated in its opinion, that “if validated, Kirk’s determination in 2003 that the Agreement did not preclude plaintiff from working for a contractor to AT&T and the Brennan promise to record plaintiff’s separation as a resignation could support plaintiff’s position that AT&T did recognize her as resigned. The Appellate Division said, while “parol evidence is not admissible to "vary the terms of the contract," its introduction is permitted to "achieve the ultimate goal of discovering the intent of the parties." Conway, supra, 187 N.J. at 270,” and could be used to “See Kearny PBA Local #21 v. Kearny, [81 N.J. 208](http://www.leagle.com/xmlcontentlinks.aspx?gfile=81%20N.J.%20208), 221 (1979) explain "circumstances leading up to the formation of the contract, custom, usage, and the interpretation placed on the disputed provision by the parties' conduct," are all "interpretive devices . . . used to discover the parties' intent").

The Appellate Court also determined that “the terms of the Agreement are ambiguous as to whether it was the parties' intent to prohibit Schiavi's future employment by a third party at an AT&T facility. The Agreement provided that Schiavi would "not apply for or seek employment with the Company at any time." Extrinsic evidence should have been permitted here as an interpretative aid to determine whether this provision was intended to address Schiavi's employment by Logistics and AT&T's internal coding of Schiavi's termination.

When the Appellate Court said that “extrinsic evidence should have been permitted as an interpretative aid” it is not likely that it meant that a parade of AT&T witnesses should be allowed to simply declare the meaning of paragraph 1 to be what they wanted it to mean.

The documentary evidence that supports the Appellate Court’s position was authenticated. The Court said in its decision, “The correspondence from Brennan, Kirk and Kramer could have established that the parties understood that Schiavi's termination would be recorded as a resignation rather than a termination for cause, and that she was permitted to work for an independent contractor working for AT&T. This interpretation is even supported by the Agreement which provides that AT&T would report Schiavi's termination as a resignation to other prospective employers.”

(a8-9\_Appellate Court Opinion Pgs.8-9) (emphasis added)

Instead of responding to the direction of the Appellate Court, the trial Court’s instructions led the jury to conclude that Brennan’s promise to record Plaintiff as “resigned” was of a lesser value than the language contained in the four corners of the Separation Agreement.

Plaintiff objected to the jury instructions proposed by AT&T and largely adopted by the Court on the issue of contract interpretation for failing to identify the specific items or types of extrinsic evidence found by the Appellate Division to be deserving of jury consideration, and for failing to explain the special value of extrinsic evidence in discerning the intent of the parties respecting matters left open by the contract's written terms.

(15T, Pg. 21:23-30:02)

Plaintiff's proposed solution was set forth in her proposed "Alternative to Instructions No. 3A and 3B (a66-69). Contract Instruction No. 3A, (a64-65) asked for a directed verdict on defendant's duty to record plaintiff as resigned, and would also have instructed the jury that anything entered in AT&T's employment records that would have identified plaintiff as not eligible for employment by an AT&T contractor would have constituted a breach of contract. Instructing the jury in accordance with plaintiff's proposed Contract Instruction No. 3A would have complied with the settled law making interpretation of non-ambiguous contract language an issue to be resolved by the Court. If accepted, the Court would have instructed the jury as follows:

The Court has determined how the separation agreement should be interpreted for purposes of this lawsuit, and accordingly instructs you as a matter of law that it was the intent of the parties to record Schiavi in its employment records as having resigned.

The Court further instructs you that it would have been a breach of AT&T’s contract obligations to record Schiavi in a way that would identify her as ‘terminated for cause’ or otherwise identify her as a person who under AT&T’s business policies and practices could not have been employed by an independent contractor working for AT&T.

 Had plaintiff’s proposal been accepted, the jury would have been instructed on specific items of extrinsic evidence it could consider, and by doing so would have focused its attention on matters on which the Agreement was silent, instead of matters made conclusive by the Agreement's written terms. Plaintiff's efforts to keep testimony and argument within the bounds articulated by Conway are also reflected in her proposed Contract Instruction No. 2 (a62-64), which identified those portions of the contract which were explicitly stated in the Agreement. It was the absence of any such instruction that emboldened AT&T's counsel to argue that extrinsic evidence (i.e., the personal opinions of the witnesses) could be considered in determining the meaning of unambiguous contract language (i.e., the prohibition of future employment by AT&T).

In utter defiance of the Appellate Court’s ruling in this case with regard to extrinsic evidence, the Defense counsel repeatedly objected each time plaintiff’s counsel sought to introduce essential documentary evidence that demonstrated how the Agreement was formed, such as the ‘Brennan promise’ to record plaintiff as resigned, the Kirk letter to plaintiff informing her that it was AT&T’s position in 2003 that the Agreement did not preclude her from working for an AT&T contractor, and Kramer’s communications to plaintiff. Through its continuous objections, Defense counsel was allowed to raise doubts in the minds of the jurors about what was admissible and create a thoroughly disjointed presentation which served to add to an already complex menu of facts, issues and characters. Thus instead of responding to the exigencies of a case that had been remanded for failing to consider extrinsic evidence, the Court failed to instruct the jury on what extrinsic evidence was available for the task of determining what the parties intended. Confusion as to what was available for consideration began with the Court’s instruction:

With respect to the claim of breach of contract, the Plaintiff has the burden to prove what the parties intended the contract to mean. The contract is to be interpreted so as to give effect the parties’ intentions. You cannot make for the parties a better contract than the parties made for themselves. It’s the intent, expressed or apparent in the writing that controls.

(16T, Pg. 100:8–15 – Jury charge) (emphasis added).

 **Despite the instruction, the jury made for AT&T a better contract than it made for itself** since, as Kirk admitted in her June 3, 2003 letter (a51 PE 17), and Judge Rand’s ruling of May 12, 2009 (a22-23 Rand Opinion pg 8-9), **nothing in the Agreement precluded Plaintiff from working for a contractor to AT&T.**

The jury was apparently convinced that the term “employment” in paragraph 1 extended to working for an AT&T contractor based largely on the opinions of Kirk and Kramer which entirely contradicted what they had previously written to plaintiff before the lawsuit was filed. In addition, the instruction that the “Plaintiff has the burden to prove what the parties intended the contract to mean” seems to defy the principle of Driscoll v. State, that “Any possible ambiguity in the terms of the Agreement, are to be strictly construed against the drafter of the Agreement.” The Court did not instruct the jury on this important rule of contract construction. Instead the Court instructed the jury:

Extrinsic evidence can be helpful to interpret the parties’ intentions when entering into the Agreement. However, the extrinsic evidence, that is evidence outside the agreement itself, cannot modify, enlarge, or curtail the terms of the actual agreement nor can it change the intention of the parties as expressed in the agreement.

(16T,Pg.99:14-100:20)

This instruction not only failed to identify the points at issue, but appeared to establish parity between the testimony on the meaning of documents and documentary evidence developed during contract formation. The importance of the practical pre-litigation interpretation of the parties themselves went altogether unmentioned, such as Judith Kramer’s interpretation of the promise from Brennan to record plaintiff as resigned in conjunction with the Separation Agreement which led her to conclude that plaintiff had been erroneously coded as “terminated for cause,” (a60 PE26)and AT&T Attorney Michelle Kirk’s June 2003 letter to plaintiff stating that there was nothing in the Agreement that prevented plaintiff for working for a contractor to AT&T. (a51 PE17)

Plaintiff's proposed Contract Instruction No. 2 (a62-64) would have at least identified the areas not explicitly addressed and the extrinsic information the jury could choose to consider in resolving them, all with the caveat that extraneous sources "may not be used to vary or contradict unambiguous terms in the formal contract."

## POINT V

## THE TRIAL COURT ERRED WHEN IT FAILED TO INTERPRET PREVIOUSLY ADJUDICATED, UNAMBIGUOUS TERMS OF THE AGREEMENT (PARAGRAPHS 9 AND 10) AND WHEN IT ENFORCED PARAGRAPH 8 WHICH IS AN ILLEGAL PENALTY CLAUSE

##

AT&T was awarded a judgment against Plaintiff MaryLynn Schiavi in the total amount of $35,074 for her alleged breach of Paragraphs 5, 6, 9, and 10 of the Separation Agreement. For breach of paragraphs 5 and 6, defendant was granted return of the severance pay she received in the amount of $19,900 under paragraph 8. For breach of Paragraphs 9 and 10, the Court awarded defendant $15,000 in attorneys’ fees despite the fact that the Hon. Judge David Rand ruled on May 12, 2009 that plaintiff did not breach paragraphs 9 and 10 and reversed his own award of attorneys’ fees.

(a15-25 Rand Opinion Pg.1-9, Order Pg.1-2)

Plaintiff’s counsel argued that the determination of whether plaintiff breached paragraphs 9 and 10 was a question of law and asked the trial Court to honor the previous decision by Judge Rand. The trial Court denied plaintiff’s request and instead, improperly allowed lay jurors to interpret issues of law.
(16T, Pg. 9:18-10:04 – Jury charge)

1. **Plaintiff did not breach paragraphs 9 and 10 because she did not litigate released claims in 2008**

The defendant claimed that it was entitled to attorneys’ fees because plaintiff filed a motion to add two claims to her lawsuit in October of 2008. However, upon receiving defendant’s threatening letter (a77-79), plaintiff withdrew her claim on November 13, 2008 in advance of the defendant’s deadline, therefore she was not in violation of Paragraphs 9 and 10 because no legal action was taken. (a80)

Judge David Rand’s decision in May 2009 should have remained undisturbed and accepted as “the law of the case.”

(a15-23 Rand Opinion Pg. 3-4)

In his decision, Rand determined that she did not breach paragraphs 9 and 10, because she withdrew her claims in a timely manner,

Ms Schiavi initiated this lawsuit as a result of her termination as an independent contractor working on AT&T premises, a situation not contemplated by the Separation Agreement, and because on November 12, 2008, Ms. Schiavi withdrew Counts 10 and 11, alleging wrongful termination.

(a17-18 Opinion pg. 3-6)

1. **Defendant misrepresented the truth in its claim for fees while seeking protective orders for witnesses who had relevant knowledge about plaintiff’s status with AT&T**

Defendant argued in its fee application in September 2012 that it should be compensated for time spent filing

protective orders around witnesses that plaintiff sought to depose in the fall of 2008. This was an outrageously false representation to the Court. The witnesses AT&T sought to prevent plaintiff from questioning included Ray Tringali who dismissed plaintiff on August 21, 2000, was copied on a number of e-mails during the negotiations between Brennan and plaintiff, and signed an internal form coding plaintiff as “resigned” dated October 20, 2000. (a50 PE16)

 Ellen Jackson was directly involved in contradictory accounts of how plaintiff was “discovered” working at AT&T in 2005 (a52 PE18) and (a55-56 PE21), telling Linda Stoynoff to “check out” plaintiff’s records in December 2005 (a52 PE18), and then six months later in June of 2006, writing to six human resources managers informing them that plaintiff was “terminated for cause” in 2000 and that plaintiff was discovered as a contractor because of a routine updating of the system and not because of Brennan’s sighting of plaintiff (a55-56 PE21).

The third witness, Susan Soares, was one of six managers copied on Jackson’s e-mail (a55-56 PE21). Tringali was the director who dismissed plaintiff in 2000 and Jackson and Soares were copied on communications about the plaintiff’s “official” status with the company according to the documentary evidence. Therefore it was entirely appropriate for plaintiff to seek to depose all three witnesses, and defendant should not have been awarded fees it racked up in the process of trying to prevent her from questioning said witnesses.

From the beginning of this case, it was the defendant which focused on circumstances and issues prior to the Separation Agreement and yet when plaintiff made an attempt to defend herself against its vague and ever-changing story regarding how and why she was dismissed, then she was accused of litigating released claims. Defendant didn’t have to enter into a Separation Agreement with plaintiff. It chose to recognize her as resigned and it kept its promise until Brennan sighted plaintiff in October 2005 and set about on a campaign to get her dismissed from her consulting job with Logistic Solutions. Yet AT&T doesn’t think that plaintiff should have had an opportunity to question three witnesses who were included on communications leading to the formation of the Agreement, or were included in communications about plaintiff in 2005-06.

1. **Plaintiff did not breach the disparagement and confidentiality clauses (5 and 6)**

Under paragraph 8, if plaintiff breached paragraphs 4, 5, or 6, she would be obligated to pay defendant $$19,900 which is exactly the amount she was paid as severance pay in 2000 upon signing the Agreement. The Appellate Division advised the trial Court in this case,

“For the guidance of the judge at trial, we note the following. There is an important distinction between permissible “liquidated damages” clauses and impermissible “penalty” clauses. Liquidated damages are the amount a party agrees to pay for a breach of contract, based on a good faith estimate of actual damages. Wasserman’s, Inc. v. Twp. Of Middletown, 137 N.J. 238, 248-49 (1994). **Where the amount of liquidated damages is not based on a good faith estimate and acts as a threat of punishment designed to prevent the breach, the clause is an unenforceable penalty clause.”**

(a12 Appellate Court Opinion Pg. 12)

 AT&T argued that plaintiff disparaged AT&T when she wrote to an AT&T attorney in the spring of 2006 and said she thought AT&T was acting in an unethical and unprofessional manner when she was given no reason why her position was suddenly ended in February 2006 after she was told three weeks prior by her supervisor that she was doing an incredible job.

In fact, it was AT&T that breached the non-disparagement clause by widely circulating that plaintiff had been ‘terminated for cause’ when she was recognized as “resigned.” AT&T also disparaged plaintiff by falsely coding her in 2006 in the data base accessible to all employees of ProcureStaff Inc., an entirely independent company that handles the on-boarding for thousands of companies, as ‘performing below expectations’ and producing ‘below average’ work when that was entirely contrary to the testimony of the project supervisor Barbara Laing.

(9T, Pg.21:11-13 and Pg. 32:06-10)

Sue Noto, a manager for ProcureStaff Inc., testified that **everyone at ProcureStaff Inc. has access to the documentation that “records” plaintiff’s performance and skills as “below my expectations.**” (a53-54 PE19)(11T, Pg. 4:19 – 05:24).

Laing said at trial that the only reason she dismissed plaintiff in February 2006 was because human resources instructed her to do so:

I didn’t personally have a performance matter that would have caused me to want to release her at that time because she was fine. And so it was just a very awkward situation. It was not my choosing at the time.

(9T, Pgs. 31:23-32:10).

Laing further testified that it was in consultation with AT&T human resources personnel that she assessed plaintiff’s work below standards. (9T, Pg. 51:23-Pg.55:07).
 Plaintiff requests that the Court reverse the entire judgment against her based on the fact that AT&T breached the Agreement when it changed her status from “resigned” to “terminated for cause” and added her to the “Do Not Hire” list used in connection with the “terminated for cause” coding which led to the loss of a job paying $104,000 annually and the fact that AT&T sustained no loss as a result of plaintiff’s comments to an AT&T attorney, nor did plaintiff breach the confidentiality clause of the Agreement (paragraph 6).

AT&T’s claim for attorneys’ fees has already been dismissed by Judge Rand on May 12, 2009 in pre-appeal proceedings and therefore his decision should be recognized as the law of the case. As the Court is no doubt aware, the law of the case doctrine prescribes that a legal decision made in a particular matter “should be respected by all other lower or equal courts during the pendency of that case.” Lanzet v. Greenbert, 126 N.J. 168, 192 (1991) (citing State v. Reldan, 100 N.J. 187, 203 (1985); State v. Hale, 127 N.J. Super. 407, 410-11 (App. Div. 1974)).

Plaintiff did not violate the Agreement by filing this lawsuit. She was empowered by Paragraph 11 which states that she would not be in violation of the Agreement if she took legal action for the sole purpose of enforcing the Agreement. (a39-47 PE12)

 Plaintiff took legal action after she was told in writing by AT&T attorney Judith Kramer in July of 2006 that she had been erroneously coded as “terminated for cause” and placed on the AT&T “Do Not Hire” list because of this erroneous coding, which then made plaintiff ineligible to continue working for an AT&T vendor. The error, which Kramer told plaintiff she corrected, had cost plaintiff her job with Logistics. Therefore plaintiff litigated to enforce the Agreement and to seek damages for defendant’s breach.

Plaintiff asks the Court to overturn defendant’s award of $19,900 (return of severance pay) for the following reasons: Paragraph 8 states that if plaintiff breaches Paragraphs 4, 5 or 6, she is to return the consideration she received in 2000 to company. Paragraph 8 is an unlawful penalty clause as defined by the New Jersey Appellate Division in its ruling in this case on April 29, 2011 **because the amount determined to represent the estimated future damage should a breach occur has no relationship to the actual breach and was only included as a threat for non-performance.** In its April 29, 2011 decision, the Appellate Division dismissed AT&T’s counterclaim as moot, but defined the difference between liquidated damages and an illegal penalty clause. The sum of $19,900 does not reflect liquidated damages or a good faith estimate of actual damages. In fact, it represents the customary fifteen weeks salary paid to employees leaving the company based on age and years of service. Since the amount is a one-size fits all penalty for any breach large or small, plaintiff asks the Court to rule that paragraph 8 is an illegal penalty clause.

(a12 Appellate Court Opinion Pg. 12)

Thus, Defendant AT&T’s counterclaim for enforcement of provisions for liquidated damage is without legal basis and should be dismissed with prejudice.

### CONCLUSION

AT&T’s duty to record plaintiff’s separation from AT&T was clear based on the Brennan promise that assured plaintiff that she would “record” plaintiff’s separation from AT&T as a “resignation” and a final Agreement that only referred to plaintiff as “resigned.” While plaintiff was recorded as resigned on two AT&T internal documents in 2000, her employment records were changed five years later in direct breach of AT&T’s promise to plaintiff to recognize her as a resigned employee resulting in her job loss with Logistic Solutions Inc., and the potential to earn more than $300,000 during the course of three years. Once the pre-litigation evidence was authenticated, all that remained were questions of law. Defendant argued that Brennan’s promise to record plaintiff as resigned was inconsequential and the real reason plaintiff was dismissed from her work while employed by an AT&T contractor was because she was really “terminated for cause” and her Agreement contained paragraph 1. Kramer’s communications in July 2006 utterly obliterated defendant’s argument. Kramer’s precise language in her letter made transparent the events that actually transpired. She told plaintiff in both writing and in her voice mail that it was the “terminated for cause” coding that led to her dismissal on February 2006. (a57 PE24) (a59 PE25 for ID)

**Brennan’s communication in 2005 was contrary to AT&T’s official position as stated by AT&T Attorney C. Michelle Kirk**

The Appellate Court determined in this case in 2011 that if Kirk did in fact tell plaintiff that the Agreement did not preclude her from working for a contractor to AT&T, and Brennan set out to defy AT&T’s ruling, **“Brennan’s actions to have Schiavi terminated, included on the Do Not Hire list and coded as terminated for cause, would conflict with AT&T’s interpretation of the Agreement.”** (a10 Appellate Court Opinion Pg.10) Plaintiff submits that Brennan breached the Agreement with plaintiff when she communicated to Kathleen Larkin, AT&T vice president of human resources and other hr personnel that plaintiff had been terminated for cause in 2000 and set into motion changes to plaintiff’s records that prompted her untimely dismissal in 2006. Plaintiff requests that the Court rule as a matter of law and based on weight of evidence, that AT&T breached the Agreement, tortuously interfered with her economic opportunity with Logistic Solutions Inc. and breached the doctrine of good faith and fair dealing when it changed her employment records five years later. Plaintiff asks for a directed verdict and/or new trial. Plaintiff also asks the Court to dismiss defendant’s $35,000 judgment against her in its entirety. Since plaintiff is currently on the AT&T Do Not Hire list, she is, in effect, being treated as a former employee who is classified as “terminated for cause” which bars her from entering AT&T’s premises – even as the employee of a video production company or a marketing consulting company. Given AT&T’s reach in the business community, this constitutes a highly restrictive covenant that prevents plaintiff from working for thousands of companies that work in consultation to AT&T and may require their staff to be present for on-site meetings at AT&T. Plaintiff asserts that this is precisely why she lost her job with Grafica in May of 2006. She was told by James Hathaway, Grafica’s business development director at the time of her interview that he had her in mind to write for an AT&T newsletter. He also told her she would have had to have access to AT&T systems and attend meetings on-site from time to time. Unknown to her at the time, her name and social security number had been added to the “Do Not Hire” list. The job offer from Grafica was withdrawn within four days, no reason given. The job paid $82,000 annually plus benefits. (6T, Pg. 9:14 – pg 12:20) Because of the tension created by the trial Court, plaintiff’s counsel made the decision to turn away at the last minute James Hathaway and Rachel Ramos. Ramos was prepared to authenticate documentation related to the Grafica job. Hathaway told plaintiff’s counsel that he was prepared to testify that she was his first choice to write for the AT&T Labs newsletter and would have been required to attend on-site meetings at AT&T. Because she was on the “Do Not Hire” list, she would have been stopped at AT&T’s gate. In addition, because of plaintiff’s derogatory rating in ProcureStaff’s data base, her reputation has been negatively impacted. ProcureStaff Inc., handles the on-boarding for companies across the nation. Plaintiff loved her work at AT&T. She wrote in her resignation letter, “I enjoyed being a member of the team of people within the company who helped bring the world into the Internet age.” Plaintiff was equally excited about her assignment on the ISNN project and the prospect of transforming it into “The Future Channel.” Plaintiff asks the Court to bring this story to a fair and just conclusion.

Respectfully submitted,

MaryLynn Schiavi, Pro se April 30, 2013