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In a controversial decision, the New Jersey Supreme Court in *Quinlan v. Curtiss-Wright Corporation* has extended the New Jersey Law Against Discrimination's anti-retaliation protections to an employee's theft and use of confidential company documents in furtherance of her discrimination lawsuit, ruling that she could not be lawfully terminated for such conduct.

The End Justifies the Means: New Jersey Supreme Court Rewards Employees Theft of Personnel Documents in the Name of the Law

By Keith J. Rosenblatt and Jacqueline McClintock

In a highly controversial decision, the New Jersey Supreme Court ruled on December 2, 2010, in *Quinlan v. Curtiss-Wright Corporation*, that a trusted employee's act of stealing and using her employer's confidential personnel documents in furtherance of her discrimination lawsuit constituted protected activity under the New Jersey Law Against Discrimination ("LAD"), for which she should not have been terminated.

The decision, closely followed by many employers, implicates serious employer-employee privacy and trust concerns. It will also make it easier for employees who work in New Jersey to bring and prevail on statutory retaliation claims, as their employers may no longer safely discharge a thieving or disloyal employee if the stolen documents may evidence conduct prohibited under the state's workplace discrimination or whistleblower laws.

Summary of the Facts

Joyce Quinlan worked in the human resources department of Curtiss-Wright Corporation for approximately 23 years prior to her termination. During that time, she rose to the level of Executive Director of Human Resources, reporting directly to the company's CEO and president.

In 2003, the company promoted a male human resources employee as part of a departmental reorganization, who became Quinlan's direct supervisor. Believing she had been passed over for that position for gender-based discriminatory reasons, and as part of her effort to prove her theory of company-wide gender discrimination, Quinlan surreptitiously gathered more than 1800 pages of documents that were available to her as a human resources officer, copied them, and turned them over to her attorney. Many of these documents contained employees' confidential personal information, including social security numbers and salary information. She did so despite having signed a confidentiality agreement and an acknowledgement that the company's code of conduct prohibited employees from using confidential company information for private purposes.

In November 2003, Quinlan filed suit in the Superior Court of New Jersey, alleging

that the company discriminated against her based upon her gender because it: (i) failed to promote her; (ii) engaged in a pattern and practice of discrimination; and (iii) treated her differently with respect to wages and salary. During pre-trial discovery, Quinlan's attorney produced to the company's attorneys the 1800-plus pages of records that Quinlan had copied from the company's files. This marked the company's first awareness that she had copied confidential files for use outside of work in violation of company policy. Nonetheless, Quinlan remained employed at Curtiss-Wright and received a bonus and a raise as part of her regularly scheduled pay increase.

Several weeks thereafter, in her continued capacity as the Executive Director of Human Resources, Quinlan came across the CEO's most recent performance evaluation of her supervisor. The evaluation noted that her new supervisor needed improvement in numerous areas, leading Quinlan to believe that the appraisal was relevant to her lawsuit. Consequently, she secretly copied that document as well and turned it over to her attorney.

Soon thereafter, Quinlan's attorney deposed her supervisor, ambushing him and defense counsel with the performance evaluation that Quinlan had copied, but that even the supervisor had not previously seen. The company's in-house counsel, who was present at the deposition, informed his superiors that Quinlan was continuing to copy confidential material. Shortly thereafter, the company discharged Quinlan, explaining: "Without authorization, you have removed confidential, and in some instances privileged, information . . . This unauthorized taking of confidential or privileged information from the Corporation constitutes a theft of Company property . . ." Quinlan then added a statutory retaliation claim to her pending lawsuit.

At trial, the court split the issue between Quinlan's initial act of copying the confidential documents and the later use of the documents by Quinlan's attorney. The trial court ruled that although Quinlan could have been terminated for secretly copying the confidential documents and performance evaluation, her attorney's use of those documents in litigation constituted protected activity, for which the employer could not terminate Quinlan. Based upon that instruction, the jury found that retaliation was the real reason for Quinlan's termination and awarded her a multi-million dollar verdict.

Following the company's appeal, the appellate division reversed the retaliation verdict and remanded the case for a new trial, holding that neither Quinlan's act of illicitly obtaining and copying confidential documents, nor her attorney's use of the documents at the deposition constituted protected activity.

The New Jersey Supreme Court's Decision

The supreme court reversed the appellate division and reinstated the jury's award, noting that the LAD "operates not only to fight discrimination wherever it is found, but to protect those who assist in rooting it out." The court declined, however, to establish a clear, bright-line rule regarding an employee's theft and use of his employer's property in furtherance of a lawsuit against it, choosing instead to "strike a balance" between an employer's legitimate right to safeguard confidential documents and an employee's right to be free from discrimination and retaliation. In doing so, the court enunciated the following flexible, seven-part "totality of the circumstances" test for determining when an employee's misappropriation of company documents will be deemed protected by the LAD:

- 1. How did the employee come into possession of, or obtain access to, the document?** If the employee did so during the ordinary course of his or her duties (like Quinlan), this factor will weigh in the employee's favor. If, however, the document was obtained by other means, such as by rummaging through another employee's files, it will weigh against the employee.
- 2. What did the employee do with the document?** If the employee shared the document with his or her attorney, this factor will support the employee. If, however, he shared it with others, such as coworkers who would not otherwise have seen it, this factor may support the company.
- 3. What is the employer's interest in keeping the document confidential?** This factor will tilt towards the company if the document contains information that is typically regarded as proprietary or confidential to the company, such as trade secrets, as well as social security numbers and medical information relating to employees or customers.
- 4. Is there a clearly identified company policy on privacy or confidentiality that the employee's disclosure has violated?** In examining this factor, the court will look not only at the existence of a policy but also at how strenuously it is enforced.

5. **What were the circumstances of disclosing the document, in view of its relevance versus its potential to disrupt the employer’s business operations?** This factor will take into account the manner and timing of the disclosure and its intended use. For example, is the disclosure central to the claim of unlawful discrimination or harassment, or is it being used solely to embarrass the company? In this regard, the focus will be on the effect the document’s disclosure has on the employer’s business, rather than on an individual company representative.
6. **What was the reason for stealing the document rather than simply requesting it in discovery during a lawsuit?** In other words, was there justification for procuring the document through illegitimate means, such as fear that the document would be discarded or destroyed, or was the resort to self-help truly unnecessary?
7. **How will the court’s decision regarding the permissibility of the employee’s actions bear upon the broad remedial purposes of the LAD, as well as the balance of the legitimate rights of employers and employees?** The supreme court acknowledged that with regard to this factor, the LAD’s protective goals tip the scales in favor of the employee.

Applying these factors, the court agreed with the trial court, concluding that while Quinlan could have been lawfully terminated for taking the documents, she protected herself from termination by providing them to her lawyer. Unfortunately, the court’s seven-part test provides little guidance as to what employers can do to protect themselves against employee thievery, or to discipline such conduct, before a lawsuit is instituted.

Import of the Supreme Court’s Ruling

The employee-friendly *Quinlan* decision likely will result in increased discrimination and retaliation complaints against employers operating in New Jersey. This is so because the supreme court has, in essence, given a green light to employees who might steal and surrender to their attorneys confidential business records that may (or may not) support their claims, by cloaking such employees in the LAD’s anti-retaliation protections.

Nevertheless, there are steps that employers may take to tip the balance of the court’s multi-part test in their favor and to prevent the theft of documents from the outset:

- **Reevaluate the categories of documents to which employees in various positions have access in the ordinary course of their employment.** Where possible, limit the access to such documents to those with a strict “need to know,” and be sure to safeguard documents from inadvertent disclosure. Employees who regularly have access to private and confidential documents may have more success in using such documents against the employer in litigation.
- **Implement new policies or strengthen existing policies regarding the confidentiality of business and personnel records.** An effective policy may prevent employees from using confidential documents for personal reasons and could bolster an argument that taking and copying such documents is not protected activity. Additionally, ensure that such policies are not policies in name only, by rigorously enforcing them.
- **Promptly investigate and immediately document and address any known theft of company property, before such theft can be brought to the company’s attention by the employee’s attorney.** While this may not always be possible, the outcome in *Quinlan* may have been different had the company learned of and addressed the employee’s conduct outside the context of the litigation.
- **Train management employees on how to prevent and handle retaliation and discrimination claims.**

By consulting with employment counsel regarding these recommendations, New Jersey-based employers may be better able to protect confidential documents and defend themselves against this tactic when faced with retaliation and discrimination claims under the LAD.

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