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New Jersey Supreme Court Leaves Employers with Little Protection against Employees Who Steal Confidential Company Documents To Support Discrimination Claims

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The Supreme Court of New Jersey issued a 5-2 decision yesterday that may very well insulate employees from discipline for wrongfully taking confidential company documents to support discrimination claims against their current employers. *Quinlan v. Curtiss-Wright Corp.*, No. A-51-09 (N.J. Sup. Ct. Dec. 2, 2010). The court's opinion sets forth a murky multifaceted balancing test that leaves employers with little guidance as to whether and how they can lawfully discipline employees for actions that violate their confidentiality policies or the employees' common-law duty of loyalty.

Factual Background

Over the course of nearly 20 years as an employee of Curtiss-Wright, Joyce Quinlan rose through the ranks to become the company's Executive Director of Human Resources, reporting directly to its Chief Executive Officer. In 2003, Curtiss-Wright promoted Kenneth Lewis, a male employee with much less experience than Quinlan, to Corporate Director of Human Resources and Management Development. Once Lewis was promoted, Quinlan was reassigned to report to him. She believed she was passed over for promotion because of gender discrimination within Curtiss-Wright.

Quinlan consulted with counsel and, without her lawyers' knowledge, began reviewing and copying files that she could access by virtue of her Human Resources role, which she thought would support her claim. She eventually compiled over 1,800 pages of documents, many including confidential personal information about other employees, and turned them over to her lawyers. Quinlan filed a gender discrimination lawsuit in November 2003. Curtiss-Wright first learned that she had copied confidential personnel documents when she produced those 1,800 pages in discovery.

Several weeks later, in connection with Quinlan's job duties as Executive Director of Human Resources, Curtiss-Wright's CEO gave her his performance appraisal of Lewis. Quinlan noticed that the CEO rated Lewis as needing improvement in several areas, so she copied the document and turned it over to her lawyers, too. Without producing the appraisal in discovery, Quinlan's lawyers used it to cross-examine Lewis in his deposition, much to his surprise, as he had not seen it yet. The appraisal also surprised Curtiss-Wright's lawyers, who now realized Quinlan was *still* taking confidential company documents to support her case.

Curtiss-Wright terminated Quinlan's employment because, as explained in a letter to her, her "unauthorized taking of confidential or privileged information from the Corporation constitutes a theft of company property." She then amended her Complaint to assert a retaliation claim.

Case History and Legal Analysis

Before trial, the Superior Court determined that neither Quinlan's taking of the 1,800 pages of documents nor her copying of the Lewis appraisal constituted "protected activity" under the New Jersey Law Against Discrimination (the "LAD") and, therefore, that Curtiss-Wright could lawfully discharge her for those acts. Her lawyers' later *use* of those documents in pursuit of her LAD claims, however, *was* protected. Consequently, the court instructed the jury that if Curtiss-Wright discharged Quinlan for *using* the document, it had committed an unlawful act of retaliation. But, if its motivation for her discharge was her *taking* of the documents, that was permissible under the LAD.

The jury returned a verdict for plaintiff on both her failure to promote and retaliation claims, awarding her compensatory damages in excess of $4.5 million *and* punitive damages in the same amount.

The Appellate Division disagreed with the Superior Court's distinction between *taking* and later *using* confidential company documents, expressing concern that this approach "would encourage 'employees to go through their employers' files and copy confidential material, secure in the knowledge that employers could do nothing so long as that material was later used in litigation.'" *Id.* at 19.

On appeal, the New Jersey Supreme Court adopted a "flexible, totality of the circumstances approach" consisting of a seven-factor test, "[a]ll of which must be balanced in order to achieve the essential goals embodied in the LAD." Under that test, "in deciding whether an employee is privileged to take or to use documents belonging to the employer," New Jersey courts must evaluate the following factors:

1. "[H]ow the employee came to have possession of, or access to, the document." Innocent acquisition will generally favor the employee, while intentional acts outside the employee's normal duties will favor the employer.

2. "[W]hat the employee did with the document." Sharing the document only with counsel for evaluating potential claims will favor the employee, but disseminating it to those who are not privileged to see it will favor the employer.

3. "[T]he nature and content of the particular document" and "the employer's interest in keeping the document confidential." If the document is privileged, reveals trade secrets or proprietary business information, or includes personal or confidential information about other employees, these factors will favor the employer.

4. "[W]hether there is a clearly identified company policy on privacy or confidentiality that the employee's disclosure has violated," or "whether, in the absence of a clear policy, the employee has acted in violation of a common-law duty of loyalty to the employer."

5. A balance of the document's "relevance against considerations about whether its use or disclosure was unduly disruptive to the employer's ordinary business." The focus must be on the employer's business and not whether its disclosure was "merely troubling or upsetting to the employee to whom it related."

6. “[T]he strength of the employee’s expressed reason for copying the document” instead of using discovery mechanisms. If there was a likelihood that the document would have been destroyed or discarded in the ordinary course of business, it will favor the employee.

7(a). “[T]he broad remedial purposes the Legislature has advanced through our laws against discrimination, including the LAD.”

7(b). “[T]he effect, if any, that either protecting the document by precluding its use or permitting it to be used will have upon the balance of legitimate rights of both employers and employees.”

At the conclusion of this lengthy balancing test, the court stated that it “need not engage in a point-by-point application of these factors,” because its conclusion would be the same as the trial court’s. In other words, the trial court was correct in drawing a distinction between the plaintiff’s taking of the document and the later use of it by her lawyers. Consequently, the court reinstated the retaliation verdict in Quinlan’s favor.

Implications for Employers

The implications of this decision are quite broad. Although the court's decision articulates a test that established standards to balance the interests of employers and employees, as a practical matter, this ruling appears to give free reign to employees who assert claims of discrimination -- especially those that have retained counsel to whom they have forwarded purloined documents -- to engage in fishing expeditions through the employer's confidential records. Though the court eschews the fears it anticipates employers will have as a result of this decision, it does so by an unrealistic theory that employees will be deterred from document theft by the fear that a jury will reject their argument that they were fired for *using it*, as opposed to *taking it*. Of course, once the pilfered documents are in the hands of an employee's counsel—and are then used by the employee's counsel in prosecuting the employee's case—it will be extraordinarily risky for an employer to take disciplinary action once it learns of the theft. Therefore, in any situation where there is a theft of documents discovered in connection with an employee's complaint of discrimination, extraordinary care must be taken before disciplinary action is taken. At minimum, however, employers must have broad and comprehensive confidentiality policies, which are widely communicated and uniformly enforced.