

Client Alert **Employment & Labor**

New Jersey Supreme Court Holds That Employee May Be Prosecuted Criminally for Taking Employer's Documents for Purpose of Discrimination Litigation

A recent New Jersey Supreme Court decision will likely make employees think twice before taking confidential documents from their employer in order to support a discrimination lawsuit against their employer. In *State v. Saavedra*, the Court made it abundantly clear that an employee who engages in this type of behavior runs the risk of being prosecuted criminally. The Court rejected outright the notion that its previous decision in *Quinlan v. Curtiss-Wright Corp.* shields employees who resort to such measures from criminal liability.

Background

Quinlan v. Curtiss-Wright Corp.

In *Quinlan v. Curtiss-Wright Corp.*, plaintiff suspected that gender discrimination was prevalent within her employer's company, and that she had been a victim of discrimination. She reviewed company files to which she had access in order to find documents that would support her belief. Plaintiff ultimately copied more than 1800 pages of documents, some of which contained confidential information, and then sued her employer for discrimination.

Plaintiff produced these documents during discovery, which is when defendant first learned that plaintiff had copied these documents without authorization. Plaintiff remained employed by defendant during the litigation until she produced a document that she had

J u n e
2015

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copied without authorization that was particularly helpful to her claims. Defendant then terminated plaintiff for theft of confidential and privileged documents. After she was terminated, plaintiff amended her complaint to include a claim of retaliation. In accordance with trial court's jury instructions, the jury found that defendant violated New Jersey's Law Against Discrimination ("LAD") by retaliating against plaintiff for her use of the company's documents in her lawsuit. The fact that they were confidential documents did not shield the employer from a retaliation claim.

The case eventually reached the Supreme Court, which ultimately affirmed this distinction. In doing so, it adopted a "totality of the circumstances" test to be used to determine whether an employee's act of taking his or her employer's confidential documents in furtherance of a LAD lawsuit is protected activity. Although, the Court in *Quinlan* stated that employers may still discipline employees for taking documents "when they are not privileged to do so," some nevertheless believed that the Court's decision would protect any employee that took a confidential document for the purposes of pursuing a claim under the LAD.

State v. Saavedra

Saavedra was a Board of Education ("Board") employee who sued the Board alleging violations of the LAD and New Jersey' Conscientious Employee Protection Act ("CEPA"). Saavedra allegedly copied and removed confidential student records from the Board's offices in order to support her discrimination lawsuit against the Board, and subsequently produced the documents during discovery. The Board reported Saavedra's alleged theft to the prosecutor's office, and a grand jury ultimately indicted Saavedra for official misconduct and unlawful taking.

Saavedra moved to dismiss the indictment, arguing that her conduct was permitted by the *Quinlan* decision and that the prosecutor withheld exculpatory evidence from the grand jury by failing to inform the grand jury that Saavedra intended to use the documents to support her discrimination lawsuit. The trial court denied Saavedra's motion to dismiss the indictment, and the Appellate Division affirmed the trial court's decision. Saavedra then moved for and was granted leave to appeal to the Supreme Court of New Jersey.

Supreme Court's Decision in *State v. Saavedra*

The Supreme Court rejected Saavedra's arguments. The Court found that the state sufficiently supported each of the *prima facie* elements of the charges for official misconduct and unlawful taking. The Court further found that the prosecutor did not improperly withhold exculpatory evidence, because proof that Saavedra took the

documents to support her employment discrimination lawsuit would not “squarely refute[]” a *prima facie* element of either of the charges against her.

Saavedra also argued that, in light of *Quinlan*, her indictment was fundamentally unfair, unconstitutional as applied to her case, and was inconsistent with New Jersey’s public policy against employment discrimination. The Court expressly rejected these arguments, explaining that *Quinlan* “did not endorse self-help as an alternative to the legal process in employment discrimination litigation” and did not “bar prosecutions arising from an employee’s removal of documents from an employer’s files for use in a discrimination case, or otherwise address any issue of criminal law.” In addition, the Court detailed the tools available to plaintiff in her civil lawsuit to obtain the documents she sought, such as discovery and other methods to preserve evidence or sanction her employer in the event it committed spoliation of evidence. The Court also explained that the trial court in Saavedra’s civil lawsuit would have been able to assess the relevance of the documents that she sought and address privacy concerns raised by the disclosure of those documents.

However, the Court also noted that, although *Quinlan* did not immunize Saavedra from criminal liability, she may nevertheless raise a “claim of right” or other justification defense at her trial. The court stated that the availability of such a defense depended on the evidence adduced at trial. The court explained that although the *Quinlan* balancing test did not govern Saavedra’s claim of right or other justification test, “evidence that would be relevant to that test in a civil case if a jury evaluates defendant’s claim of right or other justification defense.”

The Court concluded its opinion by stating that “the import of *Quinlan* in employment discrimination [was] not before the Court.” Accordingly, the Court explained that it did not respond to the dissent’s suggestion that the majority’s “discussion of factors that may be considered if a claim of right defense is submitted to a petit jury in this case does not constitute an effort to ‘clarify[]’ the test set forth in *Quinlan*.”

Regardless of *Saavedra*’s effect on the *Quinlan* balancing test in civil litigation, *Saavedra* may certainly chill surreptitious attempts by employees to obtain confidential documents for fear of criminal prosecution.

Employer Tips

In light of the Court’s decision, employers should review their confidentiality policies and practices, and ensure that they take adequate measures to put employees on notice of the consequences of unlawful taking of such information. However,

employers should also consult with counsel before taking action against an employee caught copying or taking confidential documents, as *Quinlan* is still good law in NJ, although it seems to have been somewhat limited by the *Saavedra* decision. The attorneys in the Sills Cummis & Gross P.C. Employment and Labor Law Group can assist employers in addressing these new developments.

If you have any questions regarding information in this alert, or if you need more information, please contact one of the following Sills Cummis & Gross attorneys:

David I. Rosen, Esq.

Chair, Employment and Labor Practice Group

drosen@sillscummis.com | (973) 643-5558

Galit Kierkut, Esq.

Client Alert Editor; Member, Employment and Labor Practice Group

gkierkut@sillscummis.com | (973) 643-5896

Charles H. Kaplan, Esq.

Member, Employment and Labor Practice Group

ckaplan@sillscummis.com | (212) 500-1563

Joseph V. Manney, Esq.

Client Alert Author; Associate, Employment and Labor Practice Group

jmanney@sillscummis.com | (973) 643-5659