



Workplace Whistleblower

Perspectives on whistleblower situations that employers frequently face

New Jersey Supreme Court Confirms Aspiring Whistleblowers Can't Help Themselves to Confidential Documents

By Robert T. Szyba and Jade Wallace

In a pivotal decision with broad implications for aspiring New Jersey whistleblowers, yesterday the New Jersey Supreme Court affirmed the Appellate Division's finding that no qualified privilege exists to protect an employee from criminal prosecution for taking confidential documents from her employer under the guise of gathering evidence for an employment lawsuit.

In [State v. Saavedra](#), A-68-13 (June 23, 2015), a former public employee, Ivonne Saavedra, was criminally indicted on charges of second-degree official misconduct and third-degree theft of public documents after taking hundreds of highly confidential original and photocopied documents from her former employer, the North Bergen Board of Education. These documents, which contained sensitive personal information, such as individual financial and medical information regarding individual minor students, were taken by Saavedra in support of her whistleblower retaliation and discrimination claims against the Board. Saavedra alleged that she was a victim of gender, ethnic, and sex discrimination, as well as hostile work environment and retaliatory discharge.

Saavedra moved to dismiss the indictment, arguing that, in *Quinlan v. Curtis-Wright Corp.*, 204 N.J. 239 (2010), the New Jersey Supreme Court "establishe[d] an absolute right for employees with employment discrimination lawsuits to take potentially incriminating documents from their employers." In *Quinlan*, the plaintiff's employment was terminated after her employer discovered that the plaintiff copied about 1,800 pages of confidential information without authorization, and gave them to her attorney to use in the lawsuit. The plaintiff added a claim of retaliation to her lawsuit and was awarded a multimillion dollar verdict. The New Jersey Supreme Court upheld the jury verdict, finding that the plaintiff had engaged in protected activity that could not lawfully serve as a grounds for termination.

Analyzing Saavedra's argument, the Appellate Division found that *Quinlan* did not apply in criminal cases, and instead of a bright-line prohibition against taking company documents, established a totality-of-the-circumstances test for use in civil litigation.

The New Jersey Supreme Court agreed. It confirmed that the "decision in *Quinlan* did not endorse self-help as an alternative to the legal process in employment discrimination litigation. Nor did *Quinlan* 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." On the contrary, the Court explained that the *Quinlan* decision stands for the proposition that an employer's interest

must be balanced against an employee's right to be free from unlawful discrimination when assessing whether an employee's conduct in taking documents from his or her employer constitutes a protected activity. The Court pointed to the discovery procedures available to litigants that would have provided Saavedra access the same documents that she took, but would have allowed the trial court the opportunity to balance her interests with the Board's interests, including any concerns about the privacy of minor students and their parents.

Despite the fact that the Court declined to provide an automatic shield from prosecution under *Quinlan*, the Court pointed out that in such circumstances, the employee will nevertheless be able to assert a claim of right defense or a justification. Thus, the employee will still be able to assert that his or her taking of the employer's documents was justified. And there, the Court suggested, *Quinlan*'s guidance may assist the trial court in analyzing the particular facts and circumstances to determine whether the employee can assert this defense.

The New Jersey Supreme Court has thus clarified that although self-help tactics may be justifiable in certain circumstances, *Quinlan* did not establish or endorse an unfettered right of employees to surreptitiously take documents from the workplace for their own use in litigation or otherwise. New Jersey employers, especially those who may be concerned with customer identity theft and data breaches, have won an important victory to assist in guarding against the unauthorized, and often covert, taking of confidential documents and information.

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