

LABOR & EMPLOYMENT

ALERT

LIMITS OF *QUINLAN*: THEFT OF DOCUMENTS BY THE PLAINTIFF IN AN EMPLOYMENT CASE MAY BE A CRIMINAL OFFENSE

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In a recent noteworthy decision, *State v. Saavedra*, Docket No. A-1449-12T4 (Dec. 24, 2013), the New Jersey Appellate Division refused to categorically insulate employees from criminal prosecution when a public-sector employee stole confidential employer documents to support her Law Against Discrimination (LAD) and Conscientious Employee Protection Act (CEPA) claims.

The defendant employee in *Saavedra* was a public-sector employee who took highly confidential original documents belonging to her employer, the North Bergen Board of Education, contending that she did so to support her employment discrimination lawsuit under the New Jersey LAD and the CEPA. The defendant employee was charged with second-degree official misconduct and third-degree theft of movable property.

The defendant moved to dismiss the indictment, asserting that her actions were not criminally sanctionable under *Quinlan v. Curtiss-Wright*, 204 N.J. 239 (2010), which establishes (she asserted) an absolute right for employees with employment discrimination lawsuits to take potentially incriminating documents from their employers. The court in *Quinlan* held that a private-sector employee was engaged in protected conduct when she copied

confidential documents at work for use in her discrimination law suit.

The Appellate Division disagreed with the defendant employee's position, noting that *Quinlan*, a private-sector employment discrimination case, created a seven-part totality of the circumstances test to determine whether the employer can terminate its employee for the unauthorized taking of its documents. *Saavedra* held that a criminal court judge is not required to perform a *Quinlan* analysis to decide a motion to dismiss an indictment charging a defendant with official misconduct predicated on an employment-related theft of public documents. Instead, the motion to dismiss such an indictment would be treated the same as any motion relating to criminal conduct: if the state could produce sufficient evidence to establish a prima facie case that the defendant committed a crime, then the motion should be denied.

Quinlan and *Saavedra* may be distinguished on several grounds: (1) *Quinlan* dealt with a private-sector employee/employer, while *Saavedra* dealt with a public servant; (2) *Quinlan*'s employee defendant did not actually take the documents, she just copied them, whereas the defendant in *Saavedra* took original documents; and (3) *Quinlan* was a civil case, while

Saavedra was a criminal proceeding. Thus, attempting to reconcile *Quinlan* and *Saavedra* leaves plenty of unanswered questions for the lower courts to decide. In *Saavedra*, although the Appellate Division noted how the employee was a public servant, and the holding in fact explicitly mentions “theft of public documents,” the decision did not confirm that private-sector employees would be treated any differently during a criminal prosecution if the employee’s actions could sustain a criminal indictment.

Nevertheless, it is clear that nothing in *Quinlan* prevents the criminal prosecution of public employees for criminal conduct committed in furtherance of an

employment discrimination case. The Appellate Division refused to adopt a broad public policy that such employees are categorically insulated from criminal prosecution if they take confidential employer documents to support potential LAD and CEPA claims.

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