



LABOR & EMPLOYMENT DEPARTMENT

ALERT

NJ SUPREME COURT: PLAINTIFF-EMPLOYEES CAN COPY AND COMPILE CONFIDENTIAL DOCUMENTS TO SUPPORT THEIR LAWSUITS

By Brynn Hollows and Todd A. Palo

On December 2, 2010, the New Jersey Supreme Court, in *Quinlan v. Curtiss-Wright Corporation*, ruled in favor of plaintiff-employee, Joyce Quinlan, who copied confidential information and turned it over to her attorney to support her sex discrimination and retaliation case. The court ruled that in doing so, Quinlan engaged in a protected activity under New Jersey's Law Against Discrimination (LAD). More importantly, the court found the employer had wrongfully terminated Quinlan in retaliation for this protected activity upon discovering her theft of the confidential materials and upheld the verdict in Quinlan's favor in excess of \$10.5 million.

Quinlan claimed she was overlooked for a promotion in favor of a less-qualified male co-worker. During her employment, Quinlan compiled and copied more than 1,800 documents, some of which contained confidential personnel information, in support of her sex discrimination claim. After filing suit, Quinlan gave her attorney a copy of the promoted male co-worker's evaluation in which he was rated as needing improvement in several areas. When the company learned of the disclosure, Quinlan was terminated. She then added a retaliation claim to her lawsuit.

In a 5-2 ruling, the court found in favor of Quinlan on the retaliation claim. The court analyzed seven factors

to be considered when determining if an employee's copying is protected:

1. How the employee obtained the documents
2. What the employee did with the documents
3. The nature and content of the documents
4. Whether the company has a policy and if the employee violated that policy
5. Whether disclosure of the documents is unduly disruptive to the employer's business
6. The employee's rationale for copying or accessing the documents
7. The balance between the employer's legitimate right to conduct its business, including its right to safeguard its confidential documents, and the employee's right to be free from discrimination or retaliation

In applying the seven-factor test to Quinlan's case, the court noted Quinlan only gave the documents to her attorneys, the documents themselves were directly related to her claims, there was a colorable basis to believe the documents would not have been disclosed during valid discovery, and although the documents contained personal and confidential information, they did not in any way disrupt or threaten the operation of the company.

The court recognized employers' fears that the decision may open the floodgates by granting protected status to plaintiffs who misappropriate confidential documents. Further, it acknowledged the decision heightened the risk of self-help discovery. However, the court justified its decision by stating it was reluctant to develop precedent that permitted an employer, savvy enough to include the word "theft" in a termination letter, to thereby insulate itself from legitimate discrimination claims. It also held that in considering the strong remedial purposes of the LAD, at least in this case, the employee's right to be free from discrimination or retaliation outweighed the employer's legitimate right to conduct its business, including its right to safeguard its confidential documents.

Given the broad, reaching implications of this decision, employers should exercise caution in taking an adverse employment action against an employee who has complained of discrimination against the company either through internal procedures or a formal complaint. The decision makes it clear employees are generally safe

copying and using an employer's confidential documents if the employee acquires the documents in the normal course of his or her responsibilities, delivers them only to counsel or law enforcement and does not unduly disrupt the employer's business in the process. Justice Barry Albin, in his dissent, said the decision "sends a disturbing signal to both the business community and the bar that employee theft may actually pay." However, employers may be in a position to significantly protect themselves against such employee conduct by implementing a company policy that specifically prohibits such behavior. Further, employers may protect themselves by implementing internal privacy controls to limit the flow of information to specific employees.

For more information on this Alert, please contact Brynn Hollows at 973.994.7561 or bhollows@foxrothschild.com, Todd A. Palo at 973.994.7541 or tpalo@foxrothschild.com, or any member of Fox Rothschild's Labor & Employment Department.



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