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Employee's Taking of Confidential Information Can Be a Protected Activity Under the New Jersey Law Against Discrimination

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In Quinlan v. Curtiss-Wright Corporation, __ N.J. __ (December 2, 2010), the New Jersey Supreme Court considered whether an employee's taking, copying and dissemination of an employer's confidential documents can be a protected activity under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.* ("LAD"). After balancing LAD's strong public policy of eradicating discrimination in the workplace against the legitimate interests of employers, the Court ruled that in certain circumstances the copying and dissemination of confidential information by an employee can constitute a protected activity.

In Quinlan, Ms. Quinlan, an employee of Curtis-Wright, sued the company alleging gender discrimination in violation of LAD. To support her case, Ms. Quinlan gathered over 1,800 pages of company documents that she believed supported her claim that she had been subjected to gender discrimination by being passed over for a promotion. Some of those

documents contained confidential personal information of other employees. While her lawsuit was pending, the company discovered that plaintiff had copied the confidential documents and provided them to her attorney, who used some of them during a deposition in the case. As a result of this discovery, the employer terminated plaintiff for alleged theft of company property. Ms. Quinlan subsequently amended her complaint to include a claim for retaliation.

The trial court ruled that plaintiff's taking of the documents was not a protected activity, but the later use of the documents by her attorney at a deposition was. At trial, the jury found that plaintiff had been fired in retaliation for the protected use of the documents at a deposition, and awarded Ms. Quinlan over \$10 million in damages, inclusive of attorneys' fees. On appeal, the Appellate Division reversed, holding that neither the taking of documents, nor their use at a deposition was a protected activity. The New Jersey Supreme Court disagreed, affirming the jury award and holding that, under certain circumstances, an employee's taking and disclosure of documents relating to a discrimination claim can be a protected activity.

In reaching its ruling, the Supreme Court attempted to balance the respective interests of both plaintiffs asserting LAD claims and employers. The Court set forth seven factors to be considered by trial courts to determine whether the taking and dissemination of a document is protected: (1) how the employee obtained the document; (2) what the employee did with the document; (3) the nature and content of the document at issue; (5) the circumstances of the disclosure and whether it

was unduly disruptive to the employer; (6) the employee's expressed reason for copying the document as opposed to requesting it through discovery; and (7) how the court's decision impacts the public policy embodying LAD and the effect permitting or precluding the use of the documents will have on balancing the legitimate rights of both employers and employees.

In light of the Quinlan decision, employers should not immediately assume that they can terminate an employee who has asserted a LAD claim if that employee copies or removes documents from the workplace without authorization. Nor should employees who have asserted LAD claims assume that they are free to copy and disseminate their employer's documents. In both situations, such decisions should be made only after careful consideration and consultation with counsel.

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