

CHAIR, LITIGATION  
PRACTICE GROUP  
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HEAD,  
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## The New Jersey Law Against Discrimination: Protecting a wolf in the HR den?

By Robert Bernstein, Phillip Lipari, and Falon Wrigley  
Princeton Office and St. Louis Office

**What can a New Jersey employer do about a Human Resources Manager who steals and discloses confidential personnel information in order to bolster her discrimination lawsuit?** Nothing, according to the New Jersey Supreme Court in its recent and highly nuanced opinion in *Quinlan v. Curtiss-Wright Corporation*. While theft of documents is, of course, a legitimate ground for termination, if a jury finds an employee was fired for use of the stolen documents in litigation, as opposed to theft, the employer could be liable for unlawful retaliation under the New Jersey Law Against Discrimination. *Quinlan* is particularly troubling for employers in that theft and disregard for the rules of discovery may be rewarded and leave an employer with its hands tied.

In *Quinlan*, an Executive Director of Human Resources filed a complaint alleging gender discrimination after the employer promoted a seemingly less-qualified male to be her supervisor. To bolster her case, the plaintiff systematically reviewed and stole more than 1,800 pages of confidential personnel and human resources documents with which she was entrusted. Most of the stolen information came from the personnel files of other employees. The Plaintiff shared the documents with her lawyer.

The employer received copies of the stolen documents during discovery. In spite of her violation of company policy, the company did not fire her or deny her access to confidential documents. However, several weeks later, when it became clear that she continued to steal documents entrusted to her, she was terminated. Based on her termination, the plaintiff amended her complaint and added a retaliation claim.

A jury awarded her more than \$10 million in actual and punitive damages. Although the Appellate Division reversed, the Supreme Court reinstated the verdict. A *prima facie* case of retaliation under the NJLAD requires, among other things, proof that a plaintiff engaged in a protected activity. The Supreme Court held that, although the plaintiff's act of misappropriating confidential documents was not protected, her attorney's use of those documents was. In other words, while theft of documents remains a legitimate ground for termination and does not give rise to a retaliation claim, if a jury believes the employee was terminated for use of the documents in litigation, as opposed to theft, an employer will be liable under the NJLAD.

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As the dissent in *Quinlan* notes, the effect of this decision on employers is that an employee who steals confidential documents and disregards lawful methods of securing discovery cannot be safely discharged. Moreover, even scrupulous plaintiffs' lawyers may well believe that they too can disregard the rules of discovery by accepting pilfered documents received after a lawsuit is initiated. The Supreme Court's holding motivates employees to rummage through confidential files for evidence that may be helpful in later litigation. So long as the documents are shared with an attorney and used in furtherance of an employee's case, employers can be subjected to retaliation claims.

In anticipation of this criticism, the Supreme Court opined that employers will not be powerless to discipline employees on the basis of its decision. The Court suggests its decision will be tempered by the jury's supposed ability to reject an employee's argument that he or she was fired for using documents, as opposed to theft of those documents. However, as the Appellate Division and dissent note, this is not a practical distinction that a rational jury is likely to make. Moreover, there is no consideration of the after-acquired evidence doctrine.

One final point of consternation for employers is the delicate balancing act that this Supreme Court decision necessitates. Where an employer terminates an employee for misappropriation, it subjects itself to a retaliation claim. On the other hand, where an employer elects not to terminate the offending employee, it potentially exposes itself to liability on invasion of privacy grounds or a related theory. In *Quinlan*, for instance, the plaintiff misappropriated documents containing salary data and the Social Security and bank account numbers of numerous employees. Employers, by knowingly permitting such violations of privacy, potentially expose themselves to liability. In any event, even if such misconduct is not actionable, it is likely to poison the workplace as sensitive, private information is publicly disseminated.

Employers beware!

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