

Alerts and Updates

N.J. APPELLATE COURT: FIRING AN EMPLOYEE SUING THE COMPANY FOR THE APPROPRIATION OF CONFIDENTIAL RECORDS IS NOT RETALIATION

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For employers who have been involved in employee lawsuits, the situation where an employee confiscates company records for use in litigation against the company may be all too familiar. In a case of first impression (unaided by precedence on the issue)—*Quinlan v. Curtiss-Wright Corporation*¹—the New Jersey Superior Court, Appellate Division, recently refused to condone such conduct.

Case Summary

The plaintiff, Joyce Quinlan ("Quinlan"), was a human resources ("HR") professional at Curtiss-Wright Corporation (the "Company") who was passed over for a promotion. She believed her gender played a role in the Company's decision to promote a less-experienced male coworker, Kenneth Lewis. Rather than voice her concern of gender discrimination, Quinlan informed the Company's chief executive officer that she believed he made a mistake in choosing Lewis for the position. The chief executive officer explained to Quinlan that Lewis received the position because he had developed and implemented several worthy initiatives in the HR department. Quinlan found this explanation unsatisfactory and consulted with legal counsel.

Quinlan next sought out records to bolster her gender discrimination claim. She rummaged through files in the HR department and copied more than 1,800 pages of Company records. She turned over this research to her attorneys. These documents contained confidential personal information about other employees of the Company, including their salaries, Social Security numbers, addresses and phone numbers.

While still employed with the Company, Quinlan filed suit against the Company 11 months after being denied the promotion, alleging claims of gender and wage discrimination. In the course of discovery, Quinlan's counsel produced to the Company's attorneys the 1,800-plus pages Quinlan copied from the Company's records. Several weeks after the document production, Quinlan's counsel deposed Lewis and confronted him with his recent performance appraisal. The performance appraisal was created some time after Quinlan's voluminous document production and was not produced prior to its introduction at

Lewis's deposition. Soon thereafter, the Company terminated Quinlan's employment for theft of Company property. She then moved to amend her complaint to assert a retaliation claim against the Company.

Prior to trial, the Company moved to dismiss Quinlan's retaliation claim on the basis that she was not terminated for engaging in "protected activity" (a requisite element of a retaliation claim). The trial court denied the motion, finding that while Quinlan's removal of confidential Company documents was not protected activity, her attorney's use of Lewis' performance appraisal at his deposition was protected activity. After a mistrial due to a hung jury, Quinlan had a second trial and obtained a sizeable jury verdict, including a punitive damages award; and the Company appealed.

One of the issues on appeal was whether Quinlan's termination was in retaliation for her having engaged in protected activity. The appellate court noted a dearth of reported decisions in New Jersey addressing the question of whether taking confidential documents from an employer can be considered protected activity. After an analysis of decisions in other jurisdictions, the court concluded that neither Quinlan's taking nor her attorney's use of the performance appraisal was protected activity.

When the trial court instructed the jury that Quinlan's counsel's use of the documents in prosecuting the lawsuit was protected activity, the court, in essence, transformed the employee's unprotected activity (copying confidential documents) into protected activity based on the attorney's use of the documents. The appellate court found this reasoning flawed, recognizing that such a ruling is an invitation to employees to search through their employers' files and copy confidential materials, leaving employers without legal recourse.

As the court aptly noted, this was not a case where an employee inadvertently or innocently stumbled upon a confidential document. To the contrary, Quinlan was entrusted with custody of the confidential performance appraisal in her duties as an HR professional. Quinlan admitted her actions breached her duty to her employer, including the acknowledgment she signed when she was hired that affirmed her obligation not to disclose information she obtained in the course of her employment. Quinlan also admitted that she violated the Company's code of conduct, specifically the provision precluding the use of her position with the Company for her own gain or advantage.

Unwilling to transform Quinlan's unprotected activity into protected activity by virtue of her attorney's use of the confidential performance evaluation at Lewis' deposition, the appellate court found the trial court's instruction on the retaliation claim erroneous and remanded the case for a new trial on Quinlan's retaliation claim. The appellate court established a means for

the employer to successfully challenge Quinlan's ability to satisfy a necessary element of her retaliation claim—that she was engaged in "protected activity" at the time her employment was terminated.

In addition to discouraging on-the-job records raids, the appellate court also examined whether the trial court erred in allowing the jury to consider the issue of punitive damages. Under the New Jersey Law Against Discrimination, punitive damage may be awarded where there is both actual participation in the wrongful behavior by upper management and especially egregious conduct by the wrongdoer.

In evaluating whether the jury should have been permitted to consider the issue of punitive damages, the appellate court examined how the Company treated Quinlan after she was passed over for the promotion and after the Company learned she inappropriately confiscated Company documents. Following the denial of the promotion and subsequent to filing suit against the Company, Quinlan remained in her position and received a raise and bonus.. The court also reviewed the circumstances surrounding her termination and the reason for her separation, which Quinlan argued was egregious. Contrary to Quinlan's contention, the court did not view the Company-issued termination letter citing "theft of Company property" as the reason for Quinlan's dismissal as egregious behavior, especially given her admitted violations of Company policy. There was no proof that the letter or the reason for her termination was shared with anyone other than Quinlan. Based on how upper management handled the situation in *Quinlan*, the court held that the question of the Company's liability for an award of punitive damages should not have been submitted to the jury.

It is also important to note that the punitive damages award was sizeable, \$4.5 million dollars. Based upon the appellate court's finding that there was no malice on the part of upper management, the employer may be able to avoid a punitive damages award when the case is retried, even if the jury concludes that Quinlan's discharge was retaliatory.

What This Means for New Jersey Employers

Upon terminating an employee, employers may want to consider the nature and type of information an employee had access to while employed with the company, as well as administer adequate safeguards to disable a former employee's ability to examine company documents. Employers may also wish to review their written policies that address the use of confidential company information, so employers are better prepared to defend retaliation claims.

Since retaliation claims are on the rise, employers should also consider training management on how to handle interactions with existing employees who have filed internal or external claims against the company and members of its management

team. Such training may be prudent, because a weak claim of discrimination against an employer could become a strong claim of retaliation if management does not handle properly interactions with the employee following the employee's internal or external complaint against the company.

Companies may want to seek employment counsel to assess the strength of their policies and procedures concerning confidential information, as well as their management team's readiness to avoid the creation of retaliation claims.

For Further Information

If you have any questions about this Alert or would like more information, please contact any of the [attorneys](#) in our [Employment, Labor, Benefits and Immigration Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

Note

1. *Quinlan v. Curtiss-Wright Corp.*, 976 A.2d 429 (N.J. Super. Ct. App. Div. 2009).