The Limits of *Quinlan v. Curtiss-Wright*: N.J. Appellate Division Rules that Employee Accused of Stealing Confidential Documents May Properly Face Criminal Indictment

By Kevin J. O'Connor*

When the New Jersey Supreme Court issued its decision in Quinlan v. Curtiss-Wright, 204 N.J. 239 (2010), it spurred much debate among legal commentators about whether the Court had opened a Pandora's Box and sanctioned employee theft of documents. The majority in State v. Saavedra, Docket No. A-1449-12T4 (Dec. 24, 2013) has ruled that nothing in Quinlan served to grant employees a license to steal documents and avoid criminal ramifications. The Court ruled that a former public employee will be permitted to stand trial criminally for allegedly stealing "highly confidential original documents" from her employer, the North Bergen Board of Education ("the Board"). The employee claimed as her defense that she only did so to gather evidence to support civil claims of harassment and retaliation against the Board.

By way of background, the Court in Quinlan ruled that Joyce Quinlan, an employee of Curtiss-Wright, engaged in protected conduct in copying confidential data in the workplace and feeding it to her attorney for use in her ongoing discrimination lawsuit. A close review of the decision shows that the legal commentators have likely overreacted, and that Quinlan provides a workable, 7-part test to be applied in determining whether an employee's theft of documents in the workplace can constitute protected activity under state employment statutes. The decision most certainly should prompt employers to closely analyze their workplace handbooks and be sure to keep close tabs on, and clearly mark and limit disclosure of, confidential data.

1. *Factor One: Consideration of How The Employee Obtained the Documents.*

The first factor articulated by the Supreme Court in Quinlan was for the Court to "evaluate how the employee came to have possession of, or access to, the document." 204 N.J. at 269. The Court noted that where (as was true in the case before it) "the employee came upon [the documents] innocently, for example, in the ordinary course of his or her duties for the employer, this factor will generally favor the employee." The Court observed that, while it will not be necessary for an employee to show in all cases that the materials were obtained "either inadvertently or accidentally," where the materials were obtained by "the employee's intentional acts outside of his or her ordinary duties, the balance will tip in the other direction." Id.

2. *The Second Factor: What the Employee Did With the Document.*

Under the second factor, "the court should evaluate what the employee did with the document. If the employee looked at it, copied it and shared it with an attorney for the purpose of evaluating whether the employee had a viable cause of action or of assisting in the prosecution of a claim, the factor will favor the employee." Id. However, where "the employee copied the document and disseminated it to other employees not

privileged to see it in the ordinary course of their duties or to others outside of the company, this factor will balance in the employer's favor." (Id.).

3. The Third Factor: The Nature and Content of the Particular Document.

The third Quinlan factor requires the Court to "evaluate the nature and content of the particular document in order to weigh the strength of the employer's interest in keeping the document confidential." Id. at 269-70. The Court held that where a document is "privilege[d], in whole or in part, [or] if it reveals a trade secret or similar proprietary business information, or if it includes personal or confidential information such as Social Security numbers or medical information about other people, whether employees or customers, the employer's interest will be strong." Id.

4. The Fourth Factor: Whether There Is a Clearly Identified Company Policy.

The fourth Quinlan factor requires the Court to "consider whether there is a clearly identified company policy on privacy or confidentiality that the employee's disclosure has violated." The Court recognized that this factor requires the Court to evaluate whether the employee "has routinely enforced that policy, and whether, in the absence of a clear policy, the employee has acted in violation of a common law duty of loyalty to the employer." Id.

5. The Fifth Factor: Weighing Relevance vs. Disruptiveness.

The fifth factor is a balancing test whereby the Court is to "evaluate the circumstances relating to the disclosure of the document to balance its relevance against considerations about whether its use or disclosure was unduly disruptive to the employer's ordinary business." This necessarily requires the Court to evaluate the relevance of the evidence and to also determine whether it was used in an unfair manner: Thus, for example, if the document had marginal relevance to the claim of discrimination, but was intended to be used merely to cast unfair aspersions, to divert the attention of the jury, or to sensationalize the trial, this factor would weigh in the balance against the employee. On the other hand, if the document was central to the discrimination claim and merely troubling or upsetting to the employee to whom it related, the factor will more likely weigh in favor of the employee." Id. at 270.

6. The Sixth Factor: The Employee's Explanation for Copying the Document.

The sixth factor entails the evaluation of the "strength of the employee's expressed reason for copying the document rather than, for example, simply describing it or identifying its existence to counsel so that it might be requested in discovery." Id.

7. The Seventh Factor: Balancing the Interests of Employer and Employee, and Remaining Cognizant of the Remedial Purposes of the LAD.

The last factor articulated by the Court in Quinlan is that the Court "evaluate how its decision in the particular case bears upon two fundamental considerations that are often in conflict in matters such as these": 1) remain cognizant "of the broad remedial purposes the Legislature has advanced through our laws against discrimination"; and 2) "consider the effect, if any, that either protecting the document by precluding its use or

permitting it to be used will have upon the balance of legitimate rights of both employers and employees." Id. at 271.

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In State v. Saavedra, the former employee of the Board had filed a motion to dismiss the criminal indictment against her for second-degree official misconduct and third-degree theft of movable property (public documents), using Quinlan as a sword. She argued that "Quinlan says it's legal to take confidential documents," (Slip Op., at 9), and argued for a ruling that criminal prosecution was prohibited under public policy grounds.

In rejecting these arguments, the majority in State v. Saavedra observed that the Court in Quinlan noted in several portions of its decision that an employee's decision to engage in self-help could backfire both within the civil case itself or by creating broader legal liability. The majority noted that the Justices in Quinlan had even expressly warned that where employees choose to steal documents, "their conduct may also be illegal." The Court declined to recognize any public policy basis for dismissal of the indictment.

Although Quinlan is a new decision and only time will tell how lower courts apply it, the text of the decision shows that the Court provided a workable test to be applied in situations where employees are caught pilfering files of the employer, and the employer seeks to impose discipline. State v. Saavedra demonstrates that while the Quinlan case may provide for civil protections on the part of an employee engaged in employment discrimination litigation with a former employer, nothing in Quinlan serves to prevent criminal prosecution of employees for conduct that is criminal.

This new decision makes clear, as did Quinlan, that decisions to discipline or fire employees engaged in such activity should be made only with the assistant of qualified legal counsel. Most certainly, the Quinlan decision should prompt employers to closely analyze their workplace handbooks and be sure to keep close tabs on, and clearly mark and limit disclosure of, confidential data in the workplace.

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