Misappropriating Data to Further a Claim—Theft or Protected Conduct?

By Kevin J. O'Connor – November 21, 2011

With the advent of technology in the modern workplace, an enormous amount of data is created and has the potential to end up in the hands of an employee who is pursuing an employment-based claim against his or her employer. The proliferation of such data increases the risk that such an employee will gain access to sensitive data, either legally or illegally, and turn it over to counsel for use in the litigation. Another possibility is that the employee will disseminate the data to similarly situated employees to assist in their pursuit of similar claims. Is such an employee protected from termination or some other adverse employment action on the ground that he or she has engaged in protected activity?

In some instances, employees may set out to "create" evidence by, for example, surreptitiously recording managers or co-employees to preserve statements that can be used to support ongoing litigation against the employer, or by hacking into an email account to find incriminating evidence. The question that is often raised in such circumstances is whether the employee's act of furnishing this information to his or her attorney is, itself, protected activity, and if so, whether an employer who disciplines the employee in such circumstances may be found liable for retaliation.

Many state and federal statutes exist to protect employees from retaliation for opposing unlawful practices or otherwise participating in litigation over such practices. By way of example, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623, provides as follows:

> It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment . . . because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, **assisted, or participated *in any manner*** in an investigation, proceeding, or litigation under this chapter.

29 U.S.C. § 623 (d) (emphasis added).

In recent decades, case law from a number of federal and state courts demonstrates a broad consensus that an employee who engages in illegal or tortious acts to pilfer data in an attempt to discover evidence for the prosecution of a civil-rights lawsuit will be hard-pressed to successfully claim that he or she was only engaging in protected conduct, and cannot be disciplined for the misconduct. For example, in *Watkins v. Ford Motor Co.*, 2005 U.S. Dist. LEXIS 33140 (S.D. Ohio 2005), an employee was pursuing a race-discrimination claim against Ford and stumbled across a binder of personnel profiles that he claimed was left lying around for anyone to read, and not marked as confidential. The employee reviewed the binder, copied its contents, and gave the copies to his attorney. Ford later terminated him for doing so. The court held that he was not protected from firing by dint of having participated in opposition activity or other

protected conduct: “Far from being entitled to protection under the law, plaintiff’s conduct was counterproductive, wrongful, and a breach of his employer’s trust.” *Id.* *7.

The Ninth Circuit reached a similar result in *O’Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 763 (9th Cir. 1996), where an employee of a helicopter company went into a supervisor’s desk and rummaged through a file marked “personal/sensitive,” which contained a list of employees ranked for layoff. He copied the file and shared it with an employee on the layoff list. After being denied a promotion and eventually laid off, the employee sued the company for age discrimination and sought to use the file he copied in the litigation. During discovery, the helicopter company learned of the employee’s unauthorized access and dissemination of the confidential file and used this information to defeat the employee’s discrimination claim under the after-acquired-evidence doctrine. While the employee argued that the company could not have legally discharged him for accessing and using the information under the ADEA’s anti-retaliation clause, the Ninth Circuit ruled that this conduct was not protected activity, stating that “[t]he opposition clause [of the ADEA] protects reasonable attempts to contest an employer’s discriminatory practices; it is not an insurance policy, a license to flaunt company rules or an invitation to dishonest behavior.” *Id.* at 763–64.

The Fourth Circuit ruled in a similar manner in *Laughlin v. Metropolitan Washington Airports Authority*, 149 F.3d 253, 259–261 (4th Cir. 1998), when it held that Title VII’s anti-retaliation provision does not permit an employee to claim that his or her acts of improperly accessing, copying, and disseminating confidential documents to a coworker were protected activity.

More recently, in *Niswander v. Cincinnati Insurance Co.*, 529 F.3d 714, 717 (6th Cir. 2008), the Sixth Circuit adopted a six-part test to determine whether an employee’s act of improperly accessing, copying, and disseminating data should be protected in the context of an Equal Pay Act and Fair Labor Standards Act class action. The court declined to give protected status to the employee’s actions of improperly accessing data on her computer system, although the employee’s purpose was to discover evidence of discrimination.

The decision of the Eighth Circuit in *Kempcke v. Monsanto Co.*, 132 F.3d 442 (1998) offers some good advice to employers and employees alike when dealing with this subject. There, the employee accessed documents that he believed reflected a pattern of age discrimination by his employer, Monsanto, and he gave them to his attorney. When Monsanto demanded that he return the documents, he referred it to his attorney to negotiate their return. Monsanto subsequently terminated the employee. The district court granted summary judgment to Monsanto, holding that the employee’s refusal to return the documents was not protected activity.

The Eighth Circuit, however, reversed and remanded the case back to the district court for trial. The circuit court found it significant that the employee “innocently acquired the documents”; that the documents had not been safeguarded by the employer (such as marking them as confidential and locking them up); and, further, that there was a dispute about whether the employee had shared them with anyone other than his attorney.

In December 2010, the New Jersey Supreme Court was presented with the opportunity to weigh in on this subject in *Quinlan v. Curtiss-Wright*, 204 N.J. 239 (2010).

In that case, the court adopted a seven-part test for determining whether an employee who copies data and turns it over to his or her attorney engages in legitimate oppositional or participatory activity protected under the law. The plaintiff in *Quinlan* began working in the human resources (HR) department at defendant Curtiss-Wright in 1980, and signed a confidentiality agreement with the company, agreeing not to disclose any confidential information she obtained through her employment. She also signed a code of conduct that prohibited her from using her position to gain a private advantage in other matters. In July 2000, Curtiss-Wright hired an outsider, Lewis, to work in the plaintiff's department, and several years later promoted Lewis to a position above the plaintiff. The plaintiff believed that Lewis was unqualified and that she was not promoted to the position given to Lewis because of her gender.

After filing suit for gender discrimination in November 2003, the plaintiff began to review documents in the HR department and to copy files she felt were helpful to her case, feeding them to her attorney for use in the litigation. She delivered a total of 1,800 pages of materials to her attorney, much of which was confidential. In turn, the plaintiff's attorney produced these documents to defense counsel. The plaintiff continued to copy materials until it became clear to Curtiss-Wright that she was taking confidential information from the work premises (the plaintiff's counsel sprang one of the documents on Lewis at his deposition), and she was terminated. The plaintiff later amended her complaint to sue for retaliation premised on this discipline. The court ruled that the plaintiff had engaged in protected conduct in both copying confidential data in the workplace and feeding it to her attorney for use in her ongoing discrimination lawsuit.

The New Jersey Supreme Court's December 2, 2010, decision in *Quinlan* has spurred a great deal of debate among legal commentators about whether the New Jersey Supreme Court has opened a Pandora's box and sanctioned employee theft of documents. In this author's opinion, however, a close review of the decision shows that the legal commentators have likely overreacted, and that *Quinlan* provides a workable, seven-part test (adapted from the balancing tests articulated in the above-referenced federal-circuit-court cases) to be applied in determining whether an employee's theft of documents in the workplace can constitute protected activity under state employment statutes.

Regardless of their correctness, however, *Quinlan* and the other decisions discussed in this article should cause employers to keep close tabs on and clearly mark and limit disclosure of confidential data. Meanwhile, employees who come across such data in the course of their duties would be well advised to consult with counsel on the best course of action and in no circumstances should they disseminate the documents to others. Most certainly, the decisions discussed herein should prompt employers to closely analyze their employee handbooks and written policies to ensure they clearly articulate that any unauthorized access and dissemination of confidential information will result in appropriate discipline, including termination. However, a decision by an employer to discipline an employee for such conduct should always be carefully made with the assistance of qualified legal counsel. In the words of the Ninth Circuit in *O'Day* (which was relied upon by the Appellate Division in *Quinlan*), "[a]n employee's opposition activity is protected only if it is 'reasonable in view of the employer's interest in maintaining a harmonious and efficient operation.'" *O'Day*, 79 F.3d at 763. Just as the employer in *O'Day* was fully justified in terminating an employee who broke into his

supervisor's office, rummaged through his files, copied confidential documents, and provided them to a coworker, so too will an employer be justified in enforcing its own *written* policies and procedures.

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