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Theft of Company Documents Upheld as Privileged Activity in New Jersey

Contacts

Cheryl M. Nicolson

nicolson@nicolsonassoc.com

Madeline S. Baio

baio@nicolsonassoc.com

Rose Tree Corporate Center II
1400 N. Providence Road
Suite 4045
Media, PA 19063
610.891.0300
www.nicolsonassoc.com

It is one thing to be sued by a former employee who is otherwise “out of sight/out of mind”. It is quite another thing to be sued by a current employee whose every day appearance in the work place can create quite a bit of unease for other employees and supervisors and can cause frequent headaches for anyone in upper management trying to maintain the status quo while the litigation is pending. But is maintaining the status quo possible when the employee violates company rules and steals confidential documents to help her case? Can the employee be fired or would that be retaliation? In a decision rendered on December 2, 2010, the New Jersey Supreme Court held that an employee who takes confidential documents from her employer, copies them and gives them to her attorney for use in prosecuting a pending discrimination case is privileged to do so and cannot be terminated because that amounts to retaliation which is prohibited by the New Jersey Law Against Discrimination (LAD).

In Quinlan v. Curtis-Wright Corp., 204 N.J. 239, 8 A.3d 209 (N.J. 2010), Joyce Quinlan was the Executive Director of Human Resources reporting directly to Martin Benante, the CEO and President of Curtis-Wright. When she joined the organization, Quinlan signed an acknowledgement that employees were prohibited from using the company’s confidential documents for private purposes. After Quinlan had been in the HR position for several years, Benante hired and then promoted Kenneth Lewis, who the court noted was clearly less experienced and less qualified than Quinlan, to the position of Corporate Director of Human Resources and Management Development. As a result of Lewis’s promotion, Quinlan was required to report to Lewis instead of Benante.

Having reason to suspect gender discrimination, Quinlan gathered and copied 1,800 pages of confidential company documents and gave them to her lawyer who then filed suit against the company for gender discrimination. During the discovery process, Quinlan’s attorney produced the 1,800 pages of company documents which Quinlan had gathered before suit was filed. Meanwhile, Quinlan continued in her position as Executive Director of HR and was not disciplined for her breach of the company’s policy prohibiting the private use of confidential documents. Several weeks later, in the course of her position, Quinlan received Benante’s written appraisal of Lewis’s performance which indicated that Lewis was in need of improvement in several areas. Believing that this document would help her case, Quinlan copied it and gave it to her attorney. Subsequently, Lewis was deposed by Quinlan’s attorney who questioned Lewis about the appraisal without previously disclosing that he had received it. The company’s attorney objected claiming that the document had been improperly obtained by plaintiff. Shortly thereafter, plaintiff was terminated for “theft of Company property”. After she was terminated, Quinlan amended her discrimination complaint to add a count for retaliation under the LAD.

The case went to a jury which ultimately found in favor of plaintiff on both the discrimination claim and the retaliation claim. As a result, plaintiff was awarded back pay of \$475,892, front pay of \$3,650,318, punitive damages of \$4,565,479, plus pre-judgment interests, fees, costs and \$75,000 for a tax offset for a total award of \$10,649,117.49. Curtis-Wright appealed the jury’s verdict on the retaliation claim and the punitive damages award. The Appellate Division found in



Curtis-Wright's favor and vacated the punitive damages award and reversed and remanded the retaliation claim for a new trial. Plaintiff then sought and obtained review by the New Jersey Supreme Court which reinstated the jury's verdict in favor of the plaintiff on both counts. In so doing, the Court found that Quinlan's copying and use of the company's confidential documents was **privileged**.

The Court arrived at this conclusion by adopting and applying a seven factor "flexible, totality of the circumstances approach that rests on consideration of a wide variety of factors, all of which must be balanced in order to achieve the essential goals of the LAD." The factors identified by the Court include: how the employee obtained the document; what the employee did with the document; the nature and content of the document; the existence of a company policy on privacy or confidentiality; how the document was disclosed and the extent to which the disclosure was disruptive to the employer's business; the employee's reason for taking the document; and the remedial purposes of the LAD as balanced against the competing interests of the employee and the employer. The weight or significance to be attributed to these factors is unclear and the Court's analysis provides little guidance to employers who are now being told that they must tolerate, and continue to employ, someone who violates company rules and is disloyal and untrustworthy, or risk being held liable for retaliation under the LAD.

In a strongly worded dissent, Justice Albin

lamented that "[t]oday's ruling sends a disturbing signal to both the business community and the bar that employee theft may actually pay." Justice Albin criticized the majority's analysis and ruling and stated that it "defies ordinary understanding". According to Justice Albin, plaintiff's theft of confidential documents was not privileged and violated her high-ranking position of trust with the company which in turn was justified in terminating her. "From this point forward, no business can safely discharge an employee who is stealing highly sensitive personnel documents even as she is suing her employer and disregarding the lawful means for securing discovery."

Needless to say, employers in New Jersey must proceed with extreme caution in disciplining an employee who has a lawsuit against the company pending. As each situation is different, employers are best advised to consult with counsel before taking any action which could end up costing the company millions of dollars later on. Just ask the folks at Curtis-Wright!

For over 25 years, Madeline S. Baio has counseled and defended clients in connection with employment related claims and lawsuits before the EEOC, PHRC and other state agencies as well as the State and Federal Courts. Ms. Baio has undertaken workplace investigations stemming from retaliation and harassment claims and has advised clients with regard to the drafting and implementation of employee policies and procedures. Among other things, she has defended Civil Rights Claims, FLSA claims, ERISA claims and claims of discrimination based on race, age, sex, national origin, and disability. Her clients have included national retail stores, hospitals, aerospace, defense and technology companies, trucking companies, banking institutions, country clubs, municipalities and municipal authorities, county prisons and privately owned businesses and non-profit organizations. For further information about this article or other employment related issues, please contact Ms. Baio at baio@nicolsonassoc.com or by calling 610-891-0330.

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