

July 7, 2015

## **Quinlan Revisited: Employees Who Steal Personnel Records May Not Necessarily Be Fired, But At Least They May Be Prosecuted**

BY KEITH J. ROSENBLATT AND DAVID K. BRODERICK

Five years ago, in *Quinlan v. Curtiss-Wright Corporation*, the New Jersey Supreme Court ruled that a trusted employee's act of stealing and using her employer's confidential personnel documents in furtherance of her discrimination lawsuit constituted protected activity under the New Jersey Law Against Discrimination ("LAD").<sup>1</sup> On June 23, 2015, the court revisited this highly controversial decision in *State v. Saavedra*, stating, to the surprise of many, that *Quinlan* "did not endorse self-help as an alternative to the legal process in employment discrimination litigation." Instead, the court held that *Quinlan* did not require the dismissal of the indictment of a Board of Education employee who unlawfully took confidential student documents to support her LAD suit against her employer and she could still be criminally prosecuted for her actions. The court held, however, that *Quinlan* could be a basis for a justification defense against such prosecution.

### **Summary of the Facts**

The defendant in this case started working for the North Bergen Board of Education ("Board") in 1998 as a clerk. On November 25, 2009, she and her son (a part-time Board employee) sued the Board, alleging she had been discriminated and retaliated against in violation of the LAD, the New Jersey Conscientious Employee Protection Act ("CEPA"), and numerous other federal and state statutes and common law. During discovery, the clerk produced more than 350 documents she had removed or copied from the Board's files without permission. These documents included original and photocopied versions of student educational and medical records that were highly confidential and protected from disclosure by federal and state privacy laws. Upon receiving them, the Board immediately notified the county prosecutor, who presented the matter to a grand jury. Following a hearing, the grand jury returned an indictment against the clerk for official misconduct and theft.

---

<sup>1</sup> See Keith J. Rosenblatt and Jacqueline McClintock, *The End Justifies the Means: New Jersey Supreme Court Rewards Employees Theft of Personnel Documents in the Name of the Law*, *Littler Insight* (Dec. 20, 2010).

The clerk moved to dismiss the indictment. Among other arguments, she claimed the indictment violated due process and public policy because she took the documents for use in her employment discrimination litigation, as permitted by *Quinlan*. The trial court denied her motion to dismiss and the Appellate Division affirmed, with one judge dissenting on the grounds that under *Quinlan*, prosecuting the clerk for stealing the documents was fundamentally unfair.

## The New Jersey Supreme Court's Decision

On appeal to the New Jersey Supreme Court, the clerk again argued that prosecuting her contravened the anti-discrimination policies of the LAD, CEPA and *Quinlan*, and that the Appellate Division's decision "authorized employers to circumvent the *Quinlan* balancing test by reporting an employee's collection of documents as theft to a prosecutor." The *Quinlan* balancing test requires the court to consider seven "totality of the circumstances" factors to determine whether an employee's theft of company documents are protected by the LAD: (1) how did the employee come to possess or access the document; (2) what did the employee do with it; (3) what is the employer's interest in keeping the document confidential; (4) did the employee's disclosure of the document violate a clearly identified company policy on privacy or confidentiality; (5) what were the circumstances of disclosing the document; (6) what was the reason for stealing the document as opposed to lawfully seeking it in discovery; and (7) how will judicial sanctioning of the employee's actions bear upon the remedial purposes of the LAD and a balancing of the employer's and employee's legitimate rights.

The state Supreme Court disagreed with the clerk and affirmed the Appellate Division, holding that the trial court properly denied her motion to dismiss. In so doing, the court held that the clerk's indictment did not run afoul of *Quinlan* because "nothing in *Quinlan* states or implies that the anti-discrimination policy of the LAD immunizes from prosecution an employee who takes his or her employer's documents for use in a discrimination case." The court instructed, however, that the same evidence that would be used to establish that the theft of documents constituted LAD-protected activity under *Quinlan*'s seven-factor test may be used to support a justification defense in the criminal prosecution against her.

## Import of the Supreme Court's Ruling

Although the court limited what appeared to be *Quinlan*'s endorsement of thievery and similar conduct to support employment-related claims, the primary problem for employers under *Quinlan* remains: they run the risk of civil liability for firing or disciplining employees who take personnel records without authorization, because in most instances, there is no real way to predict how a court will rule on the seven-factor test months later while defending against the employee's lawsuit. It also remains to be seen whether *Saavedra* will be limited to its facts, in that the case involved a public employee's theft of highly confidential and statutorily-protected documents. A prosecutor may be more likely to take action with regard to such records, as compared to the typical personnel documents involved in most discrimination suits. Nevertheless, the decision should, at the very least, give employees pause before stealing their employer's documents. More practically, it will likely discourage their lawyers from encouraging such conduct and from using stolen records to ambush a defendant-employer without first obtaining them through proper means in discovery, for fear of exposing their client to possible criminal prosecution.

To make the most of this decision, employers should publicize, in their employee handbooks and other appropriate policy documents, their intent to refer all suspected theft or other misappropriation of company documents (including personnel documents) to law enforcement authorities. Employers should also make good on those threats, because reporting one employee to the police may discourage others from similar conduct, regardless of whether that employee is prosecuted. Doing so uniformly will also weaken any claim that the criminal complaint was made in retaliation for some protected activity—which may or may not have been protected under *Quinlan*—rather than pursuant to a uniform company policy.