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New Jersey Court Rules Individual Can Be Criminally Prosecuted for Taking Confidential Information to Support Civil Whistleblower Claims

By Darren Nadel and Michael Roaldi

In 2010, the New Jersey Supreme Court created a qualified privilege for an employee taking documents to support an employment discrimination suit.¹ However, this past December, in *State of New Jersey v. Ivonne Saavedra*,² the Superior Court of New Jersey, Appellate Division, ruled that the qualified privilege should not be applied to protect a criminal defendant from a grand jury indictment for “official misconduct” for having taken those documents to support a retaliatory discharge claim.

Procedural History

In November 2009, the defendant and her son filed a civil complaint against the North Bergen Board of Education (the Board) for employment discrimination, hostile work environment, and retaliatory discharge in violation of the New Jersey Law Against Discrimination (the LAD).³ During discovery in the civil action, the defendant produced 367 documents which she had taken from the Board. The Board then informed the County Prosecutor.

In May 2012, a grand jury indicted the defendant for the crimes of theft and official misconduct. She moved to dismiss the indictment arguing that the New Jersey Supreme “says it’s legal to take confidential documents.” The trial court disagreed, but still performed the qualified privilege analysis outlined by the New Jersey Supreme Court out of an abundance of caution. The court found that, even under that rubric, the motion to dismiss failed.

Appeals Division’s Analysis

The Appeals Division affirmed the trial court’s analysis, ruling that the qualified privilege did not insulate the defendant from criminal prosecution for taking confidential documents. The court also affirmed the finding that the State made a prima facie showing of theft and official misconduct.

The grand jury’s indictment was based on the defendant’s possession of 367 documents which belonged to the Board. Among those documents were a bank statement provided to the Board by

1 *Quinlan v. Curtiss Wright Corp.*, 204 N.J. 239 (N.J. 2010), 52 A.3d 209 (N.J. 2010).

2 2013 N.J. Super. LEXIS 185, No. A-1449-12, (N.J. Super. Ct. App. Div., December 24, 2013).

3 N.J.S.A. 10:5-1-49.

a parent, an appointment schedule of a psychiatrist who treated students with special needs, a consent for release of information to access Medicaid reimbursement, a signed letter from a parent whose child received confidential services for special needs, and an original letter about a child's emotional problem. The Board's General Counsel testified that employees were trained to be aware that these documents were highly confidential and should not be taken.

The court began its analysis by examining the theft charge. In New Jersey, "[a] person is guilty of theft if he unlawfully takes, or exercises unlawful control over movable property of another with purpose to deprive him thereof."⁴ The court found that, since taking the documents was against the Board's internal policies, the defendant likely took the documents with the purpose to deprive the Board.

The court then addressed the defendant's qualified privilege argument. To meet its burden of producing sufficient evidence for a prima facie case of theft, the State was required to show that the taking was unlawful. The defendant claimed that the New Jersey Supreme Court decision rendered the taking lawful. The Appellate Division disagreed.

In that case, the plaintiff claimed she was discriminated against when her employer promoted a man to the position of supervisor. Her employer soon learned that she had taken confidential documents. The court sought to strike a balance between "individual plaintiffs seeking to vindicate their rights and employers legitimately expecting that they will not be required to tolerate acts amounting to self-help or thievery."⁵ The New Jersey Supreme Court designed a seven step rubric to strike this balance in civil cases.

The court in *Saavedra*, rejected the argument that the qualified privilege prevents the State from introducing evidence before the grand jury that the defendant unlawfully took documents, for several reasons.

First, the court reiterated that the New Jersey Supreme Court decision created a *qualified* privilege, requiring a seven-step analysis. Therefore, an employee runs a significant risk that taking confidential documents will not fall within its protection even in a civil context.

Second, the court emphasized that such an analysis is not necessary because the Supreme Court did not intend the holding to "act as a means of mounting a facial challenge to the indictment in this criminal case."

Third, the State's failure to present evidence that the documents were taken for use in the civil case was not a failure to present exculpatory evidence. As the court determined, "[e]ven if [the New Jersey Supreme Court case] were directly on point, which it is not, 'what the employee did with the document' is only one factor to consider" Such evidence would not be "clearly exculpatory."

The court then ruled that the State provided sufficient evidence to support a prima facie case for the second charge against the defendant, "official misconduct." A public employee commits official misconduct in New Jersey when, "[h]e commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized or he is committing such act in an unauthorized manner."⁶ The charge also requires that the act be done for the purpose of obtaining the benefit for the malefactor or another.

Critically, the court decided that the State showed that the defendant was trained and informed that the documents she took were highly confidential and should not be taken or disclosed. This was sufficient to meet the element of an "unauthorized exercise of [her] official function." Further, the court found there was sufficient evidence that defendant's purpose was to obtain a benefit for herself. The court ruled that the "official misconduct" statute requires only an affirmative act, not malicious intent. The advantage that taking the documents provided in the defendant's civil suit was therefore enough to constitute a "benefit" to her.

The court also addressed the defendant's claim that a decision would have a chilling effect on LAD claims. The court said that it does not make policy choices about what is and what is not criminal conduct, but instead makes that determination by looking at language passed by the legislature. In addition, there was no evidence that the documents in this case would have become unobtainable by using ordinary discovery to obtain them. There are also safeguards in place for employees who fear that evidence will be destroyed - such as sanctions or the tort of fraudulent concealment. In short, there was no evidence of a need for self-help.

4 N.J.S.A. 2C:20-3a.

5 204 N.J. 239, 245 (N.J. 2010).

6 N.J.S.A. 2C:30-2a.

The dissent argued that it would be unfair to prosecute an employee who legitimately believed she had a right to take the documents in question. The majority countered by pointing out that, to dismiss the indictment on those grounds would amount to the judiciary establishing a public policy that employees must be “categorically insulated from criminal prosecution under the theft and official misconduct statutes if they take confidential documents” to support discrimination claims.

What This Means For Employers

The decision in *State v. Saavedra* expands the potential for criminal prosecution of employees who use “self-help” to obtain evidence, particularly confidential documents, to support a civil claim. The court’s determination that the qualified privilege for an employee taking documents to support an employment discrimination suit is not applicable to a criminal indictment creates a far greater risk to employees who take employer documents. Under *Saavedra*, the qualified privilege cannot be used to defend against a charge of theft. Taking employers’ confidential material can be unlawful, even if it is for the purpose of supporting a civil claim. *Saavedra* also establishes that formal training with regard to what is confidential information will help to establish that the taking is unlawful.

The court’s decision with respect to the charge of official misconduct has additional implications for public employees. The defendant’s intent in taking the document was to support a civil action. This was deemed to be a significant enough personal benefit to meet a prima facie showing of the “benefit” requirement for official misconduct. Therefore, in addition to theft, public employers may have “official misconduct” as an additional avenue available to them to seek to punish public employees.

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