

IN PRACTICE

## EMPLOYMENT LAW

### Employee Document Theft Can Sometimes Pay

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May an employee copy confidential company documents for the purpose of prosecuting a gender discrimination claim against her employer? The New Jersey Supreme Court addressed this controversial question in *Quinlan v. Curtiss-Wright Corp.*, 204 N.J. 239 (2010). The Court reviewed and reversed the order of the Appellate Division, which had vacated the jury's \$4.5 million punitive damage award.

The Court sought to strike a balance between the employee's entitlement to be free from discrimination and retaliation and the employer's right to safeguard its confidential documents and conduct its business. The *Quinlan* court's resulting "flexible, totality of the circumstances" test is a measured approach which largely adopts the analytical framework set forth in *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714 (6th Cir. 2008). Accordingly, while the *Quinlan* fact pattern — which involved the employee's unauthorized copying of documents containing employees' confidential personal information —

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has earned the case notoriety, the *Quinlan* court's holding provides the lower courts with a great deal of latitude to analyze retaliation claims.

The *Quinlan* case involved an individual named Joyce Quinlan. In 1980, Quinlan joined Curtiss-Wright's human resources department as a benefits analyst. During the course of her employment she was promoted several times, and in 1999 she became the executive director of human resources.

In 2000, Curtiss-Wright hired Kenneth Lewis as its director of succession planning and management development. Three years later, Curtiss-Wright reorganized its human resources department and promoted Lewis to corporate director of human resources and management development. As a result, although he was objectively less qualified and less experienced than Quinlan, Lewis became Quinlan's supervisor and direct report. In November 2003, Quinlan filed suit alleging gender discrimination in violation of the LAD due to, inter alia, Curtiss-Wright's failure to promote her.

Subsequent to her filing suit, and without her attorney's knowledge, Quinlan began to review and copy files to which she had access by virtue of her position in human resources. In total, she copied more than 1,800 pages of docu-

ments she believed to evidence a widespread pattern of gender discrimination. Some of the documents contained other employees' confidential personal information such as Social Security numbers and salary information. Quinlan provided the documents to her attorney who, in turn, produced the documents to the defendant in the course of discovery. Although the document production demonstrated that Quinlan had copied confidential personnel files, Curtiss-Wright took no action against her at that time.

Several weeks later, in her capacity as the executive director of human resources, Quinlan received a copy of an appraisal of Lewis' work performance. Lewis received a "needs improvement" rating in several categories, and Quinlan therefore believed the Lewis performance appraisal to be important to her claim. Accordingly, she delivered a copy to her attorney. At Lewis' deposition, Quinlan's counsel showed Lewis a copy of the appraisal and questioned him about it. Defense counsel objected and reported back to the company that Quinlan was continuing to copy confidential company documents. Shortly thereafter, Curtiss-Wright terminated Quinlan's employment due to her alleged "theft of Company property." Thereafter, the plaintiff amended her complaint to include a claim for retaliation in violation of the LAD.

The trial court held that, while Quinlan's copying and disclosing to her attorney the approximately 1,800 pages and Lewis' performance appraisal was not protected activity, Quinlan's attorney's use of the Lewis appraisal at

a deposition was protected activity that could support a claim for retaliation. The Appellate Division, however, reversed and remanded the retaliation verdict for a new trial. *Quinlan v. Curtiss-Wright Corp.*, 409 N.J. Super. 193 (App. Div. 2009). The Supreme Court granted certification.

In its decision on Dec. 2, 2010, the Supreme Court articulated a seven-part test, relying on and extending the analytical framework set forth in *Niswander v. Cincinnati Ins. Co.* According to the new *Quinlan* test, courts must consider: how the employee acquired or accessed the document; what the employee did with the document; the nature and content of the document; whether there is a clearly identified company policy on privacy or confidentiality and whether it is enforced; circumstances relating to the disclosure of the document; and the strength of the employee's stated reason for copying the document. Furthermore, in applying this analysis, a court must take into account "the broad remedial purposes the Legislature has advanced through our laws against discrimination, including the LAD . . . [as well as] 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."

The Court provided further guidance for applying the *Quinlan* test. Thus, with regard to the first factor — the manner in which the employee acquired the document — the Court rejected a requirement that the employee acquire the document

"inadvertently or accidentally." Instead, the Court stated that it would be sufficient "if the employee came into possession of the document in the ordinary course of his or her duties." However, if an employee acted outside his or her job duties by "rummaging through files or by snooping around the office of supervisors or other employees," the employee would lose the benefit of this factor.

In analyzing the second factor — what the employee did with the document — the Court said an employee like *Quinlan*, who provided the document to her attorney for purposes of prosecuting a discrimination claim, should receive the benefit of this factor. In contrast, if an employee shared the document with other employees or individuals outside of the company, this conduct would tilt the balance in the employer's favor. With regard to the third factor — the nature and content of the document — the *Quinlan* court noted that where documents contained trade secrets, proprietary information or confidential employee information, such facts would tip the balance in favor of the employer.

Concerning the fourth factor — the existence of a clearly identified, consistently enforced company policy on privacy or confidentiality — the Court noted that, in the absence of such a policy, a court should evaluate whether the employee had violated a common-law duty to the employer. In addition, as noted above, a court must balance a document's relevance against whether its use or disclosure "unduly disrupted" the employ-

er's business, and consider whether the employee had a valid 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."

Finally, the *Quinlan* test requires a court to consider the "broad remedial purposes" of employment laws such as the LAD and the effect its ruling could "have upon the balance of legitimate rights of both employers and employees." The Court urged courts "[to] apply the two parts of this final factor with great care, utilizing them as a supplement rather than a substitute for the multifactor test we have created." The Court noted that "in a close case . . . the broad remedial purposes of the LAD might tip the balance."

In his dissent, Justice Albin declared that the majority's holding "sends a disturbing signal to both the business community and the bar that employee theft may actually pay." However, the *Quinlan* test provides ample ammunition for employers to seek the dismissal of retaliation claims where, for example, employees have acquired confidential documents outside the scope of their employment and have copied them without authorization. Particularly where the employer has a clearly identified, consistently enforced company policy on confidentiality, the *Quinlan* test provides courts with a basis for dismissing such claims. Accordingly, it is likely that the application of the *Quinlan* court's holding will be less controversial than the facts on which the holding was based. ■