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Employees' Attempt To Prove Discrimination Claims May Be Further Complicated

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Employees frequently enter their attorneys' office armed with documents in support of discrimination and retaliation claims. However, a recent Appellate Division opinion held that an employee who provided confidential company documents to her attorney did not engage in protected activity under the New Jersey Law Against Discrimination and that such activity did not support a retaliation claim. The opinion, *Quinlan v. Curtiss-Wright Corp.*, Docket No. A-5728-06T1 (App. Div. Aug. 11, 2009), may complicate employees' attempts to prove their discrimination claims because they will have to rely upon employers to be forthcoming with confidential documents in discovery. The *Quinlan* holding is significant for two other reasons: First, plaintiffs who are successful at trial will be entitled to a tax gross up to offset negative tax consequences of a lump-sum award. In addition, the *Quinlan* case provides additional support for defendants who argue that their behavior is not sufficiently "egregious" to support a claim for punitive damages.

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In *Quinlan*, the Appellate Division reviewed and partially reversed a verdict in a case brought pursuant to the New Jersey Law Against Discrimination. The jury had awarded the plaintiff over \$10.6 million, of which over \$4.5 million was punitive damages. In relevant part, the court held that, because the jury had received an erroneous charge on plaintiff's retaliation claim, defendant was entitled to a new trial. The panel also determined that the lower court should not have submitted the issue of plaintiff's entitlement to a punitive damages award to the jury. Finally, the court agreed that, where a lump-sum award causes a plaintiff to incur negative tax consequences, a defendant should be required to provide her with additional compensation. Although the panel devoted only a few paragraphs of its 30-page opinion to the tax issue, *Quinlan* is the first time a reported appellate opinion in New Jersey has addressed this issue.

Initially hired in 1980 as a benefits analyst in Curtiss-Wright's human resources department, Joyce Quinlan received several promotions and, in 1999, became the Executive Director of Human Resources. In July 2000, a man named Kenneth Lewis joined Curtiss-Wright's human resources department.

Less than three years later, in January 2003, Curtiss-Wright reorganized the human resources department and promoted Mr. Lewis to the position of vice-president of human resources and management development. As a result, Mr. Lewis became plaintiff's superior. In November 2003, plaintiff filed suit and alleged gender discrimination.

Protected Activity Under LAD

The panel devoted the bulk of its opinion to whether two actions on Ms. Quinlan's part constituted protected activity under the New Jersey Law Against Discrimination. The first action involved Ms. Quinlan surreptitiously reviewing and copying over 1,800 pages of confidential files containing company employees' Social Security numbers, salary information and home addresses and phone numbers. The second action concerned the use of Mr. Lewis' performance appraisal, which Ms. Quinlan had received in connection with her position in Curtiss-Wright's human resources department, at a deposition. Less than a month after the deposition, Ms. Quinlan was terminated. As a result, she amended her complaint to include a retaliation claim pursuant to N.J.S.A. 10:5-12(d).

The trial court had held that, while Ms. Quinlan's copying and use of

the approximately 1,800 pages of confidential material was not protected activity, Ms. Quinlan's use of the Lewis performance appraisal at Mr. Lewis' deposition was protected activity that could support a claim for retaliation. Accordingly, the trial court had instructed the jury "that the use of Lewis's performance appraisal at his deposition did not provide a [lawful] basis for plaintiff's termination."

The panel rejected the trial court's attempt to distinguish between these two actions. In so holding, the Court noted that its research had not revealed a reported New Jersey opinion addressing "whether taking confidential documents from an employer can be considered a protected activity." After reviewing the precedent from circuit and district courts outside New Jersey, the panel distinguished and alternatively rejected the holding in *Kempcke v. Monsanto Co.*, 132 F.3d 442 (8th Cir. 1998), which involved an employee who serendipitously found documents inadvertently left on a computer's hard drive. The court noted that, unlike the employee in *Kempcke*, Ms. Quinlan had been "entrusted" with the Lewis performance appraisal in the course of her employment. In the alternative, the panel rejected the rationale for the holding in *Kempcke* because permitting employees to utilize documents that

they inadvertently found would "not only open up another avenue of on-the-job mischief but put employers in a position where they can't do anything about it."

Tax "Gross Up"

An easily overlooked but significant aspect of the *Quinlan* opinion is its endorsement of a tax "gross up" to compensate a plaintiff for the negative tax consequences of a lump-sum damages award. While a law division case had supported this concept, *Ferrante v. Sciaretta*, 365 N.J. Super. 601 (Law Div. 2003), and an unreported Appellate Division opinion had rejected it, *Besler v. Bd. of Educ.*, Docket No. A-0137-05T3 (App. Div. Aug. 25, 2008), certif. granted, 198 N.J. 314 (2009), *Quinlan* is the first reported appellate opinion in New Jersey that has addressed this issue. In its three brief paragraphs on the topic, the panel agreed that, "[u]nder the 'make whole' policies of N.J.S.A. 10:5-3," the plaintiff was entitled to an additional award to offset the negative tax consequences of a lump-sum award.

Punitive Damages

Finally, the panel determined that the question of defendant's liability

for an award of punitive damages should not have been submitted to the jury. In reliance on the two-prong test set forth in *Rendine v. Pantzer*, 141 N.J. 292 (1995), the court found that, while plaintiff had demonstrated actual participation by upper management, she had not shown the intentional wrongdoing necessary to support a punitive damages award. The court noted that, after she filed suit, plaintiff had initially remained in her position and even received a bonus and a raise. Moreover, although the trial court had characterized defendant's letter terminating plaintiff, in which defendant accused her of "theft of company property," as "egregious behavior," the panel disagreed. It noted that no evidence existed that defendant had disseminated this letter to anyone other than plaintiff. Moreover, plaintiff herself acknowledged that, in taking confidential files, she had breached her duty to her employer.

In light of the holding in *Quinlan*, employees should be very cautious in turning over company documents to their attorneys. In turn, certainly in cases that are tried to a verdict, practitioners must be aware of the panel's endorsement of a tax "gross up." Finally, the *Quinlan* holding will provide additional ammunition for defendants who seek to have the Court dismiss claims for punitive damages. ■