

New Jersey Supreme Court Reinstates Jury Verdict on Retaliation Claim for Employee Who Took Confidential Company Documents

December 8, 2010

On December 2, in *Quinlan v. Curtiss-Wright Corp.*, Docket No. 25-1-0217, the New Jersey Supreme Court reversed a lower court holding and reinstated a jury verdict in favor of a plaintiff who was fired after copying more than 1,800 confidential company documents and sending them to her attorneys for use in her pending discrimination lawsuit against the company. While holding that the copying in these circumstances was not “protected activity” under New Jersey’s Law Against Discrimination (LAD), the court further held that Quinlan’s attorneys’ subsequent use of one of the confidential documents taken from the company (specifically, the performance appraisal of Quinlan’s boss) at a deposition in a pending discrimination case *was* protected activity for which the plaintiff could not be lawfully terminated. Having found sufficient evidence that the employer, Curtiss-Wright Corporation (the Company), had terminated Quinlan as a result of her attorneys’ use of the performance appraisal at the deposition—as opposed to her initial copying of the documents—the court upheld the jury’s verdict in favor of the plaintiff, awarding a total of \$8,691,689 (before interest). A careful review of the case provides important lessons for all employers operating in New Jersey.

Relevant Factual Background and Pretrial Procedural History

Joyce Quinlan was a long-service employee of the Company who, by 1999, had risen through the ranks to become the Executive Director of Human Resources, reporting directly to the CEO. In 2000, the Company hired Kenneth Lewis to work in the Human Resources Department, and, in 2003, Lewis, who arguably was less qualified than Quinlan, received a promotion to a position above Quinlan’s. Quinlan believed that the Company had discriminated against her when it promoted the arguably less qualified Lewis and, in an effort to prove that her suspicions were true, gathered more than 1,800 confidential company documents available to her in the ordinary course of her job and turned them over to her attorneys.

In November 2003, Quinlan sued the Company in New Jersey Superior Court, alleging gender discrimination based on disparate pay and the Company’s failure to promote her to the position held by Lewis. She also alleged that the Company had engaged in a pattern and practice of gender discrimination against women.

During discovery, Quinlan’s attorneys produced the more than 1,800 confidential company records that Quinlan had copied. This document production marked the first time that the Company was aware that Quinlan had taken confidential company records. Despite the fact that Quinlan’s actions violated the

Company's confidentiality policy, the Company did not immediately terminate (or otherwise discipline) her at that time. Several weeks later, Quinlan, as part of her job, saw a copy of Lewis's latest performance appraisal, and subsequently copied the appraisal and turned it over to her attorneys. Soon thereafter, Quinlan's attorneys used that document at Lewis's deposition. Upon learning that Quinlan had copied the Lewis appraisal and sent it to her attorneys, the Company terminated her employment for violating its confidentiality policy and described her actions as "theft" of company property in a termination letter. As a result, Quinlan added a retaliation claim to her pending lawsuit.

Jury Verdict and Appeal

The trial judge charged the jury that Quinlan's copying of the more than 1,800 confidential company records and of Lewis's performance appraisal did not constitute "protected activity" under the LAD. The trial judge found, however, that Quinlan's attorneys' use of the Lewis appraisal at Lewis's deposition was protected. Thus, the judge further charged the jury that Quinlan could prevail on her LAD retaliation claim if the jury concluded that the Company had fired her as a result of what the attorneys did, rather than because she had copied and taken confidential company records. The jury returned a verdict in Quinlan's favor, awarding back and front pay on the LAD retaliation claim in the amounts of \$475,892 and \$3,650,318, respectively, and \$4,565,479 in punitive damages.

The Appellate Division (New Jersey's intermediate appellate court) set aside the verdict, concluding that Quinlan's attorneys' use of the Lewis appraisal at the deposition was not protected activity and that there was insufficient evidence to support the punitive damages award.

New Jersey Supreme Court Decision

The New Jersey Supreme Court reversed the appellate court's decision, holding that the jury charge on the retaliation claim was correct and that the evidence amply supported the jury's verdict in favor of Quinlan on the retaliation claim. In evaluating whether the taking, copying, and use of the copied company documents was protected under the LAD, the Supreme Court created what it called a "flexible totality of the circumstances approach." As its description suggests, the court's analysis does not provide any definitive rule for employers to know when they can terminate an employee for taking confidential information to further his or her pursuit of an LAD claim. Nonetheless, the court identified the following factors it used in its decision:

- 1) How the employee came into possession of, or obtained access to, the document
- 2) What the employee did with the document
- 3) The nature and content of the particular document in order to weigh the strength of the employer's interest in keeping the document confidential
- 4) Whether the company has a clearly identified privacy or confidentiality policy that the employee's disclosure has violated
- 5) The circumstances relating to the disclosure of the document—balancing its relevance against considerations about whether its use or disclosure was unduly disruptive to the employer's ordinary business

- 6) The strength of the employee's 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
- 7) Consideration of the broad remedial purposes the legislature has advanced through New Jersey's laws against discrimination, including the LAD, as well as consideration of the effect, if any, that either protecting the document by precluding its use or permitting it to be used will have on the balance of legitimate rights of both employers and employees

The Supreme Court cautioned that, in applying these factors, trial courts must be mindful that both employers and employees have legitimate rights. Employers have the right to operate their businesses within the bounds of the law and legitimately expect that they will have the loyalty of their employees; employees have the right to be free from discrimination in their employment and the right to speak out when they are subjected to treatment that they reasonably believe violates that right.

Applying the above factors, the Supreme Court agreed with the distinction the trial court drew. It held that Quinlan's act of taking the more than 1,800 confidential documents and the Lewis appraisal was *not* protected activity and the Company would have been free to terminate her for doing so. By contrast, Quinlan's attorneys' subsequent use of the Lewis appraisal at Lewis's deposition was protected activity under the LAD and Quinlan could not be terminated for her attorneys' actions. In determining whether the trial court's decision to protect the use of the Lewis appraisal at the deposition was the correct one, the Supreme Court considered both the "strong remedial purpose of the LAD" and the impact that protecting the use of the Lewis appraisal would have in the limited context of Quinlan's retaliation claim. Citing the following facts, the Supreme Court ultimately concluded that the balancing test "weighs heavily in favor of concluding that the conduct was protected": (1) Quinlan only gave the appraisal to her attorneys, (2) the appraisal was directly relevant to Quinlan's claim, (3) Quinlan had a "colorable basis" to believe that the Lewis appraisal would not have been disclosed during discovery, and (4) the disclosure of the appraisal was not disruptive because it did not threaten the Company's operations. Accordingly, because it agreed with the trial court's jury charge on the retaliation claim, the court found no basis to disturb the jury's finding that Quinlan was the victim of retaliatory discharge.

On the punitive damages award, the Supreme Court concluded that the following evidence in the record rose to the required standard of egregiousness to justify the award:

- The CEO would conduct lunch and dinner meetings to which he invited only male colleagues, even when the business to be discussed pertained to Quinlan's department.
- The CEO regularly played golf with male subordinates and had expressed his belief that certain jobs within the Company did not "attract females."
- Quinlan had been excluded from meetings in which her male peers had been in attendance.
- The jury could have concluded that Lewis was less qualified than Quinlan and that he received a promotion over Quinlan because he was the CEO's golfing companion.
- There was evidence that the CEO was aware that Quinlan felt that she had been discriminated against, but he did nothing to address those concerns.

- By “branding” Quinlan a “thief” in her termination letter, the Company prevented Quinlan from touting her many years of experience with the Company in her search for alternative employment after her termination.

Lessons Learned from *Quinlan*

1) As a general rule, give employees access to confidential information on a “need to know basis.”

To ensure that company records remain confidential, employers should only give employees access to certain records (such as personnel files, medical files, performance appraisals, payroll records, timecards, overtime records, and written disciplinary records) on a “need to know basis.”

2) Maintain and enforce a strong confidentiality policy.

In order to both prevent and respond to the disclosure of confidential company information to third parties, employers should adopt a strong confidentiality policy. Employers should also have employees sign a document at the commencement of their employment in which they acknowledge having received and reviewed the confidentiality policy and agree to abide by its terms. Employers also should consistently enforce their confidentiality policies and appropriately discipline employees who violate those policies.

3) Act decisively and quickly.

While, undoubtedly, the employer in *Quinlan* had sound reasons not to terminate Quinlan immediately upon learning of her copying confidential information, the ensuing delay resulted in a classic case of “no good deed goes unpunished.” The employer apparently could not argue that the initial copying was the basis for termination because no action was taken immediately thereafter. It was only after the attorneys used the confidential information at Lewis’s deposition that she was disciplined. Accordingly, if the taking or copying of documents violates company policy, move quickly to decide what, if any, disciplinary action should ensue.

4) Beware of the potential pitfalls in issuing a termination letter.

Although termination letters can serve important purposes, such as informing an employee of the reason for termination in a manner that will not be disputed at a later date, care is required. The court in *Quinlan* found that the Company’s use of inflammatory language in the termination letter provided grounds for punitive damages.

5) Beware of actual or perceived favoritism.

In *Quinlan*, the court found that the CEO’s alleged practice of inviting only male employees to play golf or to attend lunch and dinner meetings where company business was discussed, together with his belief that senior positions in the company did not “attract females,” was evidence of “egregious” behavior that supported an award of punitive damages. While there are many factors that could support a punitive damages award, it is clear that this type of favoritism is the type of evidence that the courts of New Jersey now may find to be sufficiently egregious to justify a punitive damages charge.

Attorneys in our Labor and Employment Practice regularly advise and litigate on behalf of employers with respect to the issues such as those raised in the *Quinlan* decision, including employee terminations and termination letters, confidentiality policies, and how to handle current employees who have filed a discrimination lawsuit or who have otherwise engaged in protected activity under the LAD. If you would like to obtain more information on the *Quinlan* decision, or address any other issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

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