

Court's Ruling That Employees Have No Blanket Entitlement to Take Employer's Confidential Documents for Discrimination Suits Provides Guidance to Employers

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In a case that may have a broad impact, the New Jersey Appellate Division issued a decision on December 24, 2013, upholding criminal charges against a former school board clerk who took hundreds of confidential documents for the alleged purpose of supporting discrimination, whistleblowing, and other claims against her employer. The employee now faces trial for theft and official misconduct, despite her contention that her conduct constituted protected activity. The decision, [*State of New Jersey v. Saavedra*](#), Docket No. A-1449-12T4 (N.J. Super. Ct., App. Div., Dec. 24, 2013), which included a dissent, has been approved for publication and offers both guidance and caution with regard to protections and consequences that may arise from an employee's unauthorized taking of confidential documents.

In its decision, the appellate panel interpreted the New Jersey Supreme Court's "totality of the circumstances" approach and seven-factor test for determining whether "an employee is privileged to take or use documents belonging to the employer," as articulated in [*Quinlan v. Curtiss-Wright Corp.*](#), 204 N.J. 239, 269 (2010), a case alleging sex discrimination and retaliatory discharge in violation of the New Jersey Law Against Discrimination ("LAD"). That test calls for the court to consider each of the following factors: (1) how the employee came into possession of the documents; (2) what the employee did with the documents; (3) the nature and content of each of the documents to "weigh the strength of the employer's interest in keeping the document confidential"; (4) whether the employee violated a "clearly identified company policy on privacy or confidentiality"; (5) whether the disclosure "was unduly disruptive" to the employer's business; (6) the employee's reason for copying and taking the documents, as opposed to requesting them in discovery and demanding their preservation; and (7) the effect on the parties' respective rights in permitting or precluding the use of the documents—keeping in mind the broad remedial purposes of the laws against discrimination. The Supreme Court stated that this seventh factor is "of the utmost importance."

In *Quinlan*, the Supreme Court found that the balance favored the employee who had taken the documents, but cautioned that future employees engaging in self-help "run the significant risk that the conduct in which they engage will not be found by a court to fall within the protection our test creates." The *Saavedra* decision illuminates that risk.

The Saavedra Case

Saavedra worked as a clerk for the North Bergen Board of Education (“Board”) in the Special Services Department. Her son also worked part time for the Board. In 2009, Saavedra and her son filed a complaint against the Board and certain individuals alleging, among other things, that Saavedra was the victim of gender and ethnic discrimination and retaliatory discharge in violation of the LAD and that her son had been discharged in violation of the New Jersey Conscientious Employee Protection Act (“CEPA”) for complaining about alleged pay irregularities and purported regulatory violations.

At some point, Saavedra told her lawyer that she possessed hundreds of Board documents, both originals and copies. Her lawyer used some of them in discovery, which he produced to the Board’s defense attorney, who, in turn, informed the Board’s general counsel. The general counsel brought the matter to the attention of the County Prosecutor, who determined that Saavedra’s unauthorized taking of Board documents should be presented to a grand jury. The assistant prosecutor assigned to the criminal matter presented five documents to the grand jury to illustrate the confidential nature of the documents taken by Saavedra:

- 1) a dated bank statement that a parent had provided the Board to verify residency, which showed the parent’s name and address, bank account number, account balance, and type of account (i.e., checking or savings);
- 2) an appointment schedule of a psychiatrist who treats special needs students in the district, showing students’ names and, as to one, a reference to the student’s need for medication;
- 3) an original “Consent for Release of Information to Access Medicaid Reimbursement for Health-Related Support Services” (“Medicaid Consent”), identifying the student’s name, date of birth, enrollment date, school, and grade level;
- 4) an original signed letter from a parent containing the student’s name and school and the parents’ telephone number; and
- 5) an original letter from a parent discussing an emotional problem involving the parent’s child.

Evidence provided to the grand jury showed that Board “employees are trained and informed[,] via internal policies[,] guidelines[,] and regulations[,] that these documents are highly confidential and are not to be disclosed or tampered with in any way...[or] taken[.]”

Although cautioning that the *Quinlan* analysis, which was set forth in a civil action involving a private company, does not have direct application to deciding the challenge to a criminal indictment of a public official, the Appellate Division was nevertheless guided by the Supreme Court’s approach. In upholding the indictment, the Appellate Division pointed to the following factors, among other things:

- Saavedra never asserted that she took the documents because of any likelihood that the Board would have discarded or destroyed them;
- Saavedra never contended that the documents would have been unavailable, if requested in discovery;
- Saavedra never established the relevancy of the documents to her claims and never pointed to a “smoking gun” document;
- New Jersey Court Rules provide multiple mechanisms for parties to obtain and preserve evidence, including before a lawsuit is filed;
- New Jersey law provides sanctions for fraudulent concealment and spoliation of evidence;
- documents pertaining to students’ psychiatric treatment potentially jeopardized the Board’s ability to ensure that “its students with mental health issues receive psychiatric treatment and would violate privacy rights”;
- original documents taken by Saavedra, such as the Medicaid Consent, exposed the Board to liability to the State of New Jersey and federal government for missing documents, in the event of an audit; and
- the Board conducted employee training and established policies regarding the highly confidential nature of the documents and that they were not to be disclosed or tampered with in any way.

What Employers Should Do Now

Although arising under a specific New Jersey law, the *Saavedra* decision provides analysis that may usefully guide employers nationwide. In particular, this case reinforces the importance of employers identifying their confidential information and establishing policies and procedures for its handling and protection. Emphasis should be given to private information and information protected from disclosure by law. As such, employers should do the following:

- Establish written policies that define and provide procedures for handling confidential information.
- Monitor the handling of confidential information to ensure compliance with such policies and procedures.
- Where appropriate, include maintaining confidential information as an essential job requirement in job descriptions.
- Be careful to avoid providing broad access to confidential information to employees who have no business need to know. All human resources employees, for example, do not necessarily need access to all personnel files and information. Think twice about hitting “reply all,” or routinely copying groups of employees on emails containing sensitive information because electronic documents (including e-mails) fall within the definition of a protected “document.” Cyber-security measures (including passwords) and policies pertaining to access, the use of mobile devices, and the like need to be created and used.

- Train employees and managers who have access to confidential information on cyber-security measures for employees to follow; consider asking members of your IT staff to provide this training.
- Stay tuned, as there may yet be further developments in the *Saavedra* case. The split decision means that Saavedra has an automatic right to appeal to the New Jersey Supreme Court.

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