

## Employment & Immigration Law

### LAD Does Not Protect Taking An Employer's Confidential Documents For Lawsuit

Tread carefully in order to avoid a retaliation claim

By David W. Garland

The New Jersey Appellate Division issued a decision this summer making it more difficult for a current employee to use his or her position to collect a company's internal documents for a pending lawsuit. In *Quinlan v. Curtiss-Wright Corp.*, 409 N.J. Super. 193 (App. Div. 2009), the Court held that an employee who provided her employer's confidential documents to her attorneys for use in her discrimination lawsuit was not engaged in protected activity and, therefore, the employer's termination of her employment did not constitute unlawful retaliation. The Court also held that her attorneys' use of those documents was not protected activity.

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#### The Facts

Defendant Curtiss-Wright Corporation ("Curtiss"), a defense and aerospace contractor, employed plaintiff Joyce Quinlan in its human resources department for 24 years. She began her employment with Curtiss as a benefits analyst. At that time, she signed a statement acknowledging that she was prohibited from disclosing confidential information that she obtained from the company during the course of her employment. Curtiss subsequently adopted a code of conduct and distributed it to Quinlan and its other employees. The code barred employees from using their positions within the company for personal gain.

By 1999, Quinlan was the company's executive director of human resources. In 2000, Curtiss hired a new employee, Kenneth Lewis, as its director of succession planning and management development. Curtiss reorganized its human resources department in 2003, at which time Lewis became the vice-president of human resources and management devel-

opment, and Quinlan's superior.

Quinlan had many more years of experience than Lewis, and she suspected that gender played a role in the company's decision to promote Lewis rather than her. According to the company, it had promoted Lewis because of initiatives he had developed and its concern over her budget skills. Dissatisfied with the company's explanation, Quinlan consulted with an attorney and began reviewing human resources files and copying documents that she thought supported her claim of discrimination. She copied documents that contained salary information, Social Security numbers, home addresses, telephone numbers and other confidential information.

Quinlan provided over 1,800 pages of these confidential company documents to her counsel. In November 2003, she filed a lawsuit asserting claims against Curtiss for, inter alia, gender discrimination in violation of the New Jersey Law Against Discrimination, N.J.S.A. Section 10:5-1, et seq.

During discovery, Quinlan's attorneys produced the documents that she had copied. In the course of her human resources duties, Quinlan subsequently

received a new performance evaluation of Lewis, and provided it to her attorneys. Her counsel questioned Lewis about the evaluation during his deposition, and he testified that he had not seen it.

Following the deposition, Curtiss fired Quinlan for "theft of Company property" based upon her "unauthorized taking of confidential or privileged information from the Corporation." Quinlan then amended her complaint to add a retaliation claim.

### The LAD

The LAD prohibits an employer from retaliating against an employee: (1) because the employee "opposed any practices or acts" that violate the LAD; (2) because the employee "filed a complaint, testified or assisted in any proceeding" under the LAD; or (3) in order to "coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected" by the LAD. N.J.S.A. Section 10:5-12(d).

### The Trial Court

At trial, the court instructed the jury that Quinlan's removal of confidential company documents was not a protected activity and that, as a result, Curtiss could justifiably terminate her employment for this conduct. The court further instructed the jury, however, that her counsel's use of the documents during the lawsuit was a protected activity for which she could not be discharged.

The jury returned a verdict in favor of Quinlan, and the court entered judgment for approximately \$10.5 million, including over \$4.5 million in compensatory damages, over \$4.5 million in punitive damages, and over \$1.3 million in counsel fees and costs. Curtiss appealed.

### The Appellate Division

On appeal, Curtiss argued that the

trial court had erred in instructing the jury that Quinlan's counsel's use of internal company documents constituted protected activity. In considering this argument, the Appellate Division first set forth the elements of a prima facie retaliation claim. The Court explained that a plaintiff must present proof that: (1) he or she engaged in "protected activity"; (2) the employer was aware that the plaintiff had engaged in this activity; (3) the "employer unlawfully retaliated" against the plaintiff; and (4) the employer retaliated because of the plaintiff's participation in the protected activity.

According to the Court, "[p]roof that the complaining employee had engaged in a protected activity is an essential element to a claim of retaliation." The Court emphasized, however, that not all activity "taken in furtherance of the employee's claim of discrimination is protected activity."

The Court stated that no reported New Jersey cases addressed the issue of "whether taking confidential documents from an employer can be considered a protected activity." The Court reviewed the "varying approaches" taken by federal courts that have considered the issue. Based upon this analysis, the Appellate Division agreed with the trial court that Quinlan's unauthorized taking of confidential documents from her employer was not protected activity. It disagreed, however, with the trial court's distinction "between those documents which she obtained and copied by going through files and her attorney's use of Lewis's performance appraisal while deposing him." While the trial court found that "Curtiss could properly terminate her for the former but not the latter," the Appellate Division could "find no support for this distinction in the case law or in policy."

The Appellate Division criticized the trial court's approach as "transform[ing] an unprotected action, copying confidential items, into a protected action on the basis of subsequent use of the confidential material." The Court observed that such an approach "could have the undesirable result of encouraging employees to go

through their employers' files and copy confidential material, secure in the knowledge that employers could do nothing so long as that material was later used in litigation." The Court rejected the trial court's distinction as "approach[ing] the metaphysical."

The Court also rejected the trial court's attempt to distinguish Lewis' performance evaluation, which Quinlan had received in the regular course of her job duties, from most of the other company documents she had provided to her attorneys, which she had not. Although the trial court had expressed concern that an employer might "lay traps" for employees by "tantalizing" them with documents supporting their allegations and then firing them when they gave copies to their counsel, the Appellate Division noted that no evidence suggested that Curtiss had attempted to "lay a trap" for Quinlan.

Moreover, the Appellate Division explained, if Curtiss had altered procedure in order to prevent Quinlan from receiving documents that she typically received in the ordinary course of her duties, "it could have opened itself to the possibility of another claim of retaliation." The Appellate Division concluded that because the trial court had improperly instructed the jury, Curtiss was entitled to a new trial.

An employer defending a lawsuit by a current employee must tread carefully in order to avoid a retaliation claim. The situation is particularly precarious when, as is sometimes the case, the employee disregards job responsibilities or company policies confident that the employer is too fearful of a retaliation claim to take appropriate action. Prudent employers defending a claim by a current employee should consult counsel before taking any adverse action with respect to such an employee. Fortunately, the *Quinlan v. Curtiss-Wright Corp.* decision makes it more difficult for the litigating employee to develop his or her claims on company time with internal documents. This decision is most likely to help employers that issue and enforce policies safeguarding the confidentiality of their internal documents. ■