

LEGISLATIVE UPDATE

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Taking Confidential HR Documents To Support A Discrimination Lawsuit Is Not A Protected Activity

A NJ Appellate Court held in Quinlan v. Curtiss-Wright Corp., 2009 NJ Super LEXIS 200 (App. Div. August 11, 2009), that a high level HR employee was not engaging in protected activity when she copied documents she had access to as a function of her position and provided them to her attorney to support claims under the New Jersey Law Against Discrimination. This ruling provides critical guidance to New Jersey employers, as it is the first reported decision on this issue from a New Jersey State Court, and federal courts addressing similar issues have reached differing conclusions in similar circumstances.

In the case, the reported facts were as follows. The plaintiff was employed by the defendant for 23 years prior to filing suit, had worked her way up through the ranks and by 1999 was Executive Director of HR. In 2000, the company hired a male employee to work in HR in a succession planning role. In 2003, the HR Department was reorganized, the male employee was appointed to VP of HR, and became the plaintiff's supervisor. The plaintiff believed her non-promotion was the result of gender discrimination, and discussed the issue with the company's CEO. Dissatisfied with the explanation she received as to why she was not promoted, she consulted with an attorney. She also began to review HR files looking for and copying materials that she felt bolstered her discrimination claim. These included documents containing home addresses, telephone numbers, social security numbers and salary information. In total, she forwarded approximately 1800 pages of documents to her attorneys. She filed suit under the NJLAD in November 2003. During the course of discovery, her attorneys forwarded the information that the plaintiff had taken to the defendant. In May 2004, several weeks after the document production, the male employee who received the promotion was deposed. At his deposition, the plaintiff's attorney asked him about his most recent performance evaluation. The plaintiff had received a copy of the evaluation as part of her normal HR duties, read it, believed it bolstered her claim, and provided it to her attorneys. Shortly thereafter, the plaintiff was fired for removing confidential information and for theft of Company property. She added a claim of retaliation to her complaint.

At trial, the judge ruled that the plaintiff's taking of Company documents was not a protected activity, but also held that her attorneys use of the documents to prosecute a discrimination claim was a protected activity for which she could not be retaliated against. The jury returned a verdict for the plaintiff that totaled over \$10 million. On appeal, the New Jersey Appellate Division ordered a new trial on the retaliation claim. In doing so, the Court first noted that, in order to establish a viable retaliation claim under the LAD, a plaintiff needs to engage in protected activity. Given that there was no reported New Jersey decision on the issue, the Court then analyzed the "varying approaches" used by the federal courts when faced with similar facts – some holding that taking Company documents was protected activity and others holding the opposite. However, one of the primary focus points of the federal cases was how the person obtained the information, and whether the discovery was inadvertent or the result of a deliberate internal sleuthing effort. Ultimately, the Appellate Division agreed with the trial court that the plaintiff's taking of confidential documents from her employer was not protected activity. The Court also went on to hold that the plaintiff's attorney's use of the documents during the litigation was also not protected. In doing so, the Court noted that protecting such activity "would 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." As a result, the Appellate Court held that the trial court erred in allowing the jury to consider the improperly obtained evidence, and ordered a new trial on the retaliation claim.