Court-Sanctioned Employee Theft, or a Workable 7-Part Test to Resolve Employee Taking of Confidential Documents?

The New Jersey Supreme Court's December 2, 2010 decision in Quinlan v. Curtiss-Wright, 204 N.J. 239 (2010) has spurred much debate among legal commentators about whether the New Jersey Supreme Court has opened a Pandora's Box and sanctioned employee theft of documents. In Quinlan, the Court ruled that Joyce Quinlan, an employee of Curtiss-Wright, engaged in protected conduct in copying confidential data in the workplace and feeding it to her attorney for use in her ongoing discrimination lawsuit. A close review of the decision shows that the legal commentators have likely overreacted, and that Quinlan provides a workable, 7-part test to be applied in determining whether an employee's theft of documents in the workplace can constitute protected activity under state employment statutes. The decision most certainly should prompt employers to closely analyze their workplace handbooks and be sure to keep close tabs on, and clearly mark and limit disclosure of, confidential data.

1. Factor One: Consideration of How The Employee Obtained the Documents.

The first factor articulated by the Supreme Court in Quinlan was for the Court to "evaluate how the employee came to have possession of, or access to, the document." Id. at 269. The Court noted that where (as was true in the case before it) "the employee came upon [the documents] innocently, for example, in the ordinary course of his or her duties for the employer, this factor will generally favor the employee." The Court observed that, while it will not be necessary for an employee to show in all cases that the materials were obtained "either inadvertently or accidentally," where the materials were obtained by "the employee's intentional acts outside of his or her ordinary duties, the balance will tip in the other direction." Id.

2. *The Second Factor: What the Employee Did With the Document.*

Under the second factor, "the court should evaluate what the employee did with the document. If the employee looked at it, copied it and shared it with an attorney for the purpose of evaluating whether the employee had a viable cause of action or of assisting in the prosecution of a claim, the factor will favor the employee." Id. However, where "the employee copied the document and disseminated it to other employees not privileged to see it in the ordinary course of their duties or to others outside of the company, this factor will balance in the employer's favor." (Id.).

3. The Third Factor: The Nature and Content of the Particular Document.

The third Quinlan factor requires the Court to "evaluate the nature and content of the particular document in order to weigh the strength of the employer's interest in keeping the document confidential." Id. at 269-70. The Court held that where a document is "privilege[d], in whole or in part, [or] if it reveals a trade secret or similar proprietary business information, or if it includes personal or confidential information such as Social Security numbers or medical information about other people, whether employees or customers, the employer's interest will be strong." Id.

4. The Fourth Factor: Whether There Is a Clearly Identified Company Policy.

The fourth Quinlan factor requires the Court to "consider whether there is a clearly identified company policy on privacy or confidentiality that the employee's disclosure has violated." The Court recognized that this factor requires the Court to evaluate whether the employee "has routinely enforced that policy, and whether, in the absence of a clear policy, the employee has acted in violation of a common law duty of loyalty to the employer." Id.

5. The Fifth Factor: Weighing Relevance vs. Disruptiveness.

The fifth factor is a balancing test whereby the Court is to "evaluate the circumstances relating to the disclosure of the document to balance its relevance against considerations about whether its use or disclosure was unduly disruptive to the employer's ordinary business." This necessarily requires the Court to evaluate the relevance of the evidence and to also determine whether it was used in an unfair manner: Thus, for example, if the document had marginal relevance to the claim of discrimination, but was intended to be used merely to cast unfair aspersions, to divert the attention of the jury, or to sensationalize the trial, this factor would weigh in the balance against the employee. On the other hand, if the document was central to the discrimination claim and merely troubling or upsetting to the employee to whom it related, the factor will more likely weigh in favor of the employee." Id. at 270.

6. The Sixth Factor: The Employee's Explanation for Copying the Document.

The sixth factor entails the evaluation of the "strength of the employee's expressed 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." Id.

7. The Seventh Factor: Balancing the Interests of Employer and Employee, and Remaining Cognizant of the Remedial Purposes of the LAD.

The last factor articulated by the Court in Quinlan is that the Court "evaluate how its decision in the particular case bears upon two fundamental considerations that are often in conflict in matters such as these": 1) remain cognizant "of the broad remedial purposes the Legislature has advanced through our laws against discrimination"; and 2) "consider the effect, if any, that either protecting the document by precluding its use or permitting it to be used will have upon the balance of legitimate rights of both employers and employees." Id. at 271.

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Although Quinlan is a new decision and only time will tell how lower courts apply it, the text of the decision shows that the Court provided a workable test to be applied in situations where employees are caught pilfering files of the employer, and the employer seeks to impose discipline. Such decisions should not be lightly made and should only be made with the assistant of qualified legal counsel. Most certainly, the Quinlan decision should prompt employers to closely analyze their workplace handbooks and be sure to keep close tabs on, and clearly mark and limit disclosure of, confidential data in the workplace.