Labor & Employment
ALERT

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NEW JERSEY SUPREME COURT'S *SAAVEDRA* DECISION SERVES AS WARNING TO EMPLOYEES CONTEMPLATING THEFT OF EMPLOYER'S CONFIDENTIAL DOCUMENTS

By Ian W. Siminoff

On June 23, 2015, in a 6-1 decision, the New Jersey Supreme Court affirmed the denial of Ivonne Saavedra's motion to dismiss a criminal indictment against her for absconding with her employer's confidential documents. In so holding, the New Jersey Supreme Court raised the stakes for any employee who takes an employer's company documents, whether to support a contemplated or ongoing lawsuit, or otherwise.

In the case, Saavedra, a North Bergen Board of Education (Board) clerk, took 367 documents (including 69 originals) and provided them to her attorney in order to support her pending gender discrimination lawsuit against the Board. During discovery, Saavedra's attorney provided the documents to the Board, who referred the matter to the Hudson County Prosecutor. Saavedra was charged with the criminal offenses of official misconduct and theft of movable property (the latter offense not restricted to public employees). Saavedra's challenge to the indictment was rejected by the Appellate Division and now the New Jersey Supreme Court.

In so doing, the New Jersey Supreme Court explained that *Quinlan v. Curtiss-Wright Corp.*, 204 N.J. 239 (2010), a civil matter, did not control the result in *Saavedra*, a criminal matter. In *Quinlan*, the New Jersey Supreme Court held that the taking of company documents in connection with prosecuting a discrimination lawsuit against an employer could constitute protected activity for purposes of a Law Against Discrimination (LAD) retaliation claim, depending upon the result of a seven-factor test: (1) how the employee came to possess the documents; (2) what the employee did with the document; (3) the nature and content of the document; (4) the company policy on confidentiality; (5) the circumstances relating to the disclosure of the document; (6) the strength of the employee's reason for copying the document rather than seeking it in discovery; and (7) the broad remedial purpose of the LAD, and the balance of rights between employees and employers.

Even so, the *Quinlan* court may have foreshadowed the result in *Saavedra*, warning employees that "[t]he risk of self-help is high." As the *Saavedra* court explained, "This court's decision in Quinlan did not endorse self-help as an alternative to the legal process in employment discrimination litigation." Thus, the *Saavedra* decision makes it clear that the discovery process is the proper vehicle for obtaining relevant documents in employment litigation.

For Justice Albin, the lone dissent, in addition to his perceived concerns about the prosecutor effectively concealing Saavedra's motive for taking the

documents, he noted an inherent discord between *Saavedra* and *Quinlan*, whereby "it may be possible that an employee taking confidential documents from an employer's files to pursue a LAD claim will win a multimillion-dollar discrimination lawsuit but serve time in prison for committing a crime."

The lessons for employers from *Saavedra* are at least two-fold: (1) employers should install multiple layers of protection, through policies, agreements and training, safeguarding their confidential information and trade secrets, to enable them to more effectively avail themselves of criminal or civil remedies against employees who abscond with such information; and (2) notwithstanding *Saavedra*, employers should consult counsel prior to terminating or referring an employee's conduct to a prosecutor as concerns employee theft of company documents, where the employee has threatened to or filed a claim against the employer.

For more information regarding this alert, please contact Ian W. Siminoff at 973.994.7507 or isiminoff@foxrothschild.com or any member of the Labor & Employment Department.

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