

When Employee Disloyalty is Protected By Law

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Two decisions by the Supreme Court of New Jersey in 2010 have blurred the line between disloyalty and legally-protected activity. An employer clearly has a right to conduct its business and a right to require loyalty of its employees. The Supreme Court of New Jersey however has adopted an approach that will insulate disloyal employee conduct and make it nearly impossible for an employer to limit the disclosure of the company's confidential documents to an employee's lawyer.

In a first impression case, decided on March 30, 2010, the Supreme Court of New Jersey in *Stengart v. Loving Care Agency, Inc.*, held that company policies do not convert an employee's emails with her attorney -sent through the employee's personal, password-protected, web-based email account, but via her employer's computer -into the employer's property. This decision limits the ability of employers to claim that an employee's personal communications conducted from employer-owned property are no longer private and available for the company's review.

In another first-of-its kind decision on December 2, 2010, the Supreme Court of New Jersey in *Quinlan v. Curtiss-Wright Corp.* held that an HR Director can use confidential personnel information to sue her employer. Taken together, these decisions give a legal imperator to disloyal employee conduct.

In *Stengart*, a discharged employee filed a lawsuit against the company, asserting various claims including violations of New Jersey's Law Against Discrimination (NJLAD). Prior to getting fired, but unknown to the company, she used a laptop computer provided by the company to send emails to her attorneys via her personal, web-based, password-protected Yahoo email account

After the discharged employee sued, the company extracted and created a forensic image of that laptop's hard drive. As a result of this process, the company's attorneys were able to discover and review many emails between the employee and her attorneys. It was only months later, after discovery commenced and the company was required to respond to requests, that the company informed the former employee and her counsel that it had reviewed these emails. After protracted legal argument, a trial judge found that the employer's electronic communications policy put the employee on notice that her emails would be viewed as company property and, therefore, not protected by the attorney-client privilege.

The Court reviewed various versions of the company's electronic communications policy and found it problematic for the company. The court's primary concern was that the company asserted that the employee's emails with her attorneys were not private, even though she sent them via her personal web-based Yahoo email account. The trial court viewed the company's policy as an adequate warning to employees that there would be no reasonable expectation of privacy in any communications made using company laptops or servers regardless of whether the email was sent via a company email account or a personal web-based email account. The appellate court, however, pointed to language in the policy permitting some personal use and found that an objective reader of that language could have reasonably believed that personal emails with her attorney would be permitted.

The Court also reviewed the way courts have historically viewed employer-issued workplace regulations and found that such regulations should concern the terms of employment and reasonably further the legitimate business interests of the employer. Though many aspects of the policy were specific enough to aid the company in conducting its business, the court found that the company's overbroad interpretation of its electronic communications policy reached into the employee's personal life without a sufficient connection to the employer's legitimate business interests. The company's ownership of the computer that the employee used to send emails to her attorney was not enough to convert those emails into company property. An employer may discipline or terminate an employee who is engaging in business other than the company's business during work hours, the court said, but that right does not translate into a right to confiscate the employee's personal communications.

While *Stengart* appears to be limited to an employee's use of her personal email account to communicate with her attorney, when read together with *Quinlan*, it is likely that plaintiffs' lawyers will advise their clients to email company documents to them while they are still on the job in an incredibly high-stakes litigation game.

In *Quinlan*, an executive director for human resources at Curtiss-Wright sued the employer under NJLAD after she was bypassed for promotion to vice president in favor of a male employee hired many years after her. Because of her role as executive director of human resources position Quinlan had access to the company's personnel records. The Employee Handbook contained an expressed confidentiality policy covering personnel records and Quinlan had signed a separate confidentiality agreement covering personnel records, and other company documents. Nevertheless, Quinlan copied more than 1,800 pages of personnel files, including salary records, and gave them to her lawyer.

When the employer learned of Quinlan's action after the lawsuit was filed and during the course of ordinary discovery proceedings, she was warned not to copy any more documents. Despite the warning, she copied the post-promotion evaluation of Kenneth Lewis, the person who was promoted instead ahead of Quinlan, and gave it to her lawyer.

At a May 2004 deposition, Lewis was asked about the evaluation. He claimed he had never seen it before and after the employer was advised of yet another incident, Quinlan was fired the next month by a letter stating that her "unauthorized taking of confidential or privileged information from the Corporation constitutes a theft of Company property." Quinlan then added a retaliation claim to her lawsuit, alleging she was fired for protected activity -- suing the company and sharing the company documents with her lawyer.

While the Court found that Quinlan could be fired for theft of company documents adopted a complex six-factor test holding that the use of purloined documents can be justified if they are used to support a discrimination suit. This is a very abstract legal standard that the dissenting opinion thought impossible for any reasonable employer to follow. The majority found it significant that Quinlan had access to the documents as an ordinary part of her job. On the other hand, If, however, the theft of the document was due to the employee's intentional acts outside of his or her ordinary duties, the balance will tip in the other direction in favor of the employer. Therefore, the employee who finds a document by rummaging through files or by snooping around in offices of supervisors or other employees will not be entitled those documents.

Also, a Court evaluated what the Quinlan did with the confidential documents. 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 lawsuit against the employer or of assisting in the prosecution of a claim, this factor will favor the employee. On the other hand, if 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.

It is important to note that in both of these cases, the employer had policies in place that when violated would have justified the employee's discharge for cause. However, the disloyal conduct of misusing company property and copying and using confidential documents against the employer were found to be legally protected. Thus, the discharge is in theory legal but the information obtained from the disloyal conduct can be used to further a discrimination case. Thus, New Jersey law encourages employees, including HR managers, to take the big risk of being fired for disloyalty. Presumably, that risk would be based on the employee's belief that they have a valid discrimination case to bring against the employer after they are fired.

And what of the employer that finds out that an employee is violating company policy by sending confidential documents to her or her attorney? While the disloyal employee could be fired, *Stengart* and *Quinlan* require caution and a counter strategy. In this situation, the small employer that is strapped and would rather not pay a lawyer is over its head. But the game has changed in New Jersey and the discharge of even disloyal employees has gotten a lot more complex.