

New Jersey Supreme Court Affirms Validity of Criminal Prosecution of Employee's Theft of Employer's Documents

Date: 6.25.2015

A former school board employee who removed confidential documents to assist in her employment lawsuit filed against the school board may be criminally prosecuted, the New Jersey Supreme Court has ruled, affirming an Appellate Division decision. *State v. Saavedra*, No. A-68-13 (June 23, 2015). The Supreme Court's decision could strengthen employers' ability to protect their confidential documents, while forcing attorneys to seriously question the advisability of accepting and using documents from clients who may have improperly obtained them from their employers.

Facts

Ivonne Saavedra was a clerk for the North Bergen Board of Education when she filed a lawsuit against the Board alleging a variety of employment based claims, including discrimination and retaliation under New Jersey Law Against Discrimination ("NJLAD") and a violation of New Jersey's whistleblower law, the Conscientious Employee Protection Act ("CEPA"). (For details, see our previous articles, [Criminal Prosecution for Employee's Theft of Employer's Documents May Proceed](#), [New Jersey Court Rules](#) and [New Jersey High Court to Decide Whether Employee Theft of Confidential Documents May Be Exempt from Prosecution](#).)

During pre-trial discovery, the Board learned that Saavedra had removed hundreds of highly confidential documents, in violation of Board policies, for use in her civil case. Furthermore, many of the documents contained sensitive information about students, the disclosure of which could endanger the Board's federal funding and violate the Family Educational Rights and Privacy Act of 1974 ("FERPA"). The Board's general counsel notified the Hudson County prosecutor, who determined the matter should be presented to a grand jury for possible criminal action. The grand jury eventually indicted Saavedra, charging her with official misconduct and theft. The trial court denied Saavedra's motion to dismiss the indictment, and the Appellate Division affirmed.

Supreme Court Decision

Saavedra argued that the State failed to present evidence sufficient to support the indictment and withheld from the grand jury exculpatory evidence about her motive in taking the documents. She also contended that because the documents were taken for use in her employment discrimination litigation, a New Jersey Supreme Court 2010 decision immunized her conduct as a matter of public policy and prohibited the State from prosecuting her. The Supreme Court rejected all of Saavedra's arguments.

The Court found the State had presented a *prima facie* showing to the grand jury of each offense charged in the indictment. Moreover, it found the State had not failed to present any exculpatory evidence mandated by due process, noting the State made sufficient reference to Saavedra's claims against the Board as the reason for her removal of the documents.

Further, the Court rejected Saavedra's constitutional and public policy arguments based on the anti-discrimination policies of the NJLAD. Saavedra contended she took the documents for a lawful use and that the 2010 decision by the Court in another case provided that taking confidential documents to support a civil suit was lawful.

Rejecting Saavedra's assertions, the Court reiterated that its 2010 decision did not apply to criminal proceedings. In addition, the Court rejected Saavedra's broad argument that its 2010 decision had "legalized the right of employees to take confidential documents as a protective measure" under the NJLAD. Rather, the Court said, it expressly recognized that "employers legitimately expect[] that they will not be required to tolerate acts amounting to self-help or thievery." The Court clarified that "nothing in [our prior decision] states or implies that the anti-discrimination policy of the [NJLAD] immunizes from prosecution an employee who takes his or her employer's documents for use in a discrimination case." The Court also clearly stated that "the Legislature has not determined that in order to effect the State's anti-discrimination policy, employment discrimination litigants should be immunized from prosecution for surreptitiously taking employer documents to support their claims. Such litigants remain subject to our criminal laws."

The Court explained that its 2010 ruling "did not endorse self-help as an alternative to the legal process in employment discrimination litigation." It clarified that the 2010 decision found the plaintiff engaged in protected activity by removing confidential documents for use in her civil lawsuit only *because* the employee was subject to retaliation for the actual removal of documents. In the case before it, Saavedra alleged she removed the documents because she *believed* they would help her lawsuit and she was concerned the Board might discard or destroy them. However, Saavedra had not alleged she was subject to retaliation for the removal of documents. Therefore, her removal of documents would not qualify as protected activity.

The Court also considered arguments submitted by Saavedra and friend-of-the-court briefs asserting that Saavedra's indictment "chills" potential plaintiffs from bringing NJLAD and CEPA claims because employees, worried about criminal prosecution, would no longer remove documents to protect themselves. Rejecting these assertions, the Court focused on the power the court rules afford parties to obtain any relevant information in pre-trial discovery, while providing procedural safeguards and judicial oversight. To emphasize this point, the Court reviewed the discovery tools that were available to Saavedra at every step of her employment discrimination suit, all of which would have allowed her to obtain all necessary information to support her claim without running afoul of Board policies or criminal law.

By reiterating the value of the pre-trial discovery process, the Court appeared to reject the notion that plaintiffs should be permitted the discretion to determine what documents can support lawsuits against their employer and to take matters into their own hands to obtain such documents.

The Court noted that, with the benefit of judicial oversight, the trial court could have assessed the relevance of the documents at issue without endangering student confidentiality — which occurred when Saavedra independently removed the documents, including original copies.

Despite the decision's seemingly robust limitation on an employee's ability to remove confidential documents, the Court noted that a "claim of right" or "justification" defense may still be available to Saavedra at her criminal trial. Without opining on the validity of this defense in the current case, the Court presented the possibility that criminal conviction is not a certain outcome in this or similar cases. Moreover, *Saavedra* presented some unique factors that may allow future courts to distinguish its findings. In this case, the records taken were protected under FERPA, and Saavedra took original documents or the Board's only file copy, rather than mere photocopies.

The Court's decision provides some comfort to employers and supports their ability to enforce confidentiality provisions and protect their confidential documents from litigious or departing employees, while limiting a potential plaintiff's ability to independently take documents. Nevertheless, when faced with an employee who has taken documents, the disclosure or publication of which would subject the employer to damages (such as when a non-compete agreement operates), employers should consider whether pursuing criminal action is appropriate, among other things.

Jackson Lewis attorneys are available to assist employers in this and other workplace matters.

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