

Criminal Prosecution for Employee's Theft of Employer's Documents May Proceed, New Jersey Court Rules

By Jason C. Gavejian

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An employee who removes or copies her employer's documents for use in her whistleblower or discrimination case may be prosecuted criminally for stealing, a New Jersey state court has ruled. *State v. Saavedra*, No. A-1449-12T4 (App. Div. Dec. 24, 2013). The employee had taken highly confidential original documents owned by her employer, contending that she did so to support her employment discrimination suit. The Court's decision could have serious implications on whistleblower claims in the state.

Facts

The North Bergen Board of Education employed Ivonne Saavedra as a clerk. In November 2009, Saavedra filed a complaint against the Board, her supervisor, an office manager, and a North Bergen Township Commissioner alleging claims of employment discrimination, hostile work environment, and retaliatory discharge in violation of the New Jersey's whistleblower law, the Conscientious Employee Protection Act ("CEPA"), and the New Jersey Law Against Discrimination ("NJLAD"). During pre-trial discovery, the employer learned that Saavedra had possession of hundreds of documents owned by the Board, including 69 originals, a number of which contained highly sensitive information, which she evidently had removed or copied without permission.

Grand Jury

The Board's general counsel notified the Hudson County prosecutor that Saavedra had the Board's documents. The prosecutor determined the matter should be presented to a grand jury for possible criminal action.

Before the grand jury, the Board's general counsel testified that Saavedra had taken 367 documents, including original documents belonging to the Board, which contained "highly confidential" and "very sensitive" information. The general counsel also told the grand jury that the employer's policy, guidelines, and regulations trained and informed employees that these documents are highly confidential and are not to be disclosed or tampered with in any way. In May 2012, the grand jury indicted Saavedra, charging her with crimes of official misconduct and theft. Saavedra moved to dismiss the indictment.

Dismissal Denied

Saavedra contended before the trial court that she took the documents for a lawful use and that a 2010 New Jersey Supreme Court CEPA case provided that taking confidential documents to support a civil suit was lawful. Preventing her from taking the confidential documents, she argued, would have a chilling effect on future NJLAD cases. The State maintained it presented sufficient evidence to the grand jury to show Saavedra committed the crimes and any reliance on the Supreme Court case was misplaced as that case did not create a bright-line rule permitting a public servant to take highly confidential documents that did not belong to her.

The judge refused to dismiss the indictment, agreeing with the State's arguments in a thorough written decision.

Dismissal Denied on Appeal

Appealing the ruling, Saavedra said the trial judge had erred because, she argued, the 2010 New Jersey Supreme Court case had established an absolute right for employees with employment discrimination lawsuits to take potentially incriminating documents from their employers. The Appellate Division disagreed.

The Court found the Supreme Court case did not establish such a bright-line rule; instead, it said, the

Meet the Author



[Jason C. Gavejian](#)

Principal
Berkeley Heights 908-795-5139
Email

Practices

Litigation

Supreme Court delivered a seven-part “totality-of-the-circumstances” test to determine whether a private employer can terminate its employee for the unauthorized taking of its documents. The Appellate Division held, however, that a criminal court judge is not required to perform the seven-part test to decide a motion to dismiss an indictment charging a defendant with official misconduct predicated on an employment-related theft of public documents. It instructed that, to survive a motion to dismiss an indictment, the State needed only to introduce evidence before the grand jury sufficient to establish a *prima facie* case that the defendant had committed a crime; it did not need to produce evidence adequate to substantiate a conviction. The Court held the State had carried its burden against Saavedra in order to proceed on its allegations of theft of movable property and official misconduct. It was satisfied that the Supreme Court case did not apply directly to the facts presented because the Supreme Court did not intend its holding in that case to act as a means of mounting a facial challenge to the indictment.

While the Court sustained the indictment, it allowed Saavedra to argue, as an affirmative defense at trial, that her behavior was excused by her belief it was lawful to remove the documents.

An employee’s taking company documents prior to or at the time of termination is a scenario that may be familiar to many employers. As this case illustrates, employers are not without recourse.

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