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Employee-Plaintiffs Beware: The Risk of Criminal Liability for Taking Confidential Documents from the Workplace

By: Ty Hyderally, Esq. & Alex D'Amico, Esq. **January 2014 Newsletter**

On December 24, 2013, the New Jersey Superior Court Appellate Division issued its opinion in *State v. Saavedra*, 2013 WL 676248, affirming the decision to deny an employee's motion to dismiss criminal charges for the taking of documents from the workplace when the employee filed a civil lawsuit against the employer.

In November 2009, Ivonne Saavedra ("Saavedra"), an employee of the North Bergen Board of Education ("Board") and her son filed a complaint with claims of discrimination against the Board. During the course of litigation, the Board's counsel in the case learned that Saavedra possessed confidential documents belonging to the Board. Certain confidential documents in Saavedra's possession related to students and parents and contained their sensitive information. Recognizing the confidential nature of the documents, the Board's counsel in the civil lawsuit forwarded the documents to the Board's general counsel ("General Counsel"). The General Counsel notified the Hudson County Prosecutor, who presented the facts of this matter to a grand jury.

The grand jury indicted Saavedra and charged her with the crimes of official misconduct and theft. Saavedra moved to dismiss the indictment, citing the New Jersey Supreme Court's 2010 ruling in the civil employment discrimination case *Quinlan v. Curtiss-Wright Corp.*, 204 N.J. 239 (2010). In *Quinlan*, the Court established a seven-part test to determine whether an employer can terminate its employee for the unauthorized taking of its documents. The motion judge rejected Saavedra's *Quinlan* argument, stating that *Quinlan* does not govern the employee's criminal liability. The Appellate division affirmed.

As an Appellate Division decision, the most recent ruling in *Saavedra* may not be the final word on this issue. Nevertheless, plaintiff-employees can take several valuable lessons from *Saavedra*.

First, Saavedra allegedly possessed original Board documents. This exposed Saavedra to criminal liability under N.J.S.A. 2C:20-3(a), which provides that "[a] person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof." An employee who takes copies, leaving the originals documents in the employer's possession, seems less likely to satisfy the statute's element of intent to deprive the employer of those documents.

Second, the Appellate Division's opinion suggests that Saavedra's argument against criminal liability would be much stronger if the Board documents in her possession were clearly inculpatory of the Board, or "smoking gun" evidence, in support of her claim. The Appellate Division cites several possible justifications for affording greater protection to criminal defendants possessing an employer's confidential documents. One argument points to public policy and the public good that comes from immunizing plaintiff employees from criminal charges spearheaded by the "victim" employer who is the civil defendant. Another argument is that the employee might have an affirmative defense of claim of right. In New Jersey, a defendant facing a theft charge can make a claim of right defense if she was unaware that the property belonged to another or honestly believed she had a right to the property. In the case of smoking gun evidence, the defendant may have the necessary belief in her own right to the documents to assert this defense.

Finally, the Appellate Division identifies two additional protections. An employee has a malicious prosecution claim when she can show

that 1) a criminal action was instituted by her employer against her; 2) the action was motivated by malice; 3) there was an absence of probable cause to prosecute; and 4) the action was terminated favorably to the plaintiff. *See LoBiondo v. Schwartz*, 199 N.J. 62, 90 (2009) (citation omitted). Additionally, a lawyer may be subject to ethical charges under *R.P.C.* 3.4(g) if he or she pursues criminal charges to obtain an improper advantage in civil court. Thus, a defendant-employer which pursues with a retaliatory purpose baseless criminal charges against its employee may be subject to punishment for its actions.

Despite the *Saavedra* decision's harmful implications for employees in terms of potential criminal liability, plaintiff-employees can learn from the decision and take prophylactic measures to limit their own exposure to criminal liability when pursuing their civil claims.

A "Wearing" Issue: U.S. Supreme Court Contemplates The Meaning of the Word "Clothes"

By: Ty Hyderally, Esq. & Alex D'Amico, Esq.

On November 4, 2013, the United States Supreme Case heard oral argument in *Sandifer v. United States Steel Corporation*. This case focuses on Section 203(o) of the Fair Labor Standards Act ("FLSA"), under which an employer need not compensate a worker for time spent "changing clothes" if, under a collective bargaining agreement ("CBA") applicable to that worker, such time is excluded from compensable work time.

Clifton Sandifer and a group of approximately 800 steelworkers filed their action asserting that United States Steel Corporation (US Steel) failed to compensate them for hours worked. The hours in question pertain to time putting on or taking off protective gear necessitated by the dangers inherent to steel manufacturing. The "Personal Protective Equipment" (PPE) items a steelworker wears depends in part on the nature of his or her specific job. Common PPEs include: a hardhat, safety glasses, earplugs, a respirator, gloves, a flame retardant hood, a flame retardant jacket, flame retardant pants, leggings, wristlets, and steel-toed boots. The wristlets and leggings consist of Kevlar material designed to keep dangerous objects from getting into the worker's gloves or boots.

Between 1947 and 2003, CBAs between US Steel and its steelworkers contained a provision stating that US Steel was not obligated to compensate its employees "for any travel or walking time or time spent in preparatory and closing activities." In conjunction with Section 230(o) of the FLSA, this provision functioned to exempt US Steel from compensating its employees for time spent "changing clothes."

Under the FLSA, covered employers generally must pay overtime, at a rate one and one-half times the regular rate, to a non-exempt employee who works more than forty (40) hours in a given week. The FLSA measures hours "worked" based on the employee's "principal activities," starting with the employee's first principal activity of the day and stopping upon completion of his or her final principal activity of the day.

In *Steiner v. Mitchell*, the Supreme Court held that activities such as donning and doffing protective gear are compensable "if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed . . . ." 350 U.S. 247, 256 (1956). The district court in *Sandifer* interpreted "clothes" as broadly applicable to any item that is a "covering for the human body." Further, the district court

diminished the impact of the "changing" part of "changing clothes," stating that even putting items over clothes worn to the workplace would suffice.

The Court of Appeals for the Seventh Circuit rejected this broad interpretation of "clothes." The Seventh Circuit also rejected the Ninth Circuit's *Alvarez* rule, under which items worn to protect against workplace hazards are not "clothes." *See Alvarez v. IBP, Inc.*, 339 F.3d 894, 903 (9th Cir. 2003). Instead, the Seventh Circuit applied a third standard and identified certain PPE items as not clothes (e.g. the safety goggles and earplugs). However, the Seventh Circuit reasoned that the time required to put on these non-clothes items was *de minimis* and therefore non-compensable.

The Seventh Circuit suggested that the meaning of "clothes" could be based on the interpretation one would have looking at a photograph of a model wearing the item. Petitioners argue that a photograph would provide incomplete information as to the determination of whether an item is "clothes," because the function of certain items worn for protective purposes is critical to their designation as not being clothes and the function may be indeterminable from the picture. In their argument, Petitioners cited the Congressional intent for Section 203(o), noting that in 1949 the sponsor of the bill used bakers as an example. Bakers' clothes differed from street clothes for the purpose of cleanliness only and not for safety purposes. Thus, Petitioners continued, protective clothing should not be included within the "clothes" subject to the Section 203(o) "changing clothes" exception.

Respondents countered that the Ninth Circuit's *Alvarez* decision is an aberration rather than good law, noting that four circuits have issued contrary rulings while the Ninth Circuit is alone in its reasoning. Further, Respondents emphasized the *de minimis* nature of Petitioners' time spent putting on items that allegedly are not "clothes" (the goggles and ear plugs), noting the parties do not dispute that employees have no right to compensation for *de minimis* activities. Finally, Respondents diminished the importance of the issues in this case, arguing that it affects such a small portion of the population (union workers whose CBA contains a provision regarding changing clothes) and such a small amount of activity (putting on and/or taking off protective clothing) that it is not worth the Court's time.

So long as the Court issues an opinion during this term, the word "clothes" may receive further definition by June 2014. In 2008, after the filing of this action, US Steel and the Steelworkers agreed in a CBA to expressly address the "donning and doffing of protective clothing" as an activity for which compensation is not required, thereby eliminating this issue going forward. This serves as a reminder that employers and employees should try proactively to avoid legal ambiguity by expressly writing out the terms of employment.

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