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NJ High Court Creates New Worries For Whistleblower Attys

By **Martin Bricketto**

Law360, Jersey City (June 23, 2015, 7:25 PM ET) -- The New Jersey Supreme Court on Tuesday preserved criminal charges against a former school board worker accused of taking confidential records for her discrimination and whistleblower lawsuit, a decision that could put plaintiffs attorneys in the perilous position of weighing disclosure requirements against potentially exposing their clients to prosecution.

A 6-1 majority of the court found sufficient support for an indictment accusing former North Bergen Board of Education employee Ivonne Saavedra of official misconduct and theft by unlawful taking of public documents. Saavedra allegedly removed or copied 367 confidential student records from the board's offices, and her attorney produced those materials during discovery in her suit under the state Law Against Discrimination and Conscientious Employee Protection Act, among other statutes. The board then notified the Hudson County Prosecutor's Office about the alleged theft.

The decision may pose new headaches for employee-side attorneys, who will have to balance meeting disclosure requirements with protecting their clients and maybe even themselves from the scrutiny of prosecutors, some experts say.

"If a client takes documents, and disclosure is mandated under the rules, the lawyer has the Hobson's choice of disclosing and exposing the client to criminal charges or potentially being forced to withdraw, if that is even appropriate under the [Rules of Professional Conduct]," said Anthony L. Marchetti of Marchetti Law PC.

Upholding lower court decisions, the justices shot down Saavedra's argument that prosecutors improperly withheld evidence from the grand jury that she took the records to support her discrimination suit. The court also refused to find that its 2010 decision in *Quinlan v. Curtiss-Wright Corp.*, which spelled out when the taking of documents is protected under the LAD, shielded Saavedra.

"This court's decision in *Quinlan* did not endorse self-help as an alternative to the legal process in employment discrimination litigation," Justice Anne Patterson said in her opinion for the court. "Nor did *Quinlan* bar prosecutions arising from an employee's removal of documents from an employer's files for use in a discrimination case, or otherwise address any issue of criminal law."

Many whistleblowers come to their attorneys with copies of confidential, internal documents, according to Neil Mullin, a partner with Smith Mullin who represented the New Jersey chapter of the National Employment Lawyers Association as an amicus participant in the case.

Under Tuesday's decision, such whistleblowers — from a worker at a nuclear plant who

thinks engineering defects could cause a meltdown to someone within a financial services company who believes the outfit is running a Ponzi scheme — could face prosecution, Mullin said. The opinion could also mean that an attorney who reviews confidential documents is on the hook for receiving stolen property, according to Mullin.

"The practical effect is I cannot communicate in a meaningful way with whistleblowers without risking criminal indictment for myself or for my client," Mullin said.

The end result will be workers less inclined to blow the whistle and attorneys less inclined to represent them, according to Mullin.

Saavedra was a clerk in the school district, which also employed her son on a part-time basis. The pair sued the board in 2009, claiming they suffered retaliation after Saavedra complained of alleged violations of law and public policy and because of her race and gender. The documents that she ended up removing included "highly confidential" information, such as information on children that the school psychiatrist was treating. The records were allegedly barred from disclosure under state and federal law and board policy.

The decision should help public and private employers alike enforce confidentiality policies, and it makes clear that the best avenue of securing documents is the discovery process, according to Anna Maria Tejada, a partner at Kaufman Dolowich & Voluck LLP.

"I think what it's going to have a chilling effect on is inappropriate actions by employees in trying to do their own investigations," Tejada said.

Nothing in the decision should hinder a would-be whistleblower's ability to gather evidence, according to Mark A. Saloman of Ford & Harrison LLP.

"An employee's so-called fear that he must steal corporate documents before they are destroyed is rarely reasonable," Saloman said. "Documents no longer disappear without leaving behind a digital footprint, so the notion — in today's electronic information age — that any employee must resort to thievery to prove their case seems entirely outdated."

One sharp disagreement between the majority and Justice Barry Albin in his dissent was whether the government improperly withheld evidence on why Saavedra had collected the documents.

The employment litigation, which Saavedra eventually decided to voluntarily dismiss, wasn't emphasized before the grand jury, but an attorney for the school district did mention that Saavedra had an outstanding lawsuit against the board and that he learned about the documents after her attorney provided them as part of the civil case, the majority noted.

"The prosecutor had no obligation to suggest to the grand jury that defendant thought that because she maintained an employment discrimination claim, her conduct was sanctioned by law," the opinion said, adding that such a claim wouldn't squarely refute either charge.

But Justice Albin said the grand jury never learned about Saavedra's motives because a prosecutor blocked a juror's question on what she was going to do with the records. The prosecutor "subverted the grand jury's independence," the justice said.

While the majority found that its Quinlan decision couldn't immunize an employee from criminal charges, it did say that Saavedra could mount a justification defense at trial involving her planned use of the documents. The jury can consider issues such as how she gained access to the documents and her reasons for taking or copying them, the majority said.

However, Justice Albin said that attempt to flesh out a "claim-of-right" defense was just as muddy as Quinlan's test for discerning lawful from unlawful conduct.

"The law should not place whistleblowers in a position where they are playing Russian roulette with their careers or their liberty," the justice said. "Like the Quinlan standard, the majority's new approach is overly complicated and too open to differing interpretations."

Indeed, the justification defense discussed in the opinion could prove to be a dangerous path for defendants, according to Marchetti.

"The 'justification' defense is a bone, and may prove helpful, but the problem is that in the criminal arena, that means rejecting all plea offers, draining a bank account and putting your freedom on the line," he said.

Representing Saavedra, attorney Mario M. Blanch said he was extremely disappointed with the decision.

"The Supreme Court has failed to acknowledge that employers will often destroy documents and dispose of evidence, leaving little recourse to plaintiffs," Blanch said. "Further, today's ruling puts a new weapon in the hands of dishonest employers and empowers employers with the sanction of criminal prosecution against whistleblowing employees."

But an attorney for the school board, Mitchell L. Pascual of Chasan Leyner & Lamparello PC, said anything less than Tuesday's decision would have compromised student privacy. The board supports employee rights under the state's discrimination and whistleblower laws, but those rights "should not come at the expense of the privacy rights of children and their parents without due process," he said.

A representative for the Hudson County Prosecutor's Office did not return a request for comment.

Saavedra is represented by Mario M. Blanch.

The government is represented by Hudson County assistant prosecutor Stephanie Davis Elson.

The school board is represented by Mitchell L. Pascual, Michael D. Witt and Reka Bala of Chasan Leyner & Lamparello PC.

The case is State v. Saavedra, case number 073793, in the Supreme Court of the State of New Jersey.

--Editing by Kat Laskowski and Mark Lebetkin.

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