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The Criminal Liability of Whistleblowers: Risking your Freedom to Save your Job

Angela Raleigh

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I. Introduction

Plaintiffs in an employment related whistleblower or discrimination case have the often difficult task of alleging sufficient facts to state a prima facie case of discrimination in order to survive summary judgment.[1] Under the landmark case, *McDonnell Douglas Corp. v. Green*, a plaintiff alleging discrimination under Title VII[2] may establish a prima facie case of discrimination by showing (1) she is a member of a protected class; (2) she is qualified for the position sought or the position hired for; (3) she was rejected for the position or suffered an otherwise adverse employment action; and (4) circumstances existed that allow for an inference of discrimination,[3] such as the position remaining open to other candidates of the plaintiff's same qualifications.[4]

After the plaintiff proves her prima facie case, she creates a presumption of discrimination[5] and the burden of production shifts to the employer to put into evidence a nondiscriminatory reason for the employee's adverse employment action.[6] Even if an employer succeeds at putting into evidence a nondiscriminatory reason for an adverse employment action, such as poor work performance, habitual tardiness, or insubordination, the plaintiff may nevertheless prevail.[7] While it is not the court's job to decide "whether the reason for an employer's adverse employment action was wise, fair, or even correct," the employer's proffered reason for the adverse employment

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[1] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[2] *See, e.g.*, 42 U.S.C. § 2000e (2012) (regulating unlawful employment practice such as discrimination against protected classes of employees).

[3] Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981).

[4] *McDonnell Douglas*, 411 U.S. at 802.

[5] *Burdine*, 450 U.S. at 251.

[6] *Id.*

[7] Glenda K. Harnad, et. al., *Burden of Persuasion and Order of Proof*, 14A C.J.S. Civil Rights § 215 (2014).

action must be the *real* reason that the employee suffered a firing, demotion, or rejection.[8] Therefore, an employee may prove that the employer's stated nondiscriminatory reason is pretext for discrimination.[9] In other words, plaintiffs may successfully rebut the employer's stated nondiscriminatory reason by proffering evidence to show that it is simply pretext for discrimination.[10]

Due to these evidentiary requirements, plaintiffs filing a discrimination claim against their employers face daunting obstacles to successfully defend a summary judgment motion and get their claims in front of a jury. In order for a plaintiff's claim to even have a chance of success, she must possess some evidence of discrimination. What measures may an employee take in order to obtain such evidence? Can she print work e-mails from her employer-provided computer? Can she copy documents from a file? Can she take pictures of documents with her private cellphone?

Because direct evidence is often hard to come by in an employment discrimination case, an employee is forced to use largely circumstantial evidence to prove her case.[11] Some scholars argue that the presumptions created in employment discrimination cases already account for the difficulties employees face in trying to collect evidence of discrimination from their employer.[12] Direct evidence, however, is extremely helpful in proving a discrimination case.[13] Direct evidence of discrimination may be a biased statement made at the same time as the adverse employment action.[14] When such temporal proximity exists, an inference is not necessary to conclude that discriminatory bias motivated the decision.[15] Nevertheless, some courts have excluded evidence

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[8] *Id*.
[9] St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 530–31 (1993).
[10] Ryan Vantrease, *The Aftermath of St. Mary's Honor Center v. Hicks and Reeves v. Sanderson Plumbing Products, Inc.: A Call for Clarification*, 39 BRANDEIS L.J. 747, 756 (2001).
[11] *Id*. at 747.
[12] Kerri Lynn Stone, *Shortcuts in Employment Discrimination*, 56 ST. LOUIS U. L.J. 111, 115 (2011).
[13] *Id*. at 136.
[14] *See* Harnad, *supra* note 7.
[15] *Id*. at 115.

of biased comments based upon court-imposed arbitrary time limits.[16] There are other ways, however, to show circumstances allowing an inference for discrimination. One plaintiff successfully showed a prima facie case of age discrimination when she used a job posting for specifically nineteen to twenty-six year old men and women as evidence.[17]

In *State v. Saavedra*, an employee with claims under both state whistleblower and antidiscrimination statutes made copies of and removed documents from her employer's place of business.[18] During the discovery process of a civil lawsuit featuring whistleblower and discrimination claims filed by Saavedra, the employer became aware that Saavedra had made copies of and removed documents that the employer deemed confidential.[19] Her employer referred the matter to the local prosecutor's office, which filed theft and official misconduct charges against Saavedra.[20] Saavedra was then indicted by a grand jury.[21]

Saavedra countered that employees have a right to take "potentially incriminating" documents from their employers.[22] The New Jersey Court of Appeals rejected this argument and upheld Saavedra's indictment.[23] On appeal, the Supreme Court of New Jersey affirmed the appellate court's decision, holding again that the state presented a prima facie case of each offense charged in the indictment.[24] The Court further held that Saavedra's indictment did not violate New Jersey public policy by conflicting with an earlier New Jersey Supreme Court decision setting forth a seven-factor, totality of the circumstances test to determine whether a *private* employer may

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[16] *See id*. at 136-37. *See, e*.g., Auguster v. Vermilion Parish Sch. Bd., 249 F.3d 400, 405 (5th Cir. 2001) (finding that a year was too remote to find discriminatory intent); Brown v. CSC Logic, Inc., 82 F.3d 651, 655–56 (5th Cir. 1996) (finding that a sixteen-month-old comment was not enough to show a prima facie case of discrimination).
[17] *See* Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730 (5th Cir. 1977)
[18] State v. Saavedra, 81 A.3d 693, 696 (N.J. Super. Ct. App. Div. 2013), *cert. granted*, 88 A.3d 187 (N.J. 2014).
[19] *Id*. at 698.
[20] *Id*. at 696.
[21] *Id*. at 698.
[22] *Id*. at 697.
[23] *Id*. at 701, 703.
[24] *State v. Saavedra*, No. 073793, 2015 WL 3843764, at *1 (N.J. June 23, 2015).

terminate an employee for taking employer-owned documents to support civil litigation without authorization.[25]

This comment will address various issues raised by *Saavedra*. Most importantly, it will propose a framework that should make clear to employees, like Saavedra, what documents they may take and under which circumstances. Such a framework should allow employees to prove their discrimination claims using employer-owned documents without fear of criminal prosecution, while also protecting employer's interests in keeping certain documents confidential. Part II of this comment will provide an analysis of both the civil and criminal aspects of *Saavedra*, as a case study for the intersection of discrimination and whistleblower claims. Part III will address the general purposes behind whistleblower and anti-discrimination statutes. Part IV of this comment will address the property issues at play in Saavedra: what did the defendant actually steal, if not a trade secret? Ink? Paper? Part V of this comment will address possible defenses available to defendants like Saavedra. Part VI of this comment will address the public policy concerns underlying the prosecution's decision to present Saavedra's conduct to a grand jury. Specifically, this section will discuss the chilling effect that possible criminal prosecution would have on employee whistleblowers. Part VII of this comment will propose a framework for courts to apply in future similar cases to determine if it was reasonable for an employee to take a particular document from an employer for use in his or her whistleblower or discrimination case. Part VIII will conclude that whistleblowers and employees filing discrimination claims are entitled to some protection from criminal prosecution where public policy seeks to protect that conduct.

II. State v. Saavedra

[25] *Id.*, referencing Quinlan v. Curtiss-Wright Corp., 8 A.3d 209, 227 (N.J. 2010).

Ivonne Saavedra is a 48-year old[26] woman who was employed in New Jersey by the North Bergen Board of Education.[27] She worked in the payroll department for ten years before becoming a clerk for the township's child study team.[28] North Bergen's school district includes seven schools attended by over 7,000 students.[29] In November 2009, Saavedra and her son, who was also an employee of the school district,[30] filed suit against the Board of Education, Saavedra's supervisor, and the North Bergen Township Commissioner.[31] She alleged that she suffered sex, gender, and ethnic discrimination during her employment.[32] Saavedra also asserted several claims that arguably fell under the umbrella of "whistleblower" claims or public policy tort claims.[33] For example, Saavedra alleged that her son, was fired because she was vocal about pay irregularities, improper reimbursement of "unused" vacation time to employees who had used their vacation, denial of family leave to employees, unsafe workplace conditions, and failure to comply with child study team regulations.[34] Her son also alleged that his termination occurred because Saavedra voiced her concerns about the workplace.[35]

As Saavedra's case against the Board of Education progressed, the parties conducted discovery during which Saavedra provided the Board's counsel with documents she had taken

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[26] Michaelangelo Conte, *State Supreme Court Agrees to Hear Appeal of North Bergen Board of Ed Clerk*, THE JERSEY JOURNAL (Apr. 18, 2014, 9:31 AM), *available at* http://www.nj.com/jjournal-news/index.ssf/2014/04/state_supreme_court_agrees_to.html.
[27] State v. Saavedra, 81 A.3d 693, 697 (N.J. Super. Ct. App. Div. 2013), *cert. granted*, 88 A.3d 187 (N.J. 2014).
[28] *Id*.
[29] *North Bergen School District*, EDUCATION.COM, http://www.education.com/schoolfinder/us/new-jersey/district/north-bergen-school-district/ (last visited Oct. 28, 2014).
[30] *Saavedra*, 81 A.3d at 697.
[31] *Id*. at 697–98.
[32] *Id*. Saavedra claimed that the board terminated her son because she spoke out about problems with the employer, including pay irregularities, reimbursing employees improperly for "unused" vacation time that they had actually used, wrongful denial of employee unpaid family leave, violations of child study team regulations, and 'unsafe conditions.'" Saavedra claimed that the Board of Education fired her son instead of her because she was a tenured professional. *Id*. at 698, fn. 4.
[33] *Id*. at 697.
[34] *Id*. at 698.
[35] *Id*. at 698.

from her employer to use as evidence in her pending lawsuit.[36] The Board and its counsel (who were apparently both unaware that Saavedra had taken any documents in support of her discrimination and whistleblower case) brought Saavedra's conduct to the attention of the county prosecutor who in turn presented the matter to a grand jury.[37]

In April 2012, more than two years after Saavedra filed her complaint, the grand jury convened to hear the State's evidence that Saavedra had committed theft and official misconduct by taking 367 documents, including almost seventy original, uncopied documents.[38] Saavedra had access to these allegedly confidential documents as a function of her employment as a clerk for the Child Study Team.[39] The prosecutor chose to describe five of the documents to the grand jury. In doing so, the prosecutor highlighted the confidential nature of the material contained therein.[40] At one point during the proceedings, the Board of Education's general counsel testified that Saavedra did in fact have a lawsuit pending against the Board.[41] Nevertheless, at the close of the grand jury trial, the county prosecutor asked the jurors if they had any questions for Mr. Gillman, the general counsel for the Board of Education.[42] The following exchange occurred as the first and only question posed by a juror:

> JUROR: When did she take out these documents? What's she going to do with them? The documents, what she do with them?
>
> MR. HERNANDEZ (county prosecutor): I don't believe Mr. Gillman can speculate as to what she was going to do with the actual documents.[43]

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[36] *Id*.
[37] *Saavedra*, 81 A.3d at 698.
[38] *Saavedra*, 81 A.3d at 698.
[39] Brief for Petitioner at 4, State v. Saavedra, 81 A.3d 693 (2014) (No. A-1449-12).
[40] *Id*.
[41] *Saavedra*, 81 A.3d at 698.
[42] Brief for Petitioner, *supra* note 37, at 39a.
[43] Brief for Petitioner, *supra* note 37, at 39a.

Saavedra was indicted on one count of theft and one count of second degree official misconduct.[44] A former long-term employee of North Bergen's Board of Education, Saavedra now faces a possible five-to-ten year term of imprisonment if she is convicted.[45] Indeed, the official misconduct charge mandates at least a five-year sentence.[46] After the indictment, Saavedra dismissed her lawsuit against the Board, presumably to prevent her testimony in the civil proceeding from being used against her in her criminal trial.[47]

Saavedra moved to dismiss the indictment, arguing that the charges against her were fundamentally unfair and facially invalid[48] in light of her whistleblower and discrimination claims.[49] She argued that, even in the event the court found that the prosecutor did present sufficient evidence to state a prima facie case of the crimes charged,[50] she made an "honest error" in thinking she had a right to take and use the documents as evidence in her discrimination case.[51] A majority of the three-judge panel in the New Jersey Appellate Division upheld the grand jury's indictment,[52] over the dissent of Judge Simonelli. The Supreme Court of New Jersey granted certification to hear Saavedra's appeal.[53] The Supreme Court affirmed the appellate court's decision, focusing mainly on the probable cause standard for indictment and that the prosecutor's duty to present exculpatory evidence is triggered only "in the rare case in which ... evidence ... both directly negates the guilt of the accused and is clearly exculpatory."[54]

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[44] *Id*.
[45] *Saavedra*, 81 A.3d at 711 (Simonelli, J., dissenting).
[46] N.J. STAT. ANN. § 2C:43-6a-(2) (2014).
[47] Michaelangelo Conte, *North Bergen BOE Clerk Battling Prosecution on 'Theft of Documents' Charge*, THE JERSEY JOURNAL (Oct. 2, 2012, 10:00 AM), *available at* http://www.nj.com/jjournal-news/index.ssf/2012/10/north_bergen_ed_board_clerk_ba.html.
[48] *Saavedra*, 81 A.3d at 696.
[49] *Id*. at 699–700.
[50] *Id*. at 699–700.
[51] *Id*. at 704.
[52] *Id*. at 711 (holding that "that there was probable cause for the grand jury to find that defendant committed the crimes of theft and official misconduct").
[53] *Saavedra*, 88 A.3d 187.
[54] State v. Saavedra, No. 073793, 2015 WL 3843764, at *11 (N.J. June 23, 2015).

The current legal framework for proving a discrimination case is problematic for employees like Saavedra. For instance, while Saavedra may certainly file a claim against her employer for unlawful sex discrimination, her employer will likely file for summary judgment and argue that Saavedra has not sufficiently proved her prima facie case or, if she did so, did not establish a genuine issue of material fact regarding pretext in order to survive the summary judgment stage. Other than drawing the court's attention to the temporal proximity between a discriminatory act and an adverse employment act, it will likely be difficult for plaintiffs like Saavedra to be successful without using documents, evidence, or knowledge gleaned from employer-owned documents. This type of evidence, however, is typically discoverable through the regular discovery process.

III. The Purpose of Whistleblower Statutes

The state and federal legislatures that enacted whistleblower statutes did so intending to encourage employee whistleblowers to come forward to challenge their employer's violations of the law by protecting those same whistleblowers from retaliatory action by their employer.[55] In fact, there are over thirty federal whistleblower statutes, all of which reinforce the idea that Congress fully intended to provide wide-ranging protection to whistleblowers who engage in statutorily protected activities.[56] For example, the Whistleblower Protection Act (WPA) makes it unlawful to retaliate against a "protected federal employee because that employee discloses any information they 'reasonably believe' to be evidence of a (i) violation of any law, rule, regulation; (ii) gross mismanagement; (iii) gross waste of funds; (iv) an abuse of authority; or (v) a substantial

[55] Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757 (2007).
[56] Joel D. Hesch, *The False Claims Act Creates A "Zone of Protection" That Bars Suits Against Employees Who Report Fraud Against the Government*, 62 DRAKE L. REV. 361, 383 (2014) (arguing that, in addition to the False Claims Act (FCA), Congress's purpose in creating the FCA is to ensure that employees who bring forth qui tam relator claims are sufficiently protected from retaliation and therefore not frightened of employer retaliation).

and specific danger to public health or safety."[57] In the private sector, Congress intended for Sarbanes-Oxley (SOX) to attack fraud in publicly traded companies and desired to enlist employees of those companies to ensure enforcement of anti-fraud mechanisms.[58] Under SOX, an employer may not engage in an adverse employment action against an employee who reasonably believes he is engaging in conduct protected by SOX.[59] In other words, an employee need not be correct in his or her belief that the employer's conduct is an illegal practice of the employer.[60]

The New Jersey Legislature has also enacted legislation that provides protection to whistleblower employees. The Conscientious Employee Protection Act (CEPA), perhaps the most wide-sweeping whistleblower statute in the nation, provides that no employer should take retaliatory action against an employee who reasonably believes the employer has violated a law and reports or threatens to disclose that violation to a supervisor or to a public entity.[61] CEPA also protects an employee from retaliation for providing information or testimony to any public entity investigating an alleged violation by an employer.[62]

The New Jersey legislature has also enacted legislation providing a cause of action for employees who suffer discrimination in the workplace. The Law Against Discrimination (LAD) declares it an unlawful employment practice to discriminate against any employee on the basis of "race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual."[63]

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[57] *See* 5 U.S.C.A. § 1214 (West 2015); *id*. at 383.
[58] *Dworkin, supra* note 52, at 1757.
[59] § 1214; *Dworkin, supra* note 52, at 1757.
[60] *Id*. at 1758.
[61] N.J. STAT. ANN. § 34:19-3(1) (2014).
[62] *Id*. § 34:19-3(1).
[63] N.J. STAT. ANN. § 10:5-12 (2014).

The LAD also declares it unlawful "[f]or any person to take reprisals against any person because that person has opposed any practices or acts forbidden under this act or because that person has filed a complaint testified or assisted in any proceeding under this act."[64] The same section further pronounces it improper and illegal "to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this act."[65]

In light of the policies underlying antidiscrimination and whistleblower statutes, a major concern is whether an employer may, without engaging in illegal retaliation against an employee who brings either a whistleblower or discrimination case, report a theft of documents to the prosecutor's office in order to punish the employee's conduct.[66] When such charges are brought against the employee, she, like Saavedra, is forced to drop her suit lest her testimony regarding the documents be used against her in criminal proceedings, completely undercutting the protections afforded to her by the antidiscrimination and whistleblower statutes.

IV. Property Issues

A. Content of the Documents

In *Saavadra*, the prosecutor presented information to the grand jury about five of the 367 documents allegedly taken by Saavedra.[67] The first document was described as a parent-provided bank statement, used by the Board of Education to verify that the parent and his or her child actually lived in the school district.[68] The document revealed information the school alleges is confidential such as the "parent's name and address, a bank account number, an account balance,

[64] *Id*. § 10:5-12 (d).
[65] *Id*.
[66] Brief for Petitioner, *supra* note 37, at 14.
[67] State v. Saavedra, 81 A.3d 693, 698 (N.J. Super. Ct. App. Div. 2013), *cert. granted*, 88 A.3d 187 (2014).
[68] *Id*.

a description of the type of account (either a checking or savings account), and a statement date."[69] This document is presumably a copy of an original document. For many of these documents, it is unclear exactly what Saavedra sought to prove using that particular document as evidence. However, at oral argument before the Supreme Court on November 10, 2014, Saavedra's attorney asserted that Saavedra took documents to show that when viewed collectively, they provided evidence that the Board of Education was falsifying documents.[70] The Supreme Court, however, stated in the majority opinion that Saavedra's "lawsuit was focused on her compensation and working conditions."[71]

The second document was the appointment schedule of an outside (non-Board of Education) psychiatrist who treated special needs students attending the district's schools.[72] It recorded the names of the students the psychiatrist planned to meet with and named one particular student who was currently on medication and, according to the psychiatrist, "needs [more] medication."[73] This document is also presumed to be a copy of an original document.

The third document, titled "Consent for Release of Information to Access Medicaid Reimbursement for Health–Related Support Services," revealed the name and contact information of a district parent who participated in a Medicaid-reimbursement program.[74] The document also revealed the student's name, birth date, and grade level.[75] The Board of Education's general counsel informed the county prosecutor that this "Consent" paper was an original document.[76]

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[69] *Id*.
[70] Transcript of Oral Argument at ___, State v. Saavedra, _____(cite of decision) (2014) (No. A-1449-12).
[71] State v. Saavedra, No. 073793, 2015 WL 3843764, at *13 (N.J. June 23, 2015).
[72] *Saavedra*, 81 A.3d at 698.
[73] *Id*.
[74] *Id*.
[75] *Id*.
[76] *Id*.

The fourth document used at Saavedra's indictment was a letter from a parent about her child, a special needs student receiving confidential services.[77] This letter contained the parents' and child's names and contact information. It also revealed the school the child attended.[78] This document is also alleged to be an original document by the Board of Education's general counsel.[79]

The fifth and final document presented to the grand jury is a letter from another district parent to the Director of Special Services regarding that parent's child's emotional problem.[80] The letter describes an incident where the identified child "came off the bus soaked in urine, very nervous, and his eyes were twitching."[81] It is unclear from the court's discussion of this letter if it was an original or a copy.[82]

The Board of Education, through Gillman, testified that all of the described documents are confidential.[83] However, the Appellate Division never made clear whether it believed any particular document was of a more confidential nature than another, or if it was affirming Saavedra's indictment based upon her possession of copied documents, original documents, or both. It is also unclear exactly how Saavedra violated the documents' "confidentiality." Did she do so when she provided them to her attorney in support of her whistleblower and discrimination claims? Did she breach the document's confidentiality as soon as she used them for a purpose for which they were not originally intended?

B. Differentiating Between Copied Forms and Original Documents

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[77] *Saavedra*, 81 A.3d at 699.
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.* The court describes the document as "an original letter from a different parent to the Director of Special Services."
[83] *Saavedra*, 81 A.3d at 699.

Copying documents rather than taking the originals did not seem to affect the court's determination of criminal liability because the Supreme Court did not ultimately distinguish between the documents she copied and the alleged originals that she had taken and then reproduced upon the defendant's request for discovery. It instead chose to focus on the information contained in the document that was potentially damaging to the third parties referenced in the documents. The court did, however, note that the fact that the Medicaid Consent document was missing and could result in an audit problem for the District was a factor in its decision that the indictment against Saavedra should stand.[84]

While the *Saavedra* court did deal with the issue of confidentiality, it did so sparingly, instead choosing to focus on whether there were sufficient facts in evidence to uphold the indictment against Saavedra.[85] If Saavedra's case, or a case like hers, moves past the indictment stage to trial, the state would need to introduce sufficient evidence to allow a jury to find, beyond a reasonable doubt, that Saavedra committed a crime.[86] At the indictment stage, however, a prosecutor need only produce sufficient evidence showing a prima facie case that Saavedra committed a crime.[87] Interestingly, the *Saavedra* court presented the issue of confidentiality from the Board of Education's point of view instead of from the State's point of view.[88] For example, the court cites the Board of Education's general counsel, who testified before the grand jury that: "the information [contained] in those documents was highly confidential, very sensitive, and [that the Board] needed to act on [defendant's decision to resort to self-help] immediately."[89]

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[84] *Id*. at 701.
[85] *Id*. at 704–05.
[86] *Id*. at 697.
[87] *Id*.
[88] *Id*. at 698. The court, in determining that Saavedra had committed official misconduct by taking confidential documents, accepted the Board of Education's contentions that each document was confidential in nature. For example, the court relied on the Board's general counsel's testimony from the grand jury trial that the documents were confidential. *See id*. at 698–99.
[89] *Saavedra*, 81 A.3d at 698.

While there are strong arguments in favor of the Board's interest in confidentiality and limiting Saavedra's ability to use the first, second, fourth, and fifth documents, the strongest argument for such an interest likely lies in protecting the third, Consent, document. It was an original, whose absence might result in liability to the Board of Education if government auditors found it missing. Had Saavedra merely copied the document rather than taking it outright, the state's interest in protecting the document would likely be the same as with the other documents.[90]

This argument ties in closely with the criminal charges against Saavedra. The *Saavedra* court noted that the State provided evidence that Saavedra's actions violated the Board of Education's internal policies "by taking its highly confidential original documents, which suggests that defendant did so with the purpose to deprive the Board."[91] According to the court, the prosecutor also produced evidence that Saavedra intended to disrupt the psychiatric treatment of special needs' students.[92] It is unclear exactly how the court reached the decision that Saavedra's intent was to deprive the Board of its confidential documents and disrupt the psychiatric treatment of special need's students.[93] In fact, circumstances existed at the time of the grand jury indictment (but not at the time of the appellate court decision, because Saavedra had since dismissed her claims against the Board of Education) that Saavedra took the documents with the intent to prove her whistleblower and discrimination claims.

Finally, the court did not address whether Saavedra's taking of documents for use in a civil case against a public employer falls under "providing information or testimony to a public entity," under CEPA; however its failure to do so likely means that, in this particular instance, the court

[90] It is unclear if Saavedra left a copy of the third, Consent, document in its place when she took the original from the Board's possession.
[91] *Saavedra*, 81 A.3d at 701.
[92] *Id*.
[93] *Id*. The court's statement related to "intent" is unclear because the court merely states, without reference to a particular earlier proposition, that "from this perspective" the state's proffered evidence at the grand jury indictment was sufficient to meet the standard for theft in New Jersey, which requires intent to deprive.

did not believe that the alleged conduct fell under section (b) of CEPA. Dissenting Judge Simonelli noted that CEPA was enacted to encourage employees with information about unethical or illegal employment activities to provide the public with that information.[94]

C. Value of the Documents

If Saavedra were not a public employee, in order for Saavedra to be prosecuted for third degree theft under Section 2C:20-2 of New Jersey's consolidation of theft offenses, the prosecution must show that the documents Saavedra took had a value exceeding $500.00.[95] This is difficult to prove, especially because the documents at issue do not have an intrinsic or marketable value.[96] Because Saavedra is a public employee, she instead may be prosecuted under Section 2C:20-2g, which states that theft is a crime of the third degree if the defendant steals a public record from a public office.[97]

Due to Saavedra's public employee status, the prosecutor was not tasked with the difficult burden of proving that Saavedra removed at least $500 worth of papers from the Board's care, as he would be if Saavedra was an employee of a private company. In fact, the prosecution would have a difficult time meeting that burden had a private sector employer been involved. There is no reference to any evidence of exactly how many pages of paper Saavedra took. Assuming that each document was ten pages long,[98] Saavedra took 3,670 pages. A case of 5,000 sheets of paper from Staples.com can cost from anywhere between $19.99 to $101.99, with an average price of about $50.00.[99] A cartridge of ink for a regular, non-commercial copier or printer costs about

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[94] *See id*. at 713 (Simonelli, J., dissenting); N.J. STAT. ANN. § 34:19–3b (2016).
[95] § 2C:20–2a.
[96] The documents Saavedra took to prove her whistleblower and discrimination claim were school forms, not trade secrets.
[97] § 2C:20–2g.
[98] This is a broad estimate. From practical experience, the average form is fairly short and under ten pages.
[99] STAPLES.COM, PAPER http://www.staples.com/paper/directory_paper?.

$40.00.[100] One for a Xerox copier yielding about 20,000 pages costs about $150.00 on Staples.com.[101] Even if an employer constantly chose the most expensive paper and ink, it would take theft of documents in a magnitude much greater than Saavedra's likely appropriation to yield over $500.00 of stolen items if the court focused only on the value of the physical property taken.

When an employee takes documents via an electronic medium, such as e-mail, an even greater valuation problem is created. When a document is e-mailed, there is no paper or ink that the prosecution could quantifiably value. In this situation, exactly what does an employee steal? An employer might argue that the employee is stealing the value of the internet connection during that transmission, or possibly that the employee stole company time. It is unclear whether any of these arguments would be successful or what theft would surpass the $500.00 benchmark.

V. Criminality

Following her indictment, *Saavedra* appealed her charges of second-degree official misconduct[102] and third degree theft of movable property (public documents) to the Appellate Division.[103] The court determined, despite her whistleblower status, that there was sufficient evidence for the grand jury to indict Saavedra for those crimes.[104]

Under the applicable statutes "[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."[105] "Theft constitutes a crime of the third degree if . . . it is of a public record, writing or instrument kept, filed or deposited according to law with or in the keeping of any public office or public servant."[106]

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[100] STAPLES.COM, INK http://www.staples.com/ink/directory_ink?.
[101] *Id*.
[102] N.J. STAT. ANN. § 2C:30–2a (2014).
[103] N.J. STAT. ANN. § 2C:20–3 (2014); § 2C:20–2b(2)(g).
[104] State v. Saavedra, 81 A.3d 693, 711 (N.J. Super. Ct. App. Div. 2013), *cert. granted*, 88 A.3d 187 (N.J. 2014).
[105] § 2C:20–3.
[106] § 2C:20–2(b)(2)(g).

A public servant commits official misconduct "when, with purpose to obtain a benefit for himself or another or to injure or to deprive another of a benefit [h]e commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized or he is committing such act in an unauthorized manner . . . ."[107]

The interactions of these provisions raise a more nuanced issue than may appear at first glance. It is unclear if Saavedra truly met all the elements of the crime of "theft." With regard to theft, the "taking" of documents may or may not deprive the owner of such documents. Merely making a copy would not do so, although making a copy using the employer's toner and paper might amount to theft and deprivation of those materials. Given the evidence that Saavedra took original documents, however, the requirements of the theft offense would seem to be satisfied—at least if she did not leave a copy in place of any original taken.

The honest error doctrine serves to protect public servants from prosecution and potential criminal liability for honest errors and errors made in good faith.[108] For example, the New York Legislature's official misconduct statute[109] was held not to criminalize actions of public employees made in good faith.[110] Instead, the offense requires a "corrupt motive" or bad intent[111] to obtain a benefit or deprive another person (presumably the employer) of a benefit.[112] It also requires that the defendant's actions be unauthorized and outside the scope of the employee-defendant's normal duties.[113]

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[107] N.J. STAT. ANN. § 2C:30–2g (2014).
[108] Paul M. Coltoff, et. al., *Criminal Law: Substantive Principles and Offenses*, 35B N.Y. JUR. 2d § 1317 (Nov. 2014) (observing that the New York state legislature did not mean to criminalize good faith and honest errors by establishing the offense of official misconduct).
[109] N.Y. PENAL LAW § 195.00 (McKinney 2014).
[110] Coltoff, *supra* note 104.
[111] *Id*.
[112] N.Y. PENAL LAW § 195.00 (McKinney 2014).
[113] Coltoff, *supra* note 104.

As for official misconduct, the public servant must know that her action is an unauthorized exercise of her job as a public official.[114] Therefore, the second issue relates to the well-recognized "honest error" defense to the charge of official misconduct. As part of this defense, Saavedra argued that she should be entitled to a dismissal of the indictment against her because she made an "honest error" and merely exercised "improper judgment on the job by taking the documents.[115] In other words, Saavedra claimed that she is entitled to a defense under a "claim of right" theory, which is permitted under the statute.[116]

The New Jersey official misconduct statute parallels the New York official misconduct statute, and thus commentary on that statute may be helpful to interpret the New Jersey statute.[117] However, the New Jersey law, in addition to the elements set forth in the New York penal law, allows for a finding of official misconduct by a public servant where she acts with purpose to injure.[118] It also requires, as the New York law does, the defendant to commit an unauthorized act *knowing* that the act is unauthorized or that she is committing an otherwise authorized act in an unauthorized way.[119]

The *Saavedra* court found that the defendant acted with purpose to deprive the board by taking documents that would be necessary in the event of a Medicaid audit, and that she "intended to disrupt the psychiatric treatment of students with special needs."[120] However, Saavedra contended that she did not know that the act of taking the documents was unauthorized and that she thought she was able to take them in order to support her whistleblower and discrimination

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[114] § 2C:30–2g.
[115] Saavedra, 81 A.3d at 704–05.
[116] *See id*. at 705; § 2C:30-2.
[117] *See* § 195.00; N.J. STAT. ANN. § 2C:30–2a (2014).
[118] § 2C:30–2.
[119] § 2C:30–2a.
[120] State v. Saavedra, 81 A.3d 693, 697 (N.J. Super. Ct. App. Div. 2013), *cert. granted*, 88 A.3d 187 (N.J. 2014).

claims.[121] Saavedra compared her removal of the Board's allegedly confidential financial and medical records with that of a janitor erring by taking home a mop.[122] Just like a janitor given access to a mop in the course of his employment, Saavedra argues that she assumed that she had the right to temporarily remove the documents from the Board's premises. She contends that the Legislature did not intend conduct completed under a claim of right or false claim of right to be sufficient action to show official misconduct.[123]

The Appellate Division failed to address Saavedra's argument regarding the intent of the Legislature, instead holding that honest error is an affirmative defense properly asserted at trial after the prosecution has attempted to show a prima facie case of the crime charged.[124] It stated, "Pursuant to N.J.S.A. 2C:20–2c, a defendant may assert the affirmative defense that she "(1) [w]as unaware that the property . . . was that of another; [or] (2) [a]cted under an honest claim of right to the property . . . that [s]he had a right to acquire or dispose of it as [s]he did." [125] At oral argument before the Supreme Court on November 10, 2014, the justices questioned the appropriateness of moving to dismiss an indictment on an honest claim of right defense, which is typically (and under the statute), an affirmative defense.[126]

Such an approach would put Saavedra and other defendants like her in a very difficult position since they would have to risk trial and conviction in order to assert the honest error defense. Such individuals, however, may be able to seek dismissals of indictments in New Jersey when the state fails to present pertinent evidence to the grand jury.[127] The New Jersey Constitution

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[121] Brief for Petitioner, *supra* note 37, at 16. Note that Saavedra's contentions are essentially two different points: the former goes to what the state has to prove to show official misconduct, and the latter is Saavedra's potential defense.
[122] *Saavedra*, 81 A.3d at 704.
[123] *Id*.
[124] N.J. STAT. ANN. § 2C:11-13 (2014).
[125] *Saavedra*, 81 A.3d at 705. *See* N.J. STAT. ANN. § 2C:20-2c (2014).
[126] Transcript of Oral Argument at ___, State v. Saavedra, _____(cite of decision) (2014) (No. A-1449-12).
[127] N.J. CONST. art. 1, § 8.

requires that evidence presented to the grand jury be relevant to the crimes under investigation.[128] In order for that evidence to be "relevant", it must "have a tendency in reason to prove or disapprove any fact of consequence to the determination of action."[129] Again, at the Supreme Court oral argument in *Saavedra*, a justice expressed concern that information about Saavedra's pending civil claim against the Board of Education was purposely omitted from evidence by the state,[130] despite a juror inquiring about "why Saavedra took the documents."[131]

Yet a third possible defense to criminal liability in cases like Saavadra's arises from the constitutional requirement that an individual be afforded "fair notice" that her actions are criminalized.[132] In New Jersey, *Quinlan v. Curtis-Wright Corp.* set forth a seven-factor, totality of the circumstances test to determine whether a private employer may terminate an employee for taking employer-owned documents to support civil litigation without authorization.[133] Although *Quinlan* applies by analogy and does not involve a criminal prosecution, ambiguity existed at the time of Saavedra's alleged theft as to whether it applied to public employees who takes public documents.[134]

A final issue with charging Saavedra with criminal liability is that the prosecutor who eventually charged Saavedra did not learn of her conduct through information provided by a third party or through independent investigation.[135] Rather, the defendants in Saavedra's civil suit

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[128] *Id*.
[129] *Id*.
[130] Transcript of Oral Argument at ___, State v. Saavedra, _____(cite of decision) (2014) (No. A-1449-12).
[131] Brief for Petitioner, *supra* note 37, at 39a.
[132] Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (declaring a statute against vagrancy void for vagueness because it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute" and because it allows law enforcement officers to arrest alleged offenders arbitrarily).
[133] Quinlan v. Curtiss-Wright Corp., 8 A.3d 209, 227 (N.J. 2010).
[134] *See* Stanley L. Goodman and Yalda M. Haery, *Limits of Quinlan: Theft of Documents by the Plaintiff in an Employment Case May Be a Criminal Offense*, Fox Rothschild Labor & Employment Alert, http://www.foxrothschild.com/newspubs/newspubsArticle.aspx?id=15032392578 (Jan. 6, 2014).
[135] Brief for Petitioner, *supra* note 37, at 5.

informed the prosecutor of her taking of documents[136] and requested that the prosecutor take action. The fact that her employer reported her conduct to the county prosecutor in the hope that Saavedra would be charged and prosecuted criminally smacks of retaliatory intent. The New Jersey Supreme Court essentially rejected this argument, however, and relied on *Quinlan* in doing so.[137] The Court stated that *Quinlan* applies when a private employer retaliates against an employee who took or used confidential documents to prove a discrimination claim, and that the *Quinlan* court never suggested that the LAD immunized employees from possible prosecution. Rather, the Court argued that *Quinlan* court clearly recognized that "employers legitimately expect [ ] that they will not be required to tolerate acts amounting to self-help or thievery."[138] *Quinlan* and the latest *Saavedra* decision create an easy loophole for employers: refer any "theft" of a document to local prosecutors to retaliate without "retaliating" under current New Jersey law.

VI. Public Policy

A. Taking Documents as a Protected Activity

Both public and private employers certainly have an interest in protecting confidential documents from arbitrary or malicious dissemination.[139] One commentator argues that the government must protect confidential government documents.[140] While the government secrets at issue in the situations below are more akin to national security risks than the risk of the psychological profiles and records of elementary school students being exposed, the government's reaction to the publication of such information is informative when considering the best approach

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[136] *Id*.
[137] State v. Saavedra, No. 073793, 2015 WL 3843764, at *17 (N.J. June 23, 2015).
[138] *Id*.
[139] Doug Meier, *Changing with the Times: How the Government Must Adapt to Prevent the Publication of Its Secrets*, 28 REV. LITIG. 203, 209 (2008) (discussing publication of government documents or secrets by the news media (both the old print media and the new web-based media, such as Wikileaks) and situations where confidential documents or "secrets" have been published to the detriment of the government).
[140] *Id*. at 209.

to when confidential information of any kind is exposed to the public. Furthermore, examination of the government's response to both 1) whistleblowing by an employee using public documents and 2) potential criminal charges against the employee reveals a similar interplay between a desire for retaliation and an actual need for criminal prosecution in light of other interests (such as security interests) that is also present in *Saavedra*.

For example, in 1971 the New York Times published a secret government study (known as the Pentagon Papers) about the United States' involvement in the Vietnam War.[141] Upon application for an injunction prior to publication, the United States Supreme Court refused to enjoin the New York Times from printing the story, holding that the government's interest in protecting the study did not justify imposing a prior restraint on the paper's freedom of expression.[142] In considering a request for a preliminary injunction, however, Justice Stewart, concurring in the decision, noted that Congress did have the power to enact specific criminal laws that would have the effect of protecting government documents and secrets.[143]

In contrast, Justice Black, in his concurrence, stated, "I believe that every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment."[144] It is therefore unclear if Congress, according to Justice Stewart's concurrence, really does have the ability to enact specific criminal laws that would protect government documents and secrets from publication. Based on the Constitutional framework surrounding one's right to free speech, the government's interest in limiting or preventing the speech would have to be so strong as to completely override that individual's interest in their First Amendment right to free speech or freedom of expression.

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[141] *Id*.
[142] *Id*.
[143] New York Times Co. v. United States, 403 U.S. 713, 740 (1971) (Stewart, J., concurring).
[144] *Id*. at 714–15.

In another famous case, a public employee and NSA contractor, Edward Snowden, leaked confidential documents about top-secret surveillance programs.[145] The federal government charged Snowden with theft and two different crimes based on the unauthorized communication of classified information to unauthorized people.[146] One major difference between Snowden and Saavedra is that Snowden was charged under the 1917 Espionage Act.[147] The Espionage Act specifically applies to government employees who communicate classified information related to the "national defense."[148]

A. Criminal Charges as an Impermissible Form of Retaliation

In *Saavedra*, the Board of Education brought Saavedra's conduct to the county prosecutor's attention, thereby serving as the catalyst for her subsequent indictment.[149] The Board of Education's general counsel testified at the grand jury trial as follows:

> Q: And you were able to determine that Ms. Saavedra had a total of 367 documents in her possession; is that correct?
> A: That is correct.
> Q: That belonged to the North Bergen Board of Education, correct?
> A: That is correct.
> Q: She did not have permission from the Board to take any of these documents?
> A: No, she didn't, and that's why we came to you.[150]

As stated previously, this close connection between the Board's request and the eventual charges against Saavedra smacks of retaliation under New Jersey's LAD.

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[145] Peter Finn and Sari Horowitz, *U.S. Charges Snowden with Espionage*, THE WASHINGTON POST (June 21, 2013), http://www.washingtonpost.com/world/national-security/us-charges-snowden-with-espionage/2013/06/21/507497d8-dab1-11e2-a016-92547bf094cc_story.html.
[146] *Id*.
[147] *Id*.
[148] *See* 18 U.S.C. § 793 (2006). The Espionage Act is particularly concerned with information that could be potentially used to harm the United States or to the advantage of another country against the United States. *See id*. at (a).
[149] Brief for Petitioner, *supra* note 37, at 39a.
[150] *See* State v. Saavedra, 81 A.3d 693, 697 (N.J. Super. Ct. App. Div. 2013), *cert. granted*, 88 A.3d 187 (N.J. 2014); Brief for Petitioner, *supra* note 37, at 39a.
[150] *Id*.

VII. Proposed Reform – Filling in the Gaps

A. Legislative Reform

In order to solve the problem posed in cases like *Saavedra*, the legislatures of the individual states or Congress could enact a statute protecting whistleblowers from criminal liability. It is clear that any protection from criminal sanctions would have to be limited in scope. It would be unwise for the legislature to give carte blanche discretion to potential whistleblowers as to the legal and ethical bounds of their behavior.

The legislature should make clear to potential whistleblowers exactly what they can do and what documents they can take to prove their whistleblower case. For example, the legislature might, in light of Saavedra taking original documents, mandate that a whistleblowing employee is protected only with regard to documents they have copied instead of the employer's only original copy. This protects the employer's interest in materials and documents and ensures that important documents are left at the employee's former place of employment should there be an audit or if the document is later needed. The legislature also might choose to protect particularly private information (such as social security numbers) in consideration of the public's interest in keeping typically confidential information confidential.

In addition to setting categorical rules, the legislature should set forth either a series of factors or a framework for courts to work with in determining if the employee's actions should be protected from criminal liability. In New Jersey, the legislature might borrow the factors set forth in *Quinlan* and apply them in the criminal liability context.[151]

The *Quinlan* court determined that, when an employee takes documents belonging to an employer for use in a lawsuit, the court should consider how the employee came to be in possession

[151] *See* Quinlan v. Curtiss-Wright Corp., 8 A.3d 209, 226–27 (N.J. 2010).

of that document.[152] When an employee had access to the document through the course of his or her employment, the employer will have a lesser interest in the document receiving special treatment as a confidential document.[153] If the employee intentionally looked for a document that she was not typically provided access to, then the employer will have a greater interest in protecting the document.[154] For example, Saavedra was allowed access to the documents throughout the course of her employment with the Board of Education, especially in her position as a clerk for the child study team.[155] The general counsel for the Board of Education testified that Saavedra was not allowed to have the document in her possession outside of the scope of her employment.[156]

Second, the court should balance the employee and employer's interest by considering what the employee did with the document.[157] The *Quinlan* court stated that where an employee shares the document with an attorney for use in prosecuting a claim against the employer, the parties' interests weigh in favor of the employee.[158] This factor would weigh against criminal liability for Saavedra because she provided the documents to her attorney, who in turn produced them to the Board of Education's counsel during discovery.[159] The prosecutor did not present any evidence to the grand jury that Saavedra disseminated the documents to other employees or others outside of the company.[160]

Third, the court should evaluate the nature and content of the document to determine if the employer truly has an interest in labeling the document "confidential."[161] The court held that an

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[152] *Id.* at 227.
[153] *Id.*
[154] *Id.*
[155] Brief for Petitioner, *supra* note 37, at 30a.
[156] *Id.*
[157] *Quinlan*, 8 A.3d at 227.
[158] *Id.*
[159] State v. Saavedra, 81 A.3d 693, 698(N.J. Super. Ct. App. Div. 2013), *cert. granted*, 88 A.3d 187 (N.J. 2014).
[160] *See Quinlan*, 8 A.3d at 227.
[161] *Id.*

employer has a strong interest "if the document is protected by privilege, in whole or in part, if it reveals a trade secret or similar proprietary business information, or if it includes personal or confidential information such as Social Security numbers or medical information about other people, whether employees or customers . . ."[162] One major concern is that employers will label or classify documents as "confidential" in order to subject their employees to potential liability. This classification would certainly change the nature of the document. Under this factor, however, the balance weighs in the Board of Education's favor because some of the 367 documents Saavedra took contained the medical records of students visiting a psychiatrist used by the district.[163]

The fourth, fifth, and sixth factors are the employer's policy regarding documents of that nature; the circumstances surrounding the disclosure of the document and whether disclosure was "unduly disruptive" to the employer's business; and the strength and legitimacy of the employee's stated reason for taking the document instead of requesting it during the normal discovery process.[164] For the sixth factor, the potential for employer spoliation of documents weighs in the employee's favor.[165] If the document is of great importance to the success of the employee's claim against the employer, the employee's need for the document will weigh in favor of disclosure.[166] Saavedra did not submit any evidence at trial showing that employer spoliation was likely, so that factor probably does not weigh in her favor.

Finally, the court should consider how its decision in a particular case and under a particular set of facts affects "two fundamental considerations."[167] First, the court should be mindful of the remedial purpose of statutes such as the LAD and CEPA that seek to protect employees from

[162] *Id*.
[163] *Saavedra*, 81 A.3d at 698.
[164] *See Quinlan*, 8 A.3d at 227–28.
[165] *Id*. at 228.
[166] *Id*.
[167] *Id*.

unlawful retaliation from protected actions.[168] The *Quinlan* court noted that, "in a close case, for example, the broad remedial purposes of the LAD might tip the balance."[169] Second, the court should consider the effect that its decision will have on "the balance of legitimate rights of both employers and employees.[170]

In light of the last consideration,[171] it is unclear how some of the *Quinlan* factors would actually protect the expectations of the reasonable whistleblower under the LAD or CEPA. For example, with respect to "whether an employee has violated a clearly identified company policy or expectation of confidentiality," upon statutory reform every company would immediately amend its policies to state that no employee may take or copy employer documents for her own use. Furthermore, this consideration gives incentive to employers to impose a high expectation of confidentiality on their employees, even in fields where extreme confidentiality is not typically warranted or expected. For the fifth factor, level of disruption to the employer's business, it is unclear if the New Jersey legislature, in enacting CEPA and LAD, was concerned about disruption to an employer's business should a legitimate claim be filed against it. It seems as if, by definition, disclosing a document with information evidencing an employer's wrongdoing would be disruptive to an employer's business. Nevertheless, it would presumably be disruptive in exactly the way the legislature intended, that is, by disrupting violations of the law.

B. Judicial Reform

In addition to potential legislative reforms, the judiciary itself can take measures to protect whistleblowers. For example, the dissenting judge in *Saavedra* suggested that judges themselves

[168] N.J.S.A § 10:5-12 (2014); N.J. STAT. ANN. § 34:19-3(1) (2014).
[169] *Quinlan*, 8 A.3d at 228.
[170] *Id*.
[171] The court should consider the purposes between anti-retaliatory statutes such as the LAD and CEPA. *Quinlan*, A.3d at 228.

may refuse to allow charges to stand against whistleblowers or otherwise protected litigants.[172] Judge Simonelli argued that judges should expand the concept of fundamental fairness to "ensure justice for all employees who act in good faith pursuant to the LAD and/or CEPA.[173] The concept of fundamental fairness may be more appropriately applied as an affirmative defense to prosecution.[174] This approach is flawed, however, because it would require the defendant and whistleblowing plaintiff to go to trial, which 1) ensures that she drop her whistleblower claim to protect against self-incrimination and 2) is an often terrifying prospect in light of the often harsh penalties faced if convicted.

VIII. Conclusion

In light of the public policy considerations and the legislature's desire to protect whistleblowing employees, the legislature should adopt several of the Quinlan factors to protect a whistleblower's statutorily protected conduct and the rights and interests of employers. Adoption of these factors will not necessarily set forth a categorical rule making it clear exactly what whistleblowing actions are protected, but it will provide some semblance of guidance to whistleblowers and their attorneys.

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[172] State v. Saavedra, 81 A.3d 693, 714 (N.J. Super. Ct. App. Div. 2013), *cert. granted*, 88 A.3d 187 (N.J. 2014) (Simonelli, J., dissenting)

[173] *Id*. (citing Zehl v. City of Elizabeth Bd. of Educ., 43 A.3d 1188, 1193 (N.J. Super. Ct. App. Div. 2012)) (recognizing that judges have an interest in ensuring that they act in a way in which remedial legislation originally intended to facilitate justice for all litigants).

[174] *See* Raleigh, *supra* at page 16.