



NEW JERSEY SUPREME COURT HOLDS THAT NURSE'S COMPLAINTS REGARDING PATIENT HEALTH DID NOT SUPPORT VALID CEPA CLAIM

By Ian W. Siminoff

The New Jersey Supreme Court issued a decision favorable to employers earlier this month, narrowing exposure to whistleblower claims by employees. In *Hitesman v. Bridgeway, Inc.*, the court affirmed the dismissal of a claim under the Conscientious Employee Protection Act (CEPA) asserted by a nurse who was terminated after complaining about patient health.

Plaintiff James Hitesman, a registered nurse employed by Bridgeway nursing home, was terminated in January 2008, after he: (a) complained to the facility's management about the rate of infectious diseases among patients; (b) reported his concerns to governmental agencies and the press; and (c) disclosed partially redacted records of patient care to a television reporter. According to Bridgeway, Hitesman was terminated based upon his contacting the media and disclosing Bridgeway's administrative logs, in violation of Bridgeway's confidentiality policy and HIPAA.

Hitesman then filed suit, alleging a claim under CEPA's provision barring employer retaliatory action against a licensed or certified health care employee who reports on, or objects to, an employer practice that the employee reasonably believes to constitute "improper

quality of patient care." He also asserted a claim under another CEPA provision barring retaliatory action against an employee who objects to an employer activity, policy or practice that the employee reasonably believes to be "incompatible with a clear mandate of public policy concerning the public health."

The trial court denied Bridgeway's motion to dismiss at the close of the plaintiff's case and the jury returned a verdict of liability under CEPA but awarded no damages. The parties cross-appealed and an intermediate appellate court reversed the plaintiff's liability verdict, holding that the plaintiff's CEPA claim failed as a matter of law because he did not demonstrate an objectively reasonable belief that Bridgeway's conduct gave rise to an improper quality of patient care or was incompatible with a clear mandate of public policy.

The New Jersey Supreme Court affirmed the reversal of the jury verdict in Hitesman's favor, holding that claims asserted under CEPA's "improper quality of patient care" provision must be based upon a reasonable belief that the employer has violated a law, rule, regulation, declaratory ruling adopted pursuant to law or a professional code of ethics that governs the

employer and differentiates between acceptable and unacceptable conduct in the employer's delivery of patient care. The court further held that an employee asserting that his employer's conduct is incompatible with a "clear mandate of public policy concerning the public health" must, at a minimum, identify authority that applies to the "activity, policy or practice" of the employer.

Hitesman's claim was defective because he was required to present authority that serves as a standard for his employer's conduct. In an attempt to do so, Hitesman cited the American Nursing Association (ANA) Code of Ethics and two Bridgeway documents – the Employee Handbook Code of Conduct and its Statement of Resident Rights.

The ANA Code

As the court explained, although a professional code of ethics governing an employer's activities may constitute authority for purposes of CEPA in an appropriate factual circumstance, the ANA code provided no standard for Bridgeway's control of infectious disease and therefore, did not support plaintiff's CEPA allegations. The code directed a nurse's action in response to deficient patient care, but provided no standard by which such a deficiency could be ascertained. Hitesman had conceded, on cross-examination, that although the ANA code applied to him by virtue of his status as a registered nurse, it did not apply to Bridgeway.

The Handbook's Code of Conduct and the Statement of Resident Rights

Neither the Bridgeway employee handbook nor the statement of resident rights defined acceptable patient care or stated a clear mandate of public policy for purposes of CEPA. Pursuant to

CEPA, a "clear mandate" of public policy suggests an analog to a constitutional provision, statute and rule or regulation promulgated pursuant to law such that there should be a high degree of public certitude in respect of acceptable versus unacceptable conduct. As to the handbook's code of conduct, it did not provide a governing standard for Bridgeway's response to infectious diseases in patients, or otherwise define an adequate response to any condition or disease. As to the statement of resident rights, while that document ensures that a Bridgeway patient has rights, it did not have a relationship to the subject of Hitesman's complaints: allegedly deficient control of infection in staff and residents.

In the end, as the Appellate Division held, Hitesman's dispute with his employer was just a "difference of opinion."

The *Hitesman* decision is significant insofar as the New Jersey Supreme Court reaffirmed the principles that in order to have an actionable CEPA claim regarding improper quality of patient care or conduct incompatible with a clear mandate of public policy: (1) the employee's complaints must implicate an activity, policy or practice of the *employer*; and (2) the employee is required to present evidence to support a substantial connection between the conduct he complains of and the violation alleged.

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