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New Jersey Whistleblowers Must Identify A Specific Law Or Public Policy Before CEPA Claims Can Be Submitted To A Jury

By: Mollie O'Brien, James Flynn and Jiri Janko

The Supreme Court of New Jersey held on June 16th that a former registered nurse could not get his whistleblower claim to the jury because he failed to prove at trial that he held a reasonable belief that the conduct to which he objected violated a standard of patient care or a clear mandate of public policy. *James Hitesman v. Bridgeway, Inc.*, A-73-12, involved allegations of improper quality of patient care at a long-term care nursing home facility, allegations that the plaintiff attempted to support with references to the American Nursing Association's Code of Ethics ("ANA Code"), the Bridgeway Employee Handbook and its Statement of Resident Rights. The Supreme Court ruled that these are not expressions of law or mandates of public policy on which Conscientious Employee Protection Act ("CEPA") claims may rest. This decision is of interest to employers, especially in the health care field, and to those watching the evolution of New Jersey's whistleblower jurisprudence.

Part of appreciating the case's import is understanding its facts. Plaintiff was a nurse at the Bridgeway Care Center. In January 2008, he reported to his supervisors, certain government health organizations, and a local television station that patients at the nursing home had experienced what he believed was an unacceptable increase in respiratory and gastrointestinal symptoms. Bridgeway thereafter discovered that plaintiff disclosed to the television station partially-redacted patient records, which conduct violated Bridgeway's confidentiality policy and the Health Insurance Portability and Accountability Act of 1996. Accordingly, plaintiff was discharged. Following his discharge, plaintiff brought a CEPA claim against Bridgeway. He alleged that his discharge violated CEPA's prohibition of retaliatory action against a licensed or certified health care employee who reports on, or objects to, an employer activity that the employee reasonably believes to constitute "improper quality of patient care" or which the employee reasonably believes to be "incompatible with a clear mandate of public policy concerning the public health." *N.J.S.A.* 34:19-3a(1), 3c(1), and 3c(3).

The case proceeded to trial, and at the close of plaintiff's case, Bridgeway moved for an involuntary dismissal on the grounds that plaintiff failed to meet his burden in proving the first prong of a CEPA claim: that he reasonably believed that Bridgeway violated a specific law or public policy. The motion was denied, and the jury subsequently returned a verdict for plaintiff on liability, but awarded no damages. The Appellate Division reversed, holding that the trial court's denial of Bridgeway's motion was improper.

The New Jersey Supreme Court affirmed the reversal. Following *Dzwonar v. McDevitt*, 177 N.J. 451 (2003),

the Supreme Court held that, before submitting the claim to the jury, a trial court must find a substantial nexus *between* the employer's practice, procedure, action or failure to act, *and* a law, rule, regulation, declaratory ruling, or professional code of ethics or public policy. Under that analysis, plaintiff has the burden of identifying the legal authority or a clear mandate of public policy that provided a standard against which Bridgeway's conduct could be measured. The Court concluded that in this case plaintiff failed to meet this burden. In the Court's opinion, the sources that plaintiff identified – section 3.5 of the ANA Code, the Bridgeway Employee Handbook and its Statement of Resident Rights – failed to define an accepted standard of patient care or state a clear mandate of public policy. While the ANA Code addressed the obligation of a nurse to report inadequate medical care, it neither governed Bridgeway's patient care nor specified how Bridgeway should have treated its patients' illnesses. Lastly, Bridgeway's handbook and Statement of Resident Rights was silent as to a standard for Bridgeway's response to infectious diseases in patients or any authority that could be construed as an expression of public policy. Accordingly, the Court concluded the trial court should have dismissed the lawsuit for plaintiff's failure to identify a law or public policy that he believed to have been violated.

The dismissal confirms that New Jersey places a high burden on CEPA plaintiffs to identify specific sources of law or public policy that relate to the conduct of which they complain before their case will be submitted to a jury. It separately establishes that a CEPA plaintiff must present evidence as to which law, rule, regulation, declaratory ruling, professional code of ethics or public policy he believes his employer violated at trial. While *Hitesman* had identified other legal sources in prior motions, the court held that the trial court could not rely on those sources when deciding Bridgeway's motion as it was constrained to consider only evidence that was presented for the jury's consideration at trial. *Hitesman* is also of interest for those awaiting the Court's ruling in *Lippman v. Ethicon*, Docket No. 73324, another healthcare related CEPA case, where the parties and various *amici curiae* have asked the Court to determine whether reports made by employees in the regular course of fulfilling jobs as safety or quality inspectors amount to protected whistleblowing under CEPA.

While some employers may read *Hitesman* as a harbinger of a hoped-for pro-employer ruling in *Lippman*, more sophisticated employers understand that handling the highly-specialized and highly regulated workplaces across the healthcare and life science industry will, regardless of the outcomes of *Hitesman* and *Lippman*, requires an integrated understanding of applicable and evolving employment law as well as applicable healthcare regulations and standards, and applicable facts. Experienced counsel able to address those diverse but converging areas certainly can enhance that understanding.

Tags: American Nurses Association, ANA Code, Bridgeway Care Center, CEPA, Conscientious Employee Protection Act, James P. Flynn, Jiri Janko, Mollie O'Brien, New Jersey, Patient Care, Public Policy, Whistleblower

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