

## **CLOSELY WATCHED WHISTLEBLOWER CASE RESULTS IN EMPLOYER-FRIENDLY DECISION RESTRICTING SCOPE OF CEPA**

**By Kevin J. O'Connor\***

In one of two closely-watched New Jersey Supreme Court cases to be decided this year, the Court has rendered an employer-friendly decision which undoubtedly limits the application of New Jersey's whistleblower statute, the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 to -8 ("CEPA"), in the health care arena. In Hitesman v. Bridgeway, Inc., 430 N.J. Super. 198 (App. Div.), certif. granted, 214 N.J. 235 (2013), an employer who fought back saw its strategy pay off when the Court recognized that an employee suing under CEPA cannot rely upon internal company handbooks or nursing code ethics provisions which apply solely to nurses, as some basis for a whistleblower claim.

With the proliferation of anti-discrimination laws in the United States and stated intent on the part of state and federal courts alike to broadly apply such statutes to fight the cancer of discrimination, employees have felt emboldened in their pursuit of such cases and have pushed to apply CEPA in cases where they claim to have blown the whistle over violation of internal company policies, employee handbooks, and other non-statutory sources of authority. Some have argued that these cases (reported and unreported) show that, if left unchecked, CEPA would fast become a statutory remedy for any health care worker who was terminated and had made any noise about workplace practices of any kind. Employees have argued that such cases should go to the jury, with the considerable threat to employers of having to pay both sides' lawyer fees, emotional distress and economic damages, and possibly punitive damages.

Over the past few years, the Court has sought to articulate limits on CEPA recovery, and to deal with the thorny issues that often arise in such cases, such as the employee who pilfers data from the employer to further her discrimination case. See Quinlan v. Curtiss-Wright, 204 N.J. 239 (2010). While Hitesman dealt also with an employee who violated confidentiality by disclosing certain patient data to the media, the decision by the Court does not squarely address that issue but instead addresses the question of whether an employer handbook, nursing association ethics rules or other internal employer materials could serve as the source of law at the heart of a CEPA claim.

The lower court in Hitesman permitted the employee to get his case to a jury on his claim that he "blew the whistle" over alleged violations of nursing codes of ethics, provisions in the employer handbook, and a patient bill of rights. He claimed that this was the source of his complaints to outside agencies, and formed a proper basis for CEPA liability. The Appellate Division reversed the jury's determination on liability and squarely held that these materials could not serve as the source for an objectively reasonable belief of a violation of law under CEPA. The Court affirmed.

The plaintiff in Hitesman had been terminated from his employment as a registered nurse by defendant Bridgeway Inc., d/b/a Bridgeway Care Center, after he called several government health agencies and the media to report his concerns about Bridgeway's response to what he considered an inordinate rate of infection among patients. He filed a CEPA action.

Under N.J.S.A. 34:19-3a(1) and c(1), a licensed or certified health-care

professional may assert a claim against his or her employer based on a reasonable belief that the employer's conduct constitutes improper quality of patient care. "Improper quality of patient care" is defined in N.J.S.A. 34:19-2(f) as any action by a health care provider "which violates any law or any rule, regulation or declaratory ruling adopted pursuant to law, or any professional code of ethics."

On appeal, the question became whether plaintiff's proof, and specifically his reliance on a professional code of ethics not applicable to his employer, was sufficient to support a liability verdict in his favor. Plaintiff claimed, and the jury found, that he had an "objectively reasonable belief" that Bridgeway provided "improper quality of patient care," or violated a law or public policy. As support for the reasonableness of his belief, he identified the American Nursing Association's Code of Ethics (the ANA Code of Ethics); Bridgeway's employee handbook; and a "statement of residents' rights". Although the jury returned a liability verdict in plaintiff's favor, it awarded no damages. Plaintiff then appealed from the damages verdict and defendant cross-appealed from the liability verdict and refusal of the trial court to dismiss the case on a motion at trial. The Appellate Division reversed. Its decision has already been applied in a similar case by a nurse making a CEPA claim. Gibson v. 11 History Lane Operating Co., 2014 WL 700124 (N.J. Super. Ct. App. Div. Feb. 25, 2014),

Affirming the Appellate Division decision, the Court this week ruled that a licensed or certified health-care professional may assert a claim against his/her employer pursuant to CEPA based on an objectively reasonable belief that the employer's conduct constitutes "improper quality of patient care." In the case before it, however, the

employee was terminated after disclosing to several government health agencies and the media his concerns about improper patient care at defendant's nursing home, but he failed to establish the first element under CEPA --an objectively reasonable belief that the defendant's conduct constituted "improper quality of patient care" as defined in the statute. He failed to identify "any law, rule, regulation, or declaratory ruling" that he reasonably believed the nursing home had violated; and the cited American Nursing Association "professional code of ethics" did not apply to or establish a standard of care for nursing homes, and thus could not provide the basis for plaintiff's objectively reasonable belief in "improper patient care."

A CEPA claim may also be established under N.J.S.A. 34:19-3(c)(3) based on an objectively reasonable belief that the employer's conduct "is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment." Under this provision, the cited "public policy" must be "clearly identified and firmly grounded" and reflect a "high degree of public certitude respecting acceptable vs. unacceptable behavior." Here, the employee's claim was based again on defendant's alleged violations of the ANA code of ethics, which failed to provide the basis for a violation of a "clear mandate of public policy" applicable to the nursing home.

The Court's decision in Hitesman is a welcome one for employers as it combines a common sense interpretation of the statute with a realistic view of the employer-employee relationship. In a pre-Hitesman world, employers faced with CEPA claims of an amorphous nature faced a Hobson's choice: 1) settle; or 2) fight, with the considerable threat of damages and attorneys' fees in the event a summary judgment dismissal could not be obtained. The Court has, in recent years, rendered several cases such as Quinlan,

setting common sense limits on the scope of CEPA. Quinlan was itself recently interpreted in Stark v. South Jersey Transportation Authority, 2014 WL 2106428 (N.J. Super. Ct. App. Div. May 21, 2014) as prohibiting employees from using surreptitiously recorded conversations obtained in violation of the state Wiretapping Act from getting to a jury based on those tapes. Id. \* 10 ("No benefit accrues to the broad remedial purposes of either LAD or CEPA by the admission of illegal secret recordings of private conversations").

Hitesman continues the effort by the Court to strike a balance between the interests of employees in pursuing their claims, and that of the employer in maintaining some semblance of order in the workplace. The Court recognized that permitting an employee to rest his CEPA claim on the employer's alleged violation of a nursing code would be unfair precisely because that code did not govern the employer's actions and that code did not include any "readily discernable course of action that is recognized to be in the public interest." The same was true of the employer's handbook which spoke generally of a compliance program in the workplace to comply with all applicable state and federal regulations. Permitting a CEPA claim to rest on such a document would essentially guarantee to every fired employee the right to proceed under CEPA if an employee merely has the foresight to complain about any employer practices before his or her firing.

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