

## WHISTLEBLOWER GUIDANCE FROM NJ APPELLATE COURT MAY HELP EMPLOYERS KEEP MORE CEPA CLAIMS FROM REACHING A JURY

By *Harris Neal Feldman*

A plaintiff cannot succeed in whistleblower litigation against his former employer without demonstrating a specific, objectively reasonable belief that the employer violated a law or public policy, according to a recently published opinion of a New Jersey appellate court. New Jersey's Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1 to -8, provides, in part, that a licensed health care professional may assert a whistleblower claim against his employer if he possesses a "reasonable belief that the employer's conduct 'constitutes improper quality of patient care[.]'" *Hitesman v. Bridgeway Inc.*, 2013 N.J. Super. LEXIS 44, A-0140-11T3 (App. Div. Mar. 22, 2013). The appellate court found in favor of the employer and dismissed this case (reversing the rulings of the trial court and vacating a jury verdict), in finding that the plaintiff was not entitled to whistleblower protection under CEPA because he relied on a code of ethics that applied to him as a nurse, but not specifically to his former employer, a long-term care nursing home facility. By pointing out multiple errors committed by the trial court, the appellate court offered specific guidance to (1) trial judges who are often asked to dismiss similar lawsuits at various stages of litigation and (2) defense counsel who seek to prevent these types of cases from reaching juries or overturn adverse rulings on appeal.

In *Hitesman*, the plaintiff was discharged after he anonymously contacted governmental agencies and the media to report his concerns regarding what he believed was an "inordinate rate of infection among patients" and released to the media confidential administrative logs, which his employer asserted violated HIPAA, 42 U.S.C. §§ 1320d-1 to -9. The plaintiff had also raised the same concerns internally, so when the New Jersey Department of Health and Social Services contacted the nursing home facility, the administrators asked the plaintiff whether he had contacted the state authorities. While initially denying his actions, after the media began to cover the issue, the plaintiff admit-

ted — at a subsequent internal meeting a week later — that he had contacted governmental agencies and the media.

At trial, after the plaintiff closed his case, the defense moved to dismiss, arguing that the plaintiff failed to prove that he held an objectively reasonable belief that his employer "provided improper quality of care or violated a law or public policy" — the first required part of a statutory whistleblower claim in New Jersey. The only standards the plaintiff claimed his employer violated were in a code of ethics that he admitted did not apply to the nursing home. However, the trial court judge found that even though the code of ethics did not apply, the jury may nonetheless use it to glean whether there was improper health care or a violation of public policy. The court of appeals declared this ruling to be reversible error.

Also, the appellate court criticized the trial judge for not providing the jurors with the statutory definition of "improper quality of patient care," and asked the committee that prepares model jury instructions to consider adding that definition to model instructions for CEPA claims. In addition, the court highlighted the need for identifying very specific authority in statutory whistleblower claims by explaining that the judge failed to instruct the jury as to what portion of the code of ethics allegedly had been violated. Reiterating existing law, the panel instructed that a judge should "enter judgment for a defendant when no such law or policy is forthcoming." Because the plaintiff failed to identify any law or applicable policy that he believed his employer had violated, his claim "should not have been submitted to the jury." Merely identifying some vague "authority does not alone provide adequate support for an objectively reasonable belief that a violation has occurred."

Likewise, the appellate court found error in the trial judge instructing the jury that the defendant's internal code of conduct and residents' rights documents provided sources

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of law or public policy “that closely relate to the conduct about which [plaintiff] blew the whistle.” Importantly, it found that such documents do not constitute “any law or any rule, regulation or declaratory ruling adopted pursuant to law or any professional code of ethics” under the whistleblower statute. The court found that the dispute between the plaintiff and his employer was simply a “difference of opinion” and that the plaintiff had not expressed an “objectively reasonable belief” that his employer’s conduct was “incompatible with a clear mandate of public policy” where the plaintiff’s opinion was based on the nursing code of ethics, the defendant’s code of conduct and/or the defendant’s statement of residents’ rights.

#### **Takeaways for the Defense**

Employers should welcome the fact that the *Hitesman* opinion was approved for publication. The official publication of this decision allows defense counsel to cite this opinion as legal authority when seeking to dismiss CEPA complaints arising in any industry in which the former employee lacked the requisite objectively reasonable belief tethered to a law or other source of public policy. As the appellate court explained, “A plaintiff cannot rely upon ‘a broad-brush allegation of a threat to patients’ safety[,]’ because CEPA affords no protection for the employee who simply disagrees with lawful policies, procedures or priorities of the employer.”

The opinion provides further needed support for employers who generally seek to have unsupported whistleblower claims dismissed as early possible — whether by rarely-granted motions to dismiss, motions for summary judgment or motions made at the close of the plaintiff’s case. *Hitesman* may encourage more trial court judges to grant dismissal motions before CEPA cases reach the trial phase of litigation. While defense counsel often move for summary judgment in CEPA actions, the trial court rulings on such motions vary greatly.

Alert employment defense counsel should also recognize that the appellate court provided guidance on drafting

proper proposed jury instructions for trial and on objecting to unhelpful instructions so as to preserve such objections for appeal. Employment defense attorneys may use this case to illustrate to clients that even when CEPA cases reach verdict, New Jersey’s appellate courts are willing to reverse decisions of the trial court judges and nullify verdicts when made contrary to the law and the evidence.

Some of the impact of *Hitesman* may only be fleeting, however. Importantly, the questions of “reasonable belief” and other CEPA elements are now before the New Jersey Supreme Court through another case moving through the appellate process, *Battaglia v. UPS, Inc.* The expectation is that the Court will issue an opinion in that case by early Fall 2013, undoubtedly better shaping New Jersey whistleblower law. ♦

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