

New Jersey's Supreme Court Requires CEPA Plaintiffs to Identify a Law or Public Policy Applicable to the Defendant Employer

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On June 16, 2014, the New Jersey Supreme Court, in *Hitesman v. Bridgeway, Inc.*,¹ affirmed the decision of a lower appellate court dismissing a claim brought by a registered nurse under New Jersey's whistleblower law, the Conscientious Employee Protection Act (CEPA).² The decision is significant because the Supreme Court clarified that to establish a violation of the statute based on complaints concerning "improper quality of care" or behavior "incompatible with a clear mandate of public policy," a plaintiff must cite a law or other source of public policy that specifically governs or applies to the employer's alleged misconduct.

The plaintiff, James Hitesman, was a registered nurse employed by a nursing home operated by defendant Bridgeway. He was terminated in Jan. 2008, after he complained to the nursing home's management about the rate of infectious diseases among patients, anonymously reported his concerns to governmental agencies and to the press, and also disclosed partially redacted records of patient care to a television reporter.³ Bridgeway asserted Hitesman's termination was prompted by his disclosure of partially redacted administrative logs to the media, in violation of Bridgeway's confidentiality policy and the Health Insurance Portability and Accountability Act of 1996 (HIPAA).⁴

Following his termination, Hitesman filed a whistleblower suit under a CEPA provision prohibiting retaliatory discharge of a healthcare worker who reports an employer practice the employee reasonably believes constitutes "improper quality of patient care."⁵ He also asserted a claim under another CEPA provision barring retaliatory action against an employee who objects to an employer activity, policy, or practice the employee reasonably believes to be "incompatible with a clear mandate of public policy concerning the public health."⁶ In support of his claim, Hitesman alleged, among other things, that

his complaints involved improper patient care incompatible with the American Nursing Association (ANA) code of ethics, the defendant's employee handbook, and the defendant's statement of resident rights.⁷

The trial court denied Bridgeway's motion to dismiss at the close of Hitesman's case, and the jury subsequently returned a verdict of liability under CEPA but awarded no damages to Hitesman.⁸ Following cross appeals, an Appellate Division panel reversed the jury's verdict on liability, holding 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.⁹ Specifically, the appellate panel found the authorities upon which the plaintiff relied—the ANA code, the Bridgeway employee handbook and the Bridgeway statement of resident rights—neither measured the adequacy of patient care nor expressed a clear mandate of public policy as required by CEPA.¹⁰ Overall, the panel characterized the parties' dispute as nothing more than a "difference of opinion," which it held did not give rise to a cause of action under CEPA.¹¹

The New Jersey Supreme Court affirmed the reversal of the jury verdict in Hitesman's favor. The Court explained that claims asserted under CEPA's "improper quality of patient care" provisions¹² must be premised upon a reasonable belief the employer has violated a law, rule, regulation, declaratory ruling adopted pursuant to law, or professional code of ethics that governs the employer and delineates or defines acceptable conduct in the employer's delivery of patient care. Further, to fall within CEPA's provision for claims asserting an employer's conduct is incompatible with a clear mandate of public policy concerning the public health,¹³ the plaintiff must, at a minimum, identify authority that applies to the activity, policy, or practice of the employer in ques-

tion. Because the three authorities identified by *Hitesman* provided no standard for his employer's control of infectious disease, did not define acceptable patient care, and did not state a clear mandate of public policy, the Court concluded *Hitesman* could not demonstrate an objectively reasonable belief his employer's conduct constituted improper patient care or violated public policy concerning the public health.¹⁴ Accordingly, the Supreme Court concurred with the Appellate Division's determination that the trial court should have granted *Bridgeway's* motion to dismiss.¹⁵

Notably, Justice Barry T. Albin, dissenting, expressed the view that the trial court properly denied *Bridgeway's* motion for an involuntary dismissal. Justice Albin credited the trial court's and the plaintiff's reliance upon additional bases for the plaintiff's reasonable belief, including Centers for Disease Control and Prevention (CDC) standards on infection control in healthcare facilities and "myriad statutes and regulations."¹⁶ Significantly, however, the majority and dissent disagreed about whether the plaintiff had abandoned these arguments at trial and relied exclusively on the ANA code, employee handbook, and statement of resident rights.¹⁷ In itself, these dramatically different readings of the trial record should serve as a warning to litigants about the need to present exhaustive CEPA proofs and arguments, not just on summary judgment but also at trial.

The *Hitesman* reasoning and holding also make clear that before a CEPA claim is presented to a jury, the trial court must determine the whistleblower-employee has identified a law, regulation, declaratory ruling, professional code of ethics, or public policy that actually governs the employer conduct claimed by the employee to be improper.¹⁸ Also, the plaintiff employee is required to present evidence to support a substantial connection

between the adverse employment action he or she is complaining of and the employee's alleged whistleblowing activity. In other words, a trial court should require a substantial nexus between an employee's complaints and a law, regulation, or public policy that actually controls or regulates the employer conduct before permitting a CEPA claim to survive summary dismissal. Despite the outcome in this case, employers should remain wary, because handbooks and ethical guidelines may still constitute proper authorities under CEPA, so long as they serve as or identify a standard for the employer's conduct.¹⁹

The real question for employment practitioners, however, is whether the *Hitesman* decision is only tied to the particular healthcare provisions of CEPA in question in that case,²⁰ or whether it represents the start of a pendulum swing toward establishing a set of objective standards by which employers may measure the reasonableness of an employee's belief of improper activity. Two cases presently pending before the New Jersey Supreme Court, *State v. Saavedra*²¹ and *Lippman v. Ethicon, Inc.*,²² are positioned to further define whether there will be any substantial limitations on what is considered a reasonable belief of improper activity and whether employers will be able to test the assertion of a reasonable belief against an objective set of standards. When read in conjunction with the *Hitesman* decision, these cases have the potential to change the landscape for how New Jersey's courts handle CEPA for years to come. ■

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Endnotes

1. *Hitesman v. Bridgeway, Inc.*, 218 N.J. 8 (2014).
2. N.J.S.A. 34:19-1 *et seq.*
3. *Hitesman*, 218 N.J. at 14.
4. *Id.* at 20 (citing 42 U.S.C. §§ 1320d-1 to -9).
5. *Id.* at 14-15.
6. *Id.* at 15.
7. *Id.*
8. *Id.*
9. *Id.*

10. *Id.* at 24.
11. *Id.*
12. N.J.S.A. 34:19-3(a)(1) & (c)(1).
13. N.J.S.A. 34:19-3(c)(3).
14. *Hitesman*, 218 N.J. at 35-41.
15. *Id.* at 41.
16. *Id.* at 42-50 (Albin, J., dissenting).
17. *Compare, id.* at 39-40, *with, id.* at 42-50 (Albin, J., dissenting).
18. *Id.* at 33.
19. *See, e.g., id.* at 15-16, 33.
20. N.J.S.A. 34:19-3(a)(1) and (c)(1), and N.J.S.A. 34:19-3(c)(3).
21. *State v. Saavedra*, 433 N.J. Super. 501 (App. Div. 2013) (holding that defendant-employee charged criminally with official misconduct for taking the employer's confidential documents could not avoid indictment by contending that she took the documents to support her discrimination lawsuit under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.*), *certif. granted*, 217 N.J. 289 (2014).
22. *Lippman v. Ethicon, Inc.*, 432 N.J. Super. 378 (App. Div. 2013) (holding that 'watchdog' employees are protected against whistleblower retaliation under CEPA), *certif. granted*, 217 N.J. 292 (2014).