



# NJ Supreme Court Dismisses Whistleblower Claim Based Only on Employee's General Complaints About Patient Welfare

Client Advisories

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The New Jersey Supreme Court recently upheld the dismissal of a whistleblower claim under the Conscientious Employee Protection Act (CEPA), finding that such claims must be supported by a reasonable belief that the employer has violated a specific law, rule, regulation, declaratory ruling, or professional code of ethics that governs the employer's conduct. In doing so, the Court emphasized that the alleged violation in a health care setting must be based on some legal authority (such as a specific law or regulation) and not a general violation of a standard of care. Despite the broad protections of CEPA, this decision is an important one for health care employers because it reaffirmed the initial hurdle that a whistleblower plaintiff must establish before the case can go to a jury.

In this case, the plaintiff, James Hitesman, was employed as a registered nurse and shift supervisor by Bridgeway, Inc., the owner and operator of a nursing home. In January 2008, Hitesman raised concerns to management about a prevalence of respiratory and gastrointestinal symptoms among staff members and patients in the facility. Around the same time, Hitesman reported similar concerns to the local and State boards of health. He then contacted a local television station and provided it with partially redacted patient records that he created as part of his job duties and which included information from which the identities of certain patients of the facility could be ascertained. After learning of these activities, Bridgeway terminated Hitesman because of his contact with the media and his disclosure of patient records in violation of the company's confidentiality policy and the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

Hitesman filed a CEPA action on two grounds: (1) under CEPA's protection of health care employees who report or object to employer activity that the employee reasonably believes constitutes "improper quality of patient care" and (2) under CEPA's protection toward any employee who objects to employer activity that the employee reasonably believes to be "incompatible with a clear mandate of public policy concerning the public health." In

support of these claims, Hitesman alleged specifically that Bridgeway had violated standards set forth in the American Nursing Association (ANA) Code of Ethics and the company's employee handbook and Statement of Resident Rights.

The trial court allowed the case to proceed to trial, at which a jury returned a verdict in Hitesman's favor but did not award damages. On appeal, the Appellate Division overturned the verdict, and the New Jersey Supreme Court agreed. In reaching its decision, the Supreme Court instructed that a "pivotal component" of a CEPA claim is the identification of an authority that bears a substantial nexus to the claims and held that plaintiffs asserting CEPA claims based on "improper quality of patient care" or practices "incompatible with a clear mandate of public policy concerning public health" must present authority that serves as a standard for the employer's conduct. The Supreme Court found Hitesman failed to make such a showing, as none of the authorities relied upon by Hitesman set forth a standard governing the employer's conduct with respect to the adequacy of patient care. It noted that the ANA Code did not govern Bridgeway's patient care and set forth no general standard for infection control nor any direction as to how patient illnesses should be treated. Similarly the Bridgeway policy documents did not provide any governing standard for Bridgeway's delivery of patient care.

Employers, particularly those in the healthcare industry, can count this decision in the win column because it affirms the legal right of employers to be stringent in safeguarding their confidential information and because it reinforces limits to an employee's ability to improperly disclose such confidential information. Further, the decision reaffirms what may have appeared to be an eroding requirement under CEPA, i.e., that the whistleblower must cite to a specific law, regulation, standard or public policy that was supposedly being violated by the employer, in order to have a viable claim. General and unspecified beliefs of "illegal" activity are not enough under CEPA.

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