

Client Alert **Employment & Labor**

Why Whistleblowing Laws Are So Significant to Health Care Entities

The New Jersey Supreme Court has recently rejected a whistleblower's attempt to rely on, among other sources, the American Nursing Code of Ethics (the "Nursing Code") to establish his claim under the Conscientious Employee Protection Act ("CEPA"). The Court's rationale was that the Nursing Code did not provide any specific guidelines regarding control of infectious diseases, and therefore did not establish a standard to which the health care entity needed to adhere. The Court thus affirmed an appellate court judgment against a plaintiff who alleged that he was fired as an act of employer retaliation in violation of CEPA.

In *Hitesman v. Bridgeway, Inc.*, plaintiff James Hitesman, a registered nurse in a nursing home, had reported what he perceived as an outbreak of infectious diseases, that he viewed as a direct result of a substandard quality of patient care. Hitesman brought his concerns first to management, then to various government agencies, before finally contacting a local television station, to whom he supplied copies of his "administrative logs." Defendant fired Hitesman because supplying such logs violated both HIPAA and the entity's confidentiality policy, which was contained in an agreement that Plaintiff received and executed at the time of his hiring. However, the significance of the case for health care entities is the finding of the Court that the nursing home did not violate CEPA because there was no clear standard or law that formed the basis of plaintiff's report.

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2014

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CEPA makes it unlawful for an employer to discharge, suspend, demote, or take any other adverse employment action against an employee as a result of that employee's reporting, threatening to report, objecting to or refusing to participate in an employer's violation of the law, or a rule or regulation issued under the law. Moreover, CEPA specifies the protection for licensed and certified health care professionals who disclose to a public body or object to a policy or practice of an employer that the employee reasonably believes constitutes "improper quality of patient care," or is "incompatible with a clear mandate of public policy concerning the public health, safety or welfare." Plaintiff's argument of a retaliatory termination relied upon these provisions of CEPA as he disclosed to a public body the practice of his employer that he believed constituted an improper quality of patient care, specifically Defendant's allegedly inadequate control of infectious diseases in the nursing home.

In order for a CEPA claim alleging improper quality of patient care to be submitted to a jury, the court must first find a "substantial nexus" between the employer's practice, procedure, action or failure to act, and the improper quality of patient care. A plaintiff need not show that the defendant actually violated a law, rule, regulation, or other authority to prevail on a CEPA violation claim, but only that he has a reasonable belief that such a violation occurred. However, the plaintiff must also identify authority that applies to and sets standards for the activity, policy or practice of the employer. In support of his argument, Plaintiff pointed to three possible standards that could govern Defendant's conduct: Bridgeway's Employee Handbook, Bridgeway's Statement of Resident Rights and the American Nursing Association (ANA) Code of Ethics.

The trial court found that the ANA Code could serve as the authority by which to assess whether Plaintiff had an objectively reasonable belief that Bridgeway had provided improper quality of patient care. The Appellate Division reversed the jury's liability verdict, holding that Plaintiff's CEPA claim failed as a matter of law because he relied upon authorities—the ANA Code, the Bridgeway Employee Handbook and the Bridgeway Statement of Resident Rights—did not provide a clear standard for Bridgeway's control of infectious disease. Therefore, such authorities could not be used to measure Bridgeway's adequacy of patient care, nor did they express a clear mandate of public policy which Bridgeway could have violated.

The New Jersey Supreme Court affirmed the Appellate Division's judgment, highlighting that it did not find that any of the three purported sources of authority provided an actual standard of which Bridgeway's control of infectious diseases could be in violation. Of particular note was the Court's ruling that the ANA Code provides no standard for Bridgeway's control of infectious disease, and thus the employer's conduct could not rise to the level of "improper quality of patient care." The *Hitesman*

decision makes clear that before a CEPA claim is presented to a jury, the trial court must determine whether the whistleblower-employee has adequately identified a law, regulation or public policy upon which the employer's conduct can be measured and considered improper.

Employer Tips

The Court's ruling is instructive to health care entities because while it concedes that the ANA Code may ethically require a registered nurse to try to improve patient care, it does not govern with specificity a particular entity's patient care nor does it include a general standard for infection control in a nursing home. Practically, health care entities need to be aware of whistleblowing laws and their requirements when assessing the scope of their employee handbook, and when conducting training. Health care entities should also conduct management training around whistleblowing laws, identifying when a complaint needs to be taken seriously and investigated. Most importantly, non-retaliation should be addressed in policies and in training, as the retaliation aspect of whistleblowing laws is the source of liability for the entities. It is also important to keep in mind that retaliation is not simply confined to terminations, but can be more subtle, such as changes in shifts, harassment, diminished opportunities for advancement, etc. A creative plaintiff can fashion a claim if the terms and conditions of his or her employment changed after bringing to light a good faith concern about a practice or policy that affects the health and welfare of patients, so it is very important that all managers and human resources professionals understand and appreciate these types of laws.

If you have any questions regarding whether or how to revise your handbook or policies based on the information in this alert, or if you wish to discuss management training on CEPA or other issues please contact one of the following Sills Cummis & Gross attorneys:

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