

One Minute Memo®



The Supreme Court of New Jersey Defends Employers in Latest CEPA Case

By Christopher Lowe and Samuel Sverdlov

The Supreme Court of New Jersey has spoken up for employers in the latest spin on the Conscientious Employee Protection Act ("CEPA"). Last week, in *Hitesman v. Bridgeway, Inc.*, the court affirmed an Appellate Division decision that a nurse, who was terminated after reporting alleged improper patient care, was not protected by CEPA's anti-retaliatory provisions.

Facts

In early January 2008, James Hitesman—a nurse at Bridgeway Care Center—noted that five Bridgeway staff members and several patients have all been suffering from what he deemed to be, a "seasonal prevalence respiratory and gastrointestinal symptoms." On Friday, January 11, 2008, he sent an e-mail to Bridgeway management expressing his concerns. Management, which denied any pattern of disease out of the ordinary, responded promptly by sending a message to the entire staff "stat[ing] that illness could be spread by contact, and not[ing] the importance of hand-washing for staff and residents."

This was not enough for Mr. Hitesman, as he then made subsequent reports to the Bridgewater Township Board of Health, the Somerset County Department of Health, and the New Jersey Department of Health, allegedly reporting an "epidemic,"¹ all under the alias, "Bill Yates."

When he later learned that a patient had died of septicemia after complaining of gastrointestinal symptoms, Mr. Hitesman decided to contact a local television station, giving them copies of partially redacted administrative logs containing confidential patient information. Shortly thereafter, Mr. Hitesman was terminated for "violating Bridgeway's confidentiality policy and the Health Insurance Portability and Accountability Act of 1996 (HIPAA)."

Supreme Court Decision

Mr. Hitesman sued Bridgeway alleging a violation of CEPA, relying on three sources of authority for his "good faith belief" that Bridgeway violated the law or clear mandate of public policy—(1) the American Nurses Association (ANA) Code of Ethics; (2) The Bridgeway Employee Handbook, which he alleged required him to comply with the ANA Code; and (3) the Bridgeway Statement of Resident Rights.

The Supreme Court, utilizing the four *prima facie* elements of a CEPA claim,² affirmed the Appellate Division, determining that none of the authorities relied upon actually established a clear mandate of public policy. In short, the ANA Code of Ethics neither governed Bridgeway's conduct nor set an objective standard by which to judge it. The employee handbook similarly "set no governing standard to define adequate responses to any condition or disease." And finally, the Statement of Resident Rights was dismissed as irrelevant.

Outlook for Employers

At first glance, this decision is good news for employers in all industries because it builds on the standard set forth by the Supreme Court in *Dzwonar v. McDevitt*—which required the trial court to "first identify a statute, regulation, rule, or public policy, that closely relates to the complained of conduct"—by also requiring an objective standard in the alleged public policy by which to judge the employers conduct. However, employers still should be mindful not to apply the opinion too broadly, as the sources of a "clear mandate of public policy" upon which plaintiff relied may not always be insufficient. For one, the Supreme Court declined to comment on whether CDC guidelines were controlling since they were not part of the trial record and were impermissibly introduced for the first time on appeal. As such, we do not know what the result here would have been had CDC guidelines been introduced at trial.

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¹ When Bridgeway management confronted Mr. Hitesman, he denied making all of the mentioned reports.

² Plaintiff must show that he "reasonably believed that Bridgeway either provided an improper quality of patient care ... or acted in a manner incompatible with a clear mandate of public policy"; (2) he must show that he engaged in protected "whistle-blowing" activity as defined by CEPA; (3) an adverse employment action was taken against him; and (4) he must demonstrate a causal connection between his whistle-blowing activity and his termination.

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