

**WHISTLEBLOWER CLAIMS PREDICATED ON ANA CODE OF ETHICS,
PATIENT BILL OF RIGHTS, AND EMPLOYEE HANDBOOK HELD NOT
SUFFICIENT TO GET TO A JURY**

By Kevin J. O'Connor*

A newly published decision of the New Jersey Appellate Division, Hitesman v. Bridgeway Inc. (Espinosa, J.A.D.), delivered a welcome decision for employers doing business in the health care industry by carefully scrutinizing a claim by a licensed health-care professional under the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -8, that he could get to a jury based on “whistleblower activity” with a nursing code of ethics, employer handbook, and patient bill of rights as the source.

I have written in prior articles about the way in which CEPA is increasingly being used by employees to seek to hold employers liable for all manner of internal disputes in the workplace, with the employee later claiming to have “blown the whistle” on violations of law or public policy after termination. The recent trend in the case law in New Jersey has to been to closely scrutinize these claims to ensure they fit the mold set by the New Jersey Supreme Court in its recent precedents interpreting CEPA.

By way of background, as it relates to health care professionals, CEPA will permit a whistleblower claim where the employee is retaliated against for objecting to and/or reporting to an outside public agency an objectively reasonable belief that the employer’s conduct “constitutes improper quality of patient care[.]” N.J.S.A. 34:19-3a(1) and c(1). The statutory definition of “improper quality of patient care” includes the violation of “any professional code of ethics.” N.J.S.A. 34:19-2(f).

The employee in question was a nurse in a long-term care nursing home facility. He had signed a confidentiality agreement with the employer. In January 2008, when there were a number of infections among the patients at the facility, the employee raised alarm about a purported “influenza epidemic”. He wrote emails to upper management, and then began to make a series of calls to local officials and lodged anonymous complaints that the facility was not doing what it should to contain the infections. He then surreptitiously copied confidential patient documents, and only partially redacted them. He gave them to a reporter, who ran a news story based on this information.

The employee was confronted about whether he was the source of the complaints, but lied and said he was not. He later admitted to having violated the company policy on confidential data, and was fired. He filed suit under CEPA.

In this appeal, the Appellate Division squarely addressed the issue of whether a registered nurse could claim to have blown the whistle based on his purported reliance on vague provisions in the American Nursing Association’s Code of Ethics (“ANA Code”), his employer’s employee handbook which made reference to applicable ethics codes, or a “Statement of Resident’s Rights” used in the facility.

Writing for the Court, Judge Espinosa provided a thorough review of case precedents and ruled that the employee could not legitimately claim a professional code of ethics, which did not even give a standard that was applicable to the employer, was sufficient to support a liability verdict in his favor. Moreover, the Court held that it was improper for the trial judge to charge the jury that the employer handbook, and patient bill of rights, could serve as a basis for an “objectively reasonable belief” that the law was being violated, and meet the first prong under CEPA. The Court vacated the liability judgment against the employer.

Hitesman has been approved for publication and, from the employer’s perspective, is a welcome addition to the recent decisions in New Jersey which make clear that an employee must do more than simply point to a disagreement with the employer over workplace issues to get to a jury in a CEPA case.