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Why Whistle-Blowing Laws Are So Significant to Health Care Entities: A Case Study From New Jersey

By Galit Kierkut

Many states have enacted strong whistle-blowing laws that provide protection to employees who have a concern that their employers' policies or practices are illegal or impact public health, safety or welfare. For hospitals and other health care providers, patient health and safety is of paramount concern, so being accused of such types of violations has an immeasurably detrimental impact on the public image of the entity. New Jersey has one of the strongest of these statutes, called the Conscientious Employee Protection Act (CEPA)[1]. CEPA, enacted in 2007, is a whistle-blower protection law designed to protect employees who report workplace wrongdoing from retaliatory actions. The lessons learned from CEPA are applicable to health care entities all over the country. Not only do many states have laws similar to CEPA, but many of the states that do not have a comprehensive whistle-blower statute protect whistle-blowers, especially in the health care arena, with specific statutes geared to health care. In many other states, there are common law protections for whistle-blowers as well.[2] Therefore, there are very few states where no whistle-blower protection exists in the health care field, even without considering the anti-retaliation protections under the False Claims Act and state qui tam laws.

One of the requirements for a plaintiff seeking to state a claim under CEPA is to identify the basis of the belief that the policies or practices are illegal or impact public health, safety or welfare. On June 16, 2014, the New Jersey Supreme Court rejected a whistle-blower's attempt to rely on, among other sources, the American Nursing Code of Ethics (the nursing code) to establish his CEPA claim. 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 which he supplied copies of his ''administrative logs.'' The defendant fired Hitesman because supplying

[1] N.J. Stat. Ann. § 34:19-1, http://www.nj.gov/health/irb/documents/cepa.pdf.

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[2] The states that have specific and comprehensive statutory protections for whistle-blowers in private employment, including health care, are as follows: Washington, California, Oregon, Arizona, North Dakota, South Dakota, Nebraska, Texas, Missouri, Hawaii, Illinois, Michigan, Ohio, New York, Nevada, Florida, Connecticut, Delaware, New Hampshire, and Rhode Island. The additional states that have specific whistle-blower statutes in the health care area are as follows: Oklahoma, Alaska, Wisconsin, Tennessee, West Virginia, South Carolina, Maryland, Vermont, and Massachusetts. The states that do not have specific statutes for private employers but have common law protections are as follows: Idaho, Utah, Wyoming, Colorado, New Mexico, Kansas, Minnesota, Iowa, Arkansas, Mississippi, Indiana, Kentucky, Pennsylvania, Virginia, North Carolina and Washington, D.C.

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such logs violated both the Health Insurance Portability and Accountability Act and the entity's confidentiality policy, which was contained in an agreement that the 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 the plaintiff's report.

New Jersey's 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.'' (N.J. Stat. Ann. §§ 34:19–3a(1), c(1) and c(3)). The 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 the defendant's allegedly inadequate control of infectious diseases in the nursing home.

To succeed under a CEPA claim involving improper quality of care or violation of a clear mandate of public policy concerning public health, a plaintiff must prove: (1) he reasonably believed that the defendant provided an improper quality of care or acted in a manner incompatible with a clear mandate of public policy; (2) he engaged in a protected ''whistle-blowing'' activity; (3) an adverse employment action taken against him; and (4) there was a causal connection between his whistleblowing activity and the adverse employment action. 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, the plaintiff pointed to three possible standards that could govern the defendant's conduct: Bridgeway's Employee Handbook, Bridgeway's Statement of Resident Rights and the American Nursing Association (ANA) Code of Ethics[3].

The trial court found that the ANA Code could serve as the authority by which to assess whether the 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 the plaintiff's CEPA claim failed as a matter of law because his 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[4] 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[5]. 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 whistle-blower-employee has adequately identified a law, regulation or public policy upon which the employer's conduct can be measured and considered improper.

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. This case hopefully will be a guidepost for courts handling similar claims in other jurisdictions.

Practically, health care entities need to be aware of whistle-blowing laws and their requirements when assessing the scope of their employee handbook, and when conducting training. Many handbooks or hospital policies set forth very specific requirements for the handling of certain patient care issues. While of course, the efficacy of training around patient care is paramount, health care entities need to be careful to ensure that the specificity provided in such policies and training, does not box them into a potential area for liability in the whistle-blowing area. Instead, such policies and training should provide flexibility to health care providers to use their professional judgment to address tricky patient situations, rather than having to adhere to a one size fits all policy.

However, health care entities should also conduct management training around whistle-blowing laws, identifying when a complaint needs to be taken seriously and investigated. Most importantly, nonretaliation should be addressed in policies and in training, as the retaliation aspect of whistle-blowing 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. Regardless of which state he or she is in, a creative plaintiff can fashion a claim if the terms and conditions of their employment changed after bringing to light a good faith concern about a practice or policy that affects the health and welfare of patients. Therefore, it is very important that all managers and human resources professionals understand and appreciate these types of laws.

[3] http://www.nursingworld.org/MainMenuCategories/EthicsStandards/CodeofEthicsforNurses/Code-of-Ethics.pdf

[4] *Hitesman v. Bridgeway, Inc.*, 430 N.J. Super. 198, 63 A.3d 230 (App. Div. 2013) (22 HLR 484, 3/28/13).

[5] *Hitesman v. Bridgeway, Inc.*, 218 N.J. 8, 93 A.3d 306 (2014) (23 HLR 822, 6/19/14).

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