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CEPA Roundup

In recent weeks, New Jersey's primary whistleblower statute—the Conscientious Employee Protection Act ("CEPA")—has been the subject of increased judicial scrutiny.

- In *Hitesman v. Bridgeway, Inc.*, 214 N.J. 235 (2014), the New Jersey Supreme Court held that, to assert a claim for retaliation under CEPA based on complaints concerning "improper quality of patient care" or conduct "incompatible with a clear mandate of public policy concerning the public health," a plaintiff must, at a minimum, identify a source of law or other authority that sets forth a standard from which to determine whether there was a reasonable belief the employer engaged in the alleged misconduct.
- In *Stark v. South Jersey Transit Authority*, No. A-1758-11T2, 2014 N.J. Super. Unpub. LEXIS 1150 (App. Div. May 21, 2014), the Appellate Division held (i) that the plaintiffs' illegal recording of a private conversation did not constitute protected activity under CEPA or the Law Against Discrimination ("LAD"), and (ii) that the plaintiffs could not otherwise use the recording as evidence for it was obtained in a manner that violated state wiretapping law and that failed to satisfy the mitigating factors articulated in *Quinlan v. Curtiss-Wright Corp.*, 204 N.J. 239 (2010) (for more on *Quinlan*, see our [prior alert](#)).
- In *Lippman v. Ethicon*, 217 N.J. 292 (2014), the state Supreme Court granted certification on the issue of whether a "watchdog" employee qualifies as a whistleblower under CEPA by performing the tasks and functions of the job for which he or she was hired.

This newsletter summarizes these three cases and examines their implications for New Jersey employers.

Hitesman v. Bridgeway, Inc.

Background & Holding

James Hitesman ("Hitesman") worked as a registered nurse for a nursing home operated by Bridgeway, Inc. ("Bridgeway"). Hitesman was terminated after he complained to the facility's management about the rate of infectious diseases among patients, anonymously contacted government agencies and the press to report those concerns, and released

partially-redacted patient records to a television reporter, in violation of Bridgeway's confidentiality policy and the Health Insurance Portability and Accountability Act ("HIPAA").

Hitesman filed suit under CEPA alleging that Bridgeway had retaliated against him for complaining about conduct that he "reasonably believed" constituted "improper quality of patient care" and was "incompatible with a clear mandate of public policy concerning the public health." To establish the legal standard governing the alleged misconduct, as is required under CEPA, Hitesman identified the following authorities: the American Nursing Association ("ANA") Code of Ethics, Bridgeway's Internal Code of Conduct contained in its Employee Handbook, and Bridgeway's Statement of Resident Rights.

The Supreme Court concluded that the authorities identified by Hitesman did not set forth a governing standard for Bridgeway's response to infectious diseases in patients, or otherwise define an adequate response to any condition or disease. In other words, these authorities failed to establish a standard from which to conclude a "reasonable belief that the employer has violated a law, rule, regulation, declaratory ruling adopted pursuant to law, or professional code of ethics that applies to and governs the employer and differentiates between acceptable and unacceptable employer conduct." As such, Hitesman could not show the requisite "substantial nexus" between his complained-of conduct and an authority cognizable under CEPA.

Takeaway

Although "courts have recognized various sources of authority" that can trigger the protections of CEPA, Hitesman highlights that, to establish a violation of the statute based on complaints concerning "improper quality of care" or behavior "incompatible with a clear mandate of public policy," a plaintiff must, at the very least, cite a law or other source of public policy that specifically governs the employer's alleged misconduct. Despite the outcome in this case, employers still should be aware that handbooks and guidelines may constitute proper authorities under CEPA if they identify a standard based in law or other public policy from which to gauge the complained-of activity.

Stark v. South Jersey Transit Authority

Background & Holding

In *Stark*, the South Jersey Transit Authority ("SJTA") eliminated the positions of two unionized workers following an independent auditor's recommendation. At the "bumping" meeting to discuss the positions to which the plaintiffs would be transferred under the seniority provision of the collective bargaining agreement, the plaintiffs recorded a private conversation between the Human Resources manager and Deputy Executive Director, in violation of the New Jersey Wiretap Act. Upon learning of the recording, SJTA discharged one of the plaintiffs and suspended the other. The plaintiffs sued, alleging retaliation in violation of LAD and CEPA.

The Appellate Division held that the illegal recording of a private conversation did not constitute protected activity under *Quinlan* (a case in which the Supreme Court held that, in some situations, employees may be protected from discipline for using confidential company documents to support discrimination claims). Here, however, the plaintiffs had

not alleged that their employer had engaged in any specific acts of discrimination, and therefore, the Appellate Division found that *Quinlan* did not apply. For purposes of "completeness," the Appellate Division still engaged in the multi-factor inquiry under *Quinlan* only to reach the same conclusion that the recording was unprotected activity and should be excluded as evidence. It also concluded that the admission of illegal secret recordings of private conversations does not further the broad remedial purposes of LAD or CEPA.

The Appellate Division also affirmed the dismissal of the CEPA retaliation claim on the grounds that the plaintiffs had otherwise failed to identify any protected activity for which they were disciplined. Indeed, given that the plaintiffs' conduct appeared to violate both the law and company policy, the Court held that such "substantiated disciplinary charges [we]re not retaliatory." Moreover, focusing on the lack of temporal proximity (*i.e.*, causation) between the complained-of conduct and the actions taken against the plaintiffs, the Court emphasized that the discipline occurred more than a year after the plaintiffs filed their complaint against SJTA and their in-house complaints against their supervisor. Indeed, the discipline only came after SJTA learned of the illegal recordings during the course of the litigation.

Takeaway

As the different treatment of confidential information in *Stark* and *Quinlan* make clear, whether a plaintiff can use documents or other information that he or she has misappropriated from the company to support a LAD or CEPA claim turns on the particular facts of a case. Though employers generally have the right to discipline employees who misappropriate confidential information, as was the case here, employers still should prepare for the possibility that such employee conduct may constitute protected activity in the context of a discrimination/retaliation suit.

Lippman v. Ethicon

In *Lippman v. Ethicon, Inc.*, 432 N.J. Super. 378 (App. Div. 2013), the Appellate Division departed from long-standing precedent by holding that "watchdog" employees can "blow the whistle" under CEPA by simply performing tasks and functions of the job for which they were hired. Stay tuned for the Supreme Court's decision on this significant matter (for more on *Lippman*, see our [blog post](#)).

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If you have any questions or concerns regarding these recent cases, please contact your Proskauer lawyer.

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