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New Jersey Courts Issue Several Important Whistleblower Cases

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Over the last few months, New Jersey's Supreme Court and Appellate Division have issued several important decisions that have helped clarify New Jersey's Conscientious Employee Protection Act ("CEPA") especially as they answer such important questions as what constitutes "good faith," "reasonable belief," the requisite "law or public policy" and "protected activity."

Hitesman

On March 22, 2013, the Appellate Division issued its decision in *Hitesman v. Bridgeway Inc. dba Bridgeway Care Center,* Docket No. A-0140-11T3 (Mar. 22, 2013) held that a code of ethics to which the employer is not bound does not constitute a "law or public policy." In *Hitesman*, the court reversed a jury verdict in favor of the employee, highlighting his failure to identify a specific law or public policy to which the employer was bound. The court observed that the employee must identify very specific authority in statutory whistleblower claims. A judge should "enter judgment for a defendant when no such law or policy is forthcoming." Because the employee failed to identify any law or applicable policy that he believed his employer had violated, his claim "should not have been submitted to the jury." Merely identifying some vague "authority does not alone provide adequate support for an objectively reasonable belief that a violation has occurred." Moreover, the employer's internal code of conduct and residents' rights documents did not provide sources of law or public policy. It found, instead, that such documents do not constitute "any law or any rule, regulation or declaratory ruling adopted pursuant to law or any professional code of ethics" under the whistleblower statute. The court found that the dispute between the employee and his employer was simply a "difference of opinion" and that the employee had not expressed an "objectively reasonable belief" that his employer's conduct was "incompatible with a clear mandate of public policy" where the employee's opinion was based on the nursing code of ethics, the defendant's code of conduct, and/or the defendant's statement of residents' rights.

Battaglia

On July 17, the Supreme Court of New Jersey issued a decision in *Battaglia v. United Parcel Service, Inc.*, A-86/87-11 (July 17, 2013) providing guidance as to what employee conduct constitutes "protected activity" under CEPA and the New Jersey Law Against Discrimination ("NJLAD"). As it relates to the CEPA claim, the Court held that an employee cannot base his claim on complaints about minor violations of company policy.

In *Battaglia*, the plaintiff alleged that United Parcel Service, Inc. (UPS) demoted him in retaliation for complaining about his supervisor's use of crude sexual language when referring to female employees and rumors that his supervisor was having an affair with a female manager. He also claimed that his demotion was in retaliation for reporting violations of the employer's credit card usage policy. After trial, a jury found UPS liable for unlawful retaliation in violation of both the LAD and CEPA. The Appellate Division then affirmed the jury's CEPA verdict but reversed the jury's LAD verdict Regarding the CEPA claim, the Appellate Division found that the employee's complaints about improper use of UPS credit cards were "protected activity" and that there was

sufficient evidence to show that his subsequent demotion constituted retaliatory conduct under the whistleblower law. On further appeal, the New Jersey Supreme Court reinstated the employee's NJLAD verdict but reversed and vacated the CEPA verdict.

With respect to the CEPA claim, the Court then found that the employee did not engage in "protected activity" when he complained about manager abuse of credit cards. At most, the Court observed, the employee complained about behavior that "amounted to violations of internal company policies" and not "fraud within the meaning of the statute."

As the Court noted, "CEPA is intended to protect those employees whose disclosures fall sensibly within the statute; it is not intended to spawn litigation concerning the most trivial or benign employee complaints."

Longo

CEPA can allow plaintiff to recover punitive damages against an employer, under the doctrine of *respondeat superior*. However, in a decision issued on July 24, 2013, the Supreme Court made it abundantly clear that punitive damages are available only where "there is actual participation in the wrongful conduct by upper management or willful indifference." *Longo v. Pleasure Productions*, A-37-11 (July 24, 2013). In *Longo,* the Court reversed and vacated a punitive damages award because the trial court judge did not give an "upper management" jury charge in this CEPA case.

In *Longo*, plaintiff originally sued under both the NJLAD and CEPA, but later dismissed her NJLAD claim. At trial, the jury found her employer and one individual liable and then awarded $500,000 in punitive damages against the employer. On appeal, the Appellate Division affirmed the award of compensatory and punitive damages. The Supreme Court reversed and remanded for a new trial on punitive damages only.

The Court, relying on NJLAD cases, held that the "upper management" requirement was equally applicable to CEPA cases. The omission of an "upper management" charge in "CEPA claims similar to LAD claims, "is fatal" and requires a new trial. Remanding the case for a new trial on punitive damages only, the Court cautioned that the jury would need to determine "which employees are part of upper management," a "fact-sensitive task." Moreover, he emphasized that the standard of proof for punitive damages is "clear and convincing evidence." At the prior trial, the jury was erroneously charged using the "preponderance of the evidence" standard.

The Bottom Line

Hitesman, Battaglia and *Longo* are all good news for employers forced to defend CEPA cases. New Jersey courts are shortening CEPA's reach just a bit, culling out mere differences of opinion and reliance on subjective codes of conduct to which the employer is not bound. Moreover, as the Court in *Battaglia* made crystal clear, minor violations of corporate policy unrelated to areas of public regulation will simply not be enough. Of course, employers should still remain alert to ensure that they do not retaliate against employees who complain in good faith about perceived violations of law or public policy. Company policies should be reviewed and revised as needed. ■

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