

Non-Disparagement Clauses in Employment Contracts Still Valid under New Jersey Law

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Non-disparagement is not the same thing as non-disclosure. It seems simple and straightforward, except when it isn't. That was the case of [Savage v. Township of Neptune](#).

It was only a matter of time before New Jersey courts began passing judgment on the [March 18, 2019 amendment to the New Jersey Law Against Discrimination](#) (“NJLAD”) preventing the enforcement of non-disclosure agreements in employment contracts and settlement agreements. In 2019, pundits and practitioners questioned the breadth and scope of that supplement to the NJLAD. Three years later, in *Savage v. Neptune*, the New Jersey Appellate Division has now made clear that non-disparagement provisions are not covered by or included within the prohibition against non-disclosure provisions in employment contracts and settlement agreements.

Still, it is easy to see how two fundamentally different covenants – non-disparagement and non-disclosure – can be blurred, and that's precisely what happened in *Savage v. Neptune*. In an underlying litigation, the plaintiff, a sergeant with the Neptune Police Department, alleged the township engaged in sexual discrimination, harassment, and unlawful retaliation in violation of the NJLAD. The parties ultimately settled that dispute and entered into a formal written settlement agreement that contained a non-disparagement provision, but not a non-disclosure provision. The non-disparagement provision, which was reciprocal, provided:

The parties agree not to make any statements written or verbal, or cause or encourage others to make any statements, written or verbal regarding the past behavior of the parties, which statements would tend to disparage or impugn the reputation of any party. The parties agree that this non[-]disparagement provision extends to statements, written or verbal, including but not limited to, the news media, radio, television, internet postings of any kind, blogs, social media, (e.g., Facebook, Instagram, Twitter, or the like), consumer or trade bureaus, other state, county or local government offices or police departments or members of the public. Neptune Township will respond to inquiries from prospective employers with dates of employment and positions held. The parties agree that non-disparagement is a material term of this Agreement and that in the event of a breach, the nonbreaching party may seek enforcement of the nondisparagement provision and damages for its breach, and that the filing of any such action would not be deemed a breach of this

Agreement. Nothing herein shall be construed as prohibiting or precluding in any way testimony or statements of plaintiff related to other proceedings including lawsuits.

After the case settled, the plaintiff interviewed with a reporter for NBC news. During that interview, the plaintiff was asked and answered questions about the case and the police department. Among other things, the plaintiff expressed that she was abused for about eight years, hit with bogus disciplinary charges, and arbitrarily deemed unfit for duty, that women in the police department were oppressed, and that it was a “good ol’ boy system.” Neptune Township subsequently moved to enforce the settlement agreement against plaintiff on the basis that she violated the agreement’s non-disparagement provision when she commented during the televised interview that the police department had not changed and was still a good old boys club. The judge hearing the motion found against the plaintiff and awarded Neptune Township \$4,917.50 in counsel fees and costs arising from the plaintiff’s breach of the non-disparagement clause.

The plaintiff appealed, arguing, among other things, that the non-disparagement provision was against public policy and unenforceable under N.J.S.A. 10:5-12.8(a), the 2019 statutory amendment to the NJLAD prohibiting the enforcement of non-disclosure provisions in employment settlement agreements as against plaintiffs. The plaintiff argued the non-disparagement provision prohibited her from making any statements about the police department’s past behavior and, consequently, had the effect of concealing the details relating to her claims of employment discrimination, retaliation, and harassment, thus putting the design of the NJLAD statutory amendment squarely at issue in the case.

Although the Appellate Division found that the trial judge erred in concluding the plaintiff had actually violated the terms of the settlement agreement’s non-disparagement provision during the TV interview and, therefore, reversed the lower court’s order granting the township’s motion to enforce the settlement agreement, the Appellate Division expressly rejected the plaintiff’s argument that the non-disparagement provision was against public policy and unenforceable. To the contrary, the Appellate Division specifically held that the terms of the non-disparagement provision were in fact enforceable and did not violate N.J.S.A. 10:5-12.8(a), the amended section of the NJLAD statute.

In rendering its decision that non-disparagement provisions are not barred from inclusion in employment settlement agreements, the Appellate Division first revisited the plain language and purpose of the 2019 statutory amendment to the NJLAD. That statutory amendment reads:

A provision in any employment contract or settlement agreement which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment (hereinafter referred to as a “non-disclosure provision”) shall be deemed against public policy and unenforceable against a current or former employee . . . who is a party to the contract or settlement. If the employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable, then the nondisclosure provision shall also be unenforceable against the employer.

According to the Appellate Division:

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- The plain language of the statute provides that it applies to a “nondisclosure provision”;
 - There is a difference between a non-disparagement provision, which is permissible under the NJLAD, and a non-disclosure or confidentiality provision, which is against public policy and unenforceable under J.S.A. 10:5-12.8(a);
 - If the New Jersey legislature intended to include non-disparagement provisions in the statute it would have done so;
 - The plain language of the law indicates it was only intended to prevent employers from compelling employees to enter into agreements to conceal the details of their NJLAD claims; and
 - The purpose of the non-disparagement provision in the parties’ settlement agreement was to mutually prohibit the parties from making disparaging statements about each other, and not to “conceal” the details relating to plaintiff’s NJLAD claims, which would have violated J.S.A. 10:5-12.8(a).

The Appellate Division held that the “effect” of the non-disparagement provision was not to silence the plaintiff from speaking out about the details of her claims. That would have been unenforceable under the NJLAD. Rather, the “effect” of the non-disparagement provision was to prevent the plaintiff from making defamatory statements about members of the police department and township, which was a material term of the parties’ settlement agreement.

The court recognized that while there certainly can be overlap between a plaintiff making post-settlement disparaging statements about his or her current or former employer and a plaintiff’s post-settlement disclosing of the details of his or her NJLAD claims, that generally is not what non-disparagement provisions are designed to protect (or prevent). Indeed, Neptune Township conceded that the plaintiff was at liberty to discuss the facts, circumstances and details of her discrimination claims against the police department, and that she did not violate the non-disparagement provision by doing so. Rather, the township objected to the plaintiff’s disparaging statements that were not directly related to her discrimination claims (*i.e.* were not statements about past facts, circumstances and details of her claims) but, rather, were negative statements intended to impugn defendants and cause reputational harm to the township, and were related more generally to her impression of the township’s present and future behavior.

The Appellate Division’s ruling – and this distinction – is critically important. The Appellate Division preserved an employer’s ability to include non-disparagement provisions in employment contracts and settlement agreements and enforce them against breaching current or former employees. Also, while it is easy to blur the lines of past derogatory comments relating to an employee’s NJLAD claims and present disparaging remarks not directly tied or related to an employee’s claims, the Appellate Division did establish some guard rails and guideposts for distinguishing between the two. When drafting employment or settlement agreements, employers should consult with capable legal counsel about strategies to ensure the enforceability of any non-disparagement provisions contained in those contracts. For instance, employers should recognize the line drawn by the court distinguishing an employee’s comments about past facts from an employee’s comments about present and future behavior. Also, employers might consider including a proviso that nothing in the non-disparagement clause is intended to violate N.J.S.A. 10:5-12.8(a).

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