

New Jersey Supreme Court's Recent Ruling on Non-Disparagement Clauses in Employment and Settlement Agreements

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NJ Supreme Court says non-disparagement clauses in employment and settlement agreements will violate public policy and are unenforceable IF they restrain an employee from speaking out about harassment, discrimination, or retaliation.

On May 7, 2024, the New Jersey Supreme Court ruled that non-disparagement clauses are impermissible when used to silence victims of discrimination, harassment or retaliation in employment or settlement agreements.

In 2019 New Jersey amended the Law Against Discrimination (LAD) to limit the use of non-disclosure clauses in employment or settlement agreements. The legislature explained such contractual provisions are against public policy and deemed to be unenforceable against a current or former employee if they have “the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment.” Last week, in *Savage v. Township of Neptune*, the NJ Supreme Court clarified that non-disparagement clauses must be similarly scrutinized.

Typically, a non-disparagement clause would prohibit one or both of the parties from making negative statements, remarks, or representations about each other. This certainly could be viewed as something much narrower than a non-disclosure clause, which would prohibit the contracting party from disclosing protected ideas or information.

The Court examined the language and intent of the LAD amendment and observed it was designed to provide survivors of discrimination, retaliation and harassment a legal right to tell their story, a right that cannot be taken away by a settlement agreement. The Court reasoned that because the non-disparagement clause at issue “encompasses and would bar speech” that the LAD protects (specifically: “details relating to a claim of discrimination, retaliation, or harassment”), it must also be against public policy and unenforceable. Thus, if discussing the “details relating to a claim of discrimination, retaliation, or harassment,” includes statements that would disparage the employer, then so be it.

Accordingly, the Court seemingly is signaling that carve outs to non-disparagement clauses must be clear with expectations understood such that employers cannot prevent the employee from discussing the details relating to a claim of discrimination, retaliation or harassment.

The Savage Background – How We Got Here

Christine Savage began her career as a police officer with the Neptune Police Department in 1998. By December 2013 she sued the Department, the Township and several superior officers alleging sexual harassment, sex discrimination and retaliation in violation of the LAD. That case was settled in 2014, but in 2016 Ms. Savage filed a second complaint against several of the same defendants alleging they had violated the settlement agreement and engaged in continuing and intensified sex discrimination, harassment and retaliation. The second case was also settled by July 2020.

The July 2020 settlement agreement contained a non-disparagement clause prohibiting the parties from making any statements “regarding the past behavior of the parties” that would “tend to disparage or impugn the reputation of any party.” This non-disparagement clause specifically included written or verbal statements “including but not limited to, the news media, radio, [or] television.”

Thereafter, Ms. Savage gave a television interview to NBC 4 New York, in which she told her story of discrimination, harassment and retaliation at the hands of the Neptune Police Department. In response to this interview the *Savage* Defendants initiated a motion to enforce the settlement agreement accusing Ms. Savage of violating the non-disparagement clause and seeking to enjoin her from continuing to disparage the Defendants.

The trial court granted Defendants motion finding that the LAD barred only non-disclosure and confidentiality provisions and that Ms. Savage had instead violated the non-disparagement clause. The Appellate Division affirmed in part and reversed in part, concluding that the LAD did not prohibit non-disparagement clauses, but that Savage had not violated that clause.

The New Jersey Supreme Court reversed concluding that “[t]he effect of this non-disparagement clause ... is to conceal details relating to claims of discrimination, retaliation, and harassment, which is directly contrary to the LAD. For those reasons, we hold that the non-disparagement clause in the settlement agreement is against public policy and unenforceable.”

What Next?

The *Savage* ruling emphasizes the limitations of non-disparagement clauses for employers resolving claims of discrimination, harassment, and retaliation. Settling parties must consider that the claimant cannot be prevented from giving details relating to a claim of discrimination, retaliation, or harassment, including allegations that were the basis of the complaint being settled. This limitation, however, does not mean that the claimant has a free pass to otherwise defame another party. Nevertheless, employers concerned about what they believe are untrue allegations against them must consider whether negotiating resolutions to such claims meets their needs, knowing that the employee may continue to publish the employee’s allegations of discrimination, harassment and retaliation. Accordingly, it is important that employers resolving such claims understand that protected speech cannot be restrained, and that any non-disparagement clauses included in any settlement or severance agreements must comply with the LAD’s requirements. As such, legal guidance is recommended.

National Law Review, Volume XIV, Number 136

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