



NJ Supreme Court Limits Use of Non-Disparagement Clauses in Employment Agreements, by Christopher Nucifora, Esq., 5-31-2024

New Jersey employers need to tread carefully when using non-disparagement clauses in settlement agreements following a recent pivotal ruling by the Supreme Court of New Jersey that held that the broad scope of a non-disparagement provision violated the New Jersey Law Against Discrimination (NJLAD).

With its ruling, the court made clear that non-disparagement provisions that stymie speech relating to claims of discrimination, retaliation, or harassment are unenforceable. This was already true for non-disclosure agreements as per a 2019 law passed by the state, but it was not as clear for non-disparagement provisions until the recent court ruling.

The non-disparagement clause at issue was tied to a case involving a former sergeant who made negative statements against her employer and others on television regarding claims of an abusive culture.

Defendants in the case argued that the Plaintiff had violated the non-disparagement clause in their settlement agreement by discussing such details.

But the Supreme Court ultimately found that the non-disparagement clause violated N.J.S.A. 10:5-12.8(a), which provides in part that “[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.”

Background

The case, Christine Savage v. Township of Neptune, stems from a December 2013 lawsuit filed by Christine Savage against the Neptune Township Police Department, the Township of Neptune, and others for sexual harassment, sex discrimination, and retaliation. The parties entered into a settlement agreement in 2014, but in April 2016 Savage filed a second action against a number of the same defendants, alleging the defendants violated the settlement agreement and engaged in continuing and intensified sex discrimination, harassment and retaliation in violation of the LAD, the State Civil Rights Act, and the State Constitution.

In July 2020, the parties eventually entered into another settlement agreement, which included the non-disparagement clause at issue.

In particular, the clause stated that “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.”

Based on that, several weeks after the television interview with Savage aired, defendants filed a motion to enforce the second settlement agreement. The trial court granted the motion and ordered Savage to abide by the non-disparagement clause. Savage appealed and the Appellate Division affirmed in part and reversed in part the lower court’s decision ruling that the non-disparagement clause was enforceable, but that Savage had not violated it.

The Supreme Court in a unanimous opinion issued May 7, 2024 concluded that “The scope of the agreement — barring all statements that would tend to disparage a person — is quite broad” and held that the non-disparagement clause conflicts with the LAD in that it encompasses and would bar speech the statute protects — “details relating to a claim of discrimination, retaliation, or harassment.” N.J.S.A. 10:5-12.8(a).”

The Uncertain Future of Non-Disparagement Provisions

Despite the court's ruling, this does not necessarily mean the end to the use of all non-disparagement provisions. The court noted in its opinion that "in theory, parties can agree not to disparage one another by disclosing information that has nothing to do with "details relating to..." claim[s] of discrimination, retaliation, or harassment."

For example, parties could agree not to disclose details about their personal lives or matters unrelated to a discrimination claim – like "my employer drinks heavily at work" or "cheats on his taxes." But such an agreement, "however, would have to be narrowly drawn to ensure that details relating to the claims listed in section 12.8 could be revealed publicly."

Next Steps

Based on the Supreme Court's ruling, it is clear that the use of non-disparagement provisions are severely limited and cannot be used to stifle the speech of victims of discrimination, harassment or retaliation in settlement agreements. With that said, employers need to be careful in drafting these provisions and work with counsel to avoid running afoul of N.J.S.A. § 10:5-12.8(a) and the recent Supreme Court decision.

Kaufman Dolowich Can Help

If your business needs assistance interpreting the recent decision or drafting employment agreements, separation agreements, settlement agreements, or litigating labor and employment claims Kaufman Dolowich's skilled team of labor and employment attorneys can help.