Non-Disparagement Clauses Held Enforceable in New Jersey Employment Settlement Agreements

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Although New Jersey clearly prohibited non-disclosure provisions in employment contracts and settlement agreements in 2019 under N.J.S.A. 10:5-12.8 relating to claims of discrimination, retaliation, or harassment, an open question existed on whether that prohibition extends to non-disparagement clauses. The Appellate Division, in a recent, published decision, has now answered that question in the negative.

In Savage v. Township of Neptune, No. A-1415-20 (App. Div. May 31, 2022), plaintiff Christine Savage worked as a police officer at the Neptune Police Department. In 2016, she filed suit against the Neptune Police Department and other defendants alleging claims, in pertinent part, of sexual harassment, sex discrimination, and retaliation under the Law Against Discrimination. The parties settled the lawsuit in 2020. The settlement agreement included a non-disparagement clause in which the parties agreed "not 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."

Just days after receiving her settlement payment, plaintiff participated in an interview with a news reporter from NBC in which she made comments about how she was abused and oppressed at work, that the Neptune Police Department does not "want women there", and that the workplace culture "has not changed" and remained a "good ol' boy system." Defendants thereafter filed a motion to enforce the settlement agreement, arguing that plaintiff's comments during the NBC interview violated the non-disparagement provision.

At the outset, the Appellate Division rejected plaintiff's argument that the non-disparagement provision violated N.J.S.A. 10:5-12.8(a) because the statute does not apply to non-disparagement clauses. The Court recognized that there is a difference between a non-disclosure provision, which is prohibited by the statute, and a non-disparagement provision. The former prohibits parties from disclosing facts pertaining to the lawsuit and/or settlement agreement whereas the latter prohibits parties from communicating anything negative about each other. The Court explained that the Legislature could have prohibited the enforcement of non-disparagement provisions, but did not, which the Court concluded was a noteworthy omission. The Court held that the "plain language of the law indicates that it was only intended to prevent employers from compelling employees to enter into agreements to conceal the details of their LAD claims."

Although the Court held that the parties' non-disparagement clause was enforceable, it ultimately found that plaintiff did not breach its terms. The non-disparagement clause specifically prohibited the parties from making "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." (Emphasis added). The Court held that plaintiff's comments that women were "oppressed," that the department did not "want women there," and that the department had "not changed," would not change, and was "the good ol' boy system," related to defendants' present and future behavior. As such, these comments fell outside the scope of the non-disparagement clause.

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If you have any questions concerning employment settlement agreements, non-disparagement clauses, or any other federal or state employment laws, please feel free to contact Vincent C. Cirilli or Sean R. Kelly of Saiber LLC's Employment and Labor Law practice.