



New Jersey Appellate Division Clarifies Use of Non-Disparagement Provisions in Law Against Discrimination Settlement Agreements

On May 31, 2022, the New Jersey Superior Court, Appellate Division, issued an opinion in the case of Savage v. Township of Neptune Township Police Department, et als., Docket No. A-1415-20, regarding the plaintiff's appeal from an order enforcing a "non-disparagement provision" in a settlement agreement which resolved an underlying employment discrimination matter involving allegations of continuing sexual discrimination, harassment and unlawful retaliation in violation of New Jersey's Law Against Discrimination ("LAD" or "NJLAD"), N.J.S.A. 10:5-1 to -50; the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 to -2; and Article I, Paragraph 6 of the New Jersey Constitution. Writing for the panel, Judge Hass, P.J.A.D., held that while the terms of the non-disparagement provision were enforceable and that the trial court properly adjudicated the matter by motion, the reversal was warranted because the plaintiff did not, in fact, violate the provision when making comments post-settlement during a televised interview. In its opinion, the Appellate Division distinguished the prohibition against including confidentiality/non-disclosure provisions in settlement agreements in LAD matters from the availability and enforceability of non-disparagement provisions.

In Savage, the Plaintiff was a former sergeant with the Township of Neptune Police Department who filed the underlying lawsuit against the defendants alleging sex discrimination, harassment, retaliation and aiding and abetting discrimination in violation of the LAD and violation of the New Jersey Civil Rights Act and State Constitution. The parties ultimately entered into a settlement agreement which included, as an express material term, a mutual non-disparagement provision. Following receipt of the settlement funds, Plaintiff sat for an interview with a television reporter in which she made multiple comments about the defendants, comments which they contended were disparaging, including but not limited to referring to them as "good ol' boys." In response, Defendants filed a motion to enforce the settlement, and the plaintiff filed a cross-motion for counsel fees and costs under N.J.S.A. 10:5-12.9, which allows a litigant to recover reasonable attorney's fees and costs against a person who attempts to enforce a provision in an employment contract waiving any substantive or procedural rights relating to a claim of discrimination, retaliation, or harassment. The trial court ultimately concluded that the plaintiff's interview statements constituted "taking shots" at the defendants but were not related to the details of her claim, that the non-disparagement provision was not barred by public policy nor unenforceable under N.J.S.A. 10:5-12.8 (which, had the Legislature intended such a result, it could have expressly included non-disparagement provisions in that statute as being banned), and accordingly granted the defendants' motion to enforce and application for damages and fees while also denying the plaintiff's cross-motion for fees. Plaintiff appealed the trial court's decision.

On appeal, the Appellate Division first held that the non-disparagement provision was not invalid under N.J.S.A. 10:5-12.8(a) nor was it against public policy, reasoning that the statute by its plain language applied to "non-disclosure provision(s)" but did not include or exempt "non-disparagement" provisions; that the Legislature could have, but did not, prohibit enforcement of non-disparagement provisions; and, that the statute's plain language and legislative history indicates that the statute was only intended to prevent employers from compelling employees to enter into agreements to conceal the details of their LAD claims – not to prohibit enforcement of non-disparagement provisions. Similarly, the Court noted that the settlement agreement expressly noted that the purpose of the non-disparagement provision was to mutually prohibit parties from making "disparage[ing]" statements about each other's "past behavior," not to "conceal" details relating to the plaintiff's claims in contravention of N.J.S.A. 10:5-12.8(a). Thus, because the Court concluded that the non-disparagement provision was enforceable, the plaintiff was not entitled to counsel fees. Second, the Appellate Division held that the defendants made the proper application to the Court for relief in the form of their motion to enforce the settlement (i.e., in aid of litigants' rights), rather than by filing a separate breach of contract action, since the settlement was incorporated into a court order and was thus enforceable under R. 1:10-3, and also since there was no need for a hearing or trial to resolve a dispute of fact since the plaintiff's televised interview comments were already viewed by the court. However, the court ruled that the trial court erred in finding that the plaintiff violated the agreement, since the plaintiff's comments (e.g., that women were "oppressed," that the department did not "want women there," that the department had not and would not change, and that it employed a "good ol' boy system") were statements about present or future behavior, not comments about past behavior prohibited under the settlement agreement's plain language. Likewise, because some of the statements were ones which were repetitions of statements made during a pre-settlement agreement interview, they could not be considered disparaging under the agreement.

The Appellate Division's opinion reflects the continuing evolution of New Jersey courts' interpretation of N.J.S.A. 10:5-12.8. While confidentiality/non-disclosure clauses are prohibited under the statute, non-disparagement provisions are not per se barred and may be enforceable depending upon their terms. The opinion also highlights the limits on the types of statements that a settling plaintiff may later lawfully make about the underlying case and/or his or her employer, i.e. the past behavior versus present or future behavior distinction. Employers should exercise caution in crafting settlement agreements in NJLAD actions, including precisely crafting the language used in

non-disparagement provisions.

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