

Employment

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New Jersey Supreme Court Unanimously Holds Non-Disparagement Agreements Cannot be Used to Circumvent the New Jersey Law Against Discrimination

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On May 7, 2024, the New Jersey Supreme Court (the Court) unanimously held that non-disparagement clauses with the purpose or effect of concealing the details of discrimination, retaliation, or harassment cannot be included in settlement agreements and violate the New Jersey Law Against Discrimination (the NJLAD).

This ruling stems from the case *Savage v. Township of Neptune* brought by Christine Savage, a former sergeant of the Neptune Police Department. Savage alleged the Neptune Police Department and specific people within the department (the Defendants) engaged in sexual discrimination, harassment, and retaliation. Savage entered into a settlement agreement that included a non-disparagement clause in which the parties agreed “not to make any statements . . . regarding the past behavior of the parties, which statements would tend to disparage or impugn the reputation of any party.”

The claim arose from Savage’s interview with NBC’s Channel 4 News, in which Savage was asked whether the Neptune Police Department has changed since her settlement. In Savage’s reply, she stated that male officers “don’t want women there,” and that the department “has not changed, not for a minute. It’s not gonna change, it’s the good ol’ boy system.” The Defendants argued that Savage’s statements in this interview constituted a breach of Savage’s non-disparagement obligations.

The Court held the non-disparagement clause unenforceable under Section 12.8 of the NJLAD, which declares any contract or clause that has the “purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment . . . against public policy and unenforceable.” The Court explained that the non-disparagement clause in Savage’s settlement agreement barred Savage from describing the Defendants’ discriminatory conduct, which is the “core of what section 12.8 protects.”

The same week, the Court also struck down a civil service regulation aimed to silence folks alleging harassment and discrimination. In *Usachenok v. State of New Jersey*, Usachenok shared with her husband details of her sexual harassment complaint while the investigation into her complaint was underway. The state regulation permitted investigators to request all interviewees “not discuss any aspect of the investigation with others, unless there is a legitimate business reason.” The Court held that the request for complete confidentiality about harassment and discrimination investigations is unconstitutional because it requests victims to waive their constitutionally protected right to free speech.

The *Savage* and *Usachenok* opinions confirm that New Jersey will not permit employers to silence victims of harassment and discrimination. Employers should ensure that settlement agreements and investigations do not prevent victims from speaking freely about their experiences or otherwise try to circumvent the NJLAD requirements.

Lowenstein Sandler's Employment group regularly counsels companies on the nuances of settlement agreements and employment investigations. Please contact Amy Komoroski Wiwi, or another Lowenstein Sandler attorney with whom you regularly work, if you have any questions about how to comply with the law.

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