# New Jersey Supreme Court Rules that Non-Disparagement Clauses Violate #MeToo Law

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In recent years, state #MeToo laws have slowly but surely chipped away at the use of confidentiality or non-disclosure clauses in settlement agreements. Employers have attempted to get "creative" and have relied more heavily on non-disparagement clauses to preserve a degree of confidentiality. However, the New Jersey Supreme Court just shut that practice down.

The decision, Christine Savage v. Township of Neptune, involved a former police officer talking about her former employer's abusive culture on television after the parties had entered into a settlement agreement. There, the Supreme Court ruled that the non-disparagement clause in Christine Savage's settlement agreement resolving sex discrimination, sexual harassment and retaliation claims against her former employer was against public policy and unenforceable under New Jersey's #MeToo statute, N.J.S.A.10:5-12.8(a). This case represents the latest in the trend of states eroding employers' use of confidentiality in settlements.

## What Were the Facts of *Savage v. Neptune*?

Christine Savage, a former police sergeant, initially sued her employer, the Neptune Township Police Department in 2013, alleging sexual harassment, sex discrimination, and retaliation. The first lawsuit settled in 2014. Savage brought another suit in 2016, alleging violation of the settlement agreement and that the harassment, discrimination, and retaliation had increased.

The parties entered another settlement in July 2020, which contained a non-disparagement provision providing that the parties agreed not to make or cause others to make any statements "regarding the past behavior of the parties" that "would tend to disparage or impugn the reputation of any party." The non-disparagement provision extended to "statements, written or verbal, including but not limited to, the news media, radio, television, . . . government offices or police departments or members of the public."

After the parties entered into the settlement agreement, Savage participated in an interview as part of a television news show covering her lawsuit. During the interview, Savage made comments such as "you abused me for about 8 years" and that the police department was run under the "good ol' boy system."

The police department filed a motion to enforce the settlement on the grounds that Savage's television interview violated the parties' non-disparagement clause. The trial court granted the motion. An appellate court reviewed and reversed, ruling that while the non-disparagement clause was enforceable, Savage did not violate it.

Then, the Supreme Court went a step further and held that the non-disparagement clause *did* violate 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."

The Supreme Court determined that whether the provision is labeled a "non-disparagement", or "non-disclosure" provision does not control the application of the statute. Rather, the relevant determination is whether the provision has the effect of concealing the details relating to a claim of discrimination, retaliation, or harassment. The Supreme Court held that Savage's non-disparagement provision had that effect, in violation of the #MeToo statute.

## What Should Employers Do Now?

New Jersey employers should pay close attention and work with counsel to carefully craft settlement agreements for employees who have asserted claims of discrimination, harassment, or retaliation. Employers may not include *any* provision that has the effect of concealing the details relating to a claim, not just non-disclosure provisions. Significantly, this decision likely applies to New Jersey-based employees, so employers located outside of New Jersey may also be affected.

Further, despite having its origins in the #MeToo movement, the decision also does not limit such restrictions to agreements settling *only* sexual harassment claims, but also places such restrictions on agreements settling discrimination and retaliation claims as well.

Other states have similar #MeToo statutes, and we recently reported on amendments to New York's law. Among other things, the amendments prohibit settlement agreements from requiring the complainant to pay liquidated damages or forfeit settlement payment for violating a non-disclosure or non-disparagement clause.

Unlike New Jersey, New York has not gone as far as to effectively ban restrictive non-disparagement provisions. It remains to be seen whether this New Jersey decision will serve as an impetus for changes in other states. Thus, all employers should work with counsel to track state laws and court decisions interpreting evolving #MeToo laws and their application to settlement agreements.

If you have questions concerning employee settlement agreements, please contact a member of Kelley Drye's Labor and Employment team.