



Dec 23, 2024

Categories:

[Discrimination](#)
[Gibbons](#)

Authors:

[Zachary B. Possess](#)
[Kelly Ann Bird](#)

Third Circuit Concludes a Job Applicant Cannot File a Discrimination Claim Under New Jersey's Cannabis Law

In a 2-1 [split decision](#) issued on December 9, 2024, the Third Circuit held that employees **do not** have a private right of action under New Jersey's Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA), marking the first time a court has analyzed the statute's employment protections since its passage nearly four years ago.

Statutory Background

In February 2021, New Jersey enacted [CREAMMA](#), a voluminous law regulating the legal manufacturing, distribution, sale, and use of cannabis throughout the state. Among the sea of statutory provisions, CREAMMA prohibits employers from taking adverse employment action against: (1) a prospective or current employee based on the use or non-use of cannabis; or (2) a current employee based solely on a positive cannabis drug test. Yet, the law does not provide an express enforcement mechanism against employers who violate these provisions. In September 2022, the Executive Director of the New Jersey Cannabis Regulatory Commission ("the Commission") issued some guidance to employers grappling with the implementation of CREAMMA's [anti-discrimination provisions](#). However, the guidance provided little in the way of practical information for employers struggling to implement CREAMMA in the workplace.

The Third Circuit's Decision in *Zanetich*

In *Zanetich v. Wal-Mart Stores E., Inc.*, No. 23-1996, 2024 U.S. App. LEXIS 31051 (3d Cir. Dec. 9, 2024), the plaintiff filed a two-count complaint in New Jersey district court against Walmart, alleging the company violated CREAMMA by rescinding his conditional offer of employment after he tested positive for cannabis. The case presented an issue of first impression – whether CREAMMA creates

a private right of action for employees. The district court concluded it did not, and granted Walmart's motion to dismiss for failure to state a claim. Erick Zanetich appealed to the Third Circuit.

The Third Circuit affirmed the district court's findings and concluded CREAMMA does not imply a remedy for job applicants who test positive for cannabis. Preliminarily, the majority noted that "New Jersey courts are 'reluctant to infer a statutory private right of action where the [New Jersey] Legislature has not expressly provided for such action.'" Further analyzing the issue under New Jersey substantive law, the court applied the three-part analysis adopted by New Jersey's Supreme Court in considering whether to create an implied cause of action: (1) whether the statute confers a special benefit on a particular class of plaintiffs; (2) whether the Legislature intended to provide a remedy, either explicitly or implicitly; and (3) whether implying a private cause of action would further the purpose of the legislative scheme.

The Third Circuit concluded all three factors weighed against implying a private right of action under CREAMMA. First, the majority noted CREAMMA's employment protections broadly apply to both users and non-users of cannabis, or current employees, but does not confer special rights on job applicants like Zanetich. Addressing the second factor, the court found there was no explicit indication that New Jersey's Legislature intended to create a private right of action for prospective employees. Rather than imply a remedy where none existed, the majority found that "the far stronger inference from the legislative silence regarding a private remedy for cannabis-related employment discrimination is that the Legislature did not intend to provide one." The panel further opined that CREAMMA provided the Commission with broad-reaching enforcement powers and therefore could institute an action on behalf of employees. Finally, the majority found that a private right of action would not advance the underlying purposes of CREAMMA. In fact, the court observed that implying a private right of action may impede the state's attempts to regulate marijuana use because "[w]ere a cause of action to exist for a failed cannabis test regardless of whether the cannabis used was legal or illegal, courts would be protecting and compensating users of illegal cannabis."

Circuit Judge Arianna J. Freeman dissented from the majority. Preliminarily, she argued that New Jersey's Supreme Court was best-suited to assess the legal question at hand, so the matter should be certified for review. Further, applying the same three-factor-analysis, Judge Freeman concluded "that the New Jersey Supreme Court **would** recognize an implied private right of action for Zanetich to enforce CREAMMA's employment protections." (Emphasis added). First, she concluded CREAMMA *does* protect a limited class of plaintiffs, *i.e.*, those who have been denied employment or otherwise suffered adverse employment action because of cannabis use or non-use. Second, Judge Freeman was persuaded by the lack of an express prohibition on private rights of action under CREAMMA, noting that the Legislature had passed a related statute during the same session as CREAMMA wherein it expressly precluded a private right of action. Judge Freeman also disagreed with the majority that the Commission was empowered to enforce CREAMMA's anti-discrimination provisions, which she argued would leave Zanetich with no alternative remedy. Third, Judge Freeman found that "CREAMMA's broad remedial purposes are served by recognizing a private right of action."

Neighboring States

Given the recent trend toward the legalization of recreational use of cannabis, New Jersey is not alone in its effort to grapple with the intersection between new regulations and employment laws. New York, for example, passed the Marijuana Regulation and Taxation Act (MRTA) in March 2021, which prohibits employers from discriminating against employees based on an employee's lawful use of cannabis outside of the workplace, with limited exceptions. Unlike CREAMMA, MRTA explicitly amends New York's Labor Law (NYLL) to provide a private right of action to employees who allege a violation of the statute's employment protections. Similarly, although Pennsylvania has not yet legalized recreational marijuana use, the state's Medical Marijuana Act provides a private right of action for employees alleging discrimination based on the legal use of medical marijuana under the Act.

Looking Forward

For now, federal courts in New Jersey will be bound by the decision in Zanetich that CREAMMA does not provide a cause of action for wronged employees. However, New Jersey's state courts have yet to weigh in on this novel question of statutory interpretation. Further, because the Zanetich decision is not binding on a proceeding in New Jersey state court, it is entirely plausible that a state judge will disagree with the Zanetich majority and instead adopt Judge Freeman's reasoning. Further, given New Jersey's tendency to provide the broadest legal protections available to employees, employers should be wary that a state court may still imply a private right of action under CREAMMA.

© 2026 FBT Gibbons LLP. May be considered attorney advertising in some jurisdictions.