

New Jersey Cannabis Law Does Not Imply a Private Right of Action for Job Applicants Who are Denied Employment Due to Cannabis Use

Article By:

Scott I. Unger

On December 9, 2024, the United District Court of Appeals for the Third Circuit issued an important decision whether New Jersey’s Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (“CREAMMA”) provides a private right of action for a job applicant who was denied employment because he failed a pre-employment drug test. The Court in Zanetich v. Wal-Mart Stores, Inc., 2024 U.S. App. LEXIS 31051 (3rd Cir. 2024), held it does not.

In 2021, as part of its efforts to legalize and regulate marijuana use “in a similar fashion to the regulation of alcohol for adults,” New Jersey enacted CREAMMA. One of the provisions of CREAMMA prohibits employers from refusing to hire a job applicant for the use of cannabis. See N.J. Stat. § 24:6I-52(a)(1). CREAMMA, however, does not expressly provide a private remedy for redressing employment discrimination against cannabis users.

The facts of the case are simple and straightforward. The employee, Erick Zanetich applied for a position at a New Jersey Wal-Mart facility. He was offered the job, subject to passing a drug test. Wal-Mart rescinded its job offered after Mr. Zanetich tested positive for cannabis. He commenced litigation against Wal-Mart asserting the CREAMMA implies a private remedy for violations of its employment protections and that the recession of his job offer constituted illegal discrimination against public policy. The trial court granted Wal-Mart’s pre-answer motion to dismiss holding that neither presented a legally viable claim. Mr. Zanetich appealed the trial court’s dismissal of his claim. The United States Court of Appeals for the Third Circuit affirmed the trial court’s dismissal.

The Third Circuit Court of Appeals held that CREAMMA does not imply a private right of action because:

- the employment protection in that statute does not confer a special benefit on a particular class;
- the Court found that there was no evidence of legislative intent to create a private cause of action; and
- implying a private cause of action is inconsistent with the express language of the statute.

The Court also affirmed the dismissal of Plaintiff’s claims that the recession of his employment based

on the positive drug test violated public policy. In doing so, the United States District Court for the Third Circuit, held that the public policy exception to at-will employment does not apply to failure to hire because New Jersey Court have only applied it to wrongful termination claims by employees. The Court reasoned to hold that a job applicant was entitled to the same exception as employees would requirement rebalancing interests in a way unlikely to be adopted by New Jersey Courts.

In addition, the Court decided not to certify the legal question presented to the New Jersey Supreme Court pursuant to R. 2:12A-1 (permitting the New Jersey Supreme Court to accept certified questions from the United States District Court for the Third Circuit). In doing so, most of the Judges considering the Appeal found that the questions presented in the appeal were highly uncertain. Rather, the Third Circuit Court of Appeals held that New Jersey unequivocally uses a modified Cort v. Ash, 422 U.S. 66 (1977), in determining if a statute private a private cause of action. The Cort test considers the following four factors: (1) whether the plaintiff is one of the class for whose especial benefit the statute was enacted; (2) whether there is any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one; (3) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff; and (4) whether the cause of action has been traditionally relegated to state law, in an areas basically the concern of States, so that it would be inappropriate to infer a cause of action solely based on federal law. Because the New Jersey Supreme Court adopted the Cort test, the Third Circuit held that the law was settled. Likewise, the Third Circuit held that New Jersey state courts have not indicated any willingness to extend the Pierce exception to failure-to-hire claims by job applicants. See, Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 71 (1980) (holding that the public policy exception to at-will employment only protects employees, not job applicants, therefore, it does not encompass claims for failure to hire in violation of public policy).

The Appellate Court's decision was not unanimous. Judge Freeman issued a dissenting decision recommending that the issue be presented to the New Jersey Supreme Court for adjudication there. Although, the Plaintiff could conceivably try to appeal the decision to the United States Supreme Court, the odds of the Highest Court in the land granting certiorari and reversing the Third Circuit's decision is a long shot.

At least for now, employers may rescind employment offers if a job applicant fails a pre-employment drug test.

COPYRIGHT © 2025, STARK & STARK

National Law Review, Volume XIV, Number 345

Source URL: <https://natlawreview.com/article/new-jersey-cannabis-law-does-not-imply-private-right-action-job-applicants-who-are>