

# Parsing 3rd Circ. Ruling On Cannabis, Employee Private Suits

By **Joshua Bauchner and Natalie Diaz** (February 3, 2025)

In a significant ruling in *Zanetich v. Wal-Mart Stores East Inc.* on Dec. 9, the U.S. Court of Appeals for the Third Circuit upheld a May 24, 2023, decision in the U.S. District Court for the District of New Jersey that individuals do not have a private right of action for alleged violations of New Jersey's Cannabis Regulatory, Enforcement Assistance and Marketplace Modernization Act, or CREAMMA.

The case is crucial for both employers and employees in the state, as it clarifies who holds the authority to enforce the law and whether employees have legal recourse for employment-related cannabis issues.

The case involved a New Jersey job applicant, Erick Zanetich, whose job offer was rescinded after a positive drug test for cannabis. Zanetich filed suit against his prospective employer, Walmart, claiming that the company violated CREAMMA and common law protections against adverse employment decisions arising from lawful cannabis use.

However, both the District of New Jersey and the Third Circuit disagreed. The courts emphasized that CREAMMA does not provide a private right of action, meaning individuals cannot directly sue employers for alleged violations. Instead, the enforcement of the statute falls under the exclusive authority of the New Jersey Cannabis Regulatory Commission.

## What This Means for CREAMMA

CREAMMA, enacted in 2021, legalized and regulated adult cannabis use in New Jersey. Under CREAMMA, employers may not refuse to hire, terminate or take adverse action against an employee regarding compensation, terms, conditions or privileges of employment solely because the employee uses cannabis or has cannabinoid metabolites in their bodily fluids from lawful use.[2]

However, employers may require drug testing based on a reasonable suspicion of cannabis use during work, observable signs of intoxication or a work-related accident under investigation.[3] Employers also retain the right to maintain a drug- and alcohol-free workplace, and CREAMMA does not preempt any obligations related to this.[4]

While the law offers significant protections, including for prospective employees, the courts in this case clarified that CREAMMA does not grant individuals the right to file lawsuits when those protections are violated.

## The Third Circuit's Application of the Law

The Third Circuit's decision in *Zanetich* emphasizes an important aspect of CREAMMA: The enforcement of its employment protections is limited to the New Jersey Cannabis Regulatory Commission, which holds the exclusive authority to investigate complaints and impose penalties.



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By affirming this, the Third Circuit's decision prevents private lawsuits seeking to resolve disputes related to cannabis use in the workplace, and places the responsibility for enforcement within the state's regulatory framework. However, to date, we don't believe that the New Jersey Cannabis Regulatory Commission has ever undertaken an enforcement action pursuant to its authority, nor does it have the resources to do so.

In its decision, the Third Circuit relied on the four-prong test in the 1975 U.S. Supreme Court case *Cort v. Ash*, a well-established framework for determining whether a statute provides an implied private right of action.

According to this test, a private right of action only can be implied from a statute based on the following factors:

- Whether the plaintiff is "one of the class for whose especial benefit the statute was enacted";
- Whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one";
- Whether it is "consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff"; and
- Whether the cause of action has been "traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law."

In this case, the court determined that (1) CREAMMA does not provide special benefits to job applicants who fail cannabis drug tests; (2) there is no legislative intent to imply a remedy for job applicants who fail cannabis drug tests; and (3) implying such a remedy would be inconsistent with CREAMMA's stated purposes.

Ordinarily, after assessing the Cort factors individually, they are weighed against one another to determine whether a private remedy can be implied from a statutory right. However, the court did not balance the Cort factors in this case, as each factor individually argued against implying a private remedy. Ultimately, while CREAMMA protects both cannabis users and nonusers from employment discrimination, the statute does not explicitly or implicitly create a private right of action.

Additionally, the second count of the suit brought by Zanetich was based on New Jersey's common law public policy exception to at-will employment, as recognized in *Pierce v. Ortho Pharmaceutical Corp.* in 1979, in the Superior Court of New Jersey, Appellate Division.[6] The Pierce doctrine allows an at-will employee to bring a claim for wrongful termination if the termination violates a clear mandate of public policy.

However, the Third Circuit affirmed the district court's dismissal of this count, concluding that the doctrine does not extend to failure-to-hire claims for prospective employees.

The court explained that *Pierce* applies exclusively to employees or former employees, focusing on claims for wrongful discharge or related adverse employment actions. The court emphasized that the primary rationale for *Pierce*, which balances the interests of the employee, employer and the public, is rooted in protecting employment stability, a factor that is not relevant in failure-to-hire situations.

In its rationale, the court relied on *Sabatino v. Saint Aloysius Parish* in 1996, which explicitly held that *Pierce* does not apply to failure-to-hire claims, and *Lerner v. City of Jersey City* in 2019, both cases in the Superior Court of New Jersey, Appellate Division, which reaffirmed that failure-to-hire claims are not cognizable under the *Pierce* framework.[7][8]

Additionally, the court noted that *Pierce* claims are rooted in common law and apply to the traditional employer-employee relationship. Independent contractors and prospective employees lack the employment stability interest that *Pierce* seeks to protect. Extending the doctrine to job applicants would require the New Jersey Supreme Court to reevaluate the balancing of interests that underpins *Pierce*, a step the Third Circuit found unlikely given the state's current jurisprudence.

The Third Circuit's decision in *Zanetich* highlights an important limitation within CREAMMA: the absence of a private right of action for employees, including prospective employees, who believe they have been wronged due to cannabis-related employment discrimination. This decision places enforcement solely in the hands of the New Jersey Cannabis Regulatory Commission, reinforcing the regulatory nature of the statute and reducing the potential for private lawsuits. Employers and employees must continue to navigate this evolving legal landscape, with an eye on future legislative changes that could further clarify the enforcement of CREAMMA's protections.

## **Effect on Employers**

For employers in New Jersey, the Third Circuit's decision reinforces the fact that while they must still comply with CREAMMA, the enforcement of the statute rests entirely with the New Jersey Cannabis Regulatory Commission. Employers are still prohibited from firing, refusing to hire or discriminating against individuals based solely on cannabis use or a positive drug test result, but they need not worry about lawsuits being filed by employees or applicants for alleged violations of these provisions.

However, this decision also highlights the importance of maintaining clear and compliant drug use policies. Employers should ensure that their policies are in line with CREAMMA's provisions and reflect the understanding that enforcement is now in the hands of the New Jersey Cannabis Regulatory Commission.

Additionally, New Jersey requires every employer in the state to have a trained Workplace Impairment Recognition Evaluator to assess workplace impairment to support any adverse employment action — although, the state has yet to create a WIRE certification program.

## **What's Next?**

While this decision provides clarity for employers and employees, the Third Circuit encouraged the New Jersey Legislature to amend CREAMMA to provide a private right of action or to clarify enforcement mechanisms. This means that, in the future, the statute

could be updated to allow individuals to pursue lawsuits or further define the scope of enforcement.

Until then, employers should continue to stay informed about any potential changes to the law and ensure they are adhering to CREAMMA's employment protections. Additionally, job applicants and employees should be aware that their recourse for employment-related cannabis issues will be through the New Jersey Cannabis Regulatory Commission, not the courts.

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[1] *Zanetich v. Wal-Mart Stores East Inc., et al.*, Case No. 23-1996, 2024 (3d Cir. Dec. 9, 2024).

[2] N.J. Stat. Ann. § 24:6I-52(a)(1).

[3] *Id.*

[4] *Id.* § 24:6I-52(b)(1)(a).

[5] *Cort v. Ash*, 422 U.S. 66 (1975).

[6] *Pierce v. Ortho Pharmaceutical Corp.*, 166 N.J. Super. 335 (App. Div. 1979).

[7] *Sabatino v. Saint Aloysius Parish*, 288 N.J. Super. 233 (App. Div. 1996).

[8] *Lerner v. City of Jersey City*, 2019 WL 1468735 (N.J. Super. Ct. Apr. 2, 2019).