Class Action Lawsuit Goes Up In Smoke: District Court Decides CREAMMA Does Not Create A Private Right Of Action For Employees

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In a matter of first impression, New Jersey's Federal District Court determined that CREAMMA does not provide an explicit or implied private right for employees to seek enforcement of its employment protections for cannabis users. It also clarified that current jurisprudence does not recognize a failure to hire claim under New Jersey common law.

A recent decision by New Jersey's Federal District Court dealt a blow to aggrieved workers seeking to enforce the employment discrimination protections for cannabis users established in the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act ("CREAMMA"). Pursuant to N.J.S.A. §24:6I-52a(1), an employer cannot take adverse employment action against an employee based solely upon a drug test returning a positive cannabis result. In *Zanetich v. Walmart*, the District Court considered a class action lawsuit brought by a group of plaintiffs alleging that Walmart and its subsidiary Sam's Club violated this provision of CREAMMA by refusing to hire applicants who tested positive for marijuana. Lead plaintiff Erick Zanetich claimed that he was set to have a job in Walmart's Asset Protection Department before the company revoked his offer of employment after his drug test came back positive for marijuana. The lawsuit sought to represent all New Jersey residents who were either fired, or whose job offers were revoked, by the companies due to positive marijuana drug test results since February 2021 (when CREAMMA's employment protections became law).

Walmart and Sam's Club removed the matter from Gloucester County Court to Federal District Court where they then filed a motion to dismiss the lawsuit, arguing that CREAMMA's statutory framework does not contain an explicit, private right of action by which citizens can bring civil lawsuits to enforce its employment provisions. The companies further argued that the statutory language of CREAMMA did not evince any clear legislative intent to create an implied private cause of action to do so, because the statute actually provides for the Cannabis Regulatory Commission, instead of private individual lawsuits, to enforce it.

The District Court agreed with the companies, granted their motion, and dismissed the lawsuit, opining that CREAMMA contained neither an express nor implied private right of action for enforcement by way of individuals' lawsuits. In a particularly scathing decision, the District Court appeared to characterize CREAMMA as "incomplete legislation" and stated that it could not "re-write" CREAMMA to "create remedies for a statutory violation where the Legislature did not." Acknowledging that its decision leaves employees "without a remedy and essentially renders the language of the employment provision meaningless" the District Court tasked the Legislature, Cannabis Regulatory Commission, or New

Jersey Supreme Court with taking action to ensure that CREAMMA's protections from adverse employment action against recreational cannabis users not be rendered "illusory."

In addition to the alleged statutory violation of CREAMMA, the lawsuit alleged that the companies violated New Jersey common law with a claim stylized as "failure to hire/wrongful discharge." The District Court seized on the fact that Zanetich himself received only a conditional offer of employment which was later rescinded in reasoning that, because he never actually was employed by Walmart, he could only have a failure to hire claim, not a wrongful discharge claim. As the District Court further explained, New Jersey's courts have long declined to recognize a common law cause of action for failure to hire under the precedent established by *Pierce v. Ortho Pharmaceutical Corporation*, 84 N.J. 58 (1980), which established a common law claim for wrongful termination. Importantly, however, this does *not* mean that an employee or prospective employee cannot bring a failure to hire claim based on *another* legal theory, such as discrimination, or that employees cannot bring claims based on other types of adverse employment action, such as wrongful termination.

The District Court's decision has been appealed to the Third Circuit. The New Jersey Supreme Court accepts certified questions of state law from the Third Circuit, meaning that either or both of these aspects of the *Zanetich* decision could change as the matter works its way up through the appellate courts.

Takeaways

In declaring that there is no private right of action to be found either expressly or impliedly within CREAMMA, and that individuals cannot sustain a failure to hire claim under New Jersey common law, the *Zanetich* decision presents a clear call to action for New Jersey's Legislature and state courts to address CREAMMA's intended employment protections. At present no New Jersey state court has expanded *Pierce* to include failure to hire claims, and the Legislature has yet to amend CREAMMA to create a private enforcement mechanism for individuals. As a result, unless and until the Third Circuit (and perhaps eventually New Jersey Supreme Court) overturns this decision, employees are left without remedy (under CREAMMA, specifically) to pursue any adverse employment action-based lawsuits, including failure to hire claims. But again, that does not foreclose the possibility that a current or prospective employee can bring a claim based on some other legal theory or different type of adverse employment action. As such, New Jersey employers who have a drug and alcohol-free workplace policy, or wish to establish a drug and alcohol-free workplace, should consider taking the following measures to ensure they are protected to the fullest extent possible in light of the current state of the law:

- Assess whether they wish to continue or begin to have a drug-free workplace and either implement new or modify existing drug testing practices;
- Determine whether their current policy regarding pre-employment drug testing, if any, should be amended in any way;
- Review and update drug and alcohol policies;
- Monitor the Legislature's and courts' response to the District Court's decision;
- Recognize that employees and/or prospective employees may still be able to bring failure to hire claims based on other legal theories, or bring claims based on other types of adverse employment action, such as wrongful termination;
- Consult with experienced employment counsel if faced with a lawsuit by a similarly-situated employee who alleges an adverse employment action violation of CREAMMA, or claims that there was a violation of New Jersey common law in failing to hire the employee.

It remains to be seen whether the New Jersey Legislature opens up CREAMMA up for amendment in response to the District Court's blunt criticisms of CREAMMA's perceived shortcomings to clarify that it indeed intended for a private right of action to enforce the statutory employment protections through private lawsuits. Given the pending appeal before the

Third Circuit, the District Court's decision in *Zanetich* assuredly is not the last word on the matter of failure to hire claims post-CREAMMA. As such, New Jersey employers should work with experienced employment counsel to determine how best to proceed while the contours of these types of claims continue to develop as they work their way through the courts.

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