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IS THERE A PRIVATE RIGHT OF ACTION FOR DISCRIMINATION AGAINST CANNABIS USERS IN NEW JERSEY? A FEDERAL COURT SAYS NO.

New Jersey's Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA) makes it unlawful for an employer to discriminate against employees because they do or do not use lawful cannabis products. This includes the refusal to hire an applicant because the applicant does or does not use lawful cannabis products. In addition, an employee cannot be subject to any adverse action by an employer solely due to the presence of cannabinoid metabolites in the employee's bodily fluid. But does this statute entitle an employee to sue an employer for an alleged violation of these rights? In *Zanetich v. Wal-Mart Stores East, Inc.*, decided by the United States District Court for the District of New Jersey on May 25, 2023, the answer was "no."

The case involved an individual who had applied for a job in Walmart's Asset Protection Department. Walmart had offered the applicant a job "subject to him submitting to and passing a drug test." Walmart rescinded the offer after the employee tested positive for marijuana. The employee brought suit on his own behalf, and on behalf of others similarly situated, alleging that the rescission of his job offer violated the antidiscrimination provisions of CREAMMA. Walmart filed a motion to dismiss the CREAMMA claim, arguing that CREAMMA did not create a private cause of action for

individual employees or applicants. In a case of first impression, the Federal District Court for the District of New Jersey agreed.

The Court noted that the “express language of CREAMMA is less than helpful.” Although the statute specifically prohibits employers from taking certain adverse actions on the basis of an individual’s use of cannabis, the New Jersey Legislature “did not state how the provision could be enforced, by whom, and what, if any, remedies would be available.” CREAMMA designated the Cannabis Regulatory Commission (CRC) as the body with the “power to regulate, investigate, and prosecute all violations of the [CREAMMA].” But no provision was made for private lawsuits by individuals.

The Court assumed that individuals like the plaintiff were “within the class for whose special benefit CREAMMA was enacted as it includes individuals who recreationally use [cannabis].” However, the Court found no evidence that the Legislature intended to create a private cause of action on behalf of such individuals. “[There] is evidence that the Legislature intended for the CRC to handle all aspects of the enforcement of the statute.”

Further, “the lack of any provision in CREAMMA as to how the employment provision can be enforced, and by whom, and what remedies, if any, are available, in and of itself, negates the argument that the Legislature intended for an individual to bring a private cause of action under CREAMMA.” In contrast, “other employment statutes adopted by the New Jersey [L]egislature ... explicitly provide for a private cause of action,” as well as for remedies available in such private causes of action. “As evidenced in these employment statutes, the Legislature knows how to create a private cause of action in the employment context and will expressly do so to show its intent.” The Court found “simply no indication that the Legislature intended to allow an individual to pursue a private cause of action for a violation of CREAMMA.” The Court concluded that it would not be “consistent with the underlying purposes of the legislative scheme to infer the existence” of a private right of action. As a result, the plaintiff’s CREAMMA claim was dismissed.

This is a federal court decision and it is not binding on New Jersey courts, which may very well interpret CREAMMA differently. Nonetheless, it is a significant decision, and clearly illustrates significant gaps in the employment provisions of the CREAMMA. Indeed, the Court was remarkably candid in its criticisms of how CREAMMA was drafted. The Court noted at one point that it was “questionable” whether individual cannabis users truly were members of a class for whose special benefit CREAMMA was enacted, characterizing the statute as reading “like a licensing statute aimed at distributors, but with an employment provision shoehorned therein.” The Court suggested it was “questionable” whether the CRC’s jurisdiction “even extends to employers given the description of its jurisdiction as extending to ‘any person who buys, sells, cultivates, produces, manufactures, transports or delivers any cannabis items within the State.’” The Court closed its opinion with this pointed observation:

The Court recognizes that its decision leaves plaintiff without a remedy and essentially renders the language of the

employment provision meaningless. Yet, that is the outcome dictated by the law. It is not the function of the Court to rewrite incomplete legislation or create remedies for a statutory violation where the Legislature did not. If the State expects the statutory scheme to work and for these stated protections from adverse employment action not to be illusory, the Legislature, CRC, or the Supreme Court of New Jersey must act. If the Legislature intended for there to be a private cause of action, it should amend the statute to clearly evidence that intent... If a Legislature intended for the CRC to enforce the employment provision, then the CRC should duly adopt regulations to exercise that power and provide much-needed guidance to employers and employees.

It remains to be seen whether the Legislature or the CRC will take up the Court's invitation.

Thus, the first court to address the issue has determined that individual employees cannot sue to enforce the employment provisions of CREAMMA. It remains to be seen whether New Jersey courts will follow suit and agree that CREAMMA as currently drafted "essentially renders the language of the employment provision meaningless."

NOTE: The plaintiff in *Zanetich* filed an appeal from the dismissal of his complaint with the United States Third Circuit Court of Appeals on May 30, 2023. One can expect a decision from the Third Circuit in approximately eight months to one year from that date.

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