



# A Right Without a Remedy?

## The Uncertain Enforcement of CREAMMA's Employment Provisions



**RUTH A. RAULS** is a partner and chair of the labor and employment practice group at Saul Ewing, LLP, in the firm's Princeton office. Ruth also serves as a member of the New Jersey State Bar Association Cannabis and Psychedelic Law Committee.



**TIMOTHY D. INTELISANO** is a litigation associate at Saul Ewing, LLP, in the firm's Washington D.C. office

By Ruth A. Rauls and Timothy D. Intelisano

In 2021, New Jersey Gov. Phil Murphy signed into law the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA).<sup>1</sup> CREAMMA created a statewide Cannabis Regulatory Commission (the "commission"), tasked with enforcement and oversight over the state's cannabis industry.<sup>2</sup> Included in CREAMMA were provisions that included rights and obligations for New Jersey workers and employers, as well as a unique drug testing scheme.<sup>3</sup> Despite the presence of these provisions, it is still unclear how and by whom they can be enforced. Below we discuss recent litigation developments regarding the enforcement of the employment related provisions in CREAMMA, as well as the current state of the Workplace Impairment Recognition Expert (WIRE).

### Employment Related Provisions in CREAMMA

CREAMMA includes important employment provisions, which are meant to provide protections for cannabis users who aim to work in New Jersey. As an initial matter, CREAMMA provides that employers may not refuse to hire, nor can they fire or take any adverse action against an employee, "because that person *does or does not* smoke, vape, aerosolize or otherwise use cannabis items, and an employee shall not be subject to any adverse action by an employer solely due to the presence of cannabinoid metabolites in the employee's bodily fluid...."<sup>4</sup> However, upon a finding of rea-

sonable suspicion that an employee's cannabis use is interfering or coinciding with the performance of their job duties, an employer may require an employee to undergo drug testing.<sup>5</sup> The statute also provides that the commission, in consultation with the Police Training Commission, shall develop standards by which a WIRE can detect or identify when an employee is impaired on the job as a result of cannabis use.<sup>6</sup> Notably, in the commission's Personal Cannabis Use Rules, the commission provided that "until such time that the commission, in consultation with the Police Training Commission...develops standards for a Workplace Impairment Recognition Expert certification, no physical evaluation of an employee being drug tested... shall be required."<sup>7</sup> To date, the commission has not promulgated WIRE certification standards. Finally, CREAMMA empowers the commission with the requisite powers to enforce the statutory scheme, including enforcement of the employment related provisions.<sup>8</sup>

### The Federal Court's Application of the Employment Provisions in CREAMMA

In January 2022, following CREAMMA's enactment, Erik Zanetich applied for a job in the Asset Protection Department at Walmart.<sup>9</sup> Walmart offered Zanetich a job, on the condition that he pass a drug test.<sup>10</sup> At the time, Walmart had a policy which informed applicants that, upon a showing of cannabis in their system, any job offer could be rescinded.<sup>11</sup> After learning that Zanetich tested positive for cannabis, Walmart withdrew his employment offer.<sup>12</sup> Zanetich filed suit, alleging, among other things, that Walmart's decision to rescind his offer based on a positive cannabis test ran afoul of CREAMMA.<sup>13</sup> Walmart moved to dismiss Zanetich's claims, in part on the grounds that CREAMMA did not provide private individuals with a cause of action to enforce its employment provisions.<sup>14</sup>

In May 2023, Judge Christine O'Hearn

of the United States District Court for the District of New Jersey granted Walmart's motion to dismiss. In so granting, the Court noted that the New Jersey Legislature did not explicitly create a private cause of action for people alleging CREAMMA violations, nor did an implied cause of action exist under the statute.<sup>15</sup> To the contrary, the Legislature explicitly endowed one entity with CREAMMA enforcement powers: the commission.<sup>16</sup> CREAMMA explicitly states that "[t]he Cannabis Regulatory Commission shall have *all* powers necessary or proper to enable it to carry out the commission's duties, functions, and powers," and more specifically, the commission has the power "[t]o investigate and aid in the prosecution of every violation of the statutory laws of this State relating to cannabis and cannabis items."<sup>17</sup>

In her decision, Judge O'Hearn acknowledged that, when the Legislature does not explicitly create a private cause of action to permit private citizens to enforce their rights under a given statute, courts may find that an implied cause of action exists.<sup>18</sup> In determining whether CREAMMA contained an implied cause of action, the District Court undertook a three step analysis, relying on factors first articulated by the United States Supreme Court in *Cort v. Ash*, 422 U.S. 66 (1975) (the "*Cort* factors"), and later adopted by the New Jersey Supreme Court.<sup>19</sup>

The first *Cort* factor asks "whether Plaintiff is a member of the class for whose special benefit the statute was enacted."<sup>20</sup> Judge O'Hearn determined that Zanetich was a member of the class for whom CREAMMA was enacted, noting that the Legislature wanted to protect recreational cannabis users, particularly those facing adverse employment actions as a result of their cannabis use.<sup>21</sup> The first *Cort* factor, according to the Court, weighed in favor of finding an implied cause of action.<sup>22</sup>

The second *Cort* factor looks at the Legislature's intent.<sup>23</sup> The District Court found that the Legislature intended for

the commission to handle all aspects of CREAMMA's enforcement, because they explicitly declined to provide a private right of action.<sup>24</sup> To that end, the second factor weighed against the finding of an implied cause of action. Finally, the third *Cort* factor "requires a finding that it is consistent with the underlying purposes of the legislative scheme to infer the existence of such a remedy."<sup>25</sup> The District Court found that, in light of the substantial powers given to the commission, this third factor also weighed against the finding of an implied cause of action.<sup>26</sup> As noted above, Judge O'Hearn accordingly granted Walmart's motion to dismiss Zanetich's CREAMMA claim.<sup>27</sup>

### The Third Circuit Weighs In

Zanetich appealed the District Court's granting of Walmart's motion to dismiss. This past December, the United States Court of Appeals for the Third Circuit weighed in, affirming Judge O'Hearn's holding that there is no implied private cause of action under CREAMMA.<sup>28</sup>

The Third Circuit's analysis differed from the District Court's in a few ways. As an initial matter, Judge Peter J. Phipps, writing for the majority, disagreed with the District Court's holding as to the first *Cort* factor. The majority held that Zanetich was not a member of a class who the Legislature intended to benefit in enacting CREAMMA, because the Legislature explicitly prohibited "adverse employment actions because a person '*does or does not* smoke, vape, aerosolize or otherwise use cannabis items.'"<sup>29</sup> In other words, the Legislature prohibited an employer from taking an adverse employment action whether the employee was or was not a cannabis user. In the majority's eyes, this meant that CREAMMA was not enacted solely to benefit cannabis users, and thus the first *Cort* factor weighed against the finding of an implied cause of action.<sup>30</sup>

On the second *Cort* factor, the majority determined that the Legislature's

silence on the availability of a private remedy is indicative of the fact that they did not want such a remedy to exist. After all, the Legislature, in countless other statutes, namely those related to employment discrimination, explicitly created private causes of action.<sup>31</sup> To that end, the majority reasoned, if they wanted to do so here, they would have. Further, the majority observed that CREAMMA's factual findings largely deal with public health and law enforcement concerns, not the ability of people to enforce their own CREAMMA rights.<sup>32</sup> The majority determined that the second *Cort* factor likewise weighed against the finding of an implied cause of action. Finally, as to the third *Cort* factor, the majority looked at CREAMMA's purposes and determined that they weighed against the finding of an implied cause of action as well.<sup>33</sup> A private right of action, in the eyes of the majority, is entirely unrelated to goals such as preventing people under the age of 21 from purchasing or consuming cannabis, or regulating cannabis akin to alcohol.<sup>34</sup> The Third Circuit ultimately found that all three of the *Cort* factors weighed against the finding of an implied cause of action.

Judge Arianna J. Freeman, a member of the *Zanetich* panel, wrote a partial concurrence and partial dissent. Notably, Judge Freeman agreed with Judge O'Hearn as to the first *Cort* factor, writing that she believed that the Legislature intended to benefit individuals who faced adverse employment actions because of cannabis use or non-use.<sup>35</sup> On the second *Cort* factor, looking at legislative intent, Judge Freeman observed that, in the case of the Prior Marijuana Prosecution Law (which was enacted the same day as CREAMMA), the Legislature specifically included a provision foreclosing the existence of a private cause of action.<sup>36</sup> In Judge Freeman's opinion, the Legislature's choice not to include such a provision in CREAMMA demonstrates that it did not intend to foreclose a pri-

vate cause of action to enforce the statute.<sup>37</sup> Finally, Judge Freeman looked at CREAMMA's broad remedial purposes and held that the third *Cort* factor likewise supports finding an implied cause of action.<sup>38</sup> In balancing the *Cort* factors, Judge Freeman would have found the existence of an implied cause of action under CREAMMA.<sup>39</sup>

To date, no state court ruling has contradicted the panel's decision, nor has any other member of the Third Circuit shown an inclination to adopt Judge Freeman's view on this question. In fact, following his loss before the Third Circuit panel, Zanetich petitioned for the Third Circuit panel to rehear the case, and in the alternative, asked the Third Circuit to take his case en banc. The panel (and prospective en banc panel) denied the petition outright.

Zanetich also asked the Third Circuit to certify the question of whether CREAMMA contained an implied private right of action to the New Jersey Supreme Court.<sup>40</sup> The majority declined his invitation, noting that the application of the *Cort* factors was straightforward.<sup>41</sup> The majority also found that the question of whether a private right of action exists for CREAMMA claims is not particularly important or "transcendental."<sup>42</sup> As it stands, private individuals, according to the Federal Court, are currently without a mechanism to enforce their CREAMMA rights.

### **Lingering Questions: Cannabis Drug Testing and the WIRE**

One key feature of CREAMMA is the establishment of a WIRE. Unlike alcohol, there is not currently an acute intoxication test for cannabis, meaning that presence does not necessarily equal impairment when it comes to cannabis. That is where the WIRE comes in. According to CREAMMA, a WIRE should be a full- or part-time employee of a company, tasked with recognizing when employee cannabis use will impair someone's ability to safely perform their job duties.<sup>43</sup> The

Legislature tasked the commission with prescribing standards for the WIRE, namely the educational/training process, as well as the standards which will be used to certify each WIRE.<sup>44</sup>

While the commission has not promulgated any such regulations, in the fall of 2022, the commission did issue temporary guidance, meant to give employers guardrails for ensuring safe workplaces, free from individuals who may be impaired by cannabis. The commission provided that employers could designate temporary/interim employees, who could fill out a Reasonable Suspicion Observation Report if they felt that an employee was under the influence of cannabis while on the job.<sup>45</sup> Companies may also hire third-party contractors to conduct this monitoring.<sup>46</sup> The commission also prescribed the use of a standard Reasonable Suspicion Observation Report, while noting that employers could use, among other things, a cognitive impairment test, to ensure that their employees were capable of carrying forth their job duties.<sup>47</sup>

### **Conclusion**

CREAMMA, in premise but not practice, is a sweeping piece of legislation regarding employment issues pertaining to cannabis use and impairment. However, the Third Circuit has made clear that there is no private cause of action available to New Jersey employees who face adverse employment actions resulting from cannabis use. Without any state court authorities to the contrary, this appears to be, for now, the last word on the question. Obviously, it is possible either that a state court hears a CREAMMA claim and comes to the opposite conclusion, or the Legislature steps in to resolve the question definitively themselves. The likelihood of those events is uncertain.

Additionally, until the commission puts together the pieces of the regulatory puzzle, insofar as they publish definitive regulations pertaining to the WIRE, New

Jersey employers remain in limbo. To that end, the full scope, impact, and potential of CREAMMA's employment provisions, remain unclear. ■

## Endnotes

1. New Jersey Cannabis Regulatory Commission, CREAMM Act, nj.gov/cannabis/resources/cannabis-laws/CREAMM-Act.shtml.
2. N.J.S.A. § 24:6I-34.
3. N.J.S.A. § 24:6I-52 (a)(1).
4. *Id.* (emphasis added).
5. *Id.*
6. N.J.S.A. § 24:6I-52 (2)(a).
7. N.J. Admin. Code § 17:30-2.3(e).
8. N.J.S.A. § 24:6I-34.
9. *Zanetich v. Wal-Mart Stores E., Inc.*, No. 22-cv-05387, 2023 WL 3644813 at \*1 (D.N.J. May 25, 2023).
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at \*2.
15. *Id.*
16. *Id.* at \*3.
17. N.J.S.A. § 24:6I-34 (a), (b)(3) (emphasis added).
18. *Zanetich*, 2023 WL 3644813 at \*4.
19. *Id.* (citing *Matter of State Comm'n of Investigation*, 527 A.2d 851, 854 (N.J. 1987)).
20. *Zanetich*, 2023 WL 3644813 at \*4.
21. *Id.* at 5.
22. *Id.*
23. *Id.* at \*5-6.
24. *Id.* at \*6.
25. *Id.* at \*9.
26. *Id.*
27. *Id.*
28. *Zanetich v. Wal-Mart Stores E., Inc.*, 123 F.4th 128, 134 (3d Cir. 2024)
29. *Id.* at 142 (citing N.J.S.A. § 24:6I-52 (a)(1) (emphasis added)).
30. *Zanetich*, 123 F.4th at 142.
31. *Id.* at 144.
32. *Id.* 143-44.
33. *Id.* at 145.
34. *Id.*
35. *Id.* at 154 (Freeman, J., concurring in part and dissenting in part).
36. *Id.* at 155.
37. *Id.* at 157.
38. *Id.*
39. *Id.* at 158.
40. *Id.* at 149 (Phipps, J., Opinion of the Court).
41. *Id.* at 149-50.
42. *Id.* at 150.
43. N.J.S.A. § 24:6I-52 (2)(a).
44. *Id.*
45. New Jersey Cannabis Regulatory Commission, On "Workplace Impairment," nj.gov/cannabis/documents/businesses/Business%20Resources/Workplace%20Impairment%20Guidance%20922.pdf.
46. *Id.*
47. *Id.*

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