

New Jersey Appellate Division Rules Employees and Job Applicants Can Sue Employers Under CREAMMA for Cannabis-Related Hiring Discrimination

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Last month, the New Jersey Appellate Division held that individuals have an implied private right of action against employers under the Cannabis Regulatory, Enforcement Assistance, and Market Modernization Act (“CREAMMA”) when an employer refuses to hire or takes adverse employment action based on a positive test for cannabinoid metabolites. The case, Sanders v. The Levari Group, LLC, is the first New Jersey state court decision to address the question, and it carries significant implications for New Jersey employers that maintain pre-employment drug testing programs or condition offers of employment on drug screening results.

Case Facts and Superior Court Decision

The case concerns a plaintiff who interviewed for a customer service representative position with the defendant employer in December 2022. After the plaintiff accepted a job offer, the employer required her to take a pre-employment drug test as part of its standard hiring process. The test results indicated that she had used cannabis within the prior thirty days. The plaintiff confirmed that she had used cannabis recreationally within that time frame, but was not under the influence of cannabis at the time of the drug test or when she applied for the position.

When the plaintiff subsequently contacted the employer’s human resources department to inquire about her start date, the employer offered her the opportunity to submit to a repeat drug test within a week at her own expense. The plaintiff did not retest because she could not afford to pay for it; the employer then rescinded its offer and refused to hire her.

The plaintiff filed suit, alleging among other claims that the employer violated her rights under CREAMMA by refusing to hire her based on her recreational use of cannabis. The trial court dismissed the CREAMMA claim, concluding that the plaintiff’s remedy was through the Cannabis Regulatory Commission (“CRC”) rather than the Superior Court. The plaintiff appealed.

Appellate Division Decision

The Appellate Division reversed the trial court’s dismissal. Although CREAMMA does not expressly provide a private right of action for individuals seeking to redress adverse employment decisions based on their lawful use of cannabis, the court concluded that the statute implicitly creates one. While New Jersey courts have generally been reluctant to infer a statutory private right of action where the Legislature has not expressly provided for one, they have “readily

found an implied private right of action in statutes enacted to protect employees from wrongful conduct by employers.”

The court applied the three-part test established in Cort v. Ash, 422 U.S. 66, 78 (1975), which New Jersey courts have adopted for determining whether an implied private right of action exists.

First, the court found that the plaintiff is a member of the class for whose benefit the statute was enacted. CREAMMA does not prohibit discriminatory actions, rather, it specifically prohibits employment-related discrimination based on an individual’s positive test for cannabinoid metabolites. The plaintiff, as a prospective employee whose job offer was rescinded after she tested positive, fell squarely within the protected class.

Second, the court concluded there was evidence the Legislature intended to create a private right of action. CREAMMA states that the use of cannabis “shall not form the basis for refusal to . . . employ . . . that person,” and that “[n]o employer shall” take adverse action against a person based on cannabis use. The Appellate Division found this language analogous to Title IX’s proscription that “no person shall” be discriminated against on the basis of sex, which the United States Supreme Court held to be “rights-creating” language in Cannon v. University of Chicago, 441 U.S. 677, 694-703 (1979). The Appellate Division further noted that CREAMMA does not contain an administrative remedy for individuals discriminated against in violation of its employment provisions, nor does it explicitly authorize the CRC or any other State entity to enforce these provisions through prosecution, civil penalty, or any other consequence. Importantly, the court distinguished the exclusive administrative remedy established for the Opportunity to Compete Act – which the Legislature passed the same day as CREAMMA – which expressly forecloses a private cause of action and such a limitation not included in CREAMMA.

Third, the Appellate Division concluded that a private right of action would be consistent with CREAMMA’s underlying legislative purpose. Because CREAMMA does not provide for administrative enforcement of its anti-discrimination provisions, the court reasoned that permitting a judicial remedy would not run afoul of or bypass any regulatory structure. Moreover, absent an individual’s right to sue, these anti-discrimination provisions would be “meaningless and unenforceable.”

The court acknowledged that the United States Court of Appeals for the Third Circuit reached the opposite conclusion in Zanetich v. Wal-Mart Stores East, Inc., 123 F.4th 128, 136, 147 (3d Cir. 2024), but declined to follow that precedent, noting that New Jersey courts are “not bound by [federal courts’] decisions in respect of our own state law.”

What Should New Jersey Employers Do Now?

This decision marks a significant development for New Jersey employers. Applicants and employees who are rejected from positions, have offers rescinded, or face other adverse employment actions because they tested positive for cannabis now have a clear path to bring private lawsuits against their employers under CREAMMA. Employers should take the following steps:

- **Review pre-employment drug testing policies.** Employers should carefully review their drug testing policies and procedures to ensure they do not run afoul of CREAMMA's anti-discrimination provisions. Policies that automatically disqualify applicants or employees based solely on a positive test for cannabinoid metabolites may expose employers to litigation under this decision.
- **Revise offer letter contingencies.** With some exceptions for certain types of positions, employment offers should no longer be conditioned on an applicant testing negative for cannabis. Employers that continue to use such contingencies face the risk of CREAMMA claims if they rescind offers based on positive cannabis test results.
- **Understand the limits of permissible drug testing.** CREAMMA does permit employers to require drug tests under certain circumstances and to use results "when determining the appropriate employment action," but employers should be mindful that adverse action "solely due to the presence of cannabinoid metabolites" from lawful cannabis use is prohibited. Employers should consult with counsel to understand the distinction between permissible and impermissible uses of drug test results under the statute.
- **Train human resources personnel.** HR staff and hiring managers should be trained on the updated legal landscape so that hiring decisions and drug testing protocols comply with CREAMMA's requirements as interpreted by this decision.

If you have questions about how this decision may affect your employment policies, drug testing procedures, or hiring practices, please contact one of Saiber's employment and labor law attorneys.

*The preparation of this alert was assisted by the research of summer associate **Helen Nigro**.*