

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

ERICK ZANETICH, *on behalf of himself* )  
*and those similarly situated* )

Plaintiff, )

v. )

WAL-MART STORES EAST, INC. d/b/a )  
WALMART, INC. and SAM’S EAST, )  
INC. d/b/a/ SAM’S CLUB )  
FULFILLMENT CENTER )

Defendants. )

Civil Action No. 1:22-cv-05387

(filed electronically)

**DEFENDANTS’ MEMORANDUM OF LAW IN SUPPORT OF  
THEIR MOTION TO DISMISS PLAINTIFF’S COMPLAINT**

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## INTRODUCTION

Pursuant to Fed. R. Civ. P. 12(b)(6), Defendants Wal-Mart Stores East, LLC (improperly identified in the Complaint as Wal-Mart Stores East, Inc. d/b/a Walmart, Inc.) (hereinafter, “Wal-Mart”) and Sam’s East, Inc. (improperly identified in the Complaint as Sam’s East, Inc. d/b/a/ Sam’s Club Fulfillment Center) (hereinafter, “Sam’s East”) (hereinafter, collectively referenced as “Defendants”), by their undersigned counsel, move to dismiss the Complaint filed by Plaintiff.

Plaintiff is challenging the rescission of a job offer by Sam’s East, alleging two causes of action against Defendants: (1) Violation of the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (the “CREAMMA”); and (2) Violation of New Jersey common law.

Count I fails as a matter of law because the CREAMMA does not provide for a private right of action. Count II fails as a matter of law because New Jersey common law does not provide for a cause of action based on an employer’s alleged failure to hire. For the reasons set forth below, Defendants respectfully submit that the Complaint should be dismissed because both counts fail as a matter of law.

### I. FACTUAL AND PROCEDURAL BACKGROUND

On June 13, 2022, Plaintiff filed a Complaint against Defendants, titled *Erick Zanetich v. Wal-Mart Stores East, Inc. d/b/a Walmart, Inc. and Sam’s East Stores, Inc. d/b/a/ Sam’s Club Fulfillment Center*, in the Superior Court of New Jersey, Gloucester County, under Docket No. GLO-L-000605-22 (the “Complaint”). Plaintiff purports to bring this action on behalf of himself, individually, and on behalf of those similarly situated who have suffered damages. (Compl., Ex. A to Doc. 1, at ¶ 12). Specifically, as stated in the Complaint: “Plaintiff seeks to represent a class of all persons who, since on or after February 22, 2021: (1) were denied employment by Defendants in the state of New Jersey because he or she tested positive for marijuana in pre-

employment drug screen; and/or (2) were subject to any other adverse employment action because he or she tested positive for marijuana.” (*Id.*). In Count I of the Complaint, Plaintiff raises a cause of action against Defendants for violation of the CREAMMA. (*Id.* at ¶¶ 36-41). In Count II of the Complaint, Plaintiff raises a cause of action against Defendants for failure to hire/wrongful discharge in violation of New Jersey public policy. (*Id.* at ¶¶ 42-47).

On August 5, 2022, Plaintiff served his state court complaint on Defendants. On September 2, 2022, Defendants removed the Complaint to this Court based on diversity jurisdiction under 28 U.S.C. §§ 1332, 1441, and 1446. (Doc. 1). Defendants now seek dismissal of Plaintiff’s Complaint pursuant to Rule 12(b)(6).

## **II. STANDARD OF REVIEW**

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Thus, courts may “disregard rote recitals of the elements of a cause of action, legal conclusions, and mere conclusory statements.” *James v. City of Wilkes-Barre*, 700 F.3d 675, 679 (3d Cir. 2012). Plaintiffs must plead factual allegations sufficient to “nudge[] their claims across the line from conceivable to plausible.” *Twombly*, 550 U.S. at 570.

## **III. ARGUMENT**

### **A. Count I Fails As A Matter of Law Because the CREAMMA Does Not Provide for a Private Cause of Action**

Although the CREAMMA states that, “[n]o employer shall refuse to hire or employ any person . . . because that person does or does not smoke, vape, aerosolize or otherwise use cannabis items,” there is no express private right of action by which an employee can enforce this provision

by way of a civil lawsuit. *See generally* N.J. Stat. § 24:6I-52(a)(1). Instead, the statute specifically imbues the Cannabis Regulatory Commission with the sole authority to enforce the provisions of the CREAMMA. *See* N.J. Stat. § 24:6I-34(b)(3). In the absence of an express private right of action, Count I of Plaintiff’s Complaint can only survive if this Court concludes that the CREAMMA contains an implied private cause of action. On this issue of first impression, this Court should decline to find such an implied right. As a result, Count I should be dismissed as a matter of law.

**1. A Private Right of Action Must Be Clearly Implied by Legislative Intent**

New Jersey courts are reluctant to infer the existence of a private cause of action where the New Jersey Legislature (the “Legislature”) has not expressly provided for such. *R.J. Gaydos Ins. Agency, Inc. v. Nat’l Consumer Ins. Co.*, 773 A.2d 1132, 1143 (N.J. 2001). This is because the Legislature’s failure to include a cause of action in a statutory provision is “reliable evidence that the Legislature neither intended to create such a cause of action . . . nor desired the judiciary to create one by implication.” *Miller v. Zoby*, 595 A.2d 1104, 1108 (N.J. Super. Ct. App. Div. 1991); *see also Alexander v. Sandoval*, 532 U.S. 275, 289 (U.S. 2001) (holding that private rights of action “must be created” by legislatures). By not expressly providing for a private right of action, “the Legislature consciously [chooses] not to create one.” *Burns v. Care One at Stanwick, LLC*, 258 A.3d 368, 376 (N.J. Super. Ct. App. Div. 2021).

The New Jersey Supreme Court has adopted a three-part test to determine whether a statute contains an implied private cause of action. *R.J. Gaydos*, 773 A.2d at 1143. Courts must consider whether:

- (1) plaintiff is a member of the class for whose special benefit the statute was enacted; (2) there is any evidence that the Legislature intended to create a private right of action under the statute; and (3) it is consistent with the underlying purposes of the legislative scheme to infer the existence of such a remedy.

*Id.* While each of these factors is given varying weight, ultimately, the result turns upon the Legislature’s intent in enacting the statute in question. *Id.*; *see also Wisniewski v. Rodale, Inc.*, 510 F.3d 294, 303 (3d Cir. 2007) (noting that legislative intent is the “sole touchstone” of the court’s inquiry). Here, there is no evidence of such legislative intent.

**2. There is No Evidence That the Legislature Intended to Create a Private Cause of Action in the CREAMMA**

The legislative scheme established in the CREAMMA belies any interpretation that the Legislature intended to create a private right of action. That is, the Legislature explicitly provided for a comprehensive enforcement scheme through the Cannabis Regulatory Commission, rather than through individual lawsuits, foreclosing the idea that the Legislature intended for an implied private right of action to exist. Specifically, the Legislature provided 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 under” the CREAMMA. N.J. Stat. § 24:6I-34(a) (emphasis added).

The Cannabis Regulatory Commission has the power “[t]o investigate and aid in the prosecution of *every* violation of” the CREAMMA. N.J. Stat. § 24:6I-34(b)(3) (emphasis added). It is additionally empowered “[t]o exercise *all* powers incidental, convenient, or necessary to enable the commission to administer or carry out the provisions of [the CREAMMA] or any other law of this State that charges the commission with a duty, function, or power related to personal use cannabis.” N.J. Stat. § 24:6I-34(b)(5) (emphasis added). In exercising its powers to enforce the CREAMMA, the Cannabis Regulatory Commission can issue subpoenas, compel the attendance of witnesses, administer oaths, certify official acts, take depositions, compel the production of documents and testimony, and establish fees. N.J. Stat. § 24:6I-34(b)(5)(a)-(g). Moreover, the Cannabis Regulatory Commission “may sue . . . in any court . . . as may be necessary

to the performance of its responsibilities.” N.J. Stat. § 24:6I-24(c)(2).

By giving the Cannabis Regulatory Commission the authority to “exercise *all* powers incidental, convenient, or necessary” to carry out the CREAMMA, the Legislature demonstrated its intent that the Cannabis Regulatory Commission be the sole enforcer of the CREAMMA. Thus, the express language of the statute weighs heavily against any argument that the Legislature intended for the CREAMMA to carry an implied private right of action.

In fact, time and time again, New Jersey courts have declined to find that an implied private right of action existed in a statute when the statute’s plain language gave enforcement rights to a state agency or commission. In *In re State Commission of Investigation*, 527 A.2d 851, 855-56 (N.J. 1987), for example, the New Jersey Supreme Court concluded that a statute which contained a mechanism to ensure that the Attorney General checked for violations of the statute at issue “obviate[d] the plaintiffs’ need for a private cause of action.” Similarly, in *R.J. Gaydos*, the New Jersey Supreme Court held that the subject statute did not create a private cause of action, reasoning that the “statutory scheme vests enforcement powers exclusively in the Commissioner [of Banking and Insurance].” *R.J. Gaydos*, 773 A.2d at 1148.

Likewise, in *Jalowiechi v. Leuc*, 440 A.2d 21, 27 (N.J. Super. Ct. App. Div. 1981), the Appellate Division declined to read an implied private cause of action into a statute that included provisions giving a state agency powers to enforce the statute. The court explained that, by including the enforcement provisions, the Legislature “provided precisely the remedies it considered appropriate for the enforcement” of the statute, and that such provisions demonstrated the Legislature’s lack of intention “to authorize by implication a private cause of action for damages or other civil remedy[.]” *Id.* at 28; *see also R.J. Gaydos*, 773 A.2d at 1148 (concluding the same); *Miller*, 595 A.2d at 1108 (same).

We expect that Plaintiff will argue that courts in other states have found an implied private right of action in their respective medical marijuana statutes and therefore this Court should find one here. Those cases are distinguishable, however, because, unlike the CREAMMA, which created the Cannabis Regulatory Commission expressly to enforce the statute, the statutes in those other states contained no mechanism for such enforcement by a specifically created agency. *See e.g.*, 35 Pa. Stat. Ann. § 10231.101 *et seq.*; A.R.S. § 36-2801 *et seq.*; Conn. Gen. Stat. § 21a-408 *et seq.*

Moreover, the Legislature was aware of the fact that other states' permissive-use marijuana statutes were being challenged in litigation regarding the issue of whether they created a private cause of action for employees and declined to provide an express private right of action in the CREAMMA. Rather, the Legislature chose to give the Cannabis Regulatory Commission sole enforcement power over the CREAMMA's provisions. Thus, the Legislature clearly intended to allow the state agency, and not the state's private citizens, to enforce the statute. There is simply no evidence that the Legislature intended to create a private right of action under the CREAMMA.

**3. It Is Inconsistent With the Underlying Purposes of the CREAMMA's Legislative Scheme to Infer the Existence of a Private Right of Action**

When the Legislature enacted the CREAMMA, its members clearly articulated the statute's intended purpose. Specifically, the CREAMMA is intended to: "prevent the sale or distribution of cannabis to persons under 21 years of age;" "eliminate the problems caused by the unregulated manufacturing, distribution, and use of illegal marijuana within New Jersey;" "divert funds from marijuana sales from going to illegal enterprises, gangs, and cartels;" "free up precious resources to allow our criminal justice system to focus on serious criminal activities and public safety issues;" "strike a blow at the illegal enterprises that profit from New Jersey's current, unregulated illegal marijuana market;" "strengthen [the state's] ability to keep it . . . away from minors;" and

“enhance[] public health and minimize[] harm to New Jersey communities an families;” *See* N.J. Stat. § 24:6I-32(a)-(m).

Notably absent from the Legislature’s stated purpose in enacting the CREAMMA is any language suggesting that the purpose of the statute was to allow prospective employees to sue potential employers for discrimination in connection with their marijuana use. Indeed, in the Legislature’s long list of reasons for the enactment of the CREAMMA, the only mention of employment at all is when the Legislature notes that, “[a] marijuana *arrest* in New Jersey can have a debilitating impact on a person's future, including consequences for one's job prospects[.]” N.J. Stat. § 24:6I-32(n) (emphasis added).

It is obvious that the Legislature gave great thought into why the CREAMMA should be enacted—to end the state’s pursuit of small-scale marijuana convictions in order to assist the state’s citizens. There is no statutory language evidencing a Legislative intent to clog the courts with individual and class action employment claims. On the contrary, the CREAMMA explicitly states that it “shall not be construed to amend or affect in any way any State or federal law pertaining to employment matters[.]” N.J. Stat. § 24:6I-55.

In sum, an analysis of these factors weighs heavily against finding an implied private right of action in the CREAMMA. Neither the Legislature’s intent nor the statute’s stated purposes suggest that the CREAMMA should carry an implied private cause of action. As such, this Court should decline to read such right into the statute. Count I of Plaintiff’s Complaint should be dismissed.

**B. Count II Fails As A Matter of Law Because New Jersey Has No Common Law Cause of Action for Failure to Hire**

In the alternative to his CREAMMA claim, in Count II of the Complaint, Plaintiff asserts a common law claim for “failure to hire.” However, New Jersey does not provide for a cause of

action based on an employer's alleged failure to hire. *Ebner v. STS Tire & Auto Ctr.*, No. 10-2241, 2011 U.S. Dist. LEXIS 102006, at \*22 (D.N.J. Sep. 9, 2011) (“What [the plaintiff] actually alleges is a common law action for failure to hire, a cause of action not recognized by New Jersey courts.”).

The allegations in the Complaint make clear that Plaintiff was never employed by either Defendant. According to the Complaint, Plaintiff applied for a job, was extended an offer subject to passing a drug test, and the job offer subsequently was rescinded. (Compl. at ¶¶ 21, 27, and 31). At no point does Plaintiff allege that he commenced work for either Defendant.

That is fatal to Plaintiff's common law claim in Count II. Plaintiff labels his claim a “Pierce Claim” for “Failure to Hire/Wrongful Discharge.” (*Id.* at p. 7). However, under *Pierce v. Ortho Pharmacy Corp.*, 417 A.2d 505 (N.J. 1980), only a wrongful discharge is actionable, not a failure to hire. *See Lerner v. City of Jersey City*, No. A-1024-17T4, 2019 N.J. Super. Unpub. LEXIS 755, at \*9 (N.J. Super. Ct. App. Div. Apr. 2, 2019) (“[T]he failure to hire is not a cause of action that is recognized under *Pierce*.”); *Giles v. Lower Cape May Reg'l Sch. Dist. Bd. of Educ.*, No. 12-05688, 2014 U.S. Dist. LEXIS 106574, at \*17 (D.N.J. Aug. 1, 2014) (“New Jersey courts, however, refuse to extend *Pierce* beyond the wrongful discharge context.”).

Simply put, “[Plaintiff's] challenge is to [Defendants' failure to hire h[im]. . . . Such a challenge does not state a cause of action under *Pierce*. Moreover, *Pierce* has not been applied to failure to hire or promote situations.” *Sabatino v. Saint Aloysius Parish*, 672 A.2d 217, 221 (N.J. Super. Ct. App. Div. 1996). Plaintiff's common law claim in Count II of the Complaint must be dismissed as a matter of law.

#### IV. CONCLUSION

For the foregoing reasons, pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants respectfully request that this Court grant its Motion and dismiss Plaintiff's Complaint with prejudice. A proposed form of Order has been submitted.

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