2024 LABOR AND EMPLOYMENT SUMMER INSTITUTE – DAY TWO

2024 Seminar Material

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2024 LABOR AND EMPLOYMENT SUMMER INSTITUTE – DAY TWO

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Basic Wage and Hour Law

Kathleen McLeod Caminiti

Wage And Hour Assumptions Under FLSA and New Jersey Law

- Employment – Default is that the individual is an employee.
- Hours Worked – Default is that all time inside the “workday” is hours worked; whether time outside the “workday” is hours worked begs the question - what is that employee’s “workday” on that day?
- Exemptions – Default is that the employee is non-exempt.
- Deductions – Default is that nothing can reduce FLSA-required wages whether through a deduction, recovery, or a failure to reimburse.

Wages and Remuneration

- The **minimum wage** ($15.13 per hour) can be met by:
  - a direct cash wage (or its equivalent),
  - the tip credit ($9.87 per hour)
  - and/or meals, lodging, and other facilities
- **Salaried Exempt**
  - Minimum salary
    - $844 per week ($43,888 annualized) effective July 1, 2024
  - Paid on a salary basis
  - Meets Duties Test

Overtime

- Employers must establish and document a seven-day “workweek."
- Employers must pay **nonexempt** employees at a rate of at least **1.5 times the “regular rate"** for time worked over 40 hours in a workweek.
- The regular rate is “all remuneration for employment" divided by all hours the pay compensates.
- It includes commissions, incentive pay, most bonuses; exclusions are limited.

Hours Worked

- Any time the employee is “suffered or permitted to work.”
- Work not requested but “suffered or permitted” is hours worked.
- If the employer knows or has reason to know that the employee is working, then it is “hours worked.”
- Work is not always “burdensome” and might not be work in every circumstance.

Additional Work Time Issues

- On-Call Time
- Meetings/Training Time
- Email/Mobile Devices
- Travel Time

FLSA Exemption Basics

- There are many FLSA exemptions.
- Specific criteria apply, and it's the employer's burden to prove they are met. Otherwise, the employer loses.
- Exemptions relate to individuals – not to job descriptions, pay classifications, positions, job groups, conventional wisdom, etc.
- Best known: the “white collar" or **E**xecutive, **A**dministrative and **P**rofessional (EAP) exemptions

Salary Basis

- Employee receives at least a predetermined amount each pay period for every workweek in which he or she performs any work.
  - Minimum Salary $844 per week ($43,888 annualized) effective July 1, 2024; increases to $1,11228 per week ($58,656 annualized) effective Jan. 1, 2025
  - Minimum 52-Week Threshold For "Highly Compensated Employee" Exemption Now $132,964 (effective July 1, 2024) and increases to $151,164 (January 1, 2025)
- Amount not subject to reduction based upon quantity or quality of work done.
- Requirement is per week and must be met each pay period. However, employee need not be paid the salary for any workweek in which he or she does no work.
- There are some exception (e.g., bona fide sickness or disability plan, major safety infractions)

Exemptions

- **White Collar:**
  - Executive Exemption
  - Administrative Exemption
  - Professional Exemption
- **Other Exemptions:**
  - "7(i)" exemption for commission-paid employees of a retail or service establishment (overtime only).
  - "Salesmen, partsmen, mechanics" at automobile dealerships (overtime only).
  - "Motor Carrier" exemption: certain drivers, drivers' helpers, loaders, mechanics (overtime only).

Deductions

- FLSA-required wages must be paid “free and clear” in order to claim such requirements are actually met. So, even if state law permits a deduction, calculations often are required to ensure that a practice does not “cut into” any required wages (minimum wage, entire 1.5 of overtime, or the minimum salary requirement)
- Besides outright kickbacks, be mindful of practices that pass along business expenses to the employee or otherwise benefit the employer.

- **Examples:** Tools, Equipment, Supplies, mileage costs, shortages, uniforms, unreturned property, any profit to employer or affiliate.

NJ "Wage Theft Act" (Effective August 6, 2019)

- Written statement of wage rights to all employees.
- Greatly expands employers' liability for violation of three key NJ wage statutes.

New Jersey Wage Theft Act

- Prohibits retaliation against employees who complain about wage and hour violations.
- Provides for 200% liquidated damages and attorneys' fees and 6 year SOL.
- Penalties for "knowing" violations, including possible jail time.
- Increases Audit Risk with NJDOL and Division of Taxation.
- NJDOL may direct license suspension and issues stop-work orders.

QUESTIONS?

THANKS

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Independent Contractor Misclassification

Kathleen McLeod Caminiti

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Agenda

- Overview of Independent Contractor Misclassification
- Federal Economic Realities Test
- New Jersey ABC Test
- Enforcement, Penalties and Litigation

Misclassifying Employees As Independent Contractors

Independent Contractor v. Employee Why Does Classification Matter?

- Generally, “Independent Contractor” classification benefits employers where an “Employee” classification benefits employees.
- If classified as Independent Contractor:
  - Individual is not covered by employment laws, e.g., New Jersey Law Against Discrimation.
  - Individual is not protected by laws protecting employees (FLSA, NJ Wage and Hour Laws, FMLA, etc)
  - Employer is not obligated to pay benefits and offer job protection.
  - Employer is not vicariously liable for individual’s acts.
  - Employer enjoys greater latitude regarding termination.
  - Employer enjoys greater staffing flexibility.

Risks of Misclassification

- Minimum wage, overtime, and other unpaid wages.
- Back taxes.
- Unemployment audits.
- Social Security contributions.
- Unpaid benefits.
- Employment law violations.
- Workers' Compensation coverage.
- Penalties and fines – heighted enforcement
- Litigation costs and attorney fees.
- Corporate officers may be individually liable.

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True or False?

- If the worker and the Company both agree in a written agreement that the worker is an independent contractor, then the worker is an IC and that status cannot be challenged.

True or False?

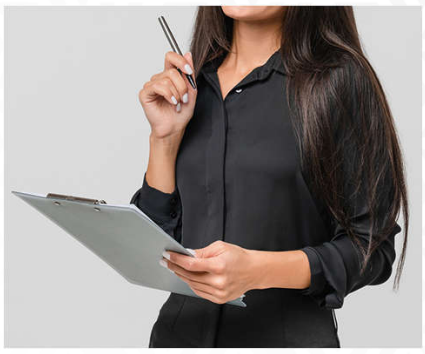
FALSE

- The various IC-employee tests will ultimately determine status, even when there is an agreement.
- New Jersey case law finding Employee status even where there is a written IC agreement

Independent Contractor Tests

Several Independent Contractor Test

- U.S. Department of Labor: **Balancing Test**
- IRS (20 points, 3 categories) Test
- **New Jersey "ABC" Test**



United States Department Of Labor Multifactor FACTOR Balancing Test (Effective March 2024)

(1) **Opportunity for profit or loss** depending on managerial skill.

(2) **Investments** by the worker and the potential employer.

(3) Degree of **permanence of the work relationship**.

(4) Nature and degree of **control**.

(5) Extent to which the work performed is **an integral part of the potential employer's business**.

(6) **Skill and initiative**.

(7) **Additional factors**.

New Jersey: "ABC" Test

Hargrove v. Sleepy's, LLC
220 N.J. 289, 106 A.3d 449 (2015)

Delivery Drivers for mattress company
Court held the ABC test applied to NJWHL and NJWPL

> Under the ABC test, classification as an independent contractor requires that the employer demonstrate that the retained individual satisfies all three criteria. This fosters the provision of greater income security for workers, which is the express purpose of both the WPL and the WHL.

New Jersey: "ABC" Test

The "ABC" test **presumes** an individual is an employee unless the employer can prove:

A. The worker has been and will continue to be **free from control** or direction over the performance of the service;

B. The service is either **outside the usual course of the business** for which the service is performed, or the service is performed **outside of all the places of business** of the employer for which the service is performed; **and**

C. The worker is **customarily engaged in an independently** established trade, occupation, profession or business.

New Jersey Supreme Court – Evidence Needed to Meet ABC Test

- In *East Bay Drywall, LLC v. Dep't of Lab. & Workforce Dev.*, 251 N.J. 477, 278 A.3d 783 (2022), the New Jersey Supreme Court held that defendant drywall installer's alleged subcontractors should instead be classified as employees because defendant failed to show they "customarily engaged in an independently established trade, occupation, profession or business" to satisfy prong C of the Unemployment Compensation Law's (UCL) ABC test (N.J.S.A. 43:21-19(i)(1)(A)).
- The Court noted the lack of any "hallmarks of independence" – such as evidence that entities "maintained independent business locations, advertised, or had employees," or information about entities' "duration and strength of the[ir] business, the number of customers and their respective volume of business" or remuneration received from other contractors besides defendant.
- The Court observed "[a] business practice that requires workers to assume the appearance of an independent business entity – a company in name only – could give rise to an inference that such a practice was intended to obscure the employer's responsibility to remit its [unemployment compensation and temporary disability benefit] fund contributions," is a "type of subterfuge [that] is particularly damaging in the construction context, where workers may be less likely to be familiar with the public policy protections afforded by the ABC test," and "also undermines the public policy codified in the UCL."

Enforcement, Penalties and Litigation

Misclassification Enforcement & Penalties

- **Civil penalties and fines**
  - NJDOL can also impose a penalty against the employer and award employees up to 5 percent of the worker's gross earnings over the past 12 months. The employer could also be penalized up to $250 per misclassified employee for a first violation and up to $1,000 per misclassified employee for each subsequent violation.
- **Back wages**
  - Liquidated damages
  - Corporate officers may be individually liable
- **Audits**
  - “Random”
  - Complaint driven

Misclassification Enforcement & Penalties

- **Court Injunction**
  - Courts can prohibit or prevent employer from violating law, compel compliance with law, or to prevent interference with enforcement efforts.
- **Stop Work Orders**
  - Authority to issue stop-work orders across one or more worksites.
  - Workers may entitled to be paid by employer as a result of the stop worker order.
- **Suspension/ Revocation of Business Licenses**

Litigation

- High Stakes Class and Collective Actions
  - FLSA and NJ Wage Theft Act Claims
- Exposure: $$$$
  - Worker works 50 hours per week
  - Hourly wage $16
  - If misclassified, at risk for OT violation

• OT rate $24 x 10 hours	$240/week
• 50 weeks	$12,000/year
• FLSA -- Liquidated (x2) 2- or 3-year SOL	$24,00/year = $ 45,000 or $36,000
• NJWTA – 200% LDs 6-year SOL	$72,000
• 10 workers “similarly situated”	$720,000
• Attorneys’ fees and costs	~$250,000

THANKS

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INTEGRATING FMLA, NJFLA, AND REASONABLE ACCOMMODATION LEAVE AND INCOME REPLACEMENT PROGRAMS: AN ESSENTIAL UPDATE

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ANY SPECIFIC QUESTIONS SHOULD BE DIRECTED TO APPROPRIATE LEGAL COUNSEL.

PROTECTED LEAVE

- **Family and Medical Leave Act of 1993**
  - 29 U.S.C. § 2601, *et seq.*
  - 29 C.F.R. § 825.100, *et seq.*
- **Americans With Disabilities Act**
  - 42 U.S.C. § 12102, *et seq.*
  - 29 C.F.R. § 1630.1, *et seq.*
- **New Jersey Law Against Discrimination**
  - N.J.S.A. 10:5-1, *et seq.*
  - N.J.A.C. 13:13-1, *et seq.*
- **The New Jersey Family Leave Act**
  - N.J.S.A. 34:11B-1, *et seq.*
  - N.J.A.C. 13:14-1
- **New Jersey Security and Financial Empowerment Act**
  - N.J.S.A. 34:11C-1, *et seq.*

INCOME REPLACEMENT

- **New Jersey Temporary Disability Benefits Law (Short Term Disability)** (or Private/Buy Up Plan)
  - N.J.S.A. 43:21-25, *et seq.*
  - N.J.A.C. 12:15-1.1, *et seq.*, 12:18-1.1, *et seq.*
- **New Jersey Paid Family Leave Law***
  - N.J.S.A. 43:21-25, *et seq.*
  - N.J.A.C. 12:15-1.1, *et seq.*, 12:21-1,1, *et seq.*
- **New Jersey Earned Sick Leave Law***
  - N.J.S.A.34:11D-1, *et seq.*
  - N.J.A.C.12:69-1.1, *et seq.*
- **Workers' Compensation**
- **Employer Provided Paid Sick Leave/PTO Programs**

***HYBRID**

FMLA: ELIGIBLE EMPLOYEES

- Employed 12 Months (need not be consecutive) (NJFLA same)
- 1250 Hours Service (in 12 months immediately preceding the leave) (NJFLA 1000)
  - Includes overtime
  - Burden on employer to demonstrate employee for whom hours records not kept ***did not*** work 1250 hours
  - Includes hours employee would have worked but for military service
- At worksite employing 50+ employees within 75 miles (NJFLA = 30 employees)

FMLA QUALIFYING EVENTS

- Employee's own "serious health condition" that renders employee unable to perform the functions of the employee's job (continuously or intermittently) (Not NJFLA)
- Incapacity due to Pregnancy or Prenatal care (Own Not NJFLA)
- Also:
  - Qualifying military exigencies
  - Care for covered service member/veteran
  - Birth of child (also NJFLA)
  - Placement of child for adoption or foster care (also NJFLA)
  - Family member serious health condition (including prenatal care and pregnancy) (also NJFLA)

FMLA LEAVE ENTITLEMENT

- 12 weeks in **12-month** period
  - 12 months calculated per policy or most favorable to the eligible employee
  - Practice Tip: Need policy WITH designation method
- May be taken on intermittent or reduced leave schedule (medically necessary)
- No intermittent or reduced leave associated with birth of child *unless employer agrees* – except pregnancy related disability/pre-natal care (permissible under NJFLA)
- Child rearing leave must be completed within year of birth/placement (NJFLA commenced within a year)
- Spouses employed by same employer may be required to "share" available leave for child rearing or parent (No spouse limits under NJFLA)

NJFLA: DIFFERENCES IN SCOPE OF COVERAGE

- Covers employers with **30 employees** (FMLA 50)
- 12 weeks in a 24-month period (FMLA 12 months)
- The definition of "serious health condition" under NJFLA is same.
- Covers only **family member serious health condition**
- **Not employee's own serious health condition** (FMLA covers employee's own)
- Significantly broader definition of family member
- Intermittent leave available for birth/placement of child (FMLA employer agreement required)
- Includes COVID-19 School and Place of Care Closures (FMLA does not)
- Does not cover military exigency (FMLA coverage)
- Only covers care of service member as family member with serious health condition (separate FMLA category)
- Child rearing leave must COMMENCE within year (FMLA must CONCLUDE)
- No reduction for dual employed spouses (FMLA shared)

NJFLA: DIFFERENCES IN SCOPE OF COVERAGE

Expanded Definition of Family Member

- Child of ANY AGE or from gestational carrier agreement (FMLA under 18 or disabled)
- Grandchildren/Grandparents (FMLA only in loco parentis)
- Parents In Law (no FMLA coverage)
- Siblings (no FMLA coverage)
- Domestic Partner (FMLA covers spouses)
- "or any other individual related by blood to the employee, and any other individual that the employee shows to have a close association with the employee which is the equivalent of a family relationship" (not within limited FMLA definitions)

FMLA: EMPLOYEE RIGHTS

- Paid or unpaid at employee's election (OR PER EMPLOYER CONCURRENT POLICY/CBA (Negotiable))
- Continued Health Insurance Benefits during period of leave
- EMPLOYEE MAY BE ENTITLED TO WORKERS' COMPENSATION, STD, OR FLI BENEFITS -- IN WHICH CASE EMPLOYER CANNOT REQUIRE USE OF PAID LEAVE.
- **Beware of mandatory concurrent use policies where PTO is utilized to satisfy NJESLL (cannot mandate use PER N.J.S.A. 34:11D-2(d); N.J.A.C 12:69-3.5(m)).**
- **Practice Tip: Use Forms and Be Aware of Timelines**

FMLA/NJFLA: EMPLOYEE RIGHTS

- No retaliation or discipline
- Return to same or equivalent position upon return from FMLA/NJFLA leave
- Immediate return upon presentation of fitness for duty certification from employee's health care provider (without delay and without medical examination)
- No demand for medical records
- Practice Tip: Proceed with caution NJFLA documentation requirements

INTERACTION BETWEEN THE FMLA AND NJFLA

- Pregnant employee/employee disabled post-birth will be charged FMLA only until released by her HCP (or FMLA exhausted (N.J.A.C. 13:14-1.6)
- NJFLA leave will not be charged until employee is released from her own disability by her HCP or FMLA is exhausted post-birth
- ADA/NJLAD accommodation may bridge gap is FMLA is exhausted pre-birth absent undue hardship
- FMLA/NJFLA available to care for spouse's prenatal care/pregnancy related disability

FMLA/NJFLA RETURN TO WORK CERTIFICATION REQUIREMENTS

- If it is the uniform policy of the employer to require a return to work certification and the employee is so notified at the start of leave, a fitness for duty certification may be required prior to reinstatement following FMLA Leave.
  - Practice Tip: Be sure requirement is noted on Designation Notice (WH-382) and job description attached.
- The employer may not require the employee to have a return to work examination.
- Upon notice employer may seek fitness as to specific job duties
- No analogous NJFLA provisions

TRAPS FOR THE UNWARY: POST-FMLA JOB PROTECTED LEAVE UNDER ADA/NJLAD

FMLA exhaustion is NOT the end of the analysis . . .

ADA and NJLAD (regulations) require employers to provide reasonable accommodations which enable an employee to perform essential functions of their position.

- Extension of unpaid leave beyond FMLA leave is one such accommodation.
- The accommodation is job protected leave – so that means – post leave reinstatement.
- Beware of managers anxious to "cut off" employees unable to return when FMLA exhausted and their associated emails.
- ADA/NJLAD accommodation leave may bridge gap between pregnant employee's FMLA leave and NJFLA leave.
- Transfer to a position that can better accommodate an LOA may be accommodation of last resort.
- Beware of "gotcha" responses (indefinite leave, etc.).
- Fully utilize the interactive process.
- Practice Tip: Start post-FMLA interactive process early.

TRAPS FOR THE UNWARY: DON'T FORGET STATE AND FEDERAL PWFA AND BREASTFEEDING ACCOMMODATIONS

- Although by its express terms, the New Jersey PWFA does NOT provide for leave, realize that it DOES require other accommodations to maintain a healthy pregnancy ***in lieu of forced leave.*** N.J.S.A. 10:12-1(a), (s).
- ***Delanoy v. Ocean Township*, 245 N.J. 384 (2021) (temporary waiver of essential job function is not automatically an undue hardship under PWFA).**
- Federal Pregnant Workers' Fairness Act, 42 U.S.C. § 2000gg-1, et seq.
- Remember FLSA/PUMP Act and NJLAD protect and require accommodations of breastfeeding.
  - Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act), 29 U.S.C. 42 U.S.C. § 2000gg-1
  - New Jersey Pregnant Workers Fairness Act, N.J.S.A. 10:12-1(s)

NEW JERSEY EARNED SICK LEAVE LAW

- Provides mandatory paid sick leave for all employees (other than where provided by statute, e.g., civil service, etc.)
  - Temporary
  - Part Time
  - Accrual and Carry Over Requirements
  - Broadly expansive reasons beyond personal and family illness (teacher conferences, etc.)
  - Practice Tip: Don't assume that employer's generous PTO policy is NJESLL compliant because it provides more hours
  - Understand impact of shared NJESLL/PTO policies
  - Understand impact of CBA end by its term (v. labor laws)

NEW JERSEY FAMILY LEAVE INSURANCE BENEFITS

Amendments provided significant expansions:

- NO LONGER MAY REQUIRE USE OF 2 WEEKS PTO (or use/exhaust PTO before receiving NJFLI benefits)
- NO WAITING PERIOD
- Family member definition expanded consistent with NJFLA
- May utilize intermittently for birth or placement for foster care/adoption
- Increased benefit amounts
- 12 weeks (or 56 days intermittent)
- Expanded (permanently) to cover COVID-19 related family member events and school and place of care coverage

NEW JERSEY FAMILY LEAVE INSURANCE BENEFITS

- Broad anti-retaliation provision prohibiting, *inter alia*, employer from discharging, harassing, or otherwise discriminating or retaliating against an employee for requesting or receiving NJFLI benefits, including **"retaliation by refusing to restore the employee following a period of leave."**
  - Has this converted the statute from a wage replacement mechanism to a hybrid job protection/wage replacement statute?

NEW JERSEY SAFE ACT

- The New Jersey Security and Financial Empowerment Act ("NJSAFE") requires employers to provide up to 20 days of leave if the employee or the employee's family member (same broad definition) is a victim of domestic violence or a sexually violent offense for variety of reasons.
- Cannot require exhaustion/utilization of PTO in connection with NJSAFE leave. (Employee must be permitted to elect).
- NJFLI benefits are available for NJSAFE leave.

GINA COMPLIANCE

ALL REQUESTS FOR MEDICAL INFORMATION:

- Must comply with Genetic Information Nondiscrimination Act of 2008 ("GINA") – prohibits collection and/or utilization of genetic information in hiring and employment decisions
- Request should include GINA Disclaimer which provides a safe harbor for employers in the event of inadvertent provision of genetic information to the employer in connection with a medical information request.
- Practice Tip: Medical information requests should not come from and medical information should not be directed to line supervision per ADA medical records provisions.

42 U.S.C. § 2000ff; 29 C.F.R. Part 1635

GINA DISCLAIMER FOR MEDICAL REQUESTS

Genetic Information Nondiscrimination Act of 2008 Notice

The Genetic Information Nondiscrimination Act of 2008 ("GINA") prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information," as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

FMLA: CERTIFICATION REQUIREMENTS

- An employer may require an employee to provide a Certification of Health Care Provider in support of FMLA Leave under appropriate circumstances
- Must comply with Genetic Information Nondiscrimination Act of 2008 ("GINA")
- Request should include GINA Disclaimer
- Fitness for Duty Certifications (permissible/limited)
- Beware of contrasting requirements under NJFLA (less stringent)
- Be sure to dual designate by letter
- Practice Tip: Use DOL Forms and comply with time lines for responses
- Practice Tip: No formal request required

FMLA: SECOND AND THIRD OPINIONS

If the employer questions the Certification of Health Care Provider procedures exist for:

- opportunity to cure;
- clarification/authentication from HCP (BUT **NOT** BY SUPERVISION)
- second and third opinions process
- no analogous NJFLA provision

NJFLA AMENDMENTS: COVID-19

- **PERMANENT NJFLA EXPANSION** of permissible reasons for NJFLA to include:
  - As a result of:
    - State of emergency declared by Governor – OR --
    - Determined to be needed by Commissioner of Health or other public health authority
  - Employee is required to
    - Care of child due to closure of school or place of care by public official
    - Mandatory quarantine of family member
    - Recommendation of voluntary self quarantine
    - Expanded definition of "Serious health condition" to include known or suspected exposure

N.J.S.A. 34:11B-3(i)(4), (l).

NJESLL AMENDMENTS: COVID-19

- **PERMANENT EXPANSION OF NJESLL**
  - As a result of:
    - State of emergency declared by Governor – OR --
    - Determined to be needed by Commissioner of Health or other public health authority
  - Employee is unable to work because:
    - Closure of workplace
    - Closure of school or place of care
    - Self-isolation or quarantine on recommendation of HCP
    - Care for family member due to family member's self-isolation or quarantine on recommendation of HCP
    - Employee and family member COVID-19 illness were already covered by NJESLL

  N.J.S.A. 34:11D-3(4).

NJ STD AND PAID FAMILY LEAVE AMENDMENTS: COVID-19

- **New Jersey Temporary Disability Law**
  - **Short Term Disability**
    - Eliminated 7-daywaiting period for expanded coverage
  - **Paid Family Leave**
    - 12 weeks as of July 1, 2020 (PREVIOUS AMENDMENT)
  - **Expanded definition of "serious health condition" to include**
    - Self-quarantine or isolation on recommendation of HCP or public health authority
      - Employee (STD)
      - Family member (FLI)

N.J.S.A. 43:21-27(s); N.J.S.A. 43:21-29 (b); N.J.S.A. 43:21-38-14(a); N.J.S.A. 43:21-39-7(5).

LAWYERS ACTING BADLY: CRINGE WORTHY STORIES FROM THE TRENCHES

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Words to Live By

"Do the right thing at the right time for the right reason"

Preet Baraha

More Words to Live By

"I always feel it's not wise to violate rules until you know how to observe them."

T.S. Eliot

BASIC RULES OF THUMB

- Don’t Be a Dope (Competency)
- Don’t Betray (Conflicts)
- Don’t Steal
- Don’t Be a Jerk
- Don’t Lie

Competency

5

R.P.C. 1.1 Competency

RPC 1.1 Competence
A lawyer shall not:

(a) Handle or neglect a matter entrusted to the lawyer in such manner that the
lawyer's conduct constitutes gross negligence.

(b) Exhibit a pattern of negligence or neglect in the lawyer's handling of legal matters generally.

In re Adoption of a Child by C.J., 463 N.J. Super. 254 (App. Div. 2020)

This was an assigned counsel matter under Madden v. Delran, 126 N.J. 591 (1992). The first paragraph of the opinion says it all:

"We write to emphasize that an attorney has an obligation to inform the court if he or she is not able to handle an assigned matter professionally due to a lack of expertise and inability to obtain sufficient knowledge to represent the client effectively and is also unable to retain a substitute attorney knowledgeable in the area. We *sua sponte* determine that appellate counsel was ineffective and new appellate counsel must be assigned in this contested stepparent adoption matter. We therefore adjourn this appeal to appoint substitute counsel. Additionally, an adjournment of this time-sensitive contested adoption is necessary because a transcript of the trial court's opinion was not provided, nor was the seeming lack of a decision mentioned by either counsel in briefing."

Sackman v. N.J. Manufacturers Insurance Company
Docket No. A-3230-13T4 (App. Div. Apr. 26, 2016)

- Jury returned a verdict in favor of defendant and against plaintiffs. Plaintiffs appealed and the Appellate Division affirmed.
- The App. Div. imposed a $200 sanction on plaintiffs' appellate counsel. Although plaintiff's brief was "neatly printed and the point headings clearly identified the legal issues raised therein," it "reveals a complete lack of any effort by counsel to cite and discuss, in a professionally responsible manner, relevant legal authority in support of the three arguments raised therein."

Sackman v. N.J. Manufacturers Insurance Company
Docket No. A-3230-13T4 (App. Div. Apr. 26, 2016)

"Lawyers who take on the responsibility to represent clients before this court are expected to: (1) familiarize themselves with the record developed in the forum of origin; (2) research and analyze the competent legal authority related to the salient facts of the case; and (3) submit briefs in support of the arguments identified therein which reflect that the lawyers conducted these tasks in a diligent and professional manner. This is the kind of effort a tribunal in this State is entitled to expect from an attorney admitted to practice in this State. Most importantly, . . this is the kind of professional effort an attorney owes to his or her client."

Conflicts

R.P.C. 1.7
Conflict of Interest: General Rule

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

1) the representation of one client will be directly adverse to another client; or

2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person *or by a personal interest of the lawyer*.

In Re Terry, DRB 17-417

Respondent represented client in criminal charges, including sexual assault upon four minors under the age of thirteen, pending against him in Superior Court.

- Just before trial, respondent sent a text to client, who hadn't paid him, warning him that he would not prepare for the trial during the weekend immediately preceding it, unless he was first paid.
- He then wrote: "HAVE FUN IN PRISON."
- RPC 1.7

In Re Fusco, DRB 19-375

The New Jersey Supreme Court censured Respondent for the simultaneous representation of a prisoner serving a 12-year term and a defense lawyer who represented him.

- Attorney No. 1 was retained by client to file appeal of criminal conviction and given $15,000 retainer. The appeal was dismissed due to attorney error, so he then retained Respondent and gave him the $15,000.
- Client chose a different attorney and demanded return of the $15,000. Attorney No. 1 claimed that Respondent had it. Respondent claimed he was retained by Attorney No. 1 to represent him in a malpractice and ethics action.

BRESSLERAMERYROSS

Don’t Steal

R.P.C. 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value or counsel or assist another person to do any such act;

b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

d) in pretrial procedure make frivolous discovery requests or fail to make reasonably diligent efforts to comply with legally proper discovery requests by an opposing party

R.P.C. 4.4 (b) Respect for the Rights of Third Parties

(b) A lawyer who receives a document or electronic information and has reasonable cause to believe that the document or information was inadvertently sent shall not read the document or information or, if he or she has begun to do so, shall stop reading it. The lawyer shall (1) promptly notify the sender (2) return the document to the sender and, if in electronic form, delete it and take reasonable measures to assure that the information is inaccessible.

A lawyer who receives a document or electronic information that contains privileged lawyer-client communications involving an adverse or third party and who has reasonable cause to believe that the document or information was wrongfully obtained shall not read the document or information or, if he or she has begun to do so, shall stop reading it. The lawyer shall (1) promptly notify the lawyer whose communications are contained in the document or information (2) return the document to the other lawyer and, if in electronic form, delete it and take reasonable measures to assure that the information is inaccessible. A lawyer who has been notified about a document containing lawyer-client communications has the obligation to preserve the document.

R.P.C. 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

Stengart v. Loving Care Agency, Inc. 201 NJ 300 (2010)

- In this employment discrimination case, plaintiff, while still employed, used her company-supplied laptop to access her personal password-protected Yahoo email account. Installed software automatically copied each web page she viewed and saved it on her hard-drive.
- The company had a policy stating that email messages, internet use and computer files were its property and that there was no privacy right.
- Stengart communicated with her lawyer via her Yahoo account, using her laptop. After leaving Loving Care, she sued for discrimination, harassment and retaliation.

Stengart v. Loving Care Agency, Inc. (continued)

• After the suit was filed, the employer hired a forensic expert to copy the hard drive on the laptop. Several emails between Stengart and her lawyer were discovered and reviewed. The emails bore the name and address of the lawyer as well as an "inadvertent disclosure notice."

• **Held:** The emails were privileged and should have been returned pursuant to 4.4 (b). It was irrelevant that plaintiff used the company laptop or that the electronic policy stated that plaintiff had not expectation of privacy; she still retained a right of privacy to emails written and sent on her personal, password protected Yahoo account. R. 4.4 (b) would apply even though the emails were not "inadvertently sent."

Quinlan v. Curtiss-Wright Corp. 204 N.J. 239 (2010)

- A human resources executive, contended that her employer discriminated against her on the basis of her gender. In an alleged violation of the employer's confidentiality policy, the plaintiff-employee reviewed and copied files, some containing other employees' personal and financial information. Most of the documents were eventually produced in discovery to the defendant employer.
- Thereafter, the plaintiff-employee copied and supplied to her attorneys her supervisor's performance evaluation, and her counsel used that evaluation at the deposition of the supervisor.
- The employer terminated her employment, and she amended her complaint to assert a retaliation claim under the LAD.

Quinlan v. Curtiss-Wright Corp. 204 N.J. 239 (2010) Holding:

The employee could recover on her retaliation claim. Employees have a duty to safeguard confidential information that they gain through the employment However, the employer's interest must be balanced against the employee's right to be free from unlawful discrimination. A court must evaluate a number of factors:

- how the employee gained "possession of, or access to, the document";
- "what the employee did with the document";
- "the nature and content of the particular document";
- whether the employee violated "a clearly identified company policy on privacy or confidentiality";
- "the circumstances relating to the disclosure of the document";
- "the strength of the employee's expressed reason for copying the document";
- the broad remedial purposes of our laws against discrimination; and
- "the effect, if any, that either protecting the document or permitting it to be used will have upon the balance of employers' and employees' legitimate rights." .

Quinlan v. Curtiss-Wright Corp. 204 N.J. 239 (2010)
The Dissent: A Warning for Lawyers

Justice Barry Albin

[T]he opinion sends the ***wrong message to the bar***: Lawyers should not in any way signal to a client that stealing documents is an acceptable substitute for the discovery process.

* * *

The other troubling aspect of this affair is that plaintiff's attorney accepted the illicitly taken [the] Lewis evaluation instead of returning it to Curtiss-Wright. At the time of the receipt of that document, plaintiff's attorney had an outstanding discovery request for documents related to Lewis. Presumably, plaintiff could have obtained the documents the old-fashioned way -- through the lawful process of discovery. Then, Curtiss-Wright would have been on notice of the company's documents in plaintiff's possession. Plaintiff's attorney, however, laid in wait with the pirated document, springing the ultimate surprise at deposition. ***This is not conduct that our Court should be encouraging***.

Sanchez v. Maquet Getinge Grp.

2018 N.J. Super Unpub. LEXIS 1199 (App. Div. May 23, 2018)

In this employment discrimination case, plaintiff, while still employed, downloaded two executives' hard drives and a "binder full of emails."

- Included emails between him and the company's in-house lawyer regarding FDA compliance issues.
- Plaintiff had previously signed NDA that prohibited him fro disclosing confidential information and requiring him to return company documents upon termination.
- Plaintiff's attorney read these confidential and privileged documents and did not return them.
- Company learned of plaintiff's possession of these privileged communications when he produced them in discovery in his subsequent lawsuit and demanded their return.

Sanchez (cont.)

Held:

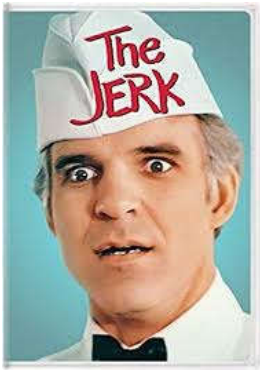
- Plaintiff and his attorney were required to return the materials removed through self-help.

- Plaintiff's lawyer was disqualified because he violated R.P.C. 4.4 (b) because he failed to cease reading the documents once he realized what he had.

"Plaintiff's extra-judicial self-help measures deprived defendant of the opportunity to prevent the disclosure of this privileged information. Plaintiff's counsel's unreasonable delay in disclosing this information rendered futile any attempt to mitigate this harm. As the motion judge noted, this case is still in its early stages. The only way left to salvage this cause of action is to permit plaintiff a reasonable time to obtain substitute counsel".

In sum - Failing to notify opposing counsel of client's "burn files" leads to disqualification in NJ case

Don’t Be a Jerk



R.P.C. 3.2. Expediting Litigation

RPC 3.2 Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client and shall treat with courtesy and consideration all persons involved in the legal process.

R.P.C. 4.4 (a) Respect for the Rights of Third Parties

RPC 4.4 Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

R.P.C. 8.2. Judicial and Legal Officials

RPC 8.2 Judicial and Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications of a judge, adjudicatory officer or other public legal officer, or of a candidate for election or appointment to judicial or legal office.

R.P.C. 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official

(f) knowingly assist a judge or judicial officer in conduct that is a violation of the Code of Judicial Conduct or other law.

(g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm.

ANESTHESIA ASSOCIATES OF MORRISTOWN, P.A. v. WEINSTEIN SUPPLY COMPANY
Docket No. A-5033-18T4 (App. Div. Oct. 7, 2020)

"Finally, we would be remiss if we did not comment on AAM's and SJC's counsels' briefs that accused the two judges of either abusing their authority or rendering incoherent or preposterous decisions. *We view these pejorative attacks on the judges to be totally unwarranted and disrespectful.* The judges of the court of compensation, like other judges, are dedicated public servants who strive each day to properly assess the cases before them after giving due regard to the facts and the applicable law. Most times, as here, they render legally correct decisions. Other times, lawyers and appellate courts might disagree with them, or they might have made a mistake, but that does not render their thoughtful consideration of the case to be in any manner an abuse of their power, preposterous or incoherent. *Such characterizations do little to advance a client's position and unjustifiably undermines the public's confidence in the judiciary. We hope that in the future counsel will think twice before resorting to such attacks."*

In Re Rychal, DRB 16-250 (2017)

During OAE Investigation, Respondent sent the following e-mail:

Hi Scott: Given my spare time I went through my evidence files. . . Attached hereto you'll find a memo that was circulated around the office post JH's alleged "going crazy." Take note that they make fun of this guy because he opposes/es [sic] "State Offenses, ... Insurance Fraud, and "Ethics Violations." Do me a big favor and tell Director Centinaro, THANKS FOR THE BACK UP!!!!!!!!!!!!!!!!!!!! I really appreciate his f*****g lack of concern. THIS IS A F*****G ATROCITY THAT AN HONEST LAW ABIDING ATTORNEY SHOULD HAVE TO GO THROUGH THIS S**T!!!!!! TELL CHARLES CENTINARO THAT I SAID TO GO F**K HIM SELF [sic]!!!!!!!! QUOTE ME IN YOUR REPORT!!!!!! NO OFFENSE AGAINST YOU, I KNOW YOU'RE A DECENT HONEST GUY.
mIKE R¥CHEL
Held violated RPC 3.2 and 8.2(a)

In re Giscombe, DRB 19-326 (2020)

During contentious trial, after the lawyers could not agree on another date, the court clerk told the parties to return on "the 15th." Because Respondent was not available that day, she told the court clerk that she would not attend the hearing and said to the court clerk, "I'm not going to tell you what I really think about you because I'm too much of a lady." Then, while exiting the courtroom, Respondent called the court clerk a "fat a--."

Held: Respondent violated RPC 3.2 and 4.4 (a)

In re Bailey, OBAD No. 2229 (2019)

- Bailey, an Oklahoma lawyer who assaulted his girl friend (and paralegal) was given private reprimand by Oklahoma Board of Attorney Discipline ("OBAD") and charged $290. He was later ordered to give a client a $700 refund.
- Subsequently, Bailey goes to the offices of the Oklahoma Bar Association with two checks, one of which he instructed be delivered directly to the assigned assistant general counsel who handled the case. Long story short –The check was provided to forensic scientists, who concluded that the "smear" was, indeed, fecal matter.

R.P.C. 8.4. (g)

It is professional misconduct for a lawyer to:

* * *

(g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm.

RPC 8.4

The Supreme Court's official comment (May 3, 1994) to RPC 8.4(g) provides:

> This rule amendment (the addition of paragraph g) is intended to make discriminatory conduct unethical when engaged in by lawyers in their professional capacity. It would, for example cover . . . activities related to practice outside of the courthouse, whether or not related to litigation[.] . . .
>
> "Discrimination" is intended to be construed broadly. It includes sexual harassment, derogatory or demeaning language, and, generally, any conduct towards the named groups that is both harmful and discriminatory.

RPC 8.4(g) protects against discrimination and harassment. Indeed, as the DRB stated when sanctioning an attorney for sexual harassment:

> Our decision as to the appropriate sanction is also a recognition that society's attitude toward sexual harassment has changed and that "much conduct that would have been considered acceptable twenty or thirty years ago would be considered sexual harassment today. As community standards evolve, the standard of what a reasonable woman would consider harassment will also evolve." Lehman v. Toys 'R' US, Inc.,132 N.J. 587, 612 (1993). See also In re Seaman, 133 N.J. at 67, 99 (1993) ("sexual harassment of women by men is among the most pervasive, serious, and debilitating forms of gender discrimination.").

In re Sims, Docket No. DRB 04-433, *aff'd* 185 N.J. 276 (2005)

In Re Vincente, 114 N.J. 275 (1989)

- The attorney threatened opposing counsel, engaged in vulgar name-calling, and challenged him to a fight.
- In a telephone conversation, attorney used threatening, abusive, racist, and vulgar language directed to the trial judge's law clerk.
- The Supreme Court that this conduct constituted a violation of RPC 3.2 and RPC 8.4 and issued a three-month suspension.

In Re Vincente, 114 N.J. 275 (1989)

"In addition, we cannot overemphasize that some of the respondent's offensive verbal attacks carried invidious racial connotations. Such verbal abuse, we reiterate, was directed against another lawyer in the context of the practice of law. We believe that this kind of harassment is particularly intolerable. Any kind of conduct or verbal oppression or intimidation that projects offensive and invidious discriminatory distinctions, be it based on race or color, as in this case, or, in other contexts, on gender, or ethnic or national background or handicap, is especially offensive. In the context of either the practice of law or the administration of justice, prejudice both to the standing of this profession and the administration of justice will be virtually conclusive if intimidation, abuse, harassment, or threats focus or dwell on invidious discriminatory distinctions."

114 N.J. 275, 283 (1989).

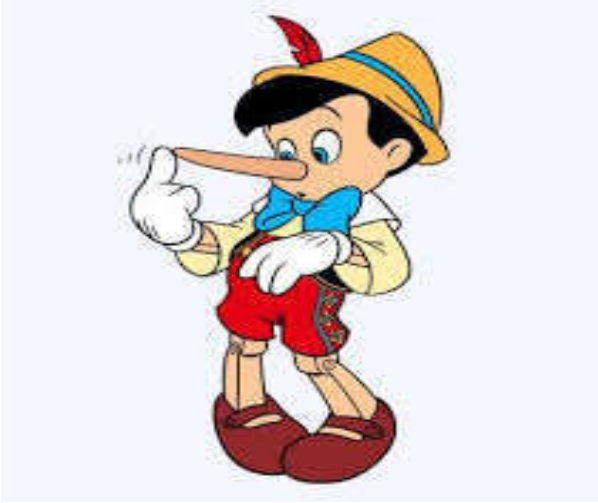
8.4(g) Cases

- In re Regan, DRB 20-134 (2021), *aff'd* 249 NJ 17 (2021) (attorney representing woman in divorce action censured for violating Rule 8.4(g) when, after divorce finalized, sent her email thanking her for a positive review and offered to perform oral sex on her);
- In re Farmer, DRB 18-276 (2019), *aff'd* 239 N.J. 527 (attorney reprimanded for violating Rule 8.4(g) by engaging in discriminatory conduct while pursuing a medical malpractice action on his client's behalf when he attributed a doctor's alleged misrepresentations to the physician's Chinese heritage);
- In re Garofalo, DRB 16-037 (2016), *aff'd,* 229 N.J. 245 (2017) (attorney suspended for, among other things, sexually harassing law firm employees);
- In re Geller, Docket No. DRB 02-467 (2003), *aff'd* 177 N.J. 505 (2003) (attorney sanctioned for a number of ethics violations that were the subject of a 12-count complaint, including RPC 8.4(g), as a result of his referring to "Monmouth County Irish" as having their own way of doing business);

8.4(g) Cases

- In re Pinto, DRB 00-049 (2001), *aff'd* 168 N.J. 111 (2001) (attorney reprimanded for discriminatory conduct with his client in the form of graphic, sexually-charged comments);
- In re Walterscheid, DRB 00-234 and 00235 (2000) ("The Committee also proved by clear and convincing evidence that the Respondent violated R.P.C. 8.4(g) by engaging in a professional capacity, [in] conduct involving discrimination, in this case sexual harassment and race.");
- In re Pearson, 139 N.J. 30 (1995) (attorney was sanctioned for hugging his client, putting his hands on her buttocks, pushing his head into her chest and commenting about the size of her dress);

Don’t Lie



R.P.C. 3.1 Meritorious Claims

RPC 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, nor assert or controvert an issue therein unless the lawyer knows or reasonably believes that there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law, or the establishment of new law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

R.P.C. 3.3 Candor Toward the Tribunal

(a) A lawyer shall not:
(1) make a false statement of material fact to the tribunal;
(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting an illegal, criminal or fraudulent act by the client;
(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed to the opposing party;
(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures; or
(5) Fail to disclose to a tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal . . .

R.P.C. 4.1 Truthfulness in Statements to Others

RPC 4.1 Truthfulness in Statements to Others

(a) In representing a client, a lawyer shall not knowingly:

(1) make a false statement of material fact or law to a third person; or

(2) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

(b) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.

Mata v. Avianca
Civ. No. 22-1461, 2023 U.S. Dist. LEXIS 108263 (SDNY June 22, 2023)

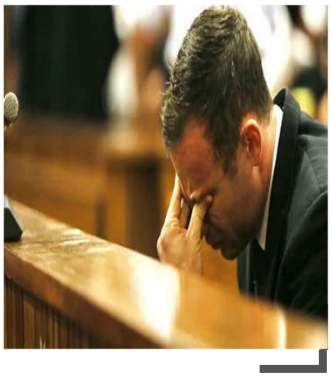
- In this personal injury case, Avianca moved to dismiss Mata's claims as time-barred under the Montreal Convention. Mata's lawyers, LoDuca and Schwartz, filed their opposition. Avianca, in its reply brief, stated it had been "unable to locate" many authorities cited in Mata's brief.
- Pursuant to the Court's Order, Mata's lawyer prepared an affidavit and attached copies of "decisions" *fabricated* by ChatGPT when he asked the chatbot to identify favorable rulings addressing the tolling effect of a bankruptcy stay under the Montreal Convention.
- The Court issued an order to show cause why the lawyers should not be sanctioned, which led to them filing an affidavit containing misstatements regarding submission of the fake cases. Making matters worse, they submitted another affidavit offering "shifting and contradictory explanations."

Mata v. Avianca
Civ. No. 22-1461, 2023 U.S. Dist. LEXIS 108263 (SDNY June 22, 2023)

Holding:

- LoDuca violated Rule 11 by (1) failing to read the cited cases or otherwise take any action to ensure the legal assertions in the Affirmation in Opposition "were warranted by existing law," (2) "swearing to the truth" of his first affidavit "with no basis for doing so," and (3) telling the Court he was on vacation when in fact it was Mr. Schwartz on vacation.

- Schwartz violated Rule 11 by failing to acknowledge in the first affidavit that he was "aware of facts that alerted him to the high probability" that at least two of the fake cases "did not exist" and by making other false statements about his use of ChatGPT in preparing the Affirmation in Opposition. .



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SEC ADMINISTRATIVE PROCEEDING, File No. 3-20114

- Chief Compliance Officer ("CCO") at financial institution was tasked to review an investment analyst and potential insider information he obtained just before a major investment. She concluded no insider information was exchanged but did not document that review in a memo as her supervisor asked.
- When CCO's supervisor asked for an update eleven months later, she emailed him a backdated memo. She also furnished the backdated memo to the SEC amid its inquiry.
- CCO was fired in connection with her backdating the memo. The SEC issued a cease and desist order suspending her from practicing before the commission for a year and from compliance roles with investors, brokers and other agents for three years. She consented to the order but did not admit wrongdoing.

In re Alexander, DRB 20-068 (2020)

Respondent, a lawyer, gave false testimony before a hearing officer and the court in connection with a domestic violence matter, falsely claimed that he was the victim in a domestic violence incident perpetrated by his girlfriend with whom he resided. Based on this testimony, the court entered a TRO. However, on appeal, the girlfriend produced an audio recording showing that the Respondent lied under oath.

Held: Respondent violated RPC 3.1, 3.3. (a)(1) and (4), 3.4 (b), 8.1(a), 8.4(b), 8.4 (c), and 8.4(d).

In re Nadler, DRB 19-089 (2020)

Respondent applied for an associate position with Williams & Connolly, submitting an unofficial law school transcript and a resume. In fact, there were twenty-six misrepresentations on the unofficial transcript submitted to the firm. He falsified the transcript to reflect, among other things, grades that were higher than he had received, high grades in courses that he had never taken, and a cumulative GPA of 3.825, rather than the 3.269 that he had actually achieved. He also lied on his resume.

Held: Respondent violated RPC 8.1 (a), 8.4 (c), and 8.4(d) – 2 year suspension.

In re Nadler, DRB 19-089 (2020)

"The degree and scope of respondent's deception, his steadfast commitment to demonstrably false claims, and his attempt to place blame on someone else, demonstrate a disturbing pattern of dishonesty, a refusal to admit wrongdoing, and an arrogant lack of contrition that cannot be countenanced. Moreover, nothing in the record serves to mitigate his misconduct, including his alleged depression, which is undiagnosed and untreated, other than a weekly conversation with someone at the NJLAP. *Moreover, although respondent was an inexperienced attorney at the time of these events, one need not have experience to know that one should not lie. Inexperience may serve as mitigation for some shortcomings, but not for engaging in repeated acts of dishonesty, deception, and fabrication of documents.* We, thus, determine to impose a two-year suspension."

"There's no such thing as a good-for-nothing. You can always serve as a bad example"

Morris Sass

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About the Panelists…

Lisa K. Barré-Quick is a Partner in Apruzzese, McDermott, Mastro & Murphy, P.C. in Liberty Corner, New Jersey, where her practice focuses primarily upon the counseling and defense of management in the spectrum of employment law issues and actions. She works with clients in a variety of specialized business settings and environments and frequently serves as an external resource to in-house legal and human resource teams advising on employment law and personnel issues, with an emphasis on workplace training and client counseling and assisting clients in managing leave, accommodation, and a full range of human resources issues. Prior to joining Apruzzese, McDermott, Mastro & Murphy, Ms. Barré- Quick was a Partner at Florio & Perrucci, P.C. (acquired by Fischbein Badillo Wagner Harding), after beginning her legal career as an associate at Mudge Rose Guthrie Alexander & Ferdon. She has more than 25 years of diverse experience in employment law and has been with Apruzzese, McDermott, Mastro and Murphy since 1999.

Ms. Barré-Quick is admitted to practice in New Jersey, New York and Pennsylvania; and before the United States District Court for the District of New Jersey, the Southern and Northern Districts of New York, and the Middle and Western Districts of Pennsylvania; the Third Circuit Court of Appeals; and the United States Supreme Court. She is a member of the Executive Committee of the New Jersey State Bar Association Labor & Employment Law Section, for which she has co-chaired the Protected Expression Subcommittee and is former Co-Chair of several other subcommittees. She has been a member of the American Bar Association Employment Law Section, the Society of Human Resource Management, the Union County Bar Association and the Association of the Federal Bar.

Secretary and former Co-Chair of the Program Committee of the Sidney Reitman Employment Law American Inn of Court, Ms. Barré-Quick has been Managing Editor of the *New Jersey Labor and Employment Law Quarterly* and is a former adjunct faculty member at Seton Hall Law School. She frequently serves as a panelist, lecturer and author on workplace and employment law topics.

Ms. Barré-Quick received her B.A., *cum laude*, from the University of Pennsylvania and her J.D., with Honors, from the National Law Center, George Washington University, where she was Editor of the *George Washington Journal of International Law and Economics* and the recipient of several other honors.

Kathleen McLeod Caminiti is a Partner in Fisher & Phillips LLP in the firm's Murray Hill, New Jersey, and New York City offices, and Co-Chair of the firm's Wage and Hour and Pay Equity Groups. She has extensive experience handling employment litigation matters, including individual plaintiff discrimination claims, restrictive covenant litigation, and wage and hour class and collective actions. She has successfully defended cases alleging civil rights violations; race, sex, age and handicap discrimination; sexual harassment; whistleblowing; wrongful discharge and retaliation; and has also defended employers and financial institutions in *Employee Retirement Income Security Act* (ERISA) cases.

Ms. Caminiti is admitted to practice in New Jersey, New York and Florida; and before the United States District Court for the District of New Jersey; the District of Connecticut; the District of Columbia; the District of Colorado; the Western District of Michigan; the Northern District of

California; the Northern District of Illinois, the Eastern District of Wisconsin; the Eastern District of Texas; the Northern, Middle and Southern Districts of Florida; and the Southern, Eastern and Northern Districts of New York; and the Second, Third and Sixth Circuit Courts of Appeal. She is a member of the American and New Jersey State Bar Associations, and the latter's Labor and Employment Law Executive Committee, and has lectured widely for professional organizations. The author of articles which have appeared in *New Jersey Lawyer*, the *New York Law Journal*, *New Jersey Business* and other publications, she has been quoted ABC News, *NJBiz*, *HR Executive* and other media outlets, and is the recipient of several honors.

Ms. Caminiti received her B.A., *cum laude*, from Rutgers University, where she was elected to *Phi Beta Kappa*, and her J.D., *magna cum laude*, from Boston College Law School, where she was a member of the Order of the Coif.

Arnold Shep Cohen is a Partner in Oxfeld Cohen, P.C. in Newark, New Jersey, where he concentrates his practice in private and public-sector labor, employment and employee benefits law. He has negotiated numerous labor agreements and has handled thousands of labor arbitrations and administrative hearings in several industries and levels of government.

A member of the New Jersey State Bar Association, Mr. Cohen is Past Chair of the Association's Labor and Employment Law Section and has served on the Board of Trustees of the American Labor Museum. He has had twelve reported decisions before the New Jersey Supreme Court in addition to many reported decisions in federal and state trial and appellate courts, and is a former member of the Editorial Board of *New Jersey Lawyer*, the weekly newspaper. He is also a Fellow of the College of Labor and Employment Lawyers.

Mr. Cohen was a founding Master of the Sidney Reitman Employment Law American Inn of Court and former Editor-in-Chief of *New Jersey Labor and Employment Law Quarterly*. Listed in *Who's Who in American Law*, he is an editor and co-author of ICLE's *New Jersey Labor and Employment Law*, has written numerous articles on labor and employment law and has lectured for ICLE and other organizations. Mr. Cohen is the host of "World of Work" on WDVR-FM and an Adjunct Professor at Rutgers School of Law-Newark, where he teaches labor arbitration, labor negotiations and alternative dispute resolution. He was the recipient of ICLE's Distinguished Service Award for Excellence in Continuing Legal Education in 2015, the 2019 Sidney H. Lehmann Award bestowed by the NJSBA Labor & Employment Law Section and several other honors.

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Tedd J. Kochman is a Shareholder in the Newark, New Jersey, office of the national-international labor and employment law firm Littler Mendelson, P.C. Mr. Kochman has served on several vital committees within his firm, including as a prior long-time member of the firm's National Diversity Council, as well as the Newark Office's Hiring Committee. He and the firm focus strictly upon representing companies, small and large, in all aspects of traditional labor law (including labor relations, labor counseling and training, handling collective bargaining negotiations and contract arbitrations, handling unfair labor practice and representational matters before the NLRB, and advising clients regarding organizing campaigns), employment counseling services (including drafting and overseeing application of employee handbooks and policy procedures, drug/alcohol testing standards, wage/hour compliance and audits, and

workplace training issues), and employment litigation/benefits law (including the defense of all state and federal discrimination and harassment claims, wage/hour litigation, benefit plan compliance and ERISA matters).

Admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey and the Southern and Eastern Districts of New York, Mr. Kochman has been a member of the New Jersey State, New York State, Essex County and New York City Bar Associations. He is Past Chair of the New Jersey Department of Labor's Employer's Council for Bergen County and Passaic County and has been a long-time member of the New Jersey State Bar Association's Labor and Employment Law Section Executive Committee, where he serves on the NLRB (Region 22) Conference Planning Committee. Having served as a Board Member of the Bergen County Workforce Investment Board, Mr. Kochman also previously served for many years as a certified New Jersey State Court Mediator as part of New Jersey's mandatory litigation mediation program. He has served as a Board Member for New Jersey's American Heart Association/American Stroke Association (AHA/AHS), as well as a Member of the AHA/ASA's Executive Leadership Team and Chairperson for the AHA/ASA's Open Your Heart campaign for the *Affair of the Heart* Gala. He has also been a member of the Board for New Jersey's Gilda's Club of Northern New Jersey.

Mr. Kochman is a frequent lecturer on a variety of labor and employment topics for organizations including ICLE, the Commerce and Industry Association of New Jersey, the New Jersey Banker's Association, NJCPA-Hudson Chapter and other groups. He has also authored a number of articles focused on developments and guidance in this area of law, and is the recipient of several professional awards and prestigious recognitions, including the Essex County Bar Association's "Young Lawyer's Achievement Award."

Mr. Kochman received his undergraduate degree, *summa cum laude*, from Emory University's Honors Program, where he was elected to *Phi Beta Kappa*, *Omicron Delta Kappa* and to the *Order of Omega*. He received his law degree from Georgetown University Law Center, where he was Articles Editor of Georgetown's *American Criminal Law Review* and a member of Georgetown Law's Clinical Program. He clerked for the Honorable Board Member Charles I. Cohen, National Labor Relations Board, in Washington, D.C.

Jed L. Marcus, Marcus ADR Services LLC in Morris Plains, New Jersey, is an experienced labor and employment arbitrator-mediator, fact finder and investigator who serves on the Labor, Employment and MPPA Withdrawal Liability Panels of the American Arbitration Association. He formerly co-chaired the Labor and Employment Law and Alternate Dispute Resolution practices of Bressler Amery & Ross, P.C., where he represented employers throughout the United States in all types of employment and labor relations matters, including class and collective actions, and before the National Labor Relations Board (NLRB).

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Mr. Marcus received his B.A. and M.A. from Rutgers University and his J.D. from the University of Oklahoma, where he was a member of the Order of the Coif and Research Editor of the *Oklahoma Law Journal.*

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Admitted to practice in New Jersey and before the United States District Court for the District of New Jersey, Ms. Reis has served twice as President of the National Employment Lawyers Association-New Jersey (NELA-NJ), is a member of the New Jersey State Bar Association Labor & Employment Law Section's Executive Committee and Chair of its Weed and Work Section, and has been Managing Editor of the *New Jersey Labor and Employment Law Quarterly*. She is also a member of the National Employment Lawyers Association (NELA), the New Jersey Women Lawyers Association and the Labor and Employment Section of the American Bar Association.

Ms. Reis' article "Get Rid of All Those Dirty Jews" appeared in *New Jersey Lawyer, the Magazine*, and she co-authored a chapter on wage and hour claims in *Employment Litigation in New Jersey* (Lexis-Nexis). She has also contributed to *The Family and Medical Leave Act 2009 Cumulative Supplement* (ABA Section of Labor and Employment Law) as well as materials involving misconduct and the *ADA* (National Employment Law Institute). Ms. Reis is a Barrister of the Sidney Reitman Employment Law American Inn of Court (the "Inn"), was Co-Chair of the Inn's Programing Committee from 2011-2012 and is the recipient of the Inn's David Solomon Award. She has appeared on a Channel 12 news segment and was quoted in several news publications for her testimony before the Senate Labor Committee on behalf of NELA-NJ in support of legislation that prohibits employers from requiring or demanding access to employees' social networking sites. The recipient of several honors, she also teaches employment law to undergraduate students at Kean University and has lectured for ICLE, the New Jersey State Bar Association, NELA, NELA-NJ and other organizations.

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Mr. Shahdanian is admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey and the Third Circuit Court of Appeals. A former Trustee of the New Jersey State Bar Association, he has been a member of the Association of the Federal Bar of the State of New Jersey and the NJSBA Labor & Employment and Federal Practice & Procedure Sections, is Second Vice Chair of the NJSBA Labor and Employment Law Section and has served as Co-Chair of the CEPA Subcommittee of the Section. He is a former Vice-President and Secretary of the Hudson County Bar Association's Young Lawyers Division.

A Master of the Sidney Reitman Employment Law American Inn of Court and a Graduate of the Hudson American Inn of Court, Mr. Shahdanian has lectured for ICLE and other organizations and is the author of published articles. He has authored or co-authored revisions to the City of Jersey City, Passaic Valley Sewerage Commissioners, North Hudson Regional Fire & Rescue and Haven Savings Bank's Policies Prohibiting Discrimination and Harassment, and has performed related sensitivity training. He has also been involved in several published decisions and is the recipient of several honors.

Mr. Shahdanian received his B.A. from Boston College and his J.D. from Seton Hall University School of Law. He served as a law clerk to the Honorable Thomas P. Olivieri and the Honorable Barbara A. Curran, Superior Court of New Jersey, Hudson County, Criminal Division.

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NEW JERSEY CANNABIS REGULATORY COMMISSION GUIDANCE ON "WORKPLACE IMPAIRMENT"

Pursuant to N.J.S.A. 24:6I-52a(2)(a), the New Jersey Cannabis Regulatory Commission ("NJ-CRC") is charged with prescribing standards for a Workplace Impairment Recognition Expert ("WIRE") certification, to be issued to full- or part-time employees, or others contracted to perform services on behalf of an employer, based on education and training in detecting and identifying an employee's usage of, or impairment from, a cannabis item or other intoxicating substance, and for assisting in the investigation of workplace accidents.

This document is intended to serve as guidance until the NJ-CRC formulates and approves standards for WIRE certifications. Additionally, a template "Reasonable Suspicion" Observation Report Form is included for download and use. Please note that the sample form is not cannabis-specific.

Cannabis is a drug that can remain in the bodily fluids of users for a long period of time and although tests are improving in accuracy there is no perfect test for detecting present cannabis impairment. Therefore, best practice has been for employers to establish evidence-based protocols for documenting observed behavior and physical signs of impairment to develop reasonable suspicion, and then to utilize a drug test to verify whether or not an individual has used an impairing substance in recent history.

Although N.J.S.A. 24:6I-52 provides that Workplace Impairment Recognition Experts can be certified and assist in the documentation of the physical and behavioral signs of intoxication, the statute does not impede the ability of employers to continue to utilize established protocols for developing reasonable suspicion of impairment and using that documentation, paired with other evidence, like a drug test, to make the determination that an individual violated a drug free workplace policy. In some industries, these protocols are federally mandated.

ALL EMPLOYERS, whether operating in the cannabis industry or otherwise, shall be guided accordingly:

Pursuant to N.J.S.A. 24:6I-52a(1), and in accordance with all state and federal laws, 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 as a result of engaging in conduct permitted under N.J.S.A. 24:6I-31 *et al.* However:

- Employers have the right to maintain a drug free workplace consistent with the requirements of N.J.S.A. 24:6I-52; and
- Employers may require an employee to undergo a drug test upon reasonable suspicion of an employee's usage of cannabis or cannabis products while engaged in the performance of the employee's work responsibilities, or upon finding any observable signs of impairment related to usage of cannabis or cannabis products, or as part of a random drug test program, or following a work-related accident subject to investigation by the employer.

A scientifically reliable objective testing method that indicates the presence of cannabinoid metabolites in the employee's bodily fluid alone is insufficient to support an adverse employment action. However, such a test combined with evidence-based documentation of physical signs or other evidence of impairment during an employee's prescribed work hours may be sufficient to support an adverse employment action.

In order to demonstrate physical signs or other evidence of impairment sufficient to support an adverse employment action against an employee for suspected cannabis use or impairment during an employee's prescribed work hours employers may:

- Designate an interim staff member to assist with making determinations of suspected cannabis use during an employee's prescribed work hours. This employee:

    - Should be sufficiently trained to determine impairment and qualified to complete the Reasonable Suspicion Observation Report; and
    - May be a third-party contractor.
- Utilize a uniform "Reasonable Suspicion" Observation Report (see below) that documents the behavior, physical signs, and evidence that support the employer's determination that an employee is reasonably suspected of being under the influence during an employee's prescribed work hours. The employer should establish a Standard Operating Procedure for completing such a report that includes:
    - the employee's manager or supervisor or an employee at the manager or supervisor level; and
    - an interim staff member that has been designated to assist with determining whether an employee is reasonably suspected of being impaired during an employee's prescribed work hours, or a second manager or supervisor.
- An example form is attached to this guidance, however, if employers already utilize a Reasonable Suspicion Observation Report to determine when drug testing is necessary, they may continue to do so.
- An employer may use a cognitive impairment test, a scientifically valid, objective, consistently repeatable, standardized automated test of an employee's impairment, and/or an ocular scan, as physical signs or evidence to establish reasonable suspicion of cannabis use or impairment at work.

Note on Federal Contracts: N.J.S.A. 24:6I-52b(1)(b) specifically provides that if it is determined that any of the provisions set forth in that section of the law result in a provable adverse impact on an employer subject to the requirements of a federal contract, then the employer may revise their employee prohibitions to be consistent with federal law, rules, and regulations. As such, employers may be required by federal contract or law to follow specific protocols related to determining reasonable suspicion and drug testing and are permitted under N.J.S.A. 24:6I-52 to continue to do so.

DISCLAIMER: The purpose of this guidance is to clarify and explain the NJ-CRC's understanding of the existing legal requirements under the governing law. This guidance does not impose any additional requirements that are not included in the law and does not establish additional rights for any person or entity. Please note, however, that adverse employment actions may impact employees' protected rights under various laws including, but not limited to, state and federal anti-discrimination laws. When incorporating this guidance, employers should ensure compliance with all state and federal employment laws.

Issued: September 9, 2022

Jeff Brown
Executive Director
New Jersey Cannabis Regulatory Commission

REASONABLE SUSPICION OBSERVED BEHAVIOR REPORT

Behavior that provides reasonable suspicion supporting a test for controlled substances or alcohol use must be observed and documented by a supervisor. If possible, the behavior should be observed and documented by two supervisors. The documentation of the employee's conduct shall be prepared by the observing supervisor(s) within 24 hours of the observed behavior or before the results of the tests are released, whichever is earlier. Distribute this report to appropriate authorities based on agency policy and procedures while maintaining employee confidentiality.

Employee Name _____ **Employee ID Number** _____

Employee Job Title _____ **Agency** _____

Employee is reporting for duty _____ Employee is already on duty _____

Behavioral observation timeline:
From (date/time) _____/_____am/pm To (date/time) _____/_____am/pm

Site or Location where observation(s) occurred:

_____

Street Address **City** **Zip Code**

CAUSE FOR REASONABLE SUSPICION

NOTE: A manager or supervisor must complete this form. A combination of one or more observable signs and symptoms of drug or alcohol use must be observed to establish reasonable suspicion. Determination of reasonable suspicion must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, body odors or speech (ABBS) of the employee. The observations may include indications of the chronic and withdrawal effects of controlled substances. In making a determination of reasonable suspicion, additional factors may include, but are not limited to the following:

- Pattern of unsatisfactory job performance or work habits;
- Occurrence of a serious or potentially serious work-related accident that may have been caused by human error or flagrant violations of safety, security, or other operating procedures;
- Evidence of illegal substance use, possession, sale, or delivery while on duty and/or possession of drug paraphernalia;
- Information provided by either a reliable or credible source independently corroborated or having corroborative evidence from a supervisor;

Physical Signs or Symptoms *(CIRCLE ALL THAT APPLY)*

Flush/pale/sweaty face
Profuse/excessive sweating
Red/bloodshot eyes
Glassy/watery eyes
Closed eyes
Droopy eyelids
Dilated/constricted pupils
Dry mouth/lip smacking
Vomiting/excessive belching
Shaking hands/body tremors/twitching
Disheveled appearance
Needle tracks or puncture marks
Frequent sniffing
Shortness of breath/difficulty breathing
Runny nose/sores around nostrils
Odor of alcohol
Odor of marijuana
Odor of chemicals

Behavioral Indicators *(CIRCLE ALL THAT APPLY)*

Agitated/insulting speech
Combative/threatening speech
Incoherent/slurred/slow speech
Rapid/rambling/repetitive speech
Delayed/mumbling speech
Shouting/whispering/silent
Uncharacteristically talkative
Irritable/angry/impulsive
Use of profanity/argumentative
Swaying/stumbling/staggering
Lack of coordination
Disoriented/confused
Euphoric
Tearful
Impaired judgment
Sleepy/stupor
Sad, depressed, withdrawn
Anxious/fearful
Cannot control machinery/equipment
Excessive yawning/fatigue/lethargy
Unaccounted time/extended breaks
Loss of inhibition
Inappropriate wearing of sunglasses
Falling down/reaching for support
In appropriate wearing of outerwear

Description of actions or behaviors Provide a **detailed description** of the behaviors or indicators you observed. *Apply BOAS* - Describe Behavior, Odors, Appearance, Speech when documenting observations.

Post Accident (Complete if applicable) Specify indicators of drug or alcohol use as a potential factor in this accident:

Employee Interview Ask employee, "Explain the behaviors we have observed" and provide **employee response:**

Checklist Answer the following questions to establish reasonable cause for testing. Consult with your Human Resources Business Partner, Human Resources Representative, Appointing Authority or designee to determine appropriateness of testing upon answering the following questions.

1. Has impairment been displayed by the employee in their workplace appearance, actions and/or performance?
   ☐Yes ☐No
2. Could the impairment result from the possible use of drugs and/or alcohol?
   ☐Yes ☐No
3. Is the impairment current?
   ☐Yes ☐No
4. Did you personally witness the situation and/or the concerning appearance, actions, behavior or performance?
   ☐Yes ☐No
5. Are observers able to (and/or have they) document(ed) facts about the situation?
   ☐Yes ☐No

Observer Information (Must be a manager or supervisor)

Supervisor/Manager Name: _____

Title: _____ **Date/Time:** _____

IMPORTANT NOTE: SECONDARY OBSERVER must complete a separate, original form. Always seek a secondary observation from another supervisor, manager, or team lead.

Additional Documentation

Understanding the Science of Cannabis, Limitations of Drug Testing, and Difficulty of Trying to Determine Impairment

By Claudia A. Reis

This article was previously published in the *New Jersey Labor and Employment Law Quarterly*, March 2021 issue

The legalization of recreational marijuana has raised the stakes for both employers and employees as battle lines are drawn between the need to ensure workplace safetyi and employees' rights to engage in lawful off-the-clock conduct without fear of losing their jobs. Attempting to balance both interests is no easy task given that widely-used testing methods cannot distinguish between recent usage and not-so-recent usage and there is no scientifically reliable means of determining cannabis impairment.ii While legal analysts and experts often express the need for laws to catch up to technology, this is certainly a case where the opposite is true.iii In the meantime, New Jersey employers and employees are left to sort out these difficult issues, which is certain to occur through an uptick in litigation. Understanding the limitations of marijuana testing and visual determinations about impairment as well as the potential liability issues giving rise to the imposition of workplace discipline based on purely subjective and unscientific criteria will prove important to employers, employees, and their respective attorneys. Coupling that knowledge with the practicalities of taking adverse actions against medicinal marijuana patients but not employees who take other impairing medications or abuse alcohol may avoid unlawful terminations and unnecessary litigation.

The Science of Marijuana Metabolization

THC (known as delta-9-THC) is the primary compound in cannabis responsible for its medical benefits and psychoactive effects.iv Once ingested, delta-9-THC is metabolized and broken down into various compounds the primary metabolites of which are 11-Hydroxy-THC and Carboxy-THC.v 11-Hydroxy-THC binds to the brain and is the psychoactive ingredient in THC that provides a feeling of euphoria or being high.vi In contrast, Carboxy-THC is an inactive waste productvii that does not result in a high, affect the brain or otherwise affect executive functioning.viii Additionally, Carboxy-THC, unlike 11-Hydroxy-THC, binds to adipose tissue (commonly known as fatty tissue for the less scientifically-minded) where it is slowly released by the body over days and even weeks as it metabolizes fat.ix

Understanding Marijuana Testing Methods and Their Limitations

Widely available and acceptable testing mechanisms, such as blood, saliva, urine, and hair tests, have drawbacks that either make their use impractical or inaccurate for determining current usage. For example, given how it is metabolized, there is a very short window during which marijuana may be detected via a blood test because THC remains in the bloodstream only briefly.x In fact, the concentration of THC in the blood drops precipitously in the first hour of use,xi and it can be out of the system of a casual user within as short a period of time as a few hours or as long as 24 hours in more frequent users.xii That means that once an employer suspects an employee of being high or impaired by marijuana at work, the presence of the drug may no longer be detectable

in the employee's bloodstream by the time that the employee undergoes a blood test. As a result, while blood tests can be used to determine marijuana use, they are seldom used.[xiii] Saliva tests, which may also be used to detect the presence of marijuana, provide an even shorter detection period as THC will remain detectable only until fully swallowed.[xiv] Moreover, saliva testing can be undermined by the use of mouthwash, breath sprays or other alcohol-based oral rinses used within 30 minutes of sample collection.[xv]

The other widely accepted means of cannabis testing fall short of providing any insight into whether employees used or are under the influence of cannabis while at work. That is because they test for the presence of the inactive metabolite Carboxy-THC, which remains detectable long after any high or impairment has worn off given that it is released from adipose tissue over a long period of time.[xvi] As a result, Carboxy-THC may remain in the urine of a one-time user for as long as a week,[xvii] but can remain at detectable levels in the urine of frequent users for days, weeks or, in some cases, longer because it builds up in the urine of chronic users.[xviii] The ability of urinalysis to detect marijuana use for long periods of time coupled with their fast and minimally invasive results make urine tests the favored and most common means of detecting marijuana use;[xix] however, they are limited by their inability to identify the presence of either the psychoactive delta-9 (THC) or its equally psychoactive metabolite 11-Hydroxy-THC.[xx] As a result, when employees are administered urine tests, what is being tested is prior use.[xxi] Accordingly, workers who are frequent users of cannabis, will test positive even if they only engaged in marijuana usage while off-duty during the prior day, night, week, weekend, or even month.[xxii] Similarly, hair follicle testing (HFT) detects the presence of Carboxy-THC, however, it can detect the presence of marijuana going back far longer than a urinalysis and as long as 90 days earlier.[xxiii] Moreover, HFT is generally more expensive than more common testing methods.[xxiv] The obvious take-away is that urinalyses and hair tests will result in positive drug tests long after users are impaired by and stop feeling the effects of cannabis.[xxv]

The most recent advancement in marijuana testing involves a THC breathalyzer. At least two THC breathalyzers have been developed with claims that they can determine recent usage, as opposed to past usage, by either measuring the actual amount of THC on the tester's breath or setting a minimum threshold on the device to detect only very recent usage.[xxvi] The developers of one such device claim that "an undisclosed number of police departments" have tested its device.[xxvii] THC breathalyzer manufacturers claim that, unlike other testing methods, their devices provide "objective" determinations concerning recent cannabis usage because THC only remains on the breath for an hour or two after smoking marijuana and, thus, their devices provide proof of usage during peak periods of impairment.[xxviii] That breathalyzer also claims to detect recent THC ingestion from edibles.[xxix] If the THC breathalyzer does what its manufacturers claim, it will be a game changer for purposes of detecting very recent cannabis use. It is important to understand, however, that while THC breathalyzers may be able to detect recent usage, as discussed below, there is still no scientific correlation between the presence or amount of THC on a user's breath and impairment because of how the body metabolizes marijuana and the various factors that impact impairment.[xxx] It is also worth noting that there is little, if any, data on the reliability of THC breathalyzers, what police departments have actually used or tested them, and what the results of those tests were.

To make matters more complicated, regardless of any general timelines or guides discussed in this article, the impact of cannabis on any given user is highly individualistic in terms of factors related to the user, the cannabis, and the means of consumption.[xxxi] For example, the amount of detectable metabolites as well as the length of time during which they are detectable depend upon the dose and potency of the marijuana, the mode of consumption – meaning whether it was ingested, such as in the case of edibles, or inhaled, as well as the user's frequency of use, body mass, and metabolic rate.[xxxii] More specifically, the presence of Carboxy-THC and the length of time during which it remains detectable will be greater in chronic users as well as in individuals with slow metabolisms or higher levels of body fat.[xxxiii] Levels and length of detection time will also increase the more potent the cannabis, the higher the dose ingested, and if it was consumed via edibles versus inhalation.[xxxiv] The latter factor is the result of how the body metabolizes cannabis through different modes of consumption. For example, while inhaled cannabis enters the bloodstream directly from the lungs resulting in a faster high that wears off more quickly, levels of concentrate from vaping are typically higher than that encountered by smoking.[xxxv] When cannabis is eaten, as opposed to inhaled, it is metabolized first by the stomach and then by the liver, thereby, establishing two separate pathways for the creation of 11-Hydroxy-THC.[xxxvi] As a result, edibles release far more THC into your bloodstream over a prolonged period of time than smoking or vaping and are detectable for longer periods of time.[xxxvii] Interestingly, one study even concluded that THC may be detected for longer periods of time in the urine of African-American users although it is possible that various individual factors such as body mass may account for the increased detection times instead of race.[xxxviii] It is important for employment practitioners to understand that while cannabis is detectable for longer periods of time in chronic users,[xxxix] it is likely to have less of an impact on those users than it does on more casual users.[xl]

The Difficulty of Determining Impairment

Despite all the uncertainty surrounding cannabis's impact on any given user and the utility of tests that identify only prior use, general agreement exists on at least two significant points. In no particular order of importance, those points are that the presence of THC in a drug test does not equate to user impairment,[xli] and there is no scientifically reliable way or even universally accepted way of determining marijuana impairment.[xlii] The shortcomings in ascertaining impairment and the effect of current usage on performance arise from both legal and factual practicalities. On the legal front, the fact that the federal government still classifies THC as a Schedule I drug has resulted in limited research into its impairing effect.[xliii] With regard to the factual practicalities, the body simply metabolizes alcohol and THC differently and, as such, THC's impact on impairment is also different than that of alcohol and not easily measurable.[xliv] Moreover, as discussed above, THC's impacts vary user by user and are dependent on numerous other factors.[xlv] In an effort to overcome the limitations related to determining the existence of impairment, some have suggested that impairment be determined through observation with confirmation through drug testing.[xlvi] Indeed, that is the prescribed procedure set forth in the enacting legislation legalizing recreational marijuana use in New Jersey if an employer reasonably suspects cannabis usage during an employee's performance of work.[xlvii]

Whether THC impairment can be visually ascertained, however, is far from a settled issue. Indeed, while some describe the work performed and conclusions reached by drug recognition experts as science, others refer to it as "too subjective to be science", "junk science" and even

"nonsense."[xlviii] It is important to note that while drug recognition experts (DREs) have long been used by law enforcement to convict drivers of marijuana DUI in New Jersey, the Supreme Court of New Jersey has not yet made any determination as to the scientific reliability of DREs. In fact, in November 2019, the Court remanded a matter involving a DRE for a *Frye* hearing to determine whether "DRE evidence has achieved general acceptance within the relevant scientific community and therefore satisfies the reliability standard of *N.J.S.A.* 702;"[xlix] however, no such hearing has yet occurred. Courts across this country are divided on the issue of the scientific reliability of DRE evaluations and admissibility of their testimony. For example, some courts allow DREs to testify only as fact witnesses because of the unscientific nature of their evaluations,[l] others have found that DRE evaluations are scientific despite the presence of subjectivity in their protocols,[li] others require positive drug tests to validate DREs' evaluations and conclusions,[lii] and yet others refuse to allow DRE testimony because of, in part, concerns about the validity of DREs' conclusions.[liii] Notably, in the context of determining marijuana impairment while driving, the Supreme Court of Massachusetts pointed out that there is no scientific consensus concerning the efficacy of DRE protocols for determining marijuana impairment given that marijuana, unlike alcohol, does not generally depress the central nervous system and, as such, the efficacy of field sobriety tests for marijuana is heavily disputed.[liv]

In addition to the difficulties discussed above, determining current usage or impairment in the workplace raises additional questions and concerns given that "there is no scientific consensus on what, if any, physical characteristics indicate marijuana intoxication"[lv] For example, what constitutes a reasonable suspicion of cannabis use at work? Would an employer's or co-workers' observations of an employee's bloodshot and/or watery eyes suffice? What about observations of an employee's poor limb coordination or relaxed mood or lack of productivity or unexplained hyperactivity, confusion or even a lack of motivation or overeating? Would those observations sufficiently constitute a reasonable suspicion of on-duty marijuana impairment? While those may all be generally accepted signs of a marijuana high or impairment, they can also be signs or symptoms of something far less sinister such as the common cold, allergies, a lack of sleep, various medical conditions such as a diabetic attack, ALS or MS, depression, anxiety or even hyperthyroidism, being up all night with a crying or sick child, staying up too late or getting up too early to catch a middle-of-the-night World Cup match, an undisclosed pregnancy, various medications, and countless other non-cannabis-related reasons.

Other Difficulties Related to Trying to Test for Workplace Marijuana Impairment

Other concerns involve the motivations of those allegedly making the observations. What if a co-worker, in carrying out animus toward a co-worker on the basis of a protected characteristic, accuses that co-worker of being high or exhibiting cannabis-related signs of impairment? Is that enough to constitute a reasonable suspicion of workplace cannabis use? Another motivation-related concern is that supervisors may make false claims of reasonable suspicion to target subordinates, colleagues, and/or even their own managers for discrimination, harassment, retaliation or even spite.

Yet, without stringent and scientifically-approved standards for observing cannabis impairment, employees who ultimately test positive for past lawful marijuana use may lose their jobs even though they never showed up to work or performed their jobs while impaired by

cannabis. Would those employees then also be denied unemployment benefits based on such targeted observations and a test proving the existence of nothing more than prior, lawful use? It certainly seems like a harsh price to pay for lawful conduct, particularly when employers do not make similar inquiries about lawful alcohol use or abuse or even prescription drug use or abuse.

On a similar note, concerns exist that the use of Workplace Impairment Recognition Expert's observations coupled with drug tests will disproportionately impact medicinal marijuana users pursuant to the Compassionate Use Medical Marijuana Act.[lvi] Certainly issues of liability will likely be raised for employers who take adverse actions against workers lawfully prescribed medicinal marijuana who test positive on drug screens if those employers do not similarly take actions against workers lawfully prescribed other drugs known to have impairing effects. Moreover, it is inevitable that some employees will ultimately challenge adverse actions taken against them as violative of their right to privacy to engage in lawful off-duty conduct if the sole basis of those adverse actions are drug tests that identify only prior usage coupled with the subjective observations of WIREs. Sanctioning the use of WIREs, without addressing legitimate concerns regarding their lack of scientific reliability and reliance upon largely subjective criteria and interpretations of those criteria, ignores both that employment, just like liberty, is a significant interest to New Jersey citizens and that such a paradigm will result in increased litigation.

Claudia A. Reis is a plaintiffs' employment attorney at and owner of Lenzo & Reis, LLC in Morristown.

Endnotes

Commented [MD1]: Endnote 5: Is there another source we can cite besides Wikipedia?

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United States District Court, D. New Jersey.

Erick ZANETICH, Plaintiff,
v.
WAL-MART STORES EAST, INC. d/b/a Walmart, Inc., et al., Defendants.

No. 1:22-cv-05387
|
Filed May 25, 2023

Attorneys and Law Firms

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OPINION

O'HEARN, District Judge.

***1** This matter comes before the Court on a Motion to Dismiss Plaintiff Erick Zanetich's ("Plaintiff") Complaint for Failure to State a Claim pursuant to Federal Rule of Civil Procedure 12(b)(6) by Defendant Wal-Mart Stores East, LLC (improperly pled as "Wal-Mart Stores East, Inc. d/b/a Walmart, Inc.") and Sam's East, Inc. (improperly pled as Sam's East, Inc. d/b/a Sam's Club Fulfillment Center) (collectively "Defendants"). (ECF No. 10). The Court did not hear argument pursuant to Local Civil Rule 78.1. For the reasons that follow, Defendants' Motion is **GRANTED**.

I. BACKGROUND

On January 21, 2022, Plaintiff applied for a job in the Asset Protection Department in one of Defendants' facilities in New Jersey. (Compl., ECF No. 1-1, ¶ 25). Defendants interviewed Plaintiff on January 25, 2022. (Compl., ECF No. 1-1, ¶ 26). A few days later, on January 28, 2022, Defendants offered Plaintiff the job, beginning on February 7, 2022, "subject to him submitting to and passing a drug test." (Compl., ECF No. 1-1, ¶ 27). Plaintiff alleges that at the time Defendants had a Drug & Alcohol Policy, that stated "any applicant or associate who tests positive for illegal drug use may be ineligible for employment," which included marijuana. (Compl., ECF No. 1-1, ¶¶ 20–22).

Plaintiff took a drug test on January 21, 2022, and tested positive for marijuana. (Compl., ECF No. 1-1, ¶¶ 28–29). Thereafter, Plaintiff contacted Defendants on February 10, 2022, for an update on his application. (Compl., ECF No. 1-1, ¶ 30). Two days later, Defendants informed Plaintiff that his job offer would be rescinded. (Compl., ECF No. 1-1, ¶ 31). Upon inquiry as to the reason for this decision, Plaintiff was advised it was because he had tested positive for marijuana. (Compl., ECF No. 1-1, ¶¶ 32–33).

On June 13, 2022, Plaintiff filed this action on behalf of himself and others similarly situated asserting two claims: (1) violation of the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act ("CREAMMA"), N.J.S.A. 24:6I-52; and (2) failure to hire and/or termination in violation of New Jersey public policy.

II. PROCEDURAL HISTORY

Plaintiff filed this class action complaint in the Superior Court of New Jersey, Gloucester County. (Compl., ECF No. 1-1). On September 2, 2022, Defendants removed the case to this Court. (Notice of Removal, ECF No. 1). On October 7, 2022, Defendants filed a Motion to Dismiss the Complaint. (ECF No. 10). Defendants argue that CREAMMA does not provide a private cause of action and that New Jersey common law does not recognize a cause of action based on an employer's failure to hire. (Def. Br., ECF No. 10 at 1).

On November 8, 2022, Plaintiff filed a brief in opposition to Defendants' Motion. (ECF No. 13). Plaintiff argues that CREAMMA provides for an implied private cause of action and that his common law cause of action is cognizable as both a wrongful termination and failure to hire claim. (Pla. Br., ECF No. 13). Defendants filed a reply on November 14, 2022. (ECF No. 15).

III. LEGAL STANDARD

***2** To state a claim, a complaint needs only to provide a "short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). Although "short and plain," this statement must "give the defendant fair notice of what the claim is and the grounds

upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007) (quotations, alterations, and citation omitted). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." *Id.* (citations omitted). Rather, a complaint must contain sufficient factual allegations "to state a claim to relief that is plausible on its face." *Id.* at 547.

When considering a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), a court must accept the complaint's well-pleaded allegations as true and view them in the light most favorable to the plaintiff. *Evancho v. Fisher*, 423 F.3d 347, 350 (3d Cir. 2005). Through this lens, the court then conducts a three-step analysis. *Malleus v. George*, 641 F.3d 560, 563 (3d Cir. 2011). "First, the court must 'tak[e] note of the elements a plaintiff must plead to state a claim.' " *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)). Next, the court should identify and disregard those allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. *Id.* Finally, the court must determine whether "the facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.' " *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009) (quoting *Iqbal*, 556 U.S. at 679). A facially plausible claim "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 210 (quoting *Iqbal*, 556 U.S. at 678).

On a Federal Rule of Civil Procedure 12(b)(6) motion, the "defendant bears the burden of showing that no claim has been presented." *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005). The court may only consider the facts alleged in the pleadings, any attached exhibits, and any matters of judicial notice. *S. Cross Overseas Agencies, Inc. v. Kwong Shipping Grp. Ltd.*, 181 F.3d 410, 426 (3d Cir. 1999).

IV. DISCUSSION

Defendants have moved to dismiss, arguing that there is no express or implied cause of action under CREAMMA and that the Cannabis Regulatory Commission ("CRC") holds the sole authority to enforce CREAMMA. (Def. Br., ECF No. 10-1 at 2–3). Defendants further argue that New Jersey common law does not provide for a cause of action based on an employer's failure to hire under *Pierce v. Ortho Pharmaceutical Corporation*, 417 A.2d 505 (N.J. 1980). (Def. Br., ECF No. 10-1 at 8).

Plaintiff argues, after applying the three-part test first established by the United States Supreme Court in *Cort v. Ash*, 422 U.S. 66 (1975), that there is an implied private cause of action. (Pla. Br., ECF No. 13 at 3). Plaintiff also maintains that the New Jersey Supreme Court would extend *Pierce* to failure to hire cases where an employer excludes a group of applicants in violation of New Jersey public policy. (Pla. Br., ECF No. 13 at 23).

This case presents a question of first impression under New Jersey law. Upon review of the statute and relevant case law, the Court dismisses the Complaint because there is no implied private cause of action in CREAMMA and the common law does not provide for a cause of action under *Pierce* based on an employer's failure to hire.

A. Count One – Violation of CREAMMA

No court has yet considered whether CREAMMA provides an implied private cause of action. The express language of CREAMMA is less than helpful. On one hand, it explicitly prohibits employers from taking certain adverse actions on the basis of an individual's use of marijuana ("the employment provision"). On the other, however, the New Jersey Legislature did not state how this provision could be enforced, by whom, and what, if any, remedies would be available. Thus, this Court, sitting in diversity, cannot infer that the Legislature intended to create an implied private cause of action.

1. CREAMMA

***3** In November 2020, the recreational use of marijuana became legal in New Jersey by constitutional amendment, effective January 1, 2021:

> The growth, cultivation, processing, manufacturing, preparing, packaging,

> transferring, and retail purchasing and consumption of cannabis, or products created from or which include cannabis, by persons 21 years of age or older, and not by persons under 21 years of age, shall be lawful and subject to regulation by the Cannabis Regulatory Commission ... or any successor to that commission.

N.J. CONST. art. IV, § 7, ¶ 13. Thereafter, on February 22, 2021, the Governor of New Jersey signed three bills, including CREAMMA, creating a regime of civil and criminal provisions to regulate the legalized recreational use of marijuana. *See* N.J.S.A. 24:6I-31 *et al.* CREAMMA was "designed to eliminate the problems caused by the unregulated manufacturing, distribution, and use of illegal marijuana within New Jersey." N.J.S.A. 24:6I-32(c).

Most relevant here, one of the provisions of CREAMMA contains prohibitions as to an employer's ability to take certain adverse action because of the then-newly-legalized recreational use of marijuana:

> No employer shall refuse to hire or employ any person or shall discharge from employment or take any adverse action against any employee with respect to compensation, terms, conditions, or other privileges of employment 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 from engaging in conduct permitted.... However, ... [a] drug test may also be done randomly by the employer, or as part of a pre-employment screening, or regular screening of current employees to determine use during an employee's prescribed work hours. The drug test shall include scientifically reliable objective testing methods and procedures, such as testing of blood, urine, or saliva, and a physical evaluation in order to determine an employee's state of impairment. The physical evaluation shall be conducted by an individual with the necessary certification to opine on the employee's state of impairment, or lack thereof, related to the usage of a cannabis item in accordance with paragraph (2) of this subsection. The employer may use the results of the drug test when determining the appropriate employment action concerning the employee, including, but not limited to dismissal, suspension, demotion, or other disciplinary action.

N.J.S.A. 24:6I-52. CREAMMA designates the CRC with the power to regulate, investigate, and prosecute all violations of the statute:

> The 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 statute]. The jurisdiction, supervision, duties, functions, and powers of the commission extend to any person who buys, sells, cultivates, produces, manufactures, transports, or delivers any cannabis or cannabis items within this State.
>
> ....
>
> The duties, functions and powers of the commission shall include the following:
>
> ***4** ....
>
> To investigate and aid in the prosecution of every violation of the statutory laws of this State relating to cannabis and cannabis items and to cooperate in the prosecution of offenders before any State court of competent jurisdiction[.]

N.J.S.A. 24:6I-34(a), (b)(3).

2. There Is No Private Cause of Action Under CREAMMA.

Given that the parties acknowledge there is no explicit private cause of action in CREAMMA, (Pla. Br., ECF No. 13 at 2–3; Def. Br., ECF No. 10-1 at 2), the question is whether the statute confers an implied private cause of action. It does not.

As a general principle, a plaintiff cannot bring claims to enforce a statute if it does not have a private right of action. *Borough of Longport v. Netflix, Inc.*, No. 21-15303, 2022 WL 1617740, at *2 (D.N.J. May 20, 2022) (citing *In re State Comm'n of Investigation*, 527 A.2d 851, 853–54 (N.J. 1987)). "Both the United States Supreme Court and [the New Jersey Supreme] Court have held that a statute that does not expressly create a private cause of action may, nonetheless, implicitly create one." *Jarrell v. Kaul*, 123 A.3d 1022, 1029 (N.J. 2015) (citations omitted). Yet, "New Jersey courts have been reluctant to infer a statutory private right of action where the Legislature has not expressly provided for such action." *R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co.*, 773 A.2d 1132, 1142 (N.J. 2001). This is because the failure to explicitly include a private cause of action 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. App. Div. 1991).

The United States Supreme Court established three factors to determine if a statute confers an implied private cause of action, which has been adopted by the New Jersey Supreme Court:

> (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.

In re State Comm'n, 572 A.2d at 854 (citing *Cort*, 422 U.S. at 78). "Although courts give varying weight to each one of those factors, 'the primary goal has almost invariably been a search for the underlying legislative intent.' " *R.J. Gaydos Ins. Agency, Inc.*, 773 A.2d at 1143 (quoting *Jalowiecki v. Leuc,* 440 A.2d 21, 26 (N.J. App. Div. 1981)). This Court will address each of the *Cort* factors in turn.

a. The First *Cort* Factor

The first *Cort* factor considers whether Plaintiff is a member of the class for whose special benefit the statute was enacted. Defendants maintain that the Legislature's focus in enacting CREAMMA was not on expanding the employment rights for individual applicants and employees but rather to provide a mechanism to regulate the manufacture, sale, and use of marijuana in New Jersey, while freeing up resources for the state's criminal justice system. (Defs. Br., ECF No. 10 at 6–7; Defs. Reply, ECF No. 15 at 3). Plaintiff, however, argues that "CREAMMA identifies a special class of individuals —individuals who use cannabis items—and enacted broad employment protections for this class." (Pla. Br., ECF No. 13 at 5).

***5** As recently noted by this Court, "CREAMMA was enacted by the New Jersey State Legislature in order to implement the right to consume cannabis under the recently added Section VII of Article IV of the State Constitution." *Henson v. Daimler Truck N. Am. LLC*, No. 22-6479, 2013 WL 3072532, at *3 (Apr. 25, 2023) (Kugler, J.). Indeed, in its findings and declarations section, the Legislature specifically said "[t]his act is designed to eliminate the problems caused by the unregulated manufacturing, distribution, and use of illegal marijuana within New Jersey." N.J.S.A. 24:6I-32. The Legislature's intent was "to adopt a new approach to our marijuana policies ... in a similar fashion to the regulation of alcohol for adults." N.J.S.A. 24:6I-32(a); *see State v. Gomes*, 288 A.3d 825, 836 (2023).

Nevertheless, construing the statute liberally, Plaintiff is within the class for whose special benefit CREAMMA was enacted as it includes individuals who recreationally use marijuana. [1] Not to mention that the specific provision at issue here, N.J.S.A. 24:6I-52, states that "[n]o employer shall refuse to hire or employ any person or shall discharge from employment or take any adverse action against any employee ... because that person does or does not smoke, vape, aerosolize or otherwise use cannabis items." Thus, Plaintiff, as a cannabis user, is part of the class for whose special benefit CREAMMA was enacted. *See, e.g.*, *Chance v. Kraft Heinz Foods Co.*, No. 01-056, 2018 WL 6655670, at *5 (Del. Super. Ct. Dec. 7, 2018) (explaining

plaintiff, a medical marijuana cardholder, whose employment was terminated after he failed a drug test, was clearly within the class of person for whose benefit the Delaware statute—which prohibits employment-related discrimination against medical marijuana patients—was enacted). As such, the first *Cort* factor weighs in favor of finding an implied cause of action.

b. The Second *Cort* Factor

Plaintiff having satisfied the threshold question as to the first *Cort* factor, the Court turns to the second factor in which the Court must determine and give effect to the Legislature's intent. *See* *R.J. Gaydos Ins. Agency, Inc.*, 773 A.2d at 1143; *see also Liberty Bell Bank v. Deitsch,* No. 08–0993, 2008 WL 4276925, at *3 (D.N.J. Sept. 9, 2008) (citations omitted) ("Th[e] [second] factor alone, without regard to the others, has been dispositive in recent cases."). As set forth below, this factor does not weigh in favor of finding an implied private cause of action in this case.

This Court's analysis is guided by federal courts' reluctance to interpret a state statute to create a private right of action where a private right of action is not expressly stated in the statute. *See MHA, LLC v. Amerigroup Corp.,* 539 F. Supp. 3d 349, 354–55 (D.N.J. 2021) (explaining that "federal courts 'should be even less inclined' than state courts to imply private rights of action from state statutes and regulations."). Not to mention that the New Jersey Supreme Court "has indicated that a court should be especially hesitant in implying a right to a private cause of action against an entity that is subject to such pervasive regulation by a State agency." *Castro v. NYT Television,* 851 A.2d 88, 94–95 (N.J. App. Div. 2004) (citing *R.J. Gaydos Ins. Agency, Inc.*, 773 A.2d at 1148–49); *see also Smith v. Conseco Life Ins. Co.*, No. 13-5253, 2014 WL 3345592, at *3 (July 8, 2014) (collecting cases); *Veras v. LVNV Funding, LLC*, No. 13-1745, 2014 WL 1050512, at *8 (D.N.J. Mar. 17, 2014) (collecting cases); *R.J. Gaydos Ins. Agency, Inc.*, 773 A.2d at 1148–49 (concluding no implied private cause of action against insurance company in light of "comprehensive regulation" of insurance industry); *Campione v. Adamar of N.J., Inc.,* 714 A.2d 299, 309 (N.J. 1998) (determining no implied cause of action against casino "when no such cause of action exist[ed] at common law" given the "elaborate regulatory scheme" under which casinos operate).

***6** The New Jersey Supreme Court specifically addressed the relevant inquiry when a court is reviewing legislation to consider if there is an implied private cause of action in *In re State Commission of Investigation.* 527 A.2d at 852. There, the New Jersey Supreme Court considered whether plaintiffs, subjects of an investigation by the State Commission of Investigation ("SCI"), could sue the SCI seeking an injunction to enforce its confidentiality obligations under a state statute. *Id.* In concluding that the statute did not create an implied private cause of action, the Court considered the fact that the legislative scheme of the statute—which provided that unauthorized disclosures shall be brought to the attention of the Attorney General—obviated the need for a private cause of action. *Id.* at 855–56. Therefore, the Court concluded, "[t]hus the Legislature has specifically provided a mechanism to ensure that the Attorney General checks violations of the duty of confidentiality imposed by [the statute]." *Id.* at 856. As such, the Court determined that "the doctrine of exhaustion of remedies should be applied to prevent circumvention of the establish procedures." *Id.* at 856 (quoting *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 695 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980)).

Similarly, and most analogous here, the New Jersey Appellate Division did not find a private cause of action in *Jalowiecki v. Leuc*, 440 A.2d 21 (N.J. App. Div. 1981), for the same reason. There, the Court concluded that the environmental regulations at issue did not authorize an implied private cause of action because the Department of Environmental Protection ("DEP") is charged with enforcing the provisions at issue. *Id.* at 27. Indeed, the Court explained that the DEP had the power to enforce in a summary proceeding, impose fines, and seek injunctions, among other powers and that "[t]he purpose of providing such broad remedies and enforcement procedures would seem to be to allow the Department a variety of tools to force rapid compliance with the standards promulgated pursuant to the Act." *Id.* at 27.

With this background, and reviewing CREAMMA in its entirety as presently written, there is evidence that the Legislature intended for the CRC to handle all aspects of the enforcement of the statute. Indeed, the Legislature specifically created the CRC and then empowered it with the authority to "investigate and aid in the prosecution of every violation of the statutory laws of this State relating to cannabis and cannabis items and to cooperate in the prosecution of

offenders before any State court of competent jurisdiction." N.J.S.A. 24:6I-34(b)(3). To do so, the CRC is empowered to "adopt, amend, or repeal regulations as necessary to carry out the intent and provisions of [CREAMMA]" and "[t]o exercise all powers incidental, convenient, or necessary to enable the commission to administer or carry out the provisions of [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.S.A. 24:6I-34. To exercise this authority, the Legislature gave the CRC the following powers:

> (a) Issuing subpoenas;
>
> (b) Compelling attendance of witnesses;
>
> (c) Administering oaths;
>
> (d) Certifying official acts;
>
> (e) Taking depositions as provided by law;
>
> (f) Compelling the production of books, payrolls, accounts, papers, records, documents, and testimony; and
>
> (g) Establishing fees in addition to the application, licensing, and renewal fees, provided that any fee established by the commission is reasonably calculated not to exceed the cost of the activity for which the fee is charged.

N.J.S.A. 24:6I-34(b)(5).

Additionally, as Plaintiff notes, (Pla. Br., ECF No. 13 at 16), the statement accompanying the bill provides that CREAMMA "primarily concerns the development, regulation, and enforcement of activities associated with the personal use of products that contain useable cannabis or cannabis resin (the terms provided to distinguish the legalized products from unlawful marijuana or hashish) by persons 21 years of age or older" and that "[t]his would be accomplished through the expansion of the scope and duties of the Cannabis Regulatory Commission." *See* Appropriations Committee Report Statement to Assembly Bill No. 21, Dec. 15, 2020, *available at https://www.nleg.state.nj.us/bill-search/2020/A21/bill-text?f=A0500&n=21_R1.* Indeed, CREAMMA did not become operative until after the CRC adopted rules and regulations. *See* N.J.S.A. 24:6I-34 ("On the date of adoption of the initial rules and regulations pursuant to subparagraph (a) of paragraph (1) of this subsection, the provisions of P.L.2021, c. 16 (C.24:6I-31 et al.) shall become operative...."). And the CRC's Personal Use Rules, issued on August 19, 2021, like the statute itself, specifically state that the CRC will "[i]nvestigate and aid in the prosecution of every violation of the statutory laws of this State relating to cannabis and cannabis items and cooperate in the prosecution of offenders before any State court of competent jurisdiction" and will "[a]dopt, amend, or repeal rules as necessary to carry out the intent and provisions of the [CREAMMA]." N.J.A.C. 17:30-3.3(a)(3)-(4). Moreover, the CRC reiterated in its regulations that "[t]he Commission shall assume all powers, duties, and functions with regard to the regulation and oversight of activities authorized pursuant to the Act." N.J.A.C. 17:30-3.1.

***7** Just last year, the CRC began issuing guidance on the employment provision, N.J.S.A. 24:6I-52, albeit related to a different subsection dealing with Workplace Impairment Recognition Expert certifications. *See* CRC, *New Jersey Cannabis Regulatory Commission issues guidance for workplaces*, https://www.nj.gov/cannabis/news-events/approved/20220907.shtml. [2] The Court certainly recognizes, as Defendants note, (Def. Br., ECF No. 15 at 8), that the CRC is a new administrative body that will presumably continue to develop and adopt rules and regulations. Yet, in its current form, the lack of any provision in CREAMMA as to how the employment provision can be enforced, 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.

Plaintiff argues that the employment provision's use of rights-creating language supports a finding that the Legislature intended for there to be an implied private cause of action. (Pla. Br., ECF No. 13 at 7–8). Yet, the Supreme Court has explained "even where a statute is phrased in such explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent 'to create not just a private *right* but also a private *remedy.*' " *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002) (quoting *Alexander v. Sandoval,* 532 U.S. 275, 286 (2001) (emphases in original)). The Court has reiterated that it is not just whether the statute displays an intent to create a private right, but it also must intend to create a private *remedy.* *Sandoval*, 532 U.S. at 286. "Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or

how compatible with the statute." *Id.* at 286–87. Indeed, "[r]aising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." *Id.* at 287. And Plaintiff has not pointed to any case in which a federal court sitting in diversity has found an implied private cause of action from a statute devoid of any intent to do so. Plaintiff is asking this Court to infer a private cause of action and fashion a remedy despite the Legislature's silence on the issue. The Court will not do so.

Notably, other employment statutes adopted by the New Jersey legislature, such as the Conscientious Employee Protection ("CEPA") and the New Jersey Law Against Discrimination ("NJLAD"), explicitly provide for a private cause of action. *See* N.J.S.A. 34:19-5 ("Upon a violation of any of the provisions of this act, an aggrieved employee or former employee may, within one year, institute a civil action in a court of competent jurisdiction."); N.J.S.A. 10:5-12.11 ("Any person claiming to be aggrieved by a violation [of the Law Against Discrimination] may initiate suit in Superior Court."). Not only do these other employment statutes explicitly provide for a private cause of action, these statutes also expressly provide for a remedy, neither of which is present in CREAMMA. *See* N.J.S.A. 10:5-12.1 (stating violation of the NJLAD can include back pay and reinstatement); N.J.S.A. 10:5-13(a)(2) (identifying other remedies available under NJLAD); N.J.S.A. 34:19-13 (identifying remedies available under CEPA). 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. [3]

***8** That there was another bill signed into law on the same day as CREAMMA, which contained a similar employment provision, N.J.S.A. 34:6B-21, that expressly disclaimed the intent to create a private cause of action in the context of cannabis regulation further supports the Court's conclusion. That provision states "[a]n employer shall not be permitted to, when making an employment decision, rely solely on, or require any applicant to disclose or reveal, or take any adverse action against any applicant for employment solely on the basis of, any arrest, charge, conviction ... [for] ... marijuana ... in violation [of the criminal code] ... regardless of when any such arrest, charge, conviction, or adjudication of delinquency occurred, unless the employment sought or being considered is for a position in law enforcement, corrections, the judiciary, homeland security, or emergency management." N.J.S.A. 34:6B-21(a). This provision is more specific than N.J.S.A. 24:6I-52, at issue here, because it specifically provides that an employer who commits an act in violation of this section is liable for a civil penalty collectible by the Commissioner of Labor and Workforce Development. N.J.S.A. 34:6B-21(b). Notably, though, the section also states that "[n]othing set forth in this section shall be construed as creating, establishing, or authorizing a private cause of action by an aggrieved person against an employer who has violated, or is alleged to have violated, the provisions of this section." N.J.S.A. 34:6B-21(c). Although N.J.S.A. 24:6I-52 does not explicitly state that there is no private cause of action intended as does N.J.S.A. 34:6B-21(b), it would be illogical to conclude that the Legislature precluded a private cause of action in N.J.S.A. 34:6B-21(b), but intended to create one in CREAMMA particularly given the lack of any language so stating and the lack of any specification as to what remedies would be available. Further, the fact that N.J.S.A. 34:6B-21(b) vested enforcement authority in an existing state agency, the Commissioner of Labor and Workforce Development, supports the conclusion that the Legislature intended for enforcement of the employment provision at issue here to be within the province of the CRC. *But see supra n.1.*

The cases on which Plaintiff relies, (Pla. Br., ECF No. 13 at 5–6), do not persuade the Court otherwise. Unlike CREAMMA and the CRC, these cases—which have found an implied private cause of action in similar employment-related provisions in other state's medical marijuana statutes—involve statutes that are distinct from CREAMMA in that no agency or commission was created and tasked with enforcement of the statute. *See* *Chance*, 2018 WL 6655670, at *6 (concluding legislative intent to establish a private cause of action, in part, because no agency or commission has been tased with enforcement of similar anti-discrimination provision); *Noffsinger v. SSC Niantic Operating Co. LLC*, 273 F. Supp. 3d 326, 339–40 (D. Conn. Aug. 8, 2017) (determining employment-related discrimination provision of Connecticut's medical marijuana statute contained implied private cause of action because there was no indication of legislative intent to deny a private cause of action and the law did not provide for any other enforcement mechanism); *Whitmire v. Wal-Mart Store Inc.*, 359 F. Supp. 3d 761, 776 (D. Ariz. 2019) (concluding private cause of action in employment-related discrimination

provision of medical marijuana statute after noting that there was no independent enforcement mechanism against employers for violations of the provision); *Callaghan v. Darlington Fabrics Corp.*, No. 14-5680, 2017 WL 2321181, at *5 (R.I. Super. Ct. May 23, 2017) (addressing a similar employment-related discrimination provision in a medical marijuana statute and determining a private cause of action existed as no state department was given authority to enforce the provision); *Palmiter v. Commonwealth Health Sys., Inc.*, 260 A.3d 967, 977 (Pa. Super. Ct. Aug. 10, 2021) (concluding an implied private cause of action existed for employment-related discrimination provision in medical marijuana statute despite the fact that the statute charged Department of Health with the implementation and administration of the statute because provision did not provide an independent enforcement mechanism against employers who violated the provision). Although the Court recognizes that the majority of states with similar employer-related provisions have found an implied private cause of action, there is one critical distinguishing feature between CREAMMA and the other states' recreational, or medical marijuana, statutes: the creation of the CRC—tasked with enforcing CREAMMA.

In summary, there is simply no indication that the Legislature intended to allow an individual to pursue a private cause of action for a violation of CREAMMA. Plaintiff has not pointed to any evidence of legislative intent to the contrary sufficient to overcome the reluctance to find an implied private cause of action when the Legislature has not explicitly created one. Thus, the second factor does not weigh in favor of Plaintiff. *See Smith*, 2014 WL 3345592, at *5 ("This Court is obliged to heed the words of New Jersey's Supreme Court, which disfavors finding an implied private right of action in the context of a 'comprehensive legislative scheme including an integrated system of procedures for enforcement,' such as 'civil penalty provisions.' " (quoting *R.J. Gaydos Ins. Agency, Inc.*, 773 A.2d at 1144)).

c. The Third *Cort* Factor

***9** Finally, the third factor requires a finding that it is consistent with the underlying purposes of the legislative scheme to infer the existence of such a remedy. For similar reasons as set forth above related to the second *Cort* factor, the third factor does not weigh in favor of finding an implied private cause of action in this case.

Indeed, as discussed, the legislative scheme does not support an inference that there is an implied private cause of action under CREAMMA. "New Jersey courts have been reluctant to infer a statutory private right of action where the Legislature has not expressly provided for such action." *Id.* at 1142. Moreover, as recognized by the Third Circuit, "for an implied right of action to exist, a statute must manifest [the legislature's] intent to create (1) a personal right, and (2) a private remedy." *Three Rivers Ctr. v. Housing Auth. of the City of Pittsburgh*, 382 F.3d 412, 421 (3d Cir. 2004). Here, it cannot be inferred from the legislative scheme, which does not even suggest a private remedy, that there is a private cause of action under CREAMMA.

Thus, in light of the legislative scheme of CREAMMA, with its delegation of authority to the CRC to create regulations and enforce violations, the third factor too does not weigh in favor of finding an implied cause of action. *See Wisniewski v. Rodale, Inc.*, 510 F.3d 294, 305 (3d Cir. 2007) ("Agency enforcement creates a strong presumption against implied private rights of action that must be overcome."); *Campione v. Adamar of New Jersey, Inc.*, 714 A.2d 299, 309 (N.J. 1998) (declining to imply cause of action for damages for plaintiff because the act contained elaborate regulatory scheme).

For these reasons, the Court concludes there is no private cause of action under CREAMMA and grants Defendants' Motion to dismiss Count One for failure to state a claim.

B. New Jersey Common Law Does Not Provide for a Cause of Action for Failure to Hire.

Plaintiff asserts a "failure to hire/wrongful discharge" *Pierce* claim. (Compl., ECF No. 1-1, ¶¶ 42–47). Defendants maintain that the allegations of the Complaint make clear that Plaintiff was never employed by Defendants and that this is fatal to Plaintiff's claim because the failure to hire is not actionable under *Pierce*. Defendants are correct.

In New Jersey, an at-will employee "has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy"—commonly referred to as a *Pierce* claim. *Santiago v. City of Vineland,* 107 F. Supp. 2d 512, 567 (D.N.J. 2000) (quoting *Pierce*, 417 A.2d at 512).

Though Plaintiff states his claim is for "failure to hire/wrongful discharge" and he alleges that Defendants "refus[ed] to hire and/or terminat[ed]" Plaintiff, Defendants are correct that the allegations make clear that Plaintiff was in fact never employed. Indeed, the Complaint alleges that Plaintiff was *offered* a job with Defendants subject to him submitting to and passing a drug test. (Compl., ECF No. 1-1, ¶ 27). This is commonly referred to as a conditional job offer. After he tested positive for marijuana, Defendants rescinded the job offer. (ECF No. 1-1, ¶ 31). Given that Plaintiff's employment was conditioned upon an act with never occurred, he was never employed. As such, as Plaintiff himself notes, Defendants did not terminate him, they rescinded his conditional job offer. (ECF No. 1-1, ¶ 31).

***10** As Plaintiff was never employed by Defendants, he fails to state a wrongful discharge claim because a failure to hire claim cannot support a *Pierce* claim. Unlike Plaintiff's first claim, this is not an issue of impression. Both this Court and New Jersey appeals courts have time and time again found that there is no cause of action under common law for failure to hire. The Court sees no reason to depart from this authority. *See Giles v. Lower Cape May Reg'l Sch. Dist. Bd. of Educ.*, No. 12-5688, 2014 WL 3828166, at *5 (D.N.J. Aug. 1, 2014) ("New Jersey courts, however, refuse to extend *Pierce* beyond the wrongful discharge context."); *Ebner v. STS Tire & Auto Ctr.*, No. 10-2241, 2011 WL 4020937, at *7 (D.N.J. Sept. 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."); *Lerner v. City of Jersey City*, No. 17-1024, 2019 WL 1468735, at *4 (N.J. App. Div. Apr. 2, 2019) ("[T]he failure to hire is not a cause of action that is recognized under *Pierce*."); *Sabatino v. St. Aloysius Parish,* 672 A.2d 217, 221 (N.J. App. Div. 1996) (stating that "*Pierce* has not been applied to failure to hire or promote situations").

Accordingly, because there is no common law cause of action for failure to hire, the Court grants Defendants' Motion to dismiss Count Two for failure to state a claim.

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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 re-write incomplete legislation or create remedies for a statutory violation where the Legislature did not. If the State expects this 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, including how the provision can be enforced, by whom, and what remedies are available as it has previously done in many other employment related statutes. If the 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. However, if neither the Legislature nor the CRC takes such action, perhaps a New Jersey state court would find it appropriate to depart from its prior precedent rejecting a failure to hire common law *Pierce* claim given that the statute at issue here which is the source of the public policy itself references a failure to hire. However, the job of a district court sitting in diversity is to predict what the state supreme court would do. And all the evidence available—i.e., the relevant precedent—is clear that *Pierce* does not reach these situations. [4]

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss is **GRANTED**. (ECF No. 10). An appropriate Order accompanies this Opinion.

All Citations

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Footnotes

1 As a practical matter, the focus of CREAMMA is on regulating "any person who buys, sells, cultivates, produces, manufactures, transports, or delivers any cannabis or cannabis items within this State," N.J.S.A.

24:6I-34, as almost all the other over twenty subsections address recreational cannabis licenses. *See* N.J.S.A. 24:6I-31 *et seq.* As such, it is questionable whether Plaintiff is indeed a member of the class for whose special benefit CREAMMA was enacted: the Act reads like a licensing statute aimed at distributors, but with an employment provision shoehorned therein. Nevertheless, the Court construes CREAMMA liberally to include Plaintiff in the class.

2 As yet another example of the ambiguities with which CREAMMA's employment provision is fraught, although the CRC has provided guidance related to workplace drug testing, it seems questionable as to whether its 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 or cannabis items within this State." N.J.S.A. 24:6I-34(a), (b)(3).

3 Although this Court in *Merlo v. Federal Express Corporation* agreed with state courts that an implied private cause of action existed under a provision of the New Jersey Wage and Hour Law ("NJWHL"), that case is readily distinguishable as the remedy was easily discernible from the NJWHL and corresponding regulations. No. 17-4311, 2010 WL 2326577, *9–10 (D.N.J. May 7, 20210) (Brown, C.J.). As such, this Court limited the plaintiff's damages to the wages owed under the governing provisions of the NJWHL as statutory and punitive damages were not available. *Id.* at *10. Unlike *Merlo*, here, there is no indication in the statute or regulations as to what remedy would be available for a violation of the employment provision of CREAMMA.

4 The New Jersey Supreme Court accepts certified questions of state law from the United States Court of Appeals for the Third Circuit, N.J. Ct. R. 2:12A–1–8, however, it does not accept certified questions from this Court. If this case were to reach the Third Circuit, perhaps it would find these questions suitable for certification.