A Timely Analysis of Legal Developments

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Court Extinguishes Smoker's Claims

By Gregory C. Keating, David M. Jaffe and AnnaMary E. Gannon

In a victory for employers with mandatory wellness initiatives, a Massachusetts federal judge has dismissed a lawsuit by an employee who had started work, but whose employment, contingent on successful completion of a nicotine test, was terminated after he tested positive for nicotine. The decision, *Rodrigues v. EG Systems, Inc. d/b/a Scotts LawnService*, Civil No. 07-10104-GAO (D. Mass., Jul. 23, 2009), may have far-reaching implications for employers that want to increase the overall health and productivity of their workforce, and potentially lower health care costs, by having a non-smoking workforce.

The Scotts' Wellness Program

In December 2005, Scotts introduced its LiveTotal Health Initiative, a comprehensive company-wide wellness plan. Scotts invested considerable funds into improving employee wellness, including, among other things, building a 24,000 square foot, $5 million medical and fitness center across the street from its headquarters staffed by two full-time doctors, five nurses, a dietician, counselor, two physical therapists, and a team of fitness coaches, as well as a drive-thru pharmacy for free prescription drugs. Scotts also reimbursed employees for fitness club memberships and weight management programs. Throughout the company, employees who agree to take a health risk self-assessment earn a $40 per month reduction in their share of medical insurance premiums. In addition to the health risk assessment, an outside management company was retained to scour the physical, mental, and family health histories of nearly every employee and cross-reference that information with insurance claims data. Employees identified at moderate to high risk who did not agree to work with a health coach and follow a health management plan were required to pay an additional $67 a month in insurance premiums. Perhaps the most controversial component of the plan, however, is Scotts' requirement that employees not smoke at any time, on or off duty.

To carry out its goal of having a non-smoking work force, Scotts decided it would no longer hire smokers. After identifying those states where it could legally require pre-hire

nicotine testing, Scotts required all new hires to submit to urinalysis tests. New hires who test positive for nicotine have their conditional offers of employment withdrawn. Scotts also offered comprehensive tobacco-cessation support for an extended period to incumbent employees with the intention of eventually testing all employees for nicotine use.

Rodrigues Is Offered Employment Conditioned on a Drug Screen

Rodrigues obtained an offer of employment as a Scotts truck driver. The offer letter, which he read and signed, specifically advised him the offer was "contingent upon successful completion of a pre-hire screening required of all Scotts' associates, which included but is not limited to a drug screen (including nicotine test where applicable by law) and criminal history."

Rodrigues produced a urine sample and began to perform work for Scotts. Two weeks after he began working, the results of his urinalysis revealed the presence of nicotine. Scotts informed Rodrigues that he could not continue to work for the company. Rodrigues's suit followed. While it remains to be seen if the decision will be upheld (Rodrigues has already filed an appeal), the district court's analysis is consistent with the public policy of most states to discourage smoking and other use of tobacco products and to promote employers' interest in a healthy workforce.

The Claims Made in the Lawsuit

Rodrigues alleged claims for violation of the Massachusetts Civil Rights Act, the state's Privacy Act, ERISA's Section 510, and wrongful termination in violation of public policy. Section 510 of ERISA prohibits employers from discriminating against plan participants or beneficiaries for purposes of interfering with the attainment of any right to which the participant may become entitled under the plan.

The Civil Rights Act and wrongful termination claims were dismissed at the outset. To establish a claim under the Massachusetts Civil Rights Act, the court found that Rodrigues would have to prove that Scotts interfered by means of "threats, intimidation or coercion" with his enjoyment of a right secured by the United States Constitution or federal or Massachusetts statutes. Citing the Massachusetts Supreme Judicial Court's decision in *Webster v. Motorola, Inc.*,[1] the court held that a threat to terminate employment of an at-will employee who refuses to submit to a urine test for nicotine is not a threat within the meaning of the Massachusetts Civil Rights Act. On the wrongful termination claim, the district court observed that the Massachusetts state courts have narrowly construed the public policy exception to at-will employment, applying it in cases where the employee alleged termination for: (1) asserting a legally guaranteed right, such as filing a workers' compensation claim; (2) doing what the law requires, such as serving on a jury; (3) refusing to do what the law forbids, such as committing perjury; (4) reporting violations of criminal law; or (5) cooperating with a law enforcement agency. The district court found that the claimed "right to smoke cigarettes in [Rodrigues'] personal life, outside of the workplace and work hours" did not fall within any of these categories and, if the question were presented to the Massachusetts state courts, it was unlikely the courts would regard it as an equivalently weighty public policy matter as those that have been recognized. The district court further observed that "the public policy of Massachusetts regarding smoking appears more aligned with efforts to suppress or discourage smoking than with protection of the 'right to smoke.'"

The district court permitted the case to proceed on the privacy and ERISA Section 510 retaliation claims. After discovery, Scotts moved for summary judgment on the two causes of action, which the court granted, albeit it on narrow grounds.

The Privacy Act Claim

The legality of drug testing employees turns on a number of factors: whether the employer is a private company or public entity, whether the person tested has been given an offer of employment conditioned on the drug screen, whether the testing is "for cause" (for example, after an accident), or whether the testing is random. In *Webster v. Motorola*, a case involving random testing of current employees, the Massachusetts Supreme Judicial Court articulated a balancing test that weighs the employer's legitimate business interest in the intrusion versus the employee's right to privacy, noting that the right of privacy extends both to production of the urine sample and what

information can be extracted from the specimen.[2] Here, Rodrigues argued that the discovery of nicotine in his system violated his right to privacy.

The *Scotts* court acknowledged the need for a careful balancing of an employer's legitimate business interest in obtaining an employee's private information and the employee's interest in keeping private information private, but concluded there was no reason to conduct the balancing test here because Rodrigues had never attempted to keep private the fact he was a smoker. The court noted that Rodrigues admitted he openly smoked in public and bought cigarettes in public. During the short time he worked for Scotts, a supervisor noticed a pack of cigarettes in plain view on the dashboard of Rodrigues's car, for which he was given a written warning. Because Rodrigues made no attempt to keep his smoking private, the court ruled he had no protected privacy interest in his status as a smoker.

The ERISA Retaliation Claim

Section 510 of ERISA makes it unlawful for an employer to "discharge, fine, suspend, expel, discipline, or discriminate against [an ERISA-covered benefit plan] participant or beneficiary ... for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." The court held Rodrigues was not a "participant" in any ERISA benefit plan because he would not be eligible for benefits until the first day of the month on or following 60 days of continuous employment. The court also cited an appellate decision, *Becker v. Mack Trucks, Inc.*,[3] that concluded Section 510 does not apply to hiring decisions. While the court declined to delineate the circumstances that might or might not give a not-yet participant in an ERISA plan the right to sue under Section 510, the court concluded there must be an existing employer-employee relationship, emphasizing Rodrigues only had a contingent offer of employment.

Impact of the Court's Decision on Employers

As noted above, Rodrigues has filed an appeal and although it will be some time before the First Circuit Court of Appeals reviews the case, employers should view *Scotts* as indicative of the growing consensus that the public policy regarding smoking is, as the court noted when dismissing the wrongful termination claim, "more aligned with efforts to suppress or discourage smoking than with the protection of the 'right to smoke.'"[4] According to the American Cancer Society, smokers make up less than 20 percent of the adult population and almost all workplaces now have some type of smoking restrictions. Studies show smoking employees cost businesses more because they are out sick more frequently than non-smokers and increase insurance costs, burdens for both the employer and non-smoking coworkers.

The *Scotts* decision affirms an employer's ability to implement a policy of not hiring smokers and testing new hires for the presence of nicotine, at least as to challenges under Massachusetts's privacy and civil rights statutes and public policy claims and ERISA's non-retaliation proscription. Employers contemplating such a wellness policy undoubtedly should continue to monitor the case on appeal and should be mindful of the particular factual situation presented in *Scotts*:

- Key to the court's decision was the fact that the offer of employment was conditioned on passing the nicotine screen. The court placed no importance on the fact Rodrigues had been working for two weeks before the results of the test were known. In other contexts, such as the Americans with Disabilities Act and the Massachusetts Fair Employment Practices Act[5] there is a limit on when an employer may conduct a physical exam, and a distinction between post-offer/pre-employment testing and testing after the employee has commenced employment. Employers are better advised to wait for the results of any post-offer/pre-hire investigation before permitting new hires to perform work.
- Rodrigues did not keep his smoking private, either in general or from Scotts. It is not clear whether the result would be the same if the new hire gives no indication to the employer that he or she uses tobacco, but purchases and uses tobacco publicly outside the workplace.

- Because the court found that Rodrigues had no privacy interest, it did not weigh the employer's and employee's respective interests in keeping certain information private. Although an argument can be made that an employer's interest in a smoke-free workforce outweighs a smoker's interest in keeping his or her use of tobacco products private, that argument was not addressed by the court in *Scotts*.
- Rodrigues's conditional post-offer/pre-employment status also was important in the court's Section 510 retaliation analysis. Because the court essentially held that Rodrigues was not yet "hired," it found Section 510 did not apply. The court did not address the argument that the wellness plan was primarily intended to reduce the costs of medical insurance, accomplished by eliminating smokers before they become eligible for medical benefits. It is unknown what the outcome might have been if Rodrigues had quit smoking long enough to get nicotine out of his system (about three to four days after stopping), passed the pre-hire screen, and Scotts subsequently, but before the expiration of the 60 day waiting period for benefits, discovered he was a smoker.

Conclusion

This early decision is part of an inevitable movement toward increasing mandatory wellness programs. With over half of the cost of health care spent on preventable illness and injury, employers and government are compelled to take action. Major targets include obesity, lack of exercise, nutrition and smoking. The verdict from the medical community has arrived: employers who implement tobacco cessation and other wellness initiatives increase the productivity of the workforce and lower health care costs. An increasing number of employers have implemented "no smokers" policies, tobacco cessation programs, and reductions in insurance premiums for non-smokers. Employers interested in implementing any of these initiatives should consult counsel because in addition to the numerous issues left unanswered by this decision, there are some states that expressly prohibit or restrict such policies, as well as federal regulations applicable to ERISA-covered benefit plans that must be considered. Nonetheless, the *Scotts* decision is an early example of courts working hard to find ways of opening the door to employer-mandated wellness programs. Over the next decade judges, regulators, and legislatures will be increasingly drawn into the "war" on preventive illness and injury with the workplace serving as the primary battleground.

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[1] 637 N.E.2d 203 (Mass. 1994).

[2] 418 Mass. 425, 637 N.E.2d 203 (1994).

[3] 281 F.3d 372 (3d Cir. 2002).

[4] Of course, those states that have enacted "smokers' protection" laws and states that protect an individual's legal use of consumable products or right to engage in other lawful activity off-duty are not part of the consensus. Before implementing any no-smoking policy, employers should check with counsel to assure that the policy complies with applicable laws.

[5] Mass. Gen. L. Ch. 151B.