

Benefits and Employment Briefing



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A quarterly newsletter about employee benefits and current issues

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EMPLOYER’S AGGRESSIVE ANTI-SMOKING POLICY SURVIVES COURT CHALLENGE – FOR NOW

In a closely watched case pending in a Massachusetts federal court, Scotts LawnService has successfully defended its policy of refusing to hire anyone who smokes, even if they do so on their own time. The employer’s anti-smoking policy was just one component of a comprehensive wellness initiative. Employers across the country who are seeking judicial guidelines on the extent to which they can stretch wellness programs may find some comfort in this ruling, but they would be well advised not to place *too* much emphasis on it.

The lawsuit (*Rodrigues v. EG Systems, Inc. d/b/a Scotts LawnService*, D. Mass. 7/23/09) was filed by a contingently hired worker who was terminated after his nicotine test came back positive. His employer, Scotts LawnService, had recently launched a huge wellness program in an attempt to improve

the health of its workforce and reduce its health care costs. The program included a 24,000 square foot, \$5 million on-site clinic staffed with doctors and nurses, reimbursement of fitness club membership fees, premium discounts for those who participated in a health risk assessment, and other incentives. It also included a sweeping smoke-free-workplace policy, which prohibited smoking both while at work *and* on employees’ personal time.

Mr. Rodrigues, who is a smoker, applied for a job and was given a contingent offer of employment. The offer letter, which he read and signed, expressly conditioned his employment on negative results of the pre-employment nicotine test to which he submitted. While the test results were pending, however, Scotts allowed Mr. Rodrigues to work. When the results came back positive, Rodrigues was terminated.

Mr. Rodrigues sued Scotts under various theories that challenged the anti-smoking component of its wellness program. Among

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his theories of recovery were claims that the anti-smoking policy violated the Employee Retirement Income Security Act (“ERISA”), because it interfered with his ability to obtain health benefits, and that it violated public policy and his rights to privacy under Massachusetts state law. Notably, he did *not* challenge the program under either the Americans with Disabilities Act (“ADA”) or the Massachusetts Fair Employment Practices Act.

The case first drew headlines when the court refused to dismiss some of Mr. Rodrigues’ claims without considering evidence to be adduced by the parties. Some commentators saw that as a sign that Mr. Rodrigues might prevail. Those thoughts were put to rest, however, when the court later granted summary judgment to Scotts on all of Mr. Rodrigues’ remaining claims.

The court rejected his ERISA claim because Mr. Rodrigues was not eligible to participate in the Scotts health plan when he was terminated. The plan had a 60-day waiting period for new enrollees, and that period had not yet expired. Accordingly, the court ruled that Mr. Rodrigues did not enjoy any rights under the plan that could have been protected under ERISA. The court also held that the claims premised on Massachusetts law were meritless. In evaluating Mr. Rodrigues’ contention that the employer’s anti-smoking program violated state public policy, the court concluded that, although the

question was close, the weightier public policy actually favored a smoke-free society, rather than an individual’s right to smoke on his or her own time. The court dismissed the state law privacy claim because, in this particular case, Mr. Rodrigues made no secret of the fact that he was a smoker. During the two-week period that he worked for Scotts, he openly displayed packs of cigarettes to his supervisors. The judge therefore concluded that Mr. Rodrigues did not have an expectation of privacy in this conduct.

Although it was a victory for Scotts (and for employers in general), perhaps the most important lesson from this case is that it teaches us very little about the laws governing wellness programs. The lawsuit involved only one aspect of the much more comprehensive program sponsored by Scotts. It does not address the program’s compliance with the final regulations governing wellness programs under the Health Insurance Portability and Accountability Act (“HIPAA”), nor does it speak to how the program would fare if challenged under the ADA.

Moreover, the *state* law analysis in the decision is relevant only for employers who have employees in Massachusetts. Mr. Rodrigues might have been successful on similar claims had he been employed in Washington, Missouri, or Vermont. Indeed, some state statutes expressly *prohibit* adverse employment action premised on an employee’s off-duty use of lawful agricultural products, such as tobacco.

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Even under *Massachusetts* law, Mr. Rodrigues might have prevailed had the facts of his case been slightly different. And he might *yet* prevail, as he has appealed the lower court's decision.

Employers should not attempt to duplicate the comprehensive program initiated by Scotts solely on the basis of the *Rodrigues* decision. Before announcing any wellness

initiative, they should engage competent legal counsel to review the program under both federal and state laws to ensure that it will not have an adverse impact on the employer's fiscal health.

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