

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

**SCOTT RODRIGUES** )  
**Plaintiff** )  
 ) **C.A. 07-10104-GAO**  
**v.** )  
 )  
**THE SCOTTS COMPANY, LLC** )  
**Defendant** )

**PLAINTIFF’S OPPOSITION  
TO DEFENDANT’S MOTION TO DISMISS**

The defendant corporation claims it is fully within its legal rights to weed out those employees likely to incur the greatest future medical costs because such pruning is simply “good business.” While Scotts may be correct about the business logic behind its anti-tobacco program, the Employee Retirement Income Security Act (ERISA) protects employees from such parsimonious practices. For that reason alone, and for the other reasons stated below, the defendant’s motion to dismiss should be denied.

**Legal standard**

The defendant has moved to dismiss the Amended Complaint pursuant to Fed. R. Civ. P., Rule 12(b)(6). “Under that rule, a complaint can properly be dismissed for failure of the pleading to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). It is axiomatic that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Epstein v. C.R. Bard, Inc.*, 460 F.3d 183, 187 (1st Cir. 2006), *citing Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The court must accept as true all well-pleaded facts alleged by the plaintiff in the complaint

and draw all reasonable inferences fitting the stated theories of liability. *Platten v. HG Berm. Exempted Ltd.*, 437 F.3d 118, 127 (1st Cir. 2006).

On a motion to dismiss on the pleadings pursuant to Rule 12(b)(6), generally the facts are to be taken from the complaint itself and not from any extrinsic source, although in some extraordinary circumstances documents extrinsic to the complaint may be considered. This is permitted only when “a complaint's factual allegations are expressly linked to – and admittedly dependent upon – a document (the authenticity of which is not challenged), that document effectively merges into the pleadings.” *Beddall v. State St. Bank & Trust Co.*, 137 F.3d 12, 17 (1st Cir. 1998)<sup>1</sup>. See 2 James Wm. Moore et. al., *Moore's Federal Practice* § 12.34[2] (3d ed. 1997) (explaining that courts may consider “**undisputed** documents alleged or referenced in the complaint” in deciding a motion to dismiss)(Emphasis added).

The defendant’s motion, however, goes far beyond the limits allowed by any previous case. Scotts relies heavily on statements made by its officials not even in affidavits, but to a magazine writer and subsequently published in a magazine article about this very case. Virtually all of the facts referred to in Scott’s memorandum are derived from a *BusinessWeek* article about the present litigation. The plaintiff has moved to strike these statements and that motion should be allowed. The statements are nothing more than unsworn hearsay and would not be admissible at trial, much less on a motion to dismiss on the pleadings. Similarly, the defendant has attached certain employment documents concerning the plaintiff, “authenticated” by a corporate

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<sup>1</sup> In *Beddall*, the First Circuit specifically noted that the document had not been challenged, saying, “The plaintiffs neither challenged the authenticity of the Agreement nor moved to strike it from the record.” 137 F.3d at 17. The present plaintiff has moved to strike the defendant’s extrinsic document and evidence submission.

employee who did not witness the plaintiff signing them. The plaintiff's signature is not authenticated, nor is the date on which the document was signed. Nonetheless, the defendant baldly states that "Rodrigues signed the offer letter and submitted a urine sample." Memorandum at p. 3. Rodrigues contests this factual statement. *See* Plaintiff's Motion to Strike Extraneous Materials Submitted by the Defendant in Support of its Motion to Dismiss.

The employment documents submitted by Scotts are neither referred to nor relied on in the complaint, except in the most passing of ways. "Clearly, not every document referred to in a complaint may be considered incorporated by reference and thus introduced by the moving party in support of a motion to dismiss. *See Goldman v. Belden*, 754 F.2d 1059, 1066 (2d Cir. 1985) ('Limited quotation does not constitute incorporation by reference'). The Court should allow the Motion to Strike and should decide this motion based on the facts alleged in the Amended Complaint.

### **Argument**

#### **I. ERISA PROHIBITS SCOTTS FROM TERMINATING AN EMPLOYEE BECAUSE THAT EMPLOYEE WOULD INCREASE THE COST OF PROVIDING MEDICAL BENEFITS.**

##### **A. ERISA Section 510 prohibits employers from firing employees who are believed likely to incur future medical expenses.**

Boiled to its essentials, Rodrigues claims that Scotts fired him because he smokes cigarettes and Scotts believed that cigarette smokers will incur higher medical insurance costs than employees who do not smoke. Scotts can no more fire all cigarette smokers to save on medical expenses than it can fire all employees who have survived heart attacks or who have children with long-term illnesses. Such conduct is prohibited by ERISA Section 510, 29 USCS § 1140, which states,

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . .

“The ultimate inquiry in a Section 510 case is whether the employment action was taken with the specific intent of interfering with the employee’s ERISA benefits.” *Barbour v. Dynamics Research Corp.*, 63 F.3d 32, 37 (1<sup>st</sup> Cir. 1995). To recover under § 510, a plaintiff need not prove that “the sole reason for his [or her] termination was to interfere with pension rights,” but such an intention must be one of the motivating factors in the termination decision. *Titsch v. Reliance Group, Inc.*, 548 F. Supp. 983, 985 (S.D.N.Y. 1982), *aff’d*, 742 F.2d 1441 (2d Cir. 1983).

A paradigm example of a § 1140 violation was stated in *Fleming v. Ayers & Assoc.*, 948 F.2d 993 (6th Cir. 1991), in which the Sixth Circuit had no difficulty finding wrongful ERISA discrimination where a woman was hired one day and then fired the next day after the employer learned that she had recently given birth to a child with hydrocephalus and had incurred more than \$80,000 in medical fees. Following a bench trial, the trial judge found that the plaintiff was fired “in order to avoid incurring what were foreseen to be high future medical expenses for Fleming's child.” 948 F.2d at 997. Interestingly, on appeal the employer did not contest that such conduct would violate § 1140. Instead, the employer argued that the plaintiff was not a plan “participant” because she had not yet begun to work for the company and because she had been offered a part-time position with no benefits, although with the expectation that she would be offered full-time employment in the future.

The Court rejected all those arguments, finding that the plaintiff’s participation in an “employee orientation which included reviewing documents such as the employment

manual, job description, and other policies of the company” confirmed that she was an “employee,” even though she was not due to report for work until a date after she was fired. Further, the Court found that while she was offered a part-time position with no benefits, because she was hired with the intent that she would eventually move into a full-time position when a job became available she satisfied the statutory definition of a participant, saying, “A ‘participant’ under ERISA includes not only employees who are currently eligible for certain benefits but also those employees who ‘*may* become eligible to receive a benefit of any type from an employee benefit plan.’ 29 U.S.C. § 1002(7).” 948 F.2d at 998. (Emphasis by the Court). *Fleming* is on all fours with the present case.

Similarly, in *Fitzgerald v. Codex Corp.*, 882 F.2d 586 (1st Cir. 1989), the First Circuit held that a complaint stated a Section 510 violation when it alleged that an employee was fired because the employer did not want to be compelled to provide medical insurance coverage to the employee’s former wife, who was suing the company for such coverage. Firing an employee because the employer wants to avoid providing benefits to that employee (or his family) is the classic Section 510 violation. *See Strate v. Midwest Bankcentre, Inc.*, 398 F.3d 1011 (8th Cir. 2005)(Employee fired after giving birth to Downs Syndrome baby stated Section 510 ERISA claim based on evidence that employer was motivated, at least in part, by desire to avoid paying medical expenses for the child); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 143 (1990)(“By its terms § 510 protects plan participants from termination motivated by an employer’s desire to prevent a pension from vesting.”)

Rodrigues’ complaint follows this pattern. He alleges that he was fired after Scotts learned, through urine testing, that he smoked cigarettes and that the motivation

for his firing was to avoid paying what Scotts feared would be increased medical expenses for smokers.

**B. The amended complaint satisfied the plaintiff's burden of proving that he was fired in violation of his Section 510 rights.**

The plaintiff in a Section 510 discrimination action bears the burden of proving that the employer took an employment action against him with the specific intent of interfering with an ERISA-protected benefit. "In most cases, given that the employer controls the evidence related to intent, a plaintiff will be unable to adduce 'smoking gun' evidence that the employer intended to interfere with his or her benefits. An employer is unlikely to document such a motive, and there is rarely eyewitness testimony as to the employer's mental processes. Therefore, a plaintiff usually must rely on circumstantial evidence to prove his or her case." *Barbour v. Dynamics Research Corp.*, 63 F.3d 32, 37 (1st Cir. 1995). As a result, the normal method of proof is to employ the burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), as modified by subsequent cases. *Lehman v. Prudential Ins. Co. of Am.*, 74 F.3d 323, 330 (1st Cir. 1996). However, just as proof of discriminatory intent in employment discrimination cases can be made by "direct evidence," *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 580 (1<sup>st</sup> Cir. 1999), proof by such direct evidence is available in Section 510 cases, too. *Gavalik v. Continental Can Co.*, 812 F.2d 834, 853 (3d Cir.), *cert. denied*, 484 U.S. 979 (1987). *See Dominguez-Cruz v. Suttle Caribe, Inc.*, 202 F.3d 424, 428 n. 2 (1<sup>st</sup> Cir. 2000). When a plaintiff offers direct evidence of the employer's intention to interfere with the employee's attainment of an ERISA-protected benefit, a different method of analysis applies.

“Direct evidence” of a discriminatory motivation includes “statements by a decisionmaker that directly reflect the alleged animus and bear squarely on the contested employment decision.” *Vesprini v. Shaw Contract Flooring Servs.*, 315 F.3d 37, 41 (1st Cir. 2002). *See Febres v. Challenger Caribbean Corp.*, 214 F.3d 57, 61 (1st Cir. 2000) (“Comments which, fairly read, demonstrate that a decisionmaker made, or intended to make, employment decisions based on forbidden criteria constitute direct evidence of discrimination. The mere fact that a fertile mind can conjure up some innocent explanation for such a comment does not undermine its standing as direct evidence.”) A little direct evidence goes a long way. “With direct evidence, a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial. The plaintiff is required to produce ‘very little’ direct evidence of the employer’s discriminatory intent to move past summary judgment.” *Chuang v. University of Cal. Davis*, 225 F.3d 1115 (9th Cir. 2000)(Internal citations omitted).

Direct evidence of the employer’s discriminatory motivation for an employment action “shifts the burden of persuasion to the employer, who then must establish that he would have reached the same decision regarding the plaintiff even if he had not taken the proscribed factor into account.”<sup>2</sup> *Febres v. Challenger Caribbean Corporation*, 214 F.3d 57, 60 (1st Cir. 2000).

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<sup>2</sup> “Employees benefit from presenting such direct evidence for a number of reasons. First, the sheer strength of the evidence may carry the day. Second, it increases the chance of some form of relief, including attorneys’ fees. Third, it imposes on the employer the burdens of production and persuasion, unlike the McDonnell Douglas model, which merely shifts to the employer the burden of producing admissible evidence to support a non-discriminatory reason for its actions. Fourth, it is more difficult, although not impossible, for the employer to get summary judgment in light of the strength of direct evidence and the potential shifting of burdens.” *Weston-Smith v. Cooley Dickinson Hospital, Inc.*, 282 F.3d 60, 64-65 (1st Cir. 2002)(Internal citations omitted).

The present case is a stark example of direct evidence concerning the employer's motivation for firing the plaintiff. Scotts boasts of its "nicotine free" policy, in which employees who test positive for nicotine will be terminated. (Amended complaint ¶ 4). A purpose of this policy "was to save money on medical insurance costs." (Amended complaint ¶ 5). "Rodrigues was fired by Scotts because he tested positive for nicotine." (Amended complaint ¶ 11). Scotts provided Rodrigues with no reason for his termination other than the results of his urine analysis. (Amended complaint ¶ 12). Scotts instituted and applied its anti-tobacco policy to prevent employees who smoked tobacco products from participation in its health care and disability benefit plans because of a belief by Scotts that such employees would require greater expenditures for health care and disability benefits than would employees who did not use tobacco products. (Amended complaint ¶ 41). Scotts' instituted and applied its anti-tobacco policy for the purpose of reducing the amount of money the company spent on its health care and disability benefit plans. (Amended complaint ¶ 42).

These facts, which must be accepted as true for purposes of this motion, are as blatant an admission that Scotts fired Rodrigues because it wanted to avoid paying for his medical insurance as if the employer in *Fleming v. Ayers & Assoc., supra*, had agreed that it fired the plaintiff the day after she was hired to avoid paying medical costs

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for her hydrocephalic baby<sup>3</sup>. The amended complaint alleges, and the company candidly admits, that it has a policy of firing employees who smoke cigarettes, even in their private life. The complaint alleges and the company admits that the purpose of this policy is to cut down on the costs of the company's medical benefits plan. This is the paradigm for a Section 510 violation: an employee is fired because the employer believes the employee will incur medical expenses in the future.

Scotts attempts to justify its policy of not employing smokers as being based on "sound business concerns" as a means of "controlling the ever-increasing cost of health and disability insurance." Defendant's memorandum at p. 18. That justification is most likely true, but it is not a defense to a Section 510 ERISA discrimination charge. In fact, Section 510 is specifically designed to protect workers against just such "sound business" decisions that save employers money at the expense of their employees. The same justification would support firing an employee with a sick child, or a spouse needing long-term care or an employee on disability leave who remains covered by the medical plan. In fact, the logical next step for Scotts is to refuse to employ persons whose spouses are smokers since they would be covered under the corporation's medical plan. Of course, such discrimination between healthy employees and employees with medical needs – actual or hypothetical – would be a "sound business" decision and

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<sup>3</sup> While the plaintiff has moved to strike Scotts' references to a BusinessWeek article about this case, should the Court deny that motion, then the admission by Scotts' Chief Executive Officer, James Hagedorn, that he was aware that "federal law" prohibits the discrimination in this case constitutes the most direct of direct evidence. Hagedorn said, "If you choose to smoke then don't ask me to cover your insurance. Well, **some federal laws say we can't do that.** They say we can't transfer the risk to the person behaving in a way that will cost more. The rules are lining up so you can't assign the risk where it belongs." [http://www.businessweek.com/magazine/content/07\\_09/b4023005.htm](http://www.businessweek.com/magazine/content/07_09/b4023005.htm). (Emphasis added).

would save the employer substantial money. Fortunately for employees, Section 510 forbids such discrimination.

Besides Section 510's outright prohibition against discriminating against those employees likely to incur extraordinary medical expenses, there are sound public policy reasons for prohibiting such discrimination. This is a classic "slippery slope" situation. Firing smokers is easy; smokers are increasingly viewed as pariahs. However, with the vast attention given in the media to the "obesity crisis" in the nation and the adverse health effects of being overweight, won't it similarly be a "sound business decision" for employers to compel overweight employees to trim down or lose their jobs? For most people, obesity is as voluntary as is smoking. The same could apply to high cholesterol, another leading health risk. Could employers fire employees whose cholesterol levels exceeds healthy norms? The exact same justifications – legal and financial – apply to firing smokers as to firing overweight employees or employees with high cholesterol.

Continuing down the slippery slope, can employers fire employees who decide to have children because it would make such good business sense to only have to insure adults? The next step could be to only hire single people because paying for their medical insurance is so less costly than insuring married couples and paying the medical expenses of non-employee spouses. Of course this slippery slope argument can sound hysterical, but is there any legal difference between refusing to employ smokers and refusing to employ persons with children if the reason for doing both is to save on medical insurance costs?

**C. Rodrigues was a Scotts employee and has standing to bring an ERISA claim.**

Even though Scott Rodrigues donned a Scotts LawnCare uniform, drove a Scotts LawnCare truck to the homes of customers of Scotts LawnCare and then sprinkled Scotts LawnCare products on these customers' lawns, work for which he was paid by Scotts LawnCare, the defendant, Scotts LawnCare, asserts that he was never its employee, but at most was a "conditional" employee<sup>4</sup>. Fatal to the defendant's argument is the reality that the employment status of being a "conditional employee" is unknown to Massachusetts law. In fact, virtually all Massachusetts workers are "conditional" employees, employees-at-will who can be fired for any reason or no reason at any time, midway through their first day of employment or the day before retirement from a lifelong career. A "conditional" employee is no different from a "probationary" employee who must perform adequately for some initial period. That "probationary" employee, however, remains entitled to legal protection of employment during that probationary period (although perhaps not to some contractual benefits). Under Massachusetts law, during the period he worked for the company, Rodrigues was an employee-at-will of Scotts LawnCare.

Rodrigues would have been considered an "employee" of Scotts under virtually every Massachusetts employment statute. Had he lopped off his toes while cutting a Scotts' customer's lawn, he would have been an employee for purposes of the Workers Compensation Statute. G.L. c. 151 § 1(4). Had he been groped by his supervisor on the job, he could have filed a sexual harassment complaint pursuant to G.L. c. 151B § 4. He

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<sup>4</sup> The defendant claims that the proper defendant would be EG Systems, Inc., Scotts LawnCare's corporate name. The plaintiff intends to file a motion to amend to add EG Systems, Inc. as a defendant.

was considered an “employee” for purposes of the unemployment compensation state, G.L. c. 151A § 2. Had he struck a child on a bicycle while driving a Scott’s truck to a Scott’s customer’s home, without question Scotts would have been liable under the doctrine of *respondeat superior*. Presumably, Scotts withheld state and federal employment taxes from Rodrigues’ wages<sup>5</sup>.

Since Massachusetts does not recognize the status of being a “conditional employee,” Rodrigues was either an employee of Scotts or was not an employee. As discussed above, without question, based on the allegations in the amended complaint, the plaintiff was an at-will employee of the defendant for the period for which he worked, entitled to all the rights and protections of all other Massachusetts employees during the albeit brief term of his employment<sup>6</sup>.

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<sup>5</sup> Rodrigues’ status might have been different had Scotts chosen not to put him to work until after the results of the drug screening were received. Had he never performed any work for the company and had the company never paid him, the argument that he had only a “conditional” offer of employment might be more persuasive. That is not the route Scotts chose to follow. Instead, it chose to put Rodrigues to work and to pay him for that work. By doing so, for that period of time in which he actually worked for the company, he was its “employee.”

<sup>6</sup> Scotts misstates the holding of *O'Connor v. Davis*, 126 F.3d 112 (2d Cir. 1997), in this regard. Defendants’ memorandum at p. 23 n. 18. Scotts argues that that Title VII sexual harassment case stands for the proposition that “compensation by the putative employer ... in exchange for his services is not a sufficient condition,” 126 F.3d at 116, to establish that the plaintiff was an “employee.” In *O'Connor*, the Second Circuit found that the plaintiff was not an “employee” because she was an **unpaid** student volunteer. In fact, the full quotation from *O'Connor*, omitted from the defendants’ memorandum is that “although compensation by the putative employer to the putative employee in exchange for his services is not a sufficient condition, . . . **it is an essential condition to the existence of an employer-employee relationship.**” (Emphasis added). The *O'Connor* Court applied common law employment principles to find that because the plaintiff was an uncompensated volunteer, she was not an “employee.” Of course, in the present case, Rodrigues was compensated for his services and was offered the full range of employee benefits. For the few days he worked for Scotts, he was indistinguishable from any other Scotts’ employee.

**D. Rodrigues was a “participant” in Scotts’ ERISA plan because but for Scotts’ improper conduct, he would have been entitled to participate in its various plans.**

Employers who voluntarily choose to provide employee benefits, such as Scotts’ medical insurance plan, must do so fairly and in a non-discriminatory manner.

Rodrigues fits within the class of “participants” who have standing to bring actions under ERISA. The amended complaint alleges he would have been eligible for benefits, including medical benefits, after sixty days of employment. Amended Complaint ¶ 37.

“[T]he term ‘participant’ is naturally read to mean either employees in, **or reasonably expected to be in**, currently covered employment,” *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989) (Emphasis added). “In order to establish that he or she ‘may become eligible’ for benefits, a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future.” *Id.* See Scalia, J., concurring, “I think that, properly read, the definition of ‘participant’ embraces those whose benefits have vested, and those who (by reason of current or former employment) have some potential to receive the vesting of benefits in the future.” *Id.* at 119.

The First Circuit has followed Justice Scalia’s lead in deciding when a plaintiff is a “participant” in an ERISA plan so that he has standing to contest his employer’s conduct. The seminal First Circuit decision after *Firestone* is *Vartanian v. Monsanto Co.*, 14 F.3d 697, 702 (1st Cir. 1994), in which the Court gave a broad reading to who is to be considered a “participant” for purposes of ERISA standing. Adopting the standard established by the Fifth Circuit in *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1221 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 68 (1992), the Court said, “it would seem . . . logical to say that **but for** the employer’s conduct alleged to be in violation of ERISA,

the employee would be a current employee with a reasonable expectation of receiving benefits, and the employer should not be able through its own malfeasance to defeat the employee's standing.” (Emphasis added). While some decisions subsequent to *Vartanian* suggested that the First Circuit had retreated from its broad interpretation of ERISA standing in *Crawford v. Lamantia*, 34 F.3d 28 (1st Cir. 1994), see *Nahigian v. Leonard*, 233 F. Supp. 2d 151, 167 (D. Mass. 2002), all subsequent decisions have affirmed the continued vitality of *Vartanian*’s “but for” analysis. For example, in *Eggert v. Merrimac Paper Co.*, 311 F. Supp. 2d 245, 255 (D. Mass. 2004)(Emphasis added), the Court noted,

The rule that can be gleaned from the cases discussed above is that in the First Circuit, in general, a plaintiff must qualify as a “participant” as that term is defined in *Firestone* in order to have standing to pursue an ERISA action with the only exception being that where the plaintiff employee would still be a participant in the plan and entitled to higher benefit levels **but for the employer's malfeasance**, he still will have standing to pursue the ERISA claim.

As recently as last December, Judge Young reached the same conclusion in *Evans v. Akers*, 466 F. Supp. 2d 371 (D. Mass. 2006), summarizing the present state of First Circuit law as being “that employers ought not be able to defeat standing through their own wrongful acts.” *Id.*, 2006 U.S. Dist. LEXIS 88335, \*9. Judge Young found that “district courts in the First Circuit have followed *Crawford* in holding that the *Firestone* exception applies only when the former employee would still be a participant **but for the employer's alleged malfeasance.**” *Id.* at \*11. (Emphasis added).

Scotts’ reliance on *Becker v. Mack Trucks, Inc.*, 281 F.3d 372 (3d Cir. 2002), for the proposition that Section 510 does not apply to “hiring decisions” misses the mark. Even in that decision, the Third Circuit distinguished the facts – which involved

plaintiffs who were former employees who wanted to be rehired – from those in cases that follow the same “but for” standard applied in the First Circuit. The Third Circuit acknowledged the “but for” standard from *Christopher v. Mobil Oil Corp.*, 950 F.2d at 1221 but said that standard did not apply in *Becker* because the plaintiffs’ departure from employment had nothing to do with their ERISA benefits; they’d been laid off in a plant closing. In the present case, however, Rodrigues alleges that he was working for Scotts and then his employment was terminated specifically so that Scotts could avoid paying what it feared would be increased medical expenses for him. In other words, the Amended Complaint alleges that “but for” Scott’s violation of Section 510 – firing Rodrigues to avoid paying future medical expenses – Rodrigues would still be a Scotts employee and would be a participant in its benefit plans. That allegation satisfies the First Circuit standard for ERISA standing.

This Court should apply that same standard and should determine that Rodrigues has standing to bring an ERISA claim pursuant to *Vartanian v. Monsanto Co.*, *supra*, because the amended complaint alleges that “but for” Scotts’ conduct in violation of Section 510, Rodrigues could reasonably expect to be a participant in the corporation’s medical benefits plan. As a result, this Court should find (1) that Rodrigues had standing to bring the Section 510 ERISA claim in Count Four of the amended complaint and (2) that the allegations of that amended complaint properly state a violation of 29 USCS § 1140. The motion to dismiss Count Four should be denied.

## **II. COMPELLING RODRIGUES TO PROVIDE A SAMPLE OF HIS URINE FOR NICOTINE TESTING VIOLATED HIS STATUTORY RIGHT TO PRIVACY.**

Massachusetts has a strict personal privacy statute, G.L.c. 214 § 1B, stating,

A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages.

This statute has been applied for several decades to claims by employees of private employers alleging that their statutory privacy rights were violated when they were wrongfully compelled to provide urine samples for drug testing. Massachusetts law in this regard is solidly established. The keynote case is *Webster v. Motorola, Inc.*, 418 Mass. 425, 637 N.E.2d 203 (1994). In that case two Motorola employees were randomly selected to provide urine samples for testing for marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines. They had signed consents to urine testing when hired. The urine samples were provided in private and tested by an independent laboratory, which reported the results to an independent firm. If the tests were positive, the employee was privately counseled and provided with rehabilitation services. Employees were fired only if they refused to provide the urine sample or, if they tested positive, refused to participate in rehabilitation.

Two employees, Webster and Joyce, brought suit, challenging the program. Webster consented to provide a urine sample, under protest. Joyce refused. Webster's job involved outside sales. He drove a company automobile some 20,000 to 25,000 miles a year. Joyce was a technical editor of software documentation and user manuals for devices Motorola sold to the Defense Department and the Federal Aviation Administration. The Supreme Judicial Court found the differences between their job

duties determinative as to the employer's right to compel them to provide urine samples and to test those samples.

As a primary matter, the Court affirmed earlier decisions holding that the act of providing a urine sample for medical testing is protected by the privacy statute. Relying on substantial precedent, the Court said,

We have recognized that requiring an employee to submit to urinalysis involves a significant invasion of privacy. *Folmsbee*, [417 Mass.] at 392, citing *O'Connor v. Police Comm'r of Boston*, 408 Mass. 324, 328, 557 N.E.2d 1146 (1990), and *Horsemen's Benevolent & Protective Ass'n, Inc. v. State Racing Comm'n*, [403 Mass.] at 704. "The act of urination is inherently private," *Folmsbee*, *supra* at 393, and beyond the act itself, individuals have a privacy interest in what may be detected through urine testing. *Horsemen's Benevolent & Protective Ass'n, Inc.*, *supra* at 700 ("an individual has reasonable expectations of privacy regarding the information which can be extracted from a urine specimen"). Additionally, to the extent that it may be requested to rebut an initial positive test result, information concerning an employee's medical conditions is also within the realm of one's privacy interest.

418 Mass. at 431, 637 N.E.2d at 207. See *Horsemen's Benevolent and Protective Association, Inc. v. State Racing Commission*, 403 Mass. 692, 532 N.E.2d 644 (1989)(Finding mandatory urine testing of licensed horse racing personnel violated state constitutional privacy protection); *Folmsbee v. Tech Tool Grinding & Supply, Inc.*, 417 Mass. 388, 630 N.E.2d 586 (1994) (requiring an employee to submit to urinalysis involves a significant invasion of privacy). Besides the act of compelled urination itself, disclosing medical information obtained from the urine sample violates the employee's privacy. "An individual has reasonable expectations of privacy regarding the information which can be extracted from a urine specimen." *Horsemen's Benevolent & Protective Ass'n, Inc.*, *supra* at 700. "One does not reasonably expect to discharge urine

under circumstances making it available to others to collect and analyze in order to discover the personal physiological secrets it holds.” *McDonell v. Hunter*, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985), *aff’d as modified*, 809 F.2d 1302 (8th Cir. 1987). *See Penny v. Kennedy*, 846 F.2d 1563, 1566 (6th Cir. 1988) (stating that one can reasonably expect that his or her urine will not be exposed to sophisticated chemical analysis providing an abundance of personal information).

Of course, employers, too, have interests in providing safe workplaces and in ensuring that their employees do not injure themselves or others as a result of illegal drug use. “The defendants, as do all businesses, have a general interest in protecting the safety of their employees and in providing them a drug-free environment in which to work. This interest alone, however, is not sufficient [to overcome employees’ privacy interests].” *Motorola*, 418 Mass. at 433. The courts have required a more specific reason for drug testing. “[A]n employer may have a substantial and valid interest in aspects of an employee's health that could affect the employee's ability effectively to perform job duties.” *Bratt v. International Business Machs. Corp.*, 392 Mass. 508, 524, 467 N.E.2d 126 (1984). A close factual analysis is required. “The nature of the employee's business and the nature of the employee's duties are relevant factors in determining the gravity of the employer's interest.” *Motorola*, 418 Mass. at 432.

To accommodate these competing business interests of employers and privacy interests of employees, the Massachusetts courts apply a balancing test. “To determine whether an employer's drug testing policy violates its employees' rights under § 1B, we employ a balancing test: we balance the employees' interest in privacy against the employer's competing interest in determining whether [its employees are] using drugs.”

*Motorola*, 418 Mass. at 431. Just as in *Motorola*, the application of this balancing test is determinative in the present case.

In *Motorola* the Court found that in regard to the plaintiff Webster, the key fact was that he drove a company-owned car. “*Motorola* had the added interest in ensuring that Webster not operate their motor vehicle while intoxicated by drugs; this interest included protecting Webster's safety and the safety of others, preventing corporate liability, and protecting corporate property. In the circumstances, the defendants' legitimate business interests are sufficient to outweigh Webster's privacy interests.” *Id.* at 433. In fact, when drug testing is limited to employees operating dangerous equipment or in safety-related positions, the employer’s interests are generally found to outweigh the employee’s privacy rights. *See Byrne v. Mass. Bay Transp. Auth.*, 196 F. Supp. 2d 77 (D. Mass. 2002)(“The only time the Supreme Judicial Court has held that a drug testing procedure violated § 1B was in a case where the employee being tested was not engaged in a dangerous or safety-sensitive occupation.”)

In regard to the other *Webster* plaintiff, Joyce, who sat at a computer console and wrote manuals, even though they were used by the Defense Department and the FAA, the SJC found that his privacy interests as protected by c. 214 § 1A, outweighed the corporation’s business interests. The Court upheld the trial judge’s determination that “the nexus between his job duties and the harms feared is attenuated,” *id.*, and affirmed the injunction against testing Joyce for illegal drug use.

Applying this same balancing test to the present case yields an interesting result. Since Rodrigues drives a company truck and operates mechanical equipment, such as lawn mowers, Scott’s legitimate business interests outweigh his privacy interests in regard to testing for drugs that would impair his ability to operate this equipment. These

business interests, however, fail to counter-balance Rodrigues' privacy interests in regard to nicotine testing.

Scotts only asserted reason for nicotine testing was to save on future medical expenses. If this Court finds that reason violates ERISA Section 510, the company has no legitimate right to know whether Rodrigues uses tobacco products and no right to test Rodrigues' urine for nicotine<sup>7</sup>. Just because an employer can validly test for marijuana, for example, does not mean it is free to mine that specimen for whatever other confidential medical information it might provide: whether the employee has diabetes, his cholesterol levels, whether he takes medication for erectile dysfunction, or whether he smokes cigarettes. After all, employees' privacy interests apply not only to the physical act of providing a urine sample, but also to the personal information that sample can provide. "Urinalysis may disclose, in addition to the presence of drugs, other personal information--whether a person is taking medication for depression or epilepsy,

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<sup>7</sup> Scotts relies heavily on a Massachusetts statute prohibiting firefighters and police officers from smoking. However, the situation involving police and firefighters is *sui generis*. Massachusetts has long had a statute, G. L. c. 41, § 101A, prohibiting police and firefighters from smoking tobacco products. The validity of this statute was upheld in *Town of Plymouth v. Civil Service*, 426 Mass. 1, 686 N.E.2d 188 (1997), because of their unique job situations. "[P]olice officers and fire fighters . . . by reason of their employment, are particularly susceptible to hypertension and heart disease. It is common knowledge that tobacco smoking has been identified as a contributing risk factor in both of these conditions, and heart disease is a leading cause of disability retirement among public safety personnel. The Legislature apparently enacted § 101A in an effort to reduce the number of police officers and fire fighters who obtain substantial disability benefits from public funds under G. L. c. 32, § 94, also known as the 'Heart Law,' as a result of heart disease due to smoking." 426 Mass. at 5 n.4. The "Heart Law" states that hypertension or heart disease suffered by public safety personnel "shall be presumed to have been suffered in the line of duty" for purposes of receiving enhanced "injured in the line of duty" pensions. The Court found that the "no smoking" statute was enacted with this "Heart Law" in mind. It is possible that Scotts will eventually offer evidence that because of the toxic nature of the chemicals Rodrigues was required to handle, smoking presented an extraordinary risk to him. Scott's nonsmoking policy, however, applied to all its employees, regardless of whether they handled toxic chemicals. Amended complaint ¶ 19.

is suffering from diabetes, or, in the case of a woman, is taking birth control pills, or is pregnant.” *Horsemen's Benevolent & Protective Association*, 403 Mass. at 700.

Even should the ERISA claim fail, this Court should find that Rodrigues’ privacy interests in the medical and chemical information his urine sample could provide, other than the legitimate testing for illegal drugs, outweighs the employer’s need to know whether he smokes cigarettes. After all, finding that an employer can legitimately test every employee for nicotine means, as a practical matter, that **every employee in America** can be compelled to provide a urine sample to his and her employer, causing the carefully-crafted balancing test applied in the above cases to be tossed out the window. Balancing simply cannot mean that the scale always tips toward the employer.

This Court should apply the *Webster* balancing test to the facts alleged in the amended complaint and should find that Rodrigues’ privacy interests in regard to information that could be obtained by testing his urine sample – other than the legitimate information about illegal drug use that would hamper his safe performance of his job – outweighed Scotts’ interests in determining whether he smoked cigarettes.

**III. THE AMENDED COMPLAINT PROPERLY STATES CLAIMS FOR VIOLATIONS OF THE MASSACHUSETTS CIVIL RIGHTS ACT AND FOR WRONGFUL TERMINATION FOR A REASON IN VIOLATION OF PUBLIC POLICY.**

**A. Threatening to fire Rodrigues, and then firing him, because he smoked cigarettes violated his rights under the Massachusetts Civil Rights Act.**

The Massachusetts Civil Rights Act, G.L. c. 12 § 11I, prohibits anybody, including private entities, from interfering with any right protected “by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth” by means of “threats, intimidation or coercion.” Rodrigues’ suggests that his right to

smoke cigarettes, in private, outside the workplace, is protected by the Privacy Act, c. 214 § 1B, and Articles 1 (as amended by art. 56) and 14, of the Massachusetts Declaration of Rights<sup>8</sup>.

Scotts suggests that because it is a private corporation, not a state entity, the prohibitions of the MCRA do not apply to its conduct in violation of the state constitution. “Action by a private employer simply is not a violation of Article 14, even if the identical action would be an unconstitutional search if undertaken by the government,” Scotts argues. Memorandum at p. 8. This argument entirely misses the import of the MCRA. That statute, the Supreme Judicial Court has said, is coextensive with its federal counterpart, 42 U.S.C. § 1983, except the state statute does not require state action. “The statute extended beyond the limits of its Federal counterpart by incorporating private action within its bounds. We conclude that the Legislature intended to provide a remedy under G. L. c. 12, § 11I, coextensive with 42 U.S.C. § 1983 (Supp. V 1981), except that the Federal statute requires State action whereas its State counterpart does not.” *Bell v. Mazza*, 394 Mass. 176, 181 (1985). It is this extension to private actions that is the fundamental purpose behind the MCRA. Virtually the entirety of MCRA jurisprudence involves cases in which private actors violated plaintiffs’ rights that would otherwise be protected only against state action. This principle was made explicit in *O’Connell v. Chasdi*, 400 Mass. 686 (Mass. 1987):

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<sup>8</sup> Art. I, as amended by art. 56, says, in relevant part, “All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness.”

Art. 14 says, in relevant part, “Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions.”

A right is ‘secured . . . by the Constitution’ . . . if it emanates from the Constitution, if it finds its source in the Constitution. We concluded that the Massachusetts Civil Rights Act did not require that the person whose conduct is challenged be acting under color of law. Moreover, the right secured by the Constitution was not limited to rights as secured only against the government, but would be applied in a private context as well. Compare *Bell v. Mazza, supra* at 182 (private persons who interfered with plaintiffs’ use of private property liable under G. L. c. 12, § 11I) with *United States v. Guest, supra* at 780 (Brennan, J., concurring in part and dissenting in part) (private persons interfered with complainants’ right to use State facilities). *Cf. United States Jaycees v. Massachusetts Comm’n Against Discrimination*, 391 Mass. 594, 609 n.9 (1984) (“the protections of constitutional rights introduced in the Massachusetts Civil Rights Act may not be limited to State action”).

400 Mass. at 692.

For example, in the seminal MCRA case of *Batchelder v. Allied Stores Corp.*, 388 Mass. 83 (1983)(Batchelder I), private shopping mall security guards prohibited the plaintiffs from soliciting petition signatures, an action the plaintiffs alleged violated their right to ballot access under art. 9 of the Declaration of Rights. The Supreme Judicial Court held that the MCRA prohibited the guards’ conduct and that their actions violated the MCRA. The Court found it significant that, “[u]nlike the prohibition of the First Amendment to the Federal Constitution (‘Congress shall make no law . . .’) and the limitation of the Fourteenth Amendment (‘nor shall any State deprive any person . . .’), art. 9 is not by its terms directed only against governmental action.” *Id.*, 388 Mass. at 89. Because there was no state action component to art. 9, private violation of the article, when it meets the other requirements of the MCRA, violates the statute.

Just as art. 9 contains no “state action component,” neither does art. 14. The same reasoning that supported a MCRA claim against a private actor for a violation of art. 9 supports a similar claim for a violation of art. 14, as in the present case. Scotts is

liable for an unlawful search of Rodrigues, under the MCRA, if that search was conducted by means of “threats, intimidation or coercion.” *See Planned Parenthood League v. Blake*, 417 Mass. 467 (1994)(MCRA protects against interference with Constitutionally-protected right to obtain an abortion).

At one point, the Massachusetts courts limited the interpretation of the phrase “threats, intimidation and coercion” to physical acts of violence. More recently, however, courts have recognized that economic pressure can be as coercive as physical threats. This was made explicit in *Buster v. George W. Moore, Inc.*, 438 Mass. 635, 648 (2003), in which the SJC said, “We conclude, then, that in certain circumstances, economic coercion, standing alone, may be actionable under the act.” *See Redgrave v. Boston Symphony Orchestra, Inc.*, 399 Mass. 93 (Mass. 1987)(Economic coercion stated MCRA claim); *Deas v. Dempsey*, 403 Mass. 468, 471 (1988)(Coercion is “the application to another of such force, either physical or moral, as to constrain him to do against his will something he would not otherwise have done.”) A person is more likely to be intimidated and coerced, to be compelled to do something against his will, by a threat to take away his job, his means of supporting his family, his source of medical care for his son, than he is by being shoved to the ground.

Assuming that Rodrigues had the right to smoke cigarettes in private and also that he had the right not to be compelled to disclose this information, especially by means of a compelled urine sample, then the economic coercion of compelling him to provide a urine sample for testing for nicotine as a condition of obtaining or maintaining employment was sufficient to cross the MCRA threshold. At least at this preliminary stage, at which it is not known what was said to compel Rodrigues to provide the urine sample, the MCRA count should not be dismissed.

**B. Rodrigues was fired for doing what the law allows: smoking cigarettes in private. Such conduct constitutes a wrongful termination for a reason in violation of public policy.**

Rodrigues' wrongful termination claim rises or falls on the Court's determination of his privacy and ERISA claims. If, as Rodrigues asserts, he had the right to maintain the privacy of whatever information would be disclosed by his urine sample – excepting for illegal drugs – and if Scotts' right to terminate him because he smoked cigarettes violated ERISA, then Rodrigues should prevail on his wrongful termination claim. “An unreasonable, substantial, or serious interference with an employee's privacy could contravene public policy and warrant the imposition of liability on the employer for the discharge.” *Folmsbee v. Tech Tool Grinding & Supply*, 417 Mass. at 395 (citing *Cort v. Bristol-Myers Co.*, 385 Mass. 300, 307 (Mass. 1982)(violation of c. 214 § 1B privacy by employer “could contravene public policy and warrant the imposition of liability on the employer for the discharge.”)

The Court's focus should not be on whether it is the public policy of the Commonwealth to promote smoking; of course there is no such policy. But smokers are an easy target, virtual pariahs with little public sympathy. The public policy is the broader right to participate in legal activities in one's private life. Certainly the government can prohibit smoking in workplaces, in public places or altogether, if it chooses to do so. However, the Legislature has made carefully chosen decisions about when and where smoking is presently permitted and prohibited. Rodrigues smoked at times and places permitted by law. He had the right to do so, just as he had the right to ride a motorcycle, climb a mountain or use a chain saw, other activities that some might view as dangerous. These rights to do what the law permits are protected by the Constitutional penumbra of art. 1 of the Declaration of Rights, the “natural, essential,

and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.” Scotts’ firing of Rodrigues for smoking is as much a violation of his right to do what the law permits as if a thug came up to him in the street and ordered him to stop smoking in public, threatening him with a beating if he refused, conduct that would clearly be illegal.

At this stage of the case, the Court should deny the motion to dismiss the MCRA and wrongful termination claims and permit the record to be developed by discovery.

### **Conclusion**

This Court should deny the defendant’s motion to dismiss in its entirety and permit the case to proceed through discovery.

Respectfully submitted,

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### **Certificate of service**

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on March 30, 2007.

/s/ Harvey A. Schwartz  
Harvey A. Schwartz