

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 07-10104-GAO

SCOTT RODRIGUES,
Plaintiff

v.

THE SCOTTS COMPANY, LLC and
EG SYSTEMS, INC. d/b/a SCOTTS LAWN SERVICE,
Defendants.

OPINION AND ORDER

January 30, 2008

O'TOOLE, D.J.

In this action, the plaintiff claims that Scotts (as the defendant companies are collectively designated) wrongly terminated his incipient employment after a required urine test confirmed the presence of nicotine, indicating that the plaintiff is a smoker of tobacco. The defendants have a policy against employing smokers. The plaintiff claims that the enforcement of that policy against him was wrongful under Massachusetts law and also constituted unlawful discrimination under the federal Employee Retirement Income Security Act (ERISA).

The defendants have moved to dismiss the action on the ground that the complaint¹ fails to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6). When ruling on a motion to dismiss a complaint for failure to state a claim upon which relief can be granted, a court must “assume the truth of all well-pleaded facts and indulge all reasonable inferences that fit the plaintiff's stated theory of liability.” . . . [H]owever, the court need not credit ‘bald assertions, unsupportable

¹ The operative complaint is the second amended complaint (Dkt. No. 27).

conclusions, periphrastic circumlocutions, and the like.” Redondo-Borges v. U.S. Dep’t of Hous. and Urban Dev., 421 F.3d 1, 5 (1st Cir. 2005) (citations omitted). In particular, the court is not required to accept as true legal conclusions within the complaint. See Doran v. Mass. Tpk. Auth., 348 F.3d 315, 318 (1st Cir. 2003).

The complaint alleges the following facts, among others:

Scotts has adopted a policy “prohibiting smoking of tobacco products by its employees at any time and at any place, whether or not in the workplace or during work hours.” (Second Am. Compl. ¶ 5.) Its purpose in adopting the policy “was to save money on medical insurance costs and to promote healthy lifestyles among its employees.” (Id. ¶ 6.)

Rodrigues was hired by Scotts and was issued a Scotts uniform, and he performed services for Scotts’ customers, operating Scotts’ equipment. “He was paid by Scotts for his work.” (Id. ¶¶ 8-9.) “Pursuant to Scotts’ nicotine-free policy, Scotts required Rodrigues to submit to a urine sampling procedure . . . shortly after he was hired.” (Id. ¶ 10.) His urine sample tested positive for nicotine, and he “was fired by Scotts” as a result. (Id. ¶¶ 11-12.)

Rodrigues’ complaint alleges four causes of action: Count One alleges a violation of his right to privacy under Massachusetts General Laws ch. 214, § 1B. Count Two alleges that the defendants unlawfully interfered with Rodrigues’ rights in violation of the Massachusetts Civil Rights Act (“MCRA”), Massachusetts General Laws ch. 12, § 11I. Count Three alleges wrongful termination under Massachusetts common law. Count Four alleges that the defendants violated ERISA § 510, 29 U.S.C. § 1140, by terminating his employment and thus interfering with his attainment of benefits and rights under Scotts’ ERISA plans that he would have become eligible for but for the termination.

Upon consideration of the parties' submissions and after hearing, the motion to dismiss is granted in part and denied in part. The counts for wrongful termination and for violation of the state civil rights act fail to state a claim upon which relief can be granted. However, taking the allegations of the complaint as true, as is required at this stage of the case, the counts for invasion of privacy and for violation of the cited ERISA provision sufficiently outline claims to entitle the plaintiff to an opportunity to try to prove them.

I. The Massachusetts Civil Rights Act

To establish a claim under the MCRA, a plaintiff must prove that Scotts interfered by means of "threats, intimidation or coercion" with his enjoyment of a right secured by the Constitution or the laws of either the United States or the Commonwealth of Massachusetts. Mass. Gen. Laws ch. 12, §§ 11H, 11I; see Buster v. George W. Moore, Inc., 783 N.E.2d 399, 408 (Mass. 2003).

Count Two fails adequately to allege that any interference with Rodrigues' rights by Scotts was done by "threats, intimidation or coercion." The plaintiff alleges that "Scotts threatened to fire" him if he did not submit to a urine test for nicotine. Accepting that allegation as true, a threat to terminate employment at-will,² without more, is not a "threat" within the meaning of the MCRA. See Webster v. Motorola, Inc., 637 N.E.2d 203, 206 (Mass. 1994); see also French v. United Parcel Service, Inc., 2 F. Supp. 2d 128, 133 (D. Mass. 1998).

II. Wrongful Termination

Generally under Massachusetts law, at-will employment may be terminated by either party at "any time and without reason," except in limited circumstances, such as where the termination can be said to have been against public policy. See Parker v. Town of N. Brookfield, 861 N.E.2d 770,

² Rodrigues does not contest the fact that he was at most an at-will employee.

774 (Mass. App. Ct. 2007). Massachusetts courts have recognized that the public policy exception would protect at-will employees from 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. See Wright v. Shriners Hosp. for Crippled Children, 589 N.E.2d 1241, 1244 (Mass. 1992); see also Flesner v. Technical Commc'ns Corp., 575 N.E.2d 1107 (Mass. 1991); Hobson v. McLean Hosp. Corp., 522 N.E.2d 975 (Mass. 1988); DeRose v. Putnam Mgmt. Co., 496 N.E.2d 428 (Mass. 1986). Nonetheless, "[t]he public policy exception is narrowly construed; not every statutory right guarantees employment or provides grounds for a claim arising out of termination." Parker, 861 N.E.2d at 775.

Rodrigues does not claim that he was fired for refusing to submit to a urine test. Rather, his claim is that, after his urine test indicated the presence of nicotine, he was fired because he was a smoker. He claims that he has a "right to smoke cigarettes in his personal life, outside of the workplace and work hours." (Second Am. Compl. ¶ 34.) Whatever the merits of that conclusory assertion, his exercise of that "right" cannot be the predicate for a claim of wrongful termination under existing Massachusetts law. It obviously does not match one of the relatively few circumstances where the Massachusetts courts have explicitly permitted a claim for wrongful termination in derogation of public policy, so that to give the "right to smoke" similar significance would require extrapolation to conclude that, if the case were to be presented to the Massachusetts courts, they would regard it as an equivalently weighty public policy matter as those that have explicitly been recognized. See Smith-Pfeiffer v. Superintendent of the Walter E. Fernald State Sch., 533 N.E.2d 1368, 1371 (Mass. 1989). As Scotts points out, 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.” There simply is no reason to believe it likely that the Massachusetts courts would find termination of an at-will employee/smoker to be against a putative public policy to protect smokers’ rights.

III. Invasion of Privacy

Section 1B of Chapter 214 of the Massachusetts General Laws provides: “A person shall have a right against unreasonable, substantial or serious interference with his privacy.” The right is broadly stated and it has been left to the courts to determine its scope. It has been held that the statute “proscribe[s] the required disclosure of facts about an individual that are of a highly personal or intimate nature when there exists no legitimate, countervailing interest.” Bratt v. Int’l Bus. Mach. Corp., 467 N.E.2d 126, 133-34 (Mass. 1984); see also Schlesinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 567 N.E.2d 912, 914 n.4 (Mass. 1991). An employer’s legitimate business interest in obtaining an employee’s private information must be balanced against the employee’s interest in keeping the information private. See Webster, 637 N.E.2d at 207-08; Bratt, 467 N.E.2d at 135. More specifically, “the employer’s legitimate interest in determining the employees’ effectiveness in their jobs” should be weighed against “the seriousness of the intrusion on the employees’ privacy.” Bratt, 467 N.E.2d at 135; see also Webster, 637 N.E.2d at 207.

The required “balancing of interests involves a factual inquiry.” Webster, 637 N.E.2d at 208. Webster itself stands as an illustration of that proposition. There, two employees challenged their employer’s drug-testing policy. After the appropriate “balancing” of the pertinent facts was done, the SJC held that one of the plaintiffs had had his privacy right infringed, but the other had not. Id. at 207-208. One size does not fit all. Because the plaintiff’s obligation in framing his complaint is only

to plead facts sufficient to show “a plausible entitlement to relief,” Bell Atl. Corp. v. Twombly, – U.S. –, 127 S. Ct. 1955, 1967 (2007), it is enough for him to articulate a plausible privacy interest, which he has, and to aver, plausibly, that the articulated interest outweighs the defendants’ stated interest in a generally healthy workforce that will have high productivity and low health care costs. Filling out the details on which the balancing will ultimately be done is a matter for discovery and, if necessary, trial.

IV. ERISA

In his final count, Rodrigues alleges that in terminating his employment Scotts violated ERISA § 510, which provides:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act.

29 U.S.C. § 1140. Rodrigues’ position is that in terminating his short-lived employment because he was a smoker, Scotts “interfer[ed] with the attainment of [a] right” to which he would have become entitled – participation in the Scotts employee benefits plan – if he had remained employed.

Scotts makes two arguments for dismissal of this claim. First, it argues that section 510 only applies to employment actions taken against existing employees and not to hiring decisions, and Rodrigues never became an employee because his employment offer was conditioned on his being a non-smoker, a fact disproved by the nicotine test. The problem for Scotts, however, is that on a Rule 12(b)(6) motion, the facts alleged in the complaint are taken to be true, and Rodrigues alleges that

he was an employee.³ Accepting that as true for present purposes, as an employee he may come within the scope of protection afforded by section 510.

Scotts' second argument is that even if Rodrigues were to be considered an employee, excluding him (by terminating his employment) from participation in its benefit plans because of his smoking behavior, rather than because he was making or was expected to make a claim for benefits, does not violate the statute.

“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 (1st Cir. 1995). Two related points deserve notice. First, section 510 does not apply to those instances where “the loss of benefits was a mere consequence of, but not a motivating factor behind, a termination of employment.” Barbour, 63 F.3d at 37. And second, section 510 “relates to discriminatory conduct directed against individuals, not to actions involving the plan in general.” Aronson v. Servus Rubber, Div. of Chromalloy, 730 F.2d 12, 16 (1st Cir. 1984). The resolution of each of these issues may depend on what facts the plaintiff may ultimately prove. Scotts’ expectation that the facts ultimately proved (or not proved) will resolve the issues in its favor is not enough to warrant dismissal on a Rule 12(b)(6) motion.

³ Scotts proffers some documents external to the complaint in support of its argument that Rodrigues’ employment was contingent and thus never finally occurred. Rodrigues is correct that consideration of the documents on a motion to dismiss is not permitted, and his motion to strike the documents (dkt. no. 20) is granted.

V. Conclusion

For the foregoing reasons, the plaintiff's motion to strike (dkt. no. 20) is GRANTED. The defendants' motion to dismiss (dkt. no. 12) is GRANTED in PART and DENIED in PART. Counts Two and Three are dismissed, and the case will proceed as to Counts One and Four.

It is SO ORDERED.

/s/ George A. O'Toole, Jr.
United States District Judge