

Federal Court Decision Suggests That Employees Can Challenge Employers' Policies on Off-Duty Conduct

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Last year federal court decision, *Rodrigues v. The Scotts Co.*, suggested that an employer can be liable for terminating an employee for engaging in legal but unhealthy off-duty conduct. In *Rodrigues*, the employer maintained a "wellness plan", which prohibited employees from smoking cigarettes both on and off the job in order to reduce anticipated medical insurance costs. The plaintiff was fired after he tested positive for nicotine as part of a drug screen. In its original February 2008 decision, the federal court held that the plaintiff had asserted viable claims for invasion of privacy and under the Employee Retirement Income Security Act (ERISA) for unlawful interference with his right to benefits under Scotts' health insurance plan.

Last week, the Court issued a further decision in the case, dismissing both of the plaintiff's claims. Based upon a fuller record, the Court held that the plaintiff's smoking habit was publicly known and thus could not be the basis of an invasion of privacy claim. As to his claim under ERISA, the Court explained that the plaintiff's offer of employment was contingent upon his satisfaction of a drug test, and thus he was not yet eligible to participate in his employer's health insurance plan. Because Rodrigues was not yet a participant in the plan, the Court held that he could not assert a claim for unlawful interference with his attainment of benefits under ERISA.

While this latest decision ends the case, it leaves unanswered whether an employee can successfully challenge an employer's policy against legal, off-duty conduct. Most employers are not interested in policing employees' private lives, but the exponentially rising cost of health insurance necessarily means that employers have incentives to control personal habits which are viewed as costly to health plans. In *Rodrigues*, the federal court ultimately dismissed the plaintiff's claims based upon the specific facts at issue. However, both decisions leave open the possibility that a terminated employee, under different factual circumstances, might be able to challenge an employer's rules against certain off-the-job conduct and prevail on a claim for invasion of privacy or a claim under ERISA. In fact, the plaintiff in *Rodrigues* has appealed the dismissal of his claims, and we anticipate further litigation on these issues. We will keep you informed of further developments in this area of the law.

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