

rescinding his offer of employment based on the discovery that he engages in precisely the conduct that he knew Scotts prohibits, somehow violated his civil rights under Massachusetts law, the public policy of the Commonwealth, or the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 *et seq.* Rodrigues is wrong. The face of the amended complaint and the indisputable documentary materials that this Court may properly consider at this stage—such as Rodrigues’s employment paperwork—establish that each of Rodrigues’s claims is legally deficient and must be dismissed.¹

STATEMENT OF FACTS

Scotts announced in December 2005 the creation of a company-wide wellness plan, the LiveTotal Health Initiative. Scotts recognized, as have numerous other companies, that encouraging its employees to lead a healthier lifestyle boosts productivity and reduces the cost to Scotts of self-insuring its employee health plan. Components of the wellness plan include on-site fitness and health-care facilities, which employees are free to use even during work hours; lower premiums for employees who agree to take a health care self-assessment and follow the wellness recommendations; and even healthier food in the cafeterias. *See generally* Michelle Conlin, *Get Healthy—Or Else*, BUS. WK., Feb. 26, 2007, at 58.

One important component of the wellness plan at Scotts (and other companies) is reducing smoking among employees. Smoking is the leading cause of preventable illness among American workers. Accordingly, Scotts has announced a Tobacco-Free Policy that prohibits its employees from using tobacco products at any time, and provides them with resources to help

¹ The documents that are “integral” to establishing the nature of Rodrigues’s claims are properly considered without converting this motion to one for summary judgment. *E.g.*, *Clorox Co. P.R. v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 32 (1st Cir. 2000). Indeed, the complaint appears to refer to Rodrigues’s offer letter, Bell Decl. Exh. 2. *See* Am. Compl. ¶ 37.

them quit smoking. Am. Compl. ¶ 4; Conlin, *supra*.² One component of the policy is testing prospective new employees for nicotine use to ensure that no new smokers are hired.

Months after Scotts announced that it would stop hiring smokers, Rodrigues applied for a lawn-care job in Sagamore Beach, Massachusetts, with Scotts LawnService, a Scotts subsidiary. Am. Compl. ¶ 6.³ He was offered an at-will position, “contingent upon completion of a pre-hire screening required of all Scotts’ associates,” including a “nicotine test.” Bell Decl. Exh. 2, at 2; *see id.* Exh. 1, at 3. Rodrigues signed the offer letter and submitted a urine sample. *Id.* Exh. 2, at 3; Am. Compl. ¶ 9. The urinalysis correctly detected that he had continued to smoke actively despite the Tobacco-Free Policy. Am. Compl. ¶¶ 9, 13. Rodrigues’s offer of employment was immediately revoked. Am. Compl. ¶¶ 10, 11. Thus, although Rodrigues was paid for a few days’ work before the test results came back, *see* Am. Compl. ¶ 8, he never successfully completed the “pre-hire screening” on which his job offer was “contingent.” Rodrigues never qualified for any form of employee benefits. *See* Bell Decl. Exh. 2, at 1 (explaining the 60-day waiting period before qualifying).

Rodrigues commenced this action against Scotts in the Massachusetts Superior Court for Suffolk County. That court held that venue was improper, and Rodrigues had the case transferred to the Superior Court for Barnstable County. Scotts timely removed the action to this Court on January 22, 2006, based on diversity jurisdiction. Notice of Removal ¶¶ 14, 15. Rodrigues then filed an amended complaint that added a federal claim. That amended complaint is the subject of this motion.

² The facts alleged are accepted as true solely for purposes of this motion to dismiss.

³ He had applied once before, but he did not then meet other company standards for employment. Those reasons are unrelated to this motion.

STANDARD

A motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) must be granted when the complaint alleges “no set of facts in support of [the] claim which would entitle [the plaintiff] to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). “The court need not accept a plaintiff’s assertion that a factual allegation satisfies an element of a claim, however, nor must a court infer from the assertion of a legal conclusion that factual allegations could be made that would justify drawing such a conclusion.” *Cordero-Hernandez v. Hernandez-Ballesteros*, 449 F.3d 240, 244 n.3 (1st Cir. 2006).

ARGUMENT

Rodrigues’s complaint proceeds from the incorrect premises that he “was hired by Scotts” and “was fired” from regular employment. Am. Compl. ¶¶ 7, 11. Those *legal* averments about Rodrigues’s employment relationship are not binding on the Court even at the pleading stage, *Cordero-Hernandez*, 449 F.3d at 244, and the key document governing the putative employment relationship shows them to be incorrect. *See* Bell Decl. Exh. 2. Rodrigues received an *offer* of employment, with an accompanying condition that he failed to satisfy (though he tried, by taking the urine test).⁴ Of course an offer of employment is not employment, and the

⁴ Moreover, that offer came not from Scotts but from Scotts LawnService, which is incorporated as EG Systems, Inc. *See* Bell. Decl. Exh. 2, at 1; *supra* note 1 (explaining why these facts are properly considered at this stage). Ignoring the identity of the company that offered him the job, Rodrigues has sued not EG Systems but Scotts. The complaint sets forth no factual allegation that would legally justify piercing the corporate veil or otherwise disregarding EG Systems’ separate existence. That fact alone warrants dismissal, since it is indisputable that the named defendant never had any employment relationship with Rodrigues. Moreover, any leave to amend further would be futile, because (as demonstrated by the balance of this memorandum) each of Rodrigues’s claims would require dismissal even if Rodrigues had sued the correct entity. (Rodrigues’s error in this regard does not affect this Court’s jurisdiction, which rests on a federal question as well as complete diversity. *See* Am. Compl. ¶ 44 (federal claim); Notice of Removal Exh. 7, ¶¶ 3-7 (neither Scotts nor EG Systems is a citizen of Massachusetts).)

difference dooms all of Rodrigues's claims. Indeed, even if Rodrigues *were* deemed an "employee" of Scotts, his claims would still be legally deficient. Because all of his claims suffer from incurable deficiencies, the complaint should be dismissed.

I. RODRIGUES'S MASSACHUSETTS CIVIL RIGHTS ACT CLAIM FAILS AS A MATTER OF LAW

Rodrigues contends that Scotts violated the Massachusetts Civil Rights Act (MCRA) by enforcing the express condition of his employment offer.⁵ That assertion does not state a claim under the MCRA, which protects individual employees from deprivation of their constitutional rights through threats and coercion; it does not give would-be applicants for private-sector, at-will employment a new right to challenge hiring criteria.

A. Rodrigues's Attempt To Allege The Required "Threats, Intimidation or Coercion" Fails As A Matter Of Law

Both this Court and the state courts have recognized that the MCRA "should not be interpreted as creating a vast constitutional tort remedy." *Marsman v. W. Elec. Co.*, 719 F. Supp. 1128, 1138 (D. Mass. 1988) (citing *Bell v. Mazza*, 474 N.E.2d 1111, 1115 (Mass. 1985)). Rather, the MCRA gives a right of action only to persons who can show that their rights under the federal or Massachusetts constitution or laws have been interfered with "by threats, intimidation or coercion." Mass. Gen. Laws ch. 12, §§ 11H, 11I. Conclusory assertions of a threat are not enough to state a claim; Rodrigues must "specifically allege the type of conduct" by Scotts that rises to the level of actionable "threats, intimidation, or coercion." *Marsman*, 719 F. Supp. at 1138 (citing *Mouradian v. Gen. Elec. Co.*, 503 N.E.2d 1318, 1321 n.5 (Mass. App. Ct. 1987)).

⁵ The MCRA allows "[a]ny person whose exercise or enjoyment of . . . rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, as described in section 11H" to bring a civil action. Mass. Gen. Laws. ch. 12, § 11I.

In his attempt to carry this burden, Rodrigues asserts only that failing the urine test was a “threat” to his employment. Am. Compl. ¶¶ 28-29 (Scotts “*threatened to fire* Rodrigues if he refused to urinate and to provide a urine sample”; Scotts “*threatened to fire* Rodrigues if his urine sample revealed that he had smoked cigarettes in his private life while a Scotts employee.” (emphases added)). But Rodrigues was an *applicant* who failed to comply with a condition of employment; the only “threat” to a potential employment relationship with Scotts LawnService came from his own failure to comply with the express condition to his job offer.

Moreover, even if Rodrigues had been an “employee” who was threatened with “firing,” his claim would still fail. If Rodrigues became any sort of “employee” under Massachusetts law, he would, at most, be an “at will” employee. Settled law makes clear that employees facing termination from an at-will position cannot use the MCRA to evade a drug-testing requirement, or (more generally) to keep secrets from their employers. “[T]he potential loss of at-will employment [does] not constitute ‘threats, intimidation or coercion’ within the meaning of the [MCRA].” *French v. UPS*, 2 F. Supp. 2d 128, 133 (D. Mass. 1998) (O’Toole, J.) (citing *Webster v. Motorola, Inc.*, 637 N.E.2d 203, 206 (Mass. 1994)). In *Webster*, for example, the plaintiffs objected to their employer’s decision to test all employees for drug use (including off-duty use) and to terminate any employee who refused to comply. In *French* the plaintiff complained that he was constructively fired based on his conduct during a drunken binge at his home; his theory was that the company violated his privacy rights, and hence the MCRA, by inquiring into his private, off-duty conduct without a good business reason. In those cases, the Supreme Judicial Court and this Court emphasized that the prospect of losing at-will employment does not rise to the level of “threats, intimidation or coercion” under the MCRA:

[Motorola] conditioned the plaintiffs' continued employment on their submission to the [drug-testing] program. The plaintiffs were employed "at will." Thus, the defendants allegedly attempted to interfere with the plaintiffs' rights by threatening the loss of their "at-will" positions. *This is not actionable conduct.* No physical confrontation is alleged, and because the plaintiffs were employed "at will," they had no contract right to their positions.

Webster, 637 N.E.2d at 206 (emphasis added); *accord French*, 2 F. Supp. 2d at 133.

Thus, Rodrigues's best effort—his only effort—to satisfy this crucial element relies on an allegation that the state and federal courts have repeatedly rejected as plainly inadequate. An at-will employee by definition could lose his position at any time; treating Rodrigues's fear for his job as cognizable "threats" or "coercion" would turn *any* fireable offense into an actionable MCRA claim. Massachusetts law has not extended any such open invitation.

B. In Any Event, Generally Applicable Employment Policies Are Not Actionable Under The Massachusetts Civil Rights Act

Not only has Rodrigues failed to establish any cognizable "threat, intimidation, or coercion," he cannot show that he was singled out for *any* unfavorable treatment. Rather, he admits in the complaint that his rights were violated (if at all) only pursuant to "Scotts' implementation of its . . . policy" by testing him (and others) for nicotine. Am. Compl. ¶ 30. The MCRA, however, does not permit this type of attack on a broadly applicable corporate policy, in which the plaintiff does not claim to have been targeted for discriminatory, retaliatory, or otherwise invidious treatment.

"[M]eritorious claims . . . under the [MCRA] [generally] involv[e] measures directed toward a particular individual or class of persons," not generally applicable policies such as required tests for forbidden substances. *Webster*, 637 N.E.2d at 206 (quoting *Bally v. Northeastern Univ.*, 532 N.E.2d 49, 52 (Mass. 1989)) (fourth and fifth alterations in original). Thus, rejecting an MCRA challenge to Motorola's imposition of random drug testing on existing employees, the Supreme Judicial Court squarely held that a regime of "indiscriminate,

impartially administered testing” did not pose a “direct assault” on the plaintiffs individually, and therefore such testing was not actionable under the MCRA. *Id.* (quoting *Bally*, 532 N.E.2d at 53). All that Rodrigues has alleged is that he was treated like any other applicant for employment under the Scotts Tobacco-Free Policy—and that he failed to comply with a condition that applies to every job candidate. Again he has failed to establish that he was singled out for intimidation or coercion; again he has failed to state a claim.

C. In Any Event, Scotts Is Not A Public Entity And Cannot Be Sued For Violating The Massachusetts Declaration of Rights

Even if Rodrigues could establish the type of interference that is actionable under the MCRA, he would still have to show that Scotts violated “rights secured by the constitution or laws of the commonwealth.” Mass. Gen. Laws ch. 12, § 11I. For this element, Rodrigues relies primarily on Article 14 of the Massachusetts Declaration of Rights, the constitutional prohibition on unreasonable searches and seizures. Am. Compl. ¶ 24.⁶ This allegation fails at the threshold, however, because the Massachusetts courts have made absolutely clear that Article 14—like virtually all constitutional guarantees of civil liberties—protects citizens against intrusions *by government*. 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.⁷ Indeed, the Massachusetts courts have routinely rejected MCRA claims against drug tests in the (private) workplace. *See, e.g., Folmsbee v. Tech Tool Grinding & Supply, Inc.*, 630 N.E.2d 586, 589

⁶ Article 14 provides in pertinent part, “Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his papers, and all his possessions”

⁷ Rodrigues also claims cursorily that Scotts interfered with a “right to smoke cigarettes in his private life,” which he purports to draw from Articles 1, 7, and 56 of the Declaration of Rights. These (largely unexplained) allegations, like the invocation of the search-and-seizure provision of Article 14, fail in the absence of state action.

(Mass. 1994) (“Because Tech Tool is a private employer, Folmsbee’s rights under art. 14 . . . are not implicated.” (citing *Bally*, 532 N.E.2d at 51 n.3)). Thus, not only can Rodrigues show no conduct by Scotts or injury to himself cognizable under the MCRA, he cannot even show at the threshold that his constitutional rights were violated. His MCRA claim should be dismissed for this independent reason as well.

II. RODRIGUES’S LOSS OF (AT MOST) AT-WILL EMPLOYMENT DOES NOT STATE A CLAIM FOR WRONGFUL TERMINATION

Rodrigues’s claim for wrongful termination (Am. Compl. ¶¶ 31-35) is equally unavailing, because—again, assuming he formed *any* employment relationship that Massachusetts law would recognize—he was at most an employee “at will.” *See* Bell Decl. Exh. 1, at 3. It is a bedrock principle of Massachusetts employment law that “employers are free to terminate an at-will employee at any time and for any or no reason.” *Frankina v. First Nat’l Bank*, 801 F. Supp. 875, 883 (D. Mass. 1992) (citing *Fortune v. Nat’l Cash Register Co.*, 364 N.E.2d 1251, 1255 (Mass. 1977)), *aff’d mem. on other grounds*, 991 F.2d 786 (1st Cir. 1993) (table). The exceptions to this rule are extremely few and uniformly narrow, and are based only on “violation[s] of a *clearly established* public policy.” *Id.* at 884 (emphasis added). Rodrigues, by contrast, demands that this narrow doctrine be expanded to place off-limits *anything* an employee does in his off hours. Not only would Rodrigues’s rule make termination for “any” reason a thing of the past, Rodrigues’s conduct—smoking—hardly ranks among the few key activities given special protection by Massachusetts law.

First, Rodrigues’s claim does not even approximate any of the few recognized public-policy grounds for reversing a termination. The list of exceptions to the rule of at-will employment is short: the courts have recognized as protected activities “‘asserting a legally guaranteed right (e.g., filing workers’ compensation claims), . . . doing what the law requires

(e.g., serving on a jury), . . . refusing to do that which the law forbids (e.g., committing perjury),” or “performing important public deeds.” *Id.* at 884 (quoting *Smith-Pfeffer v. Superintendent of Walter E. Fernald State Sch.*, 533 N.E.2d 1368, 1371 (Mass. 1989)); *Flesner v. Technical Commc’ns Corp.*, 575 N.E.2d 1107, 1110-11 (Mass. 1991). None of these activities is remotely comparable to the sweeping rule that Rodrigues demands, granting protection to *any* activity that occurs outside the employer’s immediate view.⁸

Second, Rodrigues certainly cannot show that Massachusetts has a “clearly established public policy” shielding smokers from firing: the Commonwealth itself has had a tobacco-free policy like Scotts’ for nearly twenty years. To help protect its investment in human capital and to control skyrocketing benefit costs by eliminating the leading cause of preventable illness, Massachusetts requires certain state and local employees to refrain from smoking—on or off the job—or face termination.

For almost two decades Massachusetts public policy has been that “no person who smokes any tobacco product shall be eligible for appointment as a police officer or firefighter in a city or town and no person so appointed after [January 1, 1988] shall continue in such office or position if such person thereafter smokes any tobacco products.” Mass. Gen. Laws ch. 41,

⁸ As discussed below, Rodrigues fails to state a claim under the Privacy Act. As this Court has recognized, when a plaintiff cannot make out a claim under an express statutory cause of action, he should not be able to bring a common-law cause of action based on the same public policy that underlies the statute. In *Frankina*, for example, a plaintiff who could not prevail on a claim under the state age-discrimination laws sued for wrongful termination instead, on the theory that ageism violates public policy. This Court rejected that claim, because “Massachusetts courts will not create a new cause of action for a violation of the public policy” allegedly embodied in a statute that, while creating its own cause of action, does not reach the conduct at issue. 801 F. Supp. at 885; *see id.* at 880-83, 885 n.4.

§ 101A.⁹ The Commonwealth's smoking ban is a "policy decision" that was "based on financial interests," *Town of Plymouth v. Civil Service Comm'n*, 686 N.E.2d 188, 191 (Mass. 1997)—one of the same motivations that Rodrigues ascribes to Scotts, Am. Compl. ¶ 5. Smoking-related illnesses increase the number of police officers and firefighters who will be eligible for disability-related retirement, and the Massachusetts legislature understandably wished to reduce or eliminate the payment of "substantial disability benefits from public funds" attributable to tobacco use, a preventable cause. *Town of Plymouth*, 686 N.E.2d at 190 n.4; *see id.* at 191. Moreover, like the operation of Scotts' Tobacco-Free Policy as alleged, the Commonwealth's prohibitions on smoking tobacco products "includes all time off the job as well as all time on the job." *Id.* at 189 (quoting personnel administration rules). And violations of the off-duty smoking ban lead to mandatory termination. *Id.* at 189, 190.

Not only does Massachusetts enforce its own smoking ban with the threat of termination, it has adopted numerous other laws recognizing that even an individual's private choice to smoke creates health risks and raises other considerations of legitimate public concern. *See, e.g.*, Mass. Gen. Laws ch. 270, § 22(b)(2)-(3) (banning smoking in numerous public spaces and in certain private offices); *Am. Lithuanian Naturalization Club v. Bd. of Health*, 844 N.E.2d 231, 236, 241, 242 (Mass. 2006) (upholding a local ban on smoking in private clubs against both a preemption challenge and a constitutional attack, and holding that the purpose—"to protect and improve the public health and welfare by prohibiting smoking in membership associations," even those that

⁹ Similar prohibitions apply to officers of the State Police, corrections department, and MBTA Police. Mass. Gen. Laws ch. 22C, § 10; ch. 27, § 2; ch. 31, § 64.

are not open to the public—was entirely consistent with the public policy of the Commonwealth).¹⁰

Massachusetts’s view of tobacco is inconsistent (to say the least) with the notion that smoking should be placed alongside jury service, whistleblowing, and refusing to commit perjury—the honorable activities for whose protection the Commonwealth has made special exceptions to the at-will rule. Rodrigues cannot show any “clearly established public policy” that would frown on, let alone forbid, Scotts’ decision to rescind his (putative at-will) employment when he failed to comply with the Tobacco-Free Policy.

III. RODRIGUES HAS FAILED TO ALLEGE ANY UNREASONABLE INTERFERENCE WITH ANY LEGITIMATE PRIVACY INTEREST

Rodrigues’s claim under the Massachusetts Privacy Act (Am. Compl. ¶¶ 16-23) fares no better. Indeed, it is conspicuous for what it omits: Rodrigues does not claim that testing his urine sample for drugs *other* than nicotine was an invasion of his privacy. Rather, his premise is that having obtained the urine sample, Scotts violated his privacy by testing it for *nicotine*. Running an additional test on a urine sample is hardly an intrusion into the sheltered precincts of Rodrigues’s private life, let alone an “*unreasonable, substantial or serious* interference” with his privacy. Mass. Gen. Laws ch. 214, § 1B (emphasis added).¹¹ Rodrigues actively pursued a job with a company that bars smoking; the test to which he submitted was minimally invasive; and

¹⁰ See also, e.g., Mass. Dep’t of Pub. Health, *Massachusetts Tobacco Control Program*, <http://www.mass.gov/dph/mtcp> (explaining that the Commonwealth funds “36 local and statewide programs” to further anti-tobacco goals, including to “persuade and help . . . adult tobacco users to quit smoking”). Massachusetts even gives out nicotine gum to encourage tobacco users to quit. Mass. Dep’t of Pub. Health, *Promotes Smoking Cessation Among Youth and Adults, and Help Smokers to Quit*, http://www.mass.gov/dph/mtcp/promote_cessation.htm.

¹¹ Section 1B reads, in full: “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.”

the only information that the supposedly objectionable aspect of the test revealed (so far as the complaint discloses) was that Rodrigues smokes, a fact unlikely to be a deeply personal secret. And even if the test does implicate some privacy interest, the complaint itself alleges that Scotts acted in accordance with sound business reasons: promoting productivity by improving the wellness of its employees, and controlling the cost of employee health care, disability insurance, and related programs. Am. Compl. ¶ 5. These interests, which the Commonwealth of Massachusetts itself has recognized and adopted, are more than sufficient to outweigh any effect on Rodrigues's privacy interests.

Moreover, because it is absolutely clear even from the pleadings that Rodrigues has asserted, at most, only a minimal effect on privacy and that Scotts has a substantial interest in continuing to test new applicants for nicotine, this claim can be resolved on a motion to dismiss. Indeed, this Court has previously recognized that Privacy Act claims may be "suitable for dismissal" at the Rule 12(b)(6) stage where—as here—an employer has "articulated [a] legitimate business justification" that clearly outweighs the alleged invasion of privacy, which is *de minimis*. *French*, 2 F. Supp. 2d at 131 n.2. This Court dismissed the Privacy Act count in *French* for failure to state a claim. It should do the same here.

A. Rodrigues Has Not Pleaded A Privacy Interest Sufficient To Overcome Scotts' Legitimate Business Interests

To claim damages from the nicotine test, Rodrigues would have to show—at a minimum—that the test was a significant infringement into truly personal and private matters. That is plainly not the case. At most, the urinalysis determined whether Rodrigues was smoking, which has a significant impact on the conduct of Scotts' business but is *not* a personal or intimate detail of life jealously guarded as private. And certainly *Rodrigues* did not jealously guard it as private—having agreed to undergo a nicotine test in the first place.

1. The analysis must begin with the fact that Rodrigues voluntarily pursued employment with a company that does not hire smokers. When Rodrigues was offered a job, he was told that the offer was contingent on passing a drug test. Bell Decl. Exh. 2, at 2. Therefore, Rodrigues was not in the same position as a current employee faced with the choice between taking the test and losing his job;¹² he could have walked away, no worse off. Cf. *O'Connor v. Police Comm'r*, 557 N.E.2d 1146, 1149 (Mass. 1990) (considering, “as a factor that diminishes the degree of intrusiveness, that [police] cadets agreed to urinalysis testing before accepting employment”); *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194, 204 (Ct. App. 1989) (“[A]pplicants . . . have a choice; they may consent to the limited invasion of their privacy . . . or may decline both the test and the conditional offer of employment.”). Yet when Rodrigues received that conditional offer, his reaction was not to guard his privacy or to shroud his smoking habit in secrecy, but to *accept* the offer and submit to the drug test, apparently without protest. At that point, Rodrigues’s alleged interest in privacy became nothing more than a desire to keep his smoking habit from his employer for as long as possible, to avoid rescission of his job offer under the Tobacco-Free Policy. That is not a privacy interest that Massachusetts recognizes as reasonable or protected.

2. Even had Rodrigues been instructed to undergo a urine test only after joining Scotts LawnService, the intrusion on his alleged privacy interest still would have been minimal. Rodrigues appears to be suggesting that allowing Scotts to learn details of his life outside the workplace necessarily violates his privacy rights. But as this Court has explained, “there are circumstances in which it is legitimate for an employer to know some ‘personal’ information

¹² Thus, Rodrigues’s privacy interests were much more attenuated than those of the employees in *Webster*.

about its employees, so long as the information reasonably bears upon the employees' fitness for, or discharge of, their employment responsibilities." *French*, 2 F. Supp. 2d at 131. And Scotts has sound reasons underlying its Tobacco-Free Policy that justify the minimal intrusion on Rodrigues's privacy rights. *See infra* section III.B.

Moreover, a urinalysis is not *per se* an invasion that is "both unreasonable and serious or substantial," as necessary to establish a Privacy Act claim. *French*, 2 F. Supp. 2d at 131. Massachusetts courts have held that mere urinalysis without direct observation, *i.e.*, "[w]hen the employee urinates [in private] and simply submits the urine sample to the medical assistant," is minimally invasive of privacy, as opposed to drug-testing policies where "a medical assistant must watch the employee urinate." *Harrison v. Eldim, Inc.*, 11 Mass. L. Rep. 153, 2000 Mass. Super. LEXIS 33, at *8 (Mass. Super. Ct. 2000) (citing *Folmsbee*, 630 N.E.2d at 590).¹³ The U.S. Supreme Court takes the same view of urinalysis in the Fourth Amendment context,¹⁴ stating that "'the degree of intrusion' on one's privacy caused by collecting a urine sample 'depends upon the manner in which production of the urine sample is monitored,'" and that collecting samples without requiring direct observation poses only "a 'negligible' intrusion." *Bd. of Educ. v. Earls*, 536 U.S. 822, 832, 833 (2002) (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995)). And Rodrigues does not allege any intrusion over and above this "negligible" level, let alone an "unreasonable, substantial or serious" interference with his privacy.

¹³ Massachusetts courts have even upheld "observed" urine tests. *See Folmsbee*, 630 N.E.2d at 589-90; *O'Connor*, 557 N.E.2d at 1149-50; *see also Byrne v. Mass. Bay Transp. Auth.*, 196 F. Supp. 2d 77, 84 (D. Mass. 2002).

¹⁴ "As a private employer," Scotts "is not subject to the more stringent requirements of probable cause that govern public employers." *Folmsbee*, 630 N.E. 2d at 393 n.7.

3. The subject of the urine test—nicotine—further undercuts Rodrigues’s claim that he suffered an infringement of privacy. Although Rodrigues appears to be claiming that the Privacy Act entitles him to keep hidden from his employer any “legal activities outside of the workplace and outside of work hours,” Am. Compl. ¶ 18, his smoking habit simply is not the type of information that the Act shields from employers. Rather, the Act protects only against “the ‘required disclosure of facts about an individual that are of a *highly personal or intimate* nature.’” *French*, 2 F. Supp. 2d at 131 (quoting *Bratt v. IBM Corp.*, 467 N.E.2d 126, 133-34 (Mass. 1984)). In *French*, for example, the district court held that the facts relating to a drinking incident involving the plaintiff French and his coworkers, on private time and on private premises, was not a fact “highly personal or intimate” to French, and that, “[m]ore importantly, the facts of what happened . . . were not information that was ‘private’ to French” because “[a]ny of [the others involved in the event] was free to describe the incident.” 2 F. Supp. 2d at 131; *see also, e.g., Galdauckas v. Interstate Hotels Corp. No. 16*, 901 F. Supp. 454, 470 (D. Mass. 1995) (a plaintiff’s age (68) is “not such an intimate or personal fact that it can be the basis of a privacy claim,” even if it is wantonly disclosed without any business reason at all).

Rodrigues has failed to plead *any* facts to suggest that his smoking is highly personal or intimate in nature, or that he keeps his smoking habit a secret. As this Court recognized in *French*, anyone who had seen Rodrigues smoke was free to report it to Scotts. *See* 2 F. Supp. 2d at 131. This undermines any claim that detecting tobacco use (off-duty or not) through urinalysis infringes on a reasonable expectation of privacy. *Accord, e.g., Town of Plymouth*, 686 N.E.2d at 190 n.4 (noting that several courts and the Massachusetts Civil Service Commission have concluded that banning off-duty cigarette usage does not violate public employees’ privacy rights); *City of N. Miami v. Kurtz*, 653 So. 2d 1025, 1028 (Fla. 1995) (“Given that individuals

must reveal whether they smoke in almost every aspect of life in today's society, we conclude that individuals have no reasonable expectation of privacy in the disclosure of that information when applying for a government job"); *see also Am. Lithuanian Naturalization Club*, 844 N.E.2d at 242 (holding that banning smoking in private clubs did not violate the Privacy Act).

That smoking is legal is immaterial. First, as discussed above, Massachusetts has acknowledged and endorsed the interest in deterring even off-duty smoking. (Some States have enacted specific protections for tobacco users, *see, e.g.*, R.I. Gen. Laws § 23-20.10-14(a); Massachusetts has not.) Second, merely because an activity is legal does not mean that every employer is obliged to let its employees engage in it; the Privacy Act does not implicitly enact a rigid dividing line between factors that employers may and may not consider in building their workforce. This Court's decision in *French* is illustrative: UPS disciplined its employee French based on his poor judgment in handling a situation at his home, where a fellow employee drank too much and "went into a violent rage, causing injury to himself." 2 F. Supp. 2d at 130. There was no suggestion of anything illegal—no drugs, no drunk driving. But UPS understandably had an interest in ensuring that French was a responsible employee, and based on the incident it reasonably concluded that he had some judgment problems. *See id.* at 131. French protested that UPS had no business inquiring into "personal" information about his off-duty activities; this Court rejected that claim and recognized that employers often have legitimate reasons to seek information that employees might call "personal." *Id.* What mattered was that the information was well known, so UPS's learning of it was hardly an actionable intrusion on privacy. The Privacy Act deals with true personal secrets—not with information that a plaintiff blithely disseminates to everyone but his employer.

To claim an actionable privacy interest, therefore, Rodrigues would have to show that he treated smoking as “highly personal or intimate.” If his smoking was no secret, then the test revealing it to Scotts can hardly have been a “substantial or serious” invasion of his privacy.

B. Substantial, Legitimate Interests Support The Scotts Tobacco-Free Policy

Scotts has substantial and genuine interests in enforcing its Tobacco-Free Policy through drug testing for nicotine, particularly of candidates for employment. Rodrigues himself alleges (Am. Compl. ¶ 5) that the Policy and the wellness initiative of which it is part are based not on animus or hostility toward smokers, but rather on sound business concerns: combating tobacco’s significant negative effect on employee productivity, and controlling the ever-increasing cost of health and disability insurance.¹⁵

1. Tobacco use and the health problems it causes are a significant drain on employees’ productivity. *See, e.g., Massachusetts Tobacco Control Program, supra* note 10 (“Tobacco use is the leading cause of preventable death and illness in Massachusetts and in the nation.”). Rodrigues’s assertion that his decision to smoke on his own time has no effect on his work (Am. Compl. ¶ 21) is both utterly conclusory and clearly contrary to judicially noticeable facts: in fact, “[s]mokers’ lost productivity accounts for . . . \$1.5 billion lost each year to the Massachusetts economy,” over and above the amount spent directly on treating smoking-related illnesses. *Massachusetts Tobacco Control Program, supra* note 10. Whether from “smoke breaks,” absenteeism, or decreased productivity due to the physical effects of tobacco use, employers pay a real economic cost when their employees use tobacco. *See generally, e.g., William B. Bunn III et al., Effect of Smoking Status on Productivity Loss*, 48 J. Occupational &

¹⁵ This is not to say that the interests that Rodrigues admits in the Complaint are, in fact, the only bases for the Tobacco-Free Policy.

Envtl. Med. 1099, 1105 tbl. 5 (2006) (calculating that smokers cause twice as much health-related productivity loss as non-smokers); Michael T. Halpern et al., *Impact of Smoking Status on Workplace Absenteeism and Productivity*, 10 Tobacco Control 233 (2001), available at <http://tc.bmj.com/cgi/reprint/10/3/233>. As the Supreme Judicial Court has recognized, “an 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.” *Webster*, 637 N.E.2d at 207 (quoting *Bratt*, 467 N.E.2d at 137).

2. The vast majority of working Americans obtain health coverage through their employers. The spiraling cost of health care is therefore a grave concern of employees, private-sector employers like Scotts, and public-sector employers like the Commonwealth of Massachusetts alike. *See generally, e.g.*, Act Providing Access to Affordable, Quality, Accountable Health Care, 2006 Mass. Acts ch. 58 (H.B. 4479). Medical costs attributable to smoking-related illnesses are the subject of particular concern, both because of their magnitude and because of their cause: “It is common knowledge that tobacco smoking has been identified as a contributing risk factor in” hypertension and heart disease. *Town of Plymouth*, 686 N.E.2d at 190 n.4. In fact, “[t]obacco use is the leading cause of preventable death and illness in Massachusetts and in the nation.” *Massachusetts Tobacco Control Program*, *supra* note 10.

Rodrigues’s allegation that Scotts’ policy is an attempt to reduce the costs attributable to those preventable illnesses, taken as true, serves only to put Scotts in good company: as discussed above, the state legislature has taken similar steps, forbidding several categories of public safety employees from smoking either on the job or on their own time. *See* statutes cited *supra* p. 11 & n.9. The legislature took these steps “based on financial interests,” *i.e.*, the ever-increasing cost of paying for employees’ disabling tobacco-related illnesses. *Town of Plymouth*,

686 N.E.2d at 191; *see supra* p. 11. This interest more than justifies testing new employees for nicotine when already conducting a drug test that is otherwise lawful—and here unchallenged.

IV. RODRIGUES HAS FAILED TO STATE AN ERISA CLAIM

Rodrigues’s final claim, added after removal to this Court, is an assertion that terminating him violates ERISA § 510, 29 U.S.C. § 1140.¹⁶ “Section 510 prohibits interfering with employment arrangements for the purpose of depriving an *employee* of employee benefits that would otherwise be owed to her.” *Edes v. Verizon Commc’ns*, 288 F. Supp. 2d 55, 59 (D. Mass. 2003) (emphasis added), *aff’d*, 417 F.3d 133 (1st Cir. 2005). Firing a longtime employee immediately before his pension benefits vest, in order to escape a promise to pay him a pension, is the classic example of a Section 510 claim. *See, e.g., Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612 (1993); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 143 (1990).

As is apparent from the name of the statute, ERISA protects *employees*: it does not confer standing on *would-be* employees to sue over hiring decisions, because *any* decision not to hire a particular applicant necessarily means that the applicant never becomes eligible for benefits at that company. Because Rodrigues cannot establish that he meets the *federal* definition of employee—even if he could establish some employment relationship under Massachusetts law, a notion debunked above—his Section 510 claim fails at the threshold. Even if he were an employee with standing to sue, his ERISA claim would lack merit: Section 510 forbids targeted retaliation against individual employees to get out of paying benefits.

Rodrigues, by contrast, offers no connection at all between Scotts’ policy against certain *conduct*

¹⁶ Section 510 provides in pertinent part: “It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the [employee benefit] plan” 29 U.S.C. § 1140.

and his attainment of benefits—except for the self-evident proposition that by failing to become a Scotts employee, Rodrigues also failed to qualify for Scotts’ benefit plan. Scotts provides benefits to sick and healthy employees alike; a smoker who wants to become an employee and obtain coverage—no matter the extent of his tobacco-related illness—has only to stop smoking. That prohibition on *conduct* does not violate ERISA.

A. Rodrigues Lacks Standing To Sue Under ERISA Because He Cannot Show That He Was An Employee

The purpose of Section 510 is to prevent employers from “circumvent[ing] the provision of promised benefits.” *Ingersoll-Rand*, 498 U.S. at 143 (citing the statute’s legislative history). Accordingly, to state a claim under Section 510, Rodrigues must show that he was a “participant” in an ERISA plan. 29 U.S.C. § 1140 (“It shall be unlawful for any person to discharge . . . a *participant* . . . for the purpose of interfering with the attainment of any right to which such *participant* may become entitled” (emphases added)); *see also id.* § 1132(a)(1)(B), (a)(3).¹⁷ And the statute defines “participant” as an “employee or former employee of an employer . . . who is or may become eligible to receive a benefit.” *Id.* § 1002(7). The courts determine “who qualifies as an ‘employee’ under ERISA” by reference to “the general common law of agency” rather than to the individual’s status under state law. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 & n.3 (1992) (internal quotation marks omitted); *Dykes v. Depuy, Inc.*, 140 F.3d 31, 37-38 (1st Cir. 1998). Thus, to state a claim under Section 510—including a claim that his employer terminated him to prevent him from gaining benefits—a plaintiff must show that he is an “employee,” or under certain circumstances a “former employee,” as ERISA uses that term. *See, e.g., Dykes*, 140 F.3d at 35-36 & n.2, 37 (holding that, to prevail under

¹⁷ Section 510 also protects plan “beneficiaries,” such as a child covered by his parent’s plan, in some circumstances; Rodrigues is not claiming such status. *See Am. Compl.* ¶¶ 39-40.

Section 510, a plaintiff must show that he was an employee and not, *e.g.*, an independent contractor); *Speen v. Crown Clothing Corp.*, 102 F.3d 625, 634 (1st Cir. 1996) (same).

Because Section 510 limits its protection to employees, courts have naturally concluded that Section 510 has absolutely nothing to say about *hiring*, and that candidates for employment accordingly have no right of action under the statute. *E.g.*, *Becker v. Mack Trucks, Inc.*, 281 F.3d 372, 382 (3d Cir. 2002); *Williams v. Am. Int'l Group, Inc.*, No. 01 Civ. 9673 (CSH), 2002 U.S. Dist. LEXIS 17886, at *8-*10 (S.D.N.Y. Sept. 23, 2002); *accord Edes*, 288 F. Supp. 2d at 59. The text of Section 510 omits any reference to “hiring” from the list of prohibited acts (such as “terminat[ion]” and “discipline”), even though it is based on a statute (the National Labor Relations Act) that expressly prohibits discrimination in hiring. *Becker*, 281 F.3d at 382. The legislative history “contain[s] no suggestion that Congress intended to protect the rights of job applicants” as well as employees. *Id.* at 382 n.8. And the policy of ERISA—protecting benefit plan participants—is not advanced by extending Section 510 to hiring: “a failure to hire does not amount to a circumvention of promised benefits because job applicants who have yet to be hired have not been promised any benefits.” *Id.* at 382.

For example, in *Becker* the Third Circuit allowed the defendant company, Mack, to make hiring decisions squarely on the ground that the rejected applicants would have been more costly to the company’s pension plan. The employees had previously worked for Mack and accrued credited service under the pension plan, but they lost their jobs when Mack closed one of its plants. Some years later Mack was expanding its other plant and hired new workers, but decided not to rehire former employees who had participated in the pension plan, because their benefits would vest more quickly and they would be entitled to pension payments at a higher rate. A group of former employees sued, demanding that they be considered for rehiring. *Becker*, 218

F.3d at 376. Although the Third Circuit recognized that Section 510 bars employers from *terminating* their employees to keep their benefits from vesting, it explained in detail that neither the text, nor the legislative history, nor the statutory purpose of Section 510 warrants “extending” its protection to hiring decisions, including re-hiring decisions. *Id.* at 383 (“[Section] 510 simply does not require that employers blind themselves to the effect on future pension liability when making hiring decisions.”).

This important limitation on the Section 510 cause of action is fatal to Rodrigues’s claim. Even taking his allegations about the motivation for the Tobacco-Free Policy at face value, *see* Am. Compl. ¶ 41, Section 510 “simply does not require that [Scotts] blind [itself] to the effect on future [benefits] liability when making hiring decisions.” *Becker*, 218 F.3d at 383. And the decision to revoke Rodrigues’s offer was plainly a hiring decision: Rodrigues never met ERISA’s definition of an employee, because he had not yet been hired: he failed to complete the required precondition. *O’Connor v. Davis*, 126 F.3d 112, 115 (2d Cir. 1997) (“[A] prerequisite to considering whether an individual is [an employee or an independent contractor] . . . is that the individual have been hired in the first instance.”).¹⁸

B. ERISA Does Not Prohibit Employers From Drawing General Distinctions Based On Conduct

Even if Rodrigues were an employee, his claim would fail: he cannot use Section 510 to bring a challenge to a broadly applicable hiring policy based on prospective employees’ *conduct*. Section 510 “relates to discriminatory conduct directed against individuals.” *Aronson v. Servus*

¹⁸ Although Rodrigues was paid for the few days before his nicotine test came back, “compensation by the putative employer . . . in exchange for his services is not a sufficient condition.” *O’Connor*, 126 F.3d at 116 (quoting *Graves v. Women’s Prof’l Rodeo Ass’n*, 907 F.2d 71, 73 (8th Cir. 1990)). Nor does previous provisional employment with Scotts make him a proper plaintiff. *Becker*, 218 F.3d at 382 (Section 510 does not apply to hiring *or* rehiring).

Rubber Div. of Chromalloy, 730 F.2d 12, 16 (1st Cir. 1984). Any policy decision that causes a certain group of employees to be terminated necessarily causes some employees, but not others, to lose their benefits, but Section 510 certainly does not mandate that an employer abandon hiring criteria merely because enforcing those criteria might implicate benefits. To the contrary: ERISA permits employers to discriminate in the offering of benefits. *Edes*, 288 F. Supp. 2d at 59 (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983)). And it plainly allows an employer to distinguish among its employees “along independently established lines” that are not themselves invidious and that “ha[ve] a readily apparent business justification.” *Aronson*, 730 F.2d at 16. In *Aronson* an employer had decided to partially terminate its employee benefit plan for one of its two plants, which was unprofitable and was being wound down. The employees who lost benefits sued, but the First Circuit explained that ERISA did not bar the employer from drawing neutral lines based on the non-invidious category of separate divisions. *See id.*

Everyone—apparently even Rodrigues—agrees that smoking tobacco is unhealthy *conduct*. But it simply does not follow that prohibiting smoking is some form of forbidden discrimination against health-insurance beneficiaries. Indeed, Rodrigues’s own complaint lists a number of risky activities, from eating processed sugar to skydiving, that he thinks he is entitled to pursue—and to forbid prospective employers from inquiring about. Am. Compl. ¶ 14. It follows, then, that under Rodrigues’s reasoning, anyone from a sugar addict to a base jumper could claim an absolute federal entitlement, *under the employee-benefits statute*, to make these lifestyle choices, because of some perceived correlation between forbidding the *conduct* and reducing the employee’s need for health care. Such a cause of action would be virtually limitless, and it would bear no resemblance to the cause of action Congress created for

employees whose benefits are revoked or terminated just when they are needed most. Rodrigues may be a proud risk-taker, but that is not enough to make him a proper ERISA plaintiff.

CONCLUSION

For the foregoing reasons, the Amended Complaint should be dismissed for failure to state a claim upon which relief may be granted.

Dated: February 20, 2007

Respectfully submitted,
THE SCOTTS COMPANY LLC

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CERTIFICATE OF SERVICE

I, David S. Godkin, hereby certify that a true and correct copy of the foregoing document was delivered to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent those indicated as non-registered participants on February 20, 2007.

/s/ David S. Godkin
David S. Godkin, Esq.