19-P-1412 Appeals Court

TERENCE MEEHAN vs. MEDICAL INFORMATION TECHNOLOGY, INC.[1]

No. 19-P-1412.

Norfolk. May 11, 2020. - January 20, 2021. [2]

Present: Green, C.J., Vuono, Meade, Rubin, & Henry, JJ.

Employment, Termination, Records. Public Policy. Practice, Civil, Motion to dismiss.

Civil action commenced in the Superior Court Department on February 11, 2019.

A motion to dismiss was heard by Diane C. Freniere, J.

James A. Kobe for the plaintiff.
Scott J. Brewerton for the defendant.

[1] Doing business as Meditech.

[2] This case was initially heard by a panel comprised of Justices Meade, Rubin, and Henry. After circulation of a majority and a dissenting opinion to the other justices of the Appeals Court, the panel was expanded to include Chief Justice Green and Justice Vuono. See Sciaba Constr. Corp. v. Boston, 35 Mass. App. Ct. 181, 181 n.2 (1993).

MEADE, J. The plaintiff, Terence Meehan, who had been an employee at will of the defendant, Medical Information Technology, Inc. (Meditech), filed a one-count complaint in Norfolk Superior Court asserting wrongful termination in violation of public policy. Meehan claimed that he was discharged as a consequence of submitting a rebuttal, utilizing the mechanism outlined in G. L. c. 149, § 52C, to a performance improvement plan (PIP) on which he had been placed. Meditech moved to dismiss the complaint pursuant to Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974), and a Superior Court judge allowed the motion. The judge determined that the narrow public policy exception to the general rule that an employee at will may be terminated without cause does not include termination for filing a rebuttal to information in one's personnel file pursuant to § 52C. We affirm.

Background. We summarize the facts alleged in Meehan's complaint, which we accept as true. Meehan began working as a sales representative for Meditech in November of 2010. In April of 2017, Meditech reorganized its twelve sales representatives; nine persons remained in the representative role and three persons, including Meehan, were placed in the supporting role of "Sales Specialist." Meehan's job, his responsibilities, and his ability to earn commissions were all affected by this change. In July of 2018, Meditech placed Meehan and the other two sales

specialists on a PIP. Approximately two weeks later, under the authority of G. L. c. 149, § 52C, Meehan wrote a lengthy rebuttal to the PIP, which he e-mailed to his supervisor.[3] That same day, members of Meditech's management met to discuss the rebuttal. During that meeting, Meditech's chief executive officer and president, Howard Messing, decided that Meehan's employment should be terminated immediately. Meehan's employment was terminated the same day. The next month, Meehan's counsel protested his termination. The following year, Meehan filed the complaint at issue.

Discussion. 1. Standard of review. We review the allowance of a motion to dismiss de novo, and in reviewing the sufficiency of a complaint under rule 12 (b) (6), "[w]e take as true 'the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff's favor.'" Marram v. Kobrick Offshore Fund, Ltd., 442 Mass. 43, 45 (2004), quoting Warner-Lambert Co. v. Execuquest Corp., 427 Mass. 46, 47 (1998). "What is required at the pleading stage are factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief . . . ." Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007).

[3] The substance of the rebuttal is not part of the record on appeal.

2. At-will employment doctrine. Typically, "employment at will can be terminated for any reason or for no reason." Harrison v. NetCentric Corp., 433 Mass. 465, 478 (2001). See King v. Driscoll, 418 Mass. 576, 582 (1994), S.C., 424 Mass. 1 (1996). "We have recognized exceptions to that general rule, however, when employment is terminated contrary to a well-defined public policy." Wright v. Shriners Hosp. for Crippled Children, 412 Mass. 469, 472 (1992). The Supreme Judicial Court "consistently has interpreted the public policy exception narrowly, reasoning that to do otherwise would 'convert the general rule . . . into a rule that requires just cause to terminate an at-will employee.'" King, supra, quoting Smith-Pfeffer v. Superintendent of the Walter E. Fernald State Sch., 404 Mass. 145, 150 (1989). To qualify as an exception to the general rule, "[t]he public policy must be well defined, important, and preferably embodied in a textual law source." Ryan v. Holie Donut, Inc., 82 Mass. App. Ct. 633, 636 (2012). See Mello v. Stop & Shop Cos., 402 Mass. 555, 557 (1988) (public policy must be "sufficiently important and clearly defined"). On the other hand, "the internal administration, policy, functioning, and other matters of an organization cannot be the basis for a public policy exception to the general rule that at-will employees are terminable at any time with or without cause." King, supra at 583. See Wright, supra at 474 (where

nurse reported internal problems at hospital to high-level officials within organization, reports were internal matter, which could not be basis for public policy exception). "The existence of a clearly defined public policy is a question of law for the court." Flynn v. Boston, 59 Mass. App. Ct. 490, 493 (2003).

3. Section 52C. Meehan claims that he was wrongfully discharged, in violation of public policy, for exercising his statutory right under G. L. c. 149, § 52C, when he submitted a rebuttal in his personnel file to the PIP on which he had been placed. Section 52C provides, in pertinent part:

> "An employer shall notify an employee within 10 days of the employer placing in the employee's personnel record any information . . . that . . . negatively affect[s] the employee's qualification for employment, promotion, transfer, additional compensation or the possibility that the employee will be subject to disciplinary action.
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> . . .
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> "If there is a disagreement with any information contained in a personnel record, removal or correction of such information may be mutually agreed upon by the employer and the employee. If an agreement is not reached, the employee may submit a written statement explaining the employee's position which shall thereupon be contained therein and shall become a part of such employee's personnel record.
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> "Whoever violates the provisions of this section shall be punished by a fine of not less than five hundred nor more than twenty-five hundred dollars. This section shall be enforced by the attorney general."

As the circumstances here present, the ultimate question is whether the right to rebuttal provided by § 52C is a public policy sufficiently well defined and important such that the exercise of that right brings an employee within the public policy exception to the general rule that an at-will employee may be terminated without cause. We conclude that, for several reasons, it does not.

Even though § 52C is embodied in a textual law source, not all statutes relating to an employee's rights are "pronouncement[s] of public policy that will protect, in every instance, an [at-will] employee from termination." King, 418 Mass. at 584. See Parker v. North Brookfield, 68 Mass. App. Ct. 235, 240-243 (2007) (public policy exception not applicable for at-will employee who claimed she was terminated solely for exercising statutory right to obtain town medical insurance benefits). Indeed, the Supreme Judicial Court has "acknowledged very few statutory rights the exercise of which would warrant invocation of the public policy exception." King, supra at 584. The court has held that "[r]edress is available for employees who are terminated for asserting a legally guaranteed right (e.g., filing [a] workers' compensation claim), for doing what the law requires (e.g., serving on a jury), or for refusing to do that which the law forbids (e.g., committing perjury)." Smith-Pfeffer, 404 Mass. at 149-150.

The right to rebut information placed in one's personnel file falls within none of the clearly defined categories. When the employer and the employee cannot agree on the correction or removal of negative information in the employee's personnel file, G. L. c. 149, § 52C, permits the employee to place in the file "a written statement explaining the employee's position." However, the Supreme Judicial Court has held that "the internal administration, policy, functioning, and other matters of an organization cannot be the basis for a public policy exception . . . ." King, 418 Mass. at 583. If it were otherwise, our courts would become super personnel departments. See Sullivan v. Liberty Mut. Ins. Co., 444 Mass. 34, 56 (2005), quoting Mesnick v. General Elec. Co., 950 F.2d 816, 825 (1st Cir. 1991), cert. denied, 504 U.S. 985 (1992) ("Courts may not sit as super personnel departments, assessing the merits -- or even the rationality -- of employers' . . . business decisions"). See also Shea v. Emmanuel College, 425 Mass. 761, 762 (1997) (no liability for discharge stemming from employee's internal complaint regarding violation of company rules). Moreover, "[i]t is well established that Massachusetts law does not protect at-will employees who claim to be fired for their complaints about internal company policies or the violation of company rules, even though the employees' actions may be considered appropriate and 'socially desirable.'" Falcon v.

Leger, 62 Mass. App. Ct. 352, 362 (2004), quoting Smith-Pfeffer, 404 Mass. at 150-151. See Wright, 412 Mass. at 474-475.

Even if G. L. c. 149, § 52C, touches on a matter of public policy, it is one that is neither sufficiently important nor clearly defined, both of which are required to justify the exception. See Mello, 402 Mass. at 557. The lack of a clear definition for any public policy embodied in § 52C is illustrated by the fact that the content of an employee's rebuttal is in no way cabined. Indeed, the rebuttal may relate to a "disagreement with any information contained in a personnel record," and § 52C allows information to be removed "upon mutual agreement . . . for any reason" (emphasis supplied). G. L. c. 149, § 52C, third par.

As for importance, a "[p]ersonnel record" is, by definition, an internal record of a particular "employee's qualifications for employment, promotion, transfer, additional compensation or disciplinary action." G. L. c. 149, § 52C. When an employee submits a written rebuttal to a company's personnel file, it has no effect on the public in general, which renders it far from important to the community.[4] See, e.g.,

[4] That internal employment records might be important in certain circumstances, as the dissent posits, does not change the equation in the matter before us. In fact, we do not suggest that G. L. c. 149, § 52C, may not play an important role in other contexts, e.g., those involving claimed violations of antidiscrimination laws, civil service provisions, or labor

Upton v. JWP Businessland, 425 Mass. 756, 758 (1997) ("no public purpose is served" by protecting employment of single mother who refused to work long hours due to childcare responsibilities). Contrast Mercado v. Manny's T.V. & Appliance, Inc., 77 Mass. App. Ct. 135, 139-140 (2010) (unlicensed employee fired for refusing to install home appliances where doing so both jeopardized public safety and violated State plumbing and electrical codes). In fact, here, as in Upton, "[t]he plaintiff seeks to recover for a termination that was not, on its face, made because [he] did something that public policy strongly encourages (such as serving on a jury) or because [he] refused to engage in conduct that public policy strongly discourages (such as refusing to lie on behalf of [his] employer)." Upton, supra at 758.

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relations matters. Indeed, the evidentiary basis for such claims may lie in internal personnel records. However, no such claim is before us. Rather, the plaintiff claims he was terminated merely for filing the rebuttal.

Further, contrary to the dissent's claim, the fact that § 52C requires that a rebuttal be contained in any transmission of the employee's personnel record to a third party does not bring it within the public policy exception. That a third party may receive what had been an internal record does not make it significant to the public at large in a manner implicating the narrow justification for the public policy exception. See King, 418 Mass. at 584 ("Even a public policy, evidenced in a particular statute, which protects employees in some instances might not protect employees in all instances").

In sum, § 52C's provision of a mechanism for permitting a rebuttal to the contents of one's personnel file is neither sufficiently important to the public nor clearly defined; it thus cannot form the basis of a public policy exception to the at-will employment rule. The motion to dismiss was properly allowed.[5]

Judgment affirmed.

[5] The dissent's claim that our decision serves none of the interests implicated in matters of employment, see Smith-Pfeffer, 404 Mass. at 149, turns a blind eye to the very issue before us. Had we applied the public policy exception in this case, it would have converted the general rule "into a rule that requires just cause to terminate an at-will employee." Id. at 150. See Upton, 425 Mass. at 760. Avoiding that result is alone a sufficient interest. Moreover, while employment stability is a laudable societal end, if the public policy exception were applicable to merely prevent unemployment and potentially protect the public fisc, as the dissent suggests, the exception would swallow the at-will employment rule.

HENRY, J. (dissenting, with whom Rubin, J., joins). I would hold that if an employer fires an at-will employee merely for exercising their statutory right to submit a written statement for their personnel record pursuant to G. L. c. 149, § 52C, that employee may assert a claim for wrongful termination. To conclude otherwise, as the majority does, nullifies this statutory right because an employee who submits a rebuttal may be fired for doing so and will have no means of redress. Only the credulous and fools would exercise this right henceforth. Accordingly, I respectfully dissent.

Discussion. As a general rule, an employer may terminate an at-will employee at any time, with or without cause. Massachusetts law, however, has long recognized an exception, that "an at-will employee has a cause of action for wrongful termination . . . if the termination violates a clearly established public policy." King v. Driscoll, 418 Mass. 576, 582 (1994), S.C., 424 Mass. 1 (1996). "Redress is available for employees who are terminated for [(1)] asserting a legally guaranteed right (e.g., filing [a] workers' compensation claim), [(2)] for doing what the law requires (e.g., serving on a jury), or [(3)] for refusing to do that which the law forbids (e.g.,

committing perjury)." Smith-Pfeffer v. Superintendent of the Walter E. Fernald State Sch., 404 Mass. 145, 149-150 (1989).[1]

The public policy exception to the at-will employment doctrine is narrowly construed, so as not "to convert the general rule . . . into a rule that requires just cause to terminate an at-will employee." Smith-Pfeffer, 404 Mass. at 150. The legally-guaranteed right for which an employee is terminated must relate to the employee's status as an employee. See, e.g., King, 418 Mass. at 584-585 (statutory right of shareholder to bring derivative action not sufficient to protect employee-shareholder from termination for participating in such action). Similarly, "internal administration, policy, functioning, and other matters of an organization cannot be the basis for a public policy exception" to the at-will employment rule. Id. at 583.[2]

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[1] The exception also has been held to apply where an employee cooperates with a law enforcement investigation of the employer, Flesner v. Technical Communications Corp., 410 Mass. 805, 810 (1991); where an employee attempts to enforce safety laws which she has a duty to enforce, Hobson v. McLean Hosp. Corp., 402 Mass. 413, 416 (1988); and where an employee reports criminal wrongdoing to individuals within the company, Shea v. Emmanuel College, 425 Mass. 761, 763 (1997).

[2] The pronouncement in King that internal matters cannot be the basis for a public policy exception to the general rule of at-will employment is dicta. The court could have ruled against the plaintiff in King solely on the ground that he was not asserting a right legally guaranteed to employees. The dicta also is questionable as it is based on several cases that did not involve an employee asserting a legally guaranteed right.

Meditech, for purposes of its motion to dismiss, agrees that it terminated Meehan solely for asserting a legally guaranteed right to submit a rebuttal pursuant to G. L. c. 149, § 52C. Thus, Meehan's claim falls under the first category of the public policy exception, involving termination based on the assertion of a legally guaranteed right.

I disagree with the majority regarding whether the public policy embodied in G. L. c. 149, § 52C, is sufficiently important and well-defined and whether an employee rebuttal pursuant to § 52C is an internal matter.

By enacting § 52C, the Legislature has determined that the contents of a personnel file are not internal only to the employment relationship. Section 52C serves the public interest by encouraging employers and employees to reach mutual agreement on removal or correction of information in an employee record. G. L. c. 149, § 52C, third par. If the employer and employee cannot agree, the Legislature has set the public policy for the Commonwealth. Section 52C provides that when "there is a disagreement with any information contained in a personnel record," an employee has the right to "submit a written

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See King, 418 Mass. at 582-583. Thus, the court in King collapsed what had to that point been two separate categories: a legally guaranteed right and a public policy violation. It also did so without offering a framework for determining when a legally guaranteed statutory right is sufficiently important and well defined.

statement explaining the employee's position which shall thereupon be contained therein and shall become a part of such employee's personnel record." In addition, "[t]he statement shall be included when said information is transmitted to a third party as long as the original information is retained as part of the file." Id. Thus, the statute ensures that anyone outside the employer's organization who receives the employee's personnel record shall also receive the employee's statement. Id.

In concluding that § 52C is concerned only with internal corporate governance and that personnel records are, "by definition, an internal record," ante at , the majority ignores the language in § 52C, third par., that affects third parties, and disregards the Legislature's public policy determination that an employee has the right to submit a rebuttal. The statute is not merely about each individual employee's individual personnel file. Section 52C serves several important public interests. First, it sets a policy that every employee shall have this right to rebut because it is in the public interest to encourage employers and employees to communicate and, perhaps, clear up misunderstandings. This promotes employment stability, which is beneficial to employers, and potentially protects employees and the public fisc from the cost of unemployment. Second, the Legislature has made the

content of a personnel file a matter for all employees and anyone who might receive a personnel record. This also serves an important public policy by ensuring that when employees choose or are to seek different employment, they can be fairly evaluated by potential new employers. In essence, the statute makes labor markets work more fairly by making more, and more balanced, information available to potential employers. The statute also expressly evinces the purpose of assisting employees in vindicating their rights under our State antidiscrimination laws, public employee labor relations laws, and civil service laws, all of which serve important public policies that go well beyond the internal concerns of employers.[3]

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[3] Furthermore, § 52C requires that:

> "An employer of twenty or more employees shall retain the complete personnel record of an employee as required to be kept under this section without deletions or expungement of information from the date of employment of such employee to a date three years after the termination of employment by the employee with such employer. In any cause of action brought by an employee against such employer of twenty or more employees in any administrative or judicial proceeding, including but not limited to, the Massachusetts Office of Affirmative Action, the Massachusetts Commission Against Discrimination, Massachusetts Civil Service Commission, Massachusetts Labor Relations Commission, attorney general, or a court of appropriate jurisdiction, such employer shall retain any personnel record required to be kept under this section which is relevant to such action until the final disposition thereof."

G. L. c. 149, § 52C, fourth par.

Furthermore, the fact that the statute imposes fines for violations and authorizes the Attorney General to enforce it suggests the statute's importance.

Reaching a result that nullifies a statutory right or fails to recognize the Legislature's conclusion that third-party rights are affected is not consistent with our obligation to discern and give effect to the intent of the Legislature. Oxford v. Oxford Water Co., 391 Mass. 581, 587-588 (1984). "A basic tenet of statutory construction requires that a statute be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous" (quotations omitted). Wolfe v. Gormally, 440 Mass. 699, 704 (2004), quoting Bankers Life & Cas. Co. v. Commissioner of Ins., 427 Mass. 136, 140 (1998). We are also to construe a law to render it "'an effectual piece of legislation,' able to accomplish legislative aims." Service Employees Int'l Union, Local 509 v. Department of Mental Health, 476 Mass. 51, 57 (2016), quoting Sun Oil Co. v. Director of the Div. on the Necessaries of Life, 340 Mass. 235, 238 (1960).

The statute thereby manifests the Legislature's understanding that any such records might be relevant to a terminated employee's cause of action against an employer. I would consider this an important public policy, particularly when placed in the context of the statutory schemes and intended purposes of the listed administrative agencies.

The majority's citation to Parker v. North Brookfield, 68 Mass. App. Ct. 235, 240-243 (2007), to illustrate the proposition that not all statutes will protect employees in every instance is misplaced. In Parker, the public employee exercised her statutory right to participate in the public employer's health insurance plan. Thereafter, the employer eliminated her position to avoid the cost of providing her with health insurance. We held that the employee could not recover on public policy grounds based on a claim that she was terminated solely for exercising her statutory rights, reasoning that the employer could consider the financial impact of the employee's request and could transfer the position to another department, even if that transfer resulted in the employee's termination. Id. at 241. In other words, the employee could have, and did, exercise her statutory right, but that was not the end of the inquiry: notwithstanding the Legislature's provision of health insurance for public employees, we found "no legislative or other source of policy . . . barring" public employers from considering the costs of health insurance when deciding whether to maintain an employee's position, as such control of the workforce permitted the public employer to make wise use of limited tax dollars. Id. at 241, 243.

Meehan's exercise of his right under § 52C is not a circumstance, like Parker, where exercise of the statutory right

implicates seriously the cost of operations, the basis of our decision in that case.[4] Rather, Meehan's submission of a rebuttal implicates no substantial interest of the employer identified by Meditech.

The result the majority reaches renders the statutory right useless and illusory, and empowers employers to punish employees for doing exactly what the Legislature authorized them to do. Countenancing such a result is wholly inconsistent with a just -- or even a sane -- employment policy. The majority essentially casts the Legislature as a trickster, creating a trap for unwitting employees that employers now may spring.

In examining the question whether employees' exercise of their rights should affect employment, the Supreme Judicial Court has recognized the competing interests at stake.

> "Employees have an interest in knowing they will not be discharged for exercising their legal rights. Employers

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[4] See Parker, 68 Mass. App. Ct. at 241-242 ("As in the private sector, we think that a municipal employer has a legitimate interest in having a large amount of control over its workforce and in exercising wide discretion to adapt to changing circumstances. Such circumstances may include the burgeoning cost of employee insurance benefits. We think the municipality's interest, and thus that of the taxpayer, in controlling its operations and finances, and in running the town business, permitted the town to consider the financial impact of [the employee's] request in determining when and whether to alter the description of her at-will position, and to transfer it to another department with the resulting termination of her employment, without fear of having to deal with the prospect of either having her locked into the position on a permanent basis, or providing other consideration as redress" [citation omitted]).

> have an interest in knowing they can run their businesses as they see fit as long as their conduct is consistent with public policy. The public has an interest in employment stability and in discouraging frivolous lawsuits by dissatisfied employees."

Smith-Pfeffer, 404 Mass. at 149, quoting Pierce v. Ortho Pharm. Corp., 84 N.J. 58, 71 (1980). Recognizing a cause of action for wrongful termination for asserting one's statutory right pursuant to § 52C serves all of these competing interests. The majority's decision serves none. Its assertion that our position would "convert[] the general rule 'into a rule that requires just cause to terminate an at-will employee,'" ante at note 5, is mistaken. Were we to recognize a cause of action for wrongful termination here, employers would continue to be able to terminate employees for no reason at all; they would be prohibited only from terminating an employee for exercising this particular statutory right.

The majority claims that prohibiting discharge of an employee for exercising the statutory right to submit a rebuttal for inclusion in his or her personnel file runs the risk of leading to courts becoming "super personnel departments." Strong corporate values and the constraint of an employer's desire to be an attractive option in the employment market will prevent an overwhelming majority of companies from acting as Meditech asserts it can. The companies willing to violate these norms will be few. The courts are more than capable of

addressing these outliers to ensure the public interest served by the requirements of § 52C.

It is the Legislature's job to set policy, see, e.g., Powers v. Secretary of Admin., 412 Mass. 119, 127-128 (1992), and it has done so with the enactment of § 52C. While the Legislature did not expressly prohibit an employer from terminating an employee for exercising the statutory right, as it did, e.g., with the workers' compensation act, G. L. c. 152, § 75B, that is not dispositive.[5] See Mello v. Stop & Shop Cos., 402 Mass. 555, 557 (1988) (where statute does not explicitly proscribe penalizing or discharging employee, "[a] basis for a common law rule of liability can easily be found when the Legislature has expressed a policy position concerning the rights of employees and an employer discharges an at-will employee in violation of that established policy").

Meditech nonetheless argues that Meehan is limited to the remedy provided in the statute. What Meditech fails to appreciate is that Meehan is not alleging that Meditech did not allow him to submit a written statement pursuant to the statute.

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[5] My conclusion is consistent with the only other decision I can find to have considered the question. See Campbell v. Windham Community Memorial Hosp., Inc., 389 F. Supp. 2d 370, 381 (D. Conn. 2005) ("A discharge premised on the simple fact that an employee disagrees with any of [the] information contained in her personnel file and brings this disagreement to the attention of her employer violates the public policy expressed by [the statute]" [quotation omitted]).

Meehan is instead challenging his termination, which is not addressed by the statute.[6]

My narrow holding would be that the exception to the rule that at-will employees may be terminated at any time with or without cause includes termination in retaliation for employees' exercise of their statutory right. Moreover, nothing in my opinion would address whether the content of an employee's statement may justify termination.[7] I, therefore, respectfully, dissent.

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[6] For the same reason, Meditech's reliance on Kessler v. Cambridge Health Alliance, 62 Mass. App. Ct. 589, 596-597 (2004), to argue that Meehan's remedy is defined by § 52C is unpersuasive because that case did not involve a claim of wrongful termination. The claim in Kessler was limited to the employee's right to seek a determination whether documents in possession of his former employer were "documents relating to disciplinary action" concerning the employee and thus subject to § 52C. Id. at 597.

[7] Indeed, Meditech argues that Meehan's "memorialization of internal objections in [the] form of a written rebuttal to his personnel file [is not sufficiently important to] protect him from termination." The flaw in this argument is that Meditech made the tactical decision to pursue a motion to dismiss rather than a motion for summary judgment and did not attach Meehan's statement. In this posture, we cannot evaluate this argument.