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IF YOU'RE SMOKING YOU'RE FIRED: HOW TOBACCO COULD BE DANGEROUS TO MORE THAN JUST YOUR HEALTH

*Christopher Valleau**

I. INTRODUCTION

It was at a benefits meeting in 2003 that Howard Weyers, president and owner of Okemos, Michigan based Weyco, announced a new company policy: "As of January 1, 2005, anyone that has nicotine in their body will be fired."¹ Employees of Weyco, ironically an insurance and medical benefits company, responded to this announcement with shock and anger arguing "you can't do that to us" and "that's not legal."² Weyers' response to his employees' outrage: "Yes I can," and "yes it is."³ Weyers was correct as Michigan has no law that prevents an employer from terminating an employee simply because they use tobacco.⁴ As Weyers put it, "I pay the bills around here. So I'm going to set the expectations."⁵ "You can do whatever you want, but if you're going to work here, you can't be a smoker like you can't be a drug user."⁶

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¹ Morley Safer, *Whose Life Is it Anyway*, CBS NEWS, Oct. 30, 2005, <http://www.cbsnews.com/stories/2005/10/28/60minutes/main990617.shtml>.

² *Id.*; Mary Snow, *No Smoking*, CNN.COM, Jan. 26, 2005, <http://www.cnn.com/2005/US/01/26/no.smoking/index.html>.

³ Safer, *supra* note 1.

⁴ *Id.*; This may however change in the future as on April 13, 2005 a bill was introduced in the Michigan state senate that would "prohibit employers from making employment decisions based upon certain conduct that is unrelated to employment," where the "employee engages in, or is regarded as engaging in, a lawful activity that is both off the employer's premises and during nonwork hours." S.B. 381, 93rd Leg., 1st Reg. Sess. (Mich., 2005); The bill is presently assigned to the Committee on Government Operations. Michigan Legislature, Senate Bill 0381, [http://www.legislature.mi.gov/\(52dwc45lnssmt55wjimzd3n\)/mileg.aspx?page=BillStatus&objectname=2005-SB-0381](http://www.legislature.mi.gov/(52dwc45lnssmt55wjimzd3n)/mileg.aspx?page=BillStatus&objectname=2005-SB-0381) (last visited Mar. 20, 2006).

⁵ Safer, *supra* note 1; see also News Release, Howard Weyers, Why Business Should Get Serious About Smoking (Feb. 5, 2005), available at <http://www.veyco.com/web/company/news/020720050001.jsp>

⁶ Barbara Wieland, *Okemos Firm Bans All Smoking*, LANSING ST. J., Oct. 2, 2004, at 1A.

Weyco gave its employees fifteen months to quit smoking and offered assistance in smoking cessation programs including acupuncture and hypnosis.⁷ According to the company, as many as fourteen employees quit before the no-smoking policy went into effect.⁸ Since January 1, 2005, at least four employees have been terminated for refusing to take an anti-smoking test.⁹ While Weyco has received a great deal of attention for taking this drastic measure, it is not the only company to take a strong stance against employees' smoking habits.

Scotts Miracle-Gro, a lawn care company based in Marysville, Ohio, announced in late 2005 a policy effective in October 2006 that smoking, even when off-duty, will cost employees their jobs.¹⁰ The chairman and chief executive of Scotts, James Hagedorn, said this dramatic action was taken because the company, which pays for medical claims using its own funds, wants to hold down health insurance costs by helping people live healthy lifestyles.¹¹ The company is giving its employees one year to quit smoking and is offering free counseling, nicotine patches, and cessation classes to help them do so.¹² Scotts' no-smoking mandate is part of a broader effort by the company to control health care costs. The company has also recently opened a \$5 million fitness and medical facility for employees.¹³ Scotts has also made changes in its cafeteria by cutting down on fried foods and offering baked salmon and other fish, while the vending machines now dispense more healthful snacks.¹⁴

Still other companies, while not firing employees for smoking, are refusing to hire smokers altogether, charging employees who smoke more for health insurance or offering perks such as lower health insurance rates to employees who do not smoke.¹⁵ A recent survey by

⁷ Katie Merx, *Workers' Unhealthy Habits Could Cost Them; Companies Look to Save on Insurance*, DETROIT FREE PRESS, May 17, 2005, at Business and Financial News.

⁸ *Weyco Fires 4 Employees for Refusing Smoking Test*, LANSING ST. J., Jan. 25, 2005, at Local 1B.

⁹ *Id.*; Safer, *supra* note 1.

¹⁰ Monique Curet & Ken Stammen, *Scotts Miracle-Gro Joins List of Companies Who Plan to Fire Smokers*, COLUMBUS DISPATCH, Dec. 9, 2005.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Ilan Brat, *Ohio Company Tells Smokers: Kick the Habit or You'll be Fired: More Corporations Moving to Cut Health Care Costs*, SEATTLE TIMES, Dec. 21, 2005, at A1.

¹⁵ One of the primary questions raised by employers charging employees different rates for health insurance is whether or not this complies with the Health Insurance

Portability and Accountability Act of 1996 (HIPAA), namely the HIPAA nondiscrimination requirements under the portability provisions. On the Department of Labor's website addressing frequently asked questions about the HIPAA nondiscrimination requirements the following question and answer were provided:

QUESTION: I am an employer that offers a premium differential between smokers and nonsmokers. That is, smokers pay more for coverage than nonsmokers. How do the bona fide wellness program provisions relate to my plan?

ANSWER: The plan is offering a reward based on an individual's ability to stop smoking. Medical evidence seems to suggest that smoking may be related to a health factor. (Under the Diagnostic and Statistical Manual of Mental Disorders, nicotine addiction is a medical condition, and a report of the Surgeon General stated that scientists in the field of drug addiction agree that nicotine, a substance common to all forms of tobacco, is a powerfully addictive drug.) Therefore, for the plan to maintain the premium differential and not be considered to discriminate based on a health factor, such a program would be required to meet the requirements for a bona fide wellness program. Under the proposed rules, there are four requirements to be a bona fide wellness program:

The total reward that may be given to an individual is limited. The departments invited comments on the appropriate level of the reward, suggesting that a limit of 10-20 percent of the total cost of employee-only coverage may be appropriate.

The program must be reasonably designed to promote good health or prevent disease for individuals in the program.

The reward must be available to all similarly situated individuals. More specifically, the program must allow any individual for whom it is unreasonably difficult due to a medical condition to meet the wellness program standard (or for whom it is medically inadvisable to attempt to meet the wellness program standard) an opportunity to satisfy a reasonable alternative standard.

All plan materials describing the terms of the program must disclose the availability of a reasonable alternative standard.

Accordingly, under the proposed rules, the wellness program would be a bona fide wellness program if the premium differential is not more than 10-20 percent of the total cost of employee-only coverage; the program accommodates individuals for whom it is unreasonably difficult to quit using tobacco products due to addiction by providing a reasonable alternative standard (such as a discount in return for attending

Hewitt, a human resources consulting firm, showed that forty-one percent of 950 U.S. based employers used some form of financial

educational classes or for trying a nicotine patch); and plan materials that describe the premium differential describe the availability of a reasonable alternative standard to qualify for the lower premium.

U.S. Department of Labor Employee Benefits Security Administration, Frequently Asked Questions About the HIPAA Nondiscrimination Requirements, http://www.dol.gov/ebsa/FAQs/faq_hipaa_ND.html (last visited Mar: 26, 2006). See 29 C.F.R. § 2590.702 (2005), 45 C.F.R. §146.121 (2005); For an example of how this would be permissible see DykemaGossett, *How HIPAA Non-Discrimination Rules Could Affect Your Company's Health Management Efforts*, Employment Law Developments, Oct. 2005, at 2-3, available at <http://www.dykema.com/labor/news/elaw1005.pdf>.

Another example is a group health plan that requires all plan participants to certify each plan year that they have not used tobacco products in the preceding twelve months. Participants who do not provide certification are assessed a surcharge that is 20% of the cost of employee-only coverage. However, all plan materials describing the terms of the wellness program include the following statement: "If it is unreasonably difficult due to a medical condition for you to meet the requirements under this program (or if it is medically inadvisable for you to attempt to meet the requirements of this program), we will make available a reasonable alternative standard for you to avoid this surcharge." If an employee notifies the plan that it is unreasonably difficult for him to stop smoking cigarettes due to an addiction to nicotine (a medical condition), the plan accommodates the employee by requiring the employee to participate in a smoking cessation program to avoid the surcharge. The employee can avoid the surcharge for as long as the employee participates in the smoking cessation program, regardless of whether the employee stops smoking (as long as the employee continues to be addicted to nicotine. In this Example, the premium surcharge is permissible as a bona fide wellness program because it satisfies the four requirements of the proposed regulations. First, the program complies with the limit on rewards under the program. Second, it is reasonably designed to promote good health or prevent disease by doing the certification on an annual basis. Third, the reward under the program is available to all similarly situated individuals because it accommodates individuals for whom it is unreasonably difficult due to a medical condition to quit using tobacco products by providing a reasonable alternative standard. Fourth, the plan discloses in all materials describing the program the availability of a reasonable alternative standard. Thus, the premium surcharge does not violate HIPAA's non-discrimination rules.

incentives or penalties in their health care plans.¹⁶ It is estimated that eight to ten percent of the surveyed businesses aimed some of these incentives or penalties at smokers, and that percentage is growing.¹⁷ For example, in April 2005, Humana, a health insurer based in Louisville, Kentucky, began to offer a \$5 per pay period bonus to its employees who indicated they had not used tobacco in the past twelve months.¹⁸ General Mills, on the other hand, charges a \$20 per month surcharge on the health benefits of smokers.¹⁹ Likewise, Gannett Company, Inc., the McLean Washington based publisher of *USA Today* and ninety-eight other newspapers, announced that during re-enrollment of benefits in January 2006 each of its 40,000 employees nationwide would be asked whether he smoked.²⁰ Those who stated that they did would be given the choice of either enrolling in a company-funded cessation program or paying a \$50 surcharge fee each month for health insurance.²¹ Other companies have also followed this trend including PepsiCo., which charges its employees who use tobacco an additional \$100 premium annually for health insurance, and grocery store chain Meijer Inc. and Northwest Airlines.²² In fact, the practice of smoker surcharges is becoming such a significant trend that in 2006 it will become part of Hewitt's annual survey of companies' current and future health care plans.²³

The practice of charging smokers more for health insurance is not limited to the private sector. Alabama, Georgia, Kentucky, and West Virginia all impose a health insurance surcharge for government employees who smoke.²⁴ Alabama charges employees who smoke an extra \$20 a month for health insurance per employee contract.²⁵ This charge applies whether it is the employee or anyone else covered under the contract, such as a spouse, who smokes.²⁶ Georgia, on the other hand, charges \$40 a month for smokers covered by the state's health

¹⁶ Lisa Cornwell, *Employers Charging Smokers Extra for Health Insurance*, MSNBC.COM, Feb. 16, 2006, <http://www.msnbc.msn.com/id/11394043/>.

¹⁷ *Id.*

¹⁸ Brat, *supra* note 14.

¹⁹ *Id.*

²⁰ Marguerite Higgins, *Gannett Smokers to Pay*, WASH. TIMES, Oct. 19, 2005, at C07.

²¹ *Id.*

²² Cornwell, *supra* note 16.

²³ *Id.*

²⁴ Sharon Terlep, *Lighting up Could Be Hazardous to Your Co-Pay*, DETROIT NEWS, Dec. 2, 2005, at A1.

²⁵ Cornwell, *supra* note 16.

²⁶ *Id.*

plan.²⁷ If employees in Georgia are caught lying on their insurance form about smoking, they could lose their insurance for up to a year.²⁸

Still, other employers have taken a different approach by simply not hiring smokers. For example, Alaska Airlines has not hired smokers since the 1980s, and both Alaska Airlines and Union Pacific screen applicants for their smoking status in states where it is legal to do so.²⁹ Further, the World Health Organization announced in December 2005 a new hiring policy that would reject all applicants who smoke.³⁰ According to the American Civil Liberties Union's National Workrights Institute ("NWI") a 1998 survey conducted by the Administrative Management Society found that more than 6,000 companies, or six percent of all employers nationwide, refused to hire smokers, and the NWI is certain this number has since increased.³¹

In an effort to control costs, employers increasingly have scrutinized the behaviors and lifestyle choices of employees. Chief among employers' concerns are smokers. The questions this raises are whether employers have gone too far and are impermissibly interfering with the personal lives of their employees, or whether employers should be entitled to make employment decisions based on whether an individual is a smoker.

This Comment proposes that employees should not be entitled to protection from any form of employment discrimination based on whether they smoke. Part Two will examine the current status and trends of health insurance and health care costs in the United States, and the role that employers play in providing this coverage. Part Three will examine the true costs of smoking both in human and economic terms. Part Four will analyze whether there is a legal right to smoke and whether smokers constitute a distinct class for equal protection purposes. Part Five will explore whether smoking, or nicotine addiction, is a disability under the Americans with Disabilities Act ("ADA") and will examine whether smokers could be regarded as disabled under the Act. Part Six of this Comment will survey the relevant state statutes in place that offer smokers protection from employment discrimination and analyze the origins and value of these

²⁷ *Id.*

²⁸ *Id.*

²⁹ Higgins, *supra* note 20.

³⁰ Business and Legal Reports, *WHO Stops Hiring Smokers*, Dec. 12, 2005, <http://hr.blr.com/display.cfm/id/17118> (last visited Mar. 18, 2006).

³¹ The National Workrights Institute, *NWI Lifestyle Discrimination Legislative Brief*, http://www.workrights.org/issue_lifestyle/ld_legislative_brief.html (last visited Mar. 18, 2006).

statutes. Finally, Part Seven of this Comment will evaluate whether permitting employers to discriminate against smokers will subsequently permit employers to intrude further into an employee's personal life.

II. THE RISING COST OF HEALTH CARE

The majority of Americans less than sixty-five years of age receive their health insurance coverage through their employer.³² This equates to employer-sponsored health insurance currently providing coverage for 160 million Americans, nearly three out of every five of the non-elderly.³³ Health insurance has become one of the most important fringe benefits offered by employers, but the numbers of employers offering health insurance is declining.³⁴ Overall there has been a nine percent decrease in the past five years with sixty percent of firms offering health insurance benefits, down from sixty-nine percent in 2000.³⁵ While ninety-eight percent of firms with 200 or more employees offered health benefits in 2005, only fifty-four percent of small firms with 3 to 199 employees offered health benefits.³⁶

³² Julie Appleby, *Fewer Getting Insurance Through Job*, Aug. 3, 2004, USATODAY.COM, http://www.usatoday.com/news/health/2004-08-03-health-insurance_x.htm. According to a 2003 survey conducted by the Center for Studying Health System Change sixty-three percent of those under age sixty-five received health insurance through their employer, down from sixty-seven percent in 2001, resulting in 9 million fewer people with employer coverage. This same survey found that only twelve percent of those surveyed received public insurance with another ten percent having other private insurance or coverage, and the remaining fifteen percent of the population was uninsured. *Id.*; THE KAISER FAMILY FOUNDATION AND HEALTH RESEARCH AND EDUCATION TRUST, *EMPLOYER HEALTH BENEFITS 2005 ANNUAL SURVEY 1*, (2005), available at <http://www.kff.org/insurance/7315/upload/7315.pdf> [hereinafter KAISER].

³³ KAISER, *supra* note 32.

³⁴ See J. LEE HARGRAVES, *TRENDS IN HEALTH INSURANCE COVERAGE AND ACCESS AMONG BLACK, LATINO, AND WHITE AMERICANS, 2001-2003 1*, (2004) available at <http://hschange.org/CONTENT/713/713.pdf>. According to this report all Americans saw a decrease in access to employer-sponsored health insurance from 2001-2003. *Id.*; KAISER, *supra* note 32; Appleby, *supra*, note 32.

³⁵ KAISER, *supra* note 32 at 32, 34.

³⁶ *Id.* at 32. The smallest firms are the least likely to offer health insurance with only forty-seven percent of firms with three to nine employees offering health insurance compared with seventy-two percent of firms with ten to twenty-four employees offering health insurance, eighty-seven percent of firms with twenty-five to forty-nine offering health insurance and nearly all employers with fifty or more employees offering coverage. *Id.*

In addition to a decrease in the overall availability of employer-subsidized health insurance, Americans have also been burdened with rapidly increasing health care costs. In 2005, health insurance premiums for families increased 9.2 percent, marking the first time since 2000 that there was a less than double-digit percentage increase in the cost of health insurance premiums.³⁷ This increase was almost six percent more than the overall rate of inflation (3.5 percent) and was slightly more than six percent of the increase in workers' wages (2.7 percent).³⁸ Since 2000 the cost of health insurance in the United States has increased by seventy-three percent with the average cost of family coverage now reaching \$10,880 per year, an amount which would exceed the annual gross earnings of a minimum wage worker who is employed full-time throughout the year.³⁹

Even with these increases, the percentage of the employee paid portion of health insurance premiums has remained steady as employees continue to pay an average of sixteen percent across plan types for single coverage and twenty-six percent across plan types for family coverage.⁴⁰ Virtually all covered workers receive a premium contribution of fifty percent or more from their employer, with the majority of workers receiving a premium contribution between seventy-five and one hundred percent for single coverage and fifty and one hundred percent for family coverage.⁴¹ Across all plans, while the average employee contributed \$610 annually to a single-employee plan, the employer paid an average of \$3,413.⁴² Likewise, for a family plan,

³⁷ *Id.* at 16. Premiums increased 10.9 percent in 2001, 12.9 percent in 2002, 13.9 percent in 2003, and 11.2 percent in 2004. The study did point out that this was the second year in a row where the percentage increase in health insurance premiums has declined. *Id.*

³⁸ *Id.*

³⁹ *Id.* In fact the estimated total health care bill for the nation by 2015 is estimated to be \$14 billion with consumers footing about half of the bill. Overall analysts forecast a 7.2 percent annual increase in health care costs over the coming decade, significantly higher than the 5.1 percent predicted growth rate of the economy over the next decade. Kevin Freking, *Analysts: Health Care Costs to Keep Rising*, ABC NEWS, Feb 21, 2006, <http://abcnews.go.com/Health/wireStory?id=1648478&CMP=OTC-RSSFeeds0312>.

⁴⁰ KAISER, *supra* note 32, at 60. The average monthly worker contribution for single coverage in 2005 was \$51 with the average contribution for family coverage was \$226. *Id.*

⁴¹ *Id.* This report also contains an in depth breakdown of the percentages paid by firms for single and family coverage. *Id.* at 66-67.

⁴² *Id.* at 62.

the average employee contribution was \$2,713 with employers contributing an average of \$8,167.⁴³

With rapidly increasing health care costs, the majority of which are subsidized by employers, it should come as no surprise that employers are increasingly looking for ways to control costs. One only needs to look at recent headlines to understand why the issue of health care costs has become such a critical concern for business. In recent months two of the largest automobile manufacturers in the United States have announced plans for massive reductions in their workforces and numerous plant closings.⁴⁴ General Motors announced in late 2005 that they would eliminate up to 30,000 jobs and close part or all of a dozen installations over the following three years in an effort to help reverse over \$2 billion in losses.⁴⁵ In addition to earlier reductions in health care benefits these cutbacks were expected to reduce costs for General Motors by \$7 billion by the end of 2006.⁴⁶ Additionally, General Motors has reached a tentative agreement with the United Auto Workers, the union representing blue-collar workers, that will cause many current General Motors employees' co-pays to increase and will impose health benefit cuts on union retirees.⁴⁷

Similarly, in January 2006 Ford Motor Company announced its plan to reduce its workforce by up to 30,000 jobs and close as many as fourteen plants.⁴⁸ Again, one of the primary reasons cited for the company's financial difficulties was increasing health care costs.⁴⁹ Ford estimated that its 2005 health care costs would reach \$3.5 billion based in part on the benefits it pays for 550,000 active and retired hourly workers and dependents in the United States.⁵⁰ Like General

⁴³ *Id.* In HMO plans employees receiving single coverage paid an average of \$563 while employers paid \$3,203 for coverage and employees paid on average \$2,604 for family coverage while employers paid \$7,852. In PPO plans employees paid an average of \$603 for health insurance while employers contributed \$3,547, and employees paid an average of \$2,641 while employers contributed \$8,449 to health insurance costs. *Id.*

⁴⁴ See Micheline Maynard & Vikas Bajaj, *G.M. Set to Drop 5,000 More Jobs and Shut Plants*, N.Y. TIMES, Nov. 22, 2005, at A1; Micheline Maynard, *Ford Eliminating Up to 30,000 Jobs and 14 Factories*, N.Y. TIMES, Jan. 24, 2006, at A1.

⁴⁵ Maynard & Bajaj, *supra* note 44.

⁴⁶ *Id.*

⁴⁷ Danny Hakim & Jeremy W. Peters, *Union Offers Details of Health Deal with G.M.*, N.Y. TIMES, Oct. 21, 2005, at C3.

⁴⁸ Maynard, *supra* note 44.

⁴⁹ *Id.*

⁵⁰ *Ford to Save \$850 Million in New Health Care Pact*, N.Y. TIMES, Dec. 15, 2005, at C4.

Motors, Ford has recently entered into a new agreement with the United Auto Workers labor union. Under Ford's new agreement, current employees will divert ninety-nine cents an hour in future wage increases to a health fund, while retirees will pay as much as \$752 a year per family for medical coverage in an effort to save Ford as much as \$850 million annually.⁵¹ These examples clearly illustrate why health care costs have become a critical economic concern for employers. Moreover, when one examines the true costs of smoking, one can easily understand why employers are focusing on reducing or terminating employees who smoke to reduce health care costs.

III. THE "COST" OF SMOKING

Smoking is an extremely dangerous and harmful behavior that continues to exert a tremendous human and economic toll on society. In addition to smokers who directly harm themselves by ingesting cigarette smoke, all non-smokers are susceptible to the harms produced by environmental tobacco smoke (i.e., secondhand smoke) with tens of thousands of non-smokers dying each year as a result of secondhand smoke.⁵² According to the Centers for Disease Control ("CDC") smoking is the number one cause of preventable deaths in the United States, causing an estimated 438,000 premature deaths annually between 1997 and 2001.⁵³ Smoking accounts for one in every five deaths in the United States – more than HIV, illegal drug use, alcohol use, motor vehicle injuries, suicides and murders combined.⁵⁴

⁵¹ *Id.*

⁵² See American Lung Association, Secondhand Smoke Fact Sheet <http://www.lungusa.org/site/pp.asp?c=dvLUK9O0E&b=35422> (last visited Feb. 27, 2007). Secondhand smoke has been classified by the Environmental Protection Agency (EPA) as a known cause of cancer in humans. Secondhand smoke is estimated to cause approximately 3,400 lung cancer deaths and 22,700-69,600 heart disease deaths in adult nonsmokers in the United States annually. Secondhand smoke is also responsible for between 150,000 and 300,000 lower respiratory tract infections in children under eighteen months of age resulting in 7,500 and 15,000 hospitalizations each year, and causes 1,900 to 2,700 sudden infant death syndrome (SIDS) deaths in the United States annually. *Id.*

⁵³ CENTERS FOR DISEASE CONTROL, ANNUAL SMOKING-ATTRIBUTABLE MORTALITY, YEARS OF POTENTIAL LIFE LOST, AND PRODUCTIVITY LOSSES 1997-2001, MORBIDITY AND MORTALITY WEEKLY REPORT, Jul. 1, 2005, at 625, available at <http://www.cdc.gov/mmwr/PDF/wk/mm5425.pdf>.

⁵⁴ Center for Disease Control, Health Effects of Cigarette Smoking – Fact Sheet, http://www.cdc.gov/tobacco/factsheets/HealthEffectsofCigaretteSmoking_Factsheet.htm (last visited Mar. 17, 2006). Among the other harms of smoking include an

But the quantification of the “cost” of smoking is not only measurable in human terms, but also in economic terms. In terms of productivity losses, the CDC reports that cigarette smoking and exposure to tobacco smoke costs the United States an estimated \$92 billion annually in lost productivity.⁵⁵ Combined with smoking-attributable health care costs, which in 1998 were estimated at \$75.2 billion, the annual economic cost of smoking exceeds an estimated \$167 billion per year.⁵⁶ This equates to an average of \$3,383 in economic costs per smoker per year, \$1,760 in lost productivity and \$1,623 in excess medical expenditures.⁵⁷ Even in the face of the indisputable evidence of the harms caused to both smokers and non-smokers by cigarettes, individuals continue to engage in this dangerous and harmful behavior, with some arguing that there is a right to smoke and that discrimination based on smoking impermissibly violates equal protection.

IV. THE RIGHT TO SMOKE AND SMOKERS AS A SUSPECT CLASS

Very few courts have been asked to address the issue of whether or not there is a “right to smoke,” but those that have been confronted with this issue have consistently held that no such right exists.⁵⁸ For example, in *City of North Miami v. Kurtz* the Florida Supreme Court considered whether the Florida state constitution provided applicants

increased risk of lung cancer, as the risk of dying from lung cancer is twenty-two times higher in men and twelve times higher in women who smoke. Cigarette smoking also increases the risk for many types of cancer including cancers of the lip, oral cavity, esophagus, uterine cervix, urinary bladder, and kidney. Cigarette smokers are two to four times more likely to develop coronary heart disease as are non-smokers, and cigarette smoking approximately doubles a person’s risk of having a stroke. Respiratory diseases also increase substantially with smoking as about ninety percent of all the deaths from chronic obstructive lung diseases are attributable to cigarette smoking. Cigarette smoking also carries with it many adverse reproductive and childhood effects including an increased risk for infertility, preterm delivery, stillbirth, low birth weight, and sudden infant death syndrome (SIDS). *Id.*

⁵⁵ CENTERS FOR DISEASE CONTROL, *supra* note 53, at 626.

⁵⁶ *Id.*

⁵⁷ Jennifer Barrett Ozols, *A Job or a Cigarette?*, NEWSWEEK.COM, Feb. 24, 2005, <http://www.msnbc.msn.com/id/7019590/site/newsweek/>.

⁵⁸ See PUBLIC HEALTH INSTITUTE TECHNICAL ASSISTANCE LEGAL CENTER, THERE IS NO CONSTITUTIONAL RIGHT TO SMOKE, Feb. 2004, *available at* <http://www.phi.org/pdf-library/talc-memo-0051.pdf> (outlining why there is no such thing as a “right to smoke” and why smokers are not a protected class).

seeking government employment a right of privacy as to their smoking habits.⁵⁹ The court held that the right to smoke was clearly not included in the federal constitution's implicit privacy provisions as they extended only to such fundamental interests as marriage, procreation, contraception, family relationships, and the rearing and educating of children.⁶⁰ The court held that applicants did not have a reasonable expectation of privacy, reasoning that individuals must reveal whether they smoke in almost every aspect of life in today's society.⁶¹

Further support for the conclusion that there is no right to smoke can be found in the Tenth Circuit Court of Appeals decision *Grusendorf v. City of Oklahoma City* in which the court held that the right to smoke was not a fundamental right.⁶² In this case a trainee firefighter who was terminated for violating the department's no smoking policy argued that although there was no specific constitutional right to smoke, it was implicit in the Fourteenth Amendment that he had a right of liberty or privacy in the conduct of his private life, which included the right to smoke.⁶³ The Tenth Circuit, however, disagreed stating that cigarette smoking could be distinguished from the activities involving liberty or privacy that the Supreme Court had thus far recognized as fundamental rights.⁶⁴ While the Tenth Circuit agreed that indisputably the department's non-smoking regulation infringed upon the liberty and privacy of the firefighter trainees, it found that only a rational connection between the non-smoking regulation and the promotion of the health and safety of the firefighter trainees was necessary to uphold the statute.⁶⁵ The Tenth Circuit stated it need look no further for a legitimate purpose and rational connection than the Surgeon General's warning on the side of every box of cigarettes that cigarette smoking is hazardous to one's health and, specifically, that good health and physical conditioning are essential requirements for firefighters.⁶⁶

Courts have also held that smokers are not entitled to heightened equal protection scrutiny as they do not constitute a suspect

⁵⁹ *City of N. Miami v. Kurtz*, 653 So. 2d 1025, 1026 (Fla. 1995).

⁶⁰ *Id.* at 1028.

⁶¹ *Id.* The court illustrated this point by stating that when individuals were seated in restaurants, checked in to motel rooms, or rented a car they were asked for their smoking preference so proper accommodations could be made. *Id.*

⁶² *Grusendorf v. City of Okla. City*, 816 F.2d 539, 541 (10th Cir. 1987).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 541-43.

⁶⁶ *Id.* at 543.

or distinct class. For example, In *Brashear v. Simms*, the state of Maryland faced a legal challenge from a state prisoner who argued that his right to equal protection had been violated by the State's newly-adopted policies that prohibited smoking within Maryland prisons.⁶⁷ The court rejected this claim holding that the act of smoking was entitled to only a minimal level of protection under the Equal Protection Clause, as it was obviously not a fundamental right, nor was the classification between smokers and non-smokers a suspect one.⁶⁸

Additionally, a New York court in *Fagan v. Axelrod* considered the constitutionality of state laws that established a comprehensive plan regulating tobacco smoking in public areas.⁶⁹ The petitioners in *Fagan* argued that there existed a right of liberty and privacy to smoke, and that the statute established irrational classifications and, in other diverse ways, violated their right to due process and the equal protection of the laws.⁷⁰ The court held that the regulation of smoking was a valid use of the State's police power and smoking cigarettes is no more a fundamental right than shooting up heroin, snorting cocaine or running a red light.⁷¹ The court also concluded the state's statutes contained no differentiation between classes of citizens because those who smoke had never been legally recognized as a distinct class.⁷² Because it is clear from these decisions that no fundamental right to smoke exists, nor are smokers a distinct or suspect class, smokers must look elsewhere for protection from employment discrimination based on their tobacco use. One potential source of protection for smokers is the ADA⁷³ as smokers, or those addicted to nicotine, could argue that since alcoholism is considered a disability by the ADA, nicotine addiction should receive similar treatment.

V. THE AMERICANS WITH DISABILITIES ACT

The ADA was signed into law on July 26, 1990 with the express intent of being the world's first comprehensive civil rights law for persons with disabilities offering protection in the realm of employment ("Title I"), public services ("Title II"), public accommodations ("Title III"),

⁶⁷ *Brashear v. Simms*, 138 F. Supp. 2d 693, 693-94 (D. Md. 2001).

⁶⁸ *Id.* at 694.

⁶⁹ *Fagan v. Axelrod*, 550 N.Y.S.2d 552, 554 (1990).

⁷⁰ *Id.* at 558.

⁷¹ *Id.* at 559.

⁷² *Id.*

⁷³ The Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2000).

and telecommunications (“Title IV”).⁷⁴ In enacting the ADA, Congress responded to the stark fact that some 43 million Americans had at least one physical or mental disability and that this number is increasing as the population ages.⁷⁵ With the ADA, Congress targeted discrimination against individuals with disabilities in critical areas including employment.⁷⁶ Specifically, the ADA provides that Americans with disabilities

have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.⁷⁷

A. What Qualifies as a “Disability”?

The ADA defines a disability as “(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”⁷⁸ The Supreme Court, in interpreting the ADA has articulated a distinction between an “impairment” and a “disability.” The Court held in *Sutton v. United Airlines* that “a ‘disability’ exists only where an impairment ‘substantially limits’ a major life activity, not where it ‘might,’ ‘could,’ or ‘would’ be substantially limiting if mitigating measures were not taken.”⁷⁹ The Court stated in *Sutton* that “a person whose physical or mental impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it does not ‘substantially limit’ a major life activity.”⁸⁰ Additionally, the Court noted that “the definition of disability also requires that disabilities be evaluated ‘with respect to

⁷⁴ The U.S. Equal Employment Opportunity Commission, *The Americans with Disabilities Act: 1990-2002*, <http://www.eeoc.gov/ada/> (last visited Feb. 10, 2006).

⁷⁵ 42 U.S.C. §12101(a)(1) (2000).

⁷⁶ 42 U.S.C. §12101(a)(3) (2000).

⁷⁷ 42 U.S.C. §12101(a)(7) (2000).

⁷⁸ 42 U.S.C. §12102 (2)(A)-(C) (2000).

⁷⁹ *Sutton v. United Air Lines*, 527 U.S. 471, 482 (1999).

⁸⁰ *Id.* at 483.

an individual' and be determined based on whether an impairment substantially limits the 'major life activities of such individual.'"⁸¹

B. When is an Individual Substantially Limited?

Under the ADA, an impairment is substantially limiting if one is

(i) Unable to perform a major life activity that the average person in the general population can perform; or (ii) significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.⁸²

Whether an impairment substantially limits a major life activity is determined in light of (i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.⁸³ For example, "a broken leg that takes eight weeks to heal is an impairment of fairly brief duration. However if the broken leg heals improperly, the 'impact' of the impairment would be the resulting permanent limp."⁸⁴ Further,

an individual who had once been able to walk at an extraordinary speed would not be substantially limited in the major life activity of walking if, as a result of a physical impairment, he or she were only able to walk at an average speed, or even at moderately below average speed.⁸⁵

C. What Constitutes a Major Life Activity?

The ADA adopted the definition of the term "major life activities" found in the regulations implementing Section 504 of the

⁸¹ *Id.*

⁸² 29 C.F.R. 1630.2(j) (2005).

⁸³ 29 C.F.R. 1630.2 (j)(2)(i)-(iii) (2005).

⁸⁴ 29 C.F.R. pt. 1630, App. § 1630.2(j) (2005).

⁸⁵ *Id.*

Rehabilitation Act of 1973.⁸⁶ The ADA therefore defines major life activities as “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”⁸⁷ Major life activities have been further described as “those basic activities that the average person in the general population can perform with little or no difficulty.”⁸⁸

The Supreme Court in its interpretation of what qualifies as a major life activity has developed a seemingly narrower view. In *Toyota Motor Manufacturing of Kentucky, Inc. v. Williams*, the Court held that “major” in the phrase “major life activities” refers to those activities that are of central importance to daily life.⁸⁹ The Court stated that

In order for performing manual tasks to fit into this category - a category that includes such basic abilities as walking, seeing, and hearing - the manual tasks in question must be central to daily life. If each of the tasks included in the major life activity of performing manual tasks does not independently qualify as a major life activity, then together they must do so.⁹⁰

The Court reasoned that the term “major life activities” needs to be interpreted strictly to create a demanding standard for qualifying as disabled. The Court pointed to the ADA’s legislative history, stating that “If Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number of disabled Americans would surely have been much higher than the 43,000,000 that Congress estimated to be disabled.”⁹¹

As the Supreme Court recognized in *Sutton*, the Equal Employment Opportunity Commission (“EEOC”) has been reluctant to define “major life activities” to include working and has suggested that working be considered as a last resort, only if an individual is not

⁸⁶ *Id.* See 34 C.F.R. 104.3(ii) (2005), Rehabilitation Act of 1973 29 U.S.C. § 794 (2000).

⁸⁷ 29 C.F.R. 1630.2(i) (2005).

⁸⁸ 29 C.F.R. pt. 1630, App. § 1630.2(j) (2005).

⁸⁹ *Toyota Motor Mfg., Ky. v. Williams*, 534 U.S. 184, 197 (2002).

⁹⁰ *Id.*

⁹¹ *Id.*

substantially limited with respect to any other major life activity.⁹² The ADA does, however, provide that if working is the articulated major life activity, one's impairment may be substantially limited if one is

significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.⁹³

D. The ADA's Treatment of Alcoholism as a Disability

Because alcoholism is treated as a disability by the ADA, one might argue that nicotine addiction is analogous to alcohol addiction and should therefore be treated as a disability by the ADA. Courts, however, have held that while alcoholism qualifies as an impairment under the ADA, it is not necessarily a disability.⁹⁴ This is because, as *Sutton* makes clear, having an impairment does not automatically equate to having a disability under the ADA.⁹⁵ Courts, in fact, have been unwilling to find alcoholism as a per se disability under the ADA.⁹⁶ Additionally, Courts have required past addiction as a requisite to one's alcoholism qualifying as a disability under the ADA,

⁹² *Sutton v. United Airlines*, 527 U.S. 471, 492 (1999); 29 C.F.R. pt. 1630, App. § 1630.2(j) (2005). If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working. *Id.*

⁹³ 29 C.F.R. 1630.2(h)(3) (2005).

⁹⁴ See *Bailey v. Ga. Pac. Corp.*, 306 F.3d 1162, 1167 (1st Cir., 2000); *Fed. Express Corp.*, 133 F.3d 137, 139 (1st Cir. 1998); *Buckley v. Consol. Edison Co.*, 127 F.3d 270, 273 (2d Cir. 1997); *Miners v. Cargill Commc'ns*, 113 F.3d 820, 823 (8th Cir. 1997); *Office of the Senate Sergeant at Arms v. Office of Senate Fair Employment Practices*, 95 F.3d 1102, 1105 (Fed. Cir. 1996).

⁹⁵ See *Bailey*, 306 F.3d at 1167; *Lessard v. Osram Sylvania, Inc.*, 175 F.3d 193, 197 (1st Cir. 1999); *Sutton*, 527 U.S. at 483.

⁹⁶ See *Reg'l Economic Cmty Action Plan Inc., v. City of Middletown*, 294 F.3d 35, 47 (2d Cir. 2002); *Burch v. Coca-Cola Co.*, 119 F.3d 305, 316 (5th Cir. 1997) (declining to adopt alcoholism as a per se disability because even though plaintiff's alcoholism "assuredly affected how he lived and worked, "far more [was] required to trigger coverage under [the ADA]"). Moreover, while the plaintiff's "alcoholism may have been permanent, he offered no evidence that he suffered from any substantially limiting impairment of any significant duration." *Id.*

while suffering negative effects of alcohol use alone has failed to rise to the level of a disability.⁹⁷

Courts have pointed out that alcoholism, while not specifically excluded from the ADA's protections, is nevertheless treated differently from other impairments and disabilities.⁹⁸ For example, the ADA specifically authorizes an employer to prohibit the consumption of alcohol at the workplace and permits an employer to require that employees not be under the influence of alcohol at work.⁹⁹ In addition, an employee suffering from alcoholism can be held to the "the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the...alcoholism of such employee."¹⁰⁰ When courts have found a duty to provide a reasonable accommodation for an alcoholic, the accommodations have generally involved a duty for an employer to accommodate a modified work schedule so an employee could attend Alcoholic Anonymous meetings or granting a leave of absence so an employee could seek

⁹⁷ Compare *Buckley*, 127 F.3d at 274 (holding that past drug addiction, not merely past drug use is required to make out a claim under the ADA) with *Burch*, 119 F.3d at 316 n9 (holding that where an alcoholic's only proffered impairments were the primary result of temporary inebriation, such proof was insufficient to demonstrate a substantially limiting impairment).

⁹⁸ *Bailey*, 306 F.3d at 1167.

⁹⁹ 29 C.F.R. § 1630.16(b)(1)-(2) (2005) (codified at 42 U.S.C. § 12114(c)(1)-(2) (2000)). See *Martin v. Barnseville Exempted Village Sch. Dist. Bd. of Educ.*, 209 F.3d 931, 935 (6th Cir. 2000) (holding that the ADA did not protect a plaintiff from his own bad judgment in drinking on the job nor require a defendant to hire him as a school bus driver where there was a serious risk that he may again drink on the job, have an accident, and kill a group of children).

¹⁰⁰ 29 C.F.R. § 1630.16(b)(4) (2005) (codified at 42 U.S.C. § 12114(c)(4) (2000)). See *Brown v. Lucky Stores*, 246 F.3d 1182, 1186 (9th Cir. 2001) (holding that an employer is permitted to terminate an alcoholic employee for violating a rational rule of conduct even if the misconduct was related to the employee's alcoholism); *Burch*, 119 F.3d at 320 (holding that does *not* require employers to excuse violations of uniformly-applied standards of conduct by offering an alcoholic employee a "firm choice" between treatment and discipline); *Carroll v. Ill. Dep't of Mental Health and Developmental Disabilities*, 979 F. Supp. 767, 770 (C.D. Ill. 1997) (holding that so long as the reason for discharge was for conduct that any person would have been disciplined for doing, the fact that alcoholism may have caused the conduct does not lead to an ADA violation); *Rollison v. Gwinnett County*, 865 F. Supp. 1564, 1572 (N.D. Ga. 1994) (holding that an employer may hold an alcoholic employee to the same standards for employment or job performance, as it holds other employees, even if the unsatisfactory performance is related to the alcoholism).

treatment for his alcoholism.¹⁰¹ For all other intents and purposes, if an employee is terminated or disciplined because of his or her conduct, and not because of his alcoholism, there is no violation of the ADA.¹⁰²

E. Nicotine Addiction Does Not Qualify as a Disability

1. The Language of the ADA

Simply from the language of the ADA it seems doubtful that Congress ever intended those addicted to nicotine to be covered by the Act. For example, Section 12201 of the ADA, which governs its construction states that “nothing in this Act shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment...in transportation...or in places of public accommodation.”¹⁰³ It seems highly improbable that Congress intended to treat something as a disability and, at the same time, permit employers to regulate the activity associated with the disability.

2. Court Decisions Dismissing Nicotine Addiction Claims

On the rare occasions that courts have addressed nicotine addiction as a disability they have consistently found that smokers are not covered by the ADA. For example, the plaintiff in *Brashear*, in addition to bringing his equal protection claim, alleged that the Maryland state prison’s no-smoking policy violated his federal statutory right to be free from discrimination under the ADA.¹⁰⁴ The district court rejected this claim holding that “common sense compels the conclusion that smoking, whether denominated as ‘nicotine addition’ or not, is not a ‘disability’ within the meaning of the ADA.”¹⁰⁵ The court stated that “Congress could not possibly have intended the absurd result of

¹⁰¹ See 42 U.S.C. § 12111(9) (2000); 29 C.F.R. § 1630.2(o)(2) (requiring that as part of a reasonable accommodation part-time or modified work schedules); *Schmidt v. Safeway, Inc.*, 864 F. Supp. 991, 996 (D. Ore. 1994) (holding that the ADA may require an employer to provide a leave of absence to an employee with an alcohol problem, particularly if the employer would provide that accommodation to an employee with cancer or some other illness requiring medical treatment).

¹⁰² See *Adamczyk v. Chief of Police*, 1998 U.S. App. LEXIS 1331, at *6 (4th Cir. 1998) (police officer’s demotion upheld because it was based on his misconduct not his alcoholism).

¹⁰³ 42 U.S.C. §12201(b) (2000).

¹⁰⁴ *Brashear v. Simms*, 138 F. Supp. 2d 693, 693-94 (D. Md. 2001).

¹⁰⁵ *Id.* at 694-95.

including smoking within the definition of 'disability,' which would render somewhere between 25% and 30% of the American public disabled under federal law because they smoke."¹⁰⁶ The court concluded that:

both smoking and "nicotine addiction" are readily remediable, either by quitting smoking outright through an act of willpower (albeit easier for some than others), or by the use of such items as nicotine patches or nicotine chewing gum. If the smokers' nicotine addiction is thus remediable, neither such addiction nor smoking itself qualifies as a disability within the coverage of the ADA.¹⁰⁷

This conclusion clearly echoes the Supreme Court's holding in *Sutton* that if an individual's impairment can be corrected by mitigating measures then the impairment does not substantially limit a major life activity.¹⁰⁸ Because smoking cessation devices do exist, such as nicotine patches, nicotine chewing gum and prescription drugs, one can argue that mitigating measures can correct the impairment of nicotine addiction, disqualifying it from the ADA's definition of a disability.

Perhaps the only state court to confront this issue was the Michigan appellate court in *Stevens v. Inland Water* in which the court affirmed the trial court's decision that smoking or nicotine addiction was not a disability.¹⁰⁹ The facts of *Stevens* involved a security guard who was terminated for repeatedly smoking on company property and refusing to quit smoking altogether.¹¹⁰ The security guard brought a suit under the Michigan Handicappers' Civil Rights Act ("HCRA") claiming that he was wrongfully terminated.¹¹¹ The court held that "even if [the] plaintiff's addiction to nicotine affected his 'ability to

¹⁰⁶ *Id.* at 695.

¹⁰⁷ *Id.*; see also *Rose v. Home Depot U.S.A. Inc.*, 186 F. Supp. 2d 595, (D. Md. 2002).

¹⁰⁸ *Sutton*, 527 U.S. at 483.

¹⁰⁹ *Stevens v. Inland Waters, Inc.*, 559 N.W.2d 61, 62 (Mich. Ct. App. 1996).

¹¹⁰ *Id.*

¹¹¹ MICH COMP. LAWS SERV. §§ 37.1101-1607 (2006). The court in *Stevens* stated that the purpose of the HCRA was similar to the purposes of the ADA in that its purpose was to ensure that all persons be accorded equal opportunities to obtain employment, housing, and the utilization of public accommodations, services, and facilities. *Stevens*, 559 N.W.2d at 63. The court further stated that The HCRA's definition of "handicap," and the ADA's definition of "disability" shared the requirement that a handicap or disability must be a condition that substantially limits" one or more of a person's "major life activities." *Id.* at 63-64.

choose not to smoke' and limited his 'body's ability to be without discomfort when not smoking,' it did not substantially limit his life's major activities" because "his smoking and addiction to nicotine did not interfere with caring for himself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working."¹¹² The court noted that the plaintiff's argument that nicotine addiction was like alcoholism ignored the fact that alcoholism was included in the HCRA's definition of a "handicap," while nicotine addiction was not.¹¹³ Further, the court reasoned that the plaintiff's claimed "handicap" was shared by countless other individuals in the workplace and in society as a whole.¹¹⁴ The court concluded that to automatically label nicotine addiction as a condition that substantially impairs a major life activity would be inconsistent with the HCRA and would do a gross disservice to the truly handicapped.¹¹⁵

3. Determinations of Government Agencies

Other government agencies, such as the Department of Housing and Urban Development ("HUD"), have also concluded that smoking is not a disability warranting protection under the ADA.¹¹⁶ Currently HUD has no policy that prohibits public housing authorities or Section 8 landlords from banning smoking in individual residential units.¹¹⁷ There are at least two HUD opinions which permit a public housing authority to ban smoking in public housing developments. In one of these opinions, HUD stated that the right to smoke is not protected under the Civil Rights Act of 1964 or any other HUD enforced civil rights authorities.¹¹⁸

What these decisions illustrate is that nicotine addiction fails to qualify as a disability and is therefore not entitled protection under the ADA. Although nicotine addiction may be considered an impairment, smoking, regardless of its addictiveness, is ultimately a voluntary

¹¹² *Id.* at 64.

¹¹³ *Id.*

¹¹⁴ *Id.* at 65.

¹¹⁵ *Id.*

¹¹⁶ SUSAN SCHOENMARKLIN, THE CENTER FOR SOCIAL GERONTOLOGY, INC., ANALYSIS OF THE AUTHORITY OF HOUSING AUTHORITIES AND SECTION 8 MULTIUNIT HOUSING OWNERS TO ADOPT SMOKE-FREE POLICIES IN THEIR RESIDENTIAL UNITS 2 (2005), available at http://www.tcsg.org/sfelp/public_housing24E577.pdf.

¹¹⁷ *Id.*

¹¹⁸ *Id.*; In re the City of Fort Pierce, Florida Housing Authority, HUD Opinion (July 9, 1996).

behavior. One might argue that those who advance claims that smoking, or nicotine addiction, should qualify as a disability under the ADA are in fact insulting those who are actually disabled and in need of the protection the ADA was intended to provide. Although the ADA offers no protection for smokers from employment discrimination based on their tobacco use, smokers can find protection at the state level of currently thirty states and the District of Columbia have enacted statutes protecting smokers from employment discrimination.¹¹⁹

VI. STATE LAWS PROTECTING SMOKERS FROM EMPLOYMENT DISCRIMINATION

A. States Statutes Protecting the Use of Tobacco

Twenty of the thirty-one statutes protecting current or prospective employees from various forms of discrimination contain language making it impermissible to discriminate against individuals specifically because of their use of tobacco products.¹²⁰ Some of these statutes refer to smoking specifically and also include tobacco usage, while others are worded generally, covering the use of tobacco and tobacco products.¹²¹ Of the twenty state laws specifically prohibiting

¹¹⁹ See American Lung Association, State Smoker Protection Laws, <http://slati.lungusa.org/appendixf.asp> (last visited Jan. 9, 2007) for a comprehensive listing of the state statutes.

¹²⁰ See ARIZ. REV. STAT. § 36-601.02 (LexisNexis 2005); CONN. GEN. STAT. § 31-40(s) (2004); D.C. CODE ANN. § 7-1703.03 (2005); IND. CODE ANN. § 22-5-4-1 (LexisNexis 2005); KY. REV. STAT. ANN. § 344.040 (LexisNexis 2005); LA REV. STAT. ANN. § 23:966 (2005); ME. REV. STAT. ANN. tit. 26, § 597 (2005); MISS. CODE ANN. § 71-7-33 (2005); MO. REV. STAT. § 290.145 (2005), N.H. REV. STAT. ANN. § 275:37-a (LexisNexis 2005), N.J. REV. STAT. § 34:6B-1 (2005); N.M. STAT. ANN. § 50-11-3 (2005); OKLA. STAT. ANN. tit. 40, § 500 (West 2005); OR. REV. STAT. ANN. § 659A.315 (West 2003); R.I. GEN. LAWS § 23-20.10-14 (2005); S.C. CODE ANN. § 41-1-85 (2004); S.D. CODIFIED LAWS § 60-4-11 (2005); VA. CODE ANN. § 2.2-2902 (2005); W. VA. CODE ANN. § 21-3-19 (2005), WYO. STAT. ANN. § 27-9-105 (2005).

¹²¹ Compare CONN. GEN. STAT. §31-40(s) (2004):

No employer or agent of any employer shall require, as a condition of employment, that any employee or prospective employee refrain from smoking or using tobacco products outside the course of his employment, or otherwise discriminate against any individual with respect to compensation, terms, conditions or privileges of employment for smoking or using tobacco products outside the course of his employment.

employment discrimination based on the use of tobacco, the Arizona and Virginia statutes apply exclusively to public employers; thus, private employers in Arizona and Virginia may discriminate against current or prospective employees based on tobacco usage.¹²² Further, three states, Arizona, Louisiana, and South Dakota, only offer protection to current employees and do not prevent an employer from discriminating against prospective employees on the basis of tobacco use.¹²³

Id.

and LA. REV. STAT. ANN. §23:966(A) (2005):

As long as an individual, during the course of employment, complies with applicable law and any adopted workplace policy regulating smoking, it shall be unlawful for an employer: (1) To discriminate against the individual with respect to discharge, compensation, promotion, any personnel action or other condition, or privilege of employment because the individual is a smoker or nonsmoker. (2) To require, as a condition of employment, that the individual abstain from smoking or otherwise using tobacco products outside the course of employment. B. A smoker, as referred to herein, is limited to a person who smokes tobacco.

Id.

with S.C. CODE ANN. §41-1-85 (2005) ("The use of tobacco products outside the workplace must not be the basis of personnel action, including, but not limited to, employment, termination, demotion, or promotion of an employee.") and ME. REV. STAT. ANN. tit.26 § 597 (2005):

An employer or an agent of an employer may not require, as a condition of employment, that any employee or prospective employee refrain from using tobacco products outside the course of that employment or otherwise discriminate against any person with respect to the person's compensation, terms, conditions or privileges of employment for using tobacco products outside the course of employment as long as the employee complies with any workplace policy concerning use of tobacco.

Id.

¹²² See ARIZ. REV. STAT. ANN. §36-601.02(F) (LexisNexis 2005); VA. CODE ANN. §2.2-2902 (2005).

¹²³ See ARIZ. REV. STAT. ANN. §36-601.02(F) (LexisNexis 2005) ("No state employer may discriminate against any employee or other person on the basis of the use or nonuse of tobacco products.").

(The use of "other person" in the statute's language may arguably make it applicable to prospective employees.); LA. REV. STAT. ANN. §23:966(A) (2005); S.D. CODIFIED LAWS §60-4-11 (2005) ("It is a discriminatory or unfair employment practice for an employer to terminate the employment of an employee due to that employee's engaging in any use of tobacco products off the premises of the employer during nonworking hours.")

B. State Statutes Protecting the Use of Lawful Products

Instead of enacting statutes specifically aimed at providing users of tobacco products some form of employment discrimination protection, nine states have enacted laws that protect employees or prospective employees from discrimination based on the use of lawful products.¹²⁴ Generally, the statutes term these products as “lawful products,” “lawful consumable products,” or phrase the statute to offer protection for the “legal use of consumable products.”¹²⁵ Most of these statutes do not provide a specific definition of what a “lawful product” or “consumable product” is. Those states with definitions of these products define them as “a product that is legally consumed, used, or enjoyed and includes food, beverages, and tobacco”¹²⁶ or “products whose use or enjoyment is lawful and which are consumed during use or enjoyment, and includes food, alcoholic or nonalcoholic beverages, and tobacco.”¹²⁷ Of the nine states that provide a definition of a lawful or consumable product only Tennessee’s statute applies only to current

¹²⁴ See 820 ILL. COMP. STAT. ANN. 55/5 (LexisNexis 2005), MINN. STAT. ANN. § 181.938 (West 2005), MO. ANN. STAT. § 290.145 (West 2005), MONT. CODE ANN. § 39-2-313 (2005), NEV. REV. STAT. ANN. § 613.333 (LexisNexis 2005), N.Y. LAB. LAW § 201-d (Consol. 2005), N.C. GEN. STAT. § 95-28.2 (2005), TENN. CODE ANN. § 50-1-304 (2005 LexisNexis), WIS. STAT. ANN. §§111.31, 111.321-22, 111.325 (West 2005).

¹²⁵ See 820 ILL. COMP. STAT. ANN. 55/5(a) (2005) “it shall be unlawful for an employer to refuse to hire or to discharge any individual, or otherwise disadvantage any individual, with respect to compensation, terms, conditions or privileges of employment because the individual uses lawful products off the premises of the employer during nonworking hours”; MINN. STAT. §181.938 (West 2005):

An employer may not refuse to hire a job applicant or discipline or discharge an employee because the applicant or employee engages in or has engaged in the use or enjoyment of lawful consumable products, if the use or enjoyment takes place off the premises of the employer during nonworking hours.

Id.;

N.Y. LAB. LAW § 201-d(2)(b) (Consol. 2005) (“an individual’s legal use of consumable products prior to the beginning or after the conclusion of the employee’s work hours.”).

¹²⁶ MONT. CODE ANN. § 39-2-313(1) (2005).

¹²⁷ MINN. STAT. §181.938(Subd 2) (West 2005).

employees, while the other eight statutes apply to both current and prospective employees.¹²⁸

C. State Statutes Protecting Lawful Conduct

Three states, California, Colorado, and North Dakota base their statutes on an employee's conduct as opposed to protecting tobacco specifically or lawful products.¹²⁹ These statutes all make it impermissible for an employer to terminate an employee for engaging in any lawful activity off of the employer's premises during nonworking hours.¹³⁰ While California and North Dakota protect both current and prospective employees, the Colorado statute protects only current employees from employment discrimination based on participation in lawful conduct.¹³¹

D. Exceptions for Certain Employers

Many of the statutes contain exceptions for various organizations whose missions conflict with permitting employees to use tobacco or other lawful products. For example, nonprofit organizations or corporations whose primary purpose is to discourage the use of tobacco or other lawful products by the general public are exempt.¹³² Other

¹²⁸ TENN. CODE ANN. §50-1-304 (e)(1)-(2) (West 2005). Tennessee's statute is the most obscurely written stating that:

(1) No employee shall be discharged or terminated solely for participating or engaging in the use of an agricultural product not regulated by the alcoholic beverage commission that is not otherwise proscribed by law, if such employee participates or engages in such use in a manner that complies with all applicable employer policies regarding such use during times at which such employee is working.

(2) No employee shall be discharged or terminated solely for participating or engaging in the use of such product not regulated by the alcoholic beverage commission that is not otherwise proscribed by law if such employee participates or engages in such activity during times when such employee is not working.

Id.

¹²⁹ CAL. LAB. CODE § 96(k), 98.6 (Deering 2005); COLO. REV. STAT. §24-34-402.5(1) (2005); N.D. CENT. CODE § 14-02.4-03 (2005).

¹³⁰ CAL. LAB. CODE § 96(k), 98.6 (Deering 2005); COLO. REV. STAT. §24-34-402.5(1) (2005); N.D. CENT. CODE § 14-02.4-03 (2005).

¹³¹ CAL. LAB. CODE § 96(k), 98.6 (Deering 2005); COLO. REV. STAT. §24-34-402.5(1) (2005); N.D. CENT. CODE § 14-02.4-03 (2005).

¹³² See CONN. GEN. STAT. §31-40(s)(a) (2004); 820 ILL. COMP. STAT. 55/5(b) (2005) ("any employer that is a non-profit organization that, as one of its primary purposes or objectives, discourages the use of one or more lawful products by the general public."); MO. REV. STAT. §290.145 (2005) ("Religious organizations and church-

states exempt organizations whose purpose is to dissuade the public from using tobacco under other statutorily created exceptions. California's statute is demonstrative of this as it provides that an employee is exempt from protection under the statute for "conduct that is actually in direct conflict with the essential enterprise-related interests of the employer and where breach of that contract would actually constitute a material and substantial disruption of the employer's operation."¹³³ Additionally, in agreement with the logic demonstrated by the court in *Grusendorf v. City of Oklahoma City*, some statutes exclude from protection members of fire and police departments.¹³⁴

E. Exceptions for Differences in Insurance Rates

operated institutions, and not-for-profit organizations whose principal business is health care promotion shall be exempt from the provisions of this section."); MONT. CODE ANN. § 39-2-313(3)(c) (2005) ("an employer that is a nonprofit organization that, as one of its primary purposes or objectives, discourages the use of one or more lawful products by the general public."); R.I. GEN. LAWS §23-20.10-14(a) (2005) ("Any employer that is a nonprofit organization which as one of its primary purposes or objectives discourages the use of tobacco products by the general public."); W. VA. CODE §21-3-19(b) (LexisNexis 2005) ("an employer which is a nonprofit organization which, as one of its primary purposes or objectives, discourages the use of one or more tobacco products by the general public"); WIS. STAT. ANN. §111.35(1)(a) -(b) (West 2005) ("a nonprofit corporation that, as one of its primary purposes or objectives, discourages the general public from using a lawful product.").

¹³³ CAL. LAB. CODE §98.6(2)(A) (Deering 2005); California's statute only applies where as part of a collective bargaining agreement or employment contract an applicant must sign a contract that protects the employer's interest. *Id.*; Other statutes such as Colorado's also possibly exempts such organizations where it "[i]s necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest." COLO. REV. STAT. §24-34-402.5(1)(b) (2005); Another example would be New Jersey's statute that exempts employees from coverage if "the employer has a rational basis for doing so which is reasonably related to the employment." N.J. STAT. ANN. §34:6B-1 (West 2005).

¹³⁴ See CAL. LAB. CODE §98.6(2)(B) (exempting firefighters); CONN. GEN. STAT. §31-40(s)(b) (2004); S.D. CODIFIED LAWS §60-4-11 (2005) (exempting full-time firefighters); VA. CODE ANN. §2.2-2902 (2005) (exempting firefighters and police officers); WIS. STAT. ANN. §111.35(4) (West 2005) (excluding fire fighters "if the applicants use of a lawful product consists of smoking tobacco."); Another relatively common exception is if the prohibition of tobacco use "[r]elates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees." See COLO. REV. STAT. §24-34-402.5(1) (2005); MINN. STAT. ANN. § 181.938 (West 2005). One illustration of this might be a chocolate manufacturer who is concerned that line workers' tobacco residue could infiltrate and degrade the quality of its product.

Ten of the state statutes specifically exclude charging higher premiums to employees for health, life or disability insurance on the basis of their use of tobacco or other lawful products.¹³⁵ The general requirement of these statutes is that the different rates charged to employees actually reflect the differential cost to the employer and that the employer makes this information available to the employee.¹³⁶ At least one other state, Kentucky, has created an exception to its statute that states “a difference in employee contribution rates for smokers and nonsmokers under this plan shall not be deemed to be an unlawful practice in violation of [the statute].”¹³⁷

F. Why State Statutes Protecting Smokers were Enacted

1. An Unlikely Pairing

It is somewhat puzzling why a state legislature would utilize its resources to pass legislation aimed at protecting smokers. That

¹³⁵ 820 ILL. COMP. STAT. 55/5(c) (2005); MINN. STAT. §181.938 3(c) (2005); MO. REV. STAT. §290.145 (2005); MONT. CODE ANN. § 39-2-313(5) (2005), N.Y. LAB. LAW § 201-d(6) (Consol. 2005), N.C. GEN. STAT. § 95-28.2(d) (2005), S.D. CODIFIED LAWS § 60-4-11 (2005), W. VA. CODE ANN. § 21-3-19(d) (2005), WIS. STAT. ANN. §§111.325(3)(a) (West 2005) WYO. STAT. ANN. § 27-9-105(a)(iv) (2005).

¹³⁶ Compare 820 ILL. COMP. STAT. 55/5(c) (2005):

It is not a violation of this Section for an employer to offer, impose or have in effect a health, disability or life insurance policy that makes distinctions between employees for the type of coverage or the price of coverage based upon the employees' use of lawful products provided that: (1) differential premium rates charged employees reflect a differential cost to the employer; and (2) employers provide employees with a statement delineating the differential rates used by insurance carriers.

Id.

with MO. REV. STAT. §290.145 (2005) (“nothing in this section shall prohibit an employer from providing or contracting for health insurance benefits at a reduced premium rate for employees who do not smoke or use tobacco products.”) and W. VA. CODE ANN. § 21-3-19(d) (2005) (“Nothing in this section shall be construed to prohibit an employer from making available to smokers and other users of tobacco products, programs, free of charge or at reduced rates, which encourage the reduction or cessation of smoking or tobacco use.”); As HIPAA gives guidance on when and how different premiums can be charged by employers under the bona fide wellness program rules, it is assumed that these provisions would not be preempted by the Employment Retirement Income Security Act (ERISA).

¹³⁷ KY. REV. STAT. ANN. § 344.040 (LexisNexis 2005).

question, however, has a relatively straightforward answer: it was the unlikely pairing of the American Civil Liberties Union (“ACLU”) and the tobacco lobby that led to the proliferation of these statutes.¹³⁸ As previously noted, a 1988 survey by the Administrative Management Society revealed that six percent or roughly 6,000 companies in the United States were refusing to hire smokers.¹³⁹ Largely in response to this, the combined lobbying effort of the ACLU and the tobacco industry led to the implementation of more than two dozen state laws protecting smokers in the late 1980s and early 1990s.¹⁴⁰ While some of these laws were framed strictly as tobacco use protection laws, others were broadened to cover such things as alcohol use, lawful products, and lawful activity to make them more palatable to the legislatures.¹⁴¹ The ACLU’s stated goal has been the enactment, in every state, of statutes that protect all working Americans from discrimination based on their off-duty activities.¹⁴² The ACLU, framing the issue as one of personal rights pontificated, “When most Americans report for work, are they supposed to have left their constitutional rights behind?”¹⁴³

The ACLU’s National Workrights Institute (“NWI”) framed this issue as “lifestyle discrimination” arguing that it was unfair and dangerous to allow employers to discriminate against certain employees because their private lifestyle choices are unhealthy and lead

¹³⁸ Stanley Siegelman, *The Right to Blow Smoke - Smokers' Rights Laws Prevent Employers from Discriminating Against Smokers*, BUSINESS & HEALTH, Sept. 1991; The ACLU was severely criticized for this alliance in 1993 when it was discovered that the ACLU had received over \$500,000 from the tobacco industry between 1987 and 1992 when the vast majority of the “smokers’ rights bills were passed in the state legislatures. *ACLU’s Link to Tobacco Firms Ripped*, CHI. TRIBUNE, July 30, 1993, at A4.

¹³⁹ The National Workrights Institute, *supra* note 31.

¹⁴⁰ Stephen D. Sugarman, ‘Lifestyle’ Discrimination in Employment, 2002, at 36, <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1000&context=ewli> (last visited Feb. 19, 2006); American Lung Association, *supra* note 119. According to this website, the statutes were enacted in the following sequence broken down by year: 1987 – Illinois; 1989 – Oregon, Virginia; 1990 – Colorado, Tennessee; 1991 – Arizona, Indiana, Louisiana, Maine, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, South Carolina, South Dakota, Wisconsin; 1992 – Minnesota, Missouri, New York, West Virginia, Wyoming; 1993 – District of Columbia, Montana, North Dakota; 1994 – Kentucky, Mississippi; 2003 – Connecticut; and 2005 – Rhode Island.

¹⁴¹ Sugarman, *supra* note 140.

¹⁴² American Civil Liberties Union, *Lifestyle Discrimination in the Workplace: Your Right to Privacy*, <http://www.aclu.org/workplacerrights/gen/13384res19981231.html>, last visited Feb. 20, 2006.

¹⁴³ Siegelman, *supra* note 138.

to higher health insurance costs.¹⁴⁴ The NWI further has argued that risks are associated with nearly every personal lifestyle choice, from smoking cigarettes, to sitting in the sun, to having children.¹⁴⁵ In responding to the question of whether the NWI efforts were really just a front for the tobacco companies, the NWI stated that lifestyle discrimination legislation is supported by a variety of civil rights and labor organizations and by the majority of Americans.¹⁴⁶

2. States Where the Laws Were Enacted

New Hampshire's experience with the smokers' rights legislation is representative of the scenario that played out in state legislatures throughout the country in the early 1990s. Passage of the New Hampshire bill was pushed largely by Phillip Morris through a letter-writing campaign, as well as the ACLU, AFL-CIO, and other smokers' rights groups.¹⁴⁷ The bill's sponsors admitted that it was brought in by a lobbyist for Philip Morris who just happened to be the former Speaker of the House.¹⁴⁸ At least one member of the New Hampshire House of Representatives was infuriated because, rather than coming from labor union representatives, the bill came from part of a tobacco company's agenda.¹⁴⁹ Conversely, a supporter of the bill,

¹⁴⁴ National Workrights Institute, *supra* note 31. Phillip Morris is however listed as one of the supporting organizations of the ACLU's lifestyle discrimination legislation efforts. *Id.*; The NWI addressing whether or not it was wrong to encourage people to smoke with protective legislation has stated that "The government has the obligation to insure that people understand the health risks of smoking. Government and employers ought to help people who want to quit smoking. Ultimately, however, it is up to the individual to decide if they want to engage in risky behavior such as smoking or riding a motorcycle. What is wrong is using the power of the government or the paycheck to tell other people how to live." NATIONAL WORKRIGHTS INSTITUTE, LIFESTYLE DISCRIMINATION: EMPLOYER CONTROL OF LEGAL OFF DUTY EMPLOYEE ACTIVITIES 9, available at http://www.workrights.org/issue_lifestyle/ldbrieff2.pdf.

¹⁴⁵ National Workrights Institute, *supra* note 31. The ACLU has even declared that a "State of Emergency exists in the American workplace," and "If the premises behind such policies are allowed to stand, employers who are motivated primarily by a desire to reduce their health care costs may well use similar means to seek control over all health-related aspects of their employees' home lives. Siegelman, *supra* note 138.

¹⁴⁶ National Workrights Institute, *supra* note 31.

¹⁴⁷ Shawne K. Wickham, *Smokers' Rights Bill Heats Up*, N. H. SUNDAY NEWS, Mar. 31, 1991, at D1.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* The executive director for the state's Commission for Human Rights who under the original version of the bill would have been responsible for its enforcement echoed concerns that the bill originated with Philip Morris instead of arising out of a

demonstrating the debatable logic of the bill's necessity, argued "What if people like Churchill and Roosevelt had been refused employment? We could all be under a nonsmoker by the name of Adolf Hitler."¹⁵⁰

New Jersey, which in 1991 became the fifteenth state to pass smokers' rights legislation, provides another example of the tactics employed by the tobacco lobby.¹⁵¹ After the legislation's passage, the Tobacco Institute, an industry group that supported the bill stated that the legislation was "good news for anyone who enjoys a legal, off-duty activity that their boss may not approve of." The Tobacco Institute further stated that "the bill intends to protect the right to privacy, not just for smokers, but for drinkers, the non-athletic and overweight people."¹⁵² One state senator even argued that "if employers can tell you you can't smoke in your living room, next they might not want to hire you because of the way you part your hair."¹⁵³

Again, not all parties were pleased with the enactment of the legislation. William Tansey, president of New Jersey's branch of the American Heart Association, noted that "This is the initiative of a large industry trying to protect its product. The more people addicted to smoking, the more this industry survives."¹⁵⁴ Senator Gabriel Ambrosio, who cast the lone vote against the bill, argued that "Smoking is by far the single most common factor in the cause of cancer and heart disease," and that "No other voluntary human activity is responsible for the burgeoning healthcare costs."¹⁵⁵ The bill passed and became law, but without the signature of New Jersey's governor, who stated that "I just do not feel comfortable affixing my signature to a bill that somehow, at least symbolically, seems to give an imprint of public approval to smoking."¹⁵⁶

defined need stating that "If there is a problem, [with employers firing or refusing to hire smokers] it's not very large at this time."

¹⁵⁰ *Id.*

¹⁵¹ New Jersey Governor James Florio vetoed the proposed legislation when it reached his desk the first time, explaining that it unwisely made smoking a civil right. Undaunted, the bill's backers tried again--this time avoiding the civil rights issue by casting the measure as a pure-and-simple labor law. Siegelman, *supra* note 138.

¹⁵² Bethany Kandel, *New Jersey to Join States Protecting Off-work Smokers*, USATODAY, May 28, 1991, at 6A.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Associated Press, *New Jersey Law Bans Employers from Firing Off-the-Job Smokers*, CHI. TRIB., July 3, 1991, at C12.

3. States Where the Laws were Vetoes

At least four states legislatures passed smokers' rights bills only to have them vetoed by each state's respective Governor. For example, in February 1993, the Virginia General Assembly, on the same day it gutted a bill to restrict public smoking, enacted a bill to protect the rights of smokers in a vivid display of the power of Virginia's tobacco lobby.¹⁵⁷ The bill's supporters pointed out that the bill protected smokers' privacy, and perhaps more importantly, that tobacco accounted for twenty-six percent of the value of all the exports from Virginia.¹⁵⁸ The bill, however, was largely symbolic in that it included no penalties against employers who violated its provisions, and did not permit aggrieved workers to sue.¹⁵⁹ But Virginia Governor L. Douglas Wilder snubbed Virginia's powerful tobacco industry by vetoing the bill because he believed it would elevate a dangerous habit to the status of a legally protected right.¹⁶⁰ Wilder, himself an ex-smoker, said he was offended by the suggestion that smokers deserve the same type of civil rights shield that had been used to fight prejudice against blacks and other minorities.¹⁶¹

The Michigan legislature likewise passed a bill that would have protected not only smoking but also alcohol consumption. The original bill was intended only to protect smokers, but was widened to include other certain legal consumable products.¹⁶² Governor John Engler vetoed the bill stating that despite the fact the word tobacco had been removed from the original bill, it continued to be a smokers' rights bill.¹⁶³ Engler cited among the reasons for vetoing the bill the fact that tobacco kills more than 15,000 Michigan citizens each year and that smoking-attributable diseases sapped more than \$2 billion each year from the state's economy in medical expenses, lost work time, and lost

¹⁵⁷ John F. Harris & Peter Baker, *Tobacco Prevails in Richmond; Smoking Restrictions Gutted; Rights Bill Enacted by the House*, WASH. POST, Feb. 23, 1993, at A1.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ John F. Harris, *Pro-Smoker Bill Doused by Wilder; Governor Unmoved by Tobacco Lobby*, WASH. POST, March 30, 1993, A1.

¹⁶¹ *Id.*

¹⁶² PR Newswire, MADD, Michigan Asks Gov. Engler to Veto Expanded 'Smokers Rights' Bill, Dec. 11, 1992, at State and Regional News; Engler's Veto of 1992 Michigan Smokers' Rights Employment Bill S 484, <http://medicolegal.tripod.com/englerveto1992.htm>, (last visited Mar. 22, 2006).

¹⁶³ Engler's Veto of 1992 Michigan Smokers' Rights Employment Bill S 484, *supra* note 162.

productivity.¹⁶⁴ Engler was also concerned that the bill would tend to trivialize fundamental rights like protection against discrimination based on race, gender, political ideology, or religious affiliation and would elevate the use of nicotine to a protected right.¹⁶⁵

Former President Bill Clinton, then the Governor of Arkansas, also vetoed a smoker's rights bill in February 1991, citing fears that it could lead to the prohibition of smoke-free workplaces.¹⁶⁶ Clinton, in a letter to Arkansas' state House Speaker John Lipton further stated that smoking was an acquired behavior and that with "the overwhelming evidence of the toll it takes every year in disease and death, it should not be accorded legal protection like Freedom of Speech, nor should smokers be a protected class like those who have been wrongly discriminated against because of race, sex, age, or physical handicaps."¹⁶⁷

A final illustration of the battle over state smokers' rights laws comes from Florida, where at the urging of tobacco lobbyists, an amendment stating that employers could not discriminate against employees who smoke during their free time was added to a bill designed to dramatically restrict smoking in public places.¹⁶⁸ Jim Burke, the representative who introduced the amendment, stated that it was a civil rights issue.¹⁶⁹ This prompted a candid response from fellow representative Lois Frankel who stated "Oh great. We have Martin Luther King, Rosa Parks, Susan B. Anthony, and now Philip Morris."¹⁷⁰ The Florida smokers' right bill too was ultimately vetoed by the state's Governor, Lawton Chiles, in April 1992.¹⁷¹

4. Why State Laws Protecting Smokers Fail the Public

Regardless of the proffered rationale of these statutes, ultimately they had little to do with civil rights or personal privacy. Instead, they had everything to do with appeasing a powerful lobbying group. The

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Michael Arbanas, 'Smoker's Rights' Bill Vetoed, ARK. DEMOCRAT-GAZETTE, Feb. 27, 1991.

¹⁶⁷ *Id.*

¹⁶⁸ Charlotte Sutton, *House Passes Bill on Smoking*, ST. PETERSBURG TIMES, May 2, 1991, at 5B.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ United Press International, *Florida Governor Snuffs Out "Smokers Rights"*, Apr. 10, 1992.

ACLU claimed the motivating factor behind these statutes was to enact lifestyle discrimination legislation to prevent employers from discriminating against individuals for personal lifestyle choices. Why then did the vast majority of the enacted and proposed statutes specifically address tobacco use only? The number of states that addressed tobacco use only would be even higher if some states had not re-worded their statutes to include protection for lawful consumable products or lawful conduct. At a time when more is discovered daily about the harms of smoking, and governments at state and local levels implement public smoking bans,¹⁷² these statutes stand out as a glaring example of the ability of a powerful special interest group to have its personal agenda forced upon the constituency.

It is not just the obvious special-interest purpose of this legislation that is problematic, but the contradictory public health message these statutes present about the health risks and societal harms of smoking. Admittedly, the United States has failed to present a consistent public health approach to the issue of smoking. While the government continues to permit the tobacco industry to manufacture and sell its undeniably harmful products, at the same time, the government discourages the public from smoking cigarettes through taxation, education and public smoking bans. While the Surgeon General and organizations such as the American Cancer Society and American Lung Association exert efforts to discourage and educate the public about the dangers of smoking, state legislatures acting at the behest of the tobacco industry enacted statutes that implicitly endorsed or, at the least, condoned tobacco use.¹⁷³ Instead of delivering a consistent message condemning smoking, these state legislatures have shielded smokers from condemnation with specifically tailored statutes.

¹⁷² See Steve Patterson, *Cook County Bans Smoking, Starting Next Year; Few Vocal Critics of Measure that Takes Effect Next March*, CHI. SUN-TIMES, Mar. 16, 2006 at 8; Steve Patterson, *It's Lights out Today All Over Town*, CHI. SUN-TIMES, Jan. 16, 2006 at 16; City of Calabasas, *Secondhand Smoking Ordinance FAQ*, <http://www.cityofcalabasas.com/secondhandsmoke-faq.html> (last visited Mar. 25, 2006). These are just some of the many examples of local governments taking action to curb exposure to environmental tobacco smoke (secondhand smoke).

¹⁷³ The tobacco industry itself even acknowledges the dangers of smoking as Phillip Morris, for example, maintains a website listing the health risks associated with cigarette smoking, stating in part that "Philip Morris USA agrees with the overwhelming medical and scientific consensus that cigarette smoking causes lung cancer, heart disease, emphysema and other serious diseases in smokers." Phillip Morris USA – Health Issues, http://www.philipmorrisusa.com/en/health_issues/ (last visited Mar. 21, 2006).

It is, however, not the contradictory message these statutes perpetrate that is most disconcerting, but the false credibility these statutes give to the argument that people have a right to smoke.

One of the consistent themes throughout the push to enact these statutes was that smoking was a civil rights and privacy issue, with proponents arguing that smokers were being impermissibly discriminated against. As this Comment has demonstrated, courts have uniformly established that there is no right to smoke, and smokers do not constitute a suspect class. It is repugnant to the concepts of civil rights and equal protection to propose that what is ultimately a voluntary behavior is worthy of the same level of consideration as immutable characteristics such as race, gender and disability. Yet many groups and individuals made such an argument during the initiative to have these statutes enacted, taking what is in reality a public health issue and distorting it with notions of liberty and privacy.

Also flawed is the argument that smoking is a personal privacy issue. It has been clearly demonstrated that environment tobacco smoke is seriously harmful to nonsmokers, causing tens of thousands of deaths each year. For smokers to claim that it is a personal choice issue, when their behavior has serious health consequences for all members of society, is simply a ridiculous proposition. Further, it is not just smokers who bear the burden of paying for the cost of smoking. Society, collectively, is burdened with the unnecessary medical care costs created because of smoking, costs that otherwise would likely not exist. With the majority of working-age Americans receiving health insurance benefits through employers and with the cost of medical care in this country rapidly increasing, employers have become increasingly burdened by rising health care costs. Employers should, therefore, be free to choose whether they will bear more of the burden imposed by smokers than they already do.

VII. DIFFERENTIATING SMOKING FROM OTHER FORMS OF LIFESTYLE DISCRIMINATION

One of the principal arguments made by groups such as the ACLU and the NWI is that employer discrimination against employees based on tobacco usage is really just one form of lifestyle discrimination, with discrimination based on factors such as alcohol and food consumption, and recreational activity also on the rise. The argument often made is that if discrimination is permitted on one basis, namely smoking, it would lead to discrimination being permissible based on any of these

factors. This argument is referred to as the “slippery slope argument,” a staple of those in the legal community. This is simply not the case, as smoking tobacco is, by its very nature, inherently different from any other behavior or lifestyle decision that is mentioned in the context of lifestyle discrimination. Simply stated, cigarettes are harmful regardless of type or brand. It is tobacco that has the unique distinction of being the only legal consumable product that is harmful when used exactly as intended. The same cannot be said for other consumable products such as alcohol and food.¹⁷⁴ Obviously, even alcohol and food can be abused, as is readily evident from the proliferation of alcoholism and the ongoing epidemic of obesity in the United States. But again, unlike tobacco, alcohol and food by their nature are not harmful products. In fact, while there is some debate, it is believed that alcohol when used in moderation potentially has health benefits.¹⁷⁵ Food too by its nature is not harmful and is essential to maintaining life. Again, food too has the potential for abuse and admittedly not all food is nutritional. While any amount of tobacco that is consumed is harmful; the same simply cannot be said for alcohol and food. It is, however, not only consumable products that have been used as talking points by proponents of lifestyle discrimination protection.

Recreational activities, such as playing basketball, or more high risk activities, such as rock climbing, are illustrative of another potential source of “lifestyle discrimination.” According to groups like the NWI, employers may be leery of employees who engage in these types of activities because of the potential for higher medical claims due to an increased likelihood of injury. While it is inevitable that some individuals participating in these activities will suffer injuries, it is highly implausible that an employer, who theoretically is trying to control medical costs by engaging in “lifestyle discrimination,” would try to avoid employing individuals who engage in physical activities, which undeniably have health benefits. For example, if employers

¹⁷⁴ In fact, the only alcohol-centered cases presented by the NWI in its legislative briefing paper on lifestyle discrimination focused on employees of breweries being terminated for being observed drinking rival breweries’ products. NATIONAL WORKRIGHTS INSTITUTE, *LIFESTYLE DISCRIMINATION: EMPLOYER CONTROL OF LEGAL OFF DUTY EMPLOYEE ACTIVITIES* 6 (2005), available at http://www.workrights.org/issue_lifestyle/ldbrieff2.pdf.

¹⁷⁵ See MayoClinic.com, *Alcohol and Your Health: Weighing the Pros and Cons*, <http://www.mayoclinic.com/health/alcohol/SC00024> (last visited Mar. 25, 2006); Harvard School of Public Health, *Alcohol: Nutrition Source*, <http://www.hsph.harvard.edu/nutritionsource/alcohol.html> (last visited Mar. 25, 2006).

were that concerned about higher claims filed by employees because they participate in dangerous activities, then perhaps employers should forbid their employees to drive to work, as over 42,000 individuals were killed and over 2.7 million were injured in motor vehicle accidents in 2004 alone.¹⁷⁶

VIII. CONCLUSION

The actions of companies such as Weyco and Scotts clearly illustrate the escalating tension between an employee's personal lifestyle choices and an employer's bottom line. So long as employers remain the primary source of health insurance for working age Americans, and health care costs continue to increase at their current rates, this tension will continue to escalate. The most common target for employers thus far has been cigarette smoking, a trend that from all indications is likely to accelerate. As this Comment has demonstrated, there is no "right to smoke" nor are smokers a distinct or suspect class. Further, as nicotine addiction is not treated as a disability under the ADA, the only protection from employment discrimination that smokers can rely on exists in the form of state statutes prohibiting employment discrimination based on tobacco use. But these statutes have been demonstrated to be the ill-conceived offspring of the tobacco lobby, whose real concern is protecting its own product and not the protection of workers. These statutes promote an unsound public health message, and offer smokers unjustified protection, even as their behavior exerts severe physical and economic harms upon society. As this Comment has illustrated, employers, if they choose to, should be free to refuse to employ smokers. Even with concerns over lifestyle discrimination, smoking has been shown to be a uniquely harmful behavior that will not automatically pave the way for further behavior and lifestyle employment discrimination.

¹⁷⁶ NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, MOTOR VEHICLE TRAFFIC CRASH FATALITY COUNTS AND INJURY ESTIMATES FOR 2004 at 8 (2005), available at <http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/PPT/2004AnnualAssessment.pdf>. Compare this to the fact that only 30 people were killed in North America in 2005 in skydiving accidents. Admittedly though, almost everyone rides in cars, and not everyone skydives. Dropzone.com, Skydiving Fatalities: 2005/North America, http://www.dropzone.com/fatalities/2005/North_America/index.shtml (last visited Mar. 26, 2006).