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Sandra M. Tomkowicz

West Chester University of Pennsylvania, stomkowicz@wcupa.edu

Susan K. Lessack

Pepper Hamilton LLP

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Where There's Smoke: Employer Policies on Smoking

Sandra M. Tomkowicz and Susan K. Lessack

In response to a recent Surgeon General's Report highlighting the dangers of secondhand smoke, employers may be increasingly pressed to balance the rights of smokers and non-smokers. Policies that attempt to control off-the-job smoking pose higher litigation risks than policies targeted specifically at eliminating smoke in the workplace. Failing to provide a smoke-free environment also may pose a risk of litigation to employers.

On June 27, 2006, the US Surgeon General issued a report, *The Health Consequences of Involuntary Exposure to Tobacco Smoke*, which concludes that “there is no risk-free level of exposure to secondhand smoke.”¹ The report recognizes that restrictions on workplace smoking are effective in reducing secondhand smoke exposure, but the only sure means of eliminating secondhand smoke exposure in the work environment is to maintain a smoke-free workplace. In the wake of the Surgeon General’s report, employer efforts to address the spectrum of issues posed by smoking and smokers in the workplace are likely to take center stage in a growing national debate. In all states except Montana, the common law doctrine of employment at-will affords an employer ample latitude to make decisions affecting its employees.² Despite the broad scope of at-will employment, employers need to consider the legal landscape of statutory restrictions and common law causes of action in making any decisions designed to respond to the growing concern over the dangers of smoke. To avoid “getting burned,” employers should take a comprehensive approach, with appreciation for potential claims that could arise from smokers and non-smokers alike.

Even before the release of this latest report from the Surgeon General, news stories had suggested that employers were becoming increasingly aggressive about eliminating smoking in the workplace and its attendant costs not only by imposing on-the-job bans, but also by adopting poli-

Sandra M. Tomkowicz is Associate Professor in the College of Business and Public Affairs and Pre-Law Advisor at West Chester University of Pennsylvania. Before joining the faculty, she practiced law at Pepper Hamilton LLP and was employed as a CPA at Touche Ross & Co. Susan K. Lessack, a partner at Pepper Hamilton, concentrates her practice in employment counseling and employment litigation. The authors, who gratefully acknowledge the research assistance of Andrew M. DeLucia, an associate with Pepper Hamilton, can be reached at stomkowicz@wcupa.edu and lessacks@pepperlaw.com, respectively.

cies based on employees' off-the-job activities. Weyco Inc., a medical benefits administrator from Okemos, Michigan, gained national attention when it gave employees an ultimatum either to quit smoking or be fired.³ Kimball Physics, a manufacturer of scientific instruments in Wilton, New Hampshire, has banned not only the use but also the possession of tobacco in company buildings and prohibits "tobacco-residuals" emitting persons (defined as anyone who has used a tobacco product within the previous two hours) from entering its workplace.⁴ And, a growing number of employers are imposing higher benefit premiums on smokers or offering incentives for cessation.⁵

These employers are motivated by a number of factors, including rising health care costs, pressure to increase productivity, and resentment of smokers by non-smokers arising from the perceptions that smokers take more frequent breaks and increase the health care cost burden on non-smokers. Regardless of the motivation, employers need to consider carefully the potential legal implications of adopting policies targeted at smokers or making employment decisions based on whether an individual smokes.

No-smoking policies, whether imposed on or off the job, carry consequences for both employers and employees. For employers, such policies may affect a hiring or retention decision, which begs the question: can smokers sue for alleged discrimination based on their status as smokers? For employees, differential treatment of smokers may hit home in the area of health care benefits, often causing smokers to pay a greater share of benefits than non-smokers. Even non-smokers have a stake in how their employers address smoking in their work environments, and some have brought claims that smoking in their workplaces has caused them harm. Future claims of this type are likely to rely on the recent Surgeon General's report and its conclusion that a smoke-free workplace is the only effective means of eliminating the risk of secondhand smoke exposure at work. As the debate about the potential harmful effects of smoking and inhalation of secondhand smoke by non-smokers continues, the potential for litigation in this area is likely to increase.

NO-SMOKING POLICIES IN THE WORKPLACE

A growing number of cities and states have enacted statutes that explicitly ban smoking in the workplace; others achieve this result by imposing bans on smoking in public places, including places where employees work.⁶ In these states, employers have a statutory obligation to ensure a smoke-free workplace for employees. In the absence of legislation, employers still may choose to implement a policy that bans smoking on the job and on employer premises.⁷ Employers must be careful to monitor and enforce the policy uniformly to avoid running afoul of federal and state anti-discrimination statutes that protect indi-

viduals from adverse employment actions or working conditions on the basis of protected characteristics.

To illustrate, enforcement of a no-smoking policy could implicate Title VII of the Civil Rights Act of 1964, which makes it unlawful for an employer "...to discriminate against any individual with respect to his...*conditions, or privileges of employment*...because of such individual's race, color, religion, sex, or national origin."⁸ Consistent with the language and intent of the statute, courts have long recognized that "Title VII applies...not only to the more blatant forms of discrimination, but also the subtler forms, such as discriminatory enforcement of work rules."⁹ In *Moore v. Inmont Corp.*,¹⁰ for example, an employer successfully defended a claim of disparate treatment on the basis of race brought by an employee whom it terminated pursuant to the company's no-smoking/automatic termination policy. The employee could not produce any evidence that the company had failed to apply its policy in an evenhanded manner to all employees, regardless of race. Although the plaintiff employee in *Moore* was not successful, *Moore* reminds employers of two very important propositions. First, compliance with a no-smoking on-the-job policy must be enforced in a consistent manner, and there should be a plan for monitoring enforcement to ensure that the policy is not being used to "target" certain employees while affording leniency to others.¹¹ Employers should investigate all complaints alleging violations of the no-smoking policy with the same degree of diligence. Second, the consequences for violating the policy should be delineated clearly and imposed uniformly. Inconsistent monitoring or unequal imposition of discipline for violations could lead to a claim for disparate treatment in contravention of federal and state anti-discrimination statutes.¹²

NO-SMOKING POLICIES GOVERNING OFF-DUTY SMOKING

More difficult questions arise when an employer seeks to implement a policy, such as hiring and retaining only non-smokers, that adversely affects an applicant or employee who engages in smoking off the job. Presently, 30 states and the District of Columbia have enacted "lifestyle" statutes that limit an employer's ability to make adverse employment decisions about an employee based upon an employee's lawful activities or use of lawful products while off-duty and away from the employer's premises.¹³ As a practical matter, these lifestyle statutes may restrict, to varying degrees, an employer's ability to terminate an employee or deny a job to an applicant who smokes tobacco.¹⁴ A policy of retaining and hiring only non-smokers, therefore, likely would be unlawful in these states.

In states without lifestyle discrimination statutes, some employers are choosing not to hire or retain smokers. These employers also are not without risk of potential claims. Unless the policy is followed for every

applicant and employee, an employer may face disparate treatment claims from smokers who are denied employment or retention and who are in different protected classes than smokers who are hired or retained. In addition, if an employer tests applicants or employees for the presence of nicotine, the employer may be subject to a common law tort claim for invasion of privacy (developed by state court judges based on cases, not statutes). This tort claim is defined as follows: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be *highly offensive* to a reasonable person."¹⁵ Although the courts have not yet addressed an invasion of privacy claim specifically in this context, an employee could argue that a test for the presence of nicotine by breathalyzer, urinalysis, or blood constitutes a "highly offensive" intrusion if an employer fails to carefully monitor the circumstances under which the test is administered.¹⁶ To reduce the risk of an invasion of privacy claim, employers should, at a minimum, follow the existing state (or relevant federal) statutory requirements applicable to drug testing or, in their absence, otherwise ensure that employee privacy interests are respected.¹⁷

Another potential claim arising from testing for the presence of nicotine is a wrongful discharge claim. If an employer terminates a current employee for refusing to take, or failing, a test for nicotine, the employee may raise a claim for the tort of wrongful discharge. The scope of a wrongful discharge claim varies widely among the states, and its success in connection with testing for nicotine would depend upon the extent to which each state's courts acknowledge an employee's right to privacy regarding off-duty conduct.¹⁸

An employer also might be subject to a disparate impact claim of discrimination based on a policy of hiring only non-smokers. In theory, a disparate impact claim is based upon the rationale that an employer should not be permitted, unless necessary to its business operations, to implement a policy or practice that appears to apply neutrally to all applicants or employees, but in fact tends to disproportionately screen out (or affect more harshly) individuals according to certain demographic characteristics, such as sex, race, or ethnicity. The success of a disparate impact claim likely will turn on statistics reflecting the demographic characteristics of smokers.

A disparate impact claim would be predicated on the argument that a preferential hiring policy for non-smokers adversely impacts a discrete class of individuals protected from discrimination under one or more of the federal or state anti-discrimination statutes, such as Title VII.¹⁹ Specifically, Title VII recognizes that it is unlawful for an employer to use "a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin" unless the employer "demonstrate[s] that the challenged practice is job related for the position in question and consistent with business necessity."²⁰ An

employee can prove a disparate impact claim by demonstrating that the employer's practice causes a disparate impact and that the employer has refused to implement an alternative practice that would achieve the asserted business objectives without resulting in the disparate effect.²¹

If an employer implements a hiring policy that excludes smokers, a smoker who is denied a job would need to demonstrate that he or she is a member of a protected class that is adversely affected by this policy.²² For example, according to the most recent statistics published by the Centers for Disease Control and Prevention for 2004, it is unlikely that a protected class of employees could show that a hiring policy that excludes smokers would result in a disparate impact on the basis of gender, race, or ethnicity, with one exception for the American Indians/Alaska Natives population. Analyzing the adult population by gender, 23.4 percent of men and 18.5 percent of women in the United States smoke.²³ Therefore, 77 out of 100 men compared with 82 out of 100 women do not smoke and would not be excluded from consideration for a job. Because a preferential hiring policy would not disproportionately affect one gender over another, no disparate impact based upon gender would be demonstrated.²⁴

Similarly, no disparate impact based upon race or ethnicity exists according to data reflecting the number of smokers in the following racial and ethnic groups: non-Hispanic Whites (22.2 percent of whom smoke), non-Hispanic Blacks (20.2 percent of whom smoke), Hispanics (15.0 percent of whom smoke) and Asians (11.3 percent of whom smoke).²⁵ The exception is the American Indians/Alaska Natives population, which has the highest incidence of smokers (33.4 percent), and could establish a *prima facie* case of disparate impact based on the present statistics.²⁶

If an employee could show a disparate impact, the employer would then need to prove the "job-relatedness" and "business necessity" for the preferential hiring policy. It is difficult to conceive of a rationale for denying all positions to all smokers on the basis that only non-smokers can perform the required tasks and, therefore, the preferential hiring policy is "job-related." Moreover, even if an employer could justify the "job-relatedness" and "business necessity" of its policy, the employee still has the opportunity to prevail on a claim by proving that an alternative practice exists that would not result in a disparate impact. For example, the employer could establish a more focused policy directed specifically at prohibiting all employees from smoking in the workplace and on company property (if secondhand smoke exposure or extended breaks for smokers is the concern) or implement a *bona fide* wellness program²⁷ (if allocating health care costs more equitably is the rationale). Although the risks of a disparate impact claim are not substantial based upon the above analysis, employers should periodically assess the potential for such a claim in the event that the demographic make-up of smokers changes significantly in the future.

SMOKING AS A DISABILITY

A smoker who is denied employment or subjected to adverse employment action because he or she smokes also may bring a disability discrimination claim. The ADA provides: “No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”²⁸

To establish a *prima facie* case of disparate treatment under the ADA and parallel state anti-discrimination laws, the plaintiff must show, among other things, that he or she is disabled²⁹—that he or she has “a physical or mental impairment that substantially limits one or more of his [or her] major life activities,” “a record of such impairment,” or that he or she was “regarded as having such an impairment.”³⁰ Conceivably, a smoker could bring claims for disability discrimination and/or “regarded as” disability discrimination if an employer refuses to hire him or her or makes other adverse employment decisions affecting him or her. As a threshold matter, a smoker would have to show that smoking substantially impairs a major life activity. To the extent that a smoker is addicted to nicotine, the smoker suffers from an addiction disorder recognized by the Diagnostic and Statistical Manual of Mental Disorders.³¹ Arguably, just as addiction to alcohol constitutes a disability under the ADA,³² so could addiction to nicotine. If smoking or addiction to nicotine is a disability, employers would be prohibited from refusing to hire a smoker because he or she smokes.³³ Although the EEOC has taken the position that smoking itself is not a disability (because it is an activity rather than impairment), the EEOC left room for the possibility that addiction to nicotine could be a disability if the addiction substantially limits a major life activity.³⁴

Most courts that have considered the issue have ruled that the smoking plaintiffs in those cases were not disabled. In *Stevens v. Inland Waters, Inc.*,³⁵ the Court of Appeals of Michigan affirmed summary judgment in favor of the employer on the employee’s claim of disability discrimination. The employee argued that the employer’s requirement that he quit smoking both on and off the job constituted disability discrimination. The appellate court disagreed, holding that the employee’s smoking and addiction to nicotine did not substantially limit his major life activities notwithstanding the effect on his ability to choose not to smoke and his ability to be without discomfort when not smoking.

In another case that reached a similar result, the US District Court for the District of Maryland stated:

“[C]ommon sense compels the conclusion that smoking, whether denominated as ‘nicotine addiction’ or not, is not a ‘disability’ within the meaning of the ADA. Congress could not possibly have intended the absurd result of 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.”³⁶

The court further reasoned that because nicotine addiction is “readily remediable,” it does not constitute a disability under the ADA.

Given the difficulty in mounting a successful claim that smoking is a disability, a more likely claim from a smoker who is denied employment or suffers another adverse employment action is a “regarded as” or “perceived” disability claim. The regulations underlying the ADA define a “regarded as” disability as

“(1) ha[ving] a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation; (2) ha[ving] a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (3) ha[ving] none of the [physical or mental] impairments defined in [the regulations] but is treated by a covered entity as having a substantially limiting impairment.”³⁷

In any case, “it is necessary that [the employer] entertain misperceptions about the individual.”³⁸

The most likely “regarded as” claim would be an argument that the employer mistakenly believes that smokers are substantially impaired and therefore make less productive employees. For example, an employer might perceive that, as a result of smoking, an employee is less energetic or more prone to being ill and missing time from work. If the employer’s fear amounts to a concern that smoking or the effects of smoking constitute a substantial impairment, then an employee may at least be able to state a *prima facie* case of perceived disability discrimination. If an employee can state a *prima facie* case, the employer must articulate a legitimate non-discriminatory reason for not hiring or for making another adverse employment decision affecting a smoker. Although this step of the burden of proof is usually *pro forma*, employers may have more difficulty in this context if the reason for not wanting smokers as employees stems from the concern that smokers are more likely to use sick days or to be less energetic and productive. That thinking may be viewed as reflecting an employer’s bias toward smoking-related health issues that themselves may be disabilities. For example, if a smoker develops a condition caused by smoking, such as emphysema, a heart condition, or lung cancer, use of sick leave or decreased productivity could be due to the effects of that condition rather than to the act of smoking itself. Consequently, an employer making a decision that is based on a smoker’s use of sick leave or decreased productivity may find itself in the position of defending a more difficult claim of discrimination based on a disability that is easier to prove, like emphysema or cancer.

DIFFERENTIAL BENEFIT COSTS FOR SMOKERS

Rather than take the aggressive position of refusing to hire smokers, many employers have instead imposed higher benefit premiums or deductibles on smokers based on the view that smokers incur higher health care costs; requiring smokers to pay a greater portion of those costs than non-smokers is simply a fair distribution of an employer's expenses. Another approach offers discounts to smokers who participate in smoking cessation or other programs. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) generally prohibits employers from discriminating on the basis of an employee's health condition in determining benefit premiums or contributions. But, HIPAA recognizes an exception for a "bona fide wellness program," and allows an employer to require a higher payment from employees who do not comply with the requirements of a bona fide wellness program.³⁹ Similarly, the ADA permits employee benefit plans to impose different conditions on disabled persons provided that the difference is based on underwriting risks and is not a subterfuge to avoid the dictates of the ADA.⁴⁰

Under proposed regulations published in 2001 (final rules have not yet been circulated) by the US Department of Labor, US Department of Health and Human Services, and the Internal Revenue Service, a bona fide wellness program must have four attributes:

1. The total reward (*e.g.*, a discount, waiver of a co-payment, or absence of a surcharge) given to an individual must be limited (with a suggested limit of 10 to 20 percent of the total cost of employee-only coverage);
2. The program must be reasonably designed to promote good health or prevent disease (so, for example, participants should have the opportunity to qualify for the reward at least once per year);
3. The reward must be available to all similarly situated individuals, meaning that the program must provide an alternative to individuals for whom it is unreasonably difficult or medically inadvisable (because of a health condition) to satisfy the program's requirements; and
4. All plan materials describing the terms of the program must disclose the availability of a reasonable alternative standard.⁴¹

If an employer's bona fide wellness plan meets these standards, the employer may impose payment differentials based on whether an individual complies with the plan. An employer may require, for instance, that a smoker who refuses to participate in a smoking cessation pro-

gram (or a reasonable alternative) pay a higher benefit premium than other employees.

The proposed regulations address specifically the design of a bona fide wellness plan that seeks to curb employee tobacco use. In Example 6, the regulations review the following situation: a group health plan imposes a 10 to 20 percent surcharge on participants who are unable to certify that they have not used tobacco products within the preceding 12 months. In accordance with the requirements for a bona fide wellness program, the benefit plan materials provide that, if it is unreasonably difficult for an employee to stop smoking because of a nicotine addiction, the employee may participate in a smoking cessation program to avoid the surcharge during his or her participation, regardless of whether the employee actually stops smoking. The design of this program passes muster under the proposed regulations, which recognize that nicotine addiction is a medical condition that could make it unreasonably difficult for an employee to quit using tobacco products.⁴² Designing a bona fide wellness program offers employers a way of controlling health costs and incenting its employees to quit smoking.

POTENTIAL CLAIMS FROM NON-SMOKERS

Although the present trend is towards prohibiting smoke in the workplace, some employers either continue to allow smoking on-the-job or on company property or fail to consistently monitor and enforce existing smoking bans in their workplaces. Those employers risk potential lawsuits from non-smokers under the federal ADA (and parallel state disability discrimination statutes) and state workers' compensation statutes.

Unlike most federal statutes that ban discrimination in employment, the ADA imposes a unique affirmative duty on employers. Specifically, the ADA requires an employer to provide a reasonable accommodation to an applicant or employee with a disability who is otherwise qualified for the position, but who needs an accommodation to perform the essential functions of the job.⁴³ A reasonable accommodation includes "*modifications or adjustments to the work environment.*"⁴⁴ A reasonable accommodation must be provided unless it imposes on the employer an "undue hardship,"⁴⁵ defined as "an action requiring significant difficulty or expense."⁴⁶

In recent years, courts have seen a spate of cases brought by individuals who assert that they are disabled within the meaning of the ADA because of their sensitivity to smoke, and claim that they need the reasonable accommodation of working in a smoke-free environment or some other related modifications to their working conditions. For an employee seeking to state a claim for failure to accommodate, the most difficult hurdle to overcome is proving that he or she is disabled within the meaning of the ADA. Many of the cases raising this claim fail because the employee is unable to meet the highly individualized

burden of proving that he or she has a disability and, therefore, qualifies for the ADA's protection.⁴⁷ For example, an employee with asthma may or may not be disabled within the meaning of the ADA. Whether the asthma rises to the level of a disability depends upon whether the impairment substantially limits a major life activity, such as breathing, of that particular employee.⁴⁸ If an employee meets the threshold requirement of establishing a disability covered by the ADA,⁴⁹ an employer must be prepared to demonstrate either that it has met its affirmative obligation to provide a reasonable accommodation or that providing the accommodation would pose an "undue hardship."⁵⁰ To meet its burden, the employer must communicate with the employee to determine what accommodation(s) would be effective. The EEOC regulations require an employer to engage in a "flexible, interactive process" with its employee that is directed towards identifying a reasonable accommodation.⁵¹ An employer who complies with the regulations and engages in a "good faith" discussion with its employee should be better able to defend against a claim for failure to accommodate and to protect itself from punitive damages.⁵²

Recent cases highlight two important considerations for any employer faced with a request for a reasonable accommodation based upon an employee's sensitivity to smoke and smoke residue. First, as in any circumstance where an employee requests a reasonable accommodation, an employer must engage in an interactive dialogue with the employee. One recent decision shows the danger in failing to appreciate fully the nature of an employee's smoke-related disability and in making only half-hearted efforts to work collaboratively with the employee to accommodate the disability. In *Bond v. Sheahan*,⁵³ a correctional officer (Bond) claimed that her employer, the Cook County Department of Corrections (CCDOC), discriminated against her by, among other things, failing to provide a smoke-free environment as a reasonable accommodation for her asthma. Although CCDOC transferred Bond to other work areas, the court was not persuaded that CCDOC had met its legal obligation to Bond in light of Bond's assertions that the transfers did not eliminate her exposure to smoke and were not intended as an accommodation. The court further observed that CCDOC failed to alert Bond to vacant positions in an area of the workplace that was, in Bond's estimation, the one genuine smoke-free environment. The court's skepticism of CCDOC's efforts is revealed most plainly in its repeated references to CCDOC's "so-called reasonable accommodations." Based upon the above and other evidence, the court denied the CCDOC's motion for summary judgment, sending the case to trial on whether CCDOC had reasonably accommodated Bond.

Second, an employer should not assume that the mere existence of a no-smoking policy would satisfy its obligation to provide a reasonable accommodation. Ironically, CCDOC did enact two different no-smoking policies over a period of years, from which, the CCDOC argued, Bond

benefited. Bond asserted that these policies were not effective accommodations because the policies were never enforced, and the court agreed.

In *Service v. Union Pacific Railroad Co.*,⁵⁴ another case reaching the same result, a locomotive engineer (Service) argued that his asthma was exacerbated by exposure to smoke and smoke residue, and that Union Pacific had failed to provide him with a smoke-free environment. Here too, Union Pacific had implemented a no-smoking policy whereby “smoking [was] permitted in locomotive cabs, cabooses, company and crew hauling vehicles only if all occupants [were] agreeable.” The court acknowledged that the policy may have reasonably accommodated Service’s need to avoid direct contact with smoke, but it failed to address his sensitivity to smoke residue (which remained in the locomotive cab after other employees smoked before Service’s shift). In addition, the court determined that Union Pacific could not prove that it would have been an undue hardship to accommodate Service’s request when it had instituted a company-wide no-smoking policy two years after Service had suffered a severe asthmatic attack (and was permitted to return to work only after the new no-smoking policy was implemented). The lesson here is to review carefully the scope of any no-smoking policy and its specific application to situations in which employees must be insulated not only from smoke, but also smoke residue.

WORKERS’ COMPENSATION CLAIMS

In addition to potential failure to accommodate claims from employees whose disabilities are aggravated by smoking in the workplace, the possibility of workers’ compensation claims based on exposure to secondhand smoke or “environmental tobacco smoke” also exists. Employees who believe they were injured at work as a result of smoking by coworkers have filed workers’ compensation claims on the theory that their injuries were work-related.

To establish a workers’ compensation claim, an employee usually (depending on the state’s workers’ compensation statute) has to prove either (1) that he or she contracted an occupational disease that is directly related to the nature of the employee’s job; or (2) that he or she suffered an accidental injury that arose out of or during the course of employment. Accidental injury has been construed to mean an unexpected hazard, rather than an ordinary incident of working in a particular environment. It does not need to be a sudden event and can occur gradually over time, as injuries resulting from exposure to secondhand smoke often do.

Courts have reached varying results in considering the question of whether injuries caused by secondhand smoke are occupational diseases or accidental injuries under the controlling workers’ compensation statute. For example, the New York Court of Appeals ruled in *Johannesen v. New York City Dep’t of Housing Preservation and Development*,⁵⁵ that the employee’s bronchial asthma, which was aggravated by exposure

to tobacco smoke at work, constituted an “accidental injury” under the New York workers’ compensation statute. The employee in that case worked as an office assistant in an unventilated space, in close proximity to approximately 50 other employees, one half of whom smoked. The court held that the employee was entitled to workers’ compensation because the work environment exacerbated her preexisting asthma condition. On the other hand, the Nevada Supreme Court held in *Palmer v. Del Webb’s High Sierra*,⁵⁶ that a casino worker who claimed he suffered an occupational disease caused by inhaling tobacco smoke in the workplace was not entitled to workers’ compensation benefits because secondhand smoke is not an occupational disease uniquely incidental to casinos. Rather, “secondary smoke is a hazard to which workers, as a class, may be ‘equally exposed outside of employment.’” The court contrasted the casino worker’s claim with the situation of a coal miner who contracts black lung disease by inhaling coal dust, which is incidental to the character of coal mining.

Employers should be cautious when deciding whether to take the position that an employee injured because of exposure to secondhand smoke is not entitled to workers’ compensation benefits because that argument may expose the employer to a negligence claim. In *McCarthy v. State of Washington Dep’t of Social and Health Services*,⁵⁷ the Supreme Court of Washington held that an office employee who was continuously exposed to cigarette smoke could pursue a negligence claim against her employer after she was denied workers’ compensation benefits. The Washington Department of Labor and Industries had denied the employee’s claim for workers’ compensation benefits on the ground that her pulmonary lung disease (which she alleged was due to secondhand smoke) was not an occupational disease. The employee then brought a common law negligence claim against her employer. Although workers’ compensation is generally the exclusive remedy for claims against employers based on work-related injuries, the court held that the exclusive remedy of the workers’ compensation statute did not apply if the employee’s work-related disease was found to fall outside the statute’s coverage. Moreover, the court ruled that the employer in that case, the State of Washington, had a duty to provide a safe workplace, which encompassed the obligation to provide a work environment reasonably free from tobacco smoke.

CONCLUSION

As employers attempt to address the growing concerns about the health hazards of smoke in the workplace and the increased costs and employee relations issues of having smokers in the workforce, they face a range of potential claims from both smokers and non-smokers. Employers attempting to navigate the issue find little guidance in the sparse case law. Further, employers in states with lifestyle laws are

constrained in addressing off-duty smoking. Recognizing that the full scope of employers' rights is yet to be determined, whatever route an employer decides to take should be informed by an evaluation of the following legal issues.

Whether to Prohibit Smoking in the Workplace

- If the jurisdiction in which the employer does business has a law banning smoking in workplaces, then this question is answered easily. Employers complying with these no-smoking bans must enforce the bans consistently and uniformly or risk a claim of differential treatment under an anti-discrimination statute.
- If the jurisdiction in which the employer does business does not have a law banning smoking in the workplace, the employer has the right to allow smoking but should recognize the legal and health risks of doing so. Employees who feel harmed by smoke in the workplace could request that the workplace be smoke-free as a reasonable accommodation. Or, employees might claim that exposure to smoke causes injury covered by workers' compensation. The recent Surgeon General's report provides compelling evidence to support an employee's claim that secondhand smoke exposure cannot be eliminated at work unless the environment is smoke-free.

Whether to Refuse to Hire/Retain Smokers

- If the jurisdiction in which the employer does business has a law that prohibits the employer from making decisions based on what an employee does outside of work (lifestyle law), then the employer is barred from refusing to hire or retain an employee based on whether the employee smokes.
- If the jurisdiction in which the employer does business does not have a lifestyle law, then the employer can consider whether making an employment decision based on an individual's smoking status is appropriate. In making that decision, employers should weigh the risk of potential claims from smokers who are not hired or retained because of the policy (including disability discrimination claims, other discrimination claims if the policy is not applied uniformly, disparate impact claims, and common law claims) against the risk of potential claims from non-smokers exposed to smoke residue on the smokers, in addition to the impact on health costs, productivity, and employee relations. Any approach that the employer

decides to take regarding smokers in the workplace should be used consistently.

- If the employer prefers not to ban the hiring of all smokers, it may consider a less aggressive alternative, such as the use of a bona fide wellness program to impose higher costs on smokers who decline participation in the program.

In addition to these legal considerations, employers should be mindful of the broader policy implications of their decisions. Employees may perceive any policy directed towards controlling their off-duty conduct as a further encroachment upon an already diminishing sense of privacy in their personal lives. This perception is likely to affect employee morale and sense of loyalty toward their employers. Further, policies addressing off-duty smoking may limit the ability of employers to attract and retain talented individuals who smoke but otherwise are willing and able to observe more limited workplace bans on smoking. The most prudent course is a measured one, balancing the respective interests of smokers and non-smokers as well as the long-term needs and objectives of the business.

NOTES

1. Office of the Surgeon General, US Department of Health and Human Services, *The Health Consequences of Involuntary Exposure to Tobacco Smoke (2006)*, <http://www.surgeongeneral.gov/library/secondhandsmoke/report/>.
2. Bradley T. Ewing, Charles M. North & Beck A. Taylor, "The Employment Effects of a 'Good Cause' Discharge Standard in Montana," 59 *Ind. & Lab. Rel. Rev.* 17, 18 (2005) (noting that Montana's Wrongful Discharge from Employment Act established "the first and so far only 'good cause' standard for discharge in the United States").
3. Jeremy W. Peters, "Warning: Cigarette smoking may be hazardous to your job," *N.Y. Times*, Feb. 8, 2005, at C5.
4. Martha Nolan McKenzie, *N.Y. Times*, Dec. 29, 1996, at 3.13.
5. Randy Dotinga, *Christian Science Monitor*, Jan. 11, 2006, at 15.
6. Mark A. Rothstein, Charles B. Craver, Elinor P. Schroeder & Elaine W. Shoben, 1 *Employment Law* § 1.24, nn.1-10 and accompanying text (3d ed. Supp. 2006).
7. A unionized employer may be required to bargain to impasse in good faith before unilaterally implementing a ban on smoking in the workplace. *See, e.g.,* NLRB v. Hi-Tech Cable Corp., 128 F.3d 271 (5th Cir. 1997).
8. 42 U.S.C. § 2000e-2(a) (2000) (emphasis added). Two other federal statutes, the Age Discrimination in Employment Act (ADEA) (prohibiting age discrimination against persons 40 years old and older) and the Americans With Disabilities Act (ADA) (prohibiting disability discrimination), contain the same operative language as Title VII and likely would protect an employee from discriminatory enforcement of a no-smoking policy on the basis of age and disability status. *See* ADEA, 29 U.S.C. § 623(a)(1) (2000) (prohibiting discrimination with respect to "terms, conditions or privileges of employment"); ADA,

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42 U.S.C. § 12112(a) (2000) (prohibiting discrimination with respect to “other terms, conditions, and privileges of employment”).

9. *Chesheir v. Liberty Mutual Ins. Co.*, 713 F.2d 1142, 1148 (5th Cir. 1983).

10. 608 F. Supp. 919 (W.D.N.C. 1985).

11. *See Chesheir*; 713 F.2d at 1149–1150 (finding that employer engaged in discrimination when it applied its “no law school” policy more leniently to similarly situated male employees by turning a deaf ear to rumors concerning male employees while aggressively investigating allegations that female employees were attending law school). A disparate treatment claim also could arise where an employer imposes a no-smoking policy on only some job classifications that are staffed exclusively, or significantly, by members of a protected class.

12. Consistent monitoring and enforcement of a no-smoking policy also should aid an employer in successfully defending a claim by an employee that the company is retaliating by targeting the employee for violations of the company’s no-smoking policy because the employee engaged in protected activity within the meaning of various federal and state anti-discrimination statutes. *See Cobb v. Anheuser Busch, Inc.*, 793 F. Supp. 1457 (E.D. Mo. 1990) (rejecting plaintiff’s claim of retaliation where company’s rules were applied uniformly).

13. Ariz. Rev. Stat. Ann. § 36-601.02(f) (2003) (public employees); Cal. Lab. Code 96(k) (West 2003); Colo. Rev. Stat. § 24-34-402.5 (2005); Conn. Gen. Stat. Ann. § 31-40s, 31-51q (West 2003); D.C. Code Ann. § 7-1703.03 (LexisNexis 2001); 820 Ill. Comp. Stat. Ann. 55/5 (West 1993); Ind. Code Ann. § 22-5-4-1 (West 2005); Ky. Rev. Stat. Ann. § 344.040(3) (LexisNexis 2005); La. Rev. Stat. Ann. § 23:966 (1998); Me. Rev. Stat. Ann. tit. 26, § 597 (Supp. 2005); Minn. Stat. Ann. § 181.938 (West 1993); Miss. Code Ann. § 71-7-33 (West 1999); Mo. Ann. Stat. § 290.145 (Vernon Supp. 2006); Mont. Code Ann. § 39-2-313 (2005); Nev. Rev. Stat. Ann. § 613.333 (LexisNexis 2006); N.C. Gen. Stat. § 95-28.2 (2005); N.D. Cent. Code § 14-02.4-01 (1997); N.H. Rev. Stat. Ann. § 275:37-a (LexisNexis 1999); N.J. Stat. Ann. § 34:6B-1 (West 2000); N.M. Stat. 1978 § 50-11-3 (2000); N.Y. Lab. Law § 201-d(2) (McKinney 2002); Okla. Stat. Ann. tit. 40, § 500 (West 1999); Or. Rev. Stat. § 659A.315 (2003); R.I. Gen. Laws § 23-20.10-14 (Supp. 2005); S.C. Code Ann. § 41-1-85 (Supp. 2005); S.D. Codified Laws § 60-4-11 (2003); Tenn. Code Ann. § 50-1-304(e)(2) (1999); Va. Code Ann. § 15.2-1504 (2003) (public employees); W. Va. Code Ann. § 21-3-19 (LexisNexis 2002); Wisc. Stat. Ann. § 111.35 (West 2002); Wyo. Stat. Ann. § 27-9-105(a)(iv) (2005).

14. An employer operating in multiple states must examine each state’s lifestyle statute to determine the scope of the restrictions imposed on its ability to take adverse action against an employee who smokes off-the-job. Some lifestyle statutes, for example, generally prohibit an employer from discharging an employee for off-the-job smoking but permit an employer to take such action if the off-duty smoking affects the employee’s ability to perform his or her job; impacts the safety of others, *see, e.g.*, Nev. Rev. Stat. Ann. § 613.333 (LexisNexis 2006); conflicts with a bona fide occupational requirement; or is at odds with a non-profit employer’s purpose in discouraging the use of a specific product. *See, e.g.*, Mont. Code Ann. § 39-2-313 (2005).

15. Restatement (Second) of Torts § 652A (1965) (emphasis added).

16. The ADA may provide another basis for a claim. Specifically, the ADA restricts an employer’s ability to make certain health-related inquiries and to require and use the results of medical examinations. *See* 42 U.S.C. § 12112(d). Whether a test for nicotine would be permissible under the ADA and provide a basis for a legal challenge is a question beyond the scope of this article.

17. See John B. Wefing, "Employer Drug Testing: Disparate Judicial and Legislative Responses," 63 *Alb. L. Rev.* 799 (2000) (concluding that private employers, in most states, are permitted to engage in pre-employment testing, post-accident testing, reasonable suspicion testing, random testing, and testing during a regularly scheduled physical exam as long as the testing is "carefully carried out with adequate safeguards to protect the privacy of the employees").

18. See Ann. L. Rives, Note, "You're Not the Boss of Me: A Call for Federal Lifestyle Discrimination Legislation," 74 *Geo. Wash. L. Rev.* 553, 556–558 (2006) (noting the differing views reflected in state court decisions involving the permissible scope of drug testing that may implicate an employee's off-duty conduct); see also Deborah A. Ballam, "Employment-at-Will: The Impending Death of a Doctrine," 37 *Am. Bus. L.J.* 653, 685–686 (2000) (positing that "the most significant development with the potential to destroy the employment-at-will doctrine is the increasing concern with privacy rights" and further observing that "[d]uring the [1990s] both statutory and common law protections for employee privacy rights expanded and continued to grow").

19. Disparate impact claims also are recognized under the ADA. See *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003). Further, in *Smith v. City of Jackson*, 544 U.S. 228 (2005), the US Supreme Court held that a disparate impact claim is cognizable under the ADEA. Under the ADEA, an employee will need to demonstrate that a preferential hiring policy for non-smokers adversely affects persons 40 years old or older. Unlike Title VII, however, an employer is not required to prove job-relatedness and business necessity, but rather that the policy was adopted based upon a "reasonable factor other than age." See *id.* at 240–243.

20. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

21. *Id.* at § 2000e-2(k)(1)(A)(ii).

22. To establish the adverse impact, an employee generally can use the "four-fifths rule" relied upon by the Equal Employment Opportunity Commission (EEOC) in evaluating claims of disparate impact. Under the "four-fifths rule," "[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by the Federal enforcement agencies as evidence of adverse impact." 29 C.F.R. § 1607.4(D).

23. Centers for Disease Control and Prevention, 54 *Morbidity and Mortality Weekly Report*, 1121–1124 (2005).

24. Applying the four-fifths rule, the selection rate for men is 93.9 percent of the selection rate for women (obtained by dividing 77 by 82). Since that rate is greater than 4/5 (or 80 percent), no disparate impact is shown.

25. Centers for Disease Control and Prevention, *supra* n.23. Asians have the least chance of being denied a job based on smoking because 89/100 Asians do not smoke. Applying the four-fifths rule, the selection rate for all other racial/ethnic groups will be compared to the selection rate for Asians, resulting in the following: the selection rate for Hispanics is 95.5 percent of the selection rate for Asians (85/89); the selection rate for non-Hispanic Blacks is 89.9 percent of the selection rate for Asians (80/89); the selection rate for non-Hispanic Whites is 87.6 percent of the selection rate for Asians (78/89). Each of these selection rates exceeds 80 percent and, therefore, does not reflect a disparate impact.

26. The selection rate for American Indians/Alaska Natives is 75.3 percent of the selection rate for Asians. This selection rate is less than 80 percent and, therefore, presumptively demonstrates a disparate impact.

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27. See *infra* ns.39–42 and accompanying text.
28. 42 U.S.C. § 12112(a).
29. Shaner v. Synthes USA, 204 F.3d 494, 500 (3d Cir. 2000). State courts have recognized that state anti-discrimination statutes are coextensive with the ADA. See, e.g., Rinehimer v. Cemcolift, Inc., 292 F.3d 375, 382 (3d Cir. 2002).
30. 42 U.S.C. § 12102(2).
31. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 292.9 (4th ed. 1994); see also *infra* n.42 and accompanying text.
32. See H. Rep. No. 485, 101st Congress, 2d Sess., pt. 2 at 51 and pt. 3 at 28 (1990); 29 C.F.R. § 1630.16(b) and Interpretive Guidance.
33. Whereas the ADA does not preclude employers from banning smoking in the workplace, see 42 U.S.C. § 12201(b), the statute is silent on whether employers can refuse to hire smokers.
34. EEOC Letter Re: Nicotine Addiction, 8 Nat. Disability Law Rep. ¶ 62 (Oct. 2, 1995).
35. 220 Mich. App. 212, 559 N.W. 2d 61 (1996), *appeal denied*, 456 Mich. 863 (1997).
36. Brashear v. Simms, 138 F. Supp. 2d 693, 695 (D. Md. 2001) (citing Sutton v. United Airlines, Inc., 527 U.S. 471 (1991)).
37. 29 C.F.R. § 1630.2(l).
38. Sutton v. United Airlines, Inc., 527 U.S. 471, 489 (1999).
39. 29 C.F.R. § 2590.702(b)(2)(ii). Some state lifestyle discrimination statutes also explicitly recognize that it is not unlawful for an employer to offer a health, disability or life insurance policy that provides different types or prices of coverage based upon an employee's use of lawful products as long as the differential premium rates reflect a differential cost to the employer and the employer provides employees with a statement delineating the differential rates used by insurance carriers. See, e.g., 820 Ill. Comp. Stat. Ann. 55/5 (West 1993).
40. See 29 C.F.R. § 1630.16(f) and Interpretive Guidance.
41. 66 Fed. Reg. 1421–1435 (2001) (to be codified at 26 C.F.R. § 54.9802-1(f); 29 C.F.R. § 2590.702(f); 45 C.F.R. § 146.121(f) (proposed Jan. 8, 2001); see also “Frequently Asked Questions About the HIPAA Nondiscrimination Requirements,” US Department of Labor, Employee Benefits Security Administration.
42. *Id.*, 60 Fed. Reg. 1421 at n.1 and Example 6.
43. 42 U.S.C. § 12112(b)(5)(A).
44. 29 C.F.R. § 1630.2(o)(ii) (emphasis added).
45. 42 U.S.C. § 12112(b)(5)(A).
46. 29 C.F.R. § 1630.2(p).
47. Employers also could face claims for retaliation by employees who have asserted their rights under the ADA (even if they are ultimately proven not to be entitled to a reasonable accommodation). Because an employee does not need to prove that he or she is disabled within the meaning of the ADA to raise a retaliation claim, employees generally have fared much better on retaliation claims than on an underlying disability discrimination or failure to reasonably accommodate claim. An employer's denial of an employee's request for the

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accommodation of a smoke-free workplace (which is protected activity under the ADA) could serve as the basis for a retaliation claim if the employer takes adverse action against the employee for making such a request. *See, e.g., Rhoads v. Federal Deposit Insurance Corp.*, 257 F.3d 373, 391 (4th Cir. 2001), *cert. denied*, 535 U.S. 933 (2002); *Owens v. General Motors Corp.*, 2005 U.S. Dist. LEXIS 33484 (E.D. Mo. 2005).

48. *See Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 198 (2002) (emphasizing that whether a disability exists must be determined on a case-by-case basis).

49. Courts are presently split on whether an employee also needs to prove in a failure to accommodate claim that he or she suffered an "adverse employment action" as a result of the employer's failure to accommodate his or her disability. *Compare* *Nawrot v. CPC Int'l*, 259 F. Supp. 2d 716 (N.D. Ill. 2003) (no adverse action required) with *Thursby v. City of Scranton*, Case 3:02-cv-02355-TIV (MD. Pa. 2006) (noting confusion in circuit as to whether adverse action is required).

50. In a unionized workplace, the terms of a collective bargaining agreement may be relevant to the determination of whether a specific accommodation imposes an undue hardship on an employer. 29 C.F.R. § 1630, app., § 1630.15(d); *see also* *Thursby v. City of Scranton*, *supra* n.49 (rejecting employer's motion for summary judgment where employer argued that providing a smoke-free workplace would constitute an undue hardship because it would violate its obligations under the governing collective bargaining agreement; court found that employer had not even attempted to negotiate the no-smoking issue, and that employer had negotiated no-smoking policies with other unions in employee's workplace and had since unilaterally implemented a no-smoking policy). *Cf.* *U.S. Airways v. Barnett*, 535 U.S. 391, 403 (2002) (reasoning that while it is generally unreasonable for an employer to provide an accommodation that conflicts with the terms of a seniority system, special circumstances may exist that would render that accommodation reasonable).

51. *See* 29 C.F.R. § 1630, app., § 1630.9; *see also* Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA, Question # 5 (EEOC, March 1999).

52. *See* Enforcement Guidance, Question # 5, (citing 42 U.S.C. § 1981a(a)(3)(1994)).

53. 13 AD Cases 157 (N.D. Ill. 2001).

54. 12 AD Cases 384 (E.D. Cal. 2001).

55. 84 N.Y.2d 129, 638 N.E.2d 981, 615 N.Y.S.2d 336 (N.Y. Ct. App. 1994); *see also* *Schober v. Mountain Bell Tel.*, 93 N.M. 337, 600 P.2d 283 (N.M. Ct. App.) (reversing grant of summary judgment for employer, reasoning that an allergic reaction to cigarette smoke can be an accidental injury compensable under the workers' compensation statute), *cert. quashed*, 92 N.M. 337 (1978); *cf.* *Helling v. McKinney*, 509 U.S. 25 (1993) (ruling that a prison inmate who claimed he was involuntarily exposed to secondhand smoke, causing a significant health risk, could state a cause of action under the Eighth Amendment for cruel and unusual punishment).

56. 108 Nev. 673, 838 P.2d 435 (Nev. 1992).

57. 10 Wash. 2d 812, 759 P.2d 351 (Wash. 1988).