

TO: Jim Shields
FROM: Lew Maltby
DATE: August 13, 1990
RE: **Employment Discrimination Against Smokers**

I. Background

The ACLU has long opposed employment discrimination based on private lifestyle choices which do not effect job performance.

In the past, this has been a rather infrequent problem deriving from the personal idiosyncrasies of individual employers. Recently, however, data has been developed suggesting links between certain forms of behavior and health care costs. Given the level of corporate concern over these costs, the potential now exists for discrimination on a scale previously unimaginable.

The current targets of this discrimination are smokers. It is reported that the number of companies which discriminate against smokers¹ has risen from near zero to over 10,000 in the last three years. The rate of increase appears to be geometric. If this trend continues, smokers will soon encounter discrimination comparable to that experienced by racial minorities and women.

Smokers, however, are only the first of many groups which will face this problem. There are numerous other activities which have an adverse affect on health, such as alcohol consumption, being overweight, and poor diet. As the confirming data is developed, we will see other forms of health based discrimination. The ACLU has already received its first complaint of serum cholesterol discrimination.

The long range implications of this trend are staggering. Whatever complaints we previously had about employer violations of civil liberties, at least they were confined to the workplace. We now face the prospect of employers attempting to control every aspect of our lives in our own homes.

¹ The ACLU takes no position on employer policies which restrict (or ban) smoking in the workplace in order to spare non-smoking employees from exposure to sidestream smoke.

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II. Current Activities

The ACLU has actively supported lifestyle discrimination legislation in the following states:

New Jersey - The ACLU formally endorsed Senate Bill No. 2232 outlawing discrimination against smokers. The Director personally testified in support of the bill and was in direct communication with the bill's sponsors regarding legislative strategy.

New York - The ACLU lobbied the governor's office in support of Assembly Bill No. 10727 (outlawing discrimination based on any legal off-duty conduct). The ACLU's National Taskforce on Workplace Civil Liberties joined in this effort.

Rhode Island - The ACLU endorsed and testified in support of 90-H8768 (outlawing discrimination against off-duty smokers).

ACLU affiliates in at least four other states (Illinois, Louisiana, Missouri, and South Carolina) have indicated that they would have supported recent bills in their states if they had been asked.

In addition, I have spoken out often against smoker discrimination, including an appearance on CNN.

III. Philip Morris Support

In 1988, Philip Morris gave ACLU's national office a three year grant for \$75,000 per year to support our new initiative on civil liberties in the workplace.

It was explicitly agreed that there were no conditions attached to this grant. The ACLU would not alter its positions or its priorities. We would simply carry out the program we had already planned.

Philip Morris has been scrupulously respectful of this agreement. They have not attempted to influence any of our decisions, or even to learn about them in advance.

We have, however, worked closely with their public affairs department in support of particular legislation, and in discussing alternate national strategies.

IV. Opportunities

The ACLU could make a much larger contribution to the fight against lifestyle discrimination. The assets we would bring to this effort include:

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A. Credibility - The ACLU is universally known to stand on principle. Even our staunchest opponents have never charged us with acting out of self-interest. This could be extremely valuable. The present supporters of this legislation are frequently perceived as acting out of economic self-interest even when engaged in something as apparently non-controversial as a general publicity campaign in support of the Bill of Rights.

B. Legal Expertise - The ACLU is frequently described as the nation's largest law firm. We have more experience drafting civil liberties legislation than any other organization.

This expertise could also be very useful. For example, the recently enacted Colorado statute provides for lost wages and benefits up to the date of judgement, but does not provide for post judgement loss, reinstatement, or general injunctive relief. The practical result is that a victim who has limited employment opportunities (perhaps because they work for the only large employer in an area) can not get their job back, can not receive reimbursement for the costs of relocating, and can not even get reimbursement for all their lost wages if they are not reemployed by the time of judgement. Moreover, the company can not be enjoined from future illegal conduct.

The New York bill was reluctantly vetoed by Governor Cuomo because it did not provide a clear exception to the general anti-discrimination clause for situations where legal off-duty conduct interferes with legitimate job requirements (such as conflict of interest rules and anti-nepotism policies).

C. Lobbying - The ACLU has 75 years of experience as an advocate for civil liberties, with both legislators and the public. This often involves defending unpopular causes and individuals.

The insights we have gained from this experience could allow us to offer new perspectives on this campaign. For example, experience has shown that Americans will not generally support the rights of an unpopular minority and do not respond well to appeals based on principle. They are quick to respond, however, when they see that their own rights will be violated.

This suggests that it might be more successful to focus the campaign on the threat to the rights of the majority of people who don't smoke.

It would be very beneficial if the groups which share a concern with lifestyle discrimination were to work more closely together. Please feel free to share this memo with your contacts at RJR. If they would like to discuss this in more depth, I'd be happy to fly down for a meeting.

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