June 29, 1982

MEMORANDUM TO THE TOBACCO INSTITUTE FILE

Re: Employment Discrimination Against Smokers

Recent reports indicate that an increasing number of private employers have adopted either tacit or express policies against employing people who smoke (even if they do not smoke on the job). This memorandum considers whether such policies might successfully be challenged as violations of federal laws prohibiting employment discrimination.

Although a respectable argument can be made that in some circumstances a policy against employing smokers constitutes discrimination against a statutorily protected group or individual, no federal statute or judicial or administrative authority appears to prohibit anti-smoker policies per se, and it is unlikely that any court or administrative agency would make such a ruling.[1]

I. Common Law and Constitutional Provisions

It seems clear that neither the common law nor any provision of the Federal Constitution protects smokers from discrimination by private employers. The longstanding common law rule is that absent a statute or contract to the contrary, a private employer can hire and fire employees for

[1] This memorandum does not consider the numerous state and local antidiscrimination laws that in some cases may provide broader protection than federal laws. Nor does it consider employment policies of state or federal government employers, which are subject to First Amendment and Due Process Clause restrictions not applicable to private employers.

any reason or no reason at all. Some state courts have created narrow exceptions to that rule to prohibit the discharge of an employee for reasons that would violate important public policies. E.g., Petermann v. Teamsters, 174 Cal.App.2d 184, 344 P.2d 25 (1959) (employee cannot be discharged for refusing to commit perjury on his employer's behalf); Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973)(employee cannot be discharged for exercising statutory right to file workers' compensation claim). But no court has applied such public policy considerations in matters of personal appearance or customs such as smoking.

In recent years, cases have been brought by nonsmokers seeking the declaration of a constitutional right to be free of tobacco smoke in various public places, including places of work. The courts that have considered the issue uniformly have held that there is no such constitutional right. Gasper v. Louisiana Stadium and Exposition District, 418 F.Supp. 416 (E.D.La. 1976), aff'd, 577 F.2d 897 (5th Cir. 1978), cert. denied, 439 U.S. 1073 (1979)(public stadium); Federal Employees for Non-Smokers' Rights v. United States, 446 F.Supp. 181 (D.D.C. 1978), aff'd, 598 F.2d 310 (D.C.Cir.), cert. denied, 444 U.S. 926 (1979)(federal government facilities); Kensell v. State of Oklahoma, Civ. No. 81-786-T (W.D. Okla. 1982)(state agency).

It might be argued that such decisions support the proposition that smokers have a constitutional right to compete freely with nonsmokers for employment. But this proposition has two defects. First, the courts' rejection of the argument that there is a right not to be subjected to tobacco smoke in public places does not imply that there is a converse right to smoke that cannot be burdened in any way. Second, the constitutional bases for any claimed rights of smokers or nonsmokers apply to government entities, not private employers.

Thus, grounds for challenging anti-smoker employment policies must be found, if at all, in existing federal statutes.

II. Statutory Provisions

A. Civil Rights Laws

The most significant limitations on the unbridled discretion of private employers to hire and fire employees are imposed by Title VII of the Civil Rights Act of 1964, as amended in 1972, 42 U.S.C. §§2000e et seq., and the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621 et seq. These laws prohibit employment discrimination against any person on the basis of race, color, religion, sex, national origin, or age. 42 U.S.C. §2000e-2; 29 U.S.C. §623. The laws do not expressly prohibit discrimination on

the basis of personal conduct or customs,[1] and no reported decision of the Equal Employment Opportunity Commission ("EEOC") or the courts has considered the issue of employment discrimination against smokers. There are, however, two bases on which an anti-smoker employment policy might be challenged as a violation of these laws.

A violation of Title VII (as well as the Age Discrimination Act) can be established by proof of either discriminatory impact or discriminatory treatment. Discriminatory impact was defined in Griggs v. Duke Power Co., 401 U.S. 424 (1971), in which the Supreme Court ruled that even in the absence of an intent to discriminate, a "neutral" criterion for hiring that is shown to have a disproportionate adverse effect on a statutorily protected group is unlawful unless the employer can prove that the criterion has a rational relation to job performance. Accord, Teamsters v. United States, 431 U.S. 324, 349 (1977); General Electric Co. v. Gilbert, 429 U.S. 125, 137 (1976). In Griggs, the Court applied this principle to invalidate a written "intelligence test" used by the defendant, which did not relate to performance on any particular job and which excluded more black than white job applicants.

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[1] In contrast, for example, the District of Columbia Human Rights Law, D.C.Code (1981 ed.) §1-2512, expressly prohibits employment discrimination on the basis of, among other things, "personal appearance."

The Griggs rationale has been applied broadly by the courts and the EEOC to invalidate numerous "neutral" hiring policies that are not shown to be directly job-related. Thus, for example, a company's refusal to hire applicants with arrest records has been held racially discriminatory upon a statistical showing that blacks are arrested more often than whites. Gregory v. Litton Systems, Inc., 316 F.Supp. 401, 403 (C.D.Cal. 1970), aff'd 472 F.2d 631 (9th Cir. 1972). See also Green v. Missouri Pacific R.R. Co., 523 F.2d 1290 (8th Cir. 1975)(refusal to hire applicants with conviction records held racially discriminatory); EEOC v. Trailways, Inc., 28 E.P.D. ¶32445 (D.Colo. 1981)("no-beard" policy unlawfully discriminates against black males, a substantial proportion of whom must wear beards due to a facial skin condition limited to blacks); Decision No. 72-0979, 4 FEP Cas. 840, 841 (Feb. 3, 1972)(policy against "Afro" hairdos and handlebar mustaches unlawfully discriminates against black and Spanish surnamed males); EEOC Decision No. 71-1418, 3 FEP Cas. 580 (March 17, 1971)(minimum height requirement for employment unlawfully discriminates against females and Spanish-surnamed persons).[1]

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[1] The disproportionate impact must be more than de minimus. See Green v. Missouri Pacific R.R. Co., supra, at 1295. The rule of thumb applied by the EEOC and other federal agencies is that discriminatory impact will be presumed only if the rate of acceptance of minority group members is less than 80 percent of the rate of acceptance of nonprotected group members

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Under the discriminatory impact theory, if it could be established that any group protected under Title VII or the Age Discrimination Act (i.e., racial or national minorities, women, religious minorities, or older persons) contains proportionately more smokers than a non-protected group (i.e., white males), it could be argued that the "neutral" anti-smoker policy has a discriminatory impact on the minority group containing more smokers. Although it might be difficult to establish the proportions of smokers among various groups on a nationwide scale, it should be possible and equally effective to prove that a disproportionate number of applicants who are rejected under an anti-smoker policy are members of protected minority groups. Compare Gregory v. Litton Systems, supra (national statistics used to show discriminatory impact) with Green v. Missouri Pacific, supra (discriminatory impact shown by statistical analysis of available labor pool and of actual job applicants).[1]

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(e.g., if an employment criterion results in acceptance of 50 out of every 100 white applicants and 45 out of every 100 black applicants the criterion is not presumed to discriminate because the black acceptance rate is 90 percent of the white acceptance rate). See EEOC Uniform Guidelines on Employee Selection Procedure §4(D), 29 C.F.R. §1607.4(D).

[1] Hence, if during the past year the job applicants at a particular company with an anti-smoking policy consisted of 100 white males and 100 black males, and if only ten of the whites smoked while forty of the blacks smoked, the "neutral" policy would have a clearly disproportionate impact on the black applicants.

The burden would then shift to the employer to prove that the anti-smoker policy was job related. The employer might seek to show, for example, that studies show that smokers have higher rates of absenteeism and job related disabilities than nonsmokers.

Whether the above arguments for or against any particular anti-smoker policy prevail would of course depend on the facts and evidence introduced in each case. In view of the number of groups protected by Title VII, however, the discriminatory impact analysis offers at least a possibility that anti-smoker policies might be vulnerable to challenge in certain cases.

Unlike discriminatory impact, discriminatory treatment involves proof of an intent to discriminate. In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), the Supreme Court held that in order to prove a prima facie case of discriminatory treatment, a rejected job applicant need only demonstrate that he or she was a member of a protected group qualified for the job sought, and that the employer continued to seek other applicants of similar qualifications for the job. The employer then must "articulate some legitimate, nondiscriminatory reason for the employee's rejection." Id. If such a reason is presented, the burden shifts back to the employee to prove that this reason is merely a pretext for discrimination. Thus, if a black job applicant who smoked were rejected in favor of a

white applicant who did not smoke, the black applicant might be able to show that the ostensible reason for his rejection -- an anti-smoker policy -- was in fact a pretext for discriminating in favor of white applicants. Since this type of claim requires some showing of discriminatory intent, however, it is more difficult to prove than a discriminatory impact claim, and situations in which antismoker policies demonstrably are used as a coverup for racial or other discrimination are likely to be rare if not nonexistent.

Neither the discriminatory impact nor the discriminatory treatment rationale would appear to permit a direct challenge to anti-smoker policies. Even the EEOC, which in the past has not been reluctant to expand the reach of the antidiscrimination laws to their limits, always has based its actions on an ostensible link to an explicitly protected group. For example, its controversial regulations prohibiting "sexual harassment" are based on the theory that such conduct subjects employees (primarily but not necessarily women) to conditions of employment that would not exist but for the employees' sex. 29 C.F.R. §1604.11; see Barnes v. Costle, 561 F.2d 983 (D.C.Cir. 1977). By the same token, the EEOC and the courts consistently have declined to prohibit discrimination against homosexuals, since such discrimination is based on sexual orientation rather than on sex or on any other protected category listed in Title VII. E.g., DeSantis

v. Pacific Telephone and Telegraph Co., 608 F.2d 327 (9th Cir. 1979); EEOC Decision No. 77-28, E.P.D. ¶6578 (Aug. 11, 1978).[1] Therefore, it seems highly unlikely that the EEOC or any other federal agency or court would extend Title VII or related laws to bar employment discrimination against persons other than those within such expressly protected categories.

B. Other Labor Laws

Although Title VII and related antidiscrimination laws offer the strongest basis for challenging anti-smoker employment policies, several other laws may support such a challenge in limited circumstances. For example, under Section 8(d) of the National Labor Relations Act, 29 U.S.C. §158(d), an employer is required, among other things, to bargain with its employees' union over "terms and conditions" of employment. Work rules relating to smoking by employees on plant premises clearly are included within this provision.

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[1] Notably, the court in DeSantis rejected a claim that discrimination against homosexuality actually constituted unlawful discrimination against males on the basis of sex. The plaintiffs argued unsuccessfully that since a larger percentage of males than females are homosexual, an anti-homosexual policy had a discriminatory impact on males and therefore was unlawful under the Griggs doctrine. The court majority held that the discriminatory impact test was intended mainly to protect blacks and women from "traditional" discrimination, and could not be used to "bootstrap" members of a group such as homosexuals not expressly protected by Title VII into one of the expressly protected categories. DeSantis, supra, at 330-31. If other courts were to adopt the same approach, challenges to anti-smoker policies based on a discriminatory impact analysis would not likely be successful.

See, e.g., Johns-Manville Sales Corp. v. Machinists Local 1609, 621 F.2d 756 (5th Cir. 1980); Gallenkamp Stores Co. v. NLRB, 402 F.2d 525, 529 n.4 (9th Cir. 1968); Winter Garden Citrus Cooperative v. NLRB, 238 F.2d 128, 129 (5th Cir. 1956). Therefore, it could be argued that since an anti-smoker policy affects the terms and conditions of employment, it cannot be implemented without union agreement. This argument, of course, would not be available in cases involving nonunion employees.

Another limited restriction on employers' hiring practices is imposed by the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. §§2012, 2021 et seq. This law requires that eligible veterans must be reemployed for at least one year in their former or similar positions unless the circumstances of the private employer have changed substantially enough to make reemployment of the veteran impractical or unreasonable. 38 U.S.C. §2021. Additionally, any private employer with government contracts or subcontracts of more than $10,000 must have an affirmative action plan for the hiring of veterans. 38 U.S.C. §2021. Accordingly, if a company's policy against hiring smokers precluded reemployment of a veteran who smoked, the policy might be held unlawful. Moreover, if the private employer had substantial government contracts, and if it could be shown that proportionately more veterans than nonveterans smoked, the

nonsmoker policy would arguably be contrary to the purposes of the affirmative action requirements under a rationale similar to that of Griggs.

Finally, under the Rehabilitation Act of 1973, 29 U.S.C. §§701 et seq., an employer with government contracts in excess of $2500 must take affirmative action to hire and promote handicapped persons. 29 U.S.C. §793(a). The term "handicapped" is defined in 29 U.S.C. §706(6) as a physical or mental impairment that substantially limits one or more of a person's major life activities. Although this definition appears to connote serious disabilities, the following argument might be made: the only possible basis for a flat refusal to hire smokers is an assumption by the employer that smoking impairs the health of the smoker; such impairment would limit the smoker's ability to engage in major life activities; therefore, by the employer's own assumption, smokers are "handicapped" within the meaning of the statute, and may not be denied employment solely because of their smoking. Such an argument is tenuous, however, and in any event does not appear to be an attractive contention for the industry to advance.[1]

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[1] In fact, laws protecting the handicapped are more likely to be utilized successfully by nonsmoking employees. In Wing v. Scribner, E81-1075 (Maine Human Rights Comm. July 2, 1981), for example, an investigator of the Maine Human Rights Commission found probable cause to believe that the Maine Department of Finance and Administration had discriminated against an employee who claimed to be allergic to

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III. Conclusion

A private employer's broad discretion to set criteria for the hiring and firing of employees has been limited by various federal laws, particularly Title VII of the 1964 Civil Rights Act. Although neither Title VII nor any other federal law prohibits private employers from refusing to hire persons on grounds of personal conduct or custom such as smoking, the courts have read Title VII to mean that any general employment criterion that is not demonstrably related to the business functions of the employer is improper if it has a substantially disproportionate adverse effect on any statutorily protected group. A flat policy of refusing to employ smokers therefore may be vulnerable if any expressly protected group of job applicants is disproportionately affected by such a policy and if the employer is unable to prove that an employee's personal decision to smoke (even off the job) is directly related to any of the employer's legitimate business interests. Similarly, in particular cases an anti-smoker policy could be invalidated by proof that the policy is merely a coverup for discrimination against a protected group or individual.

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tobacco smoke by failing to provide the employee with a smoke-free work environment. The investigator found that the employee's allergy was a "physical handicap" within the meaning of the Maine Human Rights Law.

Other labor laws provide more limited bases for challenging anti-smoker policies in particular situations. No federal law, however, would appear to permit a challenge to anti-smoker policies solely on the grounds that such policies are in themselves impermissible. Thus, persuasion and publicity are likely to be more successful than legal challenges in reducing the spread of anti-smoker policies among private employers.

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