

Employment Discrimination Based on Employee Lifestyles
Draft Report for the ACLU
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By John M. Schloerb

Introduction

Employers across the United States are adopting policies that discriminate against employees on the basis of lifestyle preferences. Increasingly, employees who smoke, overeat, have high cholesterol levels, do not wear seatbelts, or pursue various other lifestyle choices are suffering significant penalties ranging from outright termination to paying more for their employer-provided health benefits. This brief report, compiled for the American Civil Liberties Union, looks at a number of lifestyle choices that employers have singled out as a bases for discrimination.

Background

Employers in recent years have attempted new methods to harness the rapidly increasing costs of health care benefits. According to some estimates, health care costs for many employers are rising at ten to thirty percent per year.¹ Some employers assume rising health care costs are attributable to certain lifestyle choices made by their employees. Such choices include smoking, overeating, failing to exercise, or eating foods with low nutritional value and/or high fat content.

The assumption that lifestyle choices are the prime contributors to rising health and insurance costs is controversial. Other factors such as the cost of technology, aging of the population and unnecessary use and abuse of the health care system have all been cited as contributory factors in rising health care costs. While all of these factors likely play a role in escalating costs, employers have limited or no control over these forces. Employers do, however, have control over employees.

In an effort to control costs, employers have asked employees to take responsibility for certain lifestyle decisions that they say add to health care costs. Some employers are forcing employees to make lifestyle changes or face dismissal. Others, refuse to hire employees because of their lifestyle choices and in other instances, employees are charged a "surcharge" for their health coverage.

¹See Stascia, A New Look at Wellness Plans: Well-Designed Programs Trim Fat from Health Care Tab, Bus.Ins.Feb. 18, 1991, at 53.

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While the law provides no constitutional protection against such discrimination in most cases, many employees have been able to sue their employers under state or federal civil rights legislation. In addition, groups around the country have successfully campaigned to pass legislation explicitly making various forms of lifestyle discrimination illegal.

What follows is a description of several categories of employee lifestyle choices that employers have used as bases of discrimination. Some employers use only one category to discriminate, while others use all or a combination of several categories.

Smoking

During the last decade, many U.S. employers have adopted workplace smoking policies that designate sections of their workplaces as smoking and nonsmoking. Some employers have banned smoking in the workplace. Increasingly, however, employers have adopted employment practices that discriminate against smokers. Smoking during nonwork hours is used as a criterion for hiring, firing and promotion decisions. These decisions are made based on off-duty smoking and are made irrespective of other qualifications on the job, or adherence to on the job workplace smoking policies.

According to a 1989 study of 283 companies by the Administrative Management Society, six percent of employers will not hire someone who smokes, even though the smoking is done at home.² Another four percent of these employers were considering implementing such a policy.³ Among employers who refuse to hire smokers are: Turner Broadcasting Systems, Inc. of Atlanta; Letho Industries Printing Co. of Raleigh, North Carolina; and New Brunswick Scientific Corp., a medical equipment manufacturer.⁴ Cardinal Industries, another employer that refused to hire smokers, boldly states that it "only hires nonsmokers and gives every applicant a urine test and promises to fire those who say they have quit, but don't."⁵

Actual cases of employees being fired for smoking at home have been reported. Janice and Sean Bone, mother and son, were both fired in 1989 from the Ford Meter Box Company in Wabash, Indiana after the employer found traces of nicotine in their urine tests.⁶ The firing was in accordance with company policy, in place since 1987, that did not permit employees hired after that date to smoke even at home. The policy did, however, allow employees hired before 1987 to continue smoking and even allowed those employees to smoke in designated areas of the workplace.

²See Administrative Management Society Foundation, 1989 AMS Smoking Policies Survey 11 (1989)

³Id.

⁴See Garner, Fair Treatment for the New Minority, unpublished paper on file with the ACLU. For a longer list of employers that only hire nonsmokers see W. Weis & B. Miller, The Smoke-free Workplace 176 (1985)

⁵Advice to Applicants--Looking For a Job? Don't Smoke, 25 Law Off. Econ. & Mgmt. 340 (1984-85) (cited in Garner, supra note 6).

⁶See American Smokers Alliance Publication, Company Fires Employees for lighting Up at Home, Winchester News Gazette, March 23, 1990.

Other employers have taken less drastic steps to penalize smoking employees for their lifestyle decisions. A growing number of employers are now asking smoking employees to bear a larger proportion of their health care costs than nonsmoking employees. At Baker Hughes Inc., a Houston-based oil field manufacturer, employees who use tobacco products are forced to pay a \$10 per month surcharge to offset what the company says is added burden their habit places on the company's health insurance.

Lutheran Health Systems, a hospital and nursing home chain, now charges smokers ten percent more than nonsmokers for insurance because the company says smokers' health claims are higher.⁷ According to Lutheran's benefits manager, the higher premium also applies⁸ to employees whose dependents smoke, even if the employee is a nonsmoker.

U-Haul International, a truck and trailer rental firm, charges its smoking employees an extra \$5 every other week for health insurance. Pointe Resorts, which operates three hotels in Pheonix, will pay only half of the insurance premium for its executives who smoke, while non smoking executives get ninety percent of their premiums covered.¹⁰

Insurance companies have also used smoking as a basis of discrimination. King County Medical Blue Shield of Seattle, beginning in 1990, offers discounts on group insurance policies to employers who can certify that ninety percent of their employees are nonsmokers and that they maintain a smoke-free workplace.¹¹ The insurer will also pay seventy-five percent of the cost of smoking cessation programs taken by employees.

⁷ See Schachner, Wellness Plan Penalizes Tobacco Users, Bus. Ins., January 8, 1990, at 1.

⁸ See Employers Look at Employee Lifestyles in Attempt to Control Escalating Costs, 17 Pens. Rep. (BNA) No. 24, at 1026 (June 11, 1990).

⁹ See id.

¹⁰ See Crenshaw, Better Benefits for the Fittest; More Companies Rewarding Wellness, Washington Post, March 11, 1990, at H1.

¹¹ See Employers Look at Employee Lifestyles, supra note 8.

Obesity

Many of the same employers have also targeted overweight employees for similar discriminatory treatment. In addition to discriminating against smokers, U-Haul pays employees who do not maintain a "proper weight" less than employees who keep their weight within company limits. Pointe Resorts also applies the same discriminatory standards to the obese as it does to smokers: the company pays forty percent more of the insurance costs of employees with a normal weight than of those who are overweight.¹² These companies argue that this unequal treatment is justified because of the added costs overweight individuals place on company health plans.

Some employers, however, are not as certain that weight is an appropriate factor upon which to base such discrimination. Theodore Evers, benefits manager for Lutheran Health, said his company considered treating overweight employees the same way it treated smoking employees, but decided that not enough studies had been made to draw a clear enough connection between weight and health costs to justify such treatment. He added that the firm would consider adding a surcharge on other lifestyle behaviors as this connection was proven for them.¹³

A significant number of employees have also suffered outright termination or otherwise have been denied jobs because of their obesity. In the last ten years, employees have drawn attention to this form of discrimination by bringing and, in some cases, winning lawsuits against employers under state and federal civil right legislation.¹⁴ In one of the earliest successful cases, the New York Court of Appeals held that the Xerox Corporation violated New York Human Rights Law by denying Catherine McDermott a job because of her obesity.¹⁵ The Court rejected the company's claim that it had a right to deny employment because of the likely future health costs her condition would create for the company. The Court said that "employment may not be denied because of any actual or perceived undesirable effect the person's employment may have on disability or life insurance programs."¹⁶

¹²See Crenshaw supra note 10.

¹³See Employers Look at Employee Lifestyles, supra note 8.

¹⁴See, e.g., Russell v. Salve Regina College, 890 F.2d 484 (1st Cir. 1989), cert. granted, in part, 110 S. Ct. 3269 (1990) (holding that nursing college breached contractual relationship with student by forcing her to withdraw because of her obesity); Commonwealth v. Philadelphia Elec. Co., 448 A.2d 701 (Pa. Commw. Ct. 1982) (reversing decision of Pennsylvania Human Relations Commission that found employer violated state law by denying employment on the basis of obesity); Man Weighing 270 Pounds Wins Discrimination Suit, N.Y. Times, Nov. 25, 1988 (describing state administrative law judge decision that employee was victim of weight discrimination); Fired Firefighter Sues to Prove he Was Fit, Chicago Tribune, July 22, 1988, at 3 (describing suit filed by 260 pound employee with Michigan Civil Rights Commission who charged he suffered discriminatory firing).

¹⁵State Div. of Human Rights ex rel. McDermott v. Xerox Corp., 480 N.E.2d 695 (N.Y. 1985)

¹⁶Id., at 697.

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This victory against discrimination in New York, however, has not stopped employers in other states from using an employee's weight as a rationale for termination. In Michigan, for instance, Donna O'Leary was fired from her job as a bus driver for the Kearsley School District because she failed a physical exam mandated by the state.¹⁷ O'Leary, who weighs more than 368 pounds, was unable during the exam to run in place for three minutes. Although other drivers, who also failed the test due to medical problems, were allowed to keep their jobs after receiving medical treatment, O'Leary was simply terminated after 26 years employment.

Aside from these explicit examples in which employers acknowledge discriminating against employees based on their obesity, it is likely that many more overweight individuals are passed over in hiring or promotion. A University of Pittsburg study of 850 males showed that those who were twenty percent overweight earned roughly \$4,000 per year less than their average weight colleagues.¹⁸ The same research team tried to study differences in salary among women managers, but could not identify enough overweight women in management to make an adequate statistical sample. Ann Morrison of the Center for Creative Leadership, a business research company in Greensboro, North Carolina, explained: "Bosses interpret weight gain in a woman employee as a signal that she's abandoned hope of rising higher."¹⁹ Apparently, discrimination against the overweight, especially women, is pervasive in business.

¹⁷ See McDonald, Woman Loses Job After Failing Physical; School Bus Driver Fired Due to Excess Pounds, Flint Journal, Sept. 25, 1990 at C1.

¹⁸ See Extra Pounds Can Weigh Down your Career, Bus.Wk., Aug. '8, 1987, at

¹⁹ Id.

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Cholesterol Levels

Outright discrimination based on an employee's cholesterol level has been less pervasive. However, in at least one instance cholesterol testing was made a requirement for hiring. According to the ACLU director in Athens, Georgia, John O'Looney, the city government in Athens in 1990 initiated a health screening for prospective city workers. In order to be offered a job, an applicant had to have a cholesterol level in the top seventy-five percent of such readings nationally. In other words, if the applicant's cholesterol level was among the bottom twenty-five percent for individuals in the nation, he or she was simply ineligible for the position. Luckily, for those applicants, the city withdrew this requirement after discussions with the ACLU and other groups.

More commonly, employers will use the employee's cholesterol level as one measure to health to determine the amount employees must pay for their health insurance. At Coors Brewing Company in Golden, Colorado, the company encourages employees to undergo a health assessment by promising to reduce their contribution to the company health plan by ten to fifteen percent if they can show their health and lifestyle conditions place them as "not at risk."²⁰ Coors uses an employee's cholesterol level as one measure of health risk. It also looks at such factors as smoking, blood pressure, and seatbelt use. The Coors program, like a similar one at Texas Instruments, subjects not only employees, but their spouses to such testing in order to get this discount in health insurance costs.

It is interesting to note that some employers that have used lifestyle decisions as a basis of discrimination do not include cholesterol levels as factors. Baker Hughes, which has established one of the most well-known plans, explicitly refuses to use an employee's cholesterol level as one of the health standards an employee must meet in order to qualify for a reduction in insurance costs. According to Joe Vinson, director of compensation and benefits at Baker Hughes,²¹ there are too many factors, including genetic, which affect cholesterol. It would therefore be unfair to penalize employees with high rates, the company feels.

²⁰ See Kertesz, Firms Tout Wellness Savings; Programs Trim Fat From Health Care Budget, Bus. Ins., Apr. 16, 1990, at 3.

²¹ See Employers Look at Employee Lifestyles, supra note 8.

²² See Stasica, supra note 1.

²³ Id.

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Other Areas of Discrimination

Employers have also been documented reducing monthly insurance premiums for employees who are tested for hypertension and receive treatment.²² Many employers now offer financial incentives to employees who participate in company "wellness" programs. One even offers a lower cost hospital deductible for employees who are injured in auto accidents and were wearing a seatbelt. Employees who do not wear seatbelts must pay a substantially higher share of the hospital expenses after an accident.²³

Conclusion: Some Problems With Lifestyle Discrimination

There is an appeal, though suspect, to employer arguments justifying lifestyle discrimination. Without legislative or judicial action, it is likely that such discrimination will grow in the next decade. As a recent issue of Business Insurance argued:

This approach [of employers providing incentives to change employee lifestyle habits] likely will, during the 1990s, bring to health insurance the same principles that have governed automobile and property insurance premium increases. In other words, like safe drivers and owners of fire-proof buildings, healthy employees will reap economic rewards.²⁴

But this analogy raises a number of troubling questions. To what extent are employee lifestyle decisions equivalent to these other means of distinguishing between people as insurance risks? An unsafe driver may pay more for insurance, but at least is still allowed to drive a car. An "unhealthy" employe, as defined by his or her employer, may be put out of a job.

Who should decide which legal lifestyle behaviors affect insurance costs to the point that companies have the right to penalize or even fire employee for engaging in them? Should any employer have the right to exclude from employment individuals who have proven themselves competent but pursue lifestyles that the employer thinks are harmful?

²⁴ Id.

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It is notable that employers disagree among themselves on which behaviors affect costs and which they have a right to penalize. Some penalize only smoking. Some penalize smoking and obesity. Others penalize both, and then go even farther. The matter of simply charging employees more for their choices is clearly not as easy as proponents of lifestyle discrimination contend. As one commentator has noted:

In theory there may be justification for differentiating in the expenditures for, and access to, health care among people with differentiating life-styles. Nevertheless, it is important to remember some obvious facts: many who jog develop orthopedic impairments; many who are overweight suffer from glandular, not eating, disturbances; a great number of chronic medical conditions are inherited; and even the most health-conscious, exercise-oriented, cautious individual²⁵ is not immune to cancer and other devastating diseases.

Proponents of lifestyle discrimination admit that the link between employee lifestyles and health costs is tenuous. Rafael E. Castillo, risk manager of Coors, noted that it is difficult to measure the success of a program like the one in his company because "no one can say with authority how much poor health and unhealthy lifestyles actually cost an employer."²⁶

Can such arbitrary decisions by employers be used as the basis to determine the quality, indeed, the existence of a worklife for American employees?

If this discrimination against employee lifestyle goes far enough, it is not hard to imagine certain groups of individuals excluded from gainful employment because of their pursuit of perfectly legal activities away from the workplace. But even if this trend goes no further, many employees around the country have suffered and will continue to suffer discriminatory punishment purely for their lifestyle choices.

²⁵Ginzberg, U.S. health Policy--Expectations and Realities, J. of the Am. Med. Ass'n., Dec. 23-30, 1988.

²⁶Hofmann, Wellness Programs' Extra Benefits Praised, Bus. Ins., May 7, 1990, at 33.

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