

Excerpt

EMPLOYERS ARE NOT JUSTIFIED IN DISCRIMINATING
AGAINST EMPLOYEES, AND PROSPECTIVE EMPLOYEES,
BASED ON LIFESTYLE AND HEALTH CHARACTERISTICS

I. INTRODUCTION & SUMMARY

Employers increasingly discriminate against applicants and employees who engage in a wide range of what are deemed to be dangerous or unattractive off-the-job activities or who are deemed to have undesirable health characteristics. For example, employers have fired, failed to hire, or penalized workers who smoke or drink while off duty, are overweight, have high cholesterol, or ride motorcycles. Multi-Developer, Inc., for instance, a Georgia property development company, refuses to hire applicants who drive motorcycles or who participate in other hobbies deemed to be hazardous.^{1/} Similarly, Fortunoff and Turner Broadcasting terminate employees who smoke off the job,^{2/} and U-Haul International docks the pay of overweight workers, allegedly to compensate for additional health care costs.^{3/} The Town Council of Athens, Georgia voted to turn away prospective

^{1/} See Zachary Schiller & Walecia Konrad, If You Light Up on Sunday, Don't Come in on Monday, Business Week, Aug. 26, 1991, at 68.

^{2/} See Janny Scott, "Smokers' Rights" Asserted Under New Job Bias Laws, Los Angeles Times, July 23, 1991, at A5.

^{3/} See James J. Luck, Keeping the Boss Out of The Living Room, State Government News 26 (July 1992) (hereinafter "Living Room"); Barbara Durr, Get Thin, Or Get Out, Financial Times, Aug. 19, 1991, at 10.

motorcycles, or bungee jump. Consequently, it is impossible to tell if money will be saved by banning certain activities or employees with particular characteristics.

Employers, and the studies upon which they rely, also tend to overlook other cost factors. As one commentator noted about charging certain employees more for health insurance: "Trying to determine a surcharge, given such factors as family history and health problems that can't be dieted or exercised away, will require elaborate calculations."⁶ Similarly, another commentator stated: "[T]he assumption that lifestyle choices are the prime contributors to rising health care 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."⁷

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B. Statistics That Employers Rely Upon Have Been Criticized and Countered

Employers and the studies that they rely on have not established that lifestyle choices and health characteristics indeed affect employer costs. As one commentator observed, a

⁶ Paula Span, Smokers' New Hazard: No Work: Health Costs Behind Job Bias Issue, Washington Post, Nov. 12, 1991, at A1.

⁷ John M. Scholerb, Employment Discrimination Based on Employee Lifestyles, Draft Report for the American Civil Liberties Union, March 8, 1991.

company discriminating on the basis of lifestyle or health "should be able to demonstrate that the behavior in question increases employer health care costs by a measurable amount. While such relationships may exist, the data currently available does not demonstrate it clearly."^{8/} In fact, a number of studies have come to conclusions contrary to those upon which employers rely. The Bureau of National Affairs, for example, conducted a study in which it found that 95% of companies that banned smoking reported no financial savings. Similarly, in a U.S. Chamber of Commerce study absolutely "no connection between smoking and absenteeism" was found.^{9/} A National Chamber Foundation 1989 Nationwide Survey found that consumption of alcohol and tobacco products proved to have "no significant affect on absenteeism."^{10/} Some studies have even found that nonsmokers are absent from work more often than smokers.^{11/} Other studies question findings that smokers are less productive. For example, a survey of bank executives found that smokers used their time

^{8/} Legislative Briefing Series, Introduction to Lifestyle Discrimination in the Workplace (hereinafter "Intro To Lifestyle Discrimination"); see also Elizabeth B. Thompson, Constitutionality of an Off-Duty Smoking Ban for Public Employees: Should the State Butt Out? 43 Vand. L. Rev. 491 (1990) (hereinafter "Constitutionality").

^{9/} Intro to Lifestyle Discrimination, supra note 8, at 2.

^{10/} Marketing Resource Group, Inc., Michigan Views on Employee Privacy Issues (Oct. 1990) (hereinafter "Michigan Survey").

^{11/} See id.

2.5% more efficiently than nonsmokers,^{12/} and some research suggests that smoking increases mental efficiency and improves mental performance.^{13/} Thus, studies upon which employers rely have, at best, questionable validity.

C. Lifestyle Discrimination Could Increase Employer Costs

There are some indications that lifestyle discrimination may actually increase employer costs. Lifestyle discrimination could cause a drop in employee productivity, because employees must concentrate on altering their lifestyles rather than on performing job duties. Furthermore, employers that retain lifestyle discrimination policies may be unable to recruit the most qualified and efficient employees. A business that discriminates against its employees based on lifestyle choices may also alienate clients that engage in activities prohibited by that business.^{14/} In fact, one company, Fortunoff, that refuses

^{12/} Id.

^{13/} Constitutionality, supra note 8, at 497, citing Wesnes, Nicotine Increases Mental Efficiency: But How?, in Tobacco Smoking & Nicotine: A Neurobiological Approach (W. Martin Ed. 1987).

^{14/} See, e.g., Jo-Ann Armao, Smoking Bill Draws Fire, Washington Post, Jan. 17, 1990, at B1.