



# **NATIONAL WORKRIGHTS INSTITUTE**

*Bringing Human Rights to the Workplace*

## **Lifestyle Discrimination:**

Employer control of legal off duty employee activities

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## INTRODUCTION

September 9<sup>th</sup>, 2004 should have been an ordinary day at work for Lynne Gobbell, an employee of Enviromate, an Alabama housing insulation company. Instead, Gobbell was fired from her job for displaying a Kerry-Edwards bumper sticker in the rear windshield of her car.<sup>1</sup> Enviromate owner and Bush supporter Phil Geddes instructed Gobbell's manager to tell her to remove the sticker from her car or she would be fired. Gobbell confronted Geddes and an argument over whether or not Geddes could tell Gobbell who to vote for ensued, with Gedes telling Gobbell to "Get out of here and shut the door." After leaving the office, Gobbell asked her manager if Gedes meant for her to go back to work or go home. At first, the manager told her to go back to work, but soon came back and said, "I reckon you're fired. You could either work for him or John Kerry."

What happened to Lynne Gobbell may seem shocking. While Americans have long accepted that employers have a certain degree of control over what employees do while at the workplace, most are unaware of the amount of control many employers attempt to exert over their employees' private lives as well. Employers are making employment decisions based on the legal off duty conduct of their employees and prospective employees. The vast majority of states are considered "at will" states, where employees can quit and employers can fire at will and without evident reason (except when statutory exceptions like race or religion apply and discrimination would have to be proven). Employers in many states have significant legal leeway to tell workers what they can and cannot do once they leave the office and an increasing number of employers are attempting to broaden their control to include what employees do in their own homes. Many employers now refuse to hire people whose private lives are deemed "unhealthy," and a few even fire current employees who do not change their lifestyle to meet new company demands.

The most common victims of this type of discrimination are smokers and overweight people. According to a 1988 survey taken by the Administrative Management Society, 6% of all employers (about 6,000 companies) discriminate against off-duty smokers. The number has almost certainly increased since then. In a 2003 Gallup Poll, smoking beat out obesity as a factor what would make a person less likely to hire someone: 20% said they would be less likely to hire someone if they were overweight, while 25% said they would be less likely to hire someone if that person was a smoker. It is more difficult to estimate the number of companies that discriminate against fat people, since this is seldom an official corporate policy. Most egregious are those companies that take adverse employment actions against employees or prospective employees for their political views or other forms of free speech.

The early Americans adopted the Bill of Rights to limit the government's involvement in their lives and modern Americans demonstrate the same unwillingness to tolerate intrusion whether by government or by employer. According to a 1990 poll by the National Consumers League, 81% of Americans believe that an employer has no right to refuse to hire an overweight person; 76% believe employers have no right to refuse to

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<sup>1</sup> Timothy Noah, "Bumper Sticker Insubordination," *Slate Magazine* (Sep. 14, 2004).

hire a smoker; and 73% believe employers have no right to require an employee or applicant to change their diet.

A 2005 survey conducted by the Employment Law Alliance, the world's largest network of employment lawyers, discovered a culture of discrimination against those who are deemed overweight, unattractive or unconventional in appearance. The survey also revealed that only 39 percent of Americans thought that employers should be allowed to discriminate on the basis of appearance—including weight, clothing, piercing, body art, or hair style—and some 16 percent also felt that they had been discriminated against because of the way they look.<sup>2</sup> Furthermore, there are employers who refuse to hire people who drink alcohol, have high cholesterol levels, or ride motorcycles as well. These employers are discriminating against legal off-duty behavior that occurs off of the employers' premises.

The driving force behind this trend is economics: Businesses have reason to worry about their employees' health because employer-sponsored health-insurance premiums have been steadily increasing and although several factors contribute to these rising costs, the only factor employers have control over is their employees. According to a 2003 survey by the American Management Association, 71 percent of executives say corporations have a "responsibility to promote wellness among employees"—which increased to 80% in 2004.<sup>3</sup> A 2004 survey found that 92% of employer respondents said that senior leaders in their organizations view health care costs as a serious business issue that must be addressed.<sup>4</sup> With such a focus in mind, attempts by employers to dominate health related aspects of their employees' lives—including diet, exercise and “high-risk” behaviors—will become increasingly likely and, without protective legislation, will succeed. Employers are essentially free to use financial penalties to force people into “healthier lifestyles.” As this brief will illustrate, however, health-related behavior is not the only area in which employers attempt to control their employees, with free speech also becoming an important issue in lifestyle discrimination.

Recognizing that refusing to hire people for reasons unrelated to job performance is unfair and often prevents the company from hiring the best-qualified person, some employers have adopted a different strategy. Employees who have lifestyles the employer considers unhealthy are required to pay more for their company health insurance. Some employers say they are charging unhealthy employees a premium over their "normal" rate, some say they are giving healthy employees a discount. Either way, one employee is paying more for their health care than another.

Such programs are rarely based on sound actuarial data. The company 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

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<sup>2</sup> John Duckers, “Watch out for the new Lookism,” *Birmingham Post* (Apr. 29, 2005), at 23.

<sup>3</sup> “More employers offering wellness programs,” *Journal of Employee Assistance* Vol. 35, No. 1 (March 2005), at 32.

<sup>4</sup> “Towers Perrin Survey Finds Consumer-Driven Health Care Strategies Jeopardized by Employer and Employee Disconnects,” (June 14, 2004) Business Wire, Inc.

not demonstrate it clearly. For example, the Bureau of National Affairs reports that 95% of companies banning smoking reported no financial savings, and the U.S. Chamber of Commerce has found no connection between smoking and absenteeism.

The methods used to enforce these policies raise independent civil liberties issues. Most employers currently take an employee's word that they are not violating the rules for off-duty behavior. Others collect information informally and still others institute policies only after finding an employee's activities objectionable. As discrimination grows more common, however, it will become more difficult to simply avoid companies with whose policies one does not comply. People will take jobs, not reveal their lifestyle, and hope the employer does not find out. When this occurs, employers will have to hire spies to follow people away from work and/or require frequent universal medical testing (such as urinalysis) in order to enforce the policy.

## **EXAMPLES OF LIFESTYLE DISCRIMINATION**

### ***Freedom of Speech***

Lynne Gobbell is not a unique case of someone being fired over politics. Glenn Hiller was fired from Octavo Designs, a Maryland advertising and design company, after—at a 2004 political rally in West Virginia—he attempted to ask President Bush about the progress of the war in Iraq and weapons he and his administration insisted Iraq possessed. Hiller had apparently offended a client who provided tickets to the event. Arriving for work the next day, Hiller was shocked to learn he had been fired. A company spokeswoman confirmed the graphic designer was fired because of his conduct at the rally.<sup>5</sup>

In April 2003, *The San Francisco Chronicle* fired Henry Norr, one of its technology reporters, one month after suspending him for taking a day off from work to protest the war in Iraq. Norr was one many protesters arrested on March 20, the day after America began bombing Baghdad. The four-year veteran of the Chronicle spent the day in jail with his wife and daughter and was charged with being a pedestrian in the road, for blocking traffic. Yet, when he filled out his timecard on March 21, he marked the missed time as a sick day. Norr claims he never hid his reasons for missing work, and that his manager signed the card the following Monday, two days before his suspension. Chronicle editor Phil Bronstein cited the falsification of Norr's timecard and an improper claim for paid sick leave as sufficient grounds for dismissal, but also suggested that Norr's political activities played a role in the decision to fire him. According to Bronstein, Norr's arrests in other protests around the Bay Area were seen as "persistent violations" of the newspaper's ethics policies. Norr, however, said his protests violated none of the Chronicle's ethics policies at the time. Since his suspension, the newspaper has amended its policies to explicitly prohibit antiwar protests by its staff members.<sup>6</sup>

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<sup>5</sup> "Man fired for Bush taunts," (August 23, 2004) *Birmingham Post* at 9.

<sup>6</sup> Chris Gaither, "REPORTER ARRESTED PROTESTING WAR IS FIRED," *The Boston Globe* (Apr. 24, 2003), at E4.

The new trend of monitoring employees' off-duty blogs has also sprung up. Some companies are developing official blogging policies and, in some instances, dismissing workers for blogging. Blogging usually takes place outside of work and off employers' premises, where employees expect privacy from their employers. A January 2005 study by the Virginia-based Society for Human Resource Management, however, found that 3 percent of employers have disciplined or fired employees for blogging from approximately May 2004 to May 2005. That compares to 18 percent that have taken similar measures for sending personal e-mails, the survey found.<sup>7</sup>

Heather Armstrong was fired in February 2002 by the Los Angeles-based software firm where she worked after venting online about the company on her blog, dooce.com. Some excerpts from her blog: Take a two-hour lunch: one hour for the bean burrito, one hour for the nap in the front seat of your car.

When Ellen Simonetti started her blog chronicling her life and work as a Delta Air Lines flight attendant, she posted some pictures of herself in uniform on her site. In October 2004, Simonetti, 30, of Austin was fired, she says, for the pictures on her blog. She has filed a complaint with the federal Equal Employment Opportunity Commission, saying the suspension amounted to discrimination, because male employees with similar online photos were not disciplined.

A highly decorated cop lost his job because of his NYPD Rant web site—a forum for disgruntled cops. Operating under the net name of “Polecat,” Police Officer Edward Polstein allowed his Finest brethren to complain about Mayor Bloomberg, top cop Raymond Kelly, pompous bosses and even the police union. Polstein created NYPD Rant in 1999 as he became increasingly frustrated at being passed over for specialized units.

In May 2005, IBM unveiled blogging guidelines for its 329,000 employees. The guidelines state that employees should identify themselves (and, when relevant, their roles at IBM) when blogging about IBM.<sup>8</sup> IBM's policy, though, goes far beyond attempting to regulate work related speech. Indeed, it includes the broad generalization: “Don't be afraid to be yourself, but do so respectfully. This includes not only the obvious (no ethnic slurs, personal insults, obscenity, etc.) but also proper consideration of privacy and of topics that may be considered objectionable or inflammatory—such as politics and religion.” Such a recommendation can certainly be seen as a muzzle on free speech.

### ***Smoking***

Weyco, a Michigan-based health-benefits-management company, began testing its 200 employees for smoking in January 2005. If employees fail random smoking tests, they will be fired. Howard Weyers, the president Weyco, told his employees they were all

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<sup>7</sup> Rachel Osterman, “Airing work gripes online may relieve you of a job Companies are setting protective policies as more employees voice their discontent in 'blogs',” (May 16, 2005) *Sacramento Bee* at D01.

<sup>8</sup> Stephanie Armour, “Warning: Your clever little blog could get you fired,” (June 15, 2005) *USA TODAY* at 1B.

going to be charged a \$50 smoking fee. The company would waive the fee for employees who passed a nicotine test or, if they failed, agreed to take a smoking cessation class. The company brought in a smoking counselor, and Mr. Weyers said that as a result, about 20 employees stopped smoking. For those who did not quit smoking, Mr. Weyers told them they had until Jan. 1, 2005. After that, mandatory testing would begin, and anyone who failed would be fired. After 14 years at Weyco, Anita Epolito decided she would go someplace else rather than be forced to give up smoking. "You feel like you have no rights. You're all alone. It's the most helpless feeling you can imagine."<sup>9</sup>

On January 1 2005, Kalamazoo Valley Community College in Michigan stopped hiring smokers for full-time positions at both of its Michigan campuses. Part-time staffers who smoke will not be hired for full-time jobs, and the 20 to 25 openings that occur each year among the college's 365 full-time staff positions will go only to nonsmokers.

In Washington, Alaska Airlines requires potential hires to take a nicotine test before granting them a job, and the Tacoma-Pierce County Health Department makes applicants sign an "affidavit of nontobacco use" and to promise to "educate" citizens caught smoking within 50 feet of the building. Schweitzer Engineering Laboratories in Pullman, Wash., warns on its Web site that it may fire anyone who starts smoking after being hired.<sup>10</sup> At Investors Property Management in Seattle, smokers are not hired. Employees who smoked before the ban was passed about two years ago are not fired; however, they can't get medical insurance through the company. In 2004, Union Pacific decided to stop hiring smokers and now asks applicants to disclose whether or not they smoke. Montgomery County, Pennsylvania is attempting to reduce health-care costs by refusing to hire smokers for county government jobs.

### ***Drinking***

In 2003, American Eagle Distributing, a Colorado Budweiser distributor fired, Ross Hopkins, a warehouse supervisor, for, what Hopkins claims was, drinking a Coors at a Greeley, Colorado bar after work. Hopkins claims the son-in-law of his employer's majority stockholder spotted him drinking the Bud. He said he was off duty and not in uniform, and his warehouse job required no contact with the public. He also said he had ordered a Budweiser, but the waitress brought him a Coors. He decided to drink it rather than wait for a Bud.<sup>11</sup>

In February 2005, Isaac Aguero, a forklift operator for CJW Inc., a Miller Brewing distributor, was fired a day after his picture appeared in a Racine, Wisconsin newspaper. The picture showed Aguero drinking a Bud Light while celebrating Racine's annual "Mardi Crawl." When he came to work the next day, co-workers told Aguero, "You're in

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<sup>9</sup> Jeremy W. Peters, "Company's Smoking Ban Means Off-Hours, Too," (February 8, 2005) *New York Times* at Section C; Column 1; Business/Financial Desk; Pg. 5.

<sup>10</sup> Shirleen Holt, "Risks of smoking could include losing your job," *Seattle Times* (October 26, 2004).

<sup>11</sup> Rob Reuteman, "This Bud should have been for you, worker told," (May 21, 2005) *Rocky Mountain News* at 2C. Also see Stephanie Armour and Julie Appleby, "Off-duty behavior can affect job," (June 13, 2005) *USA TODAY* at 4B.

trouble for drinking Bud Light." Aguero was then called into the general manager's office and fired. Aguero claims he was not given a reason and said he never had problems with his bosses. A CJW Distributing sales manager was quoted as saying the company does not publicly discuss personnel matters. A spokesman insisted the company does not dictate what kind of beer employees can drink. But a story in the *Marshfield* (Wisconsin) *News* quotes a spokesman saying, "Our employees can and should be our best ambassadors."<sup>12</sup>

### ***Weight & Diet***

At the Borgata Hotel Casino & Spa in Atlantic City, N.J. bartenders and waitresses can be fired if they gain more than 7% of their body weight. Officials say this is a recent clarification to the company's appearance policy; approximately 200 cocktail servers and bartenders—"Borgata Babes"—are covered by the policy and must submit to weigh-ins. A person in this situation is first given a 90-day unpaid suspension to lose the weight. Weight gain for valid medical reasons, such as pregnancy, are exempt, otherwise waitresses have 90 days to comply with the target weight upon return. Or they will be fired.<sup>13</sup>

In 2003, Joseph Connor, a six-foot one-inch, 420-pound applicant for the position of cook at a Connecticut McDonald's sued the restaurant. Connor had been laid off from his cook position at a mall food court and had six years of experience as a cook. McDonald's hired him but told him he couldn't begin work until his (54-inch-waist) pants and (22-inch-neck) shirt arrived, supposedly in about three days. Connor soon received a call that his shirt had arrived but not the pants. Connor waited days, then weeks and months. He called McDonald's but contended that his calls were never returned. He went to the store and saw that others hired after him were working. Finally, he sued McDonald's, contending that it "regarded" him as disabled based on his morbid obesity. He also contended that his obesity was a disability. Connor had gained over 130 pounds after being hit in the stomach by a stray bullet years earlier while weighing 270 pounds. McDonald's denied liability, contending that he wasn't disabled or regarded as disabled, but it ultimately settled the claim in a confidential settlement.<sup>14</sup>

Susan Wantland of Missouri also sued McDonald's after it took two months to get her a uniform. Wantland stood five feet one inch and weighed 320 pounds. After finally going to work, she claimed that she was scheduled for only two hours of work a day and was not allowed work up front as a cashier, although she was originally hired as one. Instead, she was required to clean the restaurant. She claims her obesity is related to a car accident. Her case is pending.

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<sup>12</sup> Rob Reuteman, "This Bud should have been for you, worker told," (May 21, 2005) *Rocky Mountain News* at 2C.

<sup>13</sup> Stephanie Armour and Julie Appleby, "Off-duty behavior can affect job," (June 13, 2005) *USA TODAY* at 4B.

<sup>14</sup> Young, Conaway, Stargatt & Taylor, "Super-size bias: the last acceptable form of discrimination?" (February 2004) *Delaware Law Letter* Volume 9, Issue 2.

In July 2003, David Warner, a 350-pound tree-removal-company employee, sued his employer. He claims a co-worker told him that his termination came after a supervisor commented that he was so fat that the supervisor feared he would drop dead on the job.

### ***Other Off-Duty Behaviors***

Coors Brewing offered economic incentives to its workers who pledged to wear seat belts whenever they drive. Multi-Developers Inc., a Georgia real estate firm, refuses to hire anyone engaging in "high-risk" recreational activities.

Winn-Dixie, the US supermarket chain, fired a truck driver for cross-dressing in his spare time. The company, whose motto is "real good food, from real good people, at a real good price", said it might lose customers if anyone recognized one of those "real good people" wearing make-up and earrings after hours. The man claimed sex discrimination, but a federal court ruled that sex bias laws do not protect the trans-gendered.

A Florida teacher who attended an adults-only party was fired after a nude photo of her surfaced. In a moment of merriment, she bared her chest to other adults in the room, a moment that a partygoer captured with a digital camera. Photos were e-mailed to the school superintendent. Shortly thereafter, the teacher was fired.<sup>15</sup>

## **QUESTIONS AND ANSWERS: LIFESTYLE DISCRIMINATION**

### ***Which companies practice lifestyle discrimination?***

There is no comprehensive list of companies/employers that practice lifestyle discrimination. A few examples of employers who discriminate include:

- Delta Airlines
- McDonald's
- Borgata's Hotel & Casino (Atlantic City, NJ)
- IBM
- Alaska Airlines
- CJW Inc. (WI)
- Investors Property Management (Seattle, WA)
- Schweitzer Engineering Laboratories (Pullman, WA)
- Enviromate (Moulton, AL)
- Weyco Inc. (Okemos, MI)
- Octavo Designs (Frederick, MD)
- NYPD

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<sup>15</sup> Harry Wessel, "Watch it after work," *Seattle Times* (July 18, 2004), at G1.

- Winn-Dixie (Jacksonville, FL HQ)
- Multi-Developers Inc. (GA)
- Coors Brewing
- *The San Francisco Chronicle*

***Shouldn't employers be able to keep their costs down by hiring employees who won't generate high medical bills?***

It is unfair and dangerous to allow employers to discriminate against certain employees because they believe their private lifestyle choices are unhealthy and lead to higher health insurance costs. To begin with, it is unclear that employers can achieve significant savings through lifestyle discrimination. Also, if it becomes acceptable to deny employment because of potentially higher health care costs, people who are capable of working will be effectively banned from any employment, preventing them from providing for themselves or their dependents. Finally, even if employers could achieve substantial savings, sacrificing the private lives of all working Americans is too high a price to pay.

***Why shouldn't employers be able to restrict their employees' high-risk behavior?***

Risks are associated with nearly every personal lifestyle choice we make from smoking cigarettes, to sitting in the sun, to having children. There is very little that we do in our private lives that doesn't affect our health. Allowing employers to make employment decisions based on legal off duty behavior that might affect health would allow employers to explore and control every facet of our personal lives. Non job-related information should not be considered in making such decisions. It is contrary to a free society. Where do we draw the line as to what our employer can regulate? The real issue here is the individual right to lead our lives as we choose. It is important that we preserve the distinction between company time and the sanctity of our private lives.

***Isn't it wrong to encourage people to smoke with protective legislation?***

The government has the obligation to insure that people understand the health risks of smoking. Government and employers ought to help people who want to quit smoking. Ultimately, however, it is up to the individual to decide if they want to engage in risky behavior such as smoking or riding a motorcycle. What is wrong is using the power of the government or the paycheck to tell other people how to live.

No. The NWI does not oppose smoking bans in public buildings, in the workplace, or in other locations where non-smokers may be subjected to second hand smoke. We object only to bans on smoking (or beer or junk food) in a person's own home.

*Isn't lifestyle discrimination legislation just a tool of food, beverage and tobacco companies?*

No. Lifestyle discrimination legislation is supported by a variety of civil rights and labor organizations and by the majority of Americans.

## **CURRENT LEGAL STATUS OF LIFESTYLE DISCRIMINATION**

### ***Federal Law***

At the federal level, civil rights laws barring discrimination on the basis of race, gender or disability may apply to lifestyle discrimination.

#### Race and Gender

There is demographic data showing that blacks and young women smoke in disproportionately large numbers. It is possible that this disproportion is large enough to constitute disparate impact under Title VII of The Civil Rights Act of 1964, which prohibits discrimination in the workplace on the basis of race and gender.

#### Disability

The Americans with Disabilities Act (ADA) prohibits employment discrimination against people with "any physical or mental impairment that substantially limits one or more of an individual's major life activities" and also people who are "regarded as having such an impairment." Until the passage of the Americans with Disabilities Act (ADA), in 1990, most workers could be fired, not hired, paid lower wages, or denied promotions because of a disability. Employees of federal agencies and federal contractors, however, already had this protection under section 504 of the Federal Rehabilitation Act of 1973.

While there is not yet case law on point, it can be argued that certain forms of lifestyle discrimination are illegal under ADA. The critical issue is whether the individual's limitation (real or perceived) is serious enough to qualify as a "disability."

## *State Law*

Most states have statutes parallel to the Federal Rehabilitation Act of 1973, which cover both public and private sector employees. There have already been state court decisions holding that under these statutes clinically obese people are protected from discrimination. For example, the New York Court of Appeals held that Xerox Corp. violated the New York Human Rights Law by denying Catherine McDermott a job because of her obesity. 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." The New Jersey Supreme Court ruled that Regina Viscik, 5-foot-9 and nearly 400 pounds, was disabled under the state's Law Against Discrimination, which uses a broader definition of disability than the federal act. Ms. Viscik was fired on her fourth day as a billing clerk, and a consultant for her employer later told her that she was dismissed because a top manager thought she was having difficulty moving around the office.

Generally overweight individuals are not protected by such laws. Only an obese person with a disability may not be subject to discrimination in employment based on weight and must be provided reasonable accommodation. If no disability is present, however, all protection is lost except in the following areas: State of Michigan -- bans discrimination based on height and weight. San Francisco, California -- bans discrimination based on weight, except for police officers, firefighters, and the San Francisco 49ers football team. Santa Cruz, California -- bans discrimination based on height, weight, or physical characteristics. District of Columbia -- outlaws discrimination in employment based on personal appearance.<sup>16</sup>

Even the best state disability laws, however, provide no protection for lifestyle choices that are recreational rather than medical. An exception is South Carolina law, which prohibits anyone from assaulting, intimidating, or discharging citizens from their employment or occupation because of their political opinions or the exercise of their political rights and privileges.

A complete list of state lifestyle discrimination statutes:

## **PROTECTED CONDUCT<sup>17</sup>**

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<sup>16</sup> Young, Conaway, Stargatt & Taylor, "Super-size bias: the last acceptable form of discrimination?" (February 2004) *Delaware Law Letter* Volume 9, Issue 2.

<sup>17</sup> Taken from *2004 State by State Guide to Human Resources Law*, Ed. John F. Buckley & Ronald M. Green.

A “yes” in a column indicates that the state has a statute that specifically refers to the activity; a “\*\*\*” indicates that the activity is not specifically mentioned by the statute. Some of the activities, however, though not specifically mentioned may in fact be covered. This may occur, for example, if a statute saying that the use of lawful products is protected, which would extend to the use of tobacco products, though not explicitly stated. Thus, if a state does not have a statute that specifically mentions the use of tobacco or alcohol, but has a statute that mentions the use of “lawful products” (like IL) or the use of “lawful consumable products” (like AZ), then the statute extends to the use of tobacco and alcohol.

State	Tobacco	Alcohol	"Lawful products"	Other
AZ	***	***	***	use of "lawful consumable products"
CA	***	***	***	"lawful conduct occurring during nonworking hours away from the employer's premises."
CO	***	***	***	Lawful activities (including marriage and plans to marry) that are off duty and off employer's premises.
CT	yes	***	***	Appearing as witness in a criminal proceeding pursuant to a subpoena, attendance at a court proceeding or participation in a police investigation related to a criminal case in which the employee is a crime victim, obtaining certain restraining or protective orders.
DC	yes	***	***	***
IL	***	***	yes	***
IN	yes	***	***	***
KY	yes	***	***	***
LA	yes	***	***	***
ME	yes	***	***	***
MN	***	***	***	use of "lawful consumable products"
MS	yes	***	***	***
MO	yes	yes	***	***
MT	***	***	yes	***
NV	***	***	***	"lawful use of any products"
NH	yes	***	***	***
NJ	yes	***	***	***
NM	yes	***	***	***
NY	***	***	***	Lawful political activities, legal use of consumable products, recreational activities occurring off the employer's premises, and membership in a union. Coverage of dating and cohabitation as well.
NC	***	***	covers only lawful use	***
ND	***	***	***	lawful activity
OK	yes	***	***	***
OR	***	***	yes	***
RI	yes	***	***	***
SC	yes	***	***	***
SD	yes	***	***	***
TN	***	***	***	"use of an agricultural product not regulated by the Alcoholic Beverage Commission and not

				otherwise proscribed by law.”
VA	yes	***	***	***
WV	yes	***	***	***
WI	***	***	yes	***
WY	yes	***	***	***

### ***Government Employees***

Government employees are protected by equal protection and due process clauses of the federal constitution.

Public employees generally may not be fired, suspended or otherwise disciplined for their political beliefs. An exception to this rule exists, however, where the government can demonstrate that political affiliation is an appropriate requirement for performance of the duties of the position. This exception is often referred to as the policymaking or confidential employee exception.<sup>18</sup>

These constitutional provisions should protect public employees from discrimination based on non-job related criteria. Perhaps for this reason, lifestyle discrimination by public employers is rare; although some counties and municipalities have adopted or are considering adopting policies prohibiting the hiring of smokers.

## **MODEL ACT**

### **1. Prohibited Practices**

1.1 It shall be illegal for an employer to discriminate against any employee or applicant on the basis of that person's conduct during non working hours away from the employer's premises or on the basis of personal characteristics unless that conduct or characteristic affects the person's ability to properly fulfill the responsibilities of the position in question.

1.2 No employer shall collect information about the off-duty behavior or personal characteristics of employees or applicants which would not be a legitimate basis for personnel decisions under section 1.1.

### **2. Exceptions**

2.1 Nothing in sections 1.1 and 1.2 shall be construed to make it illegal for an employer to:

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<sup>18</sup> James G. Sotos, “Political firing claim wins go-ahead,” (July 1, 2004) *Chicago Daily Law Bulletin* at 6.

2.2 Maintain a bona fide conflict of interest policy. This section applies only to current employees and does not affect the law of this state regarding restrictive covenants for former employees.

2.3 Refuse to employ a person whose off-duty conduct, while not incompatible with the requirements of the position, is incompatible with the fundamental objectives of the organization.

### 3.Enforcement

3.1 Any person who has been aggrieved by a violation of this act shall have a private right of civil action in any court of competent jurisdiction in this state.

3.2 In any such civil action the plaintiff shall have the burden of proving that he or she was qualified for the position in question. The defendant shall then have the burden of producing a basis for its decision which is consistent with this statute. The plaintiff then has the burden of proving by a preponderance of the evidence that the actual reason for the decision was off-duty behavior or a personal characteristic. The defendant then has the burden of proving that this behavior or characteristic is job related.

### 4.Remedies

4.1 A prevailing plaintiff in a civil action under this action is entitled to:

4.2 Injunctive relief.

4.3 An award of damages equal to the harm caused by the violation (both economic and non-economic) or \$1,000, whichever is greater.

4.4 Full costs of action plus reasonable attorney's fees.

### 5.Waiver

5.1 The rights and procedures provided by this Act may not be waived by contract or otherwise, unless such waiver is part of a written settlement agreed to and signed by the parties to the pending action or complaint under this Act.

## **Comments on Drafting a Lifestyle Discrimination Statute**

The crucial choice in drafting a statute is deciding how broad the protection should be. There are four basic alternatives:

**Prohibit Discrimination Based on Off-Duty Smoking** This is the most limited form of protection. While it protects one of the largest groups of victims, it leaves many unprotected. It also lends credence to the charge that the legislation is about smoking rather than autonomy and privacy. Its only real benefit is that its impact is limited and clearly defined. This can reduce, or even eliminate, opposition from organized business.

**Prohibit Discrimination Based on Off-Duty Use of All Legal Substances** This formulation expands the coverage to off-duty drinking and, possibly, people with high cholesterol or other conditions related to diet.

**Prohibit Discrimination Based on Any Legal Off-Duty Behavior** This is the broadest coverage that has yet been obtained. It clearly protects all dietary lifestyle choices and also choices of hobbies (skiing, motorcycles, etc.). It also prohibits discrimination based on sexual orientation.

The pragmatic problem with this approach is that it is so sweeping that its exact impact is hard to determine in advance. This uncertainty increases opposition from organized business. While we have addressed all the legitimate concerns they have raised (see "exceptions"), there is concern that not all the legitimate concerns have yet been identified.

**Prohibit Discrimination Based on Anything Not Related to Job Performance** This is the ideal way to write the statute. It not only prevents discrimination based on off-duty conduct, but prevents discrimination based on personal characteristics unrelated to job performance. All fat people are clearly protected under this approach. So are short people, the physically unattractive, and others who are often discriminated against, but whose condition is not serious enough to be classified as a "disability".

The second question is the position you want to take on illegal off-duty behavior.

The ideal position is that the employer's legitimate interest is limited to behavior that is related to job performance, and that even illegal off-duty behavior that does not affect a person's fitness for duty should not be grounds for discrimination.

This position is probably politically untenable at the present time, especially where illegal drugs are involved. We may have to limit our bills to legal off-duty behavior, even in our initial proposal.

Assuming you choose general coverage option 3 or 4 above, there are a series of proposed exceptions from the business community to consider. Each of these purports to be a situation where a certain form of off-duty behavior is legal, but the employer has a legitimate reason for prohibiting it. These include:

**Conflict of Interest:** This is straightforward, and we have included it in the model.

Anti-nepotism Policies: Having relatives working together can create conflict. Many companies, however, have found ways to manage this without discriminating against relatives of employees. This is a judgment call. Our model does not include this exception.

Conduct Incompatible with Organizational Goals: The American Lung Association believes it should have the right to refuse to hire smokers. The model incorporates language which would allow this practice. It can be argued that this exception should be limited to high level employees.

Surcharges: Even when they support legislation banning lifestyle discrimination in hiring, organized business will lobby vigorously for the right to charge "unhealthy" employees more for company health insurance. (See introduction).

There is no compelling civil liberties argument against this in principle. It is not, however, a practice we want to encourage, and is not included in our model.

The best position may be to remain neutral in principle, but insist on two conditions if a surcharge authorization is included in legislation:

Any difference in employee contributions must be supported by sound actuarial data on employer costs.

No surcharge may have a disparate impact on a group which is protected from job discrimination under federal or state law.

## **LOBBYING STRATEGIES**

The political landscape is much different for lifestyle discrimination legislation than for other workplace rights bills.

We do not have strong opposition from organized business. The U.S. Chamber of Commerce has taken the position that it is wrong for an employer to refuse to hire (or fire) someone because of off-duty conduct unrelated to job performance. At least one state chamber (New Jersey) has actually supported lifestyle discrimination legislation.

In most states, disagreements over statutory drafting (especially damages) and a general reluctance to support legislation that restricts business led the chamber to remain neutral or offer lukewarm opposition. Seldom, however, have we encountered the strident opposition that has frustrated our efforts on other issues.

The real opposition comes from anti-smoking groups. This includes both national groups like the American Lung Association and local voluntary organizations. Although they are loath to admit it, these people are prohibitionists. They believe that smoking is so harmful

that it should not be a matter of personal choice but should be stamped out by any available means. They are not very articulate or candid, but they have a great asset in public antipathy toward smoking, and they know how to play to it.

Critical to this issue, as usual, is organized labor. The AFL-CIO and the Communications Workers of America (CWA) have generally supported lifestyle legislation. We have also had support from police and firefighters unions (those most likely to be victims). Another likely ally is the Carpenters and Joiners union.

Other progressive groups, including religious organizations, should support this legislation, but have generally not yet been asked.

## **PRESENTING THE ISSUE**

It is always true that the way an issue is framed influences, and often determines, the response. That is especially true here. Opponents will claim that the issue is smoking, even if the bill covers all legal off duty behavior. The public's tendency to think in the concrete rather than the abstract, the fact that smokers are among the most common victims, and the fact that tobacco companies support the legislation, all work in our opponents' favor. If they succeed in casting the issue this way, we will surely lose.

The real issue here is privacy--the right of all adults to live as they choose in their own homes. The public strongly supports this value. They are not inclined to view the issue this way, and you will have to repeat our position ad nauseum. But experience has shown that with enough repetition, the public will understand the real issue. Once this happens, we will be successful.

Do's and Dont's

Labor Law- not Civil Rights

Some states have attempted to create lifestyle legislation by amending their state civil rights act. This lends credence to the charge that we are trying to turn smoking (or drinking) into a civil right. It also offends some people in the civil rights community.

It is vastly better to place this protection in the state labor law. It is also more correct; the law's purpose is to modify the legal relationship of employers and employees.

Health Economics

There is in fact a great deal of uncertainty over the health care cost implication of various lifestyle choices. Even where a given behavior clearly causes a measurable increase in health care costs, it is not necessarily true that these costs will be paid by employers.

Health care economics, however, is not the issue. The issue is privacy. Any discussion of economics plays into the hands of those who would mislead the public by mis-stating the issue.

Spokespeople

Since the issue is not smoking, drinking, or hang gliding, but privacy, the spokespeople for the issue should be those who care about this principle rather than the specific behavior.

## **SUPPORTING ORGANIZATIONS**

Here are some of the organizations which support lifestyle discrimination legislation. The addresses and phone numbers listed are for national offices, but you can use these contacts to reach the appropriate state and local offices.

AFL-CIO 815 Sixteenth Street, N.W. Washington, D.C. 20006 (202) 637-5000

A.C.L.U.  
125 Broad Street  
New York, New York 10004  
(212) 549-2500

Communications Workers of America  
501 3rd Street, N.W.  
Washington, D.C. 20001  
(202) 434-1100

Fraternal Order of Police  
1410 Donelson Pike, Suite A-17  
Nashville, TN 37217  
(615) 399-0900

National Association for Advancement of Fat Acceptance (NAAFA)  
P.O. Box 188620  
Sacramento, California 95818  
(916) 558-6880

Philip Morris U.S.A.  
120 Park Avenue  
New York, N.Y. 10017  
(212) 880-4131

Smokers' Rights Alliance  
20 East Main Street  
Suite 710  
Mesa, Arizona 85201  
(602) 461-8882

United Brotherhood of Carpenters and Joiners of America  
101 Constitution Avenue, NW  
Washington, DC 20001  
(202) 546-6206