Are Employers Who Refuse to Hire Smokers Discriminating Within the Meaning of the Americans With Disabilities Act of 1990?

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ARE EMPLOYERS WHO REFUSE TO HIRE SMOKERS DISCRIMINATING WITHIN THE MEANING OF THE AMERICANS WITH DISABILITIES ACT OF 1990?

Federal legislation requires that all individuals be given an equal opportunity for employment. One of the most recent legislative attempts to ensure civil rights is the Americans with Disabilities Act of 1990 (ADA). The ADA is a broad-ranging, comprehensive statute designed to prohibit discrimination on the basis of disability in the areas of employment, public services and transportation, public accommodations, and telecommunications. Its five titles address the serious and pervasive social problem of soci-


3 42 U.S.C.A. §§ 12111-12117 (Title I). For a brief overview of Title I of the ADA, see infra notes 24-34 and accompanying text.

4 42 U.S.C.A. §§ 12131-12185 (Title II). Title II extends and explains the regulations of § 504 of the Rehabilitation Act of 1973 to all programs, activities, and services provided by state or local government regardless of whether they receive federal funding. See id.

5 42 U.S.C.A. §§ 12181-12189 (Title III). Title III affects providers of public accommodations (hotels, restaurants, theaters) and those responsible for contracting places that have a potential for employment of the disabled and is concerned with accessibility. See id.

6 47 U.S.C.A. §§ 225, 611 (West Pamph. 1992) (Title IV). Title IV ensures the provision of telecommunications services to hearing- and speech-impaired individuals. See id.

1109
ety's neglect of and discrimination against individuals with disabil-
ities. The basic premise underlying Title I of the ADA is that per-
sons with disabilities should not be excluded from job
opportunities unless they are unable to perform the duties
entailed.

Recently, some employers have adopted a policy that refuses
to hire smokers. Although Title VII of the Civil Rights Act of 1964
prohibits employment discrimination on the basis of race, color, re-
ligion, sex, or national origin, smokers are not a protected class
under the Act. Smokers that have been aggrieved by employer off-
duty restrictions on smoking have attempted to protect their rights
by filing constitutional and common law claims, however, these
claims have been uniformly rejected. It may now be possible,
however, for smokers to protect their rights under the ADA.

This Note will consider the applicability of the ADA's anti-
discrimination protections for employment applicants who are re-
fused employment because of their tobacco use. Part I will present
a brief history and overview of Title I of the ADA and its regula-

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7 42 U.S.C.A. § 12101(a).
9 See BNA, WHERE THERE'S SMOKE: PROBLEMS AND POLICIES CONCERNING SMOKING IN
THE WORKPLACE 14, 137 (1986) (hereinafter WHERE THERE’S SMOKE); U.S. DEP’T OF HEALTH
& HUMAN SERVS., REDUCING THE HEALTH CONSEQUENCES OF SMOKING: TWENTY-FIVE YEARS OF
PROGRESS, REPORT OF THE SURGEON GENERAL 575-590 (1989) (hereinafter TWENTY-FIVE
YEARS OF PROGRESS); see also Fred Williams, Burning Issue at Work: Firms' Rules Put
Smokers Under Fire, USA TODAY, May 1, 1990, at IB (noting that Motorola, Northern Life
Insurance, and Take Packaging Corp. of America banned hiring of smokers).
Rules prohibiting employment discrimination are not applied equally nor do they treat all
11 See, e.g., Grusendorf v. City of Oklahoma City, 816 F.2d 539, 542-43 (10th Cir. 1987)
(fire department ban on off-duty smoking did not violate due process clause or liberty, pri-
vacy, or property interest of trainee firefighter); Rossie v. Department of Revenue, 395
N.W.2d 801, 807 (Wis. Ct. App. 1986) (holding that statute restricting smoking in certain
areas does not violate equal protection clause of Fourteenth Amendment). But see Best
Lock Corp. v. Review Bd. of Ind. Dep’t of Employment & Training Servs., 572 N.E.2d 820
(Ind. Ct. App. 1991) (holding that employer rule prohibiting off-duty smoking unreason-
able). See generally Elizabeth B. Thompson, Note, The Constitutionality of an Off-Duty
Smoking Ban for Public Employees: Should the State Butt Out?, 43 VAND. L. REV. 491,
509-21 (1990) (analyzing public employees' constitutional claims based on off-duty employer
regulations governing employees' off-duty behavior).
12 See WHERE THERE’S SMOKE, supra note 9, at 33; Mark A. Rothstein, Refusing to
Employ Smokers: Good Public Health or Bad Public Policy?, 62 NOTRE DAME L. REV. 940,
tions. Part II will present the prima facie elements required for a cause of action under the Act, focusing primarily on the threshold issue whether or not a smoker is "disabled." It will begin with a brief discussion of nicotine addiction, and continue with statutory interpretation and case law decisions considering disability under the Rehabilitation Act of 1973. Additionally, possible employer defenses and policy considerations will be addressed. Finally, Part III will discuss how smokers' rights may best be protected.

I. HISTORY AND OVERVIEW

The Fess-Kenyon Act, passed in 1920,\textsuperscript{13} was the first major legislative challenge to the then prevalent notion that a "handicap" meant lifelong economic dependency.\textsuperscript{14} After decades of struggle, marked by landmark litigation\textsuperscript{15} and legislation,\textsuperscript{16} the struggle for employment rights for people with disabilities culminated in the passage of the Rehabilitation Act of 1973.\textsuperscript{17} The Rehabilitation Act protects the disabled from employment discrimination by federal agencies and private employers receiving federal funding.\textsuperscript{18} The ADA of 1990 is broader in scope than the

\textsuperscript{13} See H.R. REP. No. 485, supra note 2, pt. 3, at 25, reprinted in 1990 U.S.C.C.A.N. at 448 (citing 41 Stat. 735 (the first Rehabilitation Act)).

\textsuperscript{14} Id. The inferior economic and social status of the disabled had been viewed as inevitable. See id.


Rehabilitation Act in that it attempts to address and correct public perceptions of individuals with disabilities.\textsuperscript{19} The purpose of the ADA is to eliminate discrimination against the forty-three million disabled Americans and to provide a place for them in American social and economic life by providing clear, strong, and consistent standards enforceable by the Federal government.\textsuperscript{20} The Act extends to disabled Americans the same civil rights guaranteed under the Civil Rights Act of 1964\textsuperscript{21} Its substantive framework is based on regulatory and case law interpretations of the Rehabilitation Act of 1973\textsuperscript{22} while the procedural framework borrows from the powers and remedies provided by Title VII of the Civil Rights Act of 1964\textsuperscript{23}

Title I of the ADA prohibits discrimination\textsuperscript{24} by a “covered entity”\textsuperscript{25} against a “qualified individual with a disability.”\textsuperscript{26}


\textsuperscript{20} 42 U.S.C.A. § 12101(b)(1)-(4).


Historically, society has tended to isolate and segregate the disabled. See 42 U.S.C.A. §12101(a)(2)-(3). Discrimination against the disabled continues, particularly in areas of “employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting and access to public services.” Id. “[U]nlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, [the disabled] . . . have often had no legal recourse, id. § 12101(a)(4), and [as a result have been] socially, economically, and educationally disadvantaged, id. § 12101, (a)(6). The goals of the Act “are to assure equality of opportunity, full participation, independent living and economic self-sufficiency” for the disabled. Id. § 12101(a)(8). Denial of the opportunity to compete on an equal basis costs the United States billions of dollars in unnecessary expenses resulting from dependency and non-productivity. See id. § 12101(a)(9).


\textsuperscript{23} See id.

\textsuperscript{24} 42 U.S.C. § 12112(b)(1)-(7). The term “discriminate” includes limiting, segregating or classifying a job applicant or employee; participating in contractual relationships that effect discrimination; using standards, criteria, and tests that screen-out individuals with disabilities (unless the test is job-related and consistent with business necessity); excluding an individual because of a known relationship with a disabled individual; and failing to make reasonable accommodations for individuals with disabilities who could thereby perform the essential functions of the job. See id.

\textsuperscript{25} Id. § 12111(2). The term “covered entity” means employers, employment agencies, labor organizations, and joint labor-management committees. See id. The legislative history shows that the definitions of “person,” “labor organization,” “employment agency,” “commerce” and “industry affecting commerce” are adopted from Title VII of the Civil Rights Act of 1964. H.R. REP. No. 485, supra note 2, pt. 3, at 32, reprinted in 1990 U.S.C.C.A.N. at 445. “Employer” means “a person engaged in an industry affecting commerce” who has 25 or more employees. See 42 U.S.C.A. § 12111(5)(A). “‘Employee’ means an individual employed by an employer.” See id. § 12111(4). Elected officials, their employees and appoin-
ity solely on the basis of that individual's disability, in regard to all terms, conditions, and privileges of employment. Title I specifically enumerates prohibited acts of discrimination, including the employer's use of medical examinations or inquiries in the employment screening process. Section 103, however, outlines several defenses to the denial of employment. Pursuant to section 103, discriminatory criteria may be applied to a disabled individual when they are job related and consistent with business necessity and if (1) the employer cannot accomplish reasonable accommodation for the disability; or (2) the individual poses a direct threat to the health or safety of others in the workplace. In addition, a religious entity is permitted to give employment preference to individuals of a particular religion.

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26 42 U.S.C.A. § 12111(8). "Qualified individual with a disability" means one who possesses the necessary skill, experience, education and other job-related requirements and who, with or without reasonable accommodation, can perform the essential functions of the job. Consideration is given to an employer's judgment as to what constitutes essential functions. Consideration is given to an employer's judgment as to what constitutes essential functions. Id.; see, e.g., Southeastern Community College v. Davis, 442 U.S. 397, 406-07 (1979) (holding that otherwise qualified person is one able to meet all requirements despite disability).


28 42 U.S.C.A. § 12112(a). This includes “job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training.” Id.

29 42 U.S.C.A. § 12112(a),(b); see supra note 24.


31 42 U.S.C.A. § 12113(a)-(d).


33 42 U.S.C.A. § 12113(b).

34 Id. § 12113(c)(1).
II. Prima Facie Elements

A cause of action under Title I of the ADA parallels the requirements for a private cause of action under Section 504 of the Rehabilitation Act of 1973. Thus, a plaintiff who is denied employment because the employer refuses to hire smokers will have the burden of proving four elements in order to set forth a prima facie case of discrimination: first, the individual must prove that he is “disabled” within the meaning of the ADA; second, that he is “otherwise qualified” for the position; third, that the employer discriminated against him solely on the basis of the disability; and finally, that the employer is a “covered entity” under Title I.

A. Is a Smoker “Disabled”?

More than twenty-five years have elapsed since the health hazards of smoking were first brought into public focus. The first official report issued by the Surgeon General’s Advisory Committee on Smoking and Health in 1964 referred to tobacco use as “habituating.” Fifteen years later, after considerable research, smoking

35 S. REP. No. 116, supra note 2, at 2.
37 See Sullivan, 811 F.2d at 181. As the ADA incorporates the substantive requirements under the Rehabilitation Act of 1973, it is reasonable to assume that under the ADA a plaintiff will face the same prima facie burden. See id.; see also supra notes 22, 35-36 and accompanying text (discussing legislative reliance on elements and structure of Rehabilitation Act).
38 See Sullivan, 811 F.2d at 182; supra note 26; see also infra note 80 and accompanying text (discussing “otherwise qualified individual”).
39 See Sullivan, 811 F.2d at 182; supra note 27; see also infra note 82 and accompanying text (referring to necessary nexus between disability and the exclusion at issue).
40 See Sullivan, 811 F.2d at 182; supra note 25; see also infra note 83 and accompanying text (discussing application of statute to employer).
41 See generally Twenty-Five Years of Progress at 7-10 (noting retrospective view of smoking and health findings over past twenty-five years); Rothstein, supra note 12, at 941-46 (discussing hazards, demographics and costs of smoking).
was called the prototypical substance-abuse dependency.\textsuperscript{43} In 1989, scientists in the field of drug addiction concluded not only that cigarettes are addicting, but also that nicotine is the drug causing the addiction and that the psychological and pharmacologic addictions accompanying cigarette smoking are similar to cocaine and heroin addictions.\textsuperscript{44} The American Psychiatric Association supported the Surgeon General’s findings and included nicotine addiction in its diagnostic guide as a “substance use disorder.”\textsuperscript{45}

The ADA sets forth three alternative criterion in defining disability: first, a physical or mental impairment that substantially limits a major life activity; second, a record of such an impairment;\textsuperscript{46} or third, being regarded as having such an impairment.\textsuperscript{47}
An individual satisfying any one of these criteria will be considered "disabled" within the meaning of the ADA.\textsuperscript{48} Congress, therefore, attempted to protect a large number of people in a broad range of possible situations.\textsuperscript{49} Indeed, the ambitious nature of such definition demands a case-by-case analysis.\textsuperscript{50}

1. Physical or Mental Impairment

To understand the meaning of the term disabled one must first discern what constitutes a "physical or mental impairment."\textsuperscript{51} The statute includes within the meaning of physical or mental impairment "any mental or psychological disorder."\textsuperscript{52} Both the American Psychiatric Association and the Surgeon General have vali-

\textsuperscript{48} See 29 C.F.R. pt. 1630, app. § 1630.2(g).
\textsuperscript{49} See Black, 497 F. Supp. at 1098.
\textsuperscript{50} See 29 C.F.R. pt. 1630, app. at 405. “This case-by-case approach is essential if qualified individuals of varying abilities are to receive equal opportunities to compete for an infinitely diverse range of jobs.” Id.
\textsuperscript{51} See id. § 1630.2(h). In particular, “Physical or mental impairment means:
\begin{enumerate}
  \item Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
  \item Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”
\end{enumerate}
\textsuperscript{52} 29 C.F.R. pt. 1630, app. at 405; see also supra note 51.
dated nicotine addiction as a psychological substance use disorder.\(^{53}\)

In deciding whether or not nicotine addiction is a physical or mental impairment under the ADA, courts should first look to the language of the statute.\(^{54}\) While the statute lists a number of express exceptions to the definition of disability, including transvestism, compulsive gambling, and kleptomania,\(^{55}\) neither smoking nor nicotine addiction are specifically enumerated among them.\(^{56}\) Moreover, the statute explicitly excludes from protection any "psychoactive substance use disorder resulting from current illegal use of drugs."\(^{57}\) This exception supports the argument that Congress intended to categorize legal psychoactive substance use disorders (such as nicotine addiction) as "disabilities" and exclude only illegal drug use.

In addition, hypersensitivity to smoke was held to be a disability under the Rehabilitation Act of 1973.\(^ {58}\) Further, it is proposed

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\(^{53}\) See DSM-III-R, supra note 45, at 165-66; NICOTINE ADDICTION, supra note 42, at 248-49.

\(^{54}\) See, e.g., Jasany v. United States Postal Serv., 755 F.2d 1244, 1248 (6th Cir. 1985) (threshold requirement that individual is a "handicapped person as defined by the statute"); see also Haines, supra note 47, at 541, 551-54 (analyzing administrative and judicial interpretations of term "impairment").

"Although the definition does not include a list of all specific conditions, diseases, or infections that would constitute physical or mental impairments examples include... drug addiction and alcoholism." H.R. Rep. No. 485, supra note 2, pt. 3, at 28, reprinted in 1990 U.S.C.C.A.N. at 450-51; see also 29 C.F.R. § 1630 (list of frequently disabling impairments deleted from final regulations to ensure that ADA application will not be limited).

\(^{55}\) 42 U.S.C.A. § 12111(b). "(D)isability' shall not include: (1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; (2) compulsive gambling, kleptomania, or pyromania; or (3) psychoactive substance use disorders resulting from current illegal use of drugs." Id. Eyes or hair color, left-handedness, predisposition to illness or disease, pregnancy, personality traits that are not symptoms of a mental or psychological disorder (like "poor judgment" or "quick temper"), poverty, lack of education, prison record, or advanced age do not constitute impairments. See 29 C.F.R. pt. 1630, app. § 1630.2(h).

\(^{56}\) See 42 U.S.C.A. §§ 12208, 12211(b)(1).

\(^{57}\) Id. § 12111(b)(3).

\(^{58}\) See Vickers v. Veterans Admin., 549 F. Supp. 85, 86-87 (W.D. Wash. 1982). The Vickers court held that an employee's hypersensitivity to smoke limits that employee's "capacity to work in an environment which is not completely smoke free" and thus constitutes a disability within the scope of the Rehabilitation Act of 1973. Id. Yet, the court acknowledged the defendant's stated "duty 'to strive to maintain an equitable balance between rights of smokers and nonsmokers.'" Id. at 89. The court further stated that until Congress eliminates smoking from the workplace, smokers' rights "cannot be disregarded." Id. But see GASP v. Mecklenburg County, 256 S.E.2d 477, 479 (N.C. Ct. App. 1979) (holding that legislature did not intend to include within meaning of "handicapped persons" those with any pulmonary problem, however minor, or all people who are harmed or irritated by to-
that nicotine addicts should at least be entitled to the limited pro-
tections afforded reformed alcoholics and illegal drug users. Although an employer may have legitimate reasons for not extending job offers or benefits to reformed alcoholics and illegal drug users, Congress has been wary of the danger of improper discrimination if such individuals are categorically excluded from protection. It seems that such discriminatory abuses will occur with respect to nicotine addicts unless they are afforded similar protection.

In continuing the analysis, this Note will assume, based upon prior arguments, that nicotine addiction is considered an impairment under the ADA. The next, and more critical step in the analysis is to determine whether this impairment “substantially limits a major life activity.”

2. Substantially Limits a Major Life Activity

“Major life activity” has been interpreted to mean those functions that an average person can perform easily, such as walking, seeing, hearing, performing manual tasks, and working. “Sub-
stentially limits” means the inability or significantly restricted ability to perform one or more major life activity. Three factors are considered when determining whether an individual is substantially limited in a major life activity: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the long-term impact, or expected impact of the impairment. It should be noted, however, that in determining whether or not a person is substantially limited, the activity of working is considered only if an individual is not restricted in any other major life activity. Additional factors may be considered in determining whether there is a substantial limitation on an individual’s ability to work, including any geographical limitations created by the disability and the class of jobs or broad range of jobs from which the individual would be disqualified as compared to an average person with otherwise comparable qualifications. An individual is not, however, substantially limited due to the mere inability to perform a particular job for a particular employer. Accordingly, in a case-by-case analysis as to whether an impairment substantially limits the major life activity of working, any one of these factors could potentially be dispositive. For example, it is conceivable that an individual who smokes three packs of cigarettes a day and resides in a community where the only existing industry has initiated a hiring policy of refusing to employ

and working.” Id. “This list is not exhaustive” and may include, but is not limited to “sitting, standing, lifting, [or] reaching.” Id. pt. 1630, app. § 1630.2(i); see also Arline, 480 U.S. at 280-281 (hospitalization for tuberculosis sufficient to establish that major life activity was substantially limited by impairment).

See 29 C.F.R. § 1630.2(j). Specifically, “substantially limits means: (i) Unable to perform a major life activity that the average person in the general population can perform; or (ii) [S]ignificantly restricted as to the condition, manner, or duration under which an individual can perform a major life activity . . . as compared . . . to the average person.” Id.

See id. §§ 1630.2(j)(2)(i)-(iii); see also id. pt. 1630, app. § 1630.2(j) (noting that impairment is “substantially limiting” if it significantly restricts duration, manner or condition under which individual can perform major life activity as compared with average individual).

64 See id. § 1630.2(j)(3), pt. 1630, app. § 1630.2(j); see also Forrisi v. Bowen, 794 F.2d 931, 933-34 (4th Cir. 1986) (analyzing whether employee’s acrophobia restricted ability to work).

65 See 29 C.F.R. § 1630.2(j)(3)(iii). The factors are relevant to, but are not required elements of, a showing of a substantial limitation in working. Id.

66 See id. § 1630.2(j)(3)(ii)(A)-(C).

smokers, the first part of the ADA’s definition of disability may be conclusive, thereby affording the individual the protections of the ADA. An individual who fails to satisfy this first part of the definition may, however, be able to satisfy a second definition, which is discussed below.

3. Regarded as Having Such Impairment

Although an individual may have a condition that does not substantially limit a major life activity, the reaction of others to the condition may prove just as disabling.68 Hence, the ADA also protects an individual who is “regarded as” having an impairment.69 One is “regarded as” having an impairment when, although the impairment does not in fact substantially limit a major life activity, the individual is treated as having such a limitation.70 This may result from the attitudes of others towards a condition,71 or from the mere rumors that the individual has a condition that does not actually exist at all.72 A plaintiff who can show that an employer has made an employment decision based on a myth, fear, or stereotype regarding the plaintiff’s condition will have satisfied the “regarded as” definition of disability.73 This definition demands a

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68 See School Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1986). “Congress acknowledged that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.” Id. (citation omitted).

69 See 42 U.S.C.A. § 12102(2)(c). In fact, the Act protects those with “(A) A physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) A record of such an impairment; or (C) being regarded as having such an impairment.” Id.

70 See 29 C.F.R. § 1630.2(l)(1). For example, an employer may transfer an employee with controlled high blood pressure, an impairment which is not “substantially limiting,” to a less strenuous job for fear that the individual may have a heart attack. See id. pt. 1630, app. § 1630.2(l).

71 See id. § 1630.2(l)(2). For example, an employer may refuse to hire an individual with a prominent facial scar or a tic out of fear of negative reactions by coworkers or customers despite the fact that the scar or twitch does not affect job performance. See id. pt. 1630, app. § 1630.2(l).

Common attitudinal barriers that impact on employers’ exclusions of individuals perceived as disabled include concern for “productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, . . . and acceptance by coworkers and customers.” See id. pt. 1630, app. § 1630.2(l); see also H.R. Rpr. No. 485, supra note 2, pt. 3, at 30, reprinted in 1990 U.S.C.C.A.N. at 453. This list indicates Congressional intent to include attitudinal obstacles within the meaning of “regarded as” having a disability. Id.

72 See 29 C.F.R. § 1630.2(l)(3). For example, an employer might discharge an individual because of a rumor that the employee is HIV infected. See id. pt. 1630, app. § 1630.2(l).

73 See Arline, 480 U.S. at 284; H.R. Rpr. No. 485, supra note 2, pt. 3, at 30, reprinted
lesser burden of proof from the plaintiff because an individual "regarded as" having an impairment is not required to show that the employer's perception is inaccurate. Instead, an inference in favor of the plaintiff arises, which will prevail unless the employer can provide a non-discriminatory explanation for its action. Consequently, given the social revolution relating to smoking and its negative health consequences, the third, "regarded as" definition for disability may provide the strongest support for an action brought by a smoker under the ADA.

B. Remaining Prima Facie Elements

In cases deciding if other substance abusers were disabled, whether the applicant was "otherwise qualified" for the position, was the critical element. "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." It is unlikely, however, that smoking, alone, will render an individual unqualified.

Additionally, the discriminatory behavior must be based solely


76 See 29 C.F.R. pt. 1630, app. § 1630.2(1); see also S. Rep. No. 116, supra note 2, at 31.

77 See Twenty-Five Years of Progress, supra note 9, at 11. Smoking among adults has decreased from forty percent in 1965 to twenty-nine percent in 1987. Id. Social acceptability of smoking is declining. Id. at 244. The public majority favors restricting smoking in worksites. Id. at 245.

78 See id. at 12. Smoking remains the most preventable cause of death in America. Id. at 11. Keep in mind, however, that over three-quarters of a million smoke related deaths were avoided because individuals were able to quit smoking. Id. Each year, more than 400,000 Americans die as a result of cigarette-related disease. U.S. Dep't of Health & Human Servs., Smoking Tobacco & Health: A Fact Book 1 (rev. 10/89) [hereinafter Smoking Tobacco & Health].

79 See supra note 26.


82 See DSM-III-R, supra note 45, at 182. "Since nicotine . . . rarely causes any clinically significant state of intoxication, there is no impairment in . . . occupational functioning as an immediate and direct consequence of its use." Id.
on the disability. An employment policy under which an employer refuses to hire smokers would undoubtedly satisfy this element. The final element, requiring that the employer be a "covered entity" is broadly inclusive, encompassing any employer with fifteen or more employees.

C. Possible Defenses

The ADA prohibits employers from treating individuals with disabilities differently from others solely on the basis of the employers' attitude toward the disabilities. Employers may use selection criteria that negatively affect individuals with disabilities only when the criteria are clearly job-related and consistent with business necessity. Furthermore, even if such limiting criteria are job-related and consistent with business necessity, employers may nevertheless be required to make reasonable accommodation. In order to avoid compliance, an employer may submit evidence that accommodation would cause undue hardship, but a case-by-case

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84 See 42 U.S.C.A. § 12111(5)(A). "Employer" means a person . . . who has 15 or more employees for . . . 20 or more calendar weeks . . . ." Id. For the initial two years of the ADA, however, the number of employees is set at 25. Id.
86 See 29 C.F.R. pt. 1630, app. § 1630.15(b)-(c). Reasonable accommodation includes making facilities accessible, job restructuring, part-time or modified work schedules, reassignment, buying or modifying equipment, training materials or policies, providing qualified readers or interpreters. See 42 U.S.C.A. § 12111(9); 29 C.F.R. pt. 1630, app. § 1630.2(o); see also Nisperos, 720 F. Supp. at 1432 (burden on employer to prove reasonable accommodation not possible). See generally Lisa L.Lavelle, Note, The Duty to Accommodate: Will Title I of the Americans with Disabilities Act Emancipate Individuals with Disabilities Only to Disable Small Businesses, 66 Notre Dame L. Rev. 1135 passim (1991) (exploring scope of employers' duty to accommodate disabled and what constitutes undue hardship).
87 See 42 U.S.C.A. § 12111(10)(A). "'[U]ndue hardship' means an action requiring significant difficulty or expense . . . ." Id. Factors to determine undue hardship include: nature and cost of accommodation; overall financial resources of the facility, business, or operation; number of employees; effect on resources; impact on operation. See id. § 12111(10)(B); see
analysis is required to determine if additional business costs of employing the disabled individual are significant. Finally, compliance with another federal statute could serve as a defense, but it "may be rebutted by a showing of pretext, or by showing that the federal standard [does] not require the discriminatory action." Thus, while the defenses mentioned above are not exhaustive, it is doubtful that statutory defenses would protect an employer from a cause of action brought by a smoker, who has otherwise established a prima facie case of discrimination.

D. Policy Considerations

Policy considerations will undoubtedly weigh heavily in deciding whether or not to include nicotine addiction as a protected disability within the meaning of the ADA. The policy motivation behind the ADA is to improve the quality of life, economically and socially, for the forty-three million disabled Americans. The addition of more than fifty million smokers to the classification of "disabled" would substantially limit the effectiveness of the ADA. Moreover, as reflected in the Surgeon General's Report, the government has set a goal to eliminate tobacco use by the year 2000. Protecting smokers from employment discrimination would con-


See 29 C.F.R. pt. 1630, app. §1630.15(d). Other employees' fears or prejudices or the negative impact on morale of other employees toward a disabled individual would not represent undue hardship. Id. But see Williams, supra note 8, at 18. ("Smoking costs companies about $65 billion a year in absenteeism and higher health-care bills, according to the Office of Technology Assessment.")

See 29 C.F.R. pt. 1630, app. §1630.15(e).

See id. §1630.15.

See H.R. Rep. No. 485, supra note 2, pt. 2, at 47, reprinted in 1990 U.S.C.C.A.N. at 329. The ADA is an attempt to promote greater dignity and improved quality of life for people with disabilities. Id. "[D]iscrimination makes people with disabilities dependent on social welfare programs rather than allowing them to be taxpayers and consumers." Id. at 44. "Discrimination deprives our nation of a critically needed source of labor in a period where demographic and other changes in our society are creating shortages of qualified applicants...." Id. Discrimination also negates the billions of dollars invested to educate the disabled. Id. at 46.

See Twenty-Five Years of Progress, supra note 9, at 661. While more than fifty million Americans continue to smoke, ninety million would be smoking today but for the recognition of health hazards and smoking. Id.

See id. at 10.
conflict with this public health policy. Similarly, there are enormous financial costs associated with smoking which could be avoided, including the direct medical costs of smoking-related diseases and indirect costs to businesses and health insurance providers and carriers. Nevertheless, these health and economic concerns must be weighed against the reluctance to allow employers to monitor employees’ legal off-duty activities and lifestyles.

III. LEGISLATIVE DEVELOPMENTS

In what appears to be a direct response to employment policies of refusing to hire smokers, a number of states have recently enacted statutes prohibiting discrimination against tobacco users. Most of these statutes protect the job rights of employees who smoke or use tobacco products off-duty; some extend protection to other undefined off-duty activities. In light of the uncertain coverage for smokers under the ADA, legislation of this kind may best protect smokers’ rights.

CONCLUSION

As the number of smokers continues to decrease, it remains to

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96 See SMOKING TOBACCO & HEALTH, supra note 78, at 9. Cigarette smoking accounts for $22 billion in medical costs each year. Id.
97 See id. Cigarette smoking costs business $43 billion in lost production. Id.
100 See, e.g., ME. REV. STAT. ANN. tit. 26, § 597 (West Supp. 1992). It is unlawful for an employer to “discriminate against any person with respect to the person’s compensation, terms, conditions or privileges of employment for using tobacco products outside the course of employment as long as the employee complies with any workplace policy concerning the use of tobacco.” Id.
101 See, e.g., NEV. REV. STAT. ANN. § 613.333 (Michie 1992). “It is an unlawful employment practice . . . to discriminate against any employee because he engages in the lawful use . . . of any product, outside of the premises of the employer during his nonworking hours . . . .” Id.
be seen whether smokers will receive the benefits and protections of the ADA. As this Note has explained, although an addicted smoker may be considered “disabled” and able to establish the remaining prima facie elements under the ADA, the definitive outcome is uncertain. Undoubtedly, conflicting policy considerations, namely health hazards and economic costs versus infringement of employee off-duty lifestyles, will be weighed and ultimately influence a court’s analysis. Consequently, state legislation banning employment discrimination against smokers may be the best solution to this controversial issue.

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