

“Smokers Need Not Apply:” A Legal and Ethical Defense of a Policy on Not Hiring Smokers

Editor’s Note: *Over the past five years, an increasing number of health care organizations have adopted and continue to adopt no-smoker rules that result in turning away job applicants who smoke. Several Catholic health care systems and facilities are among them. The reason for instituting such policies is to advance institutional missions of encouraging healthier lifestyles and reducing health care costs. Recently, a Texas hospital instituted a policy of banning job applicants who are too obese.*

The two feature articles in this issue present different perspectives on the merits of such policies. They are offered as a contribution to the ongoing debate. We invite your responses. Please email responses to rhamel@chausa.org.

Tyler S. Gibb, JD
Doctoral Student
Albert Gnaegi Center for Health Care
Ethics
Saint Louis University
St. Louis
tgibb@slu.edu

In June, 2011, SSM Health Care in St. Louis announced that it would no longer hire smokers.² This was not SSM’s first foray into the growing public discussion regarding smoking. In 2004, SSM was one of the first organizations in the St. Louis area to ban smoking on all of its properties.³ SSM is among several health care and other organizations across the country that have instituted such policies. At first blush, these policies may seem to be unduly harsh, illegal, imprudent or even unethical. In this article I argue that SSM’s policy of not hiring tobacco users does not violate federal or state

antidiscrimination laws and is ethically justifiable.

At the outset, I want to be clear about what I am *not* arguing. First, I am not arguing that such policies are the prudent course for all employers, and possibly not even for all health care providers. There are many sound arguments against these policies, and I will only address a few in this article. Second, I am not arguing that such policies are necessarily prudent for any particular organization to implement. My goal in this article is to defend SSM’s policy, without advocating for its wider implementation. This may seem to some to be splitting hairs; after all, how can one defend a position without advocating for the same? The answer is clear, based upon my goal. When the *St. Louis Post-Dispatch*, the local newspaper, first reported on SSM’s policy, there was a virtual uproar of online commentary, blogs, and debates on local radio

programs. Many of those opposing the policy argued that it was discriminatory, illegal or immoral. My goal is to show how the policy is neither unethical nor illegal. This is a factual analysis looking at the current state of the laws and a justification based upon Aristotelian teleology.⁴ I leave the normative question—whether the policy should be implemented—to another time.

It is necessary to clarify some foundational assumptions. First, I assume (or rather defer the discussion to others) that the health risks associated with smoking are accurate, or at least proximately accurate. I have neither the expertise, nor the interest, in critically evaluating the physiological impact of tobacco use. Second, I assume that the cost of employing smokers, as described by SSM and others who have implemented such policies, including the Cleveland Clinic, is accurate, or at least proximately accurate.⁵ These are empirical matters that may be contradicted. However, their empirical refutation has little impact on the present analysis. If it turns out that the risks or costs are significantly different than presented by SSM and others, the entire corpus of their justifications must be reevaluated. The final point of clarification is that I make no claims about the risks or costs of smoking relative to other activities. Driving a car and owning a swimming pool may be far more dangerous than smoking. This analysis is focused on one institution's policy that attempts to reduce one particular type of behavior. Criticisms that invoke the demons of slippery slopes

and rabbit holes, while entertaining in television commercials and rhetorically useful for politicians, are philosophically suspect.

Is SSM's Policy Discriminatory?

SSM's policy is not discriminatory based upon federal and state laws. Federal and state anti-discriminatory laws protect individuals in narrowly defined groups, often called suspect or protected classes. In the context of federal laws, these groups are identifiable by:

- one or more immutable characteristics, such as ethnicity or religion;⁶
- have historically suffered prejudice, hostility, and/or stigma, perhaps due, at least in part, to stereotypes;
- are powerless to protect themselves via the political process;
- and the group's distinguishing characteristic does not inhibit it from contributing meaningfully to society.⁷

The theory behind these protected classes is simple, but not without controversy: our society should not tolerate prejudice based upon characteristics that are outside the volition of the individual. The protected class identification is an attempt to correct past injustices. Traditionally, these groups lacked sufficient political or social power to protect themselves, thus, protective laws were created. Currently, under federal law,⁸ the list of protected classes includes race,⁹ color,¹⁰ national origin,¹¹ sex,¹² disability status,¹³ veteran status,¹⁴ religion,¹⁵ and genetics (i.e., genetic information).¹⁶ Notably absent in

this list are characteristics such as sexual orientation, gender identification, and developmental disability. Gaining protected class status on the federal level is remarkably difficult.

On the state level, the list of protected classes is similar, but not identical. All of the federally designated classes receive special protection, but states are granted the freedom to designate additional groups and classes. For example, California designated sexual orientation as a protected characteristic.¹⁷ During the 1990s anti-smoking advocates pushed towards severely restricting when and where smoking could occur. In response, many states passed laws explicitly protecting smokers' rights. Missouri, where SSM is headquartered, is among the 29 states¹⁸ that explicitly protect smokers via state statutes:

It shall be an improper employment practice for an employer to refuse to hire, or to discharge, any individual, or to otherwise disadvantage any individual, with respect to compensation, terms or conditions of employment because the individual uses lawful alcohol or tobacco products off the premises of the employer during hours such individual is not working for the employer, unless such use interferes with the duties and performance of the employee, the employee's

coworkers, or the overall operation of the employer's business.¹⁹

Without the exception that follows, the SSM policy would be illegal under this Missouri state law. The exemption states, "Religious organizations and church-operated institutions, and not-for-profit organizations whose principal business is health care promotion shall be exempt from the provisions of this section."²⁰ It appears that the Missouri legislature contemplated a situation where a health care organization would choose to prohibit smoking in their workforce, and explicitly provided an exemption.

Being a smoker does not qualify a person for special legal protection under state or federal employment discrimination for at least two key reasons. First, regardless of a smoker's current addiction to nicotine, which can often be extreme and debilitating, at some point, beginning to use tobacco, regardless of peer-pressure, social norms, or enticing advertising, was a choice. The characteristics of the federally protected classes each share the quality of being outside of voluntary choice. One cannot choose to be Hispanic any more than one can choose to have particular genetic markers. Religion may be the one exception because people may and often do make conscious choices about their religious affiliations. For this reason, all religions (and in some cases the absence of religious affiliation²¹) garner protection.

Some critics argue that these types of policies punish individuals for choices that were made while they were minors, and in some cases, children—when they were legally incapacitated from making many types of decisions, such as entering into contracts and owning property.²² While this is true, it does not change the nature of the characteristic at issue. Regardless of when the decision was made, the mere fact that there was a decision to be made fundamentally changes the nature and composition of the class of people.

Second, smokers are not a socially or politically disadvantaged group that laws need to protect. Smoking cuts across all segments of society and includes individuals from all walks of life and all demographics.

The second similarity among the federally protected classes is that they all were disadvantaged or marginalized historically, and in some cases continue to be, politically and socially. This is not the case for smokers. In fact, for decades smokers and smoking were glamorized. If employment practices similar to SSM's persist and become more common, if public health campaigns succeed in demonizing smoking and smokers, and a public shame and ostracization develops around smoking, it may be the case that one day smokers will share this characteristic with religion, gender, and race. But, despite the ever-increasing tax burden on smoking, that seems unlikely.

Is SSM's Policy Unethical?

Assuming that by ethical we mean supportive of individuals' and society's endeavor to seek out human flourishing, or the "good life," as described by Aristotle and his followers, the policy is not unethical. SSM and other health care organizations have a duty as providers of health care not only to provide quality health care, but, as organizations, to embody the ideals (or virtues, to use Aristotelian language) they espouse. A policy against hiring individuals with blue hair has no rational, concrete bearing on health care organizations' mission or on promoting the good life, and would thus be ethically indefensible. On the other hand, encouraging employees to develop healthful habits, and creating an enforcement mechanism, is a necessary and ethically justifiable position by SSM and other health care organizations because of their role as providers of health care. This position is supported at least for SSM by the explicit exception in Missouri's state law, discussed above.

As private organizations, SSM and other health care organizations have more latitude in policing the personal lives of their employees than a public employer, such as the state government. This assumes that the activities the employer chooses to police have a direct and identifiable relationship to the mission of the organization and do not run afoul of other existing laws.

If we can agree that smoking is not healthful for individuals, we may also agree that it has a similar impact on the broader society. SSM defended its hiring policy by providing statistics showing it is more expensive to employ a smoker versus a non-smoker. SSM spokesman Chris Sutton explained, “healthier employees does mean lower health care costs.”²³

By announcing this policy, SSM, like other leading health care providers such as Cleveland Clinic, are increasing the pressure on individuals who reportedly consume a higher percentage of finite health care resources. Public health campaigns have long sought to end smoking. First they tried to inform, and then educate, then they tried to scare, and most recently they attempt to shame people into not using tobacco. SSM, within its limited sphere as one health care provider in the Midwest, is taking this campaign one step further by placing real, tangible, economic consequences on personal choices that negatively impact society at large, as is their right to do. Sutton continued, “As an organization that provides health care, we want to encourage our employees to take better care of themselves and set good examples for our patients.”

There is little public support for outlawing tobacco use, although recent legislation has severely restricted where smoking can occur and governments at all levels levy ever-increasing taxes on tobacco. Americans love their freedoms too much, and rightly so. I retain the right

to smoke an exquisite Gurkha His Majesty’s Reserve cigar, if I so choose. However, SSM along with other organizations with similar policies are taking a rational, justifiable step in deciding what type of workforce they will employ by filtering job applications on the basis of an individual’s exercise of his or her rights. This is merely formalization of the prerogative all employers possess—to decline to employ individuals with a wide variety of characteristics unsuitable to the employer’s aims. Consider for example a claim of discrimination made by an individual whose job application to teach at a nursery school was rejected because he or she had a swastika tattooed on their forehead. These organizations are merely making the criteria for employment more transparent. Some critics fear this will lead down a slippery slope of intrusion by employers into the personal lives of employees. Some ask where it will stop? Can an employer dictate what an employee can eat? May an employer mandate physical exercise or a minimum level of physical fitness, outside of obvious job requirements? Perhaps. But each situation and decision does not necessarily lead to the next. Each step in the slippery slope is a point where a choice, a justification, and a rationalization must be made. SSM’s policy, at least, is narrowly tailored, directly relevant to their role as a health care provider, and arguably fiscally prudent. Additionally, the policy does not apply retroactively—no current smoking-employee will be terminated from his or her position at SSM. On the contrary, SSM will provide many resources to help him or her stop smoking.

If one critically analyzes SSM's recently announced policy of declining to hire smokers, there can be two conclusions: it is not illegal and it is ethically defensible. First, the policy does not violate current federal or state employment or antidiscrimination laws. Obviously, laws are not static. It is quite possible, although perhaps unlikely, that states will elect to designate smokers as a class in need of special legal protection. Second, there is at least one ethical theory, and likely others, Aristotelian teleology, which supports SSM's stated rationale and goals. Of course identifying a philosophical theory that supports a position does not end the debate. However, criticisms focused on the immorality or unethical nature of the policy have the burden of both refuting this argument and providing a contrary philosophical theory which holds this and similar policies to be ethically problematic. This analysis is limited to the 'is' side of Hume's 'is-ought' distinction.²⁴ SSM's policy *is* legal. SSM's *is* ethically justifiable. The opposite side of the Hume's fork, whether it *ought* to be implemented, is a matter for another day.

NOTES

¹ See Tyler S. Gibb, "Guest Commentary: Smokers Need Not Apply," *St. Louis Post-Dispatch*, June 28, 2011, available at www.stltoday.com/news/opinion/guest-commentary-smokers-need-not-apply/article_f4e5dfa1-7b0f-5e9c-82fa-ec22822c7f48.html?mode=story; *ibid.*

² Bernhard Blythe, "SSM Hospitals in St. Louis Area Will No Longer Hire Smokers," *St. Louis Post-Dispatch*, June 19, 2011, <http://www.stltoday.com/news/local/metro/ar>

[ticle_bb5f4d58-38a7-5bdb-be22-afca43f425b5.html](http://www.stltoday.com/news/local/metro/article_bb5f4d58-38a7-5bdb-be22-afca43f425b5.html).

³ Judith Vanderwater, "SSM Health Care Outlaws Smoking on Its Properties," *St. Louis Post-Dispatch*, November 18, 2004.

⁴ See generally Aristotle. 1999. *Nicomachean Ethics*. Trans. Terence Irwin. 2nd ed. Hackett Publishing Co.

⁵ A.G. Sulzberger, "Hospitals Shift Smoking Bans to Smoker Ban," *The New York Times*, February 10, 2011.

⁶ Robert Wintemute, 1997. *Sexual Orientation and Human Rights: the United States Constitution, the European Convention, and the Canadian Charter*. Oxford University Press, USA.

⁷ *Frontiero v. Richardson*, 411 U.S. 677 (1973).

⁸ Civil Rights Act of 1964 ([Pub.L.](#) 88-352, 78 [Stat.](#) 241, enacted July 2, 1964); see specifically Title VII: Equal Employment Opportunities, 42 U.S. Code Chapter 21.

⁹ See also *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 96 S.Ct.2574, 49 L.Ed.2d 493 (1976).

¹⁰ See *Walker v. Secretary of Treasury of IRS*, 713 F.Supp. 403 (N.D.Ga. 1989).

¹¹ See e.g., *Korematsu v. United States*, [323 U.S. 214](#) (1944), for an example of a law that discriminated on the basis of national origin but upheld by the United States Supreme Court. This was the first case where "strict scrutiny" was applied.

¹² Age Discrimination Act of 1967 [ADEA], 29 U.S. Code Chapter 14.

¹³ Vocational Rehabilitation and other Rehabilitation Services of 1973, 29 U.S. Code Chapter 16.

¹⁴ Vietnam Era Veterans Readjustment Assistance Act of 1974 [VEVRAA], 38 U.S. Code Chapter 42 §4211-4215.

¹⁵ *Abrams v. Baylor College of Medicine*, 805 F.2d 528 (5th Cir.1986); *Pime v. Loyola Univ. of Chicago*, 803 F.2d 351 (7th Cir.1986).

¹⁶ The Genetic Information Nondiscrimination Act of 2008 [GINA] ([Pub.L. 110-233](#), 122 [Stat.](#) 881, enacted May 21, 2008).

¹⁷ See [Perry v. Schwarzenegger](#), 122 (United States District Court for the Northern District of California 2010-08-05) dealing with California's Proposition 8 ballot initiative.

¹⁸ See American Lung Association, State "Smoker Protection" Laws report available at <http://www.lungusa2.org/slati/appendixf.php> (retrieved June 06, 2012).

¹⁹ MO. REV. STAT. § 290.145 (2005).

²⁰ *Ibid.*

²¹ see [EEOC v. Townley Manufacturing](#), 859 F.2d 610 (9th Cir.1988), for example of protection of atheism.

²² This argument was proffered by Michael J. McFadden in his well-written blog post on the topic, critiquing my previously cited Op/Ed article in the St. Louis Post-Dispatch, which can be accessed at Missouri Group Against Smoking Pollution's blog, available at: <http://mogasp.wordpress.com/2011/07/03/2011-07-03-michael-mcfadden-if-smokers-need-not-apply-then-why-not-motorists-too/> (retrieved June 03, 2012).

²³ Bernhard Blythe. 2011. "SSM Hospitals in St. Louis Area Will No Longer Hire Smokers." *St. Louis Post-Dispatch*, June 19. http://www.stltoday.com/news/local/metro/article_bb5f4d58-38a7-5bdb-be22-afca43f425b5.html.

²⁴ David Hume, *A Treatise of Human Nature* (NuVision Publications, LLC, 2007), p. 335.