

**RIGHTS OF NONSMOKERS***January 2003*

*The right of nonsmokers to be free from exposure to secondhand smoke is protected by both legislation and judicial rulings. There are federal, state, and local laws protecting nonsmokers, but the strongest and best enforced are generally at the local level. Many judicial rulings have applied general laws relating to the workplace, housing, and even prisons to protect nonsmokers. Although many of these court rulings will not provide a direct legal precedent for your situation, they may nevertheless provide some ideas for a legal strategy to pursue.*

**LEGISLATIVE RIGHTS**

***Federal Laws:*** The Federal Government has enacted several laws protecting nonsmokers from secondhand smoke. Federal laws require that all domestic airline flights, as well as all scheduled flights between the United States and foreign destinations, be smokefree. An Executive Order, in effect since 1998, provides that all buildings owned, rented, or leased by the executive branch of the Federal Government must be smokefree, except for designated smoking areas that are enclosed and separately ventilated. Also, under federal law, smoking is not allowed in enclosed areas of agencies receiving federal funding that primarily serve youth, such as schools.

***State Laws:*** Although almost every state has legislation restricting smoking to some degree, many states provide few protections for the general public. State laws are often limited to government buildings or to a few limited places open to the public. Restrictions that affect private workplaces are rarely strong. Only 24 states have laws restricting smoking in private workplaces, and only California, Delaware, and Florida virtually eliminate smoking in workplaces. Maryland and Washington ban smoking only in office workplaces. Although 32 states restrict smoking in restaurants, most of them exempt smaller restaurants and only require nonsmoking sections in the larger restaurants. Only California, Delaware, Florida, Utah, and Vermont eliminate smoking in restaurants altogether. Even when state laws extend to private workplaces or to public places like restaurants, the general public rarely understands the details of what the laws require, and the laws are typically not enforced well. The best state laws are those that establish minimum statewide protections, that explicitly permit local ordinances to supplement the state law, and that provide for local enforcement. Unfortunately, 18 state laws preempt, or eliminate, the power of cities and counties in those states to adopt more effective ordinances protecting nonsmokers.

***Local Laws:*** As of January 1, 2003, there were close to 1,540 local ordinances in the U.S. that restrict smoking to some degree. Of these, 1,124 restrict smoking in private workplaces, 961 restrict smoking in restaurants, and 119 restrict smoking in freestanding bars. Another 723 restrict smoking in enclosed public places. Recently, municipalities have begun to make 100% smokefree workplaces and public places (with no exceptions) the norm. As of January 1, 2003, there were 178 smokefree workplace ordinances, 121

smokefree restaurant ordinances, 87 smokefree bar ordinances, and 366 ordinances requiring all enclosed public places to be smokefree.

Local laws typically provide the best protections for nonsmokers. City councils, boards of health, and county supervisors are generally less influenced by tobacco industry campaign contributions and more interested in their constituents' opinions than are state and federal legislators. In addition, local laws tend to be better known and understood by constituents, and enforcement is easier and more effective. The city or county clerk or your board of health can usually provide you with a copy of your local law.

## **LEGAL RIGHTS**

Nonsmokers who live in areas where legislation does not adequately protect them from secondhand smoke can utilize other legal recourses to find protection. Unfortunately, pursuing this strategy usually requires finding an attorney who is willing to represent you. Some attorneys may be willing to accept your case on a contingency basis, in which they will only be paid in the event that you win your case. However, knowing that there are precedents in favor of nonsmokers may be enough to persuade employers and business owners to voluntarily adopt policies that protect nonsmoking employees and customers. Employers in particular are becoming more and more susceptible to liability for not providing a smokefree workplace and should be willing to do whatever it takes to avoid such liability. Legal rulings on smoking issues are mixed, but ANR can provide a more complete description of actual cases for you or your attorney. The following are examples of legal remedies that nonsmokers have used to obtain protection from secondhand smoke.

## **LEGAL ISSUES IN THE WORKPLACE**

### ***Workers' Compensation***

Workers' compensation laws vary somewhat from state to state. However, it is well established in most states that workers may receive compensation for injuries caused by exposure to secondhand smoke in the workplace. (See, e.g., *Schober v. Mountain Bell* (NM, 1980); *Thorensen v. U.S. Air* (MA, 1989); *Kufahl v. Wisconsin Bell* (WI, 1990).) One notable example is the case of Avatar Uhbi, an otherwise healthy, vegetarian nonsmoker who suffered a heart attack caused by exposure to secondhand smoke while working as a waiter in a bar. In an out-of-court settlement, Uhbi was awarded \$10,000, plus \$85,000 in medical expenses associated with his illness. (*Uhbi v. State Compensation Insurance Fund* (CA, 1990).)

In 1998, a worker's compensation judge in New Jersey ruled that a physical education teacher's tonsillar cancer was caused by exposure to secondhand smoke; the teacher had shared an office with a chain-smoker for 26 years. The judge awarded the teacher \$45,000 in temporary disability benefits and ordered the Middletown, NJ Board of

Education to pay his outstanding medical bills, provide future treatment, and restore sick time that he had used up. (*Magaw v. Middletown Board of Education* (NJ, 1998).)

Although workers' compensation cases only affect employees who have already been injured, successful claims will raise an employer's workers' compensation insurance premiums, thus encouraging both that employer and other employers to voluntarily adopt smoking restrictions *before* any further claims are brought.

### ***Employment Discrimination***

There is a growing body of law indicating that employers may be liable under state and federal discrimination laws for permitting smoking in the workplace. Generally, smoking in the workplace must be completely eliminated if that is the only effective means of protecting nonsmokers.

Most states prohibit discrimination on the basis of disabilities. In many states, nonsmokers sensitive to tobacco smoke are considered "handicapped" and entitled to effective or reasonable accommodation. In a case involving two employees of the County of Fresno, California, the state Court of Appeal ruled that workers who are hypersensitive to tobacco smoke are physically handicapped and that employers who do not accommodate them are liable for job discrimination. (*County of Fresno v. Fair Employment and Housing Commission* (CA, 1991).) In *Hinman v. Yakima School District No. 7* (WA, 1993), the Washington State Court of Appeals reinstated a claim brought by a nonsmoker under the state's handicap discrimination statutes. In *Figueroa v. Springfield Transit Management* (MA, 2001), the Massachusetts Commission Against Discrimination awarded lost wages and \$20,000 in emotional distress damages to a bus driver who was terminated by her employer because of asthma-related absences brought about by exposure to secondhand smoke in the starter shack and bus garage.

At the federal level, the Rehabilitation Act of 1973 (RA) and the Americans with Disabilities Act of 1990 (ADA) protect nonsmokers from discrimination on the basis of "disability," which is defined as a physical or mental impairment that substantially limits one or more of the major life activities of an individual. This has been interpreted to include impairment of breathing or heart function. The RA covers programs and activities conducted by federal agencies, including the Post Office; programs and activities receiving federal funding, including those conducted by state and local governments; and the employment practices of federal contractors. The ADA covers private workplaces with 15 or more employees, as well as places of public accommodation (see below).

Cases based on the RA include *Brinson v. Department of Environmental Regulation, et al.* (D.C. No. Dist. FL, 1984), in which an employee who was hypersensitive to tobacco smoke sued her employer for failure to make reasonable accommodation to her handicap, and the court denied the employer's motion for summary judgment. In *Pletten v. Merit Systems Protection Board* (U.S.C.A., 1990), the court held that a federal employee's asthmatic condition was a handicap under the RA, but that his employer, the U.S. Army, had no duty to provide a smokefree working environment beyond its offer of a smokefree private office.

The ADA provides plaintiffs with a powerful new tool to achieve protection from passive smoking. Title I of the Act is similar to the stronger state employment discrimination statutes in that it requires employers to accommodate nonsmokers with documented sensitivities to tobacco smoke by prohibiting or restricting smoking in the workplace.<sup>1</sup> However, use of the ADA requires nonsmoking employees to demonstrate that they have an unusual sensitivity to tobacco smoke, such as acute asthma, and that eliminating smoking is the only way to accommodate their disability. In *Harmer v. Virginia Electric & Power Company* (D.C. VA, 1993), an employee sued his employer under the ADA after his employer retaliated against him for requesting a smokefree workplace by reducing his job authority and failing to promote him. The court recognized Harmer's disability, but dismissed the claim, saying that he "must still show that he is entitled to a complete smoking ban as a reasonable accommodation to his disability." Nonsmoking employees must also show that their impairment substantially limits their ability to obtain employment generally. (*Sacher v. Walker Bag Mfg. Company* (D.C. W.D. KY (1999).)

### ***Negligence for Failure to Provide a Safe Workplace/Injunctive Relief***

There is a well-established rule under common law that employers have a duty to provide a safe, healthy workplace. In *McCarthy v. Department of Social and Health Services* (WA, 1988), the Washington Supreme Court ruled that this duty "includes a duty to provide a working environment reasonably free from tobacco smoke." And in *Smith v. Western Electric Co.* (MO, 1982), the court also recognized that an employer's failure to eliminate the hazardous condition caused by tobacco smoke can constitute a breach of the duty to provide a reasonably safe workplace. In one landmark case, injunctive relief was granted, and the employer was required to provide the nonsmoking employee with a smokefree environment. (*Shimp v. New Jersey Bell* (NJ, 1976).)

### ***Wrongful Discharge***

Employees who are fired for seeking a smokefree workplace may also have a claim for wrongful termination. In one case, in which an employee was fired after complaining about tobacco smoke in his office, an appeals court held that he was protected from a retaliatory dismissal for "complaining in good faith" about unsafe working conditions. (*Hentzel v. Singer* (CA, 1982).) In a similar case, the trial court in Suffolk County, NY granted summary judgment to an accounts payable supervisor who was terminated by her employer shortly after complaining to the County Department of Health that her employer failed to maintain a smokefree work area, as required by local law. (*Bompane v. Enzolabs, Inc.* (NY, 1994).) And in 1999 a jury awarded \$420,878 to a nonsmoking employee who filed suit under the Michigan Whistle Blower's Protection Act, contending that he had left his job because he had been unfairly disciplined and singled out for harassment by his supervisor after complaining about violations of the state's Clean Indoor Air Act. (*Keller v. City of Grand Rapids* (MI, 1999).)

### ***Disability Benefits***

---

<sup>1</sup> Gottlieb, M.A., Daynard, R.A., Lew, J.B. "Second-hand smoke and the ADA: Ensuring access for persons with breathing and heart disorders." *Saint Louis University Public Law Review*. 13(2): 635-644, 1994.

Employees who are disabled by exposure to tobacco smoke at work may be entitled to disability benefits. (*Weir v. Office of Personnel Management* (U.S., 1986); *Imamura v. City and County of Honolulu* (HI, 1993).) In a key case, the U.S. Court of Appeals ruled that a federal worker who is hypersensitive to tobacco smoke is “environmentally disabled” and is therefore eligible for disability benefits. (*Parodi v. Merit Systems Protection Board* (U.S.C.A., 1983).) Individuals seeking to prove they are disabled must show they are unable to do their job because of a work-related injury.

### ***Unemployment Compensation***

Employees who must leave their jobs due to an allergy or hypersensitivity to tobacco smoke may be entitled to unemployment insurance benefits. Employees who quit due to exposure to tobacco smoke have “good cause” to quit, and are therefore eligible for benefits. (*Alexander v. California Unemployment Insurance Appeals Board* (CA, 1980); *McCrocklin v. Employment Development Department* (CA, 1984); *Lapham v. Commonwealth Unemployment Compensation Board of Review* (PA, 1987).)

### ***Assault and Battery***

There is growing legal support for assault and battery claims against employers for exposing employees to secondhand smoke. Although assault cases, like common law negligence claims, are usually not permitted under state workers’ compensation laws, which provide the exclusive remedy for workplace injury, at least one court has allowed a tort claim. (*McCarthy v. State of Washington* (WA, 1987).)

In a case from California, the plaintiff experienced serious medical problems due to secondhand smoke exposure at work. She claimed that tobacco smoke was not an essential part of the job, such as lighting, and therefore the workers’ compensation statute did not bar an assault and battery action. A Superior Court Commissioner denied a defense motion to dismiss the lawsuit (*Portenier v. Republic Hogg Robinson* (CA, 1993).) Subsequently, the defendant agreed to pay a substantial settlement in both the workers’ compensation and assault claims in the case.

### ***Intentional Infliction of Emotional Distress***

In 1988, an employee of the Tennessee Valley Authority (TVA) sued her employer for negligence and intentional infliction of emotional distress, based on her claim that the TVA failed to provide her with a smokefree work environment, despite recommendations for such by company officials, and that the company retaliated against her and verbally harassed her. The U.S. District Court ruled that the Federal Employees’ Compensation Act barred her claim for negligence, but that there were genuine issues of material fact that precluded granting summary judgment on her emotional distress claim. (*Carroll v. Tennessee Valley Authority* (D.C. DC, 1988).) Later that year, the case was settled for an undisclosed amount of money.

## LEGAL ISSUES IN OTHER ENVIRONMENTS

### *Discrimination in Public Accommodations*

Title III of the Americans with Disabilities Act (ADA) prohibits discrimination against the disabled in “public accommodations.” As with the employment provisions of the ADA (see above), nonsmokers who have a documented sensitivity to tobacco smoke are protected from exposure to secondhand smoke in public accommodations. Virtually all businesses that serve the public are considered public accommodations, including hotels and motels, restaurants, bars, retail stores, public transportation depots, amusement parks, and recreation facilities. Individuals covered by ADA are entitled to “the full and equal enjoyment” of public accommodations. To sensitive nonsmokers, a cloud of smoke may pose as great a barrier to use of a facility as a physical barrier.

In November of 1993, a group of sixteen state Attorneys General issued preliminary recommendations regarding smoking in fast food restaurants. In part due to potential legal liability, they recommended that “fast food companies actively encourage all of their franchise operators to adopt a smoke free policy.”<sup>2</sup>

That same year, several asthmatic plaintiffs, all of whom had adverse reactions when in the presence of smoke, sued three fast food restaurant chains under the ADA in Federal District Court, seeking an injunction against smoking in the defendants’ restaurants. (*Staron v. McDonalds* (D.C. CT, 1993).) A Magistrate Judge dismissed the case and the District Court affirmed. However, the U.S. Court of Appeals reversed that decision in 1995 and ruled: “we find that plaintiffs’ complaints do on their face state a cognizable claim against the defendants under the Americans with Disabilities Act.” The court went on to say that it saw “no reason why, under the appropriate circumstances, a ban on smoking would not be a reasonable modification” to accommodate the plaintiffs’ disabilities.

In 1998, three Maryland women who suffered from asthma filed suit in U.S. District Court in an effort to force the Red Lobster and Ruby Tuesday restaurant chains to ban smoking in their Maryland restaurants. The Court denied the defendants’ motion to dismiss, rejecting their contention that physical impairments of a transitory nature do not qualify as a disability under the ADA. The Court ruled that the claim “adequately alleges a substantial limitation on the major life activity of breathing,” and concluded: “Just as a staircase denies access to someone in a wheelchair, tobacco smoke prevents plaintiffs from dining at defendants’ restaurants. Therefore, plaintiffs have adequately alleged that they are disabled within the meaning of the ADA and that their disability bars them from defendants’ restaurants.” (*Ellender v. Edwards, et al. v. GDRI, Inc., et al.* (D.C. MD, 1999).)

### *Nuisance*

---

<sup>2</sup> Attorneys General Working Group on Tobacco. *Fast Food, Growing Children and Passive Smoke: A Dangerous Menu*. New York, NY: New York Attorney General’s Office. November 1993.

Nonsmokers have filed several nuisance cases on the ground that tobacco smoke was drifting into their residence from an adjacent residence, typically from one apartment to another in a single building. The outcomes of these cases have varied. In one case, the court held that the smoke from three to six cigarettes a day did not constitute a significant “annoyance,” and that “injury to one who has specially sensitive characteristics does not constitute a nuisance.” (*Lipsman v. McPherson* (MA, 1991).) However, in *Layon, et al., v. Jolley, et al.* (CA, 1996), condominium owners, who were forced to leave their residence for hours at a time because of smoking in a garage below them, obtained a restraining order specifying that “Defendant must stay away from his garage while smoking.” In *50-58 Gainsborough St. Realty Trust v. Haile, et al.* (MA, 1998), nonsmokers living in an apartment above a bar were sued by their landlord for failure to pay rent. The tenants argued that the smoke seeping from the bar into their apartment deprived them of their right to the quiet enjoyment of their apartment. A Boston Housing Court judge agreed, ruling that “the evidence does demonstrate to the Court the tenants’ right to quiet enjoyment was interfered with because of the second-hand smoke that was emanating from the nightclub below.”

### ***Discrimination Under Federal Fair Housing Act***

The Fair Housing Act provides protection against housing discrimination for those with disabilities. Reasonable accommodation must be made to afford equal opportunity in the use and enjoyment of dwelling units and common areas. The Act has been successfully extended to those with sensitivities to tobacco smoke. In an unreported case in California, a nonsmoker requested that smoking be eliminated in the clubhouse and other common use areas of a private mobile home park. She filed a complaint with the Department of Housing and Urban Development. After an investigation, the facility agreed to eliminate smoking in the common areas.<sup>3</sup>

### ***Prisoners’ Rights***

In *Helling v. McKinney*, (U.S.S.C., 1993), the U.S. Supreme Court held that exposing a prisoner to secondhand smoke may violate the Eighth Amendment to the federal Constitution, which prohibits “cruel and unusual punishment.” The case also established that prison officials may not, with deliberate indifference, expose an inmate to secondhand smoke levels that pose an unreasonable risk to future health. As with other areas of potential liability, prisoners’ Eighth Amendment claims are judged on the facts of each individual case. The right of prisoners to be free from exposure to secondhand smoke has been the subject of a great deal of litigation, some based on the Eighth Amendment protections and some based on claimed violations of state laws. Many state statutes now prohibit smoking in correctional facilities.

### ***Child Custody Disputes***

There have been numerous child custody cases in recent years in which the court has either awarded custody to one parent because of the other parent’s smoking in the

---

<sup>3</sup> Chen, S. Public Affairs Officer, American Lung Association, Alameda County, CA, personal communication, 2/28/94.

presence of the child or restrained the custodial parent from smoking in the presence of the child. Most of these cases have involved children with specific health problems, like asthma, that are particularly affected by exposure to secondhand smoke. However, two cases in 2002 held that even a healthy child has a right to be free from exposure to secondhand smoke in the home. In one case, when an apparently healthy 13-year-old child complained about his mother's smoking during court-ordered visitations, the court found that the child's exposure to secondhand smoke put him "at increased risk to develop asthma, reduced lung function, coronary artery disease, lung cancer, and respiratory disorders." The court ordered that, to the extent practical, "each parent maintain a smoke-free environment for [the child] at all times in home and car, and wherever possible and practical, in other circumstances." (*Johnita M.D. v. David D.D.* (NY, 2002).) In the second case, after citing numerous studies demonstrating the health hazards of secondhand smoke for both adults and children, the court issued a restraining order prohibiting the parents of a healthy 8-year-old child from allowing any person, including themselves, to smoke tobacco in the presence of the child. The court also stated: "The overwhelming authoritative evidence leads to the inescapable conclusion that a family court that fails to issue court orders restraining persons from smoking in the presence of children under its jurisdiction is failing the children whom the law has entrusted to its care." (*In re Julie Anne* (OH, 2002).)

## GENERAL REFERENCES

- American Nonsmokers' Rights Foundation, U.S. Tobacco Control Laws Database<sup>®</sup>, unpublished data, January 2003.
- Americans with Disabilities Act of 1990, 42 USC 12101 et seq.
- Fair Housing Act, 42 USC 3601 et seq.
- Gottlieb, M.A., Daynard, R.A., Lew, J.B. "Second-hand smoke and the ADA: Ensuring access for persons with breathing and heart disorders." *Saint Louis University Public Law Review*. 13(2): 635-644, 1994.
- Rehabilitation Act of 1973, 29 USC 701 et seq.
- Smoke-free Environments Law Project, <http://www.tcsg.org/sfelp/home.htm>
- State Laws on Tobacco Control – United States, 1995. *Morbidity and Mortality Weekly Report*, U.S. Department of Health and Human Services, Public Health Services, Centers for Disease Control and Prevention. Atlanta, GA: November 3, 1995.
- State Legislated Actions on Tobacco Issues 2002. Washington, D.C.: American Lung Association, 2002; <http://slati.lungusa.org>.
- Sweda, E.L., *Summary of Legal Cases Regarding Smoking in the Workplace and Other Places*. Tobacco Control Resource Center. Boston, MA: July 2002.

© Americans for Nonsmokers' Rights, 1996, revised 1998, 2003