

Legal Requirements to Protect Nonsmokers

The evidence of the negative health effects of involuntary smoking has grown dramatically in recent years. As a result, the potential liability of employers or others for exposing employees or patrons to tobacco smoke has also grown.

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 benefits for injuries caused by workplace smoking exposure (*Schober v. Mountain Bell*, 1980; *Thorensen v. U.S. Air*, 1989; *Kufahl v. Wisconsin Bell*, 1990). One notable example is the case of Avatar Uhbi, settled in 1990. Uhbi, an otherwise healthy, vegetarian nonsmoker, suffered a heart attack. It was determined that his heart attack was caused by passive smoking exposure while working as a waiter in a restaurant which permitted smoking. In an out-of-court settlement, the California Compensation Insurance Fund covered Uhbi's \$85,000 in medical expenses associated with his secondhand smoke induced illness (*Uhbi v. State Compensation Insurance Fund*, 1990).

More recently, 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. On July 23, 1998, 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*, 1998).

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. 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. Smoking in the workplace must be completely eliminated if that is the only effective means of protecting nonsmokers.

In a case involving two employees of the County of Fresno, California, the court ruled that the county violated the law in failing to eliminate smoking in the nonsmokers' work area (*County of Fresno v. Fair Employment and Housing Commission*, 1991). In *Hinman v. Yakima School District No. 7* (1993), the Washington State Court of Appeals reinstated a claim brought by a nonsmoker under the state's handicap discrimination statutes. And in 1996, a court refused to dismiss a plaintiff's claims alleging violations of the Americans with Disabilities Act of 1990 (ADA) and the Illinois Clean Indoor Air Act (*Bell v. Elmhurst Chicago Stone Co*, 1996).

The Americans with Disabilities Act (ADA) provides plaintiffs with a powerful new tool to achieve protection from passive smoking (ADA, 1990). Title I of the ADA 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 (Gottlieb, et. al., 1994). The ADA is currently in force for employers with 15 or more employees.

Use of the ADA requires nonsmoking employees to demonstrate that they have an unusual sensitivity to tobacco smoke, such as acute asthma, and that banning smoking is the only way to accommodate their disability. In *Harmer v. Virginia Electric & Power Company* (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 courts 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."

Negligence for Failure to Provide a Safe Workplace

There is a well established rule under common law that employers must provide a safe, healthy workplace (*McCarthy v. Department of Social and Health Services*, 1988). 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*, 1976). The theory that permitting smoking constitutes negligence is supported by cases in several states (*McCarthy v. Washington Department of Social and Health Services*, 1988; *Smith v. Western Electric Co.*, 1982).

Wrongful Discharge

Employees who are fired for seeking a smokefree workplace may also have a claim for wrongful termination. In one case, 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*, 1982). In 1992, the Suffolk County, NY Supreme Court granted summary judgment to an accounts payable supervisor who was terminated by her employer shortly after filing a complaint with the Suffolk County Department of Health. The employee had complained that her employer failed to maintain a smokefree work area. (*Bompane v. Enzolabs, Inc.*, 1994).

Disability Benefits

Employees who are disabled by exposure to tobacco smoke at work may be entitled to disability benefits (*Weir v. Office of Personnel Management*, 1986; *Imamura v. City and County of Honolulu*, 1993). In a key case, the court found that a federal worker who is hypersensitive to tobacco smoke is "environmentally disabled," and therefore eligible for disability benefits (*Parodi v. Merit Systems Protection Board*, 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*, 1980; *McCrocklin v. Employment Development Department*, 1984; *Lapham v. Commonwealth Unemployment Compensation Board of Review*, 1987).

Assault and Battery

There is growing legal support for assault and battery claims against employers for exposing employees to environmental tobacco 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*, 1987).

In a recent case in California, the plaintiff experienced serious medical problems due to ETS 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 does not bar an assault and battery action. In October, 1993, a Superior Court Commissioner denied a defense motion to dismiss the lawsuit (*Portenier v. Republic Hogg Robinson*, 1993). In March, 1994, the defendant agreed to pay a substantial settlement in both the workers' compensation and assault claims in the case.

Legal Issues in Other Environments

Discrimination in Public Accommodations

Title III of the Americans with Disabilities Act prohibits discrimination against the disabled in "public accommodations." As with the employment provisions of the ADA, nonsmokers who have a documented sensitivity to tobacco smoke are protected from exposure to environmental tobacco smoke in public accommodations. Virtually all businesses which serve the public are considered public accommodations, including hotels and motels, restaurants, bars, retail stores, public transportation depots, amusement parks, recreation facilities, and so on. Individuals covered by ADA are entitled to "the full and equal enjoyment" of public accommodations (ADA, 1990). To sensitive nonsmokers, a cloud of smoke may pose as great a barrier to use of a facility as a physical barrier.

Several test cases concerning nonsmokers' access to public accommodations under ADA are currently pending. Several cases have been filed in Federal District Court in Connecticut by a state legislator and attorney on behalf of three mothers of children with asthma. The suits name McDonald's, Burger King, and Wendy's as defendants (*Staron v. McDonalds*, 1993). Although a Magistrate Judge dismissed the case, the U.S. Court of Appeals reinstated it on appeal in 1995.

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" (Attorneys General, 1993).

In early 1998, three Maryland women who suffer 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 lawsuit alleges that the restaurant chains are violating the ADA (Castaneda, 1998).

Nuisance

Several nuisance cases have been filed by nonsmokers over tobacco smoke drifting from an adjacent residence, typically apartments 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*, 1991). However, another case against a landlord found that smoke drifting from an apartment below the plaintiffs' violated the warranty of habitability (*Fox Point Apartments v. Kippes*, 1992). More recently, 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" (*50-58 Gainsborough St. Realty Trust v. Haile, et al.*, 1998).

Federal Housing Act

The Fair Housing Act (FHA), amended in 1988, 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 (Chen, 1994).

Prisoners

In *Helling v. McKinney*, the Supreme Court held that exposing a prisoner to environmental tobacco smoke may violate the Eighth Amendment to the Constitution, which prohibits "cruel and unusual punishment." The case also established that prison officials may not, with deliberate indifference, expose an inmate to ETS levels that pose an unreasonable risk to future health (*Helling v. McKinney*, 1993). As with other areas of potential liability, prisoners' Eighth Amendment claims are judged on the facts of each individual case.

REFERENCES

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