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Smoking at Work

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Though North Carolina does not regulate workplace smoking,[1] public and private employers here as elsewhere are curious about whether they may, perhaps even should. The employer's dilemma is this: A few individuals are smoke allergic and cannot work where smoking is allowed. Moreover, evidence on the dangers of passive smoking suggests that all employees are harmed to some extent. On the other hand, the surgeon-general's 1988 report on tobacco's addictive quality sharply reminds employers of the difficulty that smoking restrictions impose on the nearly one third of adults[2] in the United States who smoke.

Nationwide 35 to 40 percent of private employers set limits, a figure that has grown rapidly in the 1980s.[3] While no rate for North Carolina is available, some employers, especially national or international firms operating here—IBM, E. I. Dupont, Northern Telecom, and Burroughs Wellcome, for example—do have policies. Most do not. Only a few local governments in the state regulate smoking either in public places or for their own employees. These units are Gaston, Mecklenburg, New Hanover, and Orange counties and the City of Charlotte, all of which adopted policies in 1988.

Most employers are only now considering how to handle smoking. Should it influence hiring and retention? Is it better to establish a policy or let individuals manage it? The few reported cases on smoking simply do not answer the main questions. For that reason employers currently are quite free to choose among policies or to continue without one (except in rare circumstances).

New scientific evidence may change the law in the future. The evidence does not point in one direction, however: the surgeon-general's 1986 report makes a case for curbing smoking for others' sake, but the report on addiction might bolster smokers' requests for protection. This bulletin, which is being sent to city and county managers and attorneys, reviews existing law in North Carolina and elsewhere, weighs possible areas of future liability, and concludes that the prudent employer may now wish to consider some restrictions.

The author is an Institute of Government faculty member who specializes in health law. She expresses appreciation to Fred C. Bauer, assistant librarian of the Institute of Government, for his valuable help with research.

1. Twenty states have such laws; forty regulate smoking in public places, according to the *State Health Legislation Report* of the American Medical Association, 1987. North Carolina's only state law on smoking forbids furnishing tobacco products to anyone under age seventeen. N.C. GEN. STAT. § 14-313. The 1986 surgeon-general's report noted, "Compared with other states, major tobacco states are less likely to have enacted smoking legislation and more likely to have enacted less stringent laws." CENTERS FOR DISEASE CONTROL, PUBLIC HEALTH SERVICE, THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING, Surgeon General C. Everett Koop, 87-8398 (Washington, D.C.: GPO, 1986), 276 (hereinafter 1986 REPORT).

2. Rates are 34.8 percent for black American adults, 29.7 percent for non-Hispanic whites, and 25.7 percent for Hispanic whites. CENTERS FOR DISEASE CONTROL, PUBLIC HEALTH SERVICE, THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION, Surgeon General C. Everett Koop, 88-8406 (Washington, D.C.: GPO, 1988), 509 (hereinafter 1988 REPORT). Although there is a racial differential, no one seems to have challenged smoking restrictions because of their "disparate impact" on black workers. Perhaps this is because blacks suffer the highest rates of cardiovascular disease and cancer and, as the same report observes, "smoking represents an especially serious health risk for blacks."

3. 1986 REPORT, *supra* note 1, at 285, 294.

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North Carolina Law and Related Rulings

The entire body of law on workplace smoking is small. North Carolina's share consists of a few cases involving smoke allergy as a protected handicap, smoking as assault and battery, nonsmokers' constitutional rights, and reasoning by analogy from a case involving another type of allergy, entitlement to workers compensation. This section describes the North Carolina rulings and, for comparison, those from other jurisdictions on the same points.

Smoke Allergy As a Handicap

North Carolina has no statute or administrative regulation that directly addresses smoking in the workplace. The General Statutes do, however, protect certain rights of the handicapped. Section 168-2 provides:

> Handicapped persons have the same right as the able bodied to the full and free use of the streets, highways, sidewalks, walkways, *public buildings, public facilities, and all other buildings and facilities, both publicly and privately owned, which serve the public.* (emphasis added)

Section 168-3 provides:

> The handicapped and physically disabled are entitled to accommodations, advantages, facilities, and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motor buses, streetcars, boats or any other public conveyances or modes of transportation; hotels, lodging places, places of public accommodation, amusement or resort to which the general public is invited, subject only to the conditions and limitations established by law and applicable alike to all persons.

Section 168-5 provides in part:

> It is a discriminatory practice for
> (1) An employer to fail to hire or consider for employment or promotion, to discharge, or otherwise to discriminate against a qualified handicapped person on the basis of a handicapping condition with respect to compensation or the terms, conditions or privileges of employment.

In 1979 the North Carolina Court of Appeals ruled against a group of citizens' (GASP, for Group Against Smoking Pollution) claim that Mecklenburg County, by permitting smoking in its public buildings and facilities, effectively denied the plaintiffs access to the buildings and violated the state handicapped protection law.[4] The plaintiffs had sought an injunction on behalf of everyone harmed by tobacco smoke, describing the class as "at least 20% of all persons . . . among others, those with allergic rhinitis, those pregnant, those with heart conditions, and those with any pulmonary problem (e.g. emphysema)."[5]

The court of appeals refused to consider a group so large handicapped, saying, "It is manifestly clear that the legislature did not intend to include within the meaning of 'handicapped persons' those people with *'any* pulmonary problem' however minor, or *all people* who are harmed or irritated by tobacco smoke."[6] The court noted, however, that the failure of so broadly defined a class to qualify as handicapped under state law would not necessarily prevent a narrower class from qualifying in future: "We do not attempt to determine, in this opinion, whether a class of persons with a particular pulmonary problem or disease such as emphysema, would be considered 'handicapped persons' within the meaning of G.S. 168-1, et seq. . . ." Also the court did not say whether a class, though handicapped, might be too small to be taken into account. Would it be reasonable, for example, to ban smoking in public places to protect a few highly allergic people?

Two federal rulings are of interest, first, because of the similarity between the federal handicapped act[7] and North Carolina's and, second, because the federal act applies to any federally funded activity within the states. In *Vickers v. Veterans Administration*[8] a federal district court, and in *Pletten v. Department of Army*[9] the Merit Systems Protection Board, acknowledged that the plaintiffs were handicapped by their inability to tolerate exposure to coworkers' smoke. But in both instances the workers' demand for a smoking ban was held to exceed the statute's requirement of "reasonable accommodation" to the needs of the handicapped.

Smoking As Assault and Battery

Twice plaintiffs have characterized their subjection to smoke as assault and battery. In *McCracken v. Sloan* a Charlotte postal employee filed an action against his supervisor for smoking cigars in his presence.[10] The plaintiff did have a physician-certified allergy—"3 plus on a scale of one to four," for which he had requested (and been denied) sick leave. At two meetings in the supervisor's office to discuss the leave application, the supervisor smoked cigars, saying, according to plaintiff, "Bill, I know you claim to have an allergy to tobacco smoke and you have presented statements from your doctor stating this, but there is no law against smoking, so I'm going to smoke."

The court of appeals affirmed the trial court's dismissal of the claim for lack of evidence that the cigar smoke had a physical effect on the plaintiff on the two occasions in question. The court observed: "We are left with evidence that defendant smoked cigars in his own office when he knew it was obnoxious to a person in the room for him

4. GASP v. Mecklenburg County, 42 N.C. App. 225, 256 S.E.2d 477 (1979).
5. *GASP*, 42 N.C. App. at 226–27.
6. *Id.* at 227.
7. 29 U.S.C. § 794 (1988 Supp.).
8. 549 F. Supp. 85 (W.D. Wash. 1982).
9. MSPB Docket No. CH0752810178 (Oct. 26, 1984).
10. 40 N.C. App. 214, 252 S.E.2d 250 (1979).

to do so. That person did experience some mental distress as a result of inhaling the cigar smoke. We hold this is not enough evidence to support a claim for assault and battery." The court left the door partially open for future claims by noting, "We express no opinion as to what the result would be if there were evidence of some physical injury. . . ."

The second plaintiff, a state agency employee in Oklahoma, attempted without success to prove several federal constitutional violations. One claim was that office smoke amounted to an assault, producing a violation of Section 1983 of the United States Code because the assault was committed "under color of state law." The Tenth Circuit Court of Appeals had no difficulty in dismissing this and the other constitutional claims.[11]

Legal writers have been more favorably disposed to the smoking-as-assault-and-battery theory than courts. One commentator analogized battery in this instance to trespass, citing a case in which a refiner's emission of microscopic particles was held a trespass against those who inhaled them.[12] The same author and another[13] criticized the reasoning of North Carolina's *McCracken* decision, especially our court's statement: "Consent is assumed to all those ordinary contacts which are customary and reasonably necessary to the common intercourse of life. Smelling smoke from a cigar being smoked by a person in his own office would ordinarily be considered such an innocuous and generally permitted contact."[14]

Nonsmokers' Constitutional Rights

In *GASP v. Mecklenburg County*, discussed above, the plaintiffs lodged a constitutional complaint as well as the one based on North Carolina's handicapped discrimination act. That claim, the court of appeals ruled, was "without merit" and the trial court acted properly in dismissing it. Three federal circuit courts of appeals have also dismissed constitutional arguments made by plaintiffs objecting to smoke. The Fifth Circuit Court of Appeals refused to enjoin smoking during performances in the New Orleans Superdome. Recognizing that the City of New Orleans, State of Louisiana, United States Congress, or the Superdome's management could lawfully have banned smoking, the court's majority (two of three judges) concluded that failure to ban it did not violate the federal Constitution.[15] Similarly the Circuit Court of Appeals for the District of Columbia, refusing to enjoin smoking in federal buildings, saw no constitutional rights at stake,[16] and the Tenth Circuit held that the Constitution did not support an employee's damage claim and request for injunction requiring the employer to furnish a smokeless environment. The plaintiff, who alleged respiratory and cardiovascular illness, had claimed violation of his property interest in the job (though he was still working) and—with considerable originality—interference with First Amendment rights because smoke diminished his ability to think.[17]

Benefits for Allergic Workers

People unable to work in the presence of smoke have asserted rights to disability retirement, workers compensation, and unemployment benefits. Though our courts have not ruled on any of these points directly, a New Mexico decision on smoke-caused disability cites and discusses a North Carolina workers compensation case as analogous. The worker seeking benefits in North Carolina had been a hair stylist for twenty years before developing a severe allergy to the chemicals in cosmetic products. She became too ill to work. Within thirty days after leaving the job her skin healed, but she was unable to find other employment. Refusing to label her disabled, the Industrial Commission awarded only thirty days benefits and the court of appeals affirmed. Both bodies concluded that after thirty days, the plaintiff no longer suffered from an occupational disease: thereafter, the "plaintiff's incapacity to earn wages . . . was the result of her personal sensitivity to chemicals used in her work. . . . [It is not] the purpose of the Workmen's Compensation Act . . . to provide benefits for inability to perform a particular type of work due to an individual's susceptibility to disease from that work."[18]

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11. Kensell v. State of Oklahoma, 716 F.2d 1350 (10th Cir. 1983).

12. Paolella, *The Legal Rights of Nonsmokers in the Workplace*, 10 U. PUGET SOUND L. REV. 591, 624 (1987), citing Bradley v. American Smelting and Refining Co., 104 Wash. 2d 677, 709 P.2d 782 (1985).

13. Comment, *The Legal Conflict Between Smokers and Nonsmokers: The Majestic Vice Versus the Right to Clean Air*, 45 MO. L. REV. 444, 472 (1980).

14. McCracken v. Sloan, 40 N.C. App. 214, 217 (1979).

15. Gasper v. Louisiana Stadium and Exposition District, 418 F. Supp. 716 (E.D. La. 1976), *aff'd*, 577 F.2d 897 (5th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979).

16. Federal Employees for Non-Smokers' Rights v. United States, 446 F. Supp. 181, *aff'd mem.*, 598 F.2d 310 (1978), *cert. denied*, 444 U.S. 926 (1979). This case and *GASP v. Mecklenburg County* both find that there is no constitutional right to a safe or healthy environment and cite for the proposition *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971). While this author knows no authority for the proposition that there *is* such a right, the citation to *Ely* seems weak. In that case residents of an historic neighborhood sought an injunction against the state prison system locating a medical center nearby. Denying the injunction on several grounds, the court of appeals only briefly addressed the plaintiffs' constitutional argument, referring to it as "an ancillary argument of the complaining parties, not vigorously pressed." The court declined to break new ground by recognizing "a constitutional protection for the environment [because] this newly advanced constitutional doctrine has not yet been accorded judicial sanction; and appellants do not present a compelling case for doing so."

17. Kensell v. State of Oklahoma, 716 F.2d 1350 (10th Cir. 1983).

18. Sebastian v. Mona Watkins Hair Styling, 40 N.C. App. 30, 251 S.E.2d 872, *cert. denied*, 297 N.C. 301, 254 S.E.2d 921 (1979).

The Court of Appeals of New Mexico sharply disagreed with the analysis. It found that an engineer forced by smoke allergy to work outdoors as a gardener was totally and permanently disabled, despite the facts that smoke does not alter body tissue and the individual remains well if he avoids exposure.[19] The Supreme Court of California went further and found a worker entitled to compensation for the one third of his disability attributable to *his* on-the-job smoking.[20] In Washington a worker lost before the compensation hearing board but was allowed to sue on another theory. The board denied benefits on the theory that plaintiff's need for a smoke-free workplace did not constitute an occupational disease or injury. (She developed obstructive lung disease from smoke exposure and quit work on doctor's orders.) But when a trial court then dismissed the plaintiff's negligence action against her employer because workers compensation is an exclusive remedy, the court of appeals reversed, and the state supreme court upheld the reversal. It is unfair, the court observed, to restrict a claimant to a remedy that has been barred.[21]

Federal employees have raised the disability issue twice. Both workers won, with the Merit Systems Protection Board (MSPB) reaching contrary results. In one case MSPB reversed the decision of the Office of Personnel Management (OPM) on whether the smoke-allergic worker was disabled. The worker, an accounting technician who lost her voice every Monday and did not regain it until the weekend, had tried a respiratory mask and other accommodations for months unsuccessfully. OPM ruled that the allergy and resulting inability to communicate orally did not impair job performance. MSPB, on the contrary, judged the worker totally disabled and eligible for retirement.[22] In the other case MSPB denied disability benefits for the same reason our court denied the hair stylist's application—because plaintiff's allergy caused no lasting physical damage and she could work in a smoke-free environment. The Ninth Circuit Court of Appeals reversed MSPB.[23]

No clear pattern is visible in the few rulings on unemployment benefits. The California Court of Appeals awarded benefits twice—once to the type of plaintiff (allergic nonsmoker) typical of such litigation,[24] the second time to a plaintiff who smoked in his own home but objected to smoke at work.[25] One source cites unreported decisions awarding benefits to nonsmokers in Washington, Idaho, and Iowa.[26] Courts in Colorado[27] and Nebraska[28] have denied awards to nonsmokers. (The Colorado plaintiff, however, presented a weak case, and the other at least won a strong dissent.) Finally there is what seems to be a single decision on a discharged smoker's right to unemployment compensation.[29] The applicant for benefits was a sixty-two-year-old amputee fired after nearly eight years satisfactory work as a nursing assistant. Violating the nursing home's new policy, she smoked one cigarette in a patient's bathroom. The unemployment board's and court of appeals' decisions, which denied benefits because the discharge was for "willful misconduct," were affirmed by an equally divided Pennsylvania Supreme Court.

Other Rulings

Elsewhere smokers and nonsmokers have filed claims based on legal theories not tested in North Carolina. The results are interesting but of limited utility because, first, they are not binding here and, second, no definite trend can be discerned.

Nonsmokers' Claims

Nonsmokers as plaintiffs have asked courts to support these propositions: (1) employers should limit smoking as part of a common law duty to provide a safe workplace; (2) failure to restrict smoking breaches the implied contract between worker and employer; (3) an employee cannot be fired for complaining about smoking; and (4) failing to protect against smoke pollution amounts to infliction of emotional distress.

Courts divide on the first point—that is, whether the employer's traditional obligation to make working conditions reasonably safe includes protection against coworkers' smoke. An appeals court for the District of Columbia held it did not,[30] and Colorado's appellate court affirmed dismissal of a similar claim.[31] Four other courts, however,

19. Schober v. Mountain Bell Telephone, 96 N.M. 376, 630 P.2d 1231 (N. M. App. 1981).

20. Fuentes v. Worker's Compensation Appeals Bd., 128 Cal. Rptr. 673, 16 Cal. 3d 1, 547 P.2d 449 (1976).

21. McCarthy v. Washington Dep't of Social and Health Servs., 46 Wash. App. 125, 730 P.2d 681 (1986), *aff'd*, 110 Wash. 2d 812 (1988).

22. Flaniken v. Office of Personnel Management, No. DA 831L10001 (Dec. 29, 1980).

23. Parodi v. Merit Sys. Protection Bd., 690 F.2d 731 (9th Cir. 1982).

24. Alexander v. California Unemployment Ins. Appeals Bd., 163 Cal. Rptr. 411, 104 Cal. App. 3d 97 (1980).

25. McCrocklin v. Employment Div. Dep't, 156 Cal. App. 3d 1067, 205 Cal. Rptr. 156 (1984).

26. Paolella, *The Legal Rights of Nonsmokers in the Workplace*, 10 U. PUGET SOUND L. REV. 591, 630 (1987).

27. Rotenberg v. Industrial Comm'n of Colorado, 590 P.2d 521 (Colo. Ct. App. 1979).

28. Tuma v. Omaha Public Power Dist., 226 Neb. 19, 409 N.W. 2d 306 (1987).

29. Selan v. Unemployment Compensation Bd., 495 Pa. 338, 433 A.2d 1337 (1983).

30. Gordon v. Raven Sys. and Research, Inc., 462 A.2d 10 (D.C. 1983).

31. *Rotenberg*, 590 P.2d 521. The claim, which arose in the context of plaintiff's seeking unemployment benefits, may have been so inadequately presented that the court's dismissal is not a decision on the merits. Plaintiff offered no evidence of adverse effects on his health or of air quality in his work space. The court noted with asperity that it was not an investigative body.

treated the claim more seriously. One ordered fuller briefing on that issue in a suit brought by federal workers seeking an injunction against smoking in federal buildings.[32] A New Jersey trial court, in an opinion widely noted but rarely followed, enjoined a private employer to eliminate smoking in work areas, including offices and customer service areas.[33] The severely allergic plaintiff was owed that level of protection, the court ruled, and the existence of federal legislation protecting workers (the Occupational Health and Safety Act [OSHA]) did not relieve the employer of its state tort law duty. The Missouri Court of Appeals did follow this ruling closely in approving a similar request for injunction.[34] Three members of the Washington Supreme Court held that employers do breach a duty by failing to restrict smoking; five justices, though, reserved judgment on the matter.[35]

A Massachusetts plaintiff lost on the claim that the employer's failure to enforce its policy of separating smokers and nonsmokers was a breach of contract.[36] The state supreme court refused to find a smoke-free environment to be part of the implied terms of employment. On the contrary, it was merely the plaintiff's preference, which the employer indulged for a time.

In the same case plaintiff's charge of infliction of emotional distress also failed. Without evidence of physical injury to her, defendant's conduct was not sufficiently outrageous. A California plaintiff, however, succeeded in contesting his firing, which he alleged resulted from his agitating for an office smoke ban.[37] The state court of appeals held that plaintiff was entitled to try to prove, first, that his was a "retaliatory discharge" and, second, that it was an intentional infliction of emotional distress. The court's treatment of California's OSHA[38] was noteworthy. Though that act, like the federal equivalent, does not label tobacco a work hazard, the act establishes as a premise of California law, the court said, that the state has an interest in allowing employees to protest any working condition they reasonably believe to be hazardous.

Smokers' Claims

Most arguments raised by nonsmokers also appear in litigation initiated by smokers. Retaliatory discharge is an example. Three times in the 1960s federal courts of appeals were asked to determine whether a firing based on smoking was a pretext to punish union activity.[39] Like nonsmokers, smokers have raised contract and constitutional claims. A smoker asserted unsuccessfully that the Wisconsin Clean Indoor Air Act, on which his employer's smoking policy rested, breached their implied employment contract and violated the federal Constitution's guarantee of equal protection.[40] The Tenth Circuit Court of Appeals heard the most significant constitutional challenge to a dismissal for smoking.[41] Plaintiff, a fire-fighter trainee, took three puffs from a cigarette during his lunch period, thereby breaking a written promise not to smoke during the probationary year. The trial court dismissed his claim that firing for so trivial an infraction violated Fourteenth Amendment interests in liberty, privacy, property, and due process, and the appellate court affirmed.[42]

Another set of smokers' claims comes from union members who assert a right to collective bargaining over smoking policy. Where employers unilaterally impose restrictions, unions have challenged the action successfully.[43] The exception, which defined a smoking ban as "inherent managerial policy" rather than "terms and conditions of employment," arose in the public school setting. The school board succeeded in characterizing the ban as "a matter of basic educational policy."[44] The same court subsequently distinguished the school case on that ground—outside the school context the court indicated employers must bargain about smoking policy.[45]

Smokers' interests triumphed in two cases where courts reviewed administrative agencies' actions. New York's court of appeals invalidated stiff regulation of smoking in public places imposed by the state's Public Health Council. Affirming the decision below 3-2, the court found that the council's regulation usurped legislative authority because

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32. Federal Employees for Non-Smokers' Rights v. United States, 598 F.2d 310 (D.C. Cir. 1978), *cert. denied*, 444 U.S. 926 (1979).

33. Shimp v. New Jersey Bell Telephone Co., 368 A.2d 408, 145 N.J. Super. 516 (Ch. Div. 1976). A contrary result obtained, apparently, in a subsequent case from the same court; the later (unpublished) opinion is said to criticize *Shimp*, Smith v. Blue Cross and Blue Shield of New Jersey, No. C-3618-81E (N.J. Super. Ct. 1983), described in 511 IERM 207.

34. Smith v. Western Electric Co., 643 S.W.2d 10 (Mo. Ct. App. 1982).

35. McCarthy v. Washington Dep't of Social and Health Servs., 110 Wash. 2d 812 (1988).

36. Bernard v. Cameron and Colby Co., Inc., 397 Mass. 320, 491 N.E.2d 604 (1986).

37. Hentzel v. Singer Co., 188 Cal. Rptr. 159, 138 Cal. App. 3d 290 (Ct. App. 1982).

38. All states, including North Carolina, have an occupational health and safety act akin to the federal act. North Carolina's is codified at Art. 16, Ch. 95 of the General Statutes, §§ 95-126 through -160.

39. Two said yes—N.L.R.B. v. S.E. Nichols-Dover, Inc., 414 F.2d 561 (3d Cir. 1969); Butcher Boy Refrigerator Door Co. v. N.L.R.B., 290 F.2d 22 (7th Cir. 1961)—one, no. Metal Processors' Union Local No. 16, AFL-CIO v. N.L.R.B., 337 F.2d 114 (D.C. Cir. 1964).

40. Rossie v. State/Department of Revenue, 133 Wis. 2d 341, 395 N.W.2d 801 (Wis. Ct. App. 1986).

41. Grusendorf v. City of Oklahoma, 816 F.2d 539 (10th Cir. 1987).

42. The appellate court expressed interest, however, in a claim plaintiff did *not* raise—whether application of the no-smoking rule only to trainees violated equal protection, 816 F.2d at 543.

43. Commonwealth v. Commonwealth, Pennsylvania Labor Relations Bd., 74 Pa. Commw. 1, 459 A.2d 452 (1983); Johns-Manville Sales Corp. v. International Ass'n of Machinists, 621 F.2d 756 (5th Cir. 1980); Gallenkamp Stores Co. v. N.L.R.B., 402 F.2d 525 (9th Cir. 1968); Butcher Boy Refrigerator Door Co. v. N.L.R.B., 290 F.2d 22 (7th Cir. 1961).

44. Chambersburg School Dist. v. Commissioner, Pennsylvania Labor Relations Bd., 60 Pa. Commw. 29, 430 A.2d 740 (1981).

45. *Commonwealth*, 74 Pa. Commw. 1, 459 A.2d 452.

it was stricter than state law.[46] At issue in the second case was protection of smokers' greater susceptibility—at the employers' expense. Smokers are vastly more susceptible to the hazards of asbestos than nonsmokers, and OSHA took that into account in determining an acceptable level of asbestos workers' exposure to the substance. Asbestos manufacturers challenged the standard, but the federal appeals court upheld it, reasoning, "We understand the employers' aggravation that they are being forced to bear part of the burden imposed by employees' decisions to smoke, but we do not think that at this stage of American history smokers can be regarded as so far beyond the pale as to *require* OSHA to disregard them in computing the risks of asbestos."[47] (emphasis in original)

Possible Areas of Future Liability

The preceding case review reveals courts' general reluctance to step in to settle the issue of workplace smoking. Perhaps the reluctance springs from a paucity of sympathetic plaintiffs and well documented claims,[48] but a strong reason no doubt is judges' perception that public opinion and norms of personal behavior on smoking are in flux (see the quotation above). Though uneasy about it,[49] judges—federal judges especially—seem to prefer to let ordinary social processes take their course on the matter. To interfere invites criticism, a Tenth Circuit opinion noted: "We are certain . . . that the United States Constitution does not empower the federal judiciary, upon plaintiff's application, to impose no-smoking rules in the plaintiff's workplace. To do so would support the most extreme expectations of the critics who fear the federal judiciary as a superlegislature promulgating social change under the guise of securing constitutional rights."[50]

Still, employers' current freedom to choose—whether to have a policy, of what nature, how strongly enforced—could diminish in the future. Smokers' and nonsmokers' advocates may, because of recent developments, try new arguments or return to old ones. The surgeon-general's reports of 1986—*The Health Consequences of Involuntary Smoking*—and 1988—*The Health Consequences of Smoking: Nicotine Addiction*—summarize research that might influence future litigation.

The 1988 report presents smokers more sympathetically than ever before. They are said to suffer from a powerful central-nervous-system addiction to nicotine that, together with the smoker's efforts to break the addiction, is likely to affect employment. (Smokers' performance suffers under nicotine deprivation,[51] for instance, and a few could be expected to prove unable to quit even under threat of dismissal.) These facts might bolster their legal claims.

For example, should the smoker, like the allergic nonsmoker, be considered handicapped? The principal argument against it presumably would come from the fact that the smoker chooses the habit. Because the smoker's conscious acts create the dependency, he may be ineligible for the protection of the handicapped laws. The state Handicapped Persons Protection Act excludes handicaps resulting from "drug addiction or abuse" [North Carolina General Statute Section 168A-3(4)(a)]. Federal law is more equivocal. Its definition of "handicapped individual" for employment purposes excludes "any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others."[52]

It is impossible to predict how a smoker seeking job protection would fare under this language. Although some courts have protected alcoholics[53] and the definition on its face does not necessarily exclude them (or smokers), the Supreme Court's ruling in *Traynor v. Turnage*[54] indicates that legal protection for self-inflicted handicaps continues to be disfavored. Still, when smokers are viewed as unwitting victims of addiction, their behavior—such as risking a job for three cigarette puffs[55]—seems less irresponsible than it might have previously to judges and juries. The 1988 report's conclusions on addiction may yet prove legally significant.

Information on the harm from passive smoking is more likely to do so. Its principal effect could be to shift the standard of reasonableness by which employers' actions

46. Boreali v. Axelrod, 71 N.Y.2d 1, 517 N.E.2d 1350 (1987).

47. Building and Constr. Trades Dep't, AFL-CIO v. Brock, 838 F.2d 1258 at 1265 (1988).

48. *See, e.g.*, Kensell v. State of Oklahoma, 716 F.2d 1350 (10th Cir. 1983); Rotenberg v. Industrial Comm'n of Colorado, 590 P.2d 521 (Colo. Ct. App. 1979), and McCracken v. Sloan, 40 N.C. App. 214, 252 S.E.2d 250 (1979), all of whose decisions for defendant seem easily predictable.

49. Supporting an arbitrator's decision against an asbestos manufacturer who had tried to ban smoking, the Fifth Circuit opinion seemed almost apologetic: "Courts are not the appropriate forum for the formulation of industrial sumptuary or health protection codes." Johns-Manville Sales Corp. v. International Ass'n of Machinists, 621 F.2d 756, 760 (1980).

50. *Kensell*, 716 F.2d at 1351.

51. For example, (1) nicotine enhances a smoker's performance of certain cognitive tasks, and withdrawal, correspondingly, lowers it; (2) stress increases a smoker's need for nicotine and is a risk factor for beginning smoking; (3) smokers who quit often gain weight. 1988 REPORT at 15.

52. 29 U.S.C.A. § 706 (B) (1988 Supp.).

53. Consolidated Freightways, Inc. v. Cedar Rapids Civil Rights Comm'n, 366 N.W.2d 522 (Iowa 1985); Tinch v. Walters, 765 F.2d 599 (6th Cir. 1985).

54. 99 L.Ed.2d 618 (1988). The Court upheld a Veterans Administration regulation denying extensions of time to claim benefits to veterans handicapped by "willful misconduct" such as alcoholism.

55. Grusendorf v. City of Oklahoma, 816 F.2d 539 (10th Cir. 1987).

to protect nonsmokers are measured. Decades ago the "reasonable employer" almost certainly did not restrict smoking and probably would have declined to institute restrictions if asked. Will the same be true, though, in ten years?

The surgeon-general's annual reports have brought involuntary smoking to public notice repeatedly over the past twenty years.[56] The 1986 report, the strongest to date, states, "It is now clear that disease risk due to the inhalation of tobacco smoke is not limited to the individual who is smoking, but can extend to those who inhale tobacco smoke emitted into the air."[57] Although the surgeon-general's evidence on the effects of coworkers' smoke is "limited and inconclusive,"[58] it is now possible to imagine a plaintiff who might pose a genuine legal risk to employers. Picture a young adult beginning work today. He is a nonsmoker who has not and will not in the future share a household with smokers and who lives in a rural (unpolluted) area. Most of his coworkers smoke, however. Though ventilation is poor, the employer takes no action. In 1998 the worker is diagnosed with lung cancer and soon dies. In 2000 a jury assembles to consider whether the employer's negligence caused the death. Surely such a plaintiff's chances for success, whatever they may be, are increasing.

Conclusion

Workplace smoking has not been an area of high legal risk for employers. With few exceptions, policy on the matter has been established without regard to liability considerations. Now new scientific evidence, especially that on the danger of involuntary smoking, suggests that the situation may change. Employers who have not addressed the smoking issue may be well advised to institute a policy.

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56. PUBLIC HEALTH SERVICE, THE HEALTH CONSEQUENCES OF SMOKING (Washington, D.C.: GPO, 1972), 119–35.

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58. *Id.* at 91.

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