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Bates v. Bates Smokers vs. Nonsmokers

# SMOKERS vs. NONSMOKERS: THE COMMON LAW RIGHT TO A SMOKE-FREE WORK ENVIRONMENT

*Smith v. Western Electric Co.*<sup>1</sup>

The number of American smokers has decreased steadily for the past twenty years, but an estimated fifty million persons still smoke.<sup>2</sup> Considering the diversity and the numbers of American smokers, smoking and non-smoking employees inevitably will be placed near each other in the workplace. Given the adverse effects of tobacco smoke on some non-smokers,<sup>3</sup> that situation will sometimes lead to conflict. When that conflict arises, a disgruntled nonsmoking employee has five options: (1) ask his fellow employee(s) not to smoke while working; (2) request that his employer restrict smoking, either individually or collectively, in the work area; (3) seek a transfer to a different work area free from smoke, if one exists; (4) change jobs; or (5) seek legal relief. If an employee resorts to legal action, a new application of legal principles may afford him relief.

An employer has a common law duty to use reasonable care to provide its employees with a safe workplace.<sup>4</sup> In *Smith v. Western Electric Co.*,<sup>5</sup> a Missouri court for the first time employed that doctrine to hold that an employee may obtain an injunction to compel his employer to provide a

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1. 643 S.W.2d 10 (Mo. App., E.D. 1982).

2. The Surgeon General's 1964 report estimated that the total number of American smokers was close to 70 million. U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, SMOKING AND HEALTH 45 (1964). In 1978, the number of American cigarette smokers, ages 17 and older, was estimated at 54.1 million. The prevalence of cigarette smoking among adults by 1978 had reached its lowest recorded level in 30 years. U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, SMOKING AND HEALTH 11 app. (1979) [hereinafter cited as 1979 HEW REPORT].

3. The effect of tobacco smoke on a nonsmoker will vary according to the characteristics of the individual and the amount of smoke to which he is exposed. Among healthy nonsmoking adults, the most common effects of exposure to tobacco smoke are minor eye and throat irritation. A substantial proportion of nonsmokers find it annoying to be with a person who is smoking. A 1971 national survey found that 77% of the men and 80.5% of the women surveyed agreed with the statement, "It is annoying to be near a person who is smoking cigarettes." 1979 HEW REPORT, *supra* note 2, at 11-28. The effect of tobacco smoke may be more severe on someone with heart or lung disease or who is hypersensitive to tobacco smoke. Children are also affected differently because they experience greater exposure for their body weight than adults. *Id.* at 11-29 to 11-34.

4. See notes 71-76 and accompanying text *infra*.

5. 643 S.W.2d 10 (Mo. App., E.D. 1982).

smoke-free work environment.<sup>6</sup> *Smith* represents a new application of the common law theory to the nonsmoking employee. It is a significant step forward in clarifying the rights and duties of employers and employees when smoke in the workplace causes a conflict.

The issue in *Smith* was whether the plaintiff's petition, alleging that common law duty, stated a cause of action. The plaintiff sought to enjoin his employer from exposing him to tobacco smoke at work or affecting his pay or employment conditions because of his reaction to smoke.<sup>7</sup> He alleged that exposure to tobacco smoke in the workplace caused him to suffer an allergic reaction.<sup>8</sup> He claimed that his employer's attempted solutions, including moving him to different parts of the plant and allowing him to wear a respirator at work, were ineffective,<sup>9</sup> and that he had exhausted all administrative remedies without success.<sup>10</sup> He maintained that the employer's refusal to protect him from tobacco smoke was a breach of its common law duty to provide him with a reasonably safe workplace: the employer knowingly exposed him to a reasonably avoidable health hazard not necessary to its business.<sup>11</sup> The trial court dismissed the petition for

6. *Id.* at 13.

7. The plaintiff was hired by the defendant in 1950 and worked at the same location from 1967 until the filing of the complaint. He shared an open office with both smoking and nonsmoking employees. *Id.* at 11-12.

8. The plaintiff began in 1975 to experience serious respiratory discomfort while working. A medical examination determined that he was hypersensitive to tobacco smoke, and his doctors advised him to avoid tobacco smoke whenever possible. When exposed to smoke, he suffered "sore throat, nausea, dizziness, headache, blackouts, loss of memory, difficulty in concentration, aches and pains in joints, sensitivity to noise and light, cold sweat, gagging, choking sensations, and light-headedness." *Id.* at 12.

9. The plaintiff claimed that after he complained about the smoke, his employer moved him to different parts of the plant, but no improvement resulted because each new location still exposed him to smoke. In 1980, after his employer refused to segregate smokers or limit smoking to non-work areas, the plaintiff alleged that he was given the choice of wearing a respirator while working or applying for a job in the computer room, where smoking was prohibited. The computer room job paid only \$1300 per month while the plaintiff was then making \$1800 per month. Brief for Appellant at 10. The plaintiff opted for the first alternative and wore the respirator that the employer provided, but he claimed it was ineffective. 643 S.W.2d at 12.

10. The plaintiff complained to the National Institute for Occupational Safety and Health (NIOSH) and filed a Handicapped Declaration Statement under the Federal Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1976). Brief for Appellant at 35-37. His employer adopted a smoking policy in response to recommendations from NIOSH, but the plaintiff claimed that the employer did not make a reasonable effort to implement the plan. 643 S.W.2d at 12. *Smith* also was informed by the agency that administered the Federal Rehabilitation Act that his condition was not a handicap under the Act. Brief for Appellant at 37-38.

11. 643 S.W.2d at 12.

failure to state a claim.<sup>12</sup>

On appeal, the Missouri Court of Appeals for the Eastern District reversed, becoming the first court in Missouri and the second in the nation<sup>13</sup> to hold that an employee, relying on the employer's common law duty, can compel his employer to provide him with a smoke-free work environment.<sup>14</sup> The *Smith* court believed that the plaintiff's allegations, if true, demonstrated that tobacco smoke is a health hazard to employees, that the employer knew the smoke would harm the plaintiff, and that the employer could regulate smoking within its facilities. On the facts alleged, the employer's failure to eliminate the hazard was a continuing breach of its common law duty. The court remanded the case for a trial on the merits.<sup>15</sup>

The *Smith* court decided to allow injunctive relief for three reasons. First, the future deterioration of the plaintiff's health was an irreparable harm that could be prevented, before permanent damage occurred, by eliminating tobacco smoke from his work environment. Second, the plaintiff's ailment was a recurring harm that could be remedied only by multiple lawsuits absent injunctive relief. Third, the plaintiff had exhausted his administrative remedies and had no adequate remedy at law.<sup>16</sup>

The court also held that the Occupational Safety and Health Act of 1970 (OSHA)<sup>17</sup> did not preempt state jurisdiction over common law claims arising from employment<sup>18</sup> and provides that a state court may assert jurisdiction over a claim for which no OSHA safety standard is in effect.<sup>19</sup> The court held that those provisions enabled it to hear the claim.<sup>20</sup>

The significance of *Smith* lies in its recognition that injunctive relief is available to an employee in a dispute with his employer over smoking in the

12. *Id.* at 11.

13. The first case was *Shimp v. New Jersey Bell Tel. Co.*, 145 N.J. Super. 516, 368 A.2d 408 (Ch. Div. 1976).

14. 643 S.W.2d at 13.

15. *Id.* at 13-14.

16. *Id.* at 13. In Missouri, the availability of an injunction is provided by statute. See MO. REV. STAT. § 526.030 (1978). The standards used by the *Smith* court, however, were the traditional equitable requirements.

17. 29 U.S.C. §§ 651-678 (1976).

18. *Id.* § 653(b)(4) provides:

Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

19. *Id.* § 667(a) provides: "Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under state law over any occupational safety or health issue with respect to which no standard is in effect under § 655 of this title."

20. 643 S.W.2d at 13.

workplace. It is only the second published opinion to recognize that proposition.<sup>21</sup> The facts and the reasoning in *Smith* track the first case.

In *Shimp v. New Jersey Bell Telephone Co.*,<sup>22</sup> the plaintiff worked as a secretary in an open office with smoking and nonsmoking employees. Due to her allergy to tobacco smoke, she suffered a severe reaction to "involuntary smoking," which is the inhalation of tobacco smoke by a nonsmoker from the air.<sup>23</sup> She sought relief through the available grievance mechanisms, which resulted in the installation of a fan in her work area. But the fan did not alleviate her problem,<sup>24</sup> and she brought an action to enjoin her employer from exposing her to tobacco smoke at work. She contended that the employer's practice of permitting employees to smoke while working resulted in an unsafe workplace.<sup>25</sup>

Faced with the novel issue of whether an employer has a duty to provide smoke-free air to its employees, the New Jersey court held that it did.<sup>26</sup> It found that both New Jersey common law and the purposes behind OSHA require employers to supply reasonably safe work environments.<sup>27</sup> The court rejected the employer's common law assumption of risk defense, concluding that tobacco smoke was not a necessary by-product of the employer's business and therefore was not a risk assumable as an occupational hazard.<sup>28</sup> The court stated that injunctive relief was available to the employee to compel the employer to eliminate a "preventable hazardous con-

21. The issue was raised, but not decided, in *Federal Employees for Non-smokers' Rights v. United States*, 446 F. Supp. 181 (D.D.C. 1978), *aff'd mem.*, 598 F.2d 310 (D.C. Cir.), *cert. denied*, 444 U.S. 926 (1979). The district court was unsure whether it had jurisdiction over such a cause of action even if it did exist. 446 F. Supp. at 183. The parties were instructed to brief the jurisdictional issue, but no reported decision contains the court's ruling on the question.

22. 145 N.J. Super. 516, 368 A.2d 408 (Ch. Div. 1976).

23. *Id.* at 521, 368 A.2d at 410. The plaintiff's symptoms included "nosebleeds, irritation to the eyes which resulted in corneal abrasion and corneal erosion, headaches, nausea, and vomiting." *Id.* The presence of only one adjacent smoker could trigger an allergic reaction.

24. The fan was unsuccessful because it was not kept in continuous operation. Other employees complained of cold drafts, and the resulting compromise, running the fan at set intervals, was ineffective. *Id.*

25. *Id.* at 520, 368 A.2d at 410.

26. *Id.* at 530-31, 368 A.2d at 415-16.

27. *Id.* at 521, 368 A.2d at 410. Several provisions of OSHA support the court's view that an employer has a duty to provide his employees with a safe workplace. For example, the purpose of the Act is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b) (1976). Another section provides that each employer must "furnish to each of his employees . . . a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." *Id.* § 654(a)(1).

28. 145 N.J. Super. at 523, 368 A.2d at 411. The theory of assumption of risk is that a person who knowingly exposes himself to a risk of harm caused by another

dition."<sup>29</sup> After taking judicial notice of the toxicity of tobacco smoke<sup>30</sup> and examining the medical evidence on involuntary smoking,<sup>31</sup> the court found that the employer should have foreseen the adverse consequences of involuntary smoking and acted to prevent that harm.<sup>32</sup> The court ordered the employer to ban smoking in the entire work area.<sup>33</sup>

The novel approach of *Smith* and *Shimp* provides nonsmoking employees an effective remedy for smoke-related health problems which has never before been available. Every business where nonsmokers work closely with smokers is susceptible to a similar claim. Given that broad potential, *Smith* and *Shimp* almost certainly will be tested in other jurisdictions. Acceptance of the common law action should grow in response to mounting medical evidence that involuntary smoking is harmful to nonsmokers.

The Surgeon General's Reports for 1972, 1975, and 1979 all acknowledge that involuntary smoking may cause a variety of harms to nonsmokers, from minor eye and throat irritations to the exacerbation of serious heart and respiratory diseases.<sup>34</sup> The American Medical Association has esti-

relieves that other person of any duty to act with ordinary care toward him. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 440 (4th ed. 1971).

29. 145 N.J. Super. at 524, 368 A.2d at 411.

30. *Id.* at 527, 368 A.2d at 414. Several courts have judicially noticed the toxic nature of tobacco smoke. See 29 AM. JUR. 2D *Evidence* § 120 (1967) (collecting cases).

31. 145 N.J. Super. at 527-30, 368 A.2d at 414-15. The plaintiff presented a number of affidavits from medical experts indicating that involuntary smoking is hazardous to nonsmokers. One affidavit, from former Surgeon General Dr. Luther Terry, concluded that involuntary smoking in the workplace can be injurious to the health of a significant percentage of the working population. *Id.* at 528, 368 A.2d at 414.

32. *Id.* at 531, 368 A.2d at 416. Finding the evidence "clear and overwhelming," the court reasoned that:

The right of an individual to risk his or her own health does not include the right to jeopardize the health of those who must remain around him or her in order to properly perform the duties of their jobs. The portion of the population which is especially sensitive to cigarette smoke is so significant that it is reasonable to expect an employer to foresee health consequences and to impose upon him a duty to abate the hazard which causes the discomfort.

*Id.* at 530-31, 368 A.2d at 416.

33. *Id.* at 531, 368 A.2d at 416. The court considered the interests of both smokers and nonsmokers in reaching its decision. The nonsmokers' right to a safe work environment was protected by the court's decision, while smokers were still permitted to smoke in the employees' lounge and lunchroom. The court reasoned that this imposed no hardship on the employer because it had already declared certain parts of the work area to be off-limits to smokers. The rule had been established by the company to prevent tobacco smoke from damaging sensitive telephone equipment. *Id.*

34. 1979 HEW REPORT, *supra* note 3, at 11-28 to 11-34. See Comment, *Where*

mated that thirty-four million Americans are sensitive to tobacco smoke.<sup>35</sup> A medical research team recently concluded that chronic exposure to tobacco smoke at work is harmful to nonsmokers.<sup>36</sup> In light of such evidence, increased numbers of nonsmokers can be expected to seek relief from smoke-filled work conditions. Aside from the common law approach of *Smith* and *Shimp*, there are few remedies. Neither OSHA, workers' compensation laws, state antismoking statutes, nor the United States Constitution have provided the relief sought by nonsmoking employees.

Although the declared purpose of OSHA would extend to the effect of involuntary smoking on employees,<sup>37</sup> serious obstacles prevent its application. Only OSHA's general duty clause applies to involuntary smoking unless specific safety standards governing tobacco smoke are promulgated by the agency that enforces OSHA.<sup>38</sup> For the general duty provision to apply, the health hazard must be both recognized and capable of causing death or serious physical harm.<sup>39</sup> While tobacco smoke might meet the recognition test,<sup>40</sup> its effect on nonsmokers is probably not sufficiently detrimental to

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*There's Smoke There's Ire: The Search for Legal Paths to Tobacco-Free Air*, 3 COLUM. J. ENVTL. L. 62, 62-68 (1977); Comment, *The Legal Conflict Between Smokers and Nonsmokers: The Majestic Vice Versus the Right to Clean Air*, 45 MO. L. REV. 444, 447-48 (1980).

35. Comment, 3 COLUM. J. ENVTL. L., *supra* note 34, at 67.

36. White & Froeb, *Small-Airways Dysfunction in Nonsmokers Chronically Exposed to Tobacco Smoke*, 302 NEW ENG. J. MED. 720, 720 (1980). This study is consistent with medical evidence presented to the *Smith* and *Shimp* courts. The plaintiff in *Smith* presented affidavits of nine doctors evaluating tobacco smoke as a health hazard in the workplace. One, an allergy specialist who had examined the plaintiff, concluded that tobacco smoke was a health hazard to *all* nonsmokers. All of the doctors agreed that medical evidence establishes that tobacco smoke in the workplace poses a health hazard to nonsmokers. Brief for Appellant at 11-15.

37. Since every working person is entitled to "safe and healthful working conditions," see 29 U.S.C. § 651(b) (1976), and since tobacco smoke creates a health hazard, prohibition of cigarette smoking would be consistent with the policy of OSHA.

38. OSHA imposes two duties on employers: they must comply with the safety standards established by the agency under the Act, *id.* § 654(a)(2), and they must provide employees with a work environment free from recognized hazards that are likely to cause death or serious physical harm, *id.* § 654(a)(1). This latter provision is the "general duty clause." See Morey, *The General Duty Clause of the Occupational Safety and Health Act of 1970*, 86 HARV. L. REV. 988, 989 (1973). Since no standards governing tobacco smoke have been promulgated, only the general duty clause applies.

39. 29 U.S.C. § 654(a)(1) (1976).

40. A "recognized hazard" is one "that is (a) of a common knowledge or general recognition in the industry in which it occurs, and (b) detectable by means of the senses." U.S. DEP'T OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADM'N, OSHA FIELD OPERATIONS MANUAL AND INDUSTRIAL HYGIENE FIELD OPERATIONS MANUAL ¶ 4360.1 (1979) [hereinafter cited as OSHA MANUAL]. Tobacco smoke is readily detectable by the senses, so it meets the second part of the test.

invoke the general duty clause.<sup>41</sup> Tobacco smoke has been shown to aggravate respiratory diseases and cause minor injury and irritation to non-smokers, but it has not been shown to cause them "serious physical harm."<sup>42</sup> Furthermore, even if both criteria were met, an affected non-smoker could not bring suit to enforce the statute. OSHA does not expressly create a private cause of action, and courts have held that there is no implied right of action.<sup>43</sup> An employee may therefore only complain to the agency that administers OSHA and wait for it to investigate his complaint.

State workers' compensation laws also fail to provide adequate relief. Every state has such a statute.<sup>44</sup> These laws are designed to substitute for an action for damages, not to provide injunctive relief to prevent future

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Whether it meets the first part is debatable. While cigarette smoke is not yet a hazard that an employer, as a matter of course, tries to eliminate from the workplace, evidence available to the employer has become so abundant that he should foresee the harm to his employees. Taking this evidence into account, tobacco smoke should be a recognized hazard.

41. To invoke the general duty clause, a health hazard must be capable of causing death or serious physical harm. The test adopted by the agency administering OSHA defines "serious physical harm" as:

(i) Permanent, prolonged, or temporary impairment of the body in which part of the body is made functionally useless or is substantially reduced in efficiency on or off the job. Injuries involving such impairment would require treatment by a medical doctor, although not all injuries which receive treatment by a medical doctor would necessarily involve such impairment . . . .

(ii) Illness that could shorten life or significantly reduce physical or mental efficiency by inhibiting the normal function of a part of the body, even though the effects may be cured by halting exposure to the cause or by medical treatment. Examples of such illness are cancer, silicosis, asbestosis, poisoning, hearing impairment, and visual impairment.

OSHA MANUAL, *supra* note 40, at ¶ 4360.2.

42. A comparison of the symptoms suffered by the plaintiffs in *Smith* and *Shimp*, see notes 8 & 23 *supra*, with those listed in the OSHA MANUAL, see note 41 *supra*, supports this conclusion. The plaintiffs' symptoms, while unpleasant and capable of causing permanent injury, do not reach the level of, for example, cancer or poisoning. In contrast to the symptoms experienced by hypersensitive individuals like the plaintiffs, the most serious effects of tobacco smoke on normal, healthy individuals usually are minor. See note 3 *supra*. This is not the type of injury contemplated by the term "serious physical harm."

43. See *Russell v. Bartley*, 494 F.2d 334, 336 (6th Cir. 1974); *Skidmore v. Travelers Ins. Co.*, 356 F. Supp. 670, 671 (E.D. La. 1973), *aff'd*, 483 F.2d 67 (5th Cir. 1973). An employee is empowered by 29 U.S.C. § 662(d) (1976) to seek a writ of mandamus against the Secretary of Labor if he arbitrarily and capriciously fails to seek relief under *id.* § 662, but the employee must be in imminent danger of being injured before the remedy is available. This provision has apparently never been invoked in a reported decision.

44. See *W. PROSSER*, *supra* note 28, at 530.



injuries.<sup>45</sup> An employee suffering from involuntary smoking seeks a smoke-free workplace, not a damage award from his employer. Even if an employee does seek damages, the statute will not help him unless he has suffered a compensable injury.<sup>46</sup> Most adverse effects of tobacco smoke on nonsmokers are cumulative, so no cause of action may accrue. Thus, a workers' compensation statute affords no meaningful relief to the nonsmoking employee.

Several states have enacted specific antismoking legislation,<sup>47</sup> but few statutes apply to the workplace.<sup>48</sup> Only one state specifically permits enforcement of the law by injunction.<sup>49</sup> Penalties imposed for violations are usually minor,<sup>50</sup> and enforcement has been inconsistent.<sup>51</sup> State antismoking statutes do not provide much help to nonsmokers.

The United States Constitution has also proved an ineffective remedy for nonsmoking employees. Several courts have been asked to find a constitutional right to breath smoke-free air, based on the first, fifth, ninth, and fourteenth amendments; all have rejected those theories.<sup>52</sup> In fact, a Louisiana district court ruled that the right to breath smoke-free air has no connection, however remote, to the Constitution. The court wrote, "To hold that the First, Fifth, Ninth or Fourteenth Amendments recognize as fundamental the right to be free from cigaret smoke would be to mock the lofty purposes of such amendments and broaden their penumbral protections to unheard of boundaries."<sup>53</sup> The Constitution provides no relief.

Although none of these avenues have proved effective, there is some authority to the effect that certain nonsmokers may be able to use a statutory, rather than a common law, action to obtain a smoke-free environ-

45. Blumrosen, Ackerman, Kligerman, Van Schaik & Sheehy, *Injunctions Against Occupational Hazards: The Right to Work Under Safe Conditions*, 64 CALIF. L. REV. 702, 712-13 (1976).

46. See 81 AM. JUR. 2D *Workmen's Compensation* § 1 (1976); 99 C.J.S. *Workmen's Compensation* § 1 (1958).

47. Comment, 45 MO. L. REV. 444, *supra* note 34, at 450-59.

48. *Id.* at 451 n.57. But at least four states have statutes regulating smoking in the workplace. See MINN. STAT. ANN. § 144.413 (West Supp. 1980); MONT. CODE ANN. § 50-40-103 (1981); NEB. REV. STAT. § 71-5704 (Supp. 1979); UTAH CODE ANN. § 76-10-101 (Supp. 1978).

49. That state is Minnesota. See MINN. STAT. ANN. § 144.417 (West Supp. 1980).

50. Comment, 45 MO. L. REV. 444, *supra* note 34, at 457 nn.113-15.

51. *Id.* at 458.

52. See *Federal Employees for Nonsmokers' Rights v. United States*, 446 F. Supp. 181, 184-85 (D.D.C. 1978), *aff'd mem.*, 598 F.2d 310 (D.C. Cir.), *cert. denied*, 444 U.S. 926 (1979); *Gasper v. Louisiana Stadium & Exposition Dist.*, 418 F. Supp. 716, 721 (E.D. La. 1976), *aff'd*, 577 F.2d 897 (5th Cir. 1978); *GASP v. Mecklenburg Cty.*, 42 N.C. App. 225, 228, 256 S.E.2d 477, 479 (1979).

53. *Gasper v. Louisiana Stadium & Exposition Dist.*, 418 F. Supp. 716, 721 (E.D. La. 1976), *aff'd*, 577 F.2d 897 (5th Cir. 1978).

ment. Plaintiffs relying on statutes prohibiting discrimination in the employment of handicapped persons have met with mixed success.<sup>54</sup> In a

54. In *Federal Employees for Nonsmokers' Rights v. United States*, 446 F. Supp. 181 (D.D.C. 1978), *aff'd mem.*, 598 F.2d 310 (D.C. Cir.), *cert. denied*, 444 U.S. 926 (1979), the court discussed the plaintiffs' attempt to rely on such statutes. The plaintiffs, relying on the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-794 (1976 & Supp. V 1981), sought to enjoin smoking in designated areas of the federal buildings in which they worked. The court rejected their contention, reasoning that the Act did not apply to employees of federal agencies but only to handicapped persons receiving financial assistance from the federal government. 446 F. Supp. at 184 n.1. The court did not reach the question whether a nonsmoker could ever be "handicapped" within the meaning of 29 U.S.C. § 706(7)(B) (1976), which defines "handicapped person" as "any person who . . . has a physical . . . impairment which substantially limits one or more of such person's major life activities." The court did point out that the statute which protects federal employees from discrimination on the basis of a handicap, 5 U.S.C. § 7203 (1976 & Supp. V 1981), only protects such employees from "adverse action" taken by the agency against the employee on account of his handicap. Since no allegation of adverse agency action was included in the complaint, the court denied relief. 446 F. Supp. at 184 n.1. The court's analysis suggests that a nonsmoking employee can be "handicapped" within the meaning of § 7203 and can obtain relief if the agency takes action against him because of his reactions to tobacco smoke.

The Rehabilitation Act was also examined in *GASP v. Mecklenburg Cty.*, 42 N.C. App. 225, 256 S.E.2d 477 (1979). The plaintiffs brought a class action on behalf of all persons harmed by tobacco smoke to enjoin smoking in certain public buildings. They alleged, among other things, that the class was "handicapped" within the meaning of 29 U.S.C. § 706(7)(B) (1976). The court held that the statute was not intended to cover any and all persons harmed or affected by tobacco smoke, so the plaintiff class was not handicapped. 42 N.C. App. at 227, 256 S.E.2d at 478-79. The court expressly did not decide that a class of persons particularly affected by tobacco smoke, such as those suffering from pulmonary conditions, heart disease, or emphysema, could not be a class of handicapped persons under § 706.

*GASP's* implicit recognition that some nonsmokers could be considered handicapped was made explicit in *Vickers v. Veteran's Adm'n*, 549 F. Supp. 85 (W.D. Wash 1982). The issue in *Vickers* was whether the plaintiff had a cause of action under 29 U.S.C. § 794 (1976), which provides: "No otherwise qualified handicapped individual . . . as defined in section 706(7) . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any . . . activity conducted by any Executive agency . . ." The court prefaced its decision by noting that the action had not been brought to determine whether *all* governmental employees had a right to work in a smoke-free environment, but only to determine whether the individual plaintiff had such a right. 549 F. Supp. at 87. In applying § 706(7)(B), the court found it broad enough to encompass the plaintiff:

The Court finds that plaintiff is a handicapped person within the meaning of the term "handicapped person" . . . [Section 706] provides that any person is . . . "handicapped" . . . if that person has a physical impairment which substantially limits one or more of his . . . major life activi-

1982 case, a federal appeals court found a right under the federal disability laws. In *Parodi v. Merit System Protection Board*,<sup>55</sup> a nonsmoking federal employee worked in an office where many employees smoked. She began experiencing pulmonary problems and, on her doctor's advice, took a leave of absence from her job. Her symptoms subsided, and her doctor advised her not to return to work in a smoke-filled environment. She took his advice, and shortly thereafter she applied for employment disability benefits, claiming that her reaction to tobacco smoke rendered her disabled.<sup>56</sup> Government doctors who examined her concluded that her hypersensitivity to tobacco smoke precluded her from working in a smoke-filled environment, though she had suffered no permanent harm from her previous exposure.<sup>57</sup> The Merit Board found her to be not disabled and denied her claim for disability benefits.<sup>58</sup>

On appeal, the United States Court of Appeals for the Ninth Circuit held that she was disabled.<sup>59</sup> Under the applicable statute, an employee is totally disabled if he is unable to perform "useful or efficient service in the grade or class of position last occupied by the employee . . . because of disease or injury."<sup>60</sup> The Merit Board claimed that the claimant in *Parodi*

ties. It appears from the evidence . . . that plaintiff is unusually sensitive to tobacco smoke and that this hypersensitivity does in fact limit at least one of his major life activities, his capacity to work in an environment which is not completely smoke free.

549 F. Supp. at 86-87. The finding that the plaintiff was handicapped was not enough, however. Section 794 requires that a person be excluded from participation in or denied the benefits of a program or activity conducted by an agency. The court found no evidence of such a denial, so it denied relief. *Id.* at 87. The cases suggest that a federally employed nonsmoker may be handicapped and may obtain relief if the agency discriminates against him on the basis of his sensitivity to tobacco smoke.

55. 690 F.2d 731 (9th Cir. 1982).

56. *Id.* at 735. The plaintiff applied for benefits under 5 U.S.C. §§ 8331-8348 (1976) (federal disability and retirement statute for civil servants).

57. One doctor performed no objective tests but reported that the claimant suffered no adverse effects from her previous exposure to tobacco smoke at work. He stated, however, that her condition might require "personnel and environmental control." 690 F.2d at 733. The other doctor, after performing tests, found that the claimant suffered acute pulmonary problems, including airway irritation and an increase in airway resistance. He recommended that she not return to employment in the same office, stating that to do so would endanger her health. *Id.*

58. *Id.* The Merit Board reviews disability decisions made by the Office of Personnel Management (OPM). The Merit Board accepted the doctors' recommendations but concluded that the claimant was not totally disabled.

59. *Id.* at 735.

60. 5 U.S.C. § 8331(6) (1976). This definition was replaced in 1980. The new statute provides:

Any employee shall be considered to be disabled only if the employee is found by the Office of Personnel Management to be unable, because of

was not disabled because she did not suffer permanent or serious injury, and she could work in an area containing less cigarette smoke.<sup>61</sup> The court rejected both arguments as inconsistent with the terms of the disability statute.<sup>62</sup> The court stated that a claimant need not prove serious or permanent physical injury to qualify for disability benefits; the statute merely required proof of inability, because of disease or injury, to perform the job possessed immediately before the time of the claim.<sup>63</sup> A claimant need not prove an inability to perform useful service under any circumstances, merely that he is unable to provide useful service in the job last occupied. The court therefore held that the claimant was totally disabled.<sup>64</sup> Recognizing the novelty of the claim, the court held that her eligibility for disability payments was contingent on the Merit Board's failure to offer her suitable employment in a safe environment.<sup>65</sup>

*Parodi* thus offers one alternative to a common law action, but its application will be limited. The court was construing the federal disability statute for civil service employees, so only such employees were directly affected by the decision. Further, the disability statute has been amended since *Parodi* to state that an employee will be considered disabled only if he cannot be reassigned to a vacant position within the agency at the same grade.<sup>66</sup> Interpretive regulations establish uniform procedures to be followed whenever the employee or the employer seeks to have the employee declared disabled.<sup>67</sup> While consistent with *Parodi*, the regulations add sev-

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disease or injury, to render useful and efficient service in the employee's position and is not qualified for reassignment, under procedures prescribed by the Office, to a vacant position which is in the agency at the same grade or level and in which the employee would be able to render useful and efficient service.

5 U.S.C. § 8337(a) (Supp. V 1981).

61. 690 F.2d at 737.

62. *Id.* at 737-38. The court characterized as "irrelevant" the Merit Board's assertion that the claimant could work in an environment containing less smoke than her previous location, because the government did not offer her a position in such an environment. *Id.* at 737-38 n.10.

63. *Id.* at 738.

64. *Id.*

65. *Id.* at 739.

66. 5 U.S.C. § 8337(a) (Supp. V 1981). This provision is set forth in note 60 *supra*. The purpose of the change was to add the requirement that the employee must be unqualified for transfer to a vacant position before he becomes eligible for disability benefits. 1980 U.S. CODE CONG. & AD. NEWS 5526, 5651.

67. The regulations promulgated by the Office of Personnel Management prescribe the procedures to be followed by an employee who seeks to be declared disabled. A succinct statement of what an employee must show to establish a *prima facie* case for benefits is found in the regulations:

A *prima facie* [sic] case of disability requires documentation that specifically demonstrates the employee's failure to provide useful and efficient service in his/her position, because of a medical condition. The agency

eral procedural requirements not discussed in the case that may make the award of disability payments recognized in *Parodi* more difficult to obtain.<sup>68</sup>

*Parodi* has established the right of federal employees who suffer serious reactions to tobacco smoke to work in an environment free from smoke.<sup>69</sup> Even after the amendment, an employee who suffers from smoke and who invokes this remedy must either be provided with an equivalent position where he can work without harm from tobacco smoke or be retired as disabled.<sup>70</sup> *Parodi* should provide an incentive for the federal government to comply with employees' requests for relief, for the government can ill afford to retire otherwise productive employees because of unhealthy air in the workplace.

Because of the limited scope of *Parodi* and the absence of other remedies for employees, the *Smith* and *Shimp* approach is significant. In both cases, the issue was whether an employee can compel his employer to eliminate tobacco smoke from the workplace. The issue can be divided into two questions: (1) whether an employer has a common law duty to provide a work environment free from tobacco smoke, and (2) whether injunctive relief is available to enforce that duty. *Smith* and *Shimp* held affirmatively on both questions. The persuasiveness of these decisions will depend on the soundness of the analytical framework employed and the fidelity with which traditional legal principles were applied.

At common law, an employer has a nondelegable duty<sup>71</sup> to use reason-

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shall include documentation of any steps taken to accommodate the disabling condition in the present position, and of the absence of vacant positions at the same grade or pay level and tenure, within the same commuting area, for which the employee is qualified for reassignment. However, this requirement does not obligate an agency to create or vacate a position for a disabled employee.

5 C.F.R. § 831.502(b) (1982). Significantly, the regulations limit the areas to which an employee can be forced to move in order to accept a vacant position. "Commuting area," as used in the statute, is the "geographic area that usually constitutes one area for employment purposes. It includes any population center (or two or more neighboring ones) and the surrounding localities in which people live and can be reasonably expected to travel back and forth daily in their usual employment." *Id.* § 831.502(a).

68. *See id.* § 831.502.

69. Because the common law theory of *Smith* and *Shimp* was raised but not decided in *Federal Employees for Nonsmokers' Rights v. United States*, 446 F. Supp. 181 (D.D.C. 1978), *aff'd mem.*, 598 F.2d 310 (D.C. Cir.), *cert. denied*, 444 U.S. 926 (1979), federal employees still lack a definitive statement of whether the theory applies to them. *Parodi* offers a possible alternative in the interim.

70. *See* note 67 *supra*.

71. *See, e.g.*, *Clark v. Patterson*, 190 Ark. 148, 151, 77 S.W.2d 978, 980 (1935); *Potter v. Atlantic Coast Line Ry.*, 197 N.C. 17, 20, 147 S.E. 698, 700 (1929); *American Mut. Liab. Ins. Co. v. Chain Belt Co.*, 224 Wis. 155, 160, 271 N.W. 828, 831 (1937).

able care<sup>72</sup> to provide his employees with a safe place to work.<sup>73</sup> An employer is held only to a standard of reasonable care and will be held liable only if he has been negligent in failing to provide a safe place to work.<sup>74</sup> Thus, while an employer has no duty to protect his employees from every possible danger, he is responsible for injuries to his employees that he could reasonably have foreseen and prevented.<sup>75</sup> An employer's conduct is evaluated by balancing the probability and the gravity of the risk against the utility of the employer's conduct.<sup>76</sup> Under this test, the value of permitting smoking in the workplace is weighed against the probability and gravity of the threat to the nonsmoking employee's health.

Applying this test to the facts of *Smith* and *Shimp*, both courts correctly decided that the employers breached their duty. In each case, the probability and gravity of the plaintiff's harm was significant because of hypersensitivity to tobacco smoke. That reaction rendered each plaintiff unable to work. Each employer knew of the plaintiff's symptoms and should have known, given the growing body of medical evidence, that involuntary smoking is harmful. Each employer had demonstrated its ability to control smoking in the workplace by prohibiting smoking in areas where tobacco smoke could damage equipment.<sup>77</sup>

In contrast to harm to the plaintiff, the utility of each employer's decision was slight. Permitting smoking in the workplace may benefit smokers by making them happier and more productive. Unless the smokers employed significantly outnumber nonsmokers, however, any benefit derived

72. See, e.g., *Nelson v. Smeltzer*, 221 Iowa 972, 976, 265 N.W. 924, 927 (1936); *Kimball v. Clark*, 133 Me. 263, 265, 177 A. 183, 184 (1935); *Ryan v. Gray*, 316 Mass. 259, 261, 55 N.E.2d 700, 701 (1944).

73. See, e.g., *Apache Ry. v. Shumway*, 62 Ariz. 359, 369, 158 P.2d 142, 148 (1945); *Fellsmere Sugar Co. v. Marshall*, 123 Fla. 378, 379, 167 So. 649, 649 (1935); *Venzel v. Valley Camp Coal Co.*, 304 Pa. 583, 585, 156 A. 204, 241 (1931).

74. See, e.g., *Mississippi River Fuel Corp. v. Senn*, 184 Ark. 554, 556, 43 S.W.2d 255, 259 (1931); *Home Lumber Co. v. Turley*, 282 Ky. 633, 636, 139 S.W.2d 435, 437 (1940); *Charpentier v. Great Atl. & Pac. Tea Co.*, 130 Me. 423, 425, 157 A. 237, 238 (1931).

75. See, e.g., *Smith v. Goodman*, 6 Ariz. App. 168, 175, 430 P.2d 922, 926 (1967); *Gerig v. Furr*, 183 Ark. 1036, 1039, 39 S.W.2d 1021, 1023 (1931); *Goddard v. Southern Desk Co.*, 199 N.C. 22, 23, 153 S.E. 608, 608 (1930).

76. W. PROSSER, *supra* note 28, at 148-49. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947); *Conway v. O'Brien*, 111 F.2d 611, 612 (2d Cir. 1940); RESTATEMENT (SECOND) OF TORTS §§ 291-293 (1979); Miller, *The Occupational Safety and Health Act of 1970 and the Law of Torts*, 38 LAW & CONTEMP. PROBS. 612, 616 (1974).

77. The court in *Shimp*, referring to the employer's practice of forbidding smoking in areas where sensitive equipment could be damaged, noted, "The rationale behind the rule is that machines are extremely sensitive and can be damaged by the smoke. Human beings are also very sensitive and can be damaged by cigarette smoke. Unlike a piece of machinery, the damage to a human life is all too often irreparable." 145 N.J. Super. at 531, 368 A.2d at 416.

from allowing smoking may be offset by the irritation and injury to non-smokers that results in a drop in their satisfaction and productivity. In each case, the employer reasonably could have prohibited smoking in the workplace and still accommodated smokers. In *Shimp*, for example, the New Jersey court considered an employee lounge and lunchroom, available to smokers on their breaks and at lunch, sufficient to satisfy smoking employees' needs.<sup>78</sup> Each employer's voluntary decision to restrict smoking in areas important to its financial interests suggested that the employer was capable of policing further restrictions. The utility of the employers' conduct was outweighed by the harm to the plaintiffs, so the employers violated their duty.

Both the *Smith* and *Shimp* courts also deemed injunctive relief to be appropriate. Generally, courts require a plaintiff to demonstrate that his remedy at law is insufficient before granting an injunction.<sup>79</sup> To establish that the legal remedy is inadequate, a plaintiff must first exhaust all administrative remedies,<sup>80</sup> unless that attempt would be futile.<sup>81</sup> Where damages at law are recoverable, a plaintiff can still obtain injunctive relief if damages cannot adequately compensate him for his injury.<sup>82</sup> One measure of whether damages are adequate is whether they can be computed with reasonable accuracy.<sup>83</sup> More importantly, a plaintiff's remedy at law also is inadequate if multiple suits are required to vindicate his right. This equitable maxim is generally invoked where the injury committed is continuous or repetitious. In such a case, the legal remedy is deemed inadequate and the

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78. The *Shimp* court recognized that smokers could smoke on their own time in the employee lunchroom and lounge, and it considered both to be reasonably accessible to smokers. *Id.* The *Smith* court reasoned that the employer's ability to protect its computer room from tobacco smoke illustrated that it had reasonable alternatives available to it to accommodate smokers in other places than the work environment. 643 S.W.2d at 12.

79. *Medical Soc'y v. Walker*, 245 Ala. 135, 141, 16 So. 2d 321, 325 (1944); *Orlando Sports Stadium, Inc. v. State ex rel. Powell*, 262 So. 2d 881, 885 (Fla. 1972); *City of Denison v. Clabaugh*, 306 N.W.2d 748, 755 (Iowa 1981). This is often expressed by saying that the plaintiff's harm is irreparable. See *Chacon v. Granata*, 515 F.2d 922, 925 (5th Cir. 1975), *cert. denied*, 423 U.S. 930 (1976); *Crouchley v. Pambianchi*, 152 Conn. 224, 225, 205 A.2d 492, 494 (1964); *Stoner v. South Peninsula Zoning Comm'n*, 75 So. 2d 831, 832 (Fla. 1954).

80. *Carson v. Board of Educ.*, 227 F.2d 789, 790 (4th Cir. 1955); *Beck v. Board of Trustees*, 32 Conn. Super. 153, 155, 344 A.2d 273, 274 (1975).

81. *Patsy v. Florida Int'l Univ.*, 634 F.2d 900, 903 (5th Cir. 1981); K. DAVIS, ADMINISTRATIVE LAW TEXT 391-92 (3d ed. 1972).

82. *Stalcup v. Cameron Ditch Co.*, 130 Mont. 294, 296, 300 P.2d 511, 512 (1956); *Czipott v. Fleigh*, 87 Nev. 496, 499, 489 P.2d 681, 683 (1971); *Walter v. Danisch*, 133 N.J. Eq. 127, 132, 29 A.2d 897, 900 (1943).

83. *Anderson v. Sousa*, 38 Cal. 2d 825, 832, 243 P.2d 497, 502-03 (1952); *Miller v. Lawlor*, 245 Iowa 1144, 1154, 66 N.W.2d 267, 274 (1954); *American Mut. Liab. Ins. Co. v. Fischer*, 58 Wis. 2d 299, 306, 206 N.W.2d 152, 156 (1973).

injury can be enjoined.<sup>84</sup> This applies to continuing torts.<sup>85</sup> After a plaintiff demonstrates that his remedy at law is inadequate, the court must balance the hardships on the parties of granting or denying the injunction. The court will grant an injunction only if the plaintiff will suffer more harm from denial of the injunction than the defendant will suffer from its issuance.<sup>86</sup>

The injunctions in *Smith* and *Shimp* were consistent with the traditional notions of equity. The plaintiffs' remedies at law were inadequate. First, both plaintiffs exhausted their administrative remedies. *Smith* appealed to several agencies for help, but none provided him with relief. He also exhausted all of the grievance remedies available through his employer.<sup>87</sup> Similarly, *Shimp* went through available grievance mechanisms before she sought judicial relief.<sup>88</sup> Second, damages would be difficult to ascertain, especially since the full effect of the injury may not have manifested itself. Third, in both cases, the nature of the threatened injury was continuing. Both plaintiffs were exposed to tobacco smoke on a daily basis. Damages would be ineffective because the plaintiffs would be required to bring a new suit each time their health deteriorated further.

Balancing the equities in the case weighed in favor of granting injunctive relief. The plaintiffs clearly demonstrated severe reactions to tobacco smoke. The employers could reasonably provide smoke-free environments for the plaintiffs. The employers could provide non-work areas where employees could smoke. The plaintiffs were not the only nonsmokers required to work in smoking areas.<sup>89</sup> The burden placed on the employers is therefore slight. Denying injunctive relief to the plaintiffs would subject them to serious physical discomfort every working day, with the attendant risk of permanent injury, forcing them to choose, in effect, between their health and their jobs.

Resistance from some employers to an employee's attempts to obtain a

84. *Martin v. Beaver*, 238 Iowa 1143, 1149, 29 N.W.2d 555, 558 (1947); *Czarnick v. Loup River Pub. Power Dist.*, 190 Neb. 521, 527, 209 N.W.2d 595, 599 (1973); *Rynestad v. Clemetson*, 133 N.W.2d 559, 564 (N.D. 1965).

85. 43A C.J.S. *Injunctions* § 141 (1978). See RESTATEMENT (SECOND) OF TORTS §§ 933-951 (1979) (analysis of factors to be considered when issue arises). A threatened tortious loss of health can be enjoined where the potential threat (proposed fluoridation of a town's water supply) is a continuing one. See *McGurren v. Fargo*, 66 N.W.2d 207 (N.D. 1954).

86. *FTC v. PepsiCo., Inc.*, 477 F.2d 24, 30 (2d Cir. 1973); *Minnesota Pub. Interest Research Group v. Butz*, 358 F. Supp. 584, 625 (D. Minn. 1973), *aff'd*, 498 F.2d 1314 (8th Cir. 1974); *Hickman v. Six Dimensions Custom Homes, Inc.*, 273 Or. 894, 897, 543 P.2d 1043, 1045 (1975); *Steele v. Queen City Broadcasting Co.*, 54 Wash. 2d 402, 409, 341 P.2d 499, 504 (1959).

87. 643 S.W.2d at 12.

88. 145 N.J. Super. at 521, 368 A.2d at 410.

89. In both cases, smokers and nonsmokers worked in the same areas. *Smith*, 643 S.W.2d at 12; *Shimp*, 145 N.J. Super. at 431, 368 A.2d at 416.



smoke-free work environment raises the question whether an employer is prohibited from firing such employees. Although the question was not addressed in *Smith* or *Shimp*, it implicates the employment at will doctrine.<sup>90</sup> The doctrine provides that unless a specific term of service is stated in the employment contract, an employer or employee can terminate the employment relationship for any reason.<sup>91</sup>

This issue was specifically addressed, in the context of the discharge of a nonsmoking employee for seeking relief, in *Hentzel v. Singer Co.*<sup>92</sup> The plaintiff in *Hentzel* worked as a patent attorney for Singer from 1974 until 1979, when he was discharged. He alleged that his employer terminated him in retaliation for his protests against hazardous working conditions caused by other employees smoking in the workplace. The plaintiff, among other claims, alleged that his employer had committed the tort of wrongful discharge by firing him. The trial court dismissed his petition.<sup>93</sup> The California Court of Appeals reversed, holding that the plaintiff had stated a cause of action for wrongful discharge notwithstanding the employment at will doctrine.<sup>94</sup> Although California applies a statutory codification of the traditional doctrine,<sup>95</sup> the court noted that California, as well as some other jurisdictions, has limited the doctrine judicially over the past several de-

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90. A thorough discussion of the at-will doctrine is beyond the scope of this Note. For more in-depth analysis of the doctrine, see generally Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment at Will*, 17 AM. BUS. L.J. 467 (1980); Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979); Coment, *The Employment at Will Rule*, 31 ALA. L. REV. 421 (1980); Comment, *Employment at Will: When Must an Employer Have Good Cause for Discharging an Employee?*, 48 MO. L. REV. 113 (1983).

91. Comment, 31 ALA. L. REV. 421, *supra* note 90, at 431.

92. 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982).

93. The plaintiff's original complaint stated four causes of action: (1) tortious wrongful discharge; (2) breach of an implied promise that he would not be discharged so long as his work was satisfactory; (3) estoppel, based on the implied promise; and (4) intentional infliction of emotional distress. The trial court dismissed all four counts. The plaintiff alleged that the work area was hazardous because his employer refused to provide him with a smoke-free environment. He alleged that when he complained, his employer placed him in areas of heavier concentrations of smoke, refused to segregate conference rooms into smoking and non-smoking areas, and refused to prevent other employees from harassing him. *Id.* at —, 188 Cal. Rptr. at 159-61.

94. With respect to the other causes of action, *see* note 90 *supra*, the court affirmed dismissal of the estoppel and breach of implied promise counts but granted the plaintiff leave to amend his petition. The court reversed the dismissal of the count alleging intentional infliction of emotional distress. *Id.* at —, 188 Cal. Rptr. at 168-69.

95. CAL. LAB. CODE § 2922 (West Supp. 1982) ("employment, having no specified term, may be terminated at the will of either party on notice to the other").

cares. Those decisions, according to the court, "established the rule that . . . an employer does not enjoy an absolute or totally unfettered right to discharge even an at-will employee."<sup>96</sup> The limitations imposed by such decisions include prohibitions against discharges that violate an express statutory objective or an established principle of public policy.<sup>97</sup> The court reasoned that California's long-standing public policy protecting the rights of employees to express their dissatisfaction with working conditions encompassed Hentzel's complaint, and therefore he could not be fired.<sup>98</sup>

The *Hentzel* court discussed two limitations on the at-will doctrine. There are others. The doctrine does not apply to most collective bargaining agreements because such agreements normally limit the employer's right to discharge employees.<sup>99</sup> Similarly, several federal and state statutes specifically prohibit employers from discharging employees for certain discriminatory reasons.<sup>100</sup> Where these limitations do not apply, however, most states follow the at-will doctrine.<sup>101</sup>

The doctrine has been widely criticized.<sup>102</sup> Recent cases indicate that its scope is being limited. Contract law, tort law, and the policy of employment security have all been invoked to limit the doctrine.<sup>103</sup> Nevertheless, it remains a valid principle. A recalcitrant employer protected by the rule could avoid the consequences of a threatened injunction simply by firing the employee who pursued a complaint. He could thus obtain the double benefit of ridding himself of a troublesome employee and deterring other potential complainants. An employee therefore should be aware of the potential effects of seeking injunctive relief if he is neither a fixed-term contract employee nor able to bring himself within one of the specific exceptions to the at-will doctrine. Where no protection is available, an employee will effectively be foreclosed from seeking injunctive relief without risking his job.

Despite the difficulty posed by the at-will doctrine, an injunctive action by an employee to compel his employer to eliminate tobacco smoke from the workplace is consistent with traditional common law and equitable principles. Except for those federal employees who fall within the *Parodi* holding, the injunction based on the common law duty to provide a safe workplace represents the only adequate avenue of relief for nonsmoking

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96. *Hentzel v. Singer Co.*, 138 Cal. App. 3d 290, —, 188 Cal. Rptr. 159, 162 (1982).

97. *Id.* at —, 188 Cal. Rptr. at 162.

98. *Id.* at —, 188 Cal. Rptr. at 163.

99. *See* Peck, *supra* note 90, at 8 nn.43-44.

100. *See, e.g.*, 42 U.S.C. §§ 1981, 2000(e)(2)(A) (1976); MO. REV. STAT. §§ 296.010-.070 (1978).

101. Comment, 48 MO. L. REV. 113, *supra* note 90, at 115.

102. *See* Blackburn, *supra* note 90, at 471; Blades, *supra* note 90, at 1417; Peck, *supra* note 90, at 10.

103. Recent cases are collected in Comment, 48 MO. L. REV. 113, *supra* note 90.

workers. The process of balancing the equities to decide whether to grant injunctive relief will give courts flexibility in applying the remedy. The common law approach recognized in *Smith* and *Shimp* establishes the fairest, most flexible, and most effective remedy for nonsmoking employees. It should be adopted by other jurisdictions.

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