Campbell Law Review

Volume 11
Issue 3 *Summer 1989*

Article 2

1989

When Two "Rights" Make a Wrong: The Protection of Nonsmokers' Rights in the Workplace

Donna C. Stroud

WHEN TWO "RIGHTS" MAKE A WRONG: THE PROTECTION OF NONSMOKERS' RIGHTS IN THE WORKPLACE

DONNA S. STROUD*

I. INTRODUCTION

The "right" of a smoker to smoke a cigarette wherever and whenever he wishes has been close to absolute for many years. Before the 1972 Surgeon General's report on the dangers of smoking,[1] many people viewed smoking as a harmless habit or social

* B.A. 1985 Campbell University, *Summa Cum Laude*; J.D. 1988 Campbell University, *Magna Cum Laude*. Ms. Stroud is an associate with Kirk, Gay, Kirk, Gwynn & Howell, Wendell, North Carolina. Ms. Stroud wishes to extend special thanks to Lee Boone Bollinger for his assistance with this Article.

1. PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, *Smoking and Health: A Report of the Surgeon General* (1972). The Surgeon General's office has published a new report on the effects of smoking every year since 1964.

custom. As scientific evidence of the serious health consequences of smoking to smokers has expanded, people finally started to realize that smoking can indeed be dangerous to smokers.[2] Congress has recently expressed this realization in legislation restricting advertising of cigarettes and other tobacco products.[3] The "right" to smoke has nevertheless remained intact, perhaps because of the feeling that we all have some sort of self-destructive habit, be it overeating, failure to exercise, or smoking. But this is the crucial and often overlooked distinction—one may have a "right" to harm his own health if he so chooses, but he does not have any right to harm the health of others. Medical evidence that environmental smoke[4] does pose serious health risks to nonsmokers has now progressed so far that the U.S. Surgeon General has issued a statement to that effect.[5] At this point, the personal "right" of the smoker comes into direct conflict with the "right" of a nonsmoker to breathe clean air and to protect his own health. In short, whether to smoke is a personal decision, but where and when to smoke should not be a personal decision in many situations.

The issue of protection of nonsmokers' rights should be of utmost concern because environmental smoke not only irritates the

---

2. *Id.*

3. *See* 15 U.S.C.A. § 1331-41 (West 1982 and Cum. Supp. 1988). Cigarette manufacturers must also now place strong warnings of the health hazards of cigarettes on all packages and advertisements. "Smoking causes Lung Cancer, Heart Disease, and Emphysema" is just one of these warnings. *Id.* at § 1331(1).

4. Mainstream smoke is that which is generated by a puff on a cigarette and it is breathed in by the smoker. Sidestream smoke comes from the burning end of the cigarette, pipe, or cigar. The concentrations of toxic substances are highest in sidestream smoke. Environmental smoke is made up of about eighty-five percent sidesteam smoke and smaller percentages of mainstream and other smoke. SPECIAL PROJECTS OFFICE OF THE HEALTH PROGRAM, OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, *Passive Smoking in the Workplace: Selected Issues* 8 (May 1986) [hereinafter cited as *Selected Issues*]. Because mainstream smoke and sidestream smoke are both generated from the same source, a burning cigarette, they are very similar in composition. Many toxic and carcinogenic substances which have been identified in mainstream and sidestream smoke are therefore also components of environmental smoke. Although concentrations of these substances differ and the temperature and age of the smoke is relevant in comparing the smoke breathed by the nonsmoker and that inhaled by the smoker, environmental smoke can cause some risk of cancer for the nonsmoker. PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *The Health Consequences of Involuntary Smoking: A Report of the Surgeon General*, 132-34 (1986) [hereinafter cited as *Health Consequences*].

5. *See generally Health Consequences*, *supra* note 4.

eyes, nose, and throat, but it also causes serious health threats to those who are exposed to smoke for long periods of time.[6] The 1986 Surgeon General's report comes to the definite conclusion that "[i]nvoluntary smoking is a cause of disease, including cancer, in healthy nonsmokers."[7] The main irritant effects of environmental smoke are discomfort and itching of the eyes, nose, throat, and lower respiratory tract.[8] Tobacco smoke has particularly devastating effects on those who are allergic to it.[9] Unfortunately, according to the American Medical Association, approximately thirty-four million Americans are allergic to tobacco smoke,[10] and the only remedy available to them is to avoid tobacco smoke.[11] Many scientific studies from various well-respected sources have come to these conclusions about the dangers of exposure to smoke.[12] Although there is no one definitive study establishing exactly what effects smoke does have on nonsmokers, all of the evidence, taken as a whole, is a cause for serious concern.[13] According to Surgeon General C. Everett Koop, M.D.:

> Critics often express that more research is required, that certain studies are flawed, or that we should delay action until more conclusive proof is produced. . . . [T]he time for delay is past; measures to protect the public health are required now. The scientific case against involuntary smoking as a health risk is more than sufficient to justify appropriate remedial action, and the goal of any remedial action must be to protect the nonsmoker from environmental tobacco smoke.[14]

The fact that active smoking causes lung cancer, cardiovascular disease, and chronic obstructive lung disease is well estab-

---

6. *Id.* at 106-7; *Selected Issues*, *supra* note 4, at 15-29.

7. *Health Consequences*, *supra* note 4, at 13.

8. *Id.* at 15.

9. Epstein, THE EFFECTS OF TOBACCO SMOKE POLLUTION ON THE EYES OF THE ALLERGIC NONSMOKER, Pub. Health Service, U.S. Dept. of HEW, Proceedings of the 3rd World Conference on Smoking and Health, DHEW Pub. No. (NIH) 77-1413, 1975) 337 [hereinafter cited as *Smoking and Health*, Vol. II (1975)].

10. *See* Tate, *The Effects of Tobacco Smoke on the Non-smoking Cardiopulmonary Public*, *Smoking and Health, Vol. II* at 329 (1975).

11. *Id.* at 330.

12. *See Health Consequences*, *supra* note 4 (chapter 2 for an extensive evaluation of the major studies on the effects of environmental smoke on nonsmokers).

13. *Selected Issues*, *supra* note 4, at 29-30.

14. Koop, *Preface* to *Health Consequences*, *supra* note 4, at xi-xii.

lished.[15] Smoking is responsible for over 300,000 deaths each year in the United States—about fifteen percent of all mortality.[16] Passive smoking is not different from active smoking qualitatively, for environmental smoke is just as dangerous as or more dangerous than mainstream smoke.[17] Therefore, passive smoking should be viewed as "low-dose exposure to a known hazardous agent—cigarette smoke."[18]

Exposure to smoke in the workplace is becoming an important legal issue for several practical reasons. First, most people spend more time at work than anywhere else except at home.[19] While at work, they may be unable to escape the smoke, except of course by quitting their jobs. The result is that the nonsmoking worker is forced to breathe air polluted by environmental smoke for many hours each day. This causes increased risk of various diseases for all workers and may completely incapacitate those who are particularly sensitive to smoke.[20] Along with the health risks, the nonsmoking worker may not be able to perform his job well because of headaches and eye irritation from the smoke.

The three major situations in which the nonsmoking worker may seek legal action are: first, to force the employer to provide a safe and smokefree workplace; second, to get relief for being fired because of the worker's complaints about smoke; and, third, to seek workers' compensation or disability benefits for injury caused by smoke-related illnesses.

Fortunately, more people are becoming aware of the need for protection from the hazards of smoke in the workplace as a result of the new research which is being done to help clarify the dangers of tobacco smoke.[21] This awareness has led to the adoption of leg-

---

15. *Id.* at ix.

16. *Id.*

17. *Health Consequences*, *supra* note 4, at 167.

18. *Id.* at 21.

19. *Id.* at 284.

20. *See, e.g.*, Shimp v. New Jersy Bell Telephone Co., 145 N.J. Super. 516, 368 A.2d 408 (1976). Shimp suffered several of the symptoms common to those who are allergic to smoke. She had throat and nasal irritation, nosebleeds, headaches, nausea, and vomiting from exposure to only one cigarette. *Id.* at _, 368 A.2d at 408.

21. *See generally* Marwick, *Changing Climate Seen in Efforts to Tell Public About Smoking, Health*, 252 J. Am. Med. A. 2797, Nov. 23/30, 1984. *See also* Schmidt, *Non-smokers' Rights: The U.S. Experience, in Smoking and Health, Vol. II* 347 (1975).

islation on smoking in many states and cities,[22] and to restrictions on cigarette advertising passed by Congress.[23] Many states have adopted laws which require employers to accomodate the needs of nonsmokers by providing for smokefree workplaces or which prohibit smoking in certain public places.

However, nonsmokers in North Carolina have some special difficulties in dealing with the dangers of tobacco smoke. First and foremost is naturally the tobacco industry in North Carolina. North Carolina is by far the largest producer of tobacco in the United States, and the economic impact of tobacco on North Carolina is undeniably great.[24] Not surprisingly, leaders of the tobacco industry in North Carolina often deny that smoking is harmful to anyone. For example, recently retired chairman of the Tobacco Institute, Horace Kornegay, has repeatedly pointed out the devastating economic effects that restrictions on smoking could have on the tobacco industry, while questioning the validity of studies linking smoking to cancer and other diseases.[25] Legislation would be the best way to protect nonsmokers' rights. Yet, in North Carolina, such legislation would be almost impossible to pass on a state level, and less likely on a municipal level.

This Article will deal with the protection of nonsmokers' rights with emphasis on the special problems faced by nonsmokers in North Carolina. Nonsmokers need a way to be assured of a safe workplace and of job security despite the fact that tobacco is of great importance in the state's economy. Nonsmokers need remedies to pursue if they are harmed by exposure to smoke. Also, employers need to be aware of the liability ramifications of nonsmokers' rights and of how to protect their employees.

---

22. At least forty-one states and the District of Columbia now have some type of statute restricting smoking in public. *See infra* note 63 (cities in many states have also passed smoking ordinances). *See infra* note 64.

23. *See supra* note 3.

24. North Carolina is the largest producer of tobacco in the United States. In 1984, North Carolina produced 590 million pounds of tobacco—sixty million pounds more that the closest rival, Kentucky. BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, *Statistical Abstract of the United States*, 663 106th ed. (1986).

25. *See Tobacco Industry: Unity Against Foes Called Essential*, News and Observer (Raleigh), Dec. 6, 1986, at 1C. *See also* Kornegay, *The Anti-Smoking Campaign—Its Goals and Effects*, TOBACCO REPORTER, June 1977, at 37.

II. REMEDIES FOR THE NONSMOKING EMPLOYEE

A. *Establishing a Smokefree Workplace*

The case law on the protection of nonsmokers' rights that has developed thus far certainly has not established any black letter rules. The area is simply too new for it to have developed fully, and many states have no case law on the issues at all. However, some general guidelines on the possible remedies available to nonsmokers can be gleaned from the existing case law.

1. Employer's Common Law Duty to Provide a Safe Workplace

Although there have been no cases related to nonsmokers' rights in North Carolina based on this theory, the duty of the employer to provide a safe workplace, free from known dangers, has been successful in other states. North Carolina has recognized the employer's duty to provide a reasonably safe workplace in other contexts.[26] Under this theory the plaintiff may be able to get an injunction prohibiting the employer from allowing smoking where it will harm nonsmokers. The plaintiff in *Shimp v. New Jersy Bell Telephone*[27] successfully used this theory to get a smokefree workplace. In *Shimp*, the plaintiff was a secretary who suffered from severe allergic reactions to smoke.[28] She claimed that her employer breached both his common law duty to provide a safe workplace and his statutory duty under OSHA to eliminate foreseeable and preventable hazards.[29] Along with allegations of harm to herself, the plaintiff alleged harm to all of the other employees, based on extensive evidence of illnesses caused by environmental smoke.[30] Because of the overwhelming evidence of the dangerous nature of smoke, the *Shimp* court took judicial notice of the toxic nature of cigarette smoke[31] and decided that the employer should reasonably be able to foresee the health consequences of exposing employees

---

26. *See* Muldrow v. Weinstein, 234 N.C. 587, 68 S.E.2d 249 (1951).

27. 145 N.J. Super. 516, 368 A.2d 408 (1976).

28. *Id.* at _, 368 A. 2d at 408.

29. *Id.* at _, 368 A.2d at 410. *See also* Smith v. Western Electric Co., 643 S.W.2d 10 (Mo. App. 1982) (Federal Occupational Safety and Health Act did not preempt the state common law with respect to employee's suit to enjoin employer from exposing him to tobacco smoke in the workplace).

30. *Id.* at _, 368 A.2d at 413-16.

31. *Id.* at _, 368 A.2d at 414.

to smoke and that the employer has a duty to abate the hazard.[32] However, not all courts have taken judicial notice of the toxic nature of tobacco smoke.[33] The court recognized that the employer should also consider the interests of smokers by establishing a reasonably accessible smoking area.[34]

One other case has recognized the employer's duty to provide a safe workplace in the context of a nonsmoker's claim against his employer. In *Smith v. Western Electric Co.*[35] the plaintiff developed severe adverse reactions to smoke and was unable to get his employer to move him away from the smoke.[36] Smith also alleged that smoke harmed the health of all employees.[37] The court held that Smith had stated a claim upon which relief could be granted and that Smith had to show that smoke was hazardous to his and other employees' health, that the employer knew this, and that the employer had the authority to control smoking.[38] By failing to exercise this control, the employer would breach his duty to the employees.[39] The court also noted that an injunction would be the proper form of relief.[40]

The plaintiff should allege, as did the plaintiff in *Shimp*, injury to both himself and other employees in order for a case based upon the employer's common law duty to provide a safe workplace to be successful. The required showing is made easier by all of the medical research available about the hazards of environmental smoke, and especially the 1986 Surgeon General report. Allegations of harm to all employees are necessary because while the employer has a duty to provide a safe workplace, he does not have a duty to "adapt the workplace to the particular sensitivities of an individual employee."[41] Therefore, although it may be easier for the hypersensitive employee to show personal injury from exposure to smoke in the workplace, in order to show a breach of the employer's duty he should demonstrate that the smoke endangers everyone.[42]

---

32. *Id.* at _, 368 A.2d at 415-16.
33. Gordon v. Raven Systems, 462 A.2d 10 (D.C. App. 1983).
34. *Id.* at -—, 368 A.2d at 416.
35. 643 S.W.2d 10 (Mo. App. 1982).
36. *Id.* at 11.
37. *Id.* at 12.
38. *Id.* at 13.
39. *Id.*
40. *Id.*
41. *Gordon*, 462 A.2d at 14.
42. *Id.* at 14-15.

2. *Assault and Battery*

McCracken v. Sloan[43] takes a rather unusual approach to a situation in which a nonsmoking employee was irritated by smoke in the workplace. Plaintiff's unsuccessful claim was based upon a theory of assault and battery.[44] The court noted that there is no need for physical contact for assault and battery to occur, so long as the defendant sets into motion a force which ultimately produces a result. However, absence of consent to contact is the gist of an action for battery.[45] Because consent is assumed to all ordinary and customary contacts of life, and smelling smoke is one of these ordinary contacts, plaintiff's claim failed.[46] Also, plaintiff did not allege that exposure to the smoke produced any physical illness.[47] Although the *McCracken* case may not seem to provide much hope for the nonsmoking worker at first glance, it also raises some questions. Perhaps if the employee had made his aversion to smoke known upon being hired, and his lack of consent to such contact were clear, the result would be different. Also, if the plaintiff in *McCracken* had suffered an extreme allergic reaction to the smoke and had become very ill, the court seems to suggest that the result would be a different one.[48] Clearly the assault and battery theory may not be the best avenue of relief for the nonsmoking employee, but in a case with the proper facts, it may be a possibility.

3. *Occupational Health and Safety Acts*

The Occupational Safety and Health Act of North Carolina[49] may provide a means of gaining a smoke-free workplace and other remedies. In the Act, the General Assembly declares its policy to establish "occupational health criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience."[50] The Act also establishes the duty of the employer "to furnish to each of his employees conditions of employment and a place of employment free from recognized hazards that are causing

43. 40 N.C. App. 214, 252 S.E.2d 250 (1979).
44. *Id.* at 215, 252 S.E.2d at 251.
45. *Id.* at 216-17, 252 S.E.2d at 252.
46. *Id.*
47. *Id.* at 217, 252 S.E.2d at 252.
48. *Id.*
49. N.C. GEN. STAT. CHAP. 95 Art. 16 (1943).
50. N.C. GEN. STAT. § 95-126(6)(2)(e) (1943).

or are likely to cause death or serious injury or serious physical harm to his employees."[51] According to the most recent research on the dangers of tobacco smoke, smoke is indeed likely to cause serious harm, especially to allergic employees or employees with cardiopulmonary problems, and can also cause death.[52] Therefore, the Act may provide some protection for nonsmoking workers whose employers must comply with orth Carolina OSHA standards. Under General Statute section 95-130.6, an employee who "has been exposed or is being exposed to toxic materials or harmful physical agents in concentrations or at levels in excess of that provided for by any applicable standard,"[53] has the right to file a petition to have the Commissioner investigate the situation.[54] Even without a standard on concentrations of tobacco smoke, there may be applicable standards on exposure to carbon monoxide levels which are frequently exceeded in enclosed offices with poor ventilation.[55]

The North Carolina Occupational Safety and Health Act does not create a private right of action.[56] Therefore, the employee may not sue his employer personally for what he believes is an OSHA violation. However, OSHA regulations may provide evidence of the employer's negligence in allowing dangerous, smokey conditions to continue. Courts have used OSHA standards, even when not applicable to the particular fact situation, to provide "guidelines . . . in determining standards of negligence by which civil liability is determined."[57] In *Cowan v. Laughridge Construction Co.*[58] the North Carolina Court of Appeals stated that OSHA regulations are some evidence of custom in the industry and may be admissible to help show the standard of care.[59] Yet, until there are OSHA regulations specifically on permissible levels of exposure to tobacco smoke, it is unlikely that using OSHA standards as evidence of negligence

51. N.C. GEN. STAT. § 95-129(1).

52. *Health Consequences*, *supra* note 4, at 6-7.

53. N.C. GEN STAT. § 95-130(6) (1943).

54. N.C. GEN. STAT. § 95-130(6) (1943).

55. *See supra* note 10, at 331-32.

56. The North Carolina Occupational Safety and Health Act provides an administrative procedure which employees must use to assert their rights under the Act. The employee must make his complaints to the Commissioner of Labor. N.C. GEN. STAT. § 95-130, 133 (1943).

57. Parker v. South Louisiana Contractors Inc., 370 So.2d 1310, 1313 (La. App. 1979).

58. 57 N.C. App. 321, 291 S.E.2d 287 (1982).

59. *Id.* at 305, 291 S.E.2d at 290.

would succeed in a North Carolina court.

4. Constitutional Rights

Nonsmokers do not have any federal constitutional right to breathe clean air. For example, in *Federal Employees for Nonsmokers' Rights v. United States*,[60] federal employees attempted to get declaratory and injunctive relief to restrict smoking in federal buildings.[61] They included First and Fifth Amendment claims in their complaint.[62] The court dismissed these claims, stating that to read the Constitution as protecting nonsmokers from inhaling tobacco smoke would broaden the rights of the Constitution "to limits heretofore unheard of."[63] A constitutional right to clean air has also been rejected in other cases.[64] Thus, the Constitution clearly does not provide protection for nonsmokers' rights, yet, it does not guarantee a right to smoke either.[65]

5. State Statutes

At this time, North Carolina has no statute containing any sort of restrictions on smoking tobacco products. North Carolina is in a small minority of states in this respect. Legislation is the preferred method of dealing with nonsmokers' rights.[66] In fact, at least forty-one states and the District of Columbia have some sort of

---

60. 446 F. Supp. 181 (D.D.C. 1978), *aff'd*, 598 F.2d 310 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 926 (1979).

61. *Id.* at 182.

62. *Id.*

63. *Id.* at 185 (quoting Gasper v. Louisiana Stadium and Exposition District, 418 F. Supp. 716, 721-22 (E.D. La. 1976).

64. *Accord*, GASP v. Mecklenburg County, 42 N.C. App. 225, 256 S.E.2d 477 (1979); Kensell v. State of Oklahoma, 716 F.2d 1350 (10th Cir. 1983).

65. Some older cases have recognized a right to personal liberty which prohibits laws which would punish the smoker for smoking in his own home or outdoors. In Hershberg v. City of Barbourville, 142 Ky. 60, 133 S.W. 985 (1911), the court held a municipal ordinance prohibiting smoking within the city limits to be an "unreasonable invasion of the right of personal liberty." *Id.* at _, 133 S.W. at 985. City of Zion v. Behrens, 262 Ill. 510, 104 N.E. 836 (1914) held a similar ordinance prohibiting smoking in streets and parks to be an unreasonable interference with citizens' rights. *Id.* at _, 104 N.E. at 838. However, the court noted that "we have no doubt that power exists to prohibit smoking in certain public places . . . where large numbers of persons are crowded together in a small space." *Id.* at _, 104 N.E. at 837.

66. *See generally* Comment, *Smoking in Public: This Air is My Air, This Air is Your Air*, 1984 S. ILL. U.L.J. 665 (1984).

statute restricting or punishing smoking in various public places.[67] Many cities and counties in several states have also passed local smoking ordinances.[68] On the federal level, agencies have taken the lead in nonsmoking regulations.[69] The amount of restriction and recognition of nonsmokers' rights vary widely among the states, but most states do recognize that smoking is, at the very least, a nuisance in public places.[70]

These state statutes usually contain one or more of the following provisions to protect nonsmokers:

a) Restricting smoking in government and/or private workplaces;[71]

b) Requiring written smoking policies in workplaces;[72]

c) Limiting smoking to designated smoking areas;[73]

d) Requiring smoking and nonsmoking signs to

---

67. ALASKA STAT. §§ 18.35.300-.365 (Cum. Supp. 1984); ARIZ. REV. STAT. ANN. § 36-601.01 (1956 and Supp. 1989); ARK. STAT. ANN. §§ 20-22-701 to 703 (Supp. 1985); CAL. GOV'T CODE § 19262 (West Supp. 1989); COLO. REV. STAT. §§ 25-14-101 to 105 (1982); CONN. GEN. STAT. ANN. § 31-40q and § 1-21b (West Supp. 1988); DEL. CODE ANN. tit. 11, § 1326 (1974); D.C. CODE ANN. §§ 6-911 to 917 (1981); FLA. STAT. ANN. §§ 386-201 to 209 (West 1943); GA. CODE ANN. § 16-12-2 (1981); HAW. REV. STAT. §§ 321-201 to 206 (Supp. 1984); IDAHO CODE §§ 39-5501 to 5509 (1947); IOWA CODE §§ 98A.1 to .6 (1946); KAN STAT. ANN. § 21-4008 (1964); KY. REV. STAT. §§ 196.245, 438.050 (1982); ME. REV. STAT. ANN. tit. 22, §§ 1578 to 1580-A (Supp. 1986); MD. CODE ANN. § 11-205 (1957); MASS. GEN. LAWS ANN. ch. 270, § 21 (1931), ch. 272 § 43A (1931); MICH. STAT. ANN. § 12.933(7a) and § 17.495(20) (1936); MINN. STAT. ANN. §§ 144.391 to 471 (West Supp. 1989); MISS. CODE ANN. § 97-35-1(4) (1972); MONT. CODE ANN. §§ 50-40-101 to 109 (1985); NEB. REV. STAT. §§ 71-5701 to 5713 (1943); NEV. REV. STAT. § 2C:33-13 (Supp. 1986); N.H. REV. STAT. ANN. §§ 155:45 to 56 (Supp. 1986); N.J. STAT. ANN. §§ 26:3D-1 to -54 (Supp. 1988); N.M. STAT. ANN. §§ 24-16-1 to -11 (1978); N.Y. PUB. HEALTH LAW §§ 1399-o to q (McKinney Supp. 1989); N.D. CENT. CODE §§ 23-12-09 to 11 (1959); OHIO REV. CODE ANN. § 3791.031 (American Supp. 1985); OKLA. STAT. tit. 21, § 1247 (1971); ORE. REV. STAT. §§ 243.345, -.350 (1953); PA. STAT. ANN. tit. 35, § 1225 (Purdon 1977); R.I. GEN. LAWS §§ 23-20.6-1 to 6-4 (1956) and §§ 23-20.7-1 to 7-7 (Supp. 1986); S.C. CODE ANN. § 59-67-150 (Law Co-op. 1976); S.D. CODIFIED LAWS § 22-36-2 (1979); TEX. PENAL CODE ANN. § 48.01 (Vernon Supp. 1989); UTAH CODE ANN. §§ 76-10-101 to 110 (Supp. 1988); VT. STAT. ANN. tit. 20 § 2752(1958); WASH. REV. CODE ANN. §§ 70-160-010 to 900 (Supp. 1989); W. VA. CODE § 21-3-8 (1985); WIS. STAT. ANN. § 101.123 (West Supp. 1988).

68. *Health Consequences*, *supra* note 4, at 275-76.

69. *Id.* at 276.

70. *Id.* at 266-74.

71. *See, e.g.*, FLA. STAT. ANN. § 386-201 to 209 (1943).

72. *See, e.g.*, CONN. GEN. STAT. ANN. § 31-40q (West Supp. 1988).

73. *See, e.g.*, IOWA CODE §§ 98A.1 to .6 (1946).

be posted;[74]

e) Giving preference to nonsmokers in conflict resolution;[75]

f) Prohibiting retaliatory action against nonsmoking employees;[76] and,

g) Restricting smoking in certain public places (excluding workplaces).[77]

The most protective statutes combine several of these provisions to give comprehensive protection, while others may have only one provision.[78] The most comprehensive laws regulate smoking in private workplaces as well as public workplaces and other public areas, with the intent of protecting nonsmokers.[79] Less protective laws simply regulate smoking in one or more public places, for safety reasons, not for protecting nonsmokers.[80]

State legislation is the most effective way to protect nonsmokers' rights, as most states have recognized. Most nonsmokers have neither the money nor the inclination to bring an uncertain law suit against their employers in order to protect their health from the smoke of fellow employees. Most employees who are subjected to smoke probably do not even realize that they might be able to do something about it and would fear that they might be fired for trying.

B. Retaliatory Termination

A nonsmoker might well fear that he would be fired if he were to press his employer to provide for nonsmoking employees, especially if many people in the office smoke. Unfortunately, this fear

---

74. *See, e.g.*, UTAH CODE ANN. §§ 76-10-101 to 110 (Supp. 1988).

75. *See, e.g.*, ALASKA STAT. §§ 18.35.300 to .365 (Supp. 1984).

76. *See, e.g.*, UTAH CODE ANN. §§ 76-10-101 to 110 (Supp. 1988).

77. *See, e.g.*, NEB. REV. STAT. §§ 71-5701 to 5713 (1943).

78. *See generally Health Consequences*, *supra* note 4, at 269-72, for a chart which compares the provisions and overall comprehensiveness of all state laws passed before 1986.

79. *See generally Health Consequences*, *supra* note 4.

80. Laws in some states are extremely limited. For example, South Carolina's sole prohibition is against drivers of school buses smoking on the bus. S.C. CODE ANN. § 59-67-150 (Law Co-op. 1976). Kentucky prohibits adult employees and students from smoking in nonsmoking areas of a school building. Potential violators are no doubt deterred by the *maximum* fine of five dollars. KY. REV. STAT. § 438.050 (1982) (emphasis added).

has some justification, and in North Carolina the rules concerning unjust termination are not likely to help. As a general rule, unless the employment contract provides otherwise, an employee with a contract of indefinite duration may be terminated at will.[81] Some states modified this rule somewhat so that the employer does not have an absolute right to fire even an at-will employee if the discharge violates an express statutory objective or firmly established principle of public policy.[82] North Carolina courts have recognized only a very limited public policy exception to the general rule of termination at will and have been conservative in remedies for discharged at-will employees, even in cases where the statutory language seems to support the employee's claim.[83]

To establish a prima facie case of retaliatory termination in North Carolina, the employee must show that: first, he was engaged in a statutorily protected activity; second, an adverse employment action occurred; and third, there is a causal connection

---

81. Mumford v. Hutton & Bourbonnais Co., 47 N.C. App. 440, 267 S.E.2d 511 (1980)(If duration of employment is not specified, the contract of employment can be terminated at will).

82. *See* Hentzel v. Singer Co., 138 Cal. App. 3d 290, 188 Cal. Rptr. 159, _ P.2d _ (1982). Here the court recognized the state's policy, as expressed in the California Labor Code, that employees should be able to tell employers about unsafe conditions so that the conditions can be corrected. North Carolina has recognized a very limited public policy exception to the terminable-at-will rule in Sides v. Duke University, 74 N.C. App. 331, 328 S.E.2d 818 (1985). *Sides* involved the dismissal of a nurse after she refused to testify falsely in a negligence action against the hospital. The court noted that the right to terminate a contract at will does not include a right to terminate for an unlawful reason or a purpose in contravention of public policy. 74 N.C. App. at 342, 328 S.E.2d at 826. However, the facts in this case were very compelling since perjury and subornation of perjury were involved. These acts are criminal and the public policy against them is very obvious.

83. In Dockery v. Lampart Table Co., 36 N.C. App. 293, 244 S.E.2d 272 (1978), the court of appeals rejected a claim for retaliatory discharge by a worker who was fired after he brought a workers' compensation claim. The court thought that to hold otherwise would go against the well established common law rule and that the problem should be left to the legislature. 36 N.C. App. at 299-300, 244 S.E.2d at 275-76. The legislature did in fact amend the workers' compensation statutes in response to this case. *See* N.C. GEN. STAT. § 97-6.1 (1943). However, North Carolina courts still require the public policy as revealed in statutes to be very clear to recognize the public policy exception. In Trought v. Richardson, 78 N.C. App. 758, 338 S.E.2d 617 (1986), a nurse claimed that she was fired for actions which she took in accordance with law and hospital regulations. The court refused to follow the *Sides* retaliatory discharge exception, which applies to a limited fact situation. 78 N.C. App. at 762, 338 S.E.2d at 619.

between the employee's activity and the adverse action.[84] Unfortunately, trying to get an employer to establish smoke-free areas is far from being a "statutorily protected activity" in North Carolina, since there is no statute limiting smoking. Unless the employee informs a prospective employer of his need and desire to work in a smoke-free environment and has this incorporated into the employment contract, a North Carolina court would probably not allow relief for a later termination caused by the employee's complaints about smoke in the workplace.

Both the North Carolina and federal Occupational Safety and Health Acts prohibit an employer from firing an employee in retaliation for the employee's filing of a complaint against the employer under OSHA regulations or the exercise of any right under OSHA.[85] If an employee believes that he has been fired in retaliation, he can file a complaint with the Commissioner of Labor alleging the discrimination against him.[86] The Commissioner "shall cause such investigation to be made as he deems appropriate."[87] If the Commissioner determines that a violation of OSHA has occurred, he can bring an action against the employer in the superior court of the county where the discrimination occurred.[88] The court is authorized to order reinstatement of the employee, payment of back pay, or any other appropriate relief.[89] This statute does not create a private cause of action,[90] so only the Commissioner can bring an action against the employer under the anti-retaliation provisions.

C. *Denial of Benefits*

1. *Disability Benefits*

In some cases, inability to work in a smoke-filled workplace

---

84. Sparrow v. Piedmont Health Systems Agency, Inc., 593 F. Supp. 1107 (M.D.N.C. 1984).

85. U.S.C.A. § 657-78 (1985); N.C. GEN. STAT. § 95-130 (1943).

86. N.C. GEN. STAT. § 95-130.9 (1943).

87. *Id.*

88. *Id.*

89. *Id.*

90. *See generally* Taylor v. Brighton Corp., 616 F.2d 256 (6th Cir. 1980). The *Taylor* court held that federal OSHA provisions prohibiting retaliatory discharge of employees who report violations do not create a private right of action against the employer. The language of North Carolina's retaliatory discharge provisions, N.C. GEN STAT. § 95-130(8) and (9), is almost identical to the federal provisions in 29 U.S.C.A. § 660(c)(1) and (2), and would probably be interpreted the same way.

because of sensitivity to smoke has been considered a "handicap" under various statutes. If a hypersensitive employee is forced to take a leave of absence from work because of difficulties caused by smoke, he may be entitled to disability benefits. In *Parodi v. Merit Systems Protection Board*,[91] the court held that the plaintiff was disabled under the applicable statute and would be entitled to benefits if the government could not provide her a smoke-free job.[92] Parodi was a federal employee who worked in a smoke-filled office.[93] Because of pulmonary difficulties and asthmatic bronchitis caused by the smoke, her doctor advised her to take a leave of absence.[94] The Office of Personnel Management ruled that Parodi was not disabled within the meaning of the applicable statute.[95] The court disagreed, stating that Parodi suffered from an "environmental limitation" which limited her just as any other disease might, as long as she was in a smoke-filled office.[96]

2. *Unemployment Benefits*

Whether an employee who has to quit his job because of sensitivity to smoke in the workplace will be able to qualify for unemployment benefits depends heavily on the particular state statute. A few states have considered the nonsmoker's situation and qualification for unemployment benefits specifically. Leaving a job because of a fear of the carcinogenic effects of smoke and the eye and throat irritation it causes may be sufficient to constitute "good cause" so that the employee is entitled to unemployment benefits. In *McCrocklin v. Employment Development Dept.*,[97] the plaintiff left his job in a smoke-filled office when he was unable to get his employer to rectify the problem.[98] His application for unemployment benefits was denied on the grounds that he had quit "voluntarily without good cause."[99] The court reversed this determination, holding that a reasonable fear of harm to one's health or safety is "good cause" to quit in some situations.[100]

---

91. 690 F.2d 731 (9th Cir. 1982).
92. *Id.* at 740.
93. *Id.* at 732.
94. *Id.*
95. *Id.* at 733.
96. *Id.* at 738.
97. 156 Cal. App. 3d 1067, 205 Cal. Rptr. 156, _ P.2d _ (1984).
98. *Id.* at 1071, 205 Cal. Rptr. at 157, _ P.2d _.
99. *Id.* at 1071, 205 Cal. Rptr. at 157, _ P.2d at _.
100. *Id.* at 1073, 205 Cal. Rptr. at 159, _ P.2d at _.

Other employees have not been successful in getting unemployment benefits. In *Ruckstuhl v. Commonwealth Unemployment Compensation Board of Review*,[101] the plaintiff, a part time market research telephone interviewer, quit her job because of illness allegedly caused by exposure to smoke.[102] Over a month after quitting, she got a certificate from her doctor stating that she was allergic to smoke and could not work in "such environment."[103] The court treated the case as a voluntary termination for health reasons.[104] Applying the usual test, the court found that the plaintiff did not qualify for benefits because she did not offer competent testimony of sufficient health reasons which existed upon termination and she did not inform her employer of her condition and request to be transferred to a more suitable place.[105] However, it seems apparent from the court's application of the test that if the plaintiff had gotten the certificate from her doctor before termination instead of after and she had informed her employer properly, she probably would have qualified for benefits.

Under the North Carolina Employment Security statutes,[106] an employee who leaves his job because of health problems caused by exposure to smoke in the workplace should be entitled to unemployment benefits. An employee is eligible for benefits if he meets the requirements of General Statute section 96-13 and he is not "unemployed because he left work voluntarily without good cause attributable to the employer."[107] When an employee leaves work for health reasons, it is considered an "involuntary leaving for health reasons" if he shows that: first, he had an adequately proven disability or health condition which justified the leaving and prevented him from doing alternative work offered by the employer which would pay the greater of minimum wage or eighty-five percent of the employee's regular wage; and second, he gave the employer notice of the health condition within a reasonable time before leaving the job.[108] There is no North Carolina case applying these provisions to a nonsmoker who had to leave the job because of sensitivity to smoke. Arguably, the particular provisions

---

101. 57 Pa. Cmwlth. 302, 426 A.2d 719 (1981).
102. *Id.* at _, 426 A. 2d at 721.
103. *Id.*
104. *Id.*
105. *Id.*
106. N.C. GEN. STAT. §§ 96-13, 14 (1943).
107. N.C. GEN. STAT. § 96-14.1.
108. N.C. GEN. STAT. § 96-14.1(A) AND (B).

for leaving for health reasons would govern the nonsmoker's situation. This would prevent the employee from having to establish that his health reasons constitute "good cause"[109] as that has been interpreted. The hypersensitive nonsmoker should be able to meet the requirements of General Statute section 96-14 easily if he lets the employer know of his problems caused by the smoke and is diagnosed as allergic or hypersensitive by a doctor.

3. *Workers' Compensation*

In North Carolina, an injury received in the workplace is compensable only if it is caused by an accident arising out of and in the course of the employment.[110] The employee must have an accident, defined as an untoward or fortuitous event, which causes the injury.[111] The injury must also arise from a contemplated risk of the employment.[112] Even if smoke were a contemplated risk of the job, the gradual injury caused by long exposure to smoke can hardly be forced to fit into the "accident" requirement of North Carolina workers' compensation law.

Under the statutes and case law of some states, a nonsmoking employee who is injured by smoke can receive workers' compensation benefits. In *Schober v. Mountain Bell Telephone*,[113] the New Mexico Court of Appeals held that an injury suffered by an employee who was allergic to cigarette smoke when he collapsed at work because of continual exposure to smoke was an injury arising out of the employment for purposes of workers' compensation.[114] Schober was advised by several doctors to avoid smoke because of his allergies to it, but he was unable to avoid it at work.[115] He was hospitalized after a collapse caused by the smoke at work.[116] The court stated that Schober's injury was caused by a risk to which he

---

109. *See* In re Clark, 47 N.C. App. 163, 266 S.E.2d 854 (1980), which defines good cause as "a reason which would be deemed by reasonable men and women valid and not indicative of an unwillingness to work." *Id.* at 166, 266 S.E.2d at 856.

110. *See* Gallimore v. Marilyn's Shoes, 292 N.C. 399, 233 S.E.2d 529 (1977) for a statement of the elements of a compensable injury.

111. *Id.* at 402, 233 S.E.2d at 531.

112. *See* Searsey v. Perry M. Alexander Const. Co., 35 N.C. App. 78, 239 S.E.2d 847 (1978).

113. 96 N.M. 376, 630 P.2d 1231 (Ct. App. 1980).

114. *Id.* at _, 630 P.2d at 1233-34.

115. *Id.* at _, 630 P.2d at 1234.

116. *Id.*

was subjected by his employment and that he was entitled to compensation.[117]

III. AVOIDANCE OF LIABILITY BY EMPLOYERS

"Legal liability is becoming a No. 1 issue for personnel departments."[118] As the scientific evidence on the dangers of environmental smoke grows, more and more suits will probably be brought by employees who have been harmed by smoke in the workplace.[119] Employers have by now become aware of the hazards of smoke and risk liability in the future if they do not respond to make sure that their workplaces are safe.

A. Advantages of Adopting a Smoking Policy

Whether there is a statute requiring the employer to have a smoking policy or to prohibit smoking, there are many practical advantages of doing it anyway. A large majority of both smokers and nonsmokers are in favor of restrictions or bans on smoking in the workplace.[120] One obvious reason is to protect the health of employees. Also, the employer will not have to worry about the possibility of lawsuits by nonsmokers. There are also economic reasons for restricting or prohibiting smoking. "Smokers have higher absentee rates than nonsmokers (and) (s)moking-related illnesses lead to disability claims and death benefits."[121] The American Lung Association claims that smoking costs twenty-five million dollars a year in lost wages, lost productivity, and absenteeism, and that over eighty million workdays per year are lost because of smoking-related illnesses.[122] Employers may even save money on maintenance costs when smoking is prohibited.[123]

Another advantage that many employers may have never realized is that eliminating smoke will protect their computers. Tobacco smoke particles coat computer chips, just as they do human

---

117. *Id.* at _, 630 P.2d at 1236.

118. Goerth, *Economics and Court Decisions Leading to a Smoke-Free Workplace, Occupational Health and Safety*, July-Aug. 1984, at 24.

119. *Id. See generally* Comment, *Nonsmokers' Rights: The Employer's Dilemma*, 28 ST. LOUIS U. L. J. 993 (1984).

120. *Health Consequences*, *supra* note 4, at 283, 293.

121. Goerth, *supra* note 118, at 24.

122. *Id.*

123. *See generally Non-smoking Rules Greeted as a Breath of Fresh Air*, News and Observer (Raleigh) Nov. 4, 1986, p. 12D.

lungs, and make them run up to thirty percent hotter.[124] Computers run by smokers often need more servicing and cleaning than those run by nonsmokers.[125] As businesses become increasingly dependent on computers, eliminating smoking could reduce both the cost and inconvenience of computer malfunctions.

Many businesses and the federal government have recognized the advantages of prohibiting smoking or at least restricting it. About thirty percent of private workplaces have formal smoking policies.[126] Presently, a clear trend is developing toward restricting smoking in both government and private workplaces.[127] Some employers are beginning to show signs of not hiring smokers in the first place, perhaps to avoid future conflicts and liability.[128]

B. Union Involvement

In establishing a smoking policy, the employer should always try to accomodate both smokers and nonsmokers. However, when the employees are members of a union, the employer must be especially careful to follow the procedures required for making rules on employee conduct in the collective bargaining agreement and must make sure the policy is fair to everyone.[129] If the employer unilaterally promulgates a no smoking rule which is not reasonable in relation to the business, the rule may be held invalid in arbitration.[130] The rule must, above all, be reasonable under the circum-

---

124. Miles, *Smokeout in the Office, Computer Decisions*, Dec. 3, 1985, at 70.

125. *Id.*

126. *Selected Issues*, *supra* note 4, at 52; *Health Consequences*, *supra* note 4, at 283.

127. *Health Consequences*, *supra* note 4, at 284-93; *Selected Issues*, *supra* note 4, at 52. Several government agencies and large private employers have recently adopted smoking policies aimed at protecting nonsmokers or have banned smoking. These include the General Services Administration, the Department of Defense, the U.S. Postal Service, the Veterans Administration, and Boeing Co.

128. *See generally* Weis, *Giving Smokers Notice*, MANAGEMENT WORLD, July 1984, at 44; *Health Consequences*, *supra* note 4, at 299.

129. *See Health Consequences*, *supra* note 4, at 294.

130. *See* Schien Body and Equipment Co., Inc. 69 Lab. Arb. (BNA) 930 (1972) (Roberts, Arb.).

stances at the particular workplace, and it must be fair to both smokers and nonsmokers.[131]

IV. Policy Concerns and Protection of Nonsmokers

In any consideration of the advisability of rules concerning smoking, attitudes of the public play an important role. The competing interests and values are more clearly defined in North Carolina than in other states whose economies do not depend so heavily on tobacco. On one side is the dependency of tobacco growers, manufacturers, sellers, and many others on a continued demand for tobacco procucts. Allowing people to smoke as much as possible is in the tobacco industry's economic best interests. On the other side is health and life, not only of willing smokers but also of the people around them who become involuntary smokers. In states with little ar no tobacco production, concerns for health and life have already been expressed in legislation.[132] Most people would agree, at least intellectually, that health is more important, in the long run, than the welfare of the tobacco industry. Unfortunately, these people do not have a powerful and well-financed lobby working for them—the tobacco industry does.

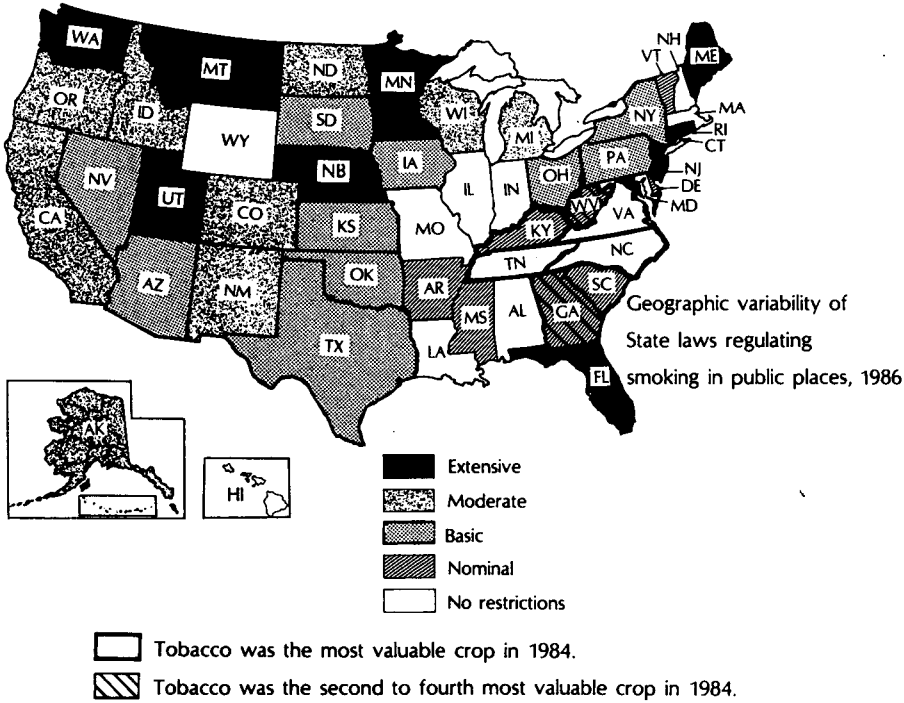
Recent opinion polls show that nine out of ten smokers would like to quit if they could, and that eighty-four percent of workers, both smokers and nonsmokers, think that workers have the right

---

131. *See* Union Sanitary Dist., 79 Lab. Arb. (BNA) 193 (1982) (Koven, Arb.); United Telephone Co. of Florida, 78 Lab. Arb. (BNA) 865 (1982) (Clark, Arb.) In *United Telephone* the no-smoking area designation was held to be reasonable because it had a legitmate business purpose—to provide a safe workplace for employees as required by OSHA—and the area chosen as a no-smoking area was reasonable in relation to the air flow and design of the cafeteria. *See also* Jauvtis, *The Rights of Nonsmokers in the Workplace: Recent Developments*, Lab. L.J. 144, 147-48 (1983).

132. *See supra* note 67. A graphic comparison of major tobacco-producing states with states with nonsmoking statutes makes the relation between economic concerns and legislation very clear. The map, showing the comparative strengths of state laws, is taken from *Health Consequences*, at 268 *See supra* note 4. Superimposed on this map are indications of the major tobacco producing states, based on information from the Bureau of the Census, U.S. Dept of Commerce, Statistical Abstract of the U.S. 1986, 106th Ed. at 658, Chart #1172 Crops—Acreage and Value, 1982 to 1984, and Order of Value, 1984, by state. Obviously, the tobacco producing states tend not to have nonsmoking laws or have very weak laws. *See also Health Consequences, supra* note 4, at 275.

to establish nonsmoking policies.[133] In fact, the latest Gallup Poll shows that fifty-five percent of the public endorse a ban on smoking in all public places, while sixty-nine percent of the nonsmoking public favor such a ban.[134] A subtle change in attitudes toward smoking is coming, slowly but surely.[135] This change is reflected in statements such as Miss Manners' declaration that: "Smoking should be confined to certain parlors to which the smokers may



The classifications of comprehensiveness of the state laws shown on the chart are:
Extensive—Regulates smoking in private workplaces.
Moderate—Regulates smoking in restaurants.
Basic—Restricts smoking in four or more public places.
Nominal—Restricts smoking in one to three public places.
The guiding principle behind this classification was that the "stronger measures are those that reduce exposure to ETS to the greatest degree." *Health Consequences, supra* note 4, at 325.

133. *Non-smoking Rules Greeted as a Breath of Fresh Air, supra* note 123.

134. *Majority Favors Ban on Smoking in Public Places*, News and Observer (Raleigh) April 7, 1987, p. 8A.

135. *Health Consequences, supra* note 4, at 317-18.

retire from the sensible people and make their disgusting mess. . . . If you wish to smoke in the presence of clean people, you must ask their permission and be prepared to take their refusal to grant it."[136] Certainly not all nonsmokers feel so strongly about smoking, but smoking in the presence of others is losing its status as a presumed right.

If people do indeed feel this way about smoking, then why should their legislators not respond by passing the appropriate legislation? One answer, at least in North Carolina, is the tobacco industry. At present, short term interests in the economic position of the tobacco industry are outweighing long term interests in life and health. The tobacco industry is committed to fighting anti-smoking groups.[137] For this reason, nonsmokers must turn to the courts, often the protectors of unpopular interests, for help.

V. CONCLUSION

Some people think that all of the recent publicity about nonsmokers' rights is a lot of fuss about nothing. Smoking has been around for many years and is likely to stay around for many more. Everyone has to put up with a few minor irritations in life—Why don't nonsmokers just quit complaining? Nonsmokers will not quit complaining because their lives and health are in jeopardy. All nonsmokers are endangered by environmental smoke, and hypersensitve nonsmokers experience more immediate damage to their health and may even be forced to quit their jobs.

The issue in this Article is not whether smoking is bad for smokers—that point has been settled.[138] The issue is not whether the government has the authority to make smokers quit smoking, nor is it how far the government can go in regulating smoking. The issue is whether nonsmokers must be forced by their fellow employees to become involuntary smokers and whether they should have to risk their health because the smoker at the next desk wishes to exercise his personal choice and "right" to smoke. No one should have to submit to this sort of health risk. Many states and cities have recognized this in legislation and regulations. Many employers have recognized this by voluntarily adopting smoking policies. Nonsmokers and courts must use the existing law in North Carolina to try to fashion new remedies to protect nonsmokers,

136. Glynn, *The Last Cigarette*, *Vogue*, Aug, 1986 at 333.
137. *Tobacco Industry Unity*, *supra* note 25.
138. *Supra* notes 7 through 18 and accompanying text.

while employers can do so voluntarily to their advantage. Until the economic conditions in North Carolina change radically, voluntary action and judicial remedies are the nonsmoker's only hopes.