

# The Legal Rights of Nonsmokers in the Workplace

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## I. INTRODUCTION

The Surgeon General first suggested that nonsmokers might be harmed by exposure to tobacco smoke in his 1972 report on the health consequences of smoking.<sup>1</sup> Since 1972, numerous studies have produced growing medical and scientific evidence showing that such harms are substantial.<sup>2</sup> Most recently, in December of 1986 the Surgeon General issued an unprecedented report stating unequivocally that the inhalation of smoke from other people's cigarettes causes lung cancer and other diseases in healthy nonsmokers.<sup>3</sup>

To protect nonsmokers from involuntary smoking, most states have enacted legislation that restricts smoking in *public places*.<sup>4</sup> However, nonsmokers are probably most vulnerable to serious harm from exposure to tobacco smoke in the *workplace* because they spend relatively large amounts of time at work. Only a handful of states has imposed effective restrictions on smoking in the workplace.<sup>5</sup>

When legislatures fail to address an important health issue such as this, people naturally turn to the courts for relief.

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1. PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, THE HEALTH CONSEQUENCES OF SMOKING, A REPORT OF THE SURGEON GENERAL 117-35 (1972).

2. See *infra* notes 21-36 and accompanying text.

3. PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING, A REPORT OF THE SURGEON GENERAL 7 (1986) [hereinafter 1986 REPORT].

4. *Id.* at 266.

5. See, e.g., MINN. STAT. ANN. § 144.414 (West 1986); NEB. REV. STAT. § 71-5704 (1981); UTAH CODE ANN. § 76-10-106 (1986). Washington currently has no state-imposed restrictions on smoking in the workplace.

Nonsmokers have had considerable success in obtaining judicial relief, and litigation by nonsmokers against their employers is likely to become increasingly common in the near future.

This article will examine the legal rights of nonsmokers based upon the common law right to a safe workplace, federal and state laws protecting handicapped persons, other tort theories, various federal and state statutory provisions, administrative regulations, and local ordinances. Although strong emphasis will be placed on the legal rights of nonsmokers in the workplace, the rights of nonsmokers in public places will also be discussed. The main focus is on Washington law; however, the common law and federal law theories discussed in this article should be viable in many other jurisdictions throughout the United States.<sup>6</sup>

## II. THE HARM FROM INVOLUNTARY SMOKING

Regardless of which legal theory a nonsmoker may employ to assert his or her rights to smoke-free air, it is essential that the decision-making tribunal be presented with a comprehensive and persuasive factual record that clearly outlines the harmful effects of tobacco smoke on nonsmokers. An exhaustive and persuasive factual record will likely be the single most important factor in convincing a court to apply or expand a common law legal doctrine to protect nonsmokers. This was clearly demonstrated in *Shimp v. New Jersey Bell Telephone Co.*,<sup>7</sup> the landmark case which first invoked the well-settled common law right to a safe workplace for the benefit of a nonsmoking employee. Therefore, some of the most potent factual data on the harm from involuntary smoking will be reviewed.

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6. Although the United States Supreme Court has never directly ruled on the issue, lower federal courts have decided that there is no constitutionally protected right to breathe air that is free from tobacco smoke contamination. In *Gaspar v. Louisiana Stadium and Exposition District*, 418 F. Supp. 716 (E.D. La. 1976), *aff'd*, 577 F.2d 897 (5th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979), the plaintiffs brought an action pursuant to 42 U.S.C. § 1983 seeking to enjoin the Louisiana Stadium and Exposition District from continuing to allow tobacco smoking in the Louisiana Superdome during events staged there. The plaintiffs claimed a constitutional right to smoke-free air based upon the first, fifth, ninth, and fourteenth amendments to the U.S. Constitution. The *Gaspar* court held that there was no such constitutional right. *Accord*, *Kensell v. Oklahoma*, 716 F.2d 1350 (10th Cir. 1983) (political question); *Federal Employees for Non-Smokers' Rights (FENSR) v. United States*, 446 F. Supp. 181 (D.D.C. 1978), *aff'd mem.*, 598 F.2d 310 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 926 (1979) (no constitutional question).

7. 145 N.J. Super. 516, 368 A.2d 408 (1976).

### A. Constituents of Tobacco Smoke

When a nonsmoker is present in a smoke-filled room, he or she is in fact *smoking* because normal inhalation exposes the nonsmoker to many of the same constituents of tobacco smoke that voluntary smokers experience.<sup>8</sup> Tobacco smoke is derived from two sources: sidestream smoke and mainstream smoke.<sup>9</sup> Sidestream smoke emerges directly from the end of the burning tobacco product; mainstream smoke is first inhaled by the smoker and then enters the environment.<sup>10</sup> Sidestream smoke contains higher concentrations of many known toxic and carcinogenic agents than mainstream smoke.<sup>11</sup>

Scientists have identified over 3,800 substances in tobacco smoke.<sup>12</sup> Upwards of 90% of cigarette smoke is composed largely of a dozen gases that are hazardous to health.<sup>13</sup> In addition, in each cubic centimeter of cigarette smoke, there are about one billion particles small enough to penetrate to the farthest recesses of the lung.<sup>14</sup> Nationally, cigarette smokers introduce an estimated 2.25 million metric tons of gaseous and inhalable particulate matter into the indoor environment each year.<sup>15</sup>

Some of the toxic and carcinogenic agents contained in environmental tobacco smoke include carbon monoxide, nitrogen dioxide, acetone, benzene, benzo(a)pyrene, N-nitrosodimethylamine, and nicotine.<sup>16</sup> The main irritants in tobacco smoke are respirable particulates, aldehydes, phenol, ammonia, nitrogen oxides, sulfur dioxide, and toluene.<sup>17</sup> Also

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8. PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, *SMOKING AND HEALTH: A REPORT OF THE SURGEON GENERAL 11-5* (1979).

9. *Id.*

10. *Id.*

11. 1986 REPORT, *supra* note 3, at 21.

12. NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCES, *ENVIRONMENTAL TOBACCO SMOKE, MEASURING EXPOSURES AND ASSESSING HEALTH EFFECTS 2* (1986) [hereinafter NATIONAL RESEARCH COUNCIL].

13. PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, *THE SMOKING DIGEST 17* (1977) [hereinafter SMOKING DIGEST].

14. *Id.* at 18.

15. Repace, *The Problem of Passive Smoking*, 57 BULL. N.Y. ACAD. MED. 936 (1981) [hereinafter *Passive Smoking*].

16. 1986 REPORT, *supra* note 3, at 134. Tobacco smoke contains substances which are pharmacologically active, toxic, mutagenic, carcinogenic, and antigenic. OFFICE ON SMOKING AND HEALTH, PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *A STATEMENT ON THE HEALTH EFFECTS OF PASSIVE SMOKING* (1986) [hereinafter HEALTH EFFECTS].

17. 1986 REPORT, *supra* note 3, at 227.

contained in tobacco smoke are particles that emit ionizing radiation, which when inhaled may cause cancer.<sup>18</sup>

Moreover, several studies show that in rooms where smokers are present, carbon monoxide and other toxic substances are commonly found in concentrations that exceed by several times the maximum levels allowed by federal air quality standards; such concentrations in outdoor air would trigger the immediate declaration of an air pollution emergency.<sup>19</sup> Three or four hours after a nonsmoker leaves such a smoky environment, carbon monoxide is still in the bloodstream.<sup>20</sup>

### B. *The Nature and Extent of the Harm*

As previously noted, the Surgeon General has concluded that involuntary smoking causes lung cancer and other diseases in healthy nonsmokers.<sup>21</sup> Another recent study on involuntary smoking was conducted under the auspices of the Environmental Protection Agency (EPA).<sup>22</sup> This study concluded that about 5,000 nonsmokers die each year from lung cancer caused by involuntary smoking.<sup>23</sup>

If these 5,000 involuntary smoking deaths are distributed proportionately throughout the United States, then a simple calculation based upon U.S. population census data yields a figure of 91 nonsmoker deaths per year from involuntary smoking in the State of Washington.<sup>24</sup> Significantly, another independent study estimated that 89.5 nonsmokers die each year from lung cancer in Washington due to involuntary

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18. For a discussion of the radioactivity of tobacco smoke, see PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *THE HEALTH CONSEQUENCES OF SMOKING, CANCER AND CHRONIC LUNG DISEASE IN THE WORKPLACE*, A REPORT OF THE SURGEON GENERAL 460-61 (1985).

19. HEALTH EFFECTS, *supra* note 16; SMOKING DIGEST, *supra* note 13, at 24-26; AMERICAN LUNG ASS'N, *SECOND-HAND SMOKE* 3, 4 (1985) [hereinafter *SECOND-HAND SMOKE*].

20. *SECOND-HAND SMOKE*, *supra* note 19, at 4.

21. 1986 REPORT, *supra* note 3, at 7.

22. Repace and Lowrey, *A Quantitative Estimate of Nonsmokers' Lung Cancer Risk From Passive Smoking*, 11 ENV'T INT'L 3 (1985).

23. *Id.* at 3. To place the health risk in perspective, the study's authors state that the number of passive smoking fatalities is at least 70 times greater than the total number of fatalities from the airborne carcinogens currently regulated by the EPA. *Id.* at 12.

24. In 1980, the U.S. had a population of 226,545,805. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES: 1986* (106th ed. 1985). In 1980, Washington had a population of 4,132,204. WASH. OFFICE OF FINANCIAL MANAGEMENT, *WASH. STATE DATA BOOK: 1985* (1985). Thus, Washington's share of passive smoking deaths is (4,132,204 divided by 226,545,805) x (5,000) = 91.

smoking.<sup>25</sup> This Washington study concluded that "passive cigarette smoke is likely the most dangerous air pollutant we face today."<sup>26</sup>

A recent Canadian study has concluded that "[t]obacco smoke, which contains over 50 known carcinogens and many other toxic agents, is a health hazard for nonsmokers who are regularly exposed to it while at work . . . The evidence on the composition of tobacco smoke and on the health hazards of involuntary exposure suggests that there may not be a 'safe' level for such exposure."<sup>27</sup> Other studies have shown that involuntary smoking harms certain lung functions,<sup>28</sup> results in double the lung cancer risk,<sup>29</sup> and adversely affects persons with heart disease.<sup>30</sup>

Similarly, studies show that involuntary smoking may be harmful to fetuses and children. When nonsmoking pregnant women are exposed to passive tobacco smoke, the fetal blood picks up significant amounts of toxic tobacco smoke byproducts.<sup>31</sup> Also, involuntary smoking by small children results in significantly increased respiratory infections manifested as pneumonia and bronchitis.<sup>32</sup> Because of these risks, the National Academy of Sciences recently recommended that

25. Office of Public Health Laboratories and Epidemiology, Washington Department of Social and Health Services, *Passive Smoking: Myth or Reality*, 1 WASH. MORBIDITY REP., No. 2 (May-June 1984). The Washington study also states that dangerous levels of tobacco smoke carcinogens have been measured at many indoor locations. *Id.* at 4.

26. *Id.* See also Repace and Lowrey, *Indoor Air Pollution, Tobacco Smoke, and Public Health*, 208 SCI. 464, 471 (May 2, 1980) ("Clearly, indoor air pollution from tobacco smoke presents a serious risk to the health of nonsmokers.").

27. Collishaw, Kirkbride & Wigle, *Tobacco Smoke in the Workplace: An Occupational Health Hazard*, 131 CAN. MED. A. J. 1199 (1984).

28. White & Froeb, *Small-Airways Dysfunction in Nonsmokers Chronically Exposed to Tobacco Smoke*, 302 NEW ENG. J. MED. 720 (1980) (An exhaustive study of 2,100 subjects concluded that "chronic exposure to tobacco smoke in the work environment is deleterious to the nonsmoker and significantly reduces small-airways function.").

29. Hirayama, *Non-Smoking Wives of Heavy Smokers Have a Higher Risk of Lung Cancer: A Study From Japan*, 282 BRIT. MED. J. 183 (1981) (In a 14 year study of 91,540 nonsmoking Japanese wives, Dr. Takeshi Hirayama found that wives with smoking husbands had double the risk of lung cancer than wives with nonsmoking husbands.).

30. Aronow, *Effect of Passive Smoking on Angina Pectoris*, 299 NEW ENG. J. MED. 21 (1978) (passive smoking aggravates angina pectoris and causes adverse effects in persons with coronary heart disease).

31. Bottoms, Kuhnert, Kuhnert, and Reese, *Maternal Passive Smoking and Fetal Serum Thiocyanate Levels*, 144 AM. J. OBSTET. GYNECOL. 787 (1982).

32. NATIONAL RESEARCH COUNCIL, *supra* note 12, at 9.

tobacco smoke be eliminated from the environments of small children.<sup>33</sup>

In terms of physical discomfort, studies indicate that large percentages of nonsmokers have difficulty working near smokers,<sup>34</sup> and experience various types of physical distress from exposure to tobacco smoke.<sup>35</sup> Based in part on the irritating and noxious effects of involuntary smoking, the National Academy of Sciences has recommended that smoking be banned on all commercial airline flights.<sup>36</sup>

On the economic front, a report from the Office of Technology Assessment, Congress's scientific advisory agency, estimated that disease and lost productivity due to smoking cost this nation about \$65 billion a year, \$43 billion in lost productivity and \$22 billion in health care expenses.<sup>37</sup> Similarly, other researchers have concluded that employers incur significantly increased costs when they permit smoking in the workplace.<sup>38</sup>

Finally, the harmful effects of involuntary smoking have recently been recognized by the Washington Legislature. The legislative intent section of the Washington Clean Indoor Air

33. *Id.*

34. *Passive Smoking*, *supra* note 15, at 939 (study of more than 10,000 nonsmoking office workers reported that more than 50 percent of the nonsmokers had difficulty working near a smoker. Another 36 percent said they were forced to move away from their desks or work stations because of passive smoking).

35. SECOND-HAND SMOKE, *supra* note 19, at 5 (study showed that 70 percent of nonsmokers suffer from eye irritations caused by smoke. Even among nonsmokers with no allergies, 30 percent developed headaches and nasal discomfort from tobacco smoke, while 25 percent experienced coughing). For some nonsmokers, smoke-induced eye tearing can be so intense as to be incapacitating. NATIONAL RESEARCH COUNCIL, *supra* note 12, at 8.

36. NATIONAL RESEARCH COUNCIL, *supra* note 12, at 13. As to indoor locations generally, the Surgeon General has concluded that "[t]he simple separation of smokers and nonsmokers within the same air space may reduce, but does not eliminate, the exposure of nonsmokers to environmental tobacco smoke." 1986 REPORT, *supra* note 3, at 7.

37. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, SMOKING-RELATED DEATHS AND FINANCIAL COSTS, STAFF MEMORANDUM 4 (Sept. 1985).

38. According to the Smoking Policy Institute at Seattle University, on average, the employee who smokes wastes six percent of his working hours with the smoking ritual; takes 50 percent more sick leave; uses a health care system at least 50 percent more; and imposes greater maintenance costs on the employer to meet building code requirements on air standards. Berkman, *Warning: Smoking Cigarettes May Reduce Your Chances For a Job*, 40 CANCER NEWS 14 (Winter 1986). Based on these economic considerations, a business administration professor has computed the incremental costs associated with employees who smoke to be approaching \$5,000 per smoker per year. Weis, *Can You Afford to Hire Smokers?*, 26 PERSONNEL AD. 71 (1981).

Act<sup>39</sup> provides:

The legislature recognizes the increasing evidence that tobacco smoke in closely confined places may create a danger to the health of some citizens of this state. In order to protect the health and welfare of those citizens, it is necessary to prohibit smoking in public places except in areas designated as smoking areas.<sup>40</sup>

Involuntary smoking causes a variety of harmful effects in nonsmokers, including lung cancer. The accumulating body of knowledge concerning these harms will likely be a crucial factor in motivating the courts to fashion legal remedies for nonsmokers.

### III. THE COMMON LAW RIGHT TO A SAFE AND HEALTHFUL WORKPLACE

The nonsmoker has an important common law right to a safe and healthful workplace. Relying on this common law right, courts have held that employers may be enjoined from allowing smoking in the workplace.<sup>41</sup> A key issue in Washington is whether the Workers' Compensation Act exclusive remedy provisions bar an employee from seeking money damages from, or injunctive relief against, his or her employer.

#### A. *An Employee's Common Law Cause of Action*

In the absence of legislation, the common law can provide protection for nonsmokers in the workplace. Every employer has a common law duty to maintain a safe and healthful workplace.<sup>42</sup> Courts have held that the presence of tobacco smoke in the workplace is a breach of this duty.

The landmark case involving nonsmokers' rights to a smoke-free workplace is *Shimp v. New Jersey Bell Telephone Co.*<sup>43</sup> In this 1976 case, the New Jersey court decided that an employer which permitted smoking in the workplace breached its affirmative duty to provide its employees with a work area free from unsafe conditions.

In *Shimp*, the plaintiff's employer allowed its employees to smoke while on the job at desks situated in the plaintiff's

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39. WASH. REV. CODE §§ 70.160.010-.900 (1985).

40. 1985 Wash. Laws ch. 236, § 1 (codified at WASH. REV. CODE § 70.160.010 (1985)).

41. See *infra* notes 43-55 and accompanying text.

42. *Richardson v. City of Spokane*, 67 Wash. 621, 122 P. 330 (1912).

43. 145 N.J. Super. 516, 368 A.2d 408 (1976).

work area. Affidavits from the plaintiff's attending physicians confirmed that she was allergic to cigarette smoke.<sup>44</sup> Passive inhalation of smoke caused severe throat irritation, nasal irritation sometimes taking the form of nosebleeds, irritation to the eyes resulting in corneal abrasion and corneal erosion, headaches, nausea, and vomiting.<sup>45</sup> The plaintiff used existing grievance mechanisms in an unsuccessful attempt to alleviate the situation. An exhaust fan was installed in plaintiff's work area; however, this action proved unsuccessful.<sup>46</sup>

Finally, the employee sought injunctive relief from the court to enjoin smoking as an unsafe working condition. The court held that employees have a common law right to a safe and healthful work environment, and employers have a concomitant affirmative duty to provide a safe work environment.<sup>47</sup>

The court took "judicial notice of the toxic nature of cigarette smoke and its well known association with emphysema, lung cancer and heart disease."<sup>48</sup> The court also stated that "[t]here can be no doubt that the by-products of burning tobacco are toxic and dangerous to the health of smokers and nonsmokers generally and this plaintiff in particular."<sup>49</sup> After reviewing the plethora of affidavits and scientific evidence presented, the court concluded:

The evidence is clear and overwhelming. Cigarette smoke contaminates and pollutes the air, creating a health hazard not merely to the smoker but to all those around her who must rely upon the same air supply. 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.<sup>50</sup>

Finally, the court noted that the employer had already

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44. *Id.* at 521, 368 A.2d at 410.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 527, 368 A.2d at 414.

49. *Id.* at 526, 368 A.2d at 413.

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

prohibited smoking around its machinery to prevent damage from tobacco smoke. The judge stated that a "company which has demonstrated such concern for its mechanical components should have at least as much concern for its human beings."<sup>51</sup> The court then ordered the employer to prohibit smoking in the plaintiff's work area.

In *Smith v. Western Electric Co.*,<sup>52</sup> the Missouri Court of Appeals likewise held that an injunction is appropriate to prevent irreparable harm to an employee from tobacco smoke in the workplace.<sup>53</sup> The *Smith* court, citing *Shimp*, recognized the well-settled duty of an employer "to use all reasonable care to provide a reasonably safe workplace" for its employees.<sup>54</sup> The court also held that "smoking in the work area is hazardous to the health of employees in general and plaintiff in particular."<sup>55</sup>

In contrast to *Smith* and *Shimp*, an employee who sought money damages from her former employer for negligent failure to provide a smoke-free workplace was denied relief in *Gordon v. Raven Systems & Research, Inc.*<sup>56</sup> In *Gordon*, the plaintiff-employee was terminated when she refused to work in an area containing tobacco smoke.<sup>57</sup> The court recognized the common law duty of an employer to provide a reasonably safe workplace. But the court also stated that "the common law does not impose upon an employer the duty or burden to conform his workplace to the particular needs or sensitivities of an individual employee."<sup>58</sup>

However, the *Gordon* court stated that its decision was "readily distinguishable" from *Shimp* because the plaintiff in *Gordon* failed to present scientific evidence on the deleterious effects of tobacco smoke on *nonsmokers in general*.<sup>59</sup> In contrast, the *Shimp* court was presented with a plethora of scien-

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51. *Id.* at 531, 368 A.2d at 416.

52. 643 S.W.2d 10 (Mo. Ct. App. 1982).

53. In *Smith*, the plaintiff suffered a severe adverse reaction to tobacco smoke. The employer offered plaintiff an ineffective respirator and a job in the computer room (where smoking was prohibited) with a decrease in pay of \$500 per month. *Id.* at 12. The court found these steps to be inadequate. *Id.*

54. *Id.* at 12.

55. *Id.* at 13.

56. 462 A.2d 10 (D.C. 1983).

57. *Id.* at 11-12.

58. *Id.* at 15.

59. *Id.*

tific studies and affidavits of medical experts on the general deleterious harms to nonsmokers from tobacco smoke.

The lesson from *Gordon* is clear. To prevail on a common law theory, a nonsmoking plaintiff must demonstrate that tobacco smoke is harmful both to himself and to nonsmokers in general. The importance of an extensive, persuasive factual foundation to prove deleterious harm from tobacco smoke cannot be overstated.

In Washington, it is also well-settled law that an employer has an affirmative and continuing duty to provide its employees with a reasonably safe place of work.<sup>60</sup> Further, the employer must take the precautions of an ordinarily prudent man in keeping the workplace reasonably safe.<sup>61</sup> Recently enacted occupational safety and health statutes<sup>62</sup> represent to some extent a codification of these long-established common law principles but do not, however, provide employees with a judicially enforceable remedy.<sup>63</sup> Significantly, these statutes do not preempt common law remedies,<sup>64</sup> and they contain policy declarations that could perhaps buttress the assertion of another legal theory.<sup>65</sup>

60. *Guy v. Northwest Bible College*, 64 Wash. 2d 116, 390 P.2d 708 (1964) (college employee awarded damages for personal injury sustained on college grounds due to employer's breach of duty to provide safe workplace); *Richardson v. City of Spokane*, 67 Wash. 621, 122 P. 330 (1912) (city employee awarded damages for personal injury sustained on bridge due to employer's negligent failure to maintain a safe workplace); *Ward v. CECO Corp.*, 40 Wash. App. 619, 699 P.2d 814 (1985) (court recognized the continuing validity of an employer's common law duty to provide safe workplace).

61. *Myers v. Little Church by the Side of the Rd.*, 37 Wash. 2d 897, 227 P.2d 165 (1951).

62. *E.g.*, Federal Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §§ 651-658 (1982); Washington Industrial Safety and Health Act (WISHA), WASH. REV. CODE §§ 49.17.010-.910 (1985).

63. There is no direct or implied private right of action under OSHA. *Johnson v. Koppers Co.*, 524 F. Supp. 1182 (N.D. Ohio 1981). While Washington courts have not directly ruled on the issue, they have apparently assumed that as with OSHA there is no private right of action to enforce WISHA. *See, e.g.*, *Ward v. CECO Corp.*, 40 Wash. App. 619, 699 P.2d 814 (1985) (violation of WISHA or its regulations constitutes negligence per se; no reference made to bringing a cause of action directly under WISHA).

64. OSHA states that its provisions shall not "be construed to supersede or in any manner affect . . . the common law or statutory rights, duties, or liabilities of employers . . . with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." 29 U.S.C. § 653(b)(4) (1982).

65. The OSHA "general duty" clause provides that every employer "shall furnish to each of his employees . . . a place of employment . . . free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1) (1982). The WISHA "general duty" clause provides that each employer "[s]hall furnish to each of his employees a place of employment

Thus far, no reported Washington court has directly decided whether an employer's common law duty to provide a safe workplace includes the obligation not to subject employees to involuntary smoking. But in *McCarthy v. Department of Social and Health Services*,<sup>66</sup> a Washington appellate court appeared to recognize the viability of a common law negligence action against an employer by an employee who has been harmed by involuntary smoking in the workplace. The *Shimp* and *Smith* decisions provide strong persuasive precedent to which Washington courts should look for guidance when such a case does arise.

This cause of action may be expressly recognized in the near future by Washington courts because of the rapidly accumulating data demonstrating that tobacco smoke in the workplace constitutes an unhealthy and unsafe condition.<sup>67</sup> That data has already motivated some employers<sup>68</sup> and legislative bodies<sup>69</sup> to develop increasingly stringent restrictions on smoking in various places. The growing trend to restrict smoking is an indication that our society has reached a point in time where the ordinarily prudent employer protects its employees

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free from recognized hazards that are causing or likely to cause serious injury or death to his employees." WASH. REV. CODE § 49.17.060 (1985). See also WASH. ADMIN. CODE R. 296-24-020 (1986) (employer must provide a "safe and healthful working environment").

66. 46 Wash. App. 125, 133, 730 P.2d 681, 686 (1986) (stating that if plaintiff can prove that her smoke-based lung disease was not compensable under the Workers' Compensation Act and was contracted because of her employer's negligence, then "she has a common law action for negligence").

67. See *supra* notes 21-36 and accompanying text.

68. *E.g.*, Pacific Northwest Bell has completely banned smoking in all of its facilities, while the Boeing Co. is working toward a smoking ban affecting 100,000 employees nationwide. Tacoma News-Tribune, Dec. 20, 1985, at C-15, col. 3.

69. In 1983 the City of Seattle restricted smoking in many public places. SEATTLE, WASH., MUNICIPAL CODE §§ 10.64.010-.060 (1986). In 1984 Pierce County enacted a stringent ban on smoking in both public places and private workplaces. PIERCE COUNTY, WASH., COUNTY CODE §§ 8.16.010-.160 (1986). On July 28, 1985 the Washington Clear Indoor Air Act became effective. WASH. REV. CODE §§ 70.160.010-900 (1985) (smoking unlawful unless in a specifically "designated smoking area"). Significantly, WASH. REV. CODE § 70.160.010 (1985) provides:

The legislature recognizes the increasing evidence that tobacco smoke in closely confined places may create a danger to the health of some citizens of this state. In order to protect the health and welfare of those citizens, it is necessary to prohibit smoking in public places except in areas designated as smoking areas.

In late 1986, both the City of Seattle and King county adopted ordinances requiring smoke-free workplaces in all facilities operated by those governmental entities. Seattle, Wash., Ordinance 113148 (Oct. 29, 1986); King County, Wash., Ordinance 7884 (Dec. 24, 1986).

from passive tobacco smoke pursuant to the employer's common law duty.<sup>70</sup>

Once employers are held liable for tobacco smoke harms, the assumption of risk doctrine will not be a defense. This doctrine, which formerly was available to insulate employers from liability in some cases, has been abolished in negligence actions by employees against employers.<sup>71</sup> However, comparative negligence principles may apply if the employee's voluntary exposure to the risk is unreasonable under the circumstances.<sup>72</sup>

The type of relief requested in a tort action against an employer will depend on the circumstances. Money damages are most appropriate in the situation where the harm has already occurred and is no longer present, such as harm sustained from tobacco smoke at a former place of employment. But injunctive relief<sup>73</sup> will be the optimum remedy for an ongoing exposure to tobacco smoke which might result in greater harm or disability over time if unabated.

A continuing health threat from regular exposure to workplace tobacco smoke that may result in future irreparable harm presents a strong case for equitable relief.<sup>74</sup> Inadequacy of the legal remedy becomes almost self-evident because the ongoing exposure will require either a multiplicity of damage lawsuits or because the legal remedy may not be available until some future date when the harm becomes more serious or per-

70. In *Shimp v. New Jersey Bell Tel. Co.*, 145 N.J. Super. 516, 368 A.2d 408 (1976), the court held that employers could reasonably foresee the deleterious health consequences of workplace tobacco smoke to nonsmoking employees. *Id.* at 531, 368 A.2d at 415.

71. *Siragusa v. Swedish Hosp.*, 60 Wash. 2d 310, 373 P.2d 767 (1962).

72. *Id.* at 319, 373 P.2d at 773. The employee's knowledge and appreciation of the risk is an important factor in this analysis. *Id.*

73. In Washington, a party seeking an injunction must establish

(1) that he has a clear legal or equitable right, (2) that he has a well grounded fear of immediate invasion of that right by the one against whom the injunction is sought, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him.

*National Grange of the Order of Patrons of Husbandry v. O'Sullivan Grange No. 1136*, 35 Wash. App. 444, 454, 667 P.2d 1105, 1111 (1983).

74. In deciding whether to grant injunctive relief, the court may balance the equities by considering the following factors:

(a) the character of the interest to be protected, (b) the relative adequacy to the plaintiff of injunction in comparison with other remedies, (c) the delay, if any, in bringing suit, (d) the misconduct of the plaintiff if any, (e) the relative hardship likely to result to the defendant if an injunction is granted and to the plaintiff if it is denied, (f) the interest of third persons and of the public, and (g) the practicability of framing and enforcing the order or judgment.

*Radach v. Gunderson*, 39 Wash. App. 392, 398, 695 P.2d 128, 132 (1985).

manent in nature. Under such circumstances, preventing the future harm by enjoining workplace smoking should be appropriate and feasible to enforce.<sup>75</sup>

The employee's common law right to a safe and healthful workplace is a very significant source of protection for non-smokers. It provides a sound basis for imposing liability on an employer that negligently fails to protect its employees from involuntary workplace smoking.

### B. Employer Immunity from Common Law Damage Suits

In a tort action for smoke-related damages, the employer is likely to claim immunity from suit based upon the exclusive remedy provisions of the Washington Workers' Compensation Act.<sup>76</sup> By their express terms, these exclusive remedy provisions immunize employers by barring employees from bringing a civil action against an employer for personal *injuries* sustained in the course of employment.<sup>77</sup> Instead, the injured

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75. There should be no significant hardship to the enjoined employer since restrictions on workplace smoking actually save the employer money in maintenance costs, consumption of employer-provided fringe benefits, and lost productivity. See *supra* note 38.

76. WASH. REV. CODE §§ 51.04.010-.98.080 (1985).

77. The primary exclusive remedy provision of the Washington Workers' Compensation Act provides:

The *common law* system governing the remedy of workers against employers for *injuries* received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. The remedy of the worker has been uncertain, slow and inadequate. *Injuries* in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, *injured* in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal *injuries* and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.

WASH. REV. CODE § 51.04.010 (1985) (emphasis added). The language of this provision has remained virtually identical to the original provision enacted in 1911. 1911 WASH. LAWS ch. 74, § 1. Only three changes have been made in the original 1911 exclusive remedy provision: (1) the original words "workman" and "workmen" have been changed to "worker" and "workers"; (2) the scope of the original provision has been broadened from "hazardous work" and "extra hazardous work" to "employment" and "work" generally; and (3) the original word "act" has been changed to "title." The second exclusive remedy provision of the Workers' Compensation Act provides:

employee's sole remedy is administrative compensation from an Industrial Insurance fund maintained by mandatory employer contributions.<sup>78</sup> Therefore, the issue for nonsmokers is whether they are barred by the exclusive remedy provisions from suing their employer for harm caused by tobacco smoke in the workplace.

In ascertaining whether the exclusive remedy provisions apply to workplace tobacco smoke harms, two distinct issues need to be considered. First, does the Workers' Compensation Act cloak employers with *absolute* immunity from suit for *any* harm to an employee occurring while in the course of employment, or rather, with *qualified* immunity which attaches whenever the type of harm sustained is compensable under the Workers' Compensation scheme? Second, assuming that employer immunity attaches only when the Workers' Compensation Act provides compensation for the type of harm sustained, then are the harmful consequences of involuntary workplace smoking compensable under the Act?

### 1. Absolute Immunity Versus Qualified Immunity

The immunity issue was recently considered in *McCarthy v. Department of Social and Health Services*,<sup>79</sup> where the Washington Court of Appeals held in a case of first impression that an employer had only qualified immunity<sup>80</sup> from suit by a nonsmoking employee. Helen McCarthy is a former employee of the Washington Department of Social and Health Services (DSHS). She claimed to be suffering from chronic obstructive pulmonary disease with broncho-spasm and diminished pulmonary function caused by exposure to tobacco smoke in the DSHS workplace over a period of several years.<sup>81</sup> In 1980, McCarthy terminated her employment with DSHS.

She then submitted a claim for benefits under the Work-

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Each worker *injured* in the course of his or her employment, or his or her family or dependents in case of death of the worker, shall receive *compensation* in accordance with this chapter, and, except as in this title otherwise provided, such *payment* shall be in lieu of any and all rights of action whatsoever against any person whomsoever . . . .

WASH. REV. CODE § 51.32.010 (1985) (emphasis added).

78. *Id.*

79. 46 Wash. App. 125, 730 P.2d 681 (1986).

80. Qualified immunity is the general rule in the United States: "where the act is inapplicable, the common-law and statutory remedies of the employee remain intact or are not barred." See 101 C.J.S. *Workmen's Compensation* § 919 (1958).

81. *McCarthy*, 46 Wash. App. at 126-27, 730 P.2d at 683.

ers' Compensation Act. After her claim was rejected by the Department of Labor and Industries, she appealed to the Washington Board of Industrial Insurance Appeals. Based upon the testimony of two doctors who had examined Ms. McCarthy, the Board concluded that exposure to cigarette smoke in the workplace had proximately caused her disabling lung disease.<sup>82</sup> Nevertheless, the Board decided that McCarthy's condition was not compensable under the Workers' Compensation Act as either an injury or occupational disease.<sup>83</sup> This administrative decision was not appealed.

Unable to obtain Workers' Compensation benefits for her condition, McCarthy commenced a civil action against DSHS in the Thurston County Superior Court. She alleged in her complaint that DSHS negligently failed to provide her with a safe and healthful place of employment and an office environment reasonably free of tobacco smoke.<sup>84</sup> The trial court dismissed this action based upon the immunity conferred on employers by the Workers' Compensation Act.

The Court of Appeals reversed. It held that the Workers' Compensation Act exclusive remedy provisions bar private causes of action only when the harm sustained is within the coverage provisions of the Act. The court reasoned that "[p]ersons who are injured by the negligent acts of others should have a remedy against the tortfeasor unless their cause of action is preempted by a statutory scheme, such as workers' compensation."<sup>85</sup> The court concluded that it "would not be a just result" to immunize a tortfeasor from suit when the harm sustained is not covered by the Workers' Compensation Act because the injured party would then be completely deprived of a remedy.<sup>86</sup>

Early cases construing the Workers' Compensation Act also held that employers have no immunity when the harm sustained was not compensable under the Act.<sup>87</sup> In *Depre v.*

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82. Decision and Order, In re McCarthy, claim no. H-846420, at 7 (Wash. Bd. Indus. Ins. App. July 26, 1983).

83. *Id.* at 2, 7.

84. *McCarthy*, 46 Wash. App. at 126, 730 P.2d at 683.

85. *Id.* at 133, 730 P.2d at 686.

86. *Id.*

87. These early cases are important because they construed an exclusive remedy provision which is virtually identical to the one currently codified at WASH. REV. CODE § 51.04.010 (1985). This case law is also important because it predates the 1937 amendments which expanded the Act's coverage to include occupational diseases. 1937 Wash. Laws ch. 212.

*Pacific Coast Forge Co.*,<sup>88</sup> a personal injury judgment in the amount of \$5,000 against the plaintiff's employer was affirmed. The plaintiff-employee had acquired inflamed lungs due to exposure over a two-year period to noxious gases in an inadequately ventilated workplace. The harm caused to the plaintiff's lungs made him susceptible to tuberculosis which he eventually contracted.<sup>89</sup> The court held that a common law or factory act suit by the employee was not barred by the Workmen's Compensation Act because the disease contracted was not compensable under the Act.<sup>90</sup>

In *Muir v. Kessinger*,<sup>91</sup> the court held that the "common-law action may still be maintained and its remedy enforced in all cases not specially covered by the Industrial Insurance Act (even against the employer)." Other cases have stated or relied on this proposition.<sup>92</sup> The absence of employer immunity in the foregoing cases is fully consistent with the policy underpinnings of the Workers' Compensation Act.

From a public policy perspective, the applicability of an exclusive remedy provision makes sense *only* when the type of harm sustained is compensable under the Workers' Compensation Act. This is so because the exclusive remedy concept is inextricably bound to the worker's expectation of "sure and certain relief" under the Act. The marriage of these two notions forms the essence of the *quid pro quo* bargain inherent in the workers' compensation scheme.<sup>93</sup> The abolition of com-

88. 151 Wash. 430, 276 P. 89 (1929).

89. *Id.* at 431, 276 P. at 90.

90. *Id.* at 432, 276 P. at 90.

91. 35 F. Supp. 116, 117 (E.D. Wash. 1940) (citing *Reynolds v. Day*, 79 Wash. 499, 140 P. 681 (1914)).

92. See, e.g., *Prince v. Saginaw Logging Co.*, 197 Wash. 4, 11, 84 P.2d 397, 400 (1938) ("by denial of compensation to the employee as being without the [Workers' Compensation] act, the employer was subjected to the hazard of a suit at common law . . . .") See *Pellerin v. Washington Veneer Co.*, 163 Wash. 555, 563, 2 P.2d 658, 661 (1931) (employer breached duty to provide safe workplace when employee harmed by gas vapor poisoning; damages allowed because harm was not compensable under Worker's Compensation Act). See also *Hatcher v. Globe Union Mfg. Co.*, 170 Wash. 494, 497, 16 P.2d 824, 826 (1932) (negligence of an employer rendered it liable to an employee poisoned by lead dust; damages allowed because no remedy existed under the Workers' Compensation Act). *Accord*, *Cagle v. Burns and Roe, Inc.*, 106 Wash. 2d 911, 726 P.2d 434 (1986) (an employer had no immunity for a tortious act that was not covered by the Workers' Compensation Act).

93. In the early case of *Stertz v. Industrial Ins. Comm'n*, 91 Wash. 588, 158 P. 256 (1916), the court discussed the historical considerations and policy underpinnings of the *quid pro quo* compromise between employers and employees which formed the foundation for the Workers' Compensation Act of 1911:

Our act came of a great compromise between employers and employed. Both

mon law remedies without compensation for a particular type of harm would constitute an abrogation of the fundamental bargain.<sup>94</sup>

Therefore, from a policy standpoint the exclusive remedy provisions should operate to remove court jurisdiction from all phases of employer liability only to the extent that the type of harm sustained is compensable under the Workers' Compensation Act.<sup>95</sup> Because there probably is no set of facts under which the harm from tobacco smoke can constitute either a compensable injury or a compensable occupational disease, the policy underpinnings of the Act should dictate that the exclusive remedy provisions are inapplicable to this type of harm.

The statutory language supports this policy interpretation. The statutory phrase "sure and certain relief for workers, injured in their work . . . is hereby provided regardless of questions of fault"<sup>96</sup> is a clear explication of the benefits employees are to receive pursuant to the *quid pro quo* compromise upon which the Act is based. But the absence of any relief under the Act for workers harmed by workplace tobacco smoke is completely inconsistent with the statutory terms under which the worker has surrendered all common law remedies against the employer.

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had suffered under the old system, the employers by heavy judgments of which half was opposing lawyers' booty, the workmen through the old defenses or exhaustion in wasteful litigation. Both wanted peace. The master in exchange for limited liability was willing to pay on some claims in future where in the past there had been no liability at all. The servant was willing not only to give up trial by jury but to accept far less than he had often won in court, provided he was sure to get the small sum without having to fight for it. All agreed that the blood of the workman was a cost of production, that the industry should bear the charge.

*Id.* at 590-91, 158 P. at 258.

94. This critical relationship between compensation and exclusive remedy has been discussed by Professor Larson in his treatise:

If, as stated earlier, the exclusiveness defense is a part of the *quid pro quo* by which the sacrifices and gains of employees and employers are to some extent put in balance, it ought logically to follow that the employer should be spared damage liability only when compensation liability has actually been provided in its place, or, to state the matter from the employee's point of view, rights of action for damages should not be deemed taken away except when something of value has been put in their place.

2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 65.40 (1983).

95. *Prince v. Saginaw Logging Co.*, 197 Wash. 4, 12-13, 84 P.2d 397, 400 (1938) (In response to employer's assertion of immunity from suit when the harm was not covered by the Act, the court stated that "[t]he law does not contemplate such an anomaly").

96. WASH. REV. CODE § 51.04.010 (1985).

Also, the primary exclusive remedy provision<sup>97</sup> uses the word *injuries* or *injured* four times in setting forth the application of the exclusiveness provision. Since *injury* is specifically defined in the Act,<sup>98</sup> this exclusive remedy provision is limited by its own terms to the types of harm that constitute an *injury*. The other exclusive remedy provision<sup>99</sup> is likewise limited by its own terms to circumstances where a worker has been *injured* in the course of employment.

The case law echoes the statute by referring to the exclusive remedy concept as arising in the *injury* context,<sup>100</sup> thus reinforcing the proposition that common law remedies have not been abolished for *non-injury* harms. There is no doubt that the exclusive remedy language is absolute and all-encompassing—but *only* within its scope of application to compensable harms.

As the foregoing analysis indicates, the policy, statute, and case law are all consistent with the concept that employer immunity was never intended to be absolute simply because of a person's status as an employee. Rather, the immunity is qualified<sup>101</sup> and only applies to cases involving *compensable* harms, i.e., when the *quid pro quo* compromise can be effectuated for the type of harm sustained.

## 2. Workers' Compensation Coverage of Tobacco Smoke Harms

In determining the scope of an employer's qualified immunity, it is essential to consider whether tobacco smoke harms are compensable under the Act. If such harms are compensable, then employers are immune from common law suits by employees.

97. *Id.*

98. WASH. REV. CODE § 51.08.100 (1985).

99. WASH. REV. CODE § 51.32.010 (1985) ("Each worker injured in the course of his or her employment . . . shall receive compensation in accordance with this chapter, and, . . . such payment shall be in lieu of any and all rights of action whatsoever . . .").

100. *See, e.g.,* Provost v. Puget Sound Power and Light Co., 103 Wash. 2d 750, 752, 696 P.2d 1238, 1239 (1985) ("By its express terms, the Washington workers' compensation act, RCW Title 51, bars all independent causes of action against the employer for damages arising out of unintentional *injury* to an employee.") (emphasis added); Zenor v. Spokane & Inland Empire R.R., 109 Wash. 471, 474, 186 P. 849, 850 (1920) ("the common law right of action for damages accruing from an *injury* received by a workman in the course of his employment is abolished . . .") (emphasis added).

101. As further evidence that employers have only qualified immunity, *see* Reese v. Sears, Roebuck & Co., 107 Wash. 2d 563, 731 P.2d 497 (1987) (no immunity from suit for violating law against handicap discrimination).

In Washington there are two ways that an employee can qualify for a Workers' Compensation payment: (1) by sustaining an "injury" in the course of employment;<sup>102</sup> or (2) by suffering disability from an "occupational disease."<sup>103</sup> Interestingly, the exclusive remedy provisions<sup>104</sup> refer only to *injuries*. But the *McCarthy* court indicated that these provisions should be impliedly read to encompass "occupational diseases" within the ambit of their operation.<sup>105</sup>

Assuming that the exclusive remedy provisions of the Workers' Compensation Act apply to both employment-related "injuries" and to "occupational diseases," then the starting point for analyzing the scope of these provisions is to consider the definitions of "injury" and "occupational disease." For purposes of the Workers' Compensation Act, "injury" is defined as follows:

"Injury" means a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom.<sup>106</sup>

"Occupational disease" is defined as follows:

"Occupational disease" means such disease or infection as arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title.<sup>107</sup>

An "injury" requires "some identifiable happening, event, cause or occurrence capable of being fixed at some point in time and connected with the employment."<sup>108</sup> While an "injury" need not result from any "unusual exertion,"<sup>109</sup> "[t]he cumulative effect of long continued routine and customary duties upon a workman, regardless of the hours devoted

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102. WASH. REV. CODE §§ 51.32.010-.015 (1985).

103. WASH. REV. CODE § 51.32.180 (1985).

104. WASH. REV. CODE §§ 51.04.010, .32.010 (1985).

105. *McCarthy*, 46 Wash. App. at 128 n.2, 730 P.2d at 684 n.2. *Accord* WASH. REV. CODE § 51.16.040 (1985) ("The compensation and benefits provided for occupational diseases shall be paid and in the same manner as compensation and benefits for injuries under this title.").

106. WASH. REV. CODE § 51.08.100 (1985).

107. WASH. REV. CODE § 51.08.140 (1985).

108. *Spino v. Department of Labor and Indus.*, 1 Wash. App. 730, 733, 463 P.2d 256, 258 (1969).

109. *Longview Fibre Co. v. Weimer*, 95 Wash. 2d 583, 628 P.2d 456 (1981).

thereto, is not a sudden and tangible happening."<sup>110</sup> "A protracted series of incidents" likewise does not satisfy the requirement for a compensable injury.<sup>111</sup>

In contrast, an occupational disease "has a slow and insidious approach and in many cases does not manifest itself until after the lapse of a considerable length of time."<sup>112</sup> The "naturally and proximately" phrase in the occupational disease definition<sup>113</sup> has been construed to contain two separate elements which must be satisfied before a condition can constitute an occupational disease: the "proximately" element and the "naturally" element. The "proximately" element is satisfied if the disease-based disability was caused by the work or its attendant conditions.<sup>114</sup>

There are two formulations of the test for satisfying the "naturally" element. In Division I, the Court of Appeals has stated that to satisfy this element, there must be a "logical relationship" between the disability and the work or its attendant conditions.<sup>115</sup> The formulation in Division II is that the "naturally" element is satisfied if the conditions producing the disease are "peculiar to, or inherent in" the particular occupation.<sup>116</sup> However, under both formulations, the real inquiry focuses on whether the disability was more likely in the claimant's occupation than in other occupations or in nonemployment life.<sup>117</sup>

110. *Haerling v. Department of Labor and Indus.*, 49 Wash. 2d 403, 405, 301 P.2d 1078, 1080 (1956).

111. *Cooper v. Department of Labor and Indus.*, 49 Wash. 2d 826, 828, 307 P.2d 272, 274 (1957).

112. *Henson v. Department of Labor and Indus.*, 15 Wash. 2d 384, 391, 130 P.2d 885, 888 (1942).

113. WASH. REV. CODE § 51.08.140 (1985).

114. *Dennis v. Department of Labor and Indus.*, 44 Wash. App. 423, 435, 722 P.2d 1317, 1324 (1986).

115. *Id.* at 433, 722 P.2d at 1322-23.

116. *Department of Labor and Indus. v. Kinville*, 35 Wash. App. 80, 87, 664 P.2d 1311, 1315 (1983).

117. These two formulations of the test for satisfying the "naturally" element probably differ more in form than in substance. Division I in the *Dennis* case was clearly disturbed by the "peculiar to" language adopted in *Kinville*. *Dennis*, 44 Wash. App. at 431, 722 P.2d at 1322. While the "peculiar to" language sounds very restrictive, Division II in *McCarthy* explained that "[a] disease need not be unique to be peculiar to the employment, but the claimant must show that the job requirements exposed the claimant to a greater risk of contracting the disease than would other types of employment or nonemployment life." *McCarthy*, 46 Wash. App. at 130, 730 P.2d at 685. Similarly, the *Dennis* court found the "logical relationship" test satisfied by the fact that "a sheet metal worker is more likely to develop disabling osteoarthritis in his or her wrists than somebody in a different profession or in nonworking life." *Dennis*, 44

Based on the definitions of "injury" and "occupational disease," it is difficult to envision a factual scenario in which the harm from involuntary smoking would be compensable under the Act. The harm is not an injury because it is not a sudden happening, nor is it traumatic. Instead, it manifests itself only after a period of exposure. Tobacco smoke permeates the indoor environment over time, often with concentrations that increase as a function of time. The effects on a nonsmoker can be hidden, and detection of the harm may be insidiously delayed for a substantial period of time. The harm cannot be attributed to any fixed point in time. Furthermore, it has been held that the natural inhalation of air by a workman cannot by itself be an "injury."<sup>118</sup>

Similarly, the harm from exposure to tobacco smoke cannot constitute an "occupational disease." This is so because tobacco smoke is undoubtedly present in virtually every type of occupational workplace in our society. Involuntary smoking disabilities have no logical relationship to the type of workplace, are not peculiar to or inherent in any particular type of occupation, and are not more likely to occur in particular occupations. Involuntary smoking is also very pervasive in nonemployment life.

The Washington Board of Industrial Insurance Appeals in its *In re McCarthy* decision held that the harm from tobacco smoke in the workplace was not compensable under the Workers' Compensation Act as either an injury or an occupational disease.<sup>119</sup> This decision was not appealed.

In the subsequent *McCarthy* case, the Court of Appeals briefly referred to the issue of whether the harmful conse-

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Wash. App. at 437, 722 P.2d at 1325. Therefore, both Division I and Division II of the Court of Appeals appear to be using the same basic definition of the "naturally" element, i.e., development of the disabling condition must be more likely in the claimant's occupation than in other occupations or in nonemployment life.

118. *Flynn v. Department of Labor and Indus.*, 188 Wash. 346, 349, 62 P.2d 728, 729 (1936) (quick intake of breath caused a workman to swallow some tobacco, cough, and strangle; he died from the resulting strain on his heart. The court held that the inhalation of air "through natural passages and in a natural way cannot be a 'happening of a traumatic nature.'") (quoting statutory definition of injury).

119. Decision and Order, *In re McCarthy*, claim no. H-846420 (Wash. Bd. Indus. Ins. App. July 26, 1983) (Board determined that the claimant's disabling lung disease was proximately caused by exposure to tobacco smoke in her place of employment, but not a compensable injury because it was not sustained at a "definite time and place." Her harm was not a compensable occupational disease because the cigarette smoke in her workplace was not "in excess of that found in other types of employment or in many non-employment situations.").

quences of involuntary workplace smoking are covered by the Workers' Compensation Act. The court did not decide this issue, but left it for determination by the trial court on remand. However, the court strongly implied that this type of harm was not compensable under the Act.<sup>120</sup> The court's remand of the coverage issue was unnecessary since the employer should be collaterally estopped from relitigating the unappealed Board decision denying coverage under the Act.<sup>121</sup>

It is unlikely that any kind of harm caused by involuntary workplace smoking will be compensable under the Workers' Compensation Act. Therefore, employers appear to have no immunity from suit for such harms.

### C. *Employer Immunity From Actions to Enjoin Smoking in the Workplace*

In an action by an employee to enjoin smoking in a particular workplace, the employer may move to dismiss the action for failure to state a claim upon which relief can be granted.<sup>122</sup> Just as in an action at law for damages, the employer would be claiming immunity under the Workers' Compensation Act. However, regardless of whether employer immunity might exist in an action at law for damages, it seems unlikely that the courts would extend such immunity to equitable actions against an employer.

Apparently, no Washington court has directly addressed the effect of the Act's exclusive remedy provisions on equitable

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120. The court stated:

After reviewing the complaint ourselves, we believe that McCarthy might be able to produce competent medical evidence that her disease was not within the coverage of the act. Indeed, the rather detailed and specific factual averments in McCarthy's complaint appear to be consistent with her allegation that DSHS was negligent and that the disease she contracted because of such negligence was not peculiar to or inherent in her occupation at DSHS.

*McCarthy*, 46 Wash. App. at 132-33, 730 P.2d at 686.

121. In *Miller v. St. Regis Paper Co.*, 60 Wash. 2d 484, 374 P.2d 675 (1962), the court had in an earlier departmental opinion *sua sponte* dismissed an employee's negligence action against her employer on the ground that the trial court was without jurisdiction because the matter came within the coverage of the workmen's compensation statute. Subsequently, the en banc court reinstated the common law action because the Department of Labor and Industries had rejected the plaintiff's claim as not covered by the Workers' Compensation Act. The court reasoned that the unappealed claim rejection by the Department of Labor and Industries was res judicata against the employer's assertion of immunity in the subsequent common law action. *Id.* at 485, 374 P.2d at 676.

122. SUPER. CT. CIVIL R. 12(b)(6).

remedies. But the cases construing the Act's exclusive remedy provisions invariably refer only to abolition of the "common law right of action for damages"<sup>123</sup> or to the removal of jurisdiction over injuries "from the law courts."<sup>124</sup>

In *Shimp v. New Jersey Bell Telephone Co.*,<sup>125</sup> the court construed the New Jersey Workers' Compensation exclusive remedy provision, which eliminated a worker's "rights to any other method, form or amount of compensation."<sup>126</sup> The court held that this provision barred the common-law action in tort for damages resulting from work-related injuries but did not bar equitable remedies.<sup>127</sup>

Assuming *arguendo* that there is a factual scenario under which a nonsmoker's common law damage action is barred by the Washington's Worker's Compensation Act, equitable relief should still be available because the exclusive remedy provisions apply by their terms only to common law actions. There is no mention of equity or equitable actions in either provision.

The first four sentences of the primary exclusive remedy provision discuss the historical problems with the "*common law system* governing the remedy of workers against employers."<sup>128</sup> The reference only to the *common law system* logically should mean that the *equity system* is not included in the exclusive remedy provision.

The last sentence of the provision states that the Workers' Compensation Act remedy will be "to the exclusion of every other remedy, proceeding or compensation."<sup>129</sup> In ascertaining the intended meaning of the general terms *remedy* and *proceeding*, the *ejusdem generis* doctrine of statutory construction is appropriately used. Under this doctrine, specific terms restrict the meaning of general terms when both are used in a sequence.<sup>130</sup> Application of this rule to the sequence "remedy,

123. See, e.g., *Zenor v. Spokane & Inland Empire R.R.*, 109 Wash. 471, 474, 186 P. 849, 850 (1920).

124. See, e.g., *Ross v. Erickson Constr. Co.*, 89 Wash. 634, 640, 155 P. 153, 156 (1916).

125. 145 N.J. Super. 516, 368 A.2d 408 (1976).

126. *Id.* at 525, 368 A.2d at 412.

127. *Id.*

128. WASH. REV. CODE § 51.04.010 (1985) (emphasis added).

129. *Id.*

130. In *Condit v. Lewis Refrigeration Co.*, 101 Wash. 2d 106, 676 P.2d 466 (1984), the court set forth the following rule:

The *ejusdem generis* rule requires that general terms appearing in a statute in connection with specific terms are to be given meaning and effect only to the extent that the general terms suggest items similar to those designated by the

proceeding or compensation" limits the interpretation of *remedy* and *proceeding* to compensation type of remedies or proceedings, i.e., actions at common law.<sup>131</sup>

The other exclusive remedy provision states that the worker will receive "compensation" and that "such *payment* shall be in lieu of any and all rights of action whatsoever."<sup>132</sup> Once again, no reference is made to excluding equitable remedies. The receipt of *compensation* and *payment* in lieu of other rights of action seems to contemplate only a relinquishment of common law damage remedies in return for equivalent money damages under the Act — the quid pro quo inherent in the scheme of workers' compensation.

Furthermore, the preamble to the original Workers' Compensation Act states in relevant part: "An Act relating to the *compensation* of injured workmen . . . abolishing the doctrine of negligence as a ground for recovery of *damages* against employers."<sup>133</sup> This language is a clear indication that the 1911 Legislature, which drafted the exclusive remedy provision still in effect today, intended to supplant only the legal system of recovering damages. Again, no mention is made of the equitable system of remedies, so they must remain intact and are not barred.

This interpretation is fully consistent with the quid pro quo bargain policy at the heart of the Act: Workers gave up potentially larger but uncertain common law damage remedies in return for smaller but *certain* statutory damage remedies. The relinquishment of equitable remedies would have no logical relationship to the fundamental quid pro quo bargain.

Even if the Legislature attempted to confer absolute immunity from suit on employers, it probably is without constitutional authority to abolish the jurisdiction of courts to exercise their "inherent equitable powers" to grant injunctions.<sup>134</sup> Furthermore, it seems unlikely that any limitation on

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specific terms. In short, specific terms modify or restrict the application of general terms where both are used in sequence.

*Id.* at 111, 676 P.2d at 469.

131. This interpretation is buttressed by the rule that statutes in derogation of the common law must be strictly construed. *Bunce Rental, Inc. v. Clark Equipment Co.*, 42 Wash. App. 644, 713 P.2d 128 (1986). Thus, a more narrow interpretation of *remedy* and *proceeding* is also appropriate because the statute is supplanting the common law rights of action.

132. WASH. REV. CODE § 51.32.010 (1985) (emphasis added).

133. 1911 Wash. Laws ch. 74 (emphasis added).

134. In *O'Brien v. Johnson*, 32 Wash. 2d 404, 202 P.2d 248 (1949), the court held

the discretionary exercise of those powers would be recognized by the courts in the absence of an explicit and unambiguous statutory provision limiting equitable remedies.

Statutory construction, policy, and case law all support the proposition that the exclusive remedy provisions apply only to tort actions at law for damages. Therefore, the Workers' Compensation Act should not bar actions in equity to enjoin smoking the workplace.

#### IV. LAWS PROTECTING HANDICAPPED PERSONS

Federal and state statutes require that certain employers accommodate "handicapped persons." If a sensitive nonsmoking employee can qualify as a "handicapped person," he or she may be able to invoke the statute to obtain a smoke-free workplace.

##### A. *Federal Rehabilitation Act of 1973*

One of the most promising legal theories for protecting nonsmoking workers is based upon the Federal Rehabilitation Act of 1973.<sup>135</sup> Under that law, a "qualified handicapped individual" is entitled to "reasonable accommodation" for his or her handicap.<sup>136</sup> Smoke-sensitive individuals have had some success in obtaining "handicapped" status under the Act.<sup>137</sup> However, the statutory scheme only protects students and employees of federal grant recipients, employees of federal contractors, and employees of the federal government. When the statute does apply, a prohibition on smoking in the individual's work or study area is arguably the appropriate "reasonable accommodation" mandated by the Act.

The statutory definition of "handicapped individual" is "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."<sup>138</sup> A more detailed definition of "handicapped individual" has been established in

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that notwithstanding a statute removing court jurisdiction to grant injunctions restraining tax collections, the courts retain all their inherent equitable powers. See also *Hsu Ying Li v. Tang*, 87 Wash. 2d 796, 557 P.2d 342 (1976) (court is at liberty to set the boundaries on the exercise of its inherent equitable powers).

135. 29 U.S.C. §§ 701-794a (1982).

136. See *infra* notes 146-80 and accompanying text.

137. *Id.*

138. 29 U.S.C. § 706 (7)(B) (1982).

regulations promulgated by various federal agencies.<sup>139</sup> For example, regulations promulgated by the Department of Health and Human Services (HHS)<sup>140</sup> state that a qualifying "physical or mental impairment" includes "any physiological disorder or condition . . . affecting one or more of the following body systems: neurological; . . . special sense organs; respiratory, including speech organs; cardiovascular; . . . digestive."<sup>141</sup> The HHS regulations also provide that "major life activities" include "walking, seeing, hearing, speaking, breathing, learning, and working."<sup>142</sup>

The Rehabilitation Act's scope of coverage is set forth in three main provisions: (1) Section 501<sup>143</sup> makes the Act applicable to each department, agency, and instrumentality in the Executive Branch of the United States Government; (2) Section 503<sup>144</sup> makes the Act applicable to government contractors where the contract value exceeds \$2,500; and (3) Section 504<sup>145</sup> makes the Act applicable to federal grant recipients and to activities of the federal government itself.

### 1. Section 501

Under Section 501, a federal agency must "make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program."<sup>146</sup> The United States Office of Personnel Management does recognize that a smoke-sensitive federal employee with a disability such as asthma, emphysema, or severe bronchitis can qualify as a handicapped individual entitled under Section 501 to "reasonable accommodation."<sup>147</sup>

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139. See, e.g., 45 C.F.R. § 84.3(j) (1986) (Dep't of Health and Human Services); 29 C.F.R. § 1613.702 (1986) (Equal Employment Opportunity Comm'n); 41 C.F.R. § 60-741.2 (1986) (Dep't of Labor, Office of Fed. Contract Compliance Programs); 32 C.F.R. § 56.3(c) (1986) (Dep't of Defense)

140. 45 C.F.R. §§ 84.1-.61 (1986).

141. *Id.* § 84.3(j)(2)(i).

142. *Id.* § 84.3(j)(2)(ii).

143. 29 U.S.C. § 791(b) (1982). See also 29 C.F.R. §§ 1613.701-709 (1986) (governing the practices of federal agencies in dealing with handicapped employees).

144. 29 U.S.C. § 793 (1982). See also 41 C.F.R. §§ 60-741.1 to .54 (1986).

145. 29 U.S.C. § 794 (1982).

146. 29 C.F.R. § 1613.704 (1986).

147. Letter from Robert L. Martinez, Assistant Director for Affirmative Employment Programs, U.S. Office of Personnel Management to Raymond L. Paoletta (March 18, 1986) ("If a person has a disability such as: asthma, emphysema, or severe

The Section 501 regulations provide for the filing of an administrative complaint by aggrieved federal employees to obtain relief based upon asserted status as a handicapped individual.<sup>148</sup> These administrative remedies must be exhausted prior to filing a court action against the government.<sup>149</sup> Final administrative decisions are then subject to judicial review in a *de novo* action brought under Section 501.<sup>150</sup>

In *Pletten v. Department of the Army*,<sup>151</sup> the U.S. Equal Employment Opportunity Commission (EEOC) determined that a smoke-sensitive employee with chronic asthma was a "handicapped individual" entitled to "reasonable accommodation" pursuant to the Rehabilitation Act. In reviewing a prior decision in the same case by the Merit Systems Protection Board (MSPB),<sup>152</sup> the EEOC construed its regulations<sup>153</sup> as mandating accommodations for a smoke-sensitive handicapped employee unless the agency could prove that such accommodating actions would be an undue hardship on the agency.<sup>154</sup> The case was then referred back to the MSPB because the Army had not carried its substantial burden of proving undue hardship.

Upon reconsideration, the MSPB reaffirmed that the employee was a handicapped person but decided that the only effective accommodation of this handicap would be a complete ban on smoking throughout the agency's 5,000 employee facility.<sup>155</sup> This was so because the smoke-sensitive employee was required as part of his job to regularly move around the entire facility. The Board concluded that such a total ban on smoking was not a reasonable accommodation because it would be diffi-

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bronchitis, and the disability is agitated by tobacco smoke where by the individual cannot perform the duties of the position, the individual may be considered by the agency for reasonable accommodation."'). [Letter on file at University of Puget Sound Law Review office.]

148. 29 C.F.R. §§ 1613.708-709 (1986). These regulations require each agency of the federal government to process complaints of discrimination based on handicap in accordance with detailed procedures set forth in *id.* §§ 1613.213-283 and in *id.* §§ 1613.601-643.

149. *McGuinness v. United States Postal Serv.*, 744 F.2d 1318 (7th Cir. 1984). A private right of action against the United States Government under § 501 is expressly provided for by 29 U.S.C. § 794a(a)(1) (1982).

150. *Prewitt v. United States Postal Serv.*, 662 F.2d 292 (5th Cir. 1981).

151. No. 03810087 (Equal Employment Opportunity Comm'n April 8, 1983).

152. *Pletten v. Department of the Army*, 6 M.S.P.B. 626 (1981).

153. 29 C.F.R. §§ 1613.701-709 (1986).

154. *Pletten*, EEOC No. 03810087 at 5.

155. *Pletten v. Department of Army*, 23 M.S.P.R. 682 (1984).

cult to enforce, might violate the collective bargaining agreement, and would impose an undue hardship on the agency's operation.<sup>156</sup>

## 2. Section 503

Under Section 503, government contractors and subcontractors "must make a reasonable accommodation to the physical and mental limitations of an employee or applicant unless the contractor can demonstrate that such an accommodation would impose an undue hardship on the conduct of the contractor's business."<sup>157</sup> Thus, a contractor would be required to reasonably accommodate a handicapped employee or applicant who is unable to work in a smoke-filled environment.

Unfortunately, however, handicapped persons have no private right of action to enforce Section 503.<sup>158</sup> They are instead relegated to filing an administrative complaint against the contractor with the Department of Labor.<sup>159</sup>

## 3. Section 504

Section 504 of the Rehabilitation Act<sup>160</sup> is probably the most significant section of the Act for nonsmokers because it applies to any recipient of federal funds regardless of the dollar amount received. Even indirect federal funding triggers the application of Section 504.<sup>161</sup> Among others, this section applies to schools, universities, medical institutions, and most entities of state and local government. In addition, this section provides an overlapping basis with Section 501 for a private right of action against the federal government by individuals

156. *Id.*

157. 41 C.F.R. § 60-741.6(d) (1986).

158. *Fisher v. City of Tucson*, 663 F.2d 861 (9th Cir. 1981), *cert. denied*, 459 U.S. 881 (1982).

159. 29 U.S.C. § 793(b) (1982). *See also* 41 C.F.R. § 60-741.28 (1986).

160. Section 504 provides in pertinent part:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, 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 program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794 (1982).

161. *Jacobson v. Delta Airlines, Inc.*, 742 F.2d 1202 (9th Cir. 1984). However, § 504 applies only to the specific "program or activity" receiving funds. *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 636 (1984).

claiming "handicapped" status.<sup>162</sup>

Like Sections 501 and 503, Section 504 imposes a duty of reasonable accommodation on those entities to which it applies.<sup>163</sup> A typical set of regulations implementing Section 504 is that promulgated by the Department of Health and Human Services (HHS).<sup>164</sup> The HHS regulations require a federal fund recipient to "make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program."<sup>165</sup> A "qualified handicapped person" is defined, in the employment context, as "a handicapped person who, with reasonable accommodation, can perform the essential functions of the job."<sup>166</sup>

Two cases have considered whether a nonsmoker can qualify as a handicapped person under Section 504. In *Vickers v. Veterans Administration*,<sup>167</sup> the court held that a smoke-sensitive employee of the Veterans Administration (VA) was a "handicapped person" within the contemplation of Section 504.<sup>168</sup> The court found that plaintiff was "unusually sensitive to tobacco smoke" and that this hypersensitivity did in fact limit a major life activity— plaintiff's capacity to work in an environment not completely smoke free.<sup>169</sup>

However, the court stated that it was unable to find that plaintiff had been solely by reason of his handicap, excluded from participation in or denied the benefits of any program or activity conducted by the VA. The court also considered whether plaintiff had been discriminated against because of the failure of the VA to make reasonable accommodation to his physical handicap.

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162. See *Vickers v. Veterans Admin.*, 549 F. Supp. 85, 86-87 (W.D. Wash. 1982) (court relied on § 504 rather than § 501 in action against federal agency).

163. Conceptually, § 504 differs from § 503 in that § 504 confers a right on handicapped persons not to be subjected to discrimination, whereas § 503 by its terms merely requires affirmative action covenants to be placed in government contracts. *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074 (5th Cir. 1980), cert. denied, 449 U.S. 886 (1980). However, implementing regulations promulgated by the Department of Labor have imposed the same basic reasonable accommodation duty on federal contractors as is imposed under § 504 on federal grant recipients. 41 C.F.R. § 60-741.6(d) (1986).

164. 45 C.F.R. §§ 84.1-.61 (1986).

165. *Id.* § 84.12(a).

166. *Id.* § 84.3(k).

167. 549 F. Supp. 85 (W.D. Wash. 1982).

168. *Id.* at 86.

169. *Id.* at 87.

In an effort to accommodate plaintiff's handicap, the VA had obtained a voluntary agreement from all of the employees in plaintiff's work area and in an adjacent work area not to smoke in either area. Smoking employees were given permission by the supervisor to smoke in an office which was physically separate from the common work area. The court found that this action alone had "significantly reduced the presence of tobacco smoke in plaintiff's work space."<sup>170</sup> Furthermore, plaintiff's supervisor had two ceiling vents installed to withdraw from the room any drifting tobacco smoke from other areas. Finally, the supervisor offered to construct a floor to ceiling enclosure around plaintiff's desk which would have a door.<sup>171</sup>

The court concluded that the VA had made a reasonable effort to accommodate plaintiff's handicap while at the same time accommodating the desires of smokers. It denied the plaintiff damages and injunctive relief.

In *Gasp v. Mecklenberg County*,<sup>172</sup> an unincorporated association brought an action against the county on behalf of a class of all persons harmed by tobacco smoke present in public facilities. The organization sought handicapped status for the entire class under both the Federal Rehabilitation Act of 1973 and a North Carolina statute that protected handicapped persons.<sup>173</sup>

In denying handicapped status to the class, the court stated that the North Carolina Legislature clearly did not intend to grant handicapped status to a broad class of persons with "any pulmonary problem however minor."<sup>174</sup> But the court also specifically reserved judgment on whether a narrower class of smoke-sensitive persons could claim handicapped status. The Rehabilitation Act claim was rejected for the same reasons. The precedential value of this case is probably limited to its particular factual context; a narrower and more specific class of persons may have been successful in obtaining handicapped status.

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170. *Id.* at 88.

171. *Id.*

172. 42 N.C. App. 225, 256 S.E.2d 477 (1979).

173. N.C. GEN. STAT. §§ 168-1 to -23 (1982).

174. *Gasp*, 256 S.E.2d at 479.

#### 4. General Considerations

The regulations implementing the Rehabilitation Act seem to provide ample grounds for classifying a smoke-sensitive worker as a "qualified handicapped person." For example, an individual with asthma who has distressing allergic reactions to tobacco smoke has a respiratory condition that substantially limits that person's ability to breathe and work in a smoke-filled environment. If this individual can perform the job functions in a smoke-free work environment, then he or she would meet the definition of a "qualified handicapped person."

Once handicapped status is established, the employer has an affirmative duty to accommodate the smoke-sensitive employee.<sup>175</sup> But the *Pletten* and *Vickers* cases demonstrate that obtaining effective smoking restrictions under the Rehabilitation Act will often be more difficult than clearing the initial hurdle of achieving "handicapped" status.

Determining what constitutes a reasonable accommodation<sup>176</sup> necessarily involves a case-by-case evaluation. Only accommodations which result in "undue hardship" to the employer are outside the scope of the reasonable accommodation duty.<sup>177</sup> This means that an employer must provide a smoke-sensitive handicapped employee with an environment in which he or she can work, except when it will create an "undue hardship."

Regulations provide several factors to be considered in determining whether a suggested accommodation would impose an undue hardship.<sup>178</sup> These factors suggest a cost-benefit balancing approach to determining the limits of reasonable accommodation. Significantly, the employer has the burden of proving that a suggested accommodation would cause undue

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175. 45 C.F.R. § 84.12(a) (1986); 29 C.F.R. § 1613.704 (1986); 41 C.F.R. § 60-741.6(d) (1986). See also U.S. OFFICE OF PERSONNEL MANAGEMENT, HANDBOOK OF REASONABLE ACCOMMODATION (1980).

176. Reasonable accommodation may include "[m]aking facilities . . . usable by handicapped persons, . . . job restructuring" and "acquisition or modification of equipment or devices." 45 C.F.R. § 84.12(b) (1986).

177. 45 C.F.R. § 84.12(a) (1986); 29 C.F.R. § 1613.704 (1986); 41 C.F.R. § 60-741.6(d) (1986).

178. The undue hardship factors include: "(1) [t]he overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget; (2) [t]he type of the recipient's operation, including the composition and structure of the recipient's workforce; and (3) [t]he nature and cost of the accommodation needed." 45 C.F.R. § 84.12(c) (1986).

hardship.<sup>179</sup>

For many employers, an objective cost-benefit analysis will likely show that substantial restrictions on workplace smoking are not an undue hardship, but rather a benefit to both the employer and employees.<sup>180</sup> Thus, employer prohibitions on workplace smoking appear to be well within the limits placed on reasonable accommodation by the concept of "undue hardship."

The smoke-sensitive employee's right to reasonable accommodation in the workplace can be vindicated by a court action under either Section 501 or Section 504 of the Rehabilitation Act. The employee can seek injunctive relief under the Act, but there is an unresolved split of authority as to whether money damages may be recovered.<sup>181</sup> Significantly, the award of attorney's fees is authorized by the Act.<sup>182</sup> Also, grant recipients must comply with the Act as a condition for future receipt of federal funds.<sup>183</sup> These available remedies coupled with the substantive rights established by the Rehabilitation Act of 1973 make that Act a potentially powerful source of legal rights for nonsmokers who can qualify as "handicapped individuals."

### *B. Washington Law Against Handicap Discrimination*

All employers in the State of Washington are required by the Law Against Discrimination<sup>184</sup> to reasonably accommodate handicapped employees.<sup>185</sup> Because of the close similarities between this Washington statute and the federal Rehabilita-

179. *Treadwell v. Alexander*, 707 F.2d 473 (11th Cir. 1983). Although *Treadwell* discussed the burden of persuasion only with respect to demonstrating undue hardship under the § 501 regulations, the same burden allocation should apply to actions brought under § 504 because the respective regulations implementing § 501 and § 504 contain virtually identical language in setting forth the undue hardship requirement. Compare 29 C.F.R. § 1613.704(a) (1986) with 45 C.F.R. § 84.12(a) (1986).

180. The imposition of smoking restrictions should normally result in reduced employer operating costs while creating a more healthy and productive workplace. See *supra* note 38.

181. *Nelson v. Thornburgh*, 567 F. Supp. 369 (E.D. Pa. 1983). See, e.g., *Kling v. County of Los Angeles*, 769 F.2d 532 (9th Cir. 1985) (money damages are recoverable); *Martin v. Cardinal Glennon Memorial Hospital for Children*, 599 F. Supp. 284 (E.D. Mo. 1984) (damages for mental distress not allowed); *Ruth Anne M. v. Alvin Indep. School Dist.*, 532 F. Supp. 460 (S.D. Tex. 1982) (money damages not recoverable).

182. 29 U.S.C. § 794a(b) (1982).

183. See, e.g., 45 C.F.R. § 84.5(a) (1986).

184. WASH. REV. CODE § 49.60.180 (1985).

185. *Dean v. Municipality of Metropolitan Seattle*, 104 Wash. 2d 627, 708 P.2d 393 (1985).

tion Act of 1973, interpretations of the federal act are considered instructive with regard to interpreting the Washington statute.<sup>186</sup>

Thus, a large part of the previous discussion on the federal Rehabilitation Act of 1973<sup>187</sup> is relevant to protecting "handicapped" nonsmokers in Washington who are unable to claim protection under the federal act. Unlike the Rehabilitation Act, the Washington Law Against Discrimination<sup>188</sup> clearly provides for a full panoply of remedies: injunctive relief; attorney's fees; special damages; and general damages for physical, emotional, and mental suffering.<sup>189</sup>

The Washington definition of "handicapped person," as set forth in regulation, is a person with a "sensory, mental, or physical condition" which is abnormal.<sup>190</sup> Under this definition, a nonsmoker who is unusually sensitive or allergic to tobacco smoke would seem to qualify as a handicapped person. Some of the other definitional language is quite similar to that found in the federal statute and implementing regulations.<sup>191</sup> Also, a statutory section expressly provides that the Washington statute should be liberally construed.<sup>192</sup>

Therefore, a nonsmoking employee in Washington may be able to obtain some relief under state law based upon his or her status as a handicapped person.

## V. OTHER TORT THEORIES

Although notable success has not yet been achieved, several other tort theories may be available to some nonsmokers in the future.<sup>193</sup> The torts of outrage, battery, and nuisance

186. *Id.*

187. See *supra* notes 135-83 and accompanying text.

188. WASH. REV. CODE § 49.60.030(2) (1985).

189. *Glasgow v. Georgia-Pacific Corp.*, 103 Wash. 2d 401, 693 P.2d 708 (1985).

190. WASH. ADMIN. CODE R. 162-22-040 (1986).

191. Compare WASH. ADMIN. CODE R. § 162-22-040(1)(b) (1986) with 29 U.S.C. § 706(7)(B) (1982) (both provisions contain three alternative tests for determining handicapped status which are very similar, although the Washington definition may be broader because it is not restricted to impairments which substantially limit major life activities).

192. WASH. REV. CODE § 49.60.020 (1985).

193. Washington has adopted sections 519 and 520 of the RESTATEMENT (SECOND) OF TORTS dealing with strict liability. *Langan v. Valicopters, Inc.*, 88 Wash. 2d 855, 567 P.2d 218 (1977). Section 519 of the RESTATEMENT provides that one who carries on an abnormally dangerous activity is subject to liability for harm to another person regardless of the amount of care exercised to prevent such harm. RESTATEMENT (SECOND) OF TORTS § 519 (1977). However, the current state of the law makes it

could become viable theories if existing tort doctrine is extended in response to the growing awareness of the harm from involuntary smoking.

Section 46 of the Restatement (Second) of Torts<sup>194</sup> provides that "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."<sup>195</sup> But under the existing state of law, a smoker's or employer's conduct will rarely reach the high magnitude of outrage necessary to recover under this theory.<sup>196</sup>

A cause of action in battery could theoretically lie for the harmful or offensive contact resulting from involuntary exposure to tobacco smoke. An act constitutes tortious battery if done with the knowledge that a harmful or offensive contact<sup>197</sup> is substantially certain to be produced.<sup>198</sup> But the courts have not yet recognized tobacco smoke exposure as constituting such a harmful or offensive contact.<sup>199</sup>

improbable that a court would confer "abnormally dangerous" status on an employer who permitted its employees to smoke in the workplace.

194. RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

195. This provision has been adopted in Washington. *Grimsby v. Samson*, 85 Wash. 2d 52, 530 P.2d 291 (1975).

196. Comment d to § 46 states that liability exists "only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." RESTATEMENT (SECOND) OF TORTS § 46(1) comment d (1965). Cf. *Hentzel v. Singer Co.*, 183 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982) (California Court of Appeal held that a former employee who was allegedly terminated in retaliation for his complaining about workplace smoking could bring such an action against his former employer).

197. Because tobacco smoke contains particulate matter which can physically harm a human being, exposure to smoke could be viewed as representing a harmful or offensive contact. In *Bradley v. American Smelting and Refining Co.*, 104 Wash. 2d 677, 695, 709 P.2d 782, 792 (1985), the Washington Supreme Court held that an "intentional deposit of microscopic particulates, undetectable by the human senses, gives rise to a cause of action for trespass as well as a claim of nuisance." By analogy, this holding has implications for the intentional tort of battery. Since the court has recognized that one type of intentional tort can be based upon the harm caused by microscopic particulates, then there should be no conceptual impediment to microscopic tobacco smoke particulates satisfying the harmful or offensive contact element of battery.

198. *Garratt v. Dailey*, 46 Wash. 2d 197, 279 P.2d 1091 (1955).

199. Failure to offer evidence of a physical injury or illness was the basis for dismissal of a tobacco smoke battery action in *McCracken v. Sloan*, 40 N.C. App. 214, 252 S.E.2d 250 (1979). The *McCracken* court also stated that "[c]onsent is assumed to all those ordinary contacts which are customary and reasonably necessary to the common intercourse of life" and that tobacco smoke fell within this area of assumed consent. *Id.* at 216, 252 S.E.2d at 252. The *McCracken* court's poorly reasoned

In Washington, a nuisance is defined as "whatever is injurious to health or indecent or offensive to the senses" and may be "the subject of an action for damages and other and further relief."<sup>200</sup> Involuntary smoking clearly can be injurious to health and offensive to the senses. But whether the courts would extend nuisance doctrine to cover tobacco smoke is simply unknown. Rigid adherence to traditional private nuisance doctrine<sup>201</sup> would limit its application to cases where one's right to enjoyment of property has been infringed.<sup>202</sup>

Finally, the Washington State Environmental Policy Act (SEPA) provides that "each person has a fundamental and inalienable right to a healthful environment."<sup>203</sup> The SEPA term "environment" has been defined very broadly<sup>204</sup> and appears to include indoor airspaces occupied by nonsmokers. Several commentators have suggested that SEPA may have created a new tort cause of action to vindicate the statutorily conferred fundamental right to a healthful environment.<sup>205</sup> Although this interpretation has not yet been adopted by the courts,<sup>206</sup> it may present an opportunity for the future development of tort law doctrine pertaining to unhealthy indoor environments.<sup>207</sup>

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determination that tobacco smoke is reasonably necessary to life should be rejected in Washington since significant legal restrictions on smoking have been adopted by both state and local legislative bodies. Such restrictions on smoking surely reflect a legislative judgment that involuntary smoking is not reasonably necessary to life.

200. WASH. REV. CODE § 7.48.010 (1985).

201. Nuisance requires a substantial and unreasonable interference with the use and enjoyment of property. *Bradley v. American Smelting and Refining Co.*, 104 Wash. 2d 677, 709 P.2d 782 (1985).

202. *But see* *Stockler v. City of Pontiac*, No. 75-131479 (Cir. Ct. Oakland County, Mich. filed Dec. 17, 1975), where the court found that smoking in a stadium constituted a public nuisance. The court issued a writ of mandamus ordering the city to abate the nuisance by prohibiting smoking and the sale of cigarettes within the facility. Comment, *The Legal Conflict Between Smokers and Nonsmokers: The Majestic Vice Versus The Right to Clean Air*, 45 MO. L. REV. 444, 469 (1980).

203. WASH. REV. CODE § 43.21C.020(3) (1985).

204. WASH. ADMIN. CODE R. 197-11-444 (1986).

205. *Rodgers, The Washington Environmental Policy Act*, 60 WASH. L. REV. 33, 64-65 (1984); *Roe & Lean, The State Environmental Policy Act of 1971 and its 1973 Amendments*, 49 WASH. L. REV. 509, 528 n.90 (1974); Note, *Miotke v. City of Spokane: Nuisance or Inverse Condemnation — Theories for Government Environmental Liability*, 9 U. PUGET SOUND L. REV. 539, 557-560 (1986).

206. In *Miotke v. City of Spokane*, 101 Wash. 2d 307, 333, 678 P.2d 803, 817 (1984), the Washington Supreme Court declined to recognize a SEPA-based tort but implied that it might recognize such a cause of action under appropriate circumstances.

207. Based upon the premise that a smoke-filled room is an unhealthy environment, SEPA could theoretically be used by the courts as the basis for an expanded application of traditional common law doctrine to protect nonsmokers. Such

At present, the foregoing tort theories are unlikely to provide nonsmokers with a useful remedy. But they may be helpful in the future if courts decide to expand the current scope of tort doctrine to protect nonsmokers.

## VI. OTHER FEDERAL LAW

### A. *Federal Employee Disability Retirement*

A smoke-sensitive employee of the federal government may be entitled to a disability retirement annuity if the government refuses to provide a work environment in which the employee can function. In *Parodi v. Merit Systems Protection Board*,<sup>208</sup> a smoke-sensitive employee had asthmatic bronchitis with hyper-irritable airways. After working for the government for twelve years, she was transferred to a new work area where many people smoked. She was unable to function in the smoke-filled workplace and so her doctor advised her to take a leave of absence.<sup>209</sup>

She then applied for disability retirement benefits. This application was rejected even though the Merit Systems Protection Board (MSPB) recognized that Parodi "might reasonably be concerned with the probable risk to her future health from working in an environment where exposure to cigarette smoke presents a hazard to all employees, and particularly to herself because of her peculiar physical sensitivity."<sup>210</sup>

The statute then in effect provided that an employee was entitled to a disability retirement annuity<sup>211</sup> if unable to perform "useful and efficient service in the grade or class of position last occupied by the employee . . . because of disease or injury."<sup>212</sup> The court held that a person with an "environmental limitation" can qualify for a disability retirement.<sup>213</sup> The court then ordered the government to grant Ms. Parodi disability retirement benefits unless it offered her a safe work envi-

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an expansive interpretation could find support from statutory pronouncements that SEPA policies overlay all Washington laws as well as the activities of all branches of government. WASH. REV. CODE §§ 43.21C.030(1), .060 (1985). See R. SETTLE, THE WASHINGTON STATE ENVIRONMENTAL POLICY ACT, A LEGAL AND POLICY ANALYSIS § 1 at 4 (1987) ("SEPA's statutory language is unusually broad, 'almost constitutional.'").

208. 690 F.2d 731 (9th Cir. 1982).

209. *Id.* at 733.

210. *Id.*

211. 5 U.S.C. § 8337(a) (Supp. III 1979).

212. 5 U.S.C. § 8331(6) (1976).

213. *Parodi*, 690 F.2d at 738.

ronment within 60 days.<sup>214</sup> The government eventually settled with Ms. Parodi by paying her \$50,000 and granting her a civil service disability annuity.<sup>215</sup>

The *Parodi* case is important for several reasons. First, a federal appeals court has clearly recognized that tobacco smoke in the workplace can prevent an otherwise normal and productive employee from performing his or her job. Second, such an employee in effect becomes disabled and may be entitled to disability benefits.

Finally, the refusal of an employer to restrict smoking in the workplace can be very costly to the employer if an employee is eventually granted a disability pension award because of the tobacco smoke.

### *B. Regulations Restricting Smoking in Federal Buildings*

The General Services Administration (GSA) has promulgated regulations to control smoking in U.S. Government buildings and facilities.<sup>216</sup> An amended version of these regulations became effective on February 6, 1987.<sup>217</sup> The regulations prohibit all smoking in auditoriums, classrooms, conference rooms, elevators, medical care facilities, libraries, and hazardous areas.<sup>218</sup> Smoking is also prohibited in corridors, lobbies, restrooms, and stairways, except that agencies may designate these areas as smoking areas "when it is not possible to designate a sufficient number of other smoking areas."<sup>219</sup>

In a major shift in policy, the recently revised regulations prohibit smoking in most general office space.<sup>220</sup> Office space may be designated as a smoking area only if it is "configured so as to limit the involuntary exposure of non-smokers to second-hand smoke to a minimum; e.g., the office space involved must be large enough and sufficiently ventilated to provide separate smoking and non-smoking sections which protect the non-

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214. *Id.* at 740.

215. Settlement Agreement, *Parodi v. Merit Systems Protection Bd.*, 690 F.2d 731 (9th Cir. 1982).

216. 41 C.F.R. § 101-20.109-10 (1986).

217. 51 Fed. Reg. 44,258 (1986) (to be codified at 41 C.F.R. § 101-20.109-10).

218. *Id.* (to be codified at 41 C.F.R. § 101-20.109-10(b)).

219. *Id.* (to be codified at 41 C.F.R. § 101-20.109-10(b)(4), .109-10(c)(2)(iv)).

220. *Id.* (to be codified at 41 C.F.R. § 101-20.109-10(b)(1)). These workplace smoking restrictions are unprecedented in terms of the number of persons affected. The restrictions apply to 7,500 federal buildings and almost the entire civilian Government workforce of 2.3 million people. *N.Y. Times*, Dec. 6, 1986, at 1, col. 1.

smokers against involuntary exposure to smoke."<sup>221</sup>

GSA's stated intent in issuing the revised regulations "is to provide a reasonably smoke-free environment for those working and visiting GSA-controlled buildings."<sup>222</sup> In a significant policy statement, the regulations provide that "[i]n recognition of the increased health hazards of passive smoke on the non-smoker, smoking is to be held to an absolute minimum in areas where there are non-smokers."<sup>223</sup>

The new GSA regulations are similar to a smoking policy that has been effective for several years at the Department of Health and Human Services (HHS). HHS directives guarantee nonsmokers "working environments which are reasonably free of contaminants by smoke."<sup>224</sup> These directives have been invoked to prohibit smoking on the entire fifth floor work area of a large federal office building.<sup>225</sup>

Existing government regulations represent a major step in the direction of a smoke-free federal workplace. In the near future, there is a distinct possibility that Congress may require even greater restrictions on smoking in federal facilities.<sup>226</sup> Thus, the immediate future looks promising for nonsmoking federal employees.

## VII. OTHER WASHINGTON LAW

### A. *Washington Clean Indoor Air Act*

The Washington Clean Indoor Air Act<sup>227</sup> became effective on July 28, 1985. This Act represents an important first step toward full statutory protection of nonsmokers in Washington.

Fundamentally, the Act reverses the long-established social presumption about public smoking. The new statutory presumption established by the Act is that smoking in "public places" is generally *prohibited*.<sup>228</sup> Since the Act's effective

221. *Id.* (to be codified at 41 C.F.R. § 101-20.109-10(b)(1), .109-10(c)(2)(iii)).

222. 51 Fed. Reg. 18,805 (1986).

223. 51 Fed. Reg. 44,258 (1986) (to be codified at 41 C.F.R. § 101-20.109-10(a)(1)).

224. *Goodman v. Social Sec. Admin.*, FMCS No. 81K-26042, at 3 (Jan. 22, 1982) (Berkeley, Arb.).

225. *Id.* at 24.

226. Bills were recently introduced in both houses of Congress that would drastically curtail workplace smoking in federal facilities. S. 1937, 99th Cong., 1st Sess. (1985); H.R. 4546, 99th Cong., 2d Sess. (1986). S. 1937 was reported out of the Senate Governmental Affairs Committee on December 12, 1985.

227. WASH. REV. CODE §§ 70.160.010-.900 (1985).

228. WASH. REV. CODE § 70.160.030 (1985).

date, smoking is permitted *only* in designated smoking areas.<sup>229</sup> A \$100 civil fine may be imposed for violating the Act.<sup>230</sup>

"Public Place" is given a broad non-exclusive definition in the Act.<sup>231</sup> The Act probably reaches every indoor location in the State of Washington except for private residences, private enclosed workplaces, federal government facilities, and private facilities to the extent that they are closed to the public. Some public places must be totally smoke-free such as elevators, retail stores, financial institutions, museums, and classrooms.<sup>232</sup> Finally, the Act requires the posting of signs "at each building entrance" of each "public place" in the State of Washington.<sup>233</sup> The signs must indicate whether smoking is permitted or prohibited.<sup>234</sup>

A serious shortcoming of the Washington Clean Indoor Air Act is its failure to regulate smoking in the private workplace. The Act currently protects only the few workers who work in a "public place" in which smoking is prohibited. Recent attempts in the Legislature to comprehensively regulate private workplace smoking have so far been unable to overcome powerful opposition by the tobacco lobby.<sup>235</sup>

### *B. Ordinances Restricting Smoking*

Ordinances restricting smoking have been adopted in the City of Seattle, King County, and Pierce County. The Seattle ordinance governing "NO SMOKING AREAS"<sup>236</sup> generally overlaps with provisions of the Washington Clean Indoor Air Act<sup>237</sup> by prohibiting smoking in public places, except in desig-

229. *Id.*

230. WASH. REV. CODE § 70.160.070 (1985).

231. WASH. REV. CODE § 70.160.020(2) (1985) (" 'Public place' means that portion of any building or vehicle used by and open to the public, regardless of whether the building or vehicle is owned in whole or in part by private persons or entities, the state of Washington, or other public entity, and regardless of whether a fee is charged for admission.").

232. WASH. REV. CODE § 70.160.040 (1985).

233. WASH. REV. CODE § 70.160.050 (1985).

234. *Id.* Local fire departments and fire districts are responsible for enforcement of the sign posting requirements. WASH. REV. CODE § 70.160.070(3) (1985).

235. On February 11, 1987, a bill was approved by the Washington House of Representatives that would have conferred on employees in both the public and private sectors the right to a smoke-free workplace. As a result of successful tobacco lobbying efforts, however, the Workplace Clean Air Act died in Senator Frank Warnke's Commerce and Labor Committee without being voted on. S.H.B. 13, 50th Leg., 1987 Reg. Sess.

236. SEATTLE, WASH., MUNICIPAL CODE §§ 10.64.010-060 (1986).

237. WASH. REV. CODE §§ 70.160.010-900 (1985).

nated smoking areas,<sup>238</sup> and by requiring the occupants of public places to post signs prohibiting smoking.<sup>239</sup> Unlike the state statute, however, the Seattle ordinance does not have any penalty for persons who smoke in a no smoking area.

Another Seattle ordinance provides that all facilities owned, leased, or rented by the City (including workplaces) will be completely smoke-free by January, 1988.<sup>240</sup> Similarly, a King County ordinance which becomes effective July 1, 1987 prohibits smoking in all enclosed work areas and common area of facilities owned, leased, or rented by King County.<sup>241</sup>

The Pierce County ordinance<sup>242</sup> is by far the strongest, most progressive legislation of its kind in Washington. Its provisions also overlap with the Clean Indoor Air Act, but in addition it contains a stringent provision on workplace smoking. This workplace provision<sup>243</sup> requires that the preferences of nonsmoking employees shall prevail in all private workplaces. An employer is required to prohibit smoking in the workplace if any nonsmoker requests such an action.<sup>244</sup> Noncompliance with this workplace provision makes the employer liable for a civil fine of up to \$500 per day.<sup>245</sup> In addition, persons who smoke in a no smoking area may be fined up to \$100.<sup>246</sup>

The Pierce County ordinance should be a model for the rest of the state to follow. Unfortunately, only the unincorporated portions of Pierce County currently benefit from its provisions.

### C. *Unemployment Compensation*

At least four states have granted unemployment benefits to nonsmokers due to inability to work in a smoke-filled environment.<sup>247</sup> In *In re Carlquist*,<sup>248</sup> a Yakima accounting clerk

238. SEATTLE, WASH., MUNICIPAL CODE § 10.64.020 (1986).

239. *Id.* § 10.64.040(A).

240. Seattle, Wash., Ordinance 113148 (Oct. 29, 1986).

241. King County, Wash., Ordinance 7884 (Dec. 24, 1986).

242. PIERCE COUNTY, WASH., COUNTY CODE §§ 8.16.010-160 (1986).

243. *Id.* § 8.16.090.

244. *Id.* § 8.16.090(A)(2).

245. *Id.* § 8.16.120(A)(2).

246. *Id.* § 8.16.120(A).

247. *In re Carlquist*, No. 406-48-0473-7 (Wash. Employment Sec. Dep't Jan. 31, 1986); *McCrocklin v. Employment Dev. Dep't*, 156 Cal. App. 3d 1067, 205 Cal. Rptr. 156 (1984); *Stevens v. Employment Sec. Comm'n*, No. CE6-2934 (Dist. Ct. Polk County, Iowa Nov. 17, 1976); *Meyer v. C.P. Clare & Co.*, No. DOE 615-78 (Idaho Indus. Comm'n Nov. 17, 1978).

248. No. 406-48-0473-7 (Wash. Employment Sec. Dep't Jan. 31, 1986).

had a severe allergy to cigarette smoke. After five new smoking employees were hired to work in her office, Ms. Carlquist asked the employer to provide her with a smoke-free work area. When the employer declined to accommodate her, she quit her job.

She then applied for and was granted unemployment compensation benefits. In granting the benefits, the Washington Employment Security Department found that Ms. Carlquist left work in accordance with her doctor's advice and only after making an unsuccessful effort to change the conditions of her employment.<sup>249</sup> The Department determined that she had good cause to leave work because continued exposure to tobacco smoke at work would constitute an unreasonable hardship on her.<sup>250</sup>

In Washington, an employee is not disqualified from receiving unemployment benefits if he or she leaves work voluntarily with "good cause."<sup>251</sup> The statute provides that a "risk" to the employee's health or safety can constitute "good cause."<sup>252</sup>

Regulations require a "good cause" claimant to demonstrate three things: (1) that "he or she left work primarily because of a work connected" factor; (2) that the work connected factor was of "such a compelling nature as to cause a reasonably prudent person to leave his or her employment"; and (3) that "he or she first exhausted all reasonable alternatives prior to termination," unless this would have been a futile act.<sup>253</sup>

Therefore, a person who cannot work in a smoke-filled workplace should not be precluded on that basis from receiving unemployment benefits provided that he or she can demonstrate "good cause" for leaving work.

## VIII. CONCLUSION

### Knowledge concerning the harmful effects of involuntary

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249. *Id.*

250. *Id.*

251. WASH. REV. CODE § 50.20.050 (1985).

252. WASH. REV. CODE § 50.20.050(3) (1985).

253. WASH. ADMIN. CODE R. 192-16-009(1) (1986). "Good cause" for leaving work may not exist if the work connected factor "was generally known and present at the time of hire." *Id.* § 192-16-009(2). However, this impediment to receiving unemployment benefits can be overcome if continued employment would constitute "an unreasonable hardship on the individual." *Id.* § 192-16-009(2)(c).

smoking is accumulating rapidly. Accordingly, the Washington Legislature should promptly enact strong and comprehensive prohibitions on smoking in the workplace.<sup>254</sup>

In the absence of state legislation restricting smoking in private workplaces, several legal theories are available to vindicate the rights of nonsmokers in Washington and other jurisdictions. These rights can and should be asserted in the courts. In Washington, the legal theories with the highest probability of success are the common law right to a safe workplace, and the claim to handicapped status under either federal or state law.

Nationally, a comprehensive survey of the case law and legal principles indicates that nonsmokers wishing to clear the air have some effective legal remedies at their disposal. In contrast, there is no recognized basis in law for the assertion that one has a right to smoke in the workplace.

This has serious ramifications for employers that fail to protect their employees from involuntary smoking in the workplace. In addition to incurring significantly increased operating costs for permitting such smoking, these employers will pay a substantial price for their improvidence if an employee is harmed and commences litigation against the employer.

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254. In December 1986, the Surgeon General stated:

As both a physician and a public health official, it is my judgment that the 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.

1986 REPORT, *supra* note 3, at xi-xiii (Preface).