University of Dayton Law Review

Volume 9 | Number 2 Article 4

1983

The Worker's Right to a Smoke-Free Workplace

Molly Cochran
University of Dayton

COMMENTS

THE WORKER'S RIGHT TO A SMOKE-FREE WORKPLACE

I. INTRODUCTION

In the past decade, nonsmokers have increasingly challenged traditional attitudes toward the right to smoke, arguing that smoking can no longer be characterized as a right when it interferes with their health and comfort. The result has been some nominal respect for the rights of nonsmokers with a corresponding infringement upon smokers' privileges. Growing awareness that exposure to smoke poses a health threat to nonsmokers has even led to legislation restricting smoking in certain public places.[1]

Yet legislators have paid scant attention to what is perhaps the single most important area for the protection of nonsmokers' rights: the workplace. Nonsmokers still face a recalcitrant smoking population in the workplace, where the well-established freedom to smoke has frequently been considered an inviolable right. While smokers exercise their presumedly unassailable freedom, however, nonsmokers are unwillingly subjected to unhealthy and irritating substances which, for those with a particular sensitivity to smoke, are a source of extreme discomfort and even illness.

Despite legislative reluctance to address the issue, some courts have found that a smoke-sensitive individual does have a right to a smoke-free workplace. This comment will analyze the rights of smoke-sensitive workers and the remedies available to them. It will demonstrate that the right to a smoke-free workplace is neither a feat of judicial creativity nor an example of judicial legislation. Rather, it is an extension of both the long-accepted principle that workers generally have the right to a healthful, safe work environment[2] and the more recent legal recognition of the right of the handicapped to work when their disability is subject to reasonable accommodation.[3]

---

1. *See infra* notes 30–37 and accompanying text.
2. *See infra* text accompanying notes 100–13.
3. *See infra* text accompanying notes 45–82.

II. ELEMENTS OF THE CONFLICT

A. *The Nature of the Nonsmoker's Claim*

The nonsmoker's demand for a smoke-free workplace can hardly be dismissed as frivolous in light of the effects of exposure to second-hand smoke, known as passive or involuntary smoking. The immediate ill-effects of a smoke-filled environment, experienced even by most healthy people, include minor throat, nasal, and eye irritation.[4] More serious consequences are experienced by those suffering from chronic lung diseases.[5] The most dramatic immediate effect is felt by those afflicted with a particular allergy or sensitivity to tobacco smoke.[6] Exposure to smoke triggers a variety of extreme reactions and unpleasant effects in these smoke-sensitive individuals, including respiratory problems, nausea, dizziness, and blackouts. However, evidence of the long-term effects of involuntary smoking is cause for deeper concern.

The weight of scientific evidence suggests that continued exposure to tobacco smoke may pose a health threat more serious than the immediate adverse effects. Researchers have found that long-term exposure to the carcinogenic[7] and toxic[8] substances contained in tobacco smoke may result, among other things,[9] in deterioration of lung capacity[10] and exacerbation of heart problems,[11] and may possibly even lead

---

4. Comment, *The Legal Conflict between Smokers and Nonsmokers: The Majestic Vice Versus the Right to Clean Air*, 45 MO. L. REV. 444, 448 (1980). Involuntary smoking can also cause deterioration in psychomotor performance, especially attentiveness and cognitive function. *Id.*

5. *See id.*

6. *Id.* Estimates of the number of Americans with a special sensitivity to tobacco smoke range from 1.5 to 34 million. *Id.*

7. OFFICE OF THE SURGEON GEN., PUBLIC HEALTH SERV., U.S. DEP'T OF HEALTH AND HUMAN SERV., THE HEALTH CONSEQUENCES OF SMOKING: CANCER, A REPORT OF THE SURGEON GEN. 251 (1982) [hereinafter cited as 1982 REPORT].

8. Carbon monoxide, hydrogen cyanide, nitrogen dioxide, tar, and nicotine are among the toxic substances in cigarette smoke. Where five parts per million (ppm) of nitrogen dioxide is considered dangerous, cigarettes contain 250 ppm; where long-term exposure to 10 ppm of hydrogen cyanide is considered dangerous, cigarettes contain 1,600 ppm; and where tunnels and garages may have carbon monoxide levels of 100 ppm, cigarettes contain 42,000 ppm. Carbon monoxide levels in a smoke-filled room may approach 80 ppm, whereas the Environmental Protection Agency sets the air quality standard at nine ppm as a maximum eight-hour concentration. Comment, *Toward Recognition of Nonsmokers' Rights in Illinois*, 5 LOY. U. CHI. L.J. 610, 611–12 (1974).

9. Involuntary smoking situations may be harmful to fetuses. Researchers have discovered that when nonsmoking pregnant women are exposed to cigarette smoke, the fetal blood picks up significant amounts of tobacco smoke by-products. N.Y. Times, Jan. 18, 1983, at C2, col. 1.

10. One study found that children of smoking parents suffer more incidents of bronchitis, pneumonia, and acute respiratory disease than do children of nonsmoking parents. 1982 REPORT, *supra* note 7, at 239. Another study found that long-term involuntary smoking in the workplace results in a decreased capacity of small airway function in the lungs similar to that characteristic of a light smoker. The researchers concluded that chronic exposure to cigarette smoke is deleteri-

to lung cancer.[12] The Surgeon General in 1982 cautioned that prudence and preventive medicine dictate that nonsmokers avoid continued exposure to tobacco smoke.[13] Yet because of some smokers' assertion that their habit constitutes a right, nonsmokers are continually subjected to an unhealthy atmosphere. Resolution of the conflict between smokers and nonsmokers turns to a large degree on a determination of the extent and nature of the right to smoke when it conflicts with the right to breathe smoke-free air.

B. The Nature of the Right to Smoke

While smokers may argue in terms of rights, they are really expressing their compelling need to smoke and their desire to preserve their traditionally unquestioned freedom to do so. Smokers are understandably protective of their long-indulged freedom; today, smokers constitute only thirty-eight percent of the American population,[14] and their socially accepted privilege of smoking anywhere and everywhere has only recently been assailed as offensive and unhealthy.[15]

It is doubtful that this new social distaste for the smoking habit will significantly reduce the incidence of smoking, inasmuch as the plethora of evidence linking smoking with heart disease, lung disease, and various forms of cancer has failed to do so.[16] The reason, however, is not that smokers do not wish to give up smoking—surveys have shown that from two-thirds to ninety percent of smokers would like to discontinue the habit.[17] Rather, it is the very addictiveness of cigarettes

---

ous to the nonsmoker's health. *Tobacco Wars: Woes in Smoke-Filled Rooms*, TIME, Apr. 7, 1980, at 71.

11. Involuntary smoking has been found to reduce the exercise tolerance of persons suffering from angina pectoris. 1982 REPORT, *supra* note 7, at 239.

12. Two studies have found that nonsmoking women with smoking husbands experience a higher risk of lung cancer. A third study found the increase in risk was not statistically significant. 1982 REPORT, *supra* note 7, at 251; *see Tobacco Wars: Is Passive Smoking Harmful?*, TIME, July 6, 1981, at 43. The Surgeon General has stated that the nature of the association between lung cancer and involuntary smoking has yet to be resolved. 1982 REPORT, *supra* note 7, at viii.

13. *Id.*

14. *Showdown on Smoking*, NEWSWEEK, June 6, 1983, at 60 [hereinafter cited as *Showdown*].

15. *See* Comment, *The Non-Smoker in Public: A Review and Analysis of Non-Smokers' Rights*, 7 SAN FERN. V.L. REV. 141, 151 (1979).

16. After decades of decline, America's smoking population is on the rise again. *Showdown*, *supra* note 14, at 60.

17. *Id.* at 63. Smoking produces both psychological and physical dependence. *Id.* The poor success rate of those attempting to stop smoking is evidence of the addictiveness of cigarettes: 75 to 80% of smokers who decide to give up the habit are smoking again within a year. NATIONAL INST. ON DRUG ABUSE, THE BEHAVIORAL ASPECTS OF SMOKING 3 (Research Monograph 26, 1976) [hereinafter cited as BEHAVIORAL ASPECTS]. A smoker's withdrawal symptoms, which may last anywhere from several weeks to years, may include craving for tobacco, blood pressure and heart rate decrease, nausea, headache, digestive problems, excessive eating, anxiety, irritability,

that keeps people smoking despite cogent reasons for stopping.

The presence of a smoke-sensitive individual in the workplace, then, does not immediately engender offers by smokers to forever lay down their cigarettes. Nonetheless, the equity of a smoke-sensitive individual's claim to protection from cigarette smoke is in no way diminished by the discomfort or inconvenience that may be caused smokers by restricting their habit. Addiction can never be used as an excuse for unlawful or harmful behavior. The very addictiveness of cigarettes strengthens the claim that nonsmokers' rights should be protected both through legislation and, when necessary, through court intervention; smokers cannot be relied upon to voluntarily abstain from smoking in respect for the health of others.

Despite the smoker's compulsion, there is little factual basis for a smoker's claim to a legal right to smoke in situations where others are subjected to smoke exposure. In the workplace, the right to smoke is better characterized as a privilege, for in most instances the employer has the full authority to prohibit employees from smoking.

C. *The Role of the Employer*

An employer caught in the conflict between smokers and smoke-sensitive employees is in a position to put a swift and cost-effective end to the problem by simply prohibiting smoking in the workplace. Aside from the possibility that a collective bargaining agreement might prove an obstacle to a prohibition of smoking in the workplace,[18] rules con-

---

aggressiveness, and hostility. *Id. See also* Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. CAL. L. REV. 1423, 1432 (1980).

18. Employer bans on smoking may be deemed violative of a collective bargaining agreement. In Commonwealth v. Commonwealth Labor Relations Bd. of Review, ___ Pa. Commw. ___, 459 A.2d 452 (1983), smoking was banned at employees' work stations. The Pennsylvania Commonwealth Court found smoking regulations to be within the realm of "conditions of employment." *Id.* at ___, 459 A.2d at 455. The ban on smoking, then, was a unilateral change by the employer in working conditions; therefore, the ban constituted an unfair labor practice. *Id.* at ___, 459 A.2d at 454, 457. One dissenting opinion, however, noted that the regulation against smoking was promulgated in response to employee complaints about smoking and urged that the smoking ban therefore did not constitute an unfair labor practice. *Id.* at ___, 459 A.2d at 457–58 (MacPhail, J., dissenting). A second dissenting opinion argued that the rights of nonsmokers and the obligations of employers to protect such rights must be weighed before labeling smoking regulations an unfair labor practice. *Id.* at ___, 459 A.2d at 458 (Doyle, J., dissenting).

Labor union resistance to smoking regulations is also demonstrated in Johns-Manville Sales Corp. v. International Ass'n of Machinists, Local Lodge 1609, 621 F.2d 756 (5th Cir. 1980). The employer, an asbestos manufacturer, had prohibited smoking on company property to avoid the increased carcinogenic risk that results when workers smoke around asbestos. *Id.* at 757. The union argued, however, that many smokers were unable to give up smoking and should be permitted to expose themselves to the danger of a higher cancer risk. *Id.* at 758. The Fifth Circuit Court of Appeals agreed and supported the union's contention that the smoking ban violated the collective bargaining agreement. *Id.* at 759. This case could be distinguished, however, from situations in which the purpose of a smoking prohibition was to protect the health of a smoke-sensitive

cerning smoking are generally within the employer's discretion. Many companies—including J.C. Penney,[19] IBM, 3M, AT&T,[20] BankAmerica Corporation, and Levi Strauss[21] — have instituted rules restricting or prohibiting smoking in the workplace.[22] One company, for example, requires that there be at least four feet separating smokers from nonsmokers. Another requires that large meetings be divided into separate areas for smokers and nonsmokers, and further provides that any one person may prohibit smoking in a small meeting.[23]

While there may be increased costs in protecting nonsmokers from coworkers who smoke,[24] businesses may also be economically motivated to discourage employees from smoking either on or off the job. Over fourteen percent of major American companies surveyed by the National Interagency on Smoking and Health offered smoking cessation programs to their employees.[25] The rationale behind such programs is that employees who smoke are economically unhealthy for the company.[26] Reducing smoking among employees saves costs in absenteeism, medical care, early mortality, insurance (fire, health, accident, and disability), time lost while on the job, property damage, maintenance, and the ill-effects of involuntary smoking.[27] Concern about these economic factors has led some employers to prohibit all smoking on company premises, and it has been suggested that restricting all hiring to non-

---

individual. In *Johns-Manville*, the objective of the ban was a paternalistic desire to protect the health of smokers themselves and was for that very reason more easily held invalid.

Despite these instances of union endorsement of smokers' rights, with nonsmokers outnumbering smokers by nearly two to one, it is likely that many unions would support smoking regulations in the workplace. Unions could then become a powerful force for nonsmokers' rights.

19. Comment, *supra* note 4, at 455.

20. *Office Smokers Feel the Heat*, BUS. WK., Nov. 29, 1982, at 102.

21. Wells, *Smokers in San Francisco Are Striking Back at Ordinance Covering Smoking in Offices*, Wall St. J., July 1, 1983, at 17, col. 4.

22. However, a 1979 report indicated that only 12% of all United States companies had nonsmoking rules for conference rooms and only 10% provided nonsmoking areas in their dining rooms. *Office Smokers Feel the Heat, supra* note 20.

23. *Id.*

24. In some cases, walls may have to be built and ventilation improved. *Id.* Offering employees cigarette breaks might also be costly. Pillsbury Company claimed that complying with Minnesota's antismoking statute would cost the company $500,000 annually in permitting its employees to leave their posts to smoke. 9 TEX. TECH. L. REV. 353, 365 (1977–78).

25. 1982 REPORT, *supra* note 7, at 272.

26. *Companies Put Up the "No-Smoking" Sign*, BUS. WK., May 29, 1978, at 68.

27. Weis, *No Ifs, Ands, or Butts: Why Workplace Smoking Should be Banned*, MGMT. WORLD, Sept. 1981, at 39, 40 [hereinafter cited as Weis, *No Ifs*]. Job absenteeism is a particularly costly factor. Cigarette smokers experience more than 81 million excess days of job absenteeism per year. OFFICE OF SMOKING AND HEALTH, PUBLIC HEALTH SERV., U.S. DEP'T OF HEALTH AND HUMAN SERV., SMOKING, TOBACCO AND HEALTH: A FACT BOOK 15 (1981). The absentee rate of smokers is 57% higher among men and 45% higher among women than that of nonsmokers. Weis, *Profits Up in Smoke*, 60 PERSONNEL J. 162 (1981).

smokers would save costs even further.[28] It is therefore clear that employers have both the right and the incentive to ban workplace smoking. Nonetheless, employers most often fail to concern themselves with the issue of smoking in the workplace, perhaps in deference to the prevalent notion that smoking is an unquestioned right. Because of the general reluctance of employers to abridge smokers' rights, smoke-sensitive individuals have come to rely upon legislation and the courts for protection.

III. ANTISMOKING LEGISLATION

While there has been widespread antismoking legislation, few of these enactments have been directed toward smoking in the workplace. The dearth of legislation in this area reveals how far the nonsmokers' rights movement has yet to go, for the privilege of being protected from smoke in elevators or on subway cars means little to the nonsmoker who has been subjected to smoke all day long at work. The extensiveness of antismoking legislation in other areas, however, does at least demonstrate the legitimacy of protecting nonsmokers' rights and of restricting smokers' rights.[29] However, there is little hope that legislation will soon become comprehensive enough to resolve the workplace smoking conflict.

While many foreign countries have placed substantial restrictions on smoking in various public places and in the workplace,[30] the United States has limited federal antismoking legislation to the area of interstate travel.[31] Furthermore, antismoking statutes enacted by a majority

---

28. Weis, *No Ifs, supra* note 27, at 39.

29. Legislation restricting workplace smoking is well within the state's police power as a measure for the protection of public health. *See* Comment, *supra* note 15, at 160–63.

30. Renaud, *Legal Rights of Non-Smokers in Ontario*, 28 CHITTY'S L.J. 37, 40 (1980). Countries with strong antismoking mandates include Poland, Italy, Finland, France, and Bulgaria. France prohibits smoking in all public places and vehicles except well-ventilated restaurants. Bulgaria prohibits smoking in the workplace in the presence of nonsmokers unless they consent in writing. *Id.* at 39. The World Health Organization has issued warnings on the effects of involuntary smoking and has recommended that smoking in public places be restricted. Comment, *supra* note 4, at 447.

31. Renaud, *supra* note 30, at 40. Federal agencies require separate seating for nonsmokers on interstate air and land conveyances. Blackburn, *Legal Aspects of Smoking in the Workplace*, 31 LAB. L.J. 564, 565–66 (1980). On trains, smoking is permitted only on smoking cars and on buses, smoking is permitted only in the rear 30% of seating. NAT'L INST. OF HEALTH, PUB. HEALTH SERV., U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, THE SMOKING DIGEST 79 (1977) [hereinafter cited as THE SMOKING DIGEST]. Airplanes are required to have nonsmoking sections large enough to accommodate all those who want to be seated there. 14 C.F.R. § 252.2(a)(2) (1983).

Efforts to relax the airline regulations were quashed in Action on Smoking and Health v. Civil Aeronautics Bd., 699 F.2d 1209 (D.C. Cir. 1983). The proposed new regulation, which would have rescinded rules protecting against involuntary smoking, was vacated. The court also remanded the Civil Aeronautics Board's rejection of a proposal to provide special accommodations

of the states typically restrict smoking in many public places[32] but conspicuously fail to address the question of workplace smoking.[33] The few that do address the issue may not always afford adequate protection to the smoke-sensitive individual.[34] Efforts to pass antismoking legislation have often been more successful on the local level than they have been on the state or federal level.[35] A San Francisco ordinance adopted in 1983, for example, requires private employers to ban smoking in work areas if employees request such a prohibition.[36] Yet the San Francisco ordinance demonstrates the vulnerability of local legislation: efforts to repeal the ordinance have already been mounted.[37]

Although comprehensive and strictly enforced antismoking legislation would be the ideal solution for the smoke-sensitive worker, a significant increase in regulations restricting workplace smoking is not readily foreseeable. Widespread smoking restrictions would inevitably undercut the social acceptability of smoking, upon which the tobacco industry thrives.[38] A significant increase in workplace bans on smoking, then, could ultimately have a serious impact on the industry's profits.[39]

---

for smoke-sensitive passengers, noting the "serious health concerns" of involuntary smoking. *Id.* at 1217–19.

Action on Smoking and Health (ASH) is a Washington, D.C.-based organization which pursues national legal action to protect the rights of nonsmokers. ASH was in part responsible for the establishment of nonsmoking sections in planes, trains, and buses. 1, pt. 2 ENCYCLOPEDIA OF ASSOCIATIONS 1086 (18th ed. 1983).

32. State statutes include bans on smoking in public vehicles, elevators, public places of recreation and entertainment, health facilities, schools, department stores, public meetings, and state-owned buildings. THE SMOKING DIGEST, *supra* note 31, at 83. For a comprehensive survey of state antismoking statutes, see Comment, *supra* note 4, at 450–59.

33. Note, *supra* note 24, at 361.

34. The strongest workplace antismoking provision, adopted in nearly identical form by Minnesota, Nebraska, and Utah, states that rules shall be established to restrict or prohibit smoking in places of work "where the close proximity of workers or the inadequacy of ventilation causes smoke pollution detrimental to the health [and/or] comfort of nonsmoking employees." MINN. STAT. ANN. § 144.414 (West Supp. 1983); NEB. REV. STAT. § 71-5707 (1981); UTAH CODE ANN. § 76-10-106 (1978). Other state antismoking statutes with workplace provisions include COLO. REV. STAT. § 25-14-103 (1982); MONT. CODE ANN. § 50-40-104 (1981); OR. REV. STAT. § 243.350 (1981).

A bill was introduced in the Connecticut Legislature in May of 1983 which would require employers with 50 or more employees to designate smoke-free work areas for nonsmoking employees. The sponsor of the bill did not express optimism for its success. Sullivan, *Assembly to Weigh Smoking Issue*, N.Y. Times, May 1, 1983, § 23, at 1, col. 1.

35. THE SMOKING DIGEST, *supra* note 31, at 86.

36. *Showdown*, *supra* note 14, at 61.

37. Wells, *supra* note 21, at 11. Californians had previously rejected a statewide referendum issue which would have restricted smoking in the workplace. Sapolsky, *The Political Obstacles to the Control of Cigarette Smoking in the United States*, 5 J. HEALTH POL. POL'Y & L. 277, 279 (1980).

38. *See* Sapolsky, *supra* note 37, at 288.

39. Of course, the protection of a smoke-sensitive individual from exposure to tobacco smoke does not always require a workplace ban on smoking. Such protection can at times be

The strength of the tobacco lobby[40] and the influential positions of Congressmen from tobacco-producing states make attempts to pass federal antismoking legislation a difficult struggle.[41] Furthermore, legislators at local, state, and national levels are influenced by the fact that a significant portion of the billions of dollars Americans spend yearly on cigarettes is allocated to government tax coffers.[42]

Present legislation fails to adequately protect nonsmokers in the workplace, and it is unlikely that legislators will soon cure the defect. Yet smoke-sensitive workers are daily victim to the unhealthy effects of smoke-filled workplaces. In invoking the courts' protection, then, smoke-sensitive workers are seeking to end an inequitable situation which will continue indefinitely unless the courts intervene. In granting relief to smoke-sensitive individuals, the courts are not creating a new right. Rather, they are merely recognizing that the legitimacy of the smoke-sensitive worker's claim cannot be denied in light of already existing law.

IV. THE CAUSES OF ACTION

A smoke-sensitive worker seeking a smoke-free workplace must pursue one of two alternative theories: that smoke sensitivity constitutes a handicap which the employer must accommodate, or that the employer is breaching its duty to provide a reasonably safe workplace by allowing employees to be exposed to cigarette smoke.[43] The principles

---

effectively accomplished through other means. *See infra* note 83.

40. The Tobacco Institute, the tobacco industry's lobby organization, was founded "to foster public understanding of the smoking and health controversy" and to "build public knowledge of the historic role of tobacco and its place in the national economy." THE SMOKING DIGEST, *supra* note 31, at 100. The Institute's lobbying has defeated numerous legislative attempts to protect the rights of nonsmokers. *Id.* The Tobacco Institute is active in attempting to obstruct antismoking legislation on the state and local levels as well as the federal level. *See* Wells, *supra* note 21, at 11; Sullivan, *supra* note 34, at 1.

41. THE SMOKING DIGEST, *supra* note 31, at 78.

42. *Showdown, supra* note 14, at 62. In 1982, governments at various levels collected nearly one-third of the almost $23 billion that Americans spent on cigarettes. *Id.* Legislators should consider, however, that the consequences of smoking cost the nation approximately $27 billion per year. *See* Pinney, *Preface* to NAT'L INST. ON DRUG ABUSE, CIGARETTE SMOKING AS A DEPENDENCE PROCESS, at vii (Research Monograph 23, 1979).

43. A number of legal theories have been raised in support of nonsmokers' rights, including constitutional claims, nuisance, battery, strict product liability, and intentional infliction of emotional distress. None of these theories is easily applied to the case of the smoke-sensitive worker nor has any of them been notably successful in litigation to date.

The oft-asserted constitutional rights argument, which has been attempted in both workplace and non-workplace cases, has proven an unqualified failure. Courts have rather summarily rejected claims based on 1st, 5th, and 14th amendment rights. *See* Federal Employees for Non-Smokers' Rights (FENSR) v. United States, 446 F. Supp. 181 (D.D.C. 1978), *aff'd*, 598 F.2d 310 (D.C. Cir.), *cert. denied*, 444 U.S. 926 (1979) [hereinafter cited as *FENSR*]; Gasper v. Louisiana Stadium and Exposition Dist., 418 F. Supp. 716 (E.D. La. 1976), *aff'd*, 577 F.2d 897 (5th Cir.

and policies underlying these established causes of action—the duty to

---

1978), *cert. denied*, 439 U.S. 1073 (1979); GASP v. Mecklenburg County, 42 N.C. App. 225, 256 S.E.2d 477 (1979). The opinion in *Gasper*, which was cited as controlling in *Mecklenburg County* and in *FENSR*, was a particularly poorly reasoned one on both the trial and appellate levels. The plaintiffs charged that the presence of tobacco smoke in the Superdome had a chilling effect on their first amendment rights. The trial court stated that smoking restrictions would upset the "delicate balance of individual rights" and would constitute intervention in "purely private affairs." 418 F. Supp. at 718. In affirming, the appeals court compared restrictions on public smoking to Prohibition: "We are not unaware of what happened when, by express constitutional amendment and congressional enactment, an effort was made to prohibit alcohol . . . ." 577 F.2d at 899. The fallacy of viewing smoking in public as a private matter, and of equating public restrictions with complete prohibition, is almost too self-evident to deserve mention.

This is just the kind of illogical reasoning the Tobacco Institute is trying to promote, however. As the February, 1977 issue of the Institute's newsletter, *The Tobacco Observer*, reads: "Prohibition. That's exactly what the current crop of anti-smoking activists want. They want tobacco products to be illegal. They would like jail terms for those who enjoy these products. They want tobacco to be extinct. They just won't admit it." THE SMOKING DIGEST, *supra* note 31, at 101.

The rejection of a constitutional right to breathe smoke-free air, however, merely reflects the historical rejection of constitutional claims in air pollution cases. *See, e.g.*, Tanner v. Armco Steel Corp., 340 F. Supp. 532, 537 (S.D. Tex. 1972); *see also In re* "Agent Orange" Prod. Liab. Litig., 475 F. Supp. 928, 934 (E.D.N.Y. 1979) (holding that there is no constitutional right to a healthful environment under the 5th, 9th, or 14th amendments). *But see* Environmental Defense Fund v. Hoerner Waldorf Corp., 3 ENVTL. L. REP. (ENVTL. L. INST.) 20,794 (D. Mont. 1970).

As long as the common-law rules are rigidly adhered to, a nuisance claim is not applicable to most nonsmokers' rights claims. *See generally* Comment, *supra* note 8, at 618–22. A nuisance claim must either be asserted as a private nuisance, where one claims that one's enjoyment of property has been disturbed, or as a public nuisance, where the claim is that a general public right has been interfered with. Public nuisance claims are normally only brought by the state. *See* W. PROSSER, LAW OF TORTS 583–91 (4th ed. 3d printing 1971). *But cf.* Stockler v. City of Pontiac, No. 75-131479 (Cir. Ct. Mich. filed Dec. 17, 1975), where the court upheld the plaintiff's claim that smoking in Pontiac's Silverdome Stadium constituted a public nuisance. The out-of-court settlement banned smoking in the stands but allowed it in other areas. Comment, *supra* note 4, at 470.

Battery actions were instituted against smokers in Jones v. Zezzo, 162 Ga. App. 281, 290 S.E.2d 312 (1982), and in Davis v. Licari, 434 F. Supp. 23 (D.D.C. 1977). *But see* Comment, *supra* note 4, at 470–72, concerning the problems in applying the battery theory in nonsmokers' rights cases.

The suggestion that strict product liability suits may be used to support nonsmokers' claims is not as farfetched as it may first appear. *See* Comment, *supra* note 4, at 474–75. Suit against the cigarette manufacturer, however, would hardly resolve the conflict between smoke-sensitive workers and their coworkers who smoke.

The intentional infliction of emotional distress theory was asserted in Hentzel v. Singer Co., 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982). The plaintiff was terminated from his employment allegedly because of his attempts to secure a smoke-free workplace. Coupled with his suit against his employer for wrongful dismissal was a claim of intentional infliction of emotional distress. The plaintiff alleged that, after learning of the plaintiff's sensitivity to smoke, his employer moved him into an office with a heavier concentration of smoke, failed to segregate meetings into smokers and nonsmokers, and permitted other employees to directly antagonize him by sitting next to him and smoking. *Id.* at 294 n.1, 188 Cal. Rptr. at 161 n.1. *See also* Brief for Grievant at 24, Wells v. Secretary of Labor, No. ARB-N-BLS-81-055 (1983) (U.S. Dep't of Labor) (Fasser, Arb.) (on file with University of Dayton Law Review) (where the employer failed to prevent workers from smoking in the presence of the smoke-sensitive employee). Situations such as these demonstrate the need for the court's involvement.

accommodate the handicapped and the duty to provide a safe workplace—support the extension of these theories to recognize the right to a smoke-free workplace.

A. Smoke Sensitivity as a Handicap

Smoke-sensitive individuals have been successful in claiming handicapped status in some instances, although such a claim has been rejected in other cases.[44] However, even when smoke-sensitive plaintiffs are granted handicapped status, they still must prove that they were subjected to discrimination because of their handicap. The Rehabilitation Act of 1973[45] is the primary source of federal protection afforded the handicapped against employment discrimination.[46] The Rehabilitation Act prohibits discrimination against the handicapped by departments and agencies of the federal government,[47] by certain government contractors,[48] and by recipients of federal grants.[49]

Key to the Rehabilitation Act is the requirement that employers make reasonable accommodations to enable the hiring and promotion of the handicapped. The requirement of reasonable accommodation is only implied with respect to programs receiving federal funds,[50] but has been made express with federal agencies and with government contractors—both of which must make reasonable accommodations unless these concessions would pose an undue hardship on their business.[51] The reasonable accommodation mandate may require government contractors to modify building architecture and allow job-sharing, part-time work, and work at home when possible.[52] Federal agencies may be required to make facilities accessible, restructure jobs, and modify work schedules and equipment to meet the reasonable accommodation rule.[53] Although the only remedy expressly indicated in the Rehabilitation Act was administrative action by the Secretary of Labor,[54] a pri-

---

44. *See infra* text accompanying notes 63–74.

45. 29 U.S.C. §§ 701–94 (1976 & Supp. V 1981).

46. Comment, *The Rehabilitation Act of 1973: Who is Handicapped under Federal Law*, 16 U.S.F.L. REV. 653, 655–56 (1982). *But see* 3 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 107 (1983) (discussing federal protection for the handicapped under the Fair Labor Standards Act and under the 5th and 14th amendments).

47. 29 U.S.C. § 791(b) (1976).

48. 29 U.S.C. § 793 (Supp. V 1981).

49. 29 U.S.C. § 794 (Supp. V 1981). This section would apply to schools, universities, hospitals, and state and local governments which receive money under federal grants. 3 A. LARSON & L. LARSON, *supra* note 46, § 106.30, at 27.

50. *Id.* § 106.42, at 33.

51. 29 C.F.R. § 1613.704 (1982); 41 C.F.R. § 60-741.5(d) (1983).

52. 3 A. LARSON & L. LARSON, *supra* note 46, § 104.4, at 30.

53. *Id.* § 106.43, at 38.

54. *Id.* § 106.00, at 20.

vate right of action now exists with respect to violations by federal agencies.[55] Case law as to whether a private right of action exists against recipients of federal funds and government contractors is still unsettled.[56]

On the state level, forty-four states and the District of Columbia have either statutes or constitutional provisions—the scope of which vary greatly—prohibiting employment discrimination against the handicapped.[57] Some of these statutes mirror federal law by requiring reasonable accommodation,[58] although not all allow for a private right of action.[59]

Courts have come to contrary conclusions as to whether a smoke-sensitive individual can be classed as handicapped. The Rehabilitation Act defines the term "handicapped individual" as any person who "has a physical or mental impairment which substantially limits one or more of such person's major life activities . . . ."[60] Implementing regulations define "life activities" as primarily meaning those activities which affect employability,[61] and define "substantially limits" as "the degree the impairment affects employability. A handicapped individual who is likely to experience difficulty in securing, retaining or advancing in employment would be considered substantially limited."[62]

The leading case denying smoke-sensitive individuals handicapped status involved a question of access to public facilities rather than employment discrimination. In *GASP v. Mecklenburg County*,[63] the Group Against Smokers' Pollution (GASP)[64] sued on behalf of a class of persons "harmed by tobacco smoke." The plaintiffs claimed that the class was handicapped and was thus protected by North Carolina's statute providing that the handicapped are to have full and free access to all public facilities. The presence of tobacco smoke, they argued, denied them access to such facilities.[65] Because the state statute did not specifically define "handicapped," the court of appeals looked to the definition in the federal Rehabilitation Act.[66] The court concluded that

55. *Id.* § 106.20, at 23.
56. *Id.* § 106.52(a), at 43.
57. *Id.* § 108.10, at 78–79.
58. *Id.* § 108.20, at 82–83.
59. *See id.* § 108.10-20, at 80–81.
60. 29 U.S.C. § 706(7)(B) (1976).
61. 41 C.F.R. § 60-741 app. A (1983).
62. *Id.*
63. 42 N.C. App. 225, 256 S.E.2d 477 (1979). *See supra* note 43.
64. GASP is a public interest organization which campaigns against cigarette smoking through an association of local chapters, focusing its activities on state and local legislative initiatives. Sapolsky, *supra* note 37, at 286.
65. 42 N.C. App. at 225, 256 S.E.2d at 478–79.
66. *Id.* at 226, 256 S.E.2d at 478.

the legislature clearly did not intend for all people harmed or irritated by tobacco smoke to be classed as handicapped.[67] The plaintiffs' vague definition of the class was understandably rejected by the court as too broad to invoke protection under the handicapped statute. Had the class been more specifically defined to include only those with a severe sensitivity to tobacco smoke, perhaps the court would have considered the claim.

Nonetheless, sensitivity to smoke may very well constitute a handicap under the Rehabilitation Act.[68] Pulmonary problems, for instance, are included in the Department of Justice's comprehensive definition of handicap which is used in implementing the Rehabilitation Act.[69] "Physical or mental impairment" is defined by the Department of Justice to include any physiological condition affecting the respiratory system.[70] Furthermore, in *Pletten v. Department of the Army*,[71] the plaintiff's asthmatic allergy to tobacco smoke was held to constitute a handicap within the meaning of the Rehabilitation Act.[72]

Even absent a particular pulmonary problem, a sensitivity to smoke may constitute a handicap. In *Vickers v. Veterans Administration*,[73] a district court held that the plaintiff's "hypersensitivity" to smoke was within the Rehabilitation Act's definition of handicapped, for it did limit one "major life activity": the plaintiff's ability to work in an environment which was not completely smoke free.[74] A different form of smoke sensitivity which deserves recognition as a handicap is presented in the pending case of *Wells v. Secretary of Labor*,[75] where the plaintiff is also seeking a smoke-free workplace. The plaintiff in *Wells* has a history of thyroid cancer and has developed an extreme sensitivity to tobacco smoke known as Sjogren's Syndrome. Exposure to tobacco smoke would not only increase the plaintiff's chances of recur-

---

67. *Id.* at 227, 256 S.E.2d at 479.

68. Smokers may argue that their addiction to tobacco constitutes a handicap which an employer should accommodate by allowing them to smoke. Such an argument, however, would be dismissed under the Rehabilitation Act, which was amended to exclude from handicapped status alcoholics or drug abusers whose current use of alcohol or drugs would interfere with job performance or directly threaten property or the safety of others. 3 A. LARSON & L. LARSON, *supra* note 46, § 105.00, at 4. By analogy, the principle of this amendment would effectively exclude a smoker's claim to handicapped status.

69. *Id.* § 105.23(b), at 15.

70. 28 C.F.R. § 41.31 (1982).

71. No. 03810087 (Apr. 4, 1983) (U.S. EEOC).

72. *Id. See also* Chicago, M., St. P., P. R.R. v. State Dep't of Indus., Labor, and Human Relations, 62 Wis. 2d 392, 215 N.W.2d 443 (1974). The Wisconsin Supreme Court held that a respiratory condition constituted a handicap under Wisconsin's antidiscrimination statute.

73. 549 F. Supp. 85 (W.D. Wash. 1982).

74. *Id.* at 87.

75. Brief for Grievant, *supra* note 43.

rent cancer,[76] but would also precipitate a deterioration of her eyesight possibly leading to blindness.[77]

Yet, as the holding in *Vickers* demonstrates, attaining handicapped status does not win the case for the smoke-sensitive plaintiff. The court in *Vickers* found that while the plaintiff was indeed handicapped, he had failed to prove that he was discriminated against in work assignments, pay, or promotion.[78] His employer had complied with the mandates of the Rehabilitation Act by making reasonable efforts to accommodate his handicap.[79] The plaintiff's need to avoid exposure to cigarette smoke must be balanced, the court held, against the rights of those employees who do smoke.[80]

The standard of what constitutes reasonable accommodation is an uncertain one in any situation. Neither congressional intent[81] nor court decisions[82] have provided fixed guidelines for determining when the standard has been met. *Vickers* suggests that entirely disrupting or reorganizing the work situation is not required, nor is a complete prohibition of employees' smoking.[83] However, in refusing to consider a smoking prohibition as within the realm of reasonable accommodation, the court in *Vickers* may have failed to follow the requirements of the Rehabilitation Act. According to the terms of the Rehabilitation Act, only accommodations which result in undue hardship on the employer's business are beyond the mandates of reasonable accommodation. Moreover, refusing to view a smoking prohibition as a possible reasonable accommodation lends unjustified weight to smokers' rights to the detriment of nonsmokers' rights. For when accommodation cannot be ac-

---

76. *Id.* at 14.

77. *Id.*

78. 549 F. Supp. at 87.

79. The plaintiff's employer prohibited smoking in the plaintiff's office and an adjacent one, installed two vents, floor-to-ceiling wall partitions and a door, provided an air purifier, offered to move the plaintiff's desk closer to a window, and offered the plaintiff an outside maintenance job. *Id.* at 88.

80. *Id.* at 89.

81. Note, *Accommodating the Handicapped: The Meaning of Discrimination under Section 504 of the Rehabilitation Act*, 55 N.Y.U. L. REV. 881, 894 (1980).

82. The only Supreme Court decision construing the Rehabilitation Act—Southeastern Community College v. Davis, 442 U.S. 397 (1979)—left unresolved the question of when failure to accommodate the handicapped is illegal. Note, *supra* note 81, at 884–86.

83. Not every smoke-sensitive worker may seek a prohibition on smoking, however. The plaintiff in *Wells*, for instance, fears that a total prohibition on smoking in her department would create morale problems and make her the object of continuing resentment by coworkers. Brief for Grievant, *supra* note 43, at 5. She instead requests a complete segregation of smokers and nonsmokers, which could be achieved by a cross-transfer of some employees. *Id.* at 37. This arrangement would be well within the guidelines set by her employer, the Department of Labor, for accommodations of handicaps; these guidelines call for reassignment, restructuring, and retraining of employees when necessary. *Id.* at 32.

complished without undue hardship and a ban on smoking is taboo, the smoke-sensitive worker is faced with an intolerable situation and, in effect, denied employment. No system of justice could reasonably hold that the right to smoke is greater than the right to work. Such a determination would reflect a distorted set of values, for the smoking habit is of little social worth. The handicapped discrimination theory could be a potent tool in the struggle for the rights of the smoke-sensitive worker if courts were to realize that the freedom to smoke is not an absolute, inviolable right.

Even where a plaintiff's condition is not granted handicapped status or where a discrimination claim is precluded because the requirement of reasonable accommodation has been met, the plaintiff may at least be entitled to collect disability benefits. In *Parodi v. Merit Systems Protection Board*,[84] the Ninth Circuit Court of Appeals held that the plaintiff's inability to work in a smoke-filled office constituted a disability and that "victims of environmental limitations" should not be precluded from collecting disability benefits.[85] The court ordered the plaintiff's employer to relocate her in a smoke-free environment within sixty days or grant her disability pay.[86]

Granting the employer such an alternative was equitable in *Parodi*, for the plaintiff merely sought disability benefits without claiming the right to a smoke-free environment.[87] However, should such an alternative be applied in a case where an employee sought a smoke-free workplace, allowing that employee to be terminated with disability pay would be unjust. Many employees would be greatly dissatisfied with having to forego employment and being relegated to collecting disability pay. *Parodi* was a valuable decision, however, for its recognition that a sensitivity to smoke can have effects so severe as to render its

---

84. 690 F.2d 731 (9th Cir. 1983).

85. *Id.* at 738–39.

86. *Id.* at 740. The plaintiff's employer responded by offering her another position which was described by her lawyer as being totally unsuitable. Not only was it a lesser position, he claimed, but 75 to 80% of her time would be spent in the same smoke-filled area she worked in before. He has requested the court to approve the disability benefits. N.Y. Times, Jan. 9, 1983, § 1, at 33, col. 1.

See also THE SMOKING DIGEST, *supra* note 31, at 87 (other instances in which smoke-sensitive employees have been granted disability payments or unemployment compensation). *But see* Ruckstuhl v. Pennsylvania Unemployment Compensation Bd. of Review, 57 Pa. Commw. 302, 426 A.2d 719 (1981). The court held that the smoke-sensitive plaintiff failed to prove that adequate health reasons existed at the time she left her employment to justify her voluntary termination. The plaintiff's claim for unemployment compensation was thus denied. *Id.* at 305, 429 A.2d at 721–22. Where a worker's efforts to secure a smoke-free workplace result in his or her involuntary termination, the worker may have a cause of action for wrongful dismissal. *See supra* note 43.

87. 690 F.2d at 732.

victim unable to work in a smoke-filled environment.

B. OSHA and the Employer's Common-Law Duty

The alternative to the handicapped discrimination theory is the theory that a smoke-filled environment is an unreasonably unsafe one in breach of the employer's duty to provide a safe workplace. This claim has been pursued through two avenues. The first has been a claim that the protections and promulgations of the Occupational Safety and Health Act (OSHA) have been violated. The second has been a claim that the employer's common-law duty to provide a safe workplace—the very duty which gave rise to the enactment of OSHA—has been breached. The common-law duty claim may be pursued against any employer in a private suit and has met with notable success. The OSHA claim is the less proven and the more restricted, for it does not give rise to a private cause of action.[88] In pursuing the OSHA route, then, the plaintiff can only report the alleged violations[89] and follow the established procedures for requesting an OSHA investigation.[90]

OSHA functions to enforce the employer's common-law duty by requiring an employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[91] The employer must also comply with specific safety and health standards promulgated under OSHA.[92] Although OSHA has set no specific standard with regard to allowable cigarette smoke levels,[93] cigarette-released toxic gases in enclosed areas sometimes reach levels that clearly violate OSHA standards.[94]

Under OSHA, certain criteria must be met before an employer can be held to have violated his or her general duty to provide a safe workplace.[95] A condition generally recognized as a hazard must exist.[96]

---

88. *FENSR*, 446 F. Supp. at 183. While denying the plaintiffs' OSHA claim, the court reserved decision on whether the plaintiffs' suit for a smoke-free workplace could be considered on the alternative ground of the employer's common-law duty. Questioning its jurisdiction over the common-law duty claim, the court ordered both sides to more fully brief the issue. *Id.* at 185–86.

89. Blackburn, *supra* note 31, at 567.

90. Note, *supra* note 24, at 364–65.

91. 29 U.S.C. § 654(a)(1) (1976).

92. 29 U.S.C. § 654(a)(2) (1976).

93. Brief for Grievant, *supra* note 43, at 24.

94. Blackburn, *supra* note 31, at 567; *see supra* note 8.

95. Blackburn, *supra* note 31, at 566.

96. The general duty clause, 29 U.S.C. § 654(a)(1), is limited in its application to recognized hazards only, meaning conditions generally recognized as a hazard in the employer's industry, detectable as a hazard, or actually known by the employer to be a hazard. M. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW § 124 (1978). The danger of exposure to cigarette

The condition must be one which the employer knows or should know of, which arises from employment, is preventable in the course of business, and is likely to cause serious physical harm.[97] In the case of the smoke-sensitive worker, the most questionable element of proof is whether tobacco smoke constitutes a hazard which is likely to cause serious physical harm. Critical to the inquiry is whether satisfaction of the "hazard" and "serious physical harm" standards can be gauged by the peculiar sensitivities of a single worker, or whether OSHA would require proof that involuntary smoking constitutes a hazard that threatens serious physical harm to all workers. Since OSHA only provides for administrative remedies, the answer to this question cannot be found in case law.[98]

Although OSHA does not permit an OSHA-based private cause of action, it does not supplant remedies founded on the employer's duty to provide a safe workplace. A private cause of action under the common law remains by virtue of OSHA's provision that "[n]othing in this chapter shall 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 deaths of employees arising . . . in the course of employment."[99]

The common law holds that an employer has a duty to use reasonable care in furnishing his or her employees with a safe place to work.[100] Repeatedly, courts have held that this duty is violated when workers are subjected to unhealthy smoke, fumes, or polluted air.[101] The first judicial recognition that cigarette smoke-filled air violated the employer's common-law duty, however, did not occur until 1976[102] in *Shimp v. New Jersey Bell Telephone Co.*[103] The plaintiff, a smoke-sensitive individual,[104] successfully sued to enjoin smoking in the office

---

smoke is arguably within the meaning of a recognized hazard, especially if the employer was informed of the ill-effects of involuntary smoking by a complaining employee.

97. Blackburn, *supra* note 31, at 566.

98. The argument that violations of OSHA standards create a private cause of action has been rejected by every state or federal court in which it has been raised. Annot., 79 A.L.R.3d 962 (1977).

99. 29 U.S.C. § 653(b)(4) (1976); *see* Smith v. Western Elec. Co., 643 S.W.2d 10, 14 (Mo. Ct. App. 1982).

100. Bailey v. Central Vt. Ry., 319 U.S. 350 (1943); Vega v. Southern Scrap Material Co., 517 F.2d 254 (5th Cir. 1975); House v. Mine Safety Appliances Co., 417 F. Supp. 939 (D. Idaho 1976); Fraley v. Worthington, 64 F.R.D. 726 (D. Wyo. 1974).

101. *See* Urie v. Thompson, 337 U.S. 163 (1949) (air filled with silica dust held unsafe); Atchison, T., S.F. R.R. v. Preston, 257 F.2d 933 (10th Cir. 1958) (fumes containing vaporized oil held unsafe); Stornelli v. United States Gypsum Co., 134 F.2d 461 (2d Cir.), *cert. denied*, 319 U.S. 760 (1943) (air filled with dust of powdered rock held unsafe).

102. Note, *supra* note 24, at 361.

103. 145 N.J. Super. 516, 368 A.2d 408 (Ch. Div. 1976).

104. The plaintiff's allergic reaction to cigarette smoke exposure included throat and nasal

where she worked. The New Jersey Superior Court noted evidence that cigarette smoke exposes nonsmokers to unhealthy levels of toxic gases[105] and stated that a smoker's rights do "not include the right to jeopardize the health of those who must remain around him . . . ."[106] Furthermore, the court stated that because a significant portion of the population is sensitive to cigarette smoke,[107] it is not unreasonable to expect an employer to foresee adverse health consequences and to require him or her to eliminate the health hazard.[108]

The *Shimp* holding was paralleled in *Smith v. Western Electric Co.*[109] The plaintiff, also highly sensitive to smoke,[110] sought to enjoin his employer from exposing him to tobacco smoke. The employee claimed that the smoke was a health hazard and that his employer had therefore breached his duty to provide a safe workplace. The Missouri Court of Appeals granted the injunction, accepting the plaintiff's evidence that tobacco smoke harmed the health of employees in general and of the plaintiff in particular.[111] Because the employer knew that cigarette smoke was harmful to the plaintiff and had the authority to control smoking, its failure to eliminate the hazardous condition was a breach of the employer's common-law duty.[112] Injunctive relief was proper, the court held, because the harm to the plaintiff's health could be characterized as irreparable.[113]

C. *Gorden v. Raven Systems and Research*

The common-law duty cause of action is founded on the assertion

---

irritation, nosebleeds, eye irritation with resulting corneal abrasion and erosion, headaches, nausea, and vomiting. *Id.* at 521, 368 A.2d at 410.

105. *See supra* note 8.

106. 145 N.J. Super. at 530, 368 A.2d at 416. The court was persuaded by an affidavit stating that "[l]ongterm health hazards . . . are rarely recognized as work related and impede the collection of data necessary to promulgate a safe limit of low level exposure. In absence of such data . . . dealing with a known noxious agent, it is the sound and accepted procedure in the practice of preventive medicine to eliminate the hazardous substance whenever possible until firm scientific guidelines can be established." *Id.* at 530, 368 A.2d at 415. *See supra* text accompanying note 13.

107. The court cited a report that 10% of the United States population is allergic to cigarette smoke, with common symptoms including coughing, wheezing, eye itching, and headaches upon minimal smoke exposure. *Id.* at 529, 368 A.2d at 415.

108. *Id.* at 531, 368 A.2d at 415–16.

109. 643 S.W.2d 10 (Mo. Ct. App. 1982). A third case, *FENSR*, reserved decision on whether the plaintiffs had a cause of action arising from the employer's duty. 446 F. Supp. at 185–86. *See also supra* note 88.

110. Upon exposure to tobacco smoke, the plaintiff's symptoms included sore throat, dizziness, headaches, nausea, blackouts, loss of memory, difficulty in concentration, aches and pains, sensitivity to noise and lights, cold sweat, gagging, and choking sensations. 643 S.W.2d at 12.

111. *Id.* at 13.

112. *Id.*

113. *Id.*

that cigarette smoke is harmful to all who are exposed to it. The recent case of *Gorden v. Raven Systems and Research*[114] supports this proposition. Some commentators may view *Gorden* as a setback for nonsmokers' rights because the plaintiff's claim for relief from a smoke-filled workplace failed. However, the case represents neither a major victory for smokers[115] nor a disregard for precedent. Instead, *Gorden* served to clarify the proper theoretical foundation on which a claim to a smoke-free workplace must be grounded.

In *Gorden*, the smoke-sensitive plaintiff[116] had been terminated from employment after refusing to work in an area occupied by cigarette-smoking employees.[117] The plaintiff argued that because it is well established that employers must provide their employees with a safe workplace, an employee with a special sensitivity to smoke has a common-law right to a smoke-free work environment.[118] The District of Columbia Court of Appeals rejected the theory that the common law imposes on an employer a duty to adapt working conditions to meet the particular sensitivities of an individual employee.[119] The court distinguished *Shimp* by noting that the plaintiff in *Shimp* had presented evidence that exposure to cigarette smoke posed a health threat to *all* employees.[120] In *Gorden*, however, the plaintiff failed to introduce such evidence, and without proof that smoke was a general health hazard for all workers, the common-law duty theory could not be invoked.[121]

The plaintiff's error in *Gorden* was in claiming that solely because of her own special sensitivities,[122] a smoke-filled workplace was therefore an unsafe workplace which the employer had a duty to eliminate. Yet, as the court in *Gorden* emphasized, the employer's common-law duty never included the duty to accommodate the particular sensitivities or handicaps of individual workers. Handicapped workers are afforded special protections in some instances through statutes or constitutional provisions,[123] but never through the common law.[124] *Gorden*

---

114. 462 A.2d 10 (D.C. Ct. App. 1983).

115. The Tobacco Institute proclaimed *Gorden* as part of a trend in favor of smokers' rights. Lauter, *Court Extinguishes Plea for Smoke-Free Workplace*, Nat'l L.J., June 6, 1983, at 4, col. 3.

116. The plaintiff's symptoms upon exposure to smoke included eye and nasal irritation, chest tightness, nausea, and headaches. 462 A.2d at 14.

117. *Id.* at 12.

118. *Id.* at 14.

119. *Id.*

120. *Id.* at 15.

121. *Id.*

122. The plaintiff's special sensitivities might have constituted a handicap, but the court denied the plaintiff's motion for leave to amend her complaint and include the handicapped theory. *Id.* at 12.

123. *See supra* text accompanying note 57.

was fatally flawed, then, in failing to distinguish between the common-law duty claim and the handicapped worker's claim, and in failing to support either theory effectively. When seen in this perspective, *Gorden* hardly negates the previous victories for nonsmokers' rights. The decision does, however, indicate the limitations on the right to a smoke-free workplace inherent in both causes of action.

The handicapped worker theory is of course limited to those so harmed by exposure to smoke that they are physically unable to work in a smoke-filled environment.[125] The only relevant evidence is that the individual plaintiff's health is threatened; the dangers of involuntary smoking in general are irrelevant. Because only reasonable accommodation without undue hardship is required, a handicapped plaintiff may not always find relief. This is especially true when courts refuse to consider a general prohibition on smoking as a means of reasonable accommodation. Courts may be less hesitant to issue an injunction prohibiting smoking in a common-law duty suit, where the basis of the claim is the general harm posed by smoking, than in a handicapped worker suit. Under the latter theory, the measure of relief which is proper is gauged by what is needed to protect the particular sensitivities of the employee.

Under the common-law duty theory, however, the relevant evidence shifts from the plaintiff's sensitivities to the evidence suggesting involuntary smoking is a health threat to all and that a smoke-filled workplace constitutes an unsafe workplace. The issue then raised is whether any employee, even one with no special sensitivity or adverse reaction to smoke, could pursue the right to a smoke-free workplace under the common-law duty claim. Theoretically, such a claim seems possible. However, *Shimp* and *Smith* emphasized that the plaintiff was particularly harmed by tobacco smoke. Moreover, if injunctive relief is sought, the plaintiff will have to prove that irreparable harm would result absent such an injunction. Before a nonsensitive individual could win such a claim, the evidence of the harmful effects of involuntary smoking would probably have to be far more conclusive than is the evidence existing today.

Just as the handicapped worker theory does not always afford relief, the smoke-sensitive worker may not necessarily find complete protection under the common-law duty theory either. An employer may ensure that smoke levels in the workplace do not approach those which constitute an unsafe workplace, and thus fulfill his or her duty. Yet

---

124. *See* Comment, *supra* note 46, at 655–56.

125. A further important limitation is that the handicapped worker theory can only be pursued against employers who are covered either by the Rehabilitation Act or by some state statute or constitutional provision. In contrast, the common-law duty theory may be asserted against virtually any employer.

even a negligible amount of smoke may trigger illness in the smoke-sensitive individual. Therefore, where compromise is effected in deference to smokers, the smoke-sensitive worker's problem may again be left unresolved. As long as courts are hesitant to interfere with smokers' rights,[126] neither theory guarantees protection to the smoke-sensitive worker.

V. CONCLUSION

The courts cannot fairly be accused of usurping individual freedom when they impinge upon smokers' rights, for whenever smoking threatens the health and well-being of a nonsmoker, it ceases to be an exercise of a private right and becomes instead a matter of public concern.[127] It is wholly unrealistic, moreover, to assume that the conflict between smokers and nonsmokers can always be resolved through compromise and courtesy.[128] Equity compels the courts' recognition of the nonsmoker's claim, even where protection of the smoke-sensitive worker poses a hardship on smokers. Working in a smoke-filled environment is often intolerable for smoke-sensitive workers. They cannot change their condition nor can they simply change jobs, for it is likely that they will be confronted with smokers wherever they go. In contrast, smokers faced with a smoking prohibition at work are not as vulnerable. Smokers may always give up the habit and eventually adjust to the smoke-free workplace situation.[129] Moreover, smokers may attempt to obtain employment elsewhere where they are free to smoke with little chance of confronting another smoke-sensitive individual. The courts, then, should not hesitate to intervene in ensuring that the right to smoke is never elevated above the right to work.

In recognizing the right to a smoke-free workplace, the courts are

---

126. As a matter of public policy, it is questionable how far the courts can go in good conscience to protect a habit which is a source of tremendous illness and death. *See infra* note 129.

127. The Tobacco Institute characterizes the push for nonsmokers' rights as bringing about the erosion of "personal freedoms in democratic societies." THE TOBACCO INSTITUTE, SPECIAL REPORT: SMOKING AND THE PUBLIC 1 (on file with University of Dayton Law Review). Restrictions on public smoking, however, are no more infringements on the right to smoke than restrictions on drunken driving are on the right to drink. *See* Comment, *supra* note 4, at 459.

128. The Tobacco Institute predictably argues that courtesy is the solution to the problem, for "[e]veryone is subjected to annoyances and irritations . . . [and] [n]obody wants the government to intrude in such matters." THE TOBACCO INSTITUTE, *supra* note 127, at 6.

129. Recognition of the right to a smoke-free workplace may have a desirable ancillary effect. Widespread workplace bans on smoking may eventually reduce the incidence of smoking. A significant number of lives could be saved with a reduction in the smoking population; deaths from cigarette-related diseases number over 300,000 per year among Americans. *See* BEHAVIORAL ASPECTS, *supra* note 17, at 1. At any rate, future smokers would be forewarned that one of the burdens accompanying the cigarette habit, aside from all the health risks, is a restriction on smoking in the workplace.

merely responding to a long-overlooked injustice. As often happens when a new right is claimed, the wisdom of the legislature has been lacking and the sensitivity of the public has also failed. It is the courts, then, which must become the instruments of change. The courts' actions in protecting smoke-sensitive workers, however, merely represent an adherence to the established policy that the workplace should be free from unreasonable hazards and that handicapped individuals should be brought into the workplace whenever possible.

The smoke-sensitive worker today has a strong precedential basis for claiming relief from a smoke-filled work environment. It is hoped, however, that instead of spawning a multiplicity of lawsuits, these court decisions recognizing nonsmokers' rights will encourage employers to develop their own "smoke sensitivity" by ensuring that workplace smoking never interferes with the health and comfort of nonsmoking workers. Smokers, too, may become more aware that in the workplace the right to smoke is merely a privilege which, when thoughtlessly asserted, can become easily abused. Until there is a change in employers' and smokers' attitudes, or until there is comprehensive protective legislation, however, the courts have the duty to prevent the patent injustices of the past from continuing.

Molly Cochran