

## NONSMOKERS' RIGHTS

Smokers pollute the air far and wide and asphyxiate every respectable individual who cannot smoke in self-defense.

Johann Wolfgang von Goethe (1749-1832)

From the turn of the century,<sup>1</sup> cigarette smokers<sup>2</sup> have adulterated the air<sup>3</sup> with relative impunity.<sup>4</sup> Traditional acceptance<sup>5</sup> of the to-

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1. Although cigarettes first appeared in the United States as early as 1854, historians generally acknowledge that the ten-fold increase in usage from 1900 to 1920 signaled the beginning of the cigarette's current popularity in the United States. PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *THE HEALTH CONSEQUENCES OF SMOKING FOR WOMEN* 17 (1980) [hereinafter cited as *WOMEN* 1980].

Scholars have theorized that smoking had a religious origin: skyward soaring smoke could ascend to the gods in heaven, and upon its billows carry the prayers of the supplicant. J. GOTTSEGEN, *TOBACCO—A STUDY OF ITS CONSUMPTION IN THE UNITED STATES* 107 (1940). Tobacco use did not become global until the 16th century. *Id.* at 1. For an account of the early history of tobacco usage, see S. WAGNER, *CIGARETTE COUNTRY: TOBACCO IN AMERICAN HISTORY AND POLITICS* 3-31 (1971). See also Note, *The Non-Smoker in Public: A Review and Analysis of Non-Smokers' Rights*, 7 *SAN FERN. V.L. REV.* 147-51 (1974).

2. For purposes of this Recent Development, the general topic of cigarette smoking shall include all types of tobacco products. For a discussion of the elemental components common to all forms of tobacco smoke, see PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUC. AND WELFARE, *SMOKING AND HEALTH* ch. 14 (1979) [hereinafter cited as *SMOKING* 1979].

3. Cigarette smoke is a highly complex gaseous solution comprised of over 3,000 separate elements. PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUC. AND WELFARE, *THE SMOKING DIGEST* 17 (1977) [hereinafter cited as *DIGEST* 1977]. Of these elements, confirmed hazardous materials include carbon monoxide, nicotine, and "tar." "Tar" is the particulate residue remaining after the elimination of nicotine and water. See 1972 SURGEON GENERAL'S REPORT, reprinted in R. SHEPHARD, *THE RISKS OF PASSIVE SMOKING* 18-19 (1982) [hereinafter cited as *RISKS*]. Probable health hazards include acrolein, cresol, hydrogen cyanide, nitric oxide, nitrogen dioxide, and phenol. *Id.* Possible health hazards include acetaldehyde, acetone, acetonitrile, acrylonitrile, ammonia, benzene, butadiene, butylamine, carbon dioxide, crotononitrile, demethylamine, DDT, endrin, ethylamine, formaldehyde, furfural, hydrogen sulphide, hydroquinone, methacrolein, methyl alcohol, methylamine, nickel compounds, and pyridine. *Id.* Additionally, cigarette smoke contains traces of other toxic materials such as various heavy metals, insecticides, fungicides, fungal products, and viruses. *Id.*

Cigarette smokers emit an estimated 2.25 million metric tons of gaseous and inhalable particulate matter into the indoor environment each year. Repace, *The Problem*

bacco habit<sup>6</sup> resulted in judicial and legislative reluctance to establish smoking restrictions.<sup>7</sup> Increased attention to health and fitness,<sup>8</sup>

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*of Passive Smoking*, 57 BULL. N.Y. ACAD. MED. 936 (1981). For further information on the elemental components of cigarette smoke and their effects on humans, see A. BRODY & B. BRODY, THE LEGAL RIGHTS OF NONSMOKERS 13-24 (1977) [hereinafter cited as BRODY]; Comment, *Where There's Smoke There's Ire: The Search for Legal Paths to Tobacco-Free Air*, 3 COLUM. J. ENVTL. L. 62 (1976). For the specific constituents of mainstream and sidestream smoke respectively, see RISKS, *supra*, at 34-36; DIGEST 1977, *supra*, at 24.

4. The rights of nonsmokers have only recently established legitimacy in the courts. See *infra* notes 37-117 and accompanying text. Not only have smokers traditionally enjoyed immunity from the complaints of nonsmokers, the tobacco industry has been free from any products liability that could arise from voluntary and involuntary inhalation of tobacco smoke. For an excellent discussion of proposed means by which the tobacco industry may be held liable for death, disability, and disease caused by cigarette smoking, see Garner, *Cigarette Dependency and Civil Liability—A Modest Proposal*, 53 S. CAL. L. REV. 1425-31 (1980).

5. Perhaps the best indication of public acceptance is the actual number of smokers. Although the exact number of smokers is always in flux, it is generally agreed that at least 53 million Americans are habitual smokers. PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CANCER ix (1982). Cf. N.Y. Times, Mar. 14, 1982, at 19, col. 1 (60 million); St. Louis Post-Dispatch, Mar. 7, 1983, at 1A, col. 1 (56 million) [hereinafter cited as Post].

6. Dr. William Pollin, director of the National Institute for Drug Abuse, has analogized the addiction of cigarette smokers to the dependence experienced by heroin and barbiturate users. Newmark, *Smoke Gets in Your Eyes*, St. Louis Post-Dispatch, April 24, 1983, PD (Magazine), at 9-10, col. 5. A new pamphlet released by the Office on Smoking and Health entitled "Why People Smoke Cigarettes" has labeled cigarette smoking as "the most widespread example of drug dependence" in the nation. The pamphlet specifically identifies the addictive quality of nicotine as creating the dependence despite public knowledge of the health hazards associated with smoking. Post, *supra* note 5, at 1A, col. 1.

Reasons for continued smoking include a sense of increased stimulation, the satisfaction of handling items, an accentuation of pleasure and relaxation, the reduction of negative feelings, and the infamous "craving" or psychological addiction. DIGEST 1977, *supra* note 3, at 5. Whatever reason is offered for perpetuating the habit, public polls perhaps best illustrate the desire of smokers to quit. In one such poll, 66% of the smokers surveyed stated they would like to quit smoking. Eighty-three percent indicated they have tried to quit. Of these smokers who attempted to quit, approximately 29% resumed smoking after one week, and only 25% quit for six months before succumbing to the tobacco habit. *Gallup Smoking Audit*, 190 GALLUP REPORTS 2-3, 5 (July 1981) [hereinafter cited as GALLUP 1981].

7. For a comparison of the number of restrictive smoking bills introduced to the actual number of laws passed, see PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUC. AND WELFARE, STATE LEGISLATION ON SMOKING AND HEALTH at 6-9 (1980) [hereinafter STATE LEGISLATION 1980]; PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUC. AND WELFARE, STATE LEGISLATION ON SMOKING AND HEALTH, at 6-9 (1975). See also Repace, *supra* note 3, at 941.

8. A 1978 public opinion poll showed that 47% of Americans participated in a

however, has prompted an apparent decrease in both the cigarette consumption rate<sup>9</sup> and public tolerance of unwelcome cigarette smoke.<sup>10</sup> In 1972, the Surgeon General warned the American public of the health risks associated with passive smoking,<sup>11</sup> the involuntary

physical activity. This figure is nearly twice the result (24%) obtained for the same question in a 1961 poll. *Living*, 151 THE GALLUP OPINION INDEX 10 (Feb. 1978). A recent poll indicated that health was one of the top two concerns in 81% of those surveyed. *What's Important to Americans?*, 198 GALLUP REPORTS 4-5 (Mar. 1982). See generally R. CATALANO, HEALTH, BEHAVIOR AND THE COMMUNITY: AN ECOLOGICAL PERSPECTIVE (1979); K. NEWELL, HEALTH BY THE PEOPLE (1975).

9 A 1981 poll showed cigarette consumption decreased to less than one pack per day for 38% of those surveyed, and the number of persons smoking one to two packs per day fell to 59%. GALLUP 1981, *supra* note 6, at 2. Smokers of more than two packs per day declined from 13% in 1977 to just 2% in 1981. *Id.*

Cigarette consumption increased from 665 cigarettes per capita in 1920 to 3,522 by 1950. In the early 1950's, the suspected link between cigarettes and cancer caused a per capita decline. The introduction of the "filter tipped" cigarette caused consumption to peak at 4,336 cigarettes per capita in 1963. The 1964 Surgeon General's report launched a continued decline that has persisted to date. Since 1975, per capita consumption has declined at an average rate of 1.4% annually. WOMEN 1980, *supra* note 1, at 21. See also S. WAGNER, *supra* note 1, at 39-44; H. DIEHL, TOBACCO AND YOUR HEALTH: THE SMOKING CONTROVERSY 10-14 (1969).

10. See Donahue & Capshaw, *The Great American Smoking Survey*, AM. LUNG ASSOC BULL., Sept. 1977, at 4. The Donahue-Capshaw survey focused on whether segregated areas should be established in public places for nonsmokers. While 78% of the nonsmokers and 73% of the ex-smokers expressed a preference for the proposal, a surprising 68% of the current smokers polled also replied in the affirmative. Of the current smokers surveyed, 41% conceded that they were bothered by other smokers' smoke. *Id.*

The 1981 Gallup poll indicated the attitude of nonsmokers and smokers towards public smoking has changed. Finding heavy pollution by cigarette smoke unacceptable, both groups urged a more restrictive smoking policy. GALLUP 1981, *supra* note 6, at 3. Of those surveyed, 46% favored a tax increase on cigarettes compared to 38% in 1977. Forty-six percent favored a complete ban of cigarette advertisements, compared to 36% in 1977. *Id.* Although the percentage favoring a total ban on advertising has increased, the percentage in favor of a ban on all cigarette sales has maintained its 20% level since 1977. *Id.* at 3, 17.

11 PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUC. AND WELFARE, SMOKING AND HEALTH 117-35 (1972) [hereinafter cited as SMOKING 1972].

Passive smoking is as old as smoking itself. It occurs when one who is not presently smoking is forced to breathe a smoker's tobacco fumes. SMOKING 1979, *supra* note 2, at chs. 11-15; DIGEST 1977, *supra* note 3, at 23; Note, *supra* note 1, at 141, 144 n.29.

In this Recent Development the term "passive smoker" describes a person in the process of involuntarily breathing smoke from another person's cigarette. The term "nonsmoker" will be used to refer to those persons who are not presently smokers or in the act of passive smoking.

The passive smoker suffers in various ways from the smoke emitted from a cigarette. Mainstream smoke is first inhaled by the smoker through the cigarette before it is exhaled into the air. RISKS, *supra* note 3, at 34. This type of smoke may be filtered

inhalation of tobacco smoke. Bolstered by overwhelming scientific data,<sup>12</sup> an active nonsmoker's movement has surfaced<sup>13</sup> to assert the fundamental right to breathe smoke-free air.

Nonsmokers are actively seeking legal remedies for injuries in-

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as many as three times, depending on the individual smoker. The first filter would be contained in the cigarette itself, if a filter tip variety is selected. The second filtering process occurs within the inside membranes of the smoker's mouth. The effectiveness of this filtering process depends on the amount of time the smoke is actually contained within the mouth before expulsion. The smoker's lungs provide the third filter. The lungs' filtering efficiency is directly related to their general health. For specific figures on the filtering ability of the mouth and lung, see Dalhamn, Edfors & Rylander, *Retention of Cigarette Smoke Components in Human Lungs*, 17 ARCHIVES ENVTL. HEALTH 746 (1968); Dalhamn, Edfors & Rylander, *Mouth Absorption of Various Compounds in Cigarette Smoke*, 16 ARCHIVES ENVTL. HEALTH 831 (1968).

Sidestream smoke is completely unfiltered smoke emitted primarily from the burning cone of the cigarette. PUBLIC HEALTH SERVICE, HEALTH SERVICE AND MENTAL HEALTH AD., U.S. DEP'T OF HEALTH, EDUC. AND WELFARE, THE HEALTH CONSEQUENCES OF SMOKING—A REPORT OF THE SURGEON GENERAL 122 (1972). Since sidestream smoke is unfiltered, this smoke constitutes a greater health hazard to the passive smoker. PUBLIC HEALTH SERVICE, CENTER FOR DISEASE CONTROL, U.S. DEP'T OF HEALTH, EDUC. AND WELFARE, THE HEALTH CONSEQUENCES OF SMOKING 88-89 (1975). See also BRODY, *supra* note 3, at 121; Note, *The Resurgence and Validity of Anti-Smoking Legislation*, 7 U.C.D. L. REV. 175, 175-76 (1974).

Although sidestream smoke comprises approximately 95% of the remaining air contamination after the mainstream source, there are other discrete sources which also deleteriously affect the passive smoker. See RISKS, *supra* note 3, at 34. Smolder stream smoke emanates from the "butt" end of the cigarette between draws. Glow-stream smoke is emitted from the cone of the cigarette during draws. Effusion stream smoke escapes along the length of the cigarette paper between draws, while diffusion stream smoke escapes through the cigarette paper between draws. *Id.*

12. The 1964 Surgeon General's Report is credited with first confirming the health risks associated with smoking. PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUC. AND WELFARE, SMOKING AND HEALTH (1964) [hereinafter cited as SMOKING 1964]. The Surgeon General and his committee unanimously agreed that "[c]igarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." *Id.* at 33. The Surgeon General's Report further specified the link between cigarette smoking and cancer. *Id.* at 31. See also S. WAGNER, *supra* note 1, at 130-31.

Following the 1964 Report linking cigarette smoking to adverse health effects, subsequent reports expanded upon the hazards associated with cigarette smoke. The Surgeon General's Report of 1972 is particularly noteworthy in that the Report stated for the first time the danger to passive smokers of inhaling smoke from a burning cigarette. SMOKING 1972, *supra* note 11, at 117-35. While recognizing the need for continued research, the 1972 report acknowledged the probable existence of a health hazard to the passive smoker. *Id.* For a summarization of the 1972 report, see Steinfeld, *The Public's Responsibility: A Bill of Rights for the Non-Smoker*, 55 R.I. MED. J. 124-25 (1972). The 1975 and 1979 reports of the Surgeon General offer additional corroboration concerning the health hazards to the active and passive smoker alike. See PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUC. AND WELFARE, THE

flicted by cigarette smokers.<sup>14</sup> Additionally, the nonsmokers' movement has encouraged the enactment of federal and state legislation restricting smoking activities.<sup>15</sup> Although legislative restrictions are briefly discussed, this Recent Development will address principally the present line of judicial decisions expanding the legal rights of passive smokers in the work place.<sup>16</sup>

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HEALTH CONSEQUENCES OF SMOKING: A REPORT TO THE SURGEON GENERAL (1975); SMOKING 1979, *supra* note 2, at ch. 7.

The information contained in these reports is primarily responsible for the increased acknowledgment of the dangers associated with cigarette smoking. A government poll conducted after the public had time to digest the contents of the 1964 report showed that 80.8% of those surveyed believed there was a health hazard associated with cigarettes. PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUC. AND WELFARE, USE OF TOBACCO (1969). That figure rose to 81.5% in 1966. *Id.* By 1970, the confirmed belief jumped to 87.5%. PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUC. AND WELFARE, ADULT USE OF TOBACCO (1973). A 1978 private poll revealed 90% of those surveyed believed smoking was harmful to one's health. *Smoking in America*, 155 THE GALLUP OPINION INDEX 21 (June 1978).

The relationship between smoking, cardiovascular, respiratory, and cancer conditions is well documented by voluminous reports. *See Note, supra* note 12, at 175-76. *See also* BRODY, *supra* note 3, at 13-34. Government studies link nicotine to the onset of heart attacks. These same studies have identified carcinogenic qualities when nicotine is combined with cigarette tars. *Post, supra* note 5, at 11A, col. 4. A recent study on low-nicotine cigarettes revealed that the higher risk of heart attacks is unrelated to a reduced amount of nicotine. *St. Louis Post-Dispatch*, Feb. 24, 1983, at 2A, col. 2. In recognition of these scientific findings, courts have taken judicial notice of the deleterious quality of cigarette smoke. *See infra* note 44 and accompanying text.

13. Active public interest groups have become effective lobbyists for legislation restricting smoking activities. Action on Smoking and Health (ASH) focuses primarily on smoking issues concerning federal regulatory agencies. In a local capacity, Group Against Smokers' Pollution (GASP) concentrates its efforts on state legislation controlling public smoking. Sapolsky, *The Political Obstacles to the Control of Cigarette Smoking in the United States*, 5 J. OF HEALTH, POL., POL'Y & L., 277-86 (1980). *See also Note, supra* note 1, at 151. For a state-by-state listing of organizations supporting nonsmokers' rights, *see* BRODY, *supra* note 3, at 218-32.

14. Besides seeking injunctions against employers to prohibit smoke in the work environment, nonsmokers may also bring civil lawsuits for monetary damages and disability benefits. The availability of a tort remedy is perhaps the most effective method of protecting the rights of passive smokers. *See Note, supra* note 1, at 154-58.

15. *See infra* notes 17-36 and accompanying text. *See generally* A. FRITSCHLER, SMOKING AND POLITICS: POLICYMAKING AND THE FEDERAL BUREAUCRACY (1969).

16. The Supreme Court has twice declined to review nonsmokers' rights cases. *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); *Gasper v. Louisiana Stadium & Exposition Dist.*, 577 F.2d 897 (5th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979).

## I. LEGISLATIVE RESTRICTIONS

### A. *Federal Legislation*

In 1965, the federal government officially recognized the health hazards inherent in cigarette smoking by requiring health risk warnings on cigarette packages.<sup>17</sup> The enactment of the Public Health Cigarette Smoking Act in 1970 strengthened the warning required on cigarette packages.<sup>18</sup> In 1976, Congress promulgated legislation banning cigarette advertising on television and radio.<sup>19</sup> Regulations restricting smoking on trains,<sup>20</sup> buses,<sup>21</sup> and airplanes<sup>22</sup> became commonplace during the 1970's as the public's attitude toward cigarette smoking became less complacent.<sup>23</sup> The federal government now restricts smoking in federal buildings by prohibiting smoking in elevators, auditoriums, and conference rooms lacking sufficient ventilation.<sup>24</sup>

Controlling the sale and distribution of tobacco products constitutes another method of limiting the public's exposure to cigarette

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17. Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, § 4, 79 Stat. 282, 283 (1965) (prior to the 1970 Amendment) (Caution: Cigarette Smoking May Be Hazardous to Your Health).

18. 15 U.S.C. §§ 1331-1340 (1982). The Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 2, 84 Stat. 87, 88 (1970), mandated a clear warning on cigarette packages, "Warning: The Surgeon General Has Determined that Cigarette Smoking Is Dangerous To Your Health." 15 U.S.C. § 1333 (1982). The 1969 Act replaced the milder statement mandated by the original 1965 Federal Cigarette Labeling and Advertising Act. *See supra* note 17.

The tobacco industry initially lobbied to halt the enactment of the federal labeling legislation. The effort soon ceased, principally due to the realization that an adequate warning on cigarette packages might establish an assumption of risk defense against potential litigants. *See Sapolsky, supra* note 13, at 283. *See generally* S. WAGNER, *supra* note 1, at 190-216.

19. 15 U.S.C. § 1335 (1982). The legislation provides, in pertinent part: "After January 1, 1971, it shall be unlawful to advertise cigarettes on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission." *Id.*

20. Limitation of Smoking on Interstate Passenger Carrier Vehicles, 49 C.F.R. § 1061 (1983). *See Note, supra* note 11, at 186-87.

21. The Interstate Commerce Commission limits smoking passengers to the back 30% of the seating capacity of a bus. 49 C.F.R. § 1061 (1983).

22. The Civil Aeronautics Board has restricted smoking to the back section of a passenger aircraft. Smoking Aboard Aircraft, 14 C.F.R. § 252 (1983).

23. *See RISKS, supra* note 3, at 109.

24. 32 C.F.R. 203 (1983). *See BRODY, supra* note 3, at 201-03. *See also* RISKS, *supra* note 3, at 127.

smoke.<sup>25</sup> Congress has been reluctant, however, to give federal regulatory agencies control over tobacco products. The regulation of tobacco products is specifically prohibited under several statutes.<sup>26</sup> Because of federal preemptions, states may not regulate tobacco products.<sup>27</sup> Nevertheless, many state legislatures have attempted to control passive smoking by enacting laws limiting cigarette smoking in public places.

### B. *State Legislation*

The Center for Disease Control has recorded state legislative activity on smoking and health since 1975.<sup>28</sup> From 1975 to 1980, state legislatures considered 1,788 bills pertaining to smoking and tobacco products.<sup>29</sup> Nearly one-third of the total bills introduced dealt with limitations on smoking.<sup>30</sup> By the end of 1980, thirty-four states<sup>31</sup> and the District of Columbia had passed laws limiting smoking in certain

25. Repace, *supra* note 3, at 941.

26. Regulation of tobacco products is specifically proscribed under the Federal Hazardous Substances Act, § 18, 15 U.S.C. § 1261 (1982); the Consumer Product Safety Act, § 3, 15 U.S.C. § 2052 (1982); and the Fair Packaging and Labeling Act, § 10, 15 U.S.C. § 1459 (1982).

27. U.S. CONST. art. VI (preemption clause).

28. See STATE LEGISLATION 1980, *supra* note 7, at 1.

29. See *id.* at 82.

#### *Total Legislation*

<u>Year</u>	<u>Base Number of States*</u>	<u>Introduced</u>	<u>Passed</u>
1975	48	423	60
1976	41	215	23
1977	48	392	44
1978	38	220	26
1979	48	346	39
1980	33	192	26
Total		1788	218

\*Total number of states (50) less the number of states not convening and the number of states not introducing smoking and health legislation.

*Id.*

30. *Id.*

areas to reduce the problem of passive smoking.<sup>32</sup>

Notwithstanding common features,<sup>33</sup> state smoking laws vary significantly with respect to the scope of prescribed limitations<sup>34</sup> and the

<i>Limitation Legislation</i>			
<u>Year</u>	<u>Base Number of States*</u>	<u>Introduced</u>	<u>Passed</u>
1975	48	138	18
1976	41	68	4
1977	48	133	12
1978	38	56	8
1979	48	116	7
1980	33	49	1
Total		560	50

\*Total number of states (50) less the number of states not convening and the number of states not introducing smoking and health legislation.

*Id.*

31. The states that have passed smoking restrictions are: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, and Washington. See Note, *The Legal Conflict Between Smokers and Nonsmokers: The Majestic Vice Versus the Right to Clean Air*, 45 MO. L. REV. 444, 450 (1980).

32. *Id.*

33. The American Lung Association has identified four components commonly associated with legislation restricting smoking: 1) the definition of ambiguous terms (e.g., public place); 2) a requirement that potential violators are adequately warned of the regulations in effect; 3) clear delegation of official scope of authority; 4) designation of appropriate penalties. DIGEST 1977, *supra* note 3, at 83.

34. For an expanded discussion of the various state smoking acts including their respective penalty provisions, see Note, *supra* note 31, at 453-58. See also STATE LEGISLATION 1980, *supra* note 7, at 16-79; BRODY, *supra* note 3, at 154-200.

Minnesota is presently the only state to enact limitations on smoking in the work place by guaranteeing a smoke-free environment to any employee requesting accommodation. At the local level, however, several cities limit smoking in the work environment. San Francisco recently approved an ordinance, Proposition P, regulating smoking in the office work place. The ordinance provides that employers permitting employees to smoke in the work area must accommodate the preferences of both nonsmoking and smoking employees. If the nonsmoking employees prefer a ban on smoking, employers must honor the request or face fines up to \$500 per day. In addition to private offices, the law applies to such work places as hospitals, libraries, medical waiting rooms, museums, and even the locker room of the San Francisco 49ers at Candlestick Park. St. Louis Globe Democrat, Nov. 11, 1983, § D, at 4, col. 1.

In an attempt to protect "captive" employees from tobacco smoke, the town of Palo Alto, California, recently enacted a law prohibiting the smoking of cigarettes, cigars,



extent of enforcement.<sup>35</sup> The lack of comprehensive no-smoking prohibitions, coupled with limited state enforcement, has forced passive smokers to seek judicial relief.<sup>36</sup>

## II. TRADITIONAL JUDICIAL RESPONSE TO NONSMOKERS' CLAIMS

Several legal theories have served as foundations for recovery for

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and pipes in hallways, meeting rooms, restrooms, elevators, auditoriums, and classrooms located at the work site. Additionally, customers seeking indoor services such as banking must extinguish smoking materials before entering lines. Violators of the law are subject to fines up to \$250. *St. Louis Post Dispatch*, Nov. 6, 1983, § A, at 19, col. 4.

In the private sector, International Business Machines Corporation (IBM) and the Martin Marietta Corporation provide separate offices and cafeterias for nonsmokers and smokers. *Repace*, *supra* note 3, at 941. The Dow Chemical Company offers financial incentives to employees who quit smoking. *Id.* Merle Norman Cosmetics prohibits smoking by employees and then gives the money saved from sick leave and increased productivity to the employees as bonuses. *Id.*

35. *See* Comment, *supra* note 3, at 106. *See also* DIGEST 1977, *supra* note 3, at 84-85. *But see* Note, *supra* note 31, at 458 (prosecution in Florida for a blatant violation of a "no-smoking in elevator" ordinance).

36. Passive smokers have a variety of self-help options available to persuade a smoker to abide by restrictive smoking statutes. Self-help remedies may be used with equal vigor in jurisdictions that have no such restrictive regulations.

The "polite request" technique is advocated by the Tobacco Institute. *BRODY*, *supra* note 3, at 127. The stereotype of complaining nonsmokers as self-righteous and disagreeable, however, has dissuaded many from the "polite request." Irrespective of the above concern, the recommendation remains that the irritated passive smoker "look doleful, gasp a bit, and say, 'could I please ask you to do me the favor of putting out your cigarette as I have bronchitis, emphysema, and a bad heart.'" *Id.* at 126. Although the end product of the passive smoker's gesture may well be voluntary compliance, something is inherently wrong when the burden is placed upon the victim to rely upon the sympathy of the intruder.

Adding to the difficulties associated with the "polite request" is the typical hesitancy of persons to ask someone to stop doing something they obviously enjoy. *Id.* at 127. This hesitancy is increased when the passive smoker considers that approximately one out of every fifteen smokers becomes hostile upon a "polite request" to not smoke. *Id.* For horror stories concerning indignant smokers, see *id.* at 127-28.

The desire to avoid creating a scene has contributed to the development of techniques of persuasion. Included are dirty looks directed at the offender, opening up windows and doors, and the use of anti-smoking buttons and bumper stickers. *Id.* A particularly amusing remedy has been practiced by a nonsmoker who opens a bottle of ammonia to overwhelm the onslaught of cigarette smoke in closed quarters. Note, *supra* note 11, at 180 n.78.

Despite the willingness of most smokers to extinguish their cigarettes upon request, the unfortunate truth is that the vast majority of passive smokers will continue to suffer in silence rather than express their discomfort.

injury inflicted by passive smoking.<sup>37</sup> In the landmark decision of *Shimp v. New Jersey Bell Telephone Company*,<sup>38</sup> the Superior Court of New Jersey recognized the traditional common law duty of an employer to provide a "safe and healthful" working environment.<sup>39</sup> In *Shimp*, the plaintiff, a nonsmoking employee, brought an action for an injunction against New Jersey Bell alleging that the company's failure to impose a ban against cigarette smoking created a health hazard.<sup>40</sup> The employee presented medical affidavits demonstrating his adverse allergic reaction to cigarette smoke.<sup>41</sup> The company had previously installed an exhaust fan in the employee's work area;<sup>42</sup> however, the fan proved ineffective in alleviating the smoke-contaminated air.<sup>43</sup>

Acknowledging the hazards of cigarette smoke,<sup>44</sup> the *Shimp* court held that the telephone company wrongfully subjected the nonsmok-

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37. For a good discussion of the various legal theories that might be employed by a passive smoker, see Note, *supra* note 31, at 461-75. See generally Note, *Smokers v. Nonsmokers: The Common Law Right to a Smoke-Free Work Environment*, 48 Mo. L. REV. 783 (1983) [hereinafter cited as Note, *Smokers v. Nonsmokers*].

38. 145 N.J. Super. 516, 368 A.2d 408 (App. Div. 1976). For additional insight concerning the *Shimp* decision as well as an analysis of the employee versus employer smoking claim, see Note, *Torts—Nonsmokers' Rights—Duty of Employer to Furnish Safe Working Environment Will Support Injunction Against Smoking in the Work Area*, 9 TEX. TECH. L. REV. 353 (1977); Note, *Torts—Occupational Safety and Health—Employee's Common Law Right to a Safe Workplace Compels Employer to Eliminate Unsafe Conditions*, 30 VAND. L. REV. 1074 (1977).

39. 145 N.J. Super. at 521, 368 A.2d at 410.

40. *Id.* at 520, 368 A.2d at 409.

41. *Id.* at 520-21, 368 A.2d at 410. After noting that plaintiff's allergic reaction was verified by physician's affidavits, the court described plaintiff's symptoms upon passive smoking as "severe throat irritation, nasal irritation sometimes taking the form of nosebleeds, irritation to the eyes which has resulted in corneal abrasion and corneal erosion, headaches, nausea and vomiting." *Id.* at 521, 368 A.2d at 410.

42. *Id.*

43. *Id.* The fan proved unsuccessful because complaints of cold drafts prevented continuous operation. *Id.*

44. *Id.* at 530-31, 368 A.2d at 415. Taking judicial notice of the health hazards of cigarette smoke, the *Shimp* court stated:

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.

*Id.*

ing employee to an unsafe working environment by compelling the employee to inhale sidestream cigarette smoke.<sup>45</sup> The New Jersey court distinguished natural by-products produced by the business operation from unnecessary by-products.<sup>46</sup> Noting that cigarette smoke was an unnecessary by-product of operating a telephone company, the *Shimp* court concluded that the employee had not assumed the risk of cigarette smoke as an occupational hazard by accepting employment.<sup>47</sup> Recognizing the need to balance both nonsmokers' and smokers' rights, the New Jersey court ordered the telephone company to prohibit cigarette smoking,<sup>48</sup> except in the cafeteria and lounge areas.<sup>49</sup> Thus, the *Shimp* court established a smoke-free working environment while still maintaining smoking areas.<sup>50</sup>

Although *Shimp* represented a major breakthrough for non-smokers, the question remained whether other courts would follow the New Jersey precedent. In 1978, the United States District Court for the District of Columbia had an opportunity to address the issue of passive smokers' rights. In *Federal Employees for Non-Smokers'*

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45. *Id.* at 517, 368 A.2d at 408.

46. *Id.* at 523, 368 A.2d at 411.

47. *Id.* The court distinguished the situation in *Shimp* from that presented in *Canonico v. Celanese Corp. of Am.*, 11 N.J. Super. 445, 78 A.2d 411 (App. Div. 1951), *cert. denied*, 7 N.J. 77 (1951). In *Canonico*, the court found the employee assumed the risk of breathing pulverized cellulose acetate material. The court indicated that the acetate dust was a necessary result of the operation of his employer's business. *See id.* at 454-55, 78 A.2d at 416-17. In *Shimp*, however, only necessary office supplies were deemed the natural by-products of plaintiff's work. 145 N.J. Super. at 523, 368 A.2d at 411. The court concluded that cigarette smoke could not "be regarded as an occupational hazard which plaintiff has voluntarily assumed in pursuing a career as a secretary." *Id.*

The *Shimp* court further distinguished the *Canonico* decision by noting cellulose dust was not inherently harmful, whereas cigarette smoke was a "nonnecessary toxic substance." *Id.* at 524, 78 A.2d at 411 (emphasis added).

48. *Id.* at 523, 368 A.2d at 411 (there is no need to fill a telephone company with smoke in order to conduct business).

49. *Id.* at 531, 368 A.2d at 416 (the nonsmoking employee has a right to a safe working environment, but the smoking employees have the right to smoke on their own time, during coffee breaks and lunch).

50. *Id.* The *Shimp* court also indicated that prohibiting smoking in the work area imposed no hardship on New Jersey Bell because they already had a rule forbidding smoking near the telephone equipment. The rationale for not allowing smoking near the equipment was to protect the sensitive machinery. The court noted that the human body is also very sensitive and that it is easier to replace a machine part than a human lung. *Id.*

*Rights (FENSR) v. United States*,<sup>51</sup> several organizations opposed to smoking joined with non-smoking employees of the federal government in a suit against the United States for permitting smoking in federal buildings.<sup>52</sup> Although claiming injury from accumulated tobacco smoke, the plaintiffs failed to offer any evidence of adverse effects. The complaint alleged that by allowing smoking in federal buildings, the federal government had violated the Occupational Safety and Health Act,<sup>53</sup> the first<sup>54</sup> and the fifth<sup>55</sup> amendments to the Constitution, and the common law duty of providing employees with a safe and healthful workplace.<sup>56</sup> Based on these allegations, the plaintiffs sought an injunction restricting smoking to certain areas in federal buildings outside work environments.<sup>57</sup>

The district court made two findings. First, it found that employees do not have a private right of action against federal employers under the Occupational Safety and Health Act.<sup>58</sup> Second, the court concluded plaintiffs failed to state a cause of action sufficient for granting relief under the first or fifth amendments.<sup>59</sup> The court refused to expand its reading of the Constitution to protect nonsmokers from inhaling tobacco smoke.<sup>60</sup>

The court added that environmental concerns such as seeking

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51. 446 F. Supp. 181 (D. D.C. 1978), *aff'd*, 598 F.2d 310 (D.C. Cir.), *cert. denied*, 444 U.S. 926 (1979).

52. 446 F. Supp. at 182.

53. 29 U.S.C. § 668(a) (1982).

54. U.S. CONST. amend. I (right to petition for redress of grievances).

55. U.S. CONST. amend. V (denial of life, liberty and property without due process of law).

56. 446 F. Supp. at 182.

57. *Id.*

58. *Id.* at 183.

59. *Id.* at 183-84. In reaching the conclusion that the plaintiffs did not have a cause of action under the Constitution, the court in *FENSR* expressly agreed with the analysis given in *Gasper v. Louisiana Stadium & Exposition Dist.*, 418 F. Supp. 716 (E.D. La. 1976), *aff'd*, 557 F.2d 897 (5th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979). The plaintiffs in *Gasper* had requested a prohibition on smoking during events in the Superdome because of adverse health effects caused by exposure to cigarette smoke. 418 F. Supp. at 717. They claimed their first, fifth and fourteenth amendment rights were violated by allowing smoking in the arena. *Id.* at 718. The *Gasper* court rejected the argument, stating that "[f]or the Constitution to be read to protect nonsmokers from inhaling tobacco smoke would be to broaden the rights of the Constitution to limits heretofore unheard of . . ." *Id.* at 722.

60. See *FENSR*, 446 F. Supp. at 185.

smoke-free air are issues better suited for legislative consideration since they affect the public interest.<sup>61</sup> The court further noted, without deciding the issue, that even if there were a common law cause of action, the court might not have jurisdiction to hear the claim.<sup>62</sup> Thus, the court denied relief to the federal employees.<sup>63</sup>

In *FENSR*, the district court addressed only the nonsmokers' constitutional and statutory claims for relief. A year later, the North Carolina Court of Appeals analyzed nonsmokers' rights using a different legal theory—tort. In *McCracken v. Sloan*,<sup>64</sup> the court denied relief to a postal employee for alleged assault and battery suffered when a co-worker smoked cigars in the plaintiff's presence.<sup>65</sup> The court held that neither the fear of smelling tobacco smoke nor the actual inhalation constituted an assault and battery.<sup>66</sup> In addition, there was no evidence that the smoke injured the plaintiff.<sup>67</sup> The court found that an apprehension of tobacco smoke is a fear one simply has to endure in a crowded world.<sup>68</sup>

In summary, after their initial victory in *Shimp*, nonsmokers suffered a temporary setback when the courts refused to recognize a constitutional basis for requesting restrictions on smoking in the work environment.<sup>69</sup> At the same time, nonsmokers discovered that OSHA did not cover their claims.<sup>70</sup> In addition, assault and battery proved to be a meritless contention.<sup>71</sup> For two years no new smoking cases were adjudicated. Then, beginning in 1981, several cases were heard involving employees who were once again asserting a right to a smoke-free work environment.

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61. *Id.*

62. *Id.* at 185-86.

63. *Id.* at 186.

64. 40 N.C. App. 214, 252 S.E.2d 250 (1979).

65. *Id.* at 215, 252 S.E.2d at 251. The fellow employee who smoked was the postmaster. The two occurrences allegedly took place in the postmaster's office when the plaintiff came there requesting sick leave because of his allergy to tobacco smoke. *Id.*

66. *Id.* at 217, 252 S.E.2d at 252.

67. *Id.* The plaintiff was allergic to tobacco smoke, but there was no proof that the two alleged incidents caused the plaintiff physical injury. *Id.*

68. *Id.*

69. *See supra* notes 59-60 and accompanying text. *See also* *Kensell v. Oklahoma*, 716 F.2d 1350 (10th Cir. 1983).

70. *See supra* note 58 and accompanying text. *See also* Note, *Smokers v. Nonsmokers*, *supra* note 37, at 786-89.

71. *See supra* note 66 and accompanying text.

### III. RECENT DECISIONS

In *Smith v. Western Electric*,<sup>72</sup> the Missouri Court of Appeals held that an injunction constituted the appropriate means to preclude an employer from exposing an employee to cigarette smoke in the work place.<sup>73</sup> Adopting the *Shimp* rationale,<sup>74</sup> the *Western Electric* court relied on the established Missouri principle that an employer owes a duty to the employee to provide a safe working environment.<sup>75</sup>

The plaintiff in *Western Electric* was a nonsmoking employee who sought injunctive relief against his employer. The plaintiff alleged the electric company breached its duty to provide a safe work place by permitting cigarette smoking in the work area.<sup>76</sup> Working with fellow smoking employees in an open office, the employee began to experience serious discomfort.<sup>77</sup> Medical examinations revealed that the employee suffered from a severe adverse reaction to cigarette smoke. The employee allegedly informed Western Electric of his deteriorating health caused by exposure to cigarette smoke.<sup>78</sup> The electric company changed the employee's work area on several occasions; however, each new work location contained significant amounts of

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72. 643 S.W.2d 10 (Mo. Ct. App. 1982).

73. *Id.* at 13.

74. Not all jurisdictions have looked favorably upon the *Shimp* decision. In *Gordon v. Raven Sys. & Research, Inc.*, 462 A.2d 10 (D.C. 1983), the Superior Court for the District of Columbia rejected the *Shimp* precedent and granted the defendant employer's motion for directed verdict. *Id.* at 15. The *Raven* court, in reviewing the District of Columbia's Air Pollution Act (D.C. CODE ANN. § 6-902 (1980)) and the Occupational Safety and Health Act laws (D.C. CODE ANN. §§ 36-401 to 36-442 (1966)), concluded that there was neither a common-law duty nor a statute requiring a smoke-free work environment. 462 A.2d at 14-15. As similarly expressed in FENSR, *supra* notes 51-63, the *Raven* court also indicated that the legislature is the appropriate body to resolve the problem of an unhealthy work environment. *See* 462 A.2d at 14.

75. 643 S.W.2d at 12. *See* *Todd v. Watson*, 501 S.W.2d 48, 50 (Mo. 1973) (employer held liable for bricklayer's injuries because of failure to provide reasonably safe working conditions at construction site); *Hightower v. Edwards*, 643 S.W.2d 273, 275 (Mo. 1969) (en banc) (employer held liable for failing to provide reasonably safe work place when employee was injured after falling into unprotected hopper of fertilizer).

76. 643 S.W.2d at 11-12.

77. Plaintiff's adverse reaction included the following symptoms: "sore throat, nausea, dizziness, headaches, blackouts, loss of memory, difficulty in concentration, aches and pains in joints, sensitivity to noise and light, cold sweat, gagging, choking sensations and lightheadedness." *Id.* at 12.

78. *Id.*

cigarette smoke.<sup>79</sup> Following a recommendation by the National Institute for Occupational Safety and Health,<sup>80</sup> Western Electric adopted a plan to separate nonsmokers from smokers in the work place.<sup>81</sup> The plan, however, was never implemented.<sup>82</sup>

The court of appeals reversed the trial court's dismissal of the plaintiff's petition and remanded with instructions that injunctive relief would be appropriate if the plaintiff prevailed on his claim.<sup>83</sup> The court noted that cigarette smoke in the work area constituted a serious health hazard to all company employees.<sup>84</sup> Finding that Western Electric failed to eliminate the known hazardous conditions caused by cigarette smoke,<sup>85</sup> the court concluded that the electric company breached its duty to secure a safe working environment.<sup>86</sup>

The courts in both *Shimp* and *Western Electric* premised their holdings on the common law theory of the employer's duty to provide safe working conditions.<sup>87</sup> The holdings in both decisions suggest cigarette smoke that is not a necessary by-product of the business operation<sup>88</sup> constitutes a per se unsafe working condition, thereby subjecting the employer to liability. Contrary to the analysis in *Shimp*, however, the *Western Electric* court failed to balance nonsmokers' interests against smokers' interests in determining whether an injunction prohibiting smoking constituted an appropriate means

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79. *Id.*

80. *Id.* The Occupational Safety and Health Act of 1970, *codified at* 29 U.S.C. §§ 651-678 (1982), established the National Institute for Occupational Safety and Health to develop safety standards and to implement sections 669 and 670 of the Act. *Id.* § 671.

81. 643 S.W.2d at 12. Western Electric adopted a policy "protecting the rights of both smokers and nonsmokers" by separating them into different work areas. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 13.

85. *Id.*

86. *Id.* The *Western Electric* court expressly recognized that an employer can be found to have breached a duty to provide a safe workplace only if he knows the tobacco smoke is harmful to the employee's health and he has the "authority, ability, and reasonable means" to remedy the smoking problem in the work environment. *Id.* The court of appeals reversed the trial court's dismissal of plaintiff's petition and remanded with instructions that injunctive relief would be appropriate if the plaintiff prevailed on his claim. *Id.*

87. See *supra* notes 45, 85 and accompanying text.

88. 643 S.W.2d at 12. See *supra* notes 46-47 and accompanying text.

to provide a safe work place.<sup>89</sup>

A new theory for recovery for injuries sustained from passive smoking emerged shortly after *Western Electric*. In *Parodi v. Merit Systems Protection Board and Office of Personnel Management*,<sup>90</sup> the Ninth Circuit Court of Appeals held that an employee's allergic reaction to cigarette smoke constituted an environmental disability,<sup>91</sup> thus entitling the employee to disability benefits.<sup>92</sup>

In *Parodi*, the appellant, a nonsmoking employee of a federal agency, transferred to an office occupied by several smoking co-workers.<sup>93</sup> Exposed to continuous cigarette smoke, the employee began to experience serious health effects.<sup>94</sup> Upon her doctor's recommendation, the employee remained home from work. Soon afterwards she filed for disability retirement benefits.<sup>95</sup> Finding the employee hypersensitive to cigarette smoke, the agency's doctors concluded that her return to the same work environment would prove

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89. See *supra* note 49 and accompanying text. In *Western Electric*, the National Institute for Occupational Safety and Health had recommended a balancing plan, but it was never implemented. See *supra* notes 79-81.

90. 690 F.2d 731 (9th Cir. 1982).

91. *Id.* at 738.

92. *Id.* at 740. Although the courts had never labeled a sensitivity to cigarette smoke as an environmental limitation, prior decisions had granted unemployment benefits to passive smokers. See, e.g., *Meyer v. C.P. Clare & Co.*, No. 615-78 (E.D. Idaho Nov. 17, 1978) (benefits awarded since the addition of two cigar smokers into work area "would compel a reasonable person to leave her employment. . . ."); *Stevens v. Employment Sec. Comm'n*, No. 6-2934 (D. Iowa Nov. 17, 1976) (benefits granted to employee whose health required she work only in a smoke-and-dust-free environment, even though her limitation did not preclude all possibilities of employment).

Besides granting unemployment benefits, courts have also allowed employees to collect workmen's compensation for their smoke-related injuries. See, e.g., *Brooks v. TWA & Liberty Mut. Ins. Co.*, No. 257-975 (Ca. WCAB Jan. 5, 1977) (airline stewardess); *Braun v. Workmen's Comp. Appeals Bd.*, No. 37:689 (Ca. Comp. 1976) (social service worker); *Stauffer v. Workmen's Comp. Appeals Bd.*, No. 37:689 (Ca. Comp. 1976) (bank teller).

93. 690 F.2d at 733.

94. *Id.* Physicians diagnosed the employee as suffering from asthmatic bronchitis caused by an adverse allergic reaction to cigarette smoke. She experienced "continual phlegm production, chest pains, congestion, and continued difficulty speaking and breathing." *Id.* Within four minutes of exposure to cigarette smoke the employee "suffered acute pulmonary problems including airway irritation [and] an increase in airway resistance." *Id.*

95. *Id.*



hazardous to her health.<sup>96</sup> Notwithstanding these findings, the agency determined that the employee's hypersensitive condition did not fall within the meaning of "disabled" as provided in the Civil Service Retirement Amendments of 1969.<sup>97</sup> The agency denied the employee's claim for disability benefits<sup>98</sup> and the employee appealed.

The Ninth Circuit Court of Appeals determined that the employee had established a prima facie case for disability benefits.<sup>99</sup> Although acknowledging that disability entitlements traditionally concern physical and mental limitations, the *Parodi* court concluded that hypersensitivity to cigarette smoke in the work place constituted an environmental disability.<sup>100</sup> Finding that the federal employee demonstrated an inability to perform work under existing conditions, the *Parodi* court shifted the burden to the agency to provide employment in a safe environment.<sup>101</sup> The *Parodi* court ordered the agency

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96. *Id.*

97. 5 U.S.C. §§ 8331-8348 (1982). Prior to revision in 1980, the statute had defined disability as the inability to perform "useful and efficient service in the grade or class of position last occupied by the employee or Member because of disease or injury not due to vicious habits, intemperance, or wilful misconduct on his part within five years before becoming so disabled." *Id.* § 8331(b) (1982). This wording was revised to read:

Any employee shall be considered to be disabled only if the employee if [sic] found by the Office of Personnel Management to be unable, because of disease or injury, to render useful and efficient service in the employee's position and is not qualified for reassignment, under procedures prescribed by the Office, to a vacant position which is in the agency at the same grade or level and in which the employee would be able to render useful and efficient service.

*Id.* § 8337(a) (1982). The revised definition was not used by the *Parodi* court since it did not become effective until after the administrative proceedings were concluded. 690 F.2d at 737 n.8.

98. 690 F.2d at 733.

99. *Id.* at 738. In finding a prima facie case for disability benefits, the *Parodi* court recognized the appellant's claim was unusual. *Id.* Most disability claims concern physical or mental limitations, while the appellant's adverse reaction to cigarette smoke constituted an environmental limitation. *Id.* An environmental limitation is correctable by placing the employee in an appropriate work environment so as to enable the employee to perform "useful and efficient service." *Id.* at 739.

100. *Id.* at 738-39. Since the express language of § 8331 of the Civil Service Retirement Amendments of 1969 did not exclude consideration of environmental limitations from a determination of disability, the environmental limitation qualified the employee for disability benefits. The *Parodi* court further noted that no authority or justification was cited so as to preclude benefits. *Id.* at 738.

101. *Id.* at 739. The *Parodi* court reasoned that the employer was in a better position to "provide evidence of the availability of suitable employment, particularly the availability of employment in a safe environment." *Id.*

either to place the employee in a smoke-free working environment in a position comparable in grade to her previous employment, or to pay the employee disability retirement benefits.<sup>102</sup>

In the same year *Parodi* was decided, the district court in Washington, D.C., addressed the question of whether hypersensitivity to cigarette smoke entitled an employee to relief as a handicapped person under the Rehabilitation Act of 1973.<sup>103</sup> In *Vickers v. The Veterans Administration*,<sup>104</sup> the plaintiff, a nonsmoking employee for the Veterans Administration Medical Center, worked in an office that permitted smoking.<sup>105</sup> On several occasions the employee requested placement in a smoke-free working environment.<sup>106</sup> The *Vickers* court held that although the employee was handicapped by the cigarette smoke,<sup>107</sup> he had the burden of proving discrimination by his employer.<sup>108</sup> Unlike the employers in *Shimp*, *Western Electric*, and *Parodi*, the Veterans Administration had taken several steps to accommodate the employee's handicap. The Veterans Administration had separated desks of nonsmokers from smokers, requested employees to refrain from smoking, installed vents to extract office smoke, and offered to construct a partition around the employee's desk.<sup>109</sup> In light of these affirmative measures taken to alleviate cigarette smoke in the work area, the *Vickers* court concluded that the Veterans Administration had not discriminated against the em-

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102. *Id.* The *Parodi* court held that not only must a healthy work environment be provided to the employee, but also he must be offered a position equivalent in "grade or class." *Id.* The government employer was given 60 days to offer the employee such a suitable position. *Id.*

103. 29 U.S.C. § 794 (1982).

104. 549 F. Supp. 85 (W.D. Wash. 1982).

105. *Id.* at 87-88.

106. *Id.* at 88.

107. *Id.* at 87. The *Vickers* court found the employee came within the meaning of the term "handicapped" as defined in 29 U.S.C. § 706(7)(B) (1982) ("a physical impairment which substantially limits one or more of his or her major life activities.") 549 F. Supp. at 87. *Vickers* suffered from hypersensitivity to tobacco smoke that permitted him to work only in a smoke-free work environment. *Id.*

108. 549 F. Supp. at 89. Notwithstanding the finding of handicapped status, the *Vickers* court could not find the discrimination necessary to provide the plaintiff with equitable relief. *Id.* The *Vickers* court found the Veterans Administration had made a reasonable effort to balance the interests of smoking and non-smoking employees. *Id.*

109. *Id.* at 88.

ployee.<sup>110</sup> The court, therefore, denied monetary relief for the employee's handicap.<sup>111</sup>

In another case decided in 1982, the California Court of Appeals pursued a new line of analysis with respect to nonsmokers' rights to a smoke-free working environment. In *Hentzel v. Singer Co.*,<sup>112</sup> a patent attorney brought an action against his former employer, claiming that his termination was in retaliation for his protests about hazardous working conditions caused by the smoking of other employees.<sup>113</sup> In addition, the attorney sued Singer on the tort theory of intentional infliction of emotional distress. He alleged the company had moved him to an office with a greater concentration of cigarette smoke after the attorney requested a smoke-free working environment.<sup>114</sup>

Reviewing the attorney's retaliatory dismissal claim, the *Hentzel* court determined that the company had undermined firmly established public policy protecting employees' rights to protest working conditions.<sup>115</sup> After reviewing provisions under the California Labor Code,<sup>116</sup> the court concluded that the discharge of the attorney for objecting to cigarette smoke subverted the legislative purpose of the Labor Code.<sup>117</sup> In holding that the hazardous working conditions caused by cigarette smoke established a cause of action, the *Hentzel* court joined with other courts recognizing the legal rights of passive smokers.

Addressing the attorney's tort claim based on intentional infliction of emotional distress, the *Hentzel* court held that the tort established

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110. *Id.* at 89.

111. *Id.*

112. 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982).

113. *Id.* at 293, 188 Cal. Rptr. at 160.

114. *Id.* at 293-95, 188 Cal. Rptr. at 160-61. Additional problems at work that were noted by the employee included the company's failure to segregate smoking and non-smoking sections in conference rooms and the exclusion of appellant from meetings because of his request for non-smoking sections. *Id.* at 294, 188 Cal. Rptr. at 161.

115. *Id.* at 296, 188 Cal. Rptr. at 162.

116. The relevant sections the *Hentzel* court reviewed were CAL. LAB. CODE §§ 6401-04 (Deering 1976).

117. 138 Cal. App. 3d at 298, 188 Cal. Rptr. at 164. The *Hentzel* court stated that the legislative purpose underlying the California Labor Code was "achievement of the statutory objective—a safe and healthy working environment for all employees—requires that employees be free to call their employer's attention to such conditions, so that the employer can be made aware of their existence, and given the opportunity to correct them if correction is needed." *Id.*

a civil action outside the scope of the Workers' Compensation Act.<sup>118</sup> Because the Act did not provide a compensable remedy for passive smoking, the court concluded the attorney could seek damages on an emotional distress theory.<sup>119</sup>

The *Hentzel* court's recognition of the actions for retaliatory dismissal and intentional infliction of emotional distress is significant in light of the absence of an allegation concerning the attorney's hypersensitive condition to cigarette smoke. California thus became the first jurisdiction to sustain the validity of a passive smoker's claim without requiring a showing of adverse health effects caused by cigarette smoke in the work environment.

#### IV. CONCLUSION: A COURSE FOR THE FUTURE

The landmark decision in *Shimp* established judicial precedent for passive smokers seeking relief from employers who permit hazardous smoke-filled working conditions. Since *Shimp*, the courts have searched for a common law right to a safe working environment while attempting to balance the rights of both nonsmokers and smokers.

Moreover, recent decisions illustrate the developing recognition of passive smokers' claims. In *Western Electric*, the Missouri Court of Appeals granted relief to a nonsmoking employee who demonstrated a direct link between the exposure to cigarette smoke and his adverse health effects.<sup>120</sup> In *Parodi*, the Ninth Circuit held that an employee's hypersensitivity to cigarette smoke established an environmental limitation entitling the employee to disability retirement benefits.<sup>121</sup> The extent to which an employer alleviates hazardous working conditions caused by cigarette smoke constitutes another significant factor considered by the courts. In *Vickers*, the Veterans Administration successfully balanced a nonsmoking employee's right to a smoke-free working environment with the smoking employees' right to smoke.<sup>122</sup> In the most radical departure from the traditional deference granted cigarette smoking, the *Hentzel* court recognized a

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118. *Id.* at 304, 188 Cal. Rptr. at 168-69. The trial court had dismissed the employee's action for intentional infliction of emotional distress on grounds that the California Workers' Compensation Act served as the exclusive remedy. *Id.*

119. *Id.*

120. *See supra* notes 72-85 and accompanying text.

121. *See supra* notes 89-101 and accompanying text.

122. *See supra* notes 103-10 and accompanying text.

nonsmoking employee's claim for punitive damages on the grounds of wrongful dismissal and intentional infliction of emotional distress.<sup>123</sup> The decision in *Hentzel* arguably has opened the floodgates for potential tort claims since a passive smoker may obtain relief without showing specific injury.

The burgeoning reserve of case law addressing the rights of passive smokers arises principally with respect to the employee-employer relationship.<sup>124</sup> Although judicial recognition of legal actions brought by nonsmoking employees is a welcome development, the vast majority of the nonsmoking populace does not have a protected right to an environment free of tobacco smoke.<sup>125</sup> The involuntary nature of passive smoking should influence the courts to expand their holdings<sup>126</sup> to passive smokers engaged in activities outside the work place. Only in this way can society remain certain that the right to a smoke-free environment will endure for all.

*Tammy Turner Walsh*  
*Phillip David Wool*

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123. See *supra* notes 111-18 and accompanying text.

124. It remains puzzling as to why most employers insist on their employees having the right to smoke, especially in light of a 1981 study by Professor William L. Weis of Seattle University which concluded that the average cost per smoking worker to employers is \$4,611 per year. Professor Weis's figure included costs accumulated from work absences, medical costs, increased insurance costs, worker unproductivity, and maintenance fees. *The Christian Science Monitor*, Feb. 11, 1983, at 10, col. 3. See also *St. Louis Globe-Democrat*, April 16-17, 1983, at 1B, col. 4 ("[T]he American Heart Association estimate[s] \$27 billion is spent in this country each year for smoking-related medical care, accidents, absenteeism and lost work output.").

125. The work area scenario constitutes approximately eight hours during the average sixteen-hour day. Smoke-filled air encountered throughout the "non-work" period can prove every bit as annoying and equally as dangerous as that encountered at the office.

126. In light of the recent cases dealing with the problem of smoke in the workplace, it appears employees demonstrating adverse health effects as a direct result of exposure to tobacco smoke have the best chance of recovering damages. The two theories under which recovery has been granted are the common law right to a safe workplace and a disability theory. To avoid this type of lawsuit, employers should provide non-smoking areas for those employees requesting them. Plans developed to deal with the controversy of smoke in the workplace should strive to establish a balance between the rights of both smokers and non-smokers.

