

EXTINGUISHING SMOKING IN THE WORKPLACE

I. INTRODUCTION

In recent years the health danger of passive smoking¹ has become a major public concern.² New scientific evidence³ on the adverse effects of tobacco smoke has sparked an aggressive war between smokers and nonsmokers.⁴ Initially, the thrust of scientific research dealt only with the impact of cigarette smoking on smokers.⁵ Consequently, nonsmokers had scant evidence to support their claims of the adverse effect

1. The Surgeon General has defined passive smoking (also referred to as involuntary smoking) as the inhalation of environmental tobacco smoke by nonsmokers. U.S. DEP'T. OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING, A REPORT OF THE SURGEON GENERAL 21 (1986) [hereinafter 1986 SURGEON GENERAL'S REPORT]; U.S. DEP'T. OF HEALTH AND HUMAN SERVICES, REDUCING THE HEALTH CONSEQUENCES OF SMOKING: A REPORT OF THE SURGEON GENERAL 14 (1989) [hereinafter 1989 SURGEON GENERAL'S REPORT].

2. See Comment, *The Rights of Nonsmokers in Tennessee*, 54 TENN. L. REV. 671, 671 (1987) (discussing the emergence of the nonsmokers' legal rights under Tennessee law).

3. The 1964 SURGEON GENERAL'S REPORT first officially declared smoking to be a health hazard of sufficient importance to warrant remedial action. U.S. DEP'T. OF HEALTH, EDUC. & WELFARE, THE HEALTH CONSEQUENCES OF SMOKING: A REPORT TO THE SURGEON GENERAL (1964) [hereinafter 1964 SURGEON GENERAL'S REPORT]. Since then, published articles linking cigarette smoking to serious illness increased from 6,000 published articles in 1964 to 30,000 in 1979. O'Kene, *Toward a Smoke-Free Society*, 74 AM. J. PUBLIC HEALTH 1198, 1201 (1984). For comprehensive scientific reports on the adverse effects of tobacco smoke, see 1986 SURGEON GENERAL'S REPORT and 1989 SURGEON GENERAL'S REPORT, *supra* note 1.

4. See Crocker, *Controlling Smoking in the Workplace*, 38 LAB. L. J. 739, 740 (1987) (discussing the pressure nonsmokers exert over employers to restrict smoking in the workplace).

5. See generally 1986 SURGEON GENERAL'S REPORT, *supra* note 1.

of secondary smoke.⁶ The 1986 Surgeon General's report marked a turning point in the controversy by arming the nonsmokers with solid evidence that secondary smoke exposes them to greater amounts of carcinogens than those to which the smoker is exposed.⁷ Particularly, the Surgeon General found that nonsmokers in the workplace face serious harm from exposure to tobacco smoke because they spend relatively large amounts of time in contact with smokers.⁸

Smokers and nonsmokers have necessarily cast the employer into the middle of their debate over smoking restrictions in the workplace.⁹ Recently there has been a trend among employers toward increasing the prevalence¹⁰ and restrictiveness¹¹ of smoking policies. Such changes are motivated by the costs associated with employees who

6. Secondary smoke (also referred to as sidestream smoke) is the aerosol that comes from the burning end of the cigarette between puffs. 1986 SURGEON GENERAL'S REPORT, *supra* note 1, at 23. Primary smoke, or mainstream smoke, is the complex mixture of smoke inhaled by the smoker from the mouthpiece of a cigarette. *Id.*

7. *Id.* The REPORT states that the combustion conditions which produce sidestream smoke result in the generation of larger amounts of toxic and carcinogenic agents than conditions which produce mainstream smoke. *Id.* at 21. The report quotes Surgeon General C. Everett Koop:

[T]he 1986 report is clearly the strongest and most well-documented health case for smoke-free indoor air policies to date. . . . The right of the smoker to smoke stops at the point where his or her smoking increases the disease risk in those occupying the same environment.

Id. See *Federal Clout Behind Nonsmokers*, SMOKING POLICY INSTITUTE REPORT 1 (1987).

8. 1986 SURGEON GENERAL'S REPORT, *supra* note 1, at 284-86. According to the REPORT, urban adults spend more time at work than at any other location except home. *Id.* at 284. For adults living in a household where no one smokes, the workplace is the greatest source of smoke exposure. *Id.* Consequently, an individual's smoke exposure from work can be substantial in duration and intensity. *Id.* Furthermore, the REPORT notes that individuals have less choice about their smoke exposure at work than they do in other places, such as restaurants or auditoriums. *Id.* at 284. See also *infra* note 96 (discussing the amplified effect of secondary smoke in asbestos environments at work).

9. Employers have tried to justify not adopting smoking policies by claiming that there is an obligation to protect the rights of smokers. *Ban Smoking at Work and Save Money, Too*, Washington Post, April 3, 1985, at B2, col. 1. Timothy Lowenberg, General Counsel for the Smoking Policy Institute, argues that smokers have the same rights as nonsmokers. By common law, these rights include the right to a safe and healthful workplace. T. Lowenberg, Remarks at the Smoking Policy Institute Forum (July 7, 1985) (available at the American Lung Association of Eastern Missouri).

10. See 1989 SURGEON GENERAL'S REPORT, *supra* note 1, at 581-84 (citing Bureau of National Affairs, *Where There's Smoke: Problems and Policies Concerning Smoking in the Workplace* 30 (2d ed. 1987)). The Bureau of National Affairs (BNA) conducted a survey comparing work site smoking policies in 1986 and 1987. In 1986 BNA reported a 36% prevalence of workplace smoking policies; in 1987 the estimate was 54%. Fur-

smoke,¹² heightened public support,¹³ the aggressiveness of non-smokers in asserting their rights to a smoke-free environment¹⁴ and the increase in state and local legislation.¹⁵

This Note addresses the private employer's legal responsibility to restrict smoking in the workplace. The author will discuss common law and statutory limitations placed upon an employer's ability to restrict smoking in the workplace. Finally, this Note will review nonsmoking legislation and offer suggestions on drafting more effective statutes.

II. THE EMPLOYER'S COMMON LAW DUTY TO PROVIDE A SAFE AND HEALTHFUL WORKPLACE

Historically, courts have recognized that the employer has a continuing affirmative duty to provide a safe and healthful work environment.¹⁶ Nonsmoking employees have claimed that their employers

thermore, 85% of the companies with a smoking policy in 1987 reported that they had adopted their policies from 1985 to 1987.

11. *Id.* According to the BNA surveys, the proportion of company smoking policies that stipulated a total ban on smoking in all company buildings doubled from 1986 to 1987. *Id.* at 583. The proportion of company policies that prohibited smoking in all open work areas also increased from 41% in 1986 to 51% in 1987. *Id.*

12. Weiss, *Can You Afford to Hire Smokers?*, PERSONNEL ADMINISTRATOR, May, 1981, at 71. Smoking greatly impedes office efficiency and causes management grave economic loss. *Id.* Estimates of on-the-job time lost to smoking rituals (i.e., lighting, puffing, informal breaks) range from eight minutes per day to 15 to 30 minutes per hour. *Id.* Smoking in the workplace also causes the employer economic losses from absenteeism, mortality, insurance, employee morale and depreciation on furniture and equipment. *Id.* See also Brief of Margaret Wells at 41, Margaret Wells, 51 INDUS. ARB. 911 (1981) (Banzhaf, Arb.). The brief refers to a study by the medical department at Dow Chemical Company reporting on the cost of smoking in the workplace. *Id.* The study found that smoking employees took 5.5 sick days per year more than nonsmokers and incurred significant excess wage costs per year. *Id.*

13. 1989 SURGEON GENERAL'S REPORT, *supra* note 1, at 263-76 (documenting trends in smoking behavior and reporting changes in the public's view toward smoking). See Classen, *Restricting the Right to Smoke in Public Areas: Whose Rights Should Be Protected?*, 38 SYRACUSE L. REV. 831, 845 (1987) (discussing trends in public opinion demanding a smoke-free environment at work).

14. 1989 SURGEON GENERAL'S REPORT, *supra* note 1, at 436-45 (describing the nature and objectives of antismoking advocacy and lobbying groups).

15. *Id.* at 556-86 (summarizing federal and state legislation restricting smoking in public places and the workplace).

16. See, e.g., *Bailey v. Central Vt. Ry.*, 319 U.S. 350 (1943); *Fitzpatrick v. Fowler*, 168 F.2d 172 (D.C. Cir. 1948); *Decatur v. Charles H. Thompkins Co.*, 25 F.2d 526 (D.C. Cir. 1928); *Green v. Pyne*, 289 F. 929 (D.C. Cir. 1923); *Gibson v. Gernat*, 267 F. 305 (D.C. Cir. 1920), *cert. denied*, 253 U.S. 487 (1920).

Federal and state occupational safety and health laws have codified an employer's

have an affirmative duty to restrict smoking in the workplace.¹⁷ Nevertheless, *Shimp v. New Jersey Bell Telephone Company*¹⁸ is the only case holding that the presence of tobacco smoke in the workplace is a breach of this affirmative duty. In *Shimp*, the plaintiff sought a prohibition on smoking at work because she was allergic to tobacco smoke.¹⁹ She alleged that her employer provided unsafe working conditions by failing to ban smoking.²⁰ The plaintiff presented affidavits from physicians to document her extreme sensitivity to cigarette smoke,²¹ as well as extensive scientific reports on the toxic nature of tobacco smoke to smokers and nonsmokers.²² New Jersey Bell failed to present any evidence in its defense.²³ Finding the plaintiff's evidence clear and convincing, the court held that although smokers have a right to smoke, the right did not include the right to jeopardize the health of coworkers.²⁴ Thus, the court reasoned that the nonsmokers' rights included

general common law duty to provide a reasonably safe working environment for its employees. See 29 U.S.C. §§ 651-78 (1982). The federal statute provides no private right of action for employees who seek to restrict workplace smoking. See *Barrera v. E.I. du Pont de Nemours*, 653 F.2d 915, 920 (5th Cir. 1981); *Federal Employees for Nonsmokers' Rights v. United States*, 446 F. Supp. 181 (D.D.C. 1987), *aff'd*, 598 F.2d 310, *cert. denied*, 444 U.S. 926 (1979).

17. See *Smith v. Western Electric Co.*, 643 S.W.2d 10 (Mo. Ct. App. 1982); *Shimp v. New Jersey Bell Tel. Co.* 145 N.J. Super. 516, 368 A.2d 408 (N.J. Super. Ct. Ch. Div. 1976).

18. 145 N.J. Super. 516, 368 A.2d 408 (N.J. Super. Ct. Ch. Div. 1976).

19. 145 N.J. Super. at 521, 368 A.2d at 409-10. The plaintiff's symptoms included "nosebleeds, irritation to the eyes which resulted in corneal abrasion and corneal erosion, headaches, nausea and vomiting." *Id.* at 521, 368 A.2d at 410.

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

21. *Id.* at 520-21, 368 A.2d at 410. Plaintiff sought relief through available grievance procedures, which resulted in the installation of a fan in her work area. The plan failed because the fan did not run continuously. Other employees complained of cold drafts, and the resulting compromise, running the fan at set intervals, was also ineffective. *Id.* at 521, 368 A.2d at 410.

22. *Id.* at 527-30, 368 A.2d at 414-15. The judge gave extensive consideration to the testimony and findings in affidavits and medical and scientific expert evidence on the toxic effects of tobacco smoking and its consequences. Quoting the affidavit of Dr. Jesse Steinfield, Professor of Medicine at the University of California and a member of the American Association for Cancer Research, the court specifically pointed out that "while the primary toxic effects of tobacco smoking occur in the individual who inhales the mainstream smoke, it is quite clear that sidestream smoke contains a considerable amount of material which is toxic to the passive smoker." *Id.* at 529, 368 A.2d at 414.

23. See *Fox & Davidson, Smoking in the Workplace: Accommodating Diversity*, 25 CAL. W. L. REV. 215, 225 (1989).

24. 145 N.J. Super. at 530-31, 368 A.2d at 415.

the right to breathe air uncontaminated by cigarette smoke in the workplace.²⁵ New Jersey Bell's failure to present a defense was a key determinant of the *Shimp* decision.²⁶ Therefore, although *Shimp* recognized nonsmoker's rights, its unusual facts have prevented it from establishing significant precedent.²⁷

Despite *Shimp*, courts generally have been unwilling to recognize a nonsmoker's legal right to a smoke-free environment.²⁸ For example, *Gordon v. Raven Systems & Research*²⁹ held that common law imposes no duty on an employer to provide a smoke-free workplace.³⁰ In *Gordon* the employer fired an employee when she refused to work in an area containing tobacco smoke.³¹ The employee argued that there was a common law duty upon the employer to furnish a safe, smoke-free workplace for an employee with special sensitivity to cigarette smoke.³² While acknowledging the general duty of the employer to furnish his employees with a reasonably safe workplace,³³ the court held that common law does not impose upon employers the duty to conform their workplace to the particular needs or sensitivities of an individual employee.³⁴ Rather, the court only recognized a limited common law duty to provide a safe working environment for average employees who do not have an unusual sensitivity to smoke. In denying the employee

25. *Id.* at 530-31, 368 A.2d at 415. For additional commentary on *Shimp*, see Comment, *The Rights of Nonsmokers in Tennessee*, 54 TENN. L. REV. 671, 676-79 (1987); Paoletta, *The Legal Rights of Nonsmokers in the Workplace*, 10 U. PUGET SOUND L. REV. 591, 592-99 (1987); Classen, *supra* note 13, at 843-45.

26. Schein, *Should Employers Restrict Smoking in the Workplace?*, 38 LAB. L.J., 173, 173-74 (1987).

27. Fox & Davidson, *supra* note 23, at 225. The result in *Shimp* might have been different had New Jersey Bell contested the nonsmoker's claim. *Id.* Ms. Shimp's attorney filed an identical case before the same judge on behalf of another employee. In the case, New Jersey Bell put on a defense, and the judge dismissed the case. *Id.*

28. *Id.* at 227.

29. 462 A.2d 10 (D.C. 1983).

30. *Id.* at 14.

31. *Id.* at 11. The plaintiff specifically charged that the employer unlawfully released her and that he breached his common law duty to furnish a safe working environment. *Id.*

32. The plaintiff's "special sensitivity" when exposed to tobacco smoke consisted of "severe symptoms of eye irritation, nasal congestion, chest tightness, nausea, and headaches." *Id.* at 14.

33. See *supra* note 16.

34. 462 A.2d at 15.

injunctive relief, the court distinguished the case from *Shimp*.³⁵ Unlike the plaintiff in *Shimp*, the employee in *Gordon* failed to present enough evidence on the deleterious effect of secondary smoke on all employees to overcome the employer's defense.³⁶

III. NONSMOKERS' STATUTORY CLAIMS

Nonsmokers are more likely to obtain relief under statutory claims than under common law claims. For example, in *Lapham v. Unemployment Compensation Bd. of Review*³⁷ the plaintiff employee's exposure to secondary smoke at work caused her to develop bronchitis and compelled her to resign.³⁸ The court established a standard for the plaintiff-employee to receive unemployment compensation after termination of her employment for health reasons: she must show that she informed her employer of her medical condition and her inability to perform regularly assigned duties.³⁹ Further, she must substantiate her condition with medical evidence. Once the plaintiff meets this burden, the defendant-employer must provide a suitable alternative.⁴⁰ In *Lapham* the plaintiff's evidence established the toxicity of tobacco smoke and its harm to the health of smokers and nonsmokers.⁴¹ Satisfied with the plaintiff's evidence, the court held that the defendant failed to provide a suitable alternative and granted the plaintiff unemployment compensation benefits.⁴²

Nonsmokers have also successfully prevailed in seeking disability benefits to cover smoke-related injuries.⁴³ In *Parodi v. Merit Systems Protection Board and Office of Personnel Management*⁴⁴ the court held that a federal employee's allergic reaction to cigarette smoke consti-

35. *Id.* at 15.

36. *Id.* at 14-15. In distinguishing *Shimp* from *Gordon*, the court noted that the *Shimp* court was willing to take judicial notice of the potential health hazards presented by cigarette smoke. *Id.*

37. 103 Pa. Commw. 144, 519 A.2d 1101 (1987).

38. *Id.* at 145, 519 A.2d at 1101.

39. *Id.* at 146, 519 A.2d at 1102.

40. *Id.*

41. *Id.* at 147, 519 A.2d at 1102.

42. *Id.* at 148, 519 A.2d at 1103.

43. See Paoletta, *supra* note 25, at 608-12 (discussing worker's compensation coverage of tobacco smoke harms).

44. 702 F.2d 743 (9th Cir. 1983).

tuted an environmental disability⁴⁵ entitling the employee to disability benefits.⁴⁶ The employee claimed that the smoke-filled workplace caused her to develop asthmatic bronchitis which eventually rendered her unable to work.⁴⁷ She sought disability benefits from the review board⁴⁸ which denied her relief.⁴⁹ On appeal, the Ninth Circuit held that the plaintiff was disabled⁵⁰ according to the federal disability statute.⁵¹ The court stated that an employee need not prove serious or permanent physical injury to qualify for disability benefits; the statute merely requires proof of an inability to perform the job because of disease or injury.⁵² The court further found that the plaintiff's eligibility for disability payments depended on the review board's failure to offer her more suitable employment.⁵³

Although *Parodi* specifically sets case precedent for federal disability suits,⁵⁴ its general holding can be useful in supporting private claims by nonsmokers for disability compensation. First, *Parodi* indicates judicial recognition that tobacco smoke in the workplace can prevent otherwise normal and productive employees from performing their jobs.⁵⁵ Second, upon becoming disabled, the employee may be entitled

45. *Id.* at 738.

46. *Id.* at 740.

47. 702 F.2d at 745. Finding the employee hypersensitive to cigarette smoke, the agency's doctors concluded that her return to the same work environment would be hazardous to her health. *Id.*

48. *Id.* The board reviews disability decisions made by the Office of Personnel Management. *Id.*

49. *Id.* The board accepted the doctor's recommendations but concluded that the employee was not totally disabled. *Id.*

50. *Id.* at 751.

51. 5 U.S.C. § 8331(6) (1976). The statute qualifies an employee as totally disabled if he is unable to perform "useful or efficient service in the grade or class of position last occupied by the employee . . . because of disease or injury." *Id.*

52. 690 F.2d at 750. In finding a prima facie case for disability benefits, the court determined that the employee's claim was an environmental limitation (as opposed to more common claims concerning physical or mental limitations). *Id.* The court held that the statute implicitly included an employee with environmental limitations as qualifying for disability benefits. *Id.*

53. *Id.* at 751. The court held that not only must a healthy work environment be provided to the employee, but he must also be offered a position equivalent in "grade or class." *Id.* The court gave the employer 60 days to offer the employee such a suitable position. *Id.*

54. See Comment, *Smokers vs. Nonsmokers*, 48 MO. L. REV. 783, 794 (1983).

55. See Paoletta, *supra* note 25, at 627.

to disability benefits.⁵⁶ Finally, the case establishes that the employer's refusal to restrict smoking can be very costly to the employer if the court grants the employee a disability pension award.⁵⁷

IV. EMPLOYERS' STATUTORY DEFENSES TO NONSMOKERS' CLAIMS

Employers are likely to rely on exclusive remedy provisions in state workmen's compensation statutes to defend against the claims of non-smokers.⁵⁸ By their express terms, the exclusive remedy provisions immunize employers by barring employees from bringing civil actions for personal injuries sustained during the course of business.⁵⁹ Instead of receiving damages from the employer directly the employee receives his or her sole remedy from an administrative compensation fund.⁶⁰ However, *McCarthy v. Department of Social Health and Services*⁶¹ established a precedent for nonsmoker employees to seek damages from their employers directly. In *McCarthy* the employee claimed that tobacco smoke in the workplace caused her to contract a pulmonary disease, forcing her to quit.⁶² As required by state law, she first submitted a claim for benefits under the Washington Worker's Compensation Act.⁶³ The reviewing board found her condition not compensable because the ailment did not qualify as either an injury⁶⁴ or occupational disease⁶⁵ as defined in the Act.⁶⁶ The employee then filed a civil action

56. *Id.*

57. *Id.*

58. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS 440, 530 (4th ed. 1971). State workman's compensation statutes are designed to substitute for an action for damages, not to provide injunctive relief to prevent future injuries. *Id.*

59. See Paoella, *supra* note 25, at 603 (discussing employer immunity based on the exclusive remedy provision of the Washington Workers' Compensation Act (WASH. REV. CODE §§ 51.04.010-.98.080 (1985))); Comment, *supra* note 25, at 688-89 (1987) (discussing the difficulty in applying Tennessee's Worker's Compensation Law (TENN. CODE ANN. §§ 50-6-101 to -401 (1983 & Supp. 1989)) to injuries caused by passive inhalation of cigarette smoke).

60. See, e.g., WASH. REV. CODE ANN. § 51.32.010 (1962 & Supp. 1989).

61. 46 Wash. App. 125, 730 P.2d 681 (1986).

62. *Id.* at 126-27, 730 P.2d at 683.

63. WASH. REV. CODE ANN. §§ 51.04.010-.98.080 (1985).

64. The Washington Workers' Compensation Act defines "injury" as "a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom." WASH. REV. CODE ANN. § 51.08.100 (1963 & Supp. 1989).

65. The Washington Workers' Compensation Act defines "occupational disease" as

against her employer. The Washington Court of Appeals held that the employer had only qualified immunity.⁶⁷ The court stated that the Act's exclusive remedy provision barred private causes of action only when the employee sustained harm within the coverage provisions of the Act.⁶⁸ Otherwise, the injured employee should be able to recover from the employer.⁶⁹ In states with similar worker's compensation laws, the employer is unlikely to establish immunity for damages caused by secondary smoke in the workplace because those statutes will not cover such harms.⁷⁰

In *Shimp v. New Jersey Bell Telephone Co.*⁷¹ the court found that the exclusive remedy provision of the state worker's compensation statute bars the common law action for damages but did not bar equitable remedies.⁷² The court acknowledged that the statute was designed to substitute for actions in damages only, not to provide injunctive relief to prevent future injuries.⁷³

a "disease or infection as arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title." WASH. REV. CODE ANN. § 51.08.140 (1963 & Supp. 1989).

66. *McCarthy v. Washington Dep't. Soc. & Health Serv.*, 1 I.E.R. 1233 (1986) (Alexander, Arb.). The Board determined that exposure to tobacco smoke at work caused the employee's disabling lung disease. The disease was not a compensable injury because it was not sustained at a "definite time and place" as required by the Act. Her harm was not a compensable occupational disease because the cigarette smoke in her workplace was not "in excess of that found in other types of employment or in many non-employment situations." *Id.* at 1235.

67. 46 Wash. App. at 133, 730 P.2d at 686. Qualified Immunity is the general rule in the United States "where the [worker's compensation] act is inapplicable, the common-law and statutory remedies of the employee remain intact or are not barred." 101 C.J.S. *Workmen's Compensation* § 919 (1958).

68. 46 Wash. App. at 128, 730 P.2d at 684.

69. *Id.* at 129, 730 P.2d at 685. The court reasoned that it "would not be a just result" to deprive the injured employee of a remedy merely because the Worker's Compensation Act does not cover his injury. *Id.* at 133.

70. *See supra* note 62. *See also* Blumrosen, Ackerman, Kligerman, Van Schaik & Sheehy, *Injunctions Against Occupational Hazards: The Right to Work Under Safe Conditions*, 64 CALIF. L. REV. 702, 712-13 (1976) (discussing the purpose of workers compensation laws and their limitations).

71. 145 N.J. Super. 516, 368 A.2d 408 (N.J. Super Ct. Ch. Div. 1976). *See supra* notes 16-27 and accompanying text for a discussion of *Shimp*.

72. 145 N.J. Super. at 525, 368 A.2d at 412.

73. *Id.* at 524, 368 A.2d at 411.

V. NONSMOKERS' CLAIMS UNDER FEDERAL AND STATE HANDICAP STATUTES

Federal and state rehabilitation statutes require certain employers to accommodate handicapped persons. The non-smoker has qualified as a "handicapped person"⁷⁴ under the Federal Rehabilitation Act of 1973⁷⁵ in order to obtain a smoke-free workplace.⁷⁶ While the Act does not cover private employers, it is useful to understand its application because it is a model for most state rehabilitation statutes.⁷⁷ Under the Act, employers must provide qualified handicapped individuals with "reasonable accommodation" for their handicap.⁷⁸ Non-smokers claim that their sensitivity to tobacco smoke qualifies them as handicapped, thus entitling them to a prohibition on smoking in the workplace as a "reasonable accommodation."

In *Vickers v. Veterans Administration*,⁷⁹ the court found that a non-smoking employee qualified as handicapped under the Federal Rehabilitation Act because of his unusual sensitivity to tobacco smoke which "limited a major life activity" — his capacity to work in an environment not completely smoke free.⁸⁰ However, the court denied the plaintiff injunctive relief, finding that the employer made a reason-

74. 29 C.F.R. 1613.702(b). The statute defines a "handicapped individual" as any person who i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, ii) has a record of such impairment or iii) is regarded as having such an impairment. *Id.*

75. 29 U.S.C. §§ 701-794a (1982).

76. *See infra* note 80 (noting cases which have qualified the nonsmoker as handicapped).

77. *See, e.g.,* Paolella, *supra* note 25, at 622-23 (1987) (comparing the Federal Rehabilitation Act of 1973 with the Washington State Law Against Discrimination (WASH. REV. CODE ANN. § 49.60.180 (1985))).

78. 29 C.F.R. § 1613.704. The statute requires that an agency must make reasonable accommodation to the known physical limitations of a qualified handicapped employee unless the agency can demonstrate that the accommodation would impose an undue hardship on its program. *Id.*

79. 549 F. Supp. 85 (W.D. Wash. 1982).

80. *Id.* at 86-87. *See also* Pletten v. Dep't. of Army, 6 M.S.P.B. 626 (1981). The court held that an employee who suffered from asthma induced by breathing tobacco smoke was a handicapped person entitled to reasonable accommodation. *Id.* at 629. *Cf.* Federal Employees for Nonsmokers' Rights v. United States, 446 F.Supp. 181 (D.D.C. 1978), *aff'd mem.*, 598 F.2d 310 (D.C. Cir.), *cert. denied*, 444 U.S. 926 (1979). The court held that the Act did not apply to employees of federal agencies, but only to handicapped persons receiving financial assistance from the federal government. *Id.* at 184. However, the court did not address whether a nonsmoker could ever be "handicapped" within the meaning of the Act. *Id.*

able effort to accommodate the employee's handicap.⁸¹ The employer satisfied his obligation by obtaining voluntary agreements not to smoke, except in designated areas, from all of the employees in the plaintiff's work area.⁸² In addition, the employer installed ceiling vents.⁸³

In *GASP v. Mecklenberg County*,⁸⁴ the North Carolina Court of Appeals agreed that a employee sensitive to smoke could claim handicapped status.⁸⁵ In *GASP* an anti-smoking association sued the county on behalf of a class of all persons harmed by tobacco smoke present in public facilities.⁸⁶ The organization sought state and federal handicapped status for a class of persons with any type of pulmonary illness, regardless of its severity.⁸⁷ Finding their class was too broad to fall under either statute, the court denied handicapped status for the association.⁸⁸ However, the court reserved judgment on whether a narrower class of smoke-sensitive persons could qualify as handicapped.⁸⁹

VI. SMOKERS' RIGHTS CLAIMS

Few smoking employees have challenged their employer's decision to alter smoking policies at work sites.⁹⁰ However, in situations involving collective bargaining, a union may prevent an employer from adopting a non-smoking policy. In *Johns-Manville Sales Corp. v. International Association of Machinists*,⁹¹ the union successfully challenged an asbestos manufacturer's attempt to implement a no smoking policy. The manufacturer produced expert medical testimony that smoking employees were ninety-two times more likely to die from lung cancer

81. 549 F. Supp. at 88.

82. *Id.*

83. *Id.*

84. 42 N.C. App. 225, 256 S.E.2d 477 (1979).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 227, 256 S.E.2d at 478-79.

89. *Id.* See Classen, *supra* note 13, at 850-51. The author cautions that the handicap claims made by nonsmokers could become a double-edged sword. Nonsmokers who are handicapped by smoke-related ailments would have the right to a smoke-free environment. However, at the same time, smokers who are handicapped because of their "addiction" to smoking would have the right to smoke in their place of employment if the employer could accommodate them. *Id.*

90. Crocker, *Controlling Smoking in the Workplace*, 38 LAB. L.J. 739, 742 (1987).

91. 621 F.2d 756 (5th Cir. 1980).

than nonsmoking employees.⁹² Despite the evidence, the union disputed the policy on grounds that it was too paternalistic and would force heavy smokers to quit.⁹³ In another arbitration case, *Union Sanitary District*,⁹⁴ the arbitrator found an employer's total ban on smoking unreasonable where the majority of workers found the secondhand smoke negligible and unoffensive.⁹⁵

In addition to labor union challenges to employers' no-smoking policies, smokers might claim that such policies violate their constitutional rights.⁹⁶ Smokers have argued that smoking is an unenumerated right protected by the right to privacy.⁹⁷ However, the right to privacy only includes enumerated fundamental personal liberties such as rights associated with marriage and abortion.⁹⁸ Thus, courts have not recognized smoking as conforming to the conceptual pattern of cases which have recognized the right of privacy.⁹⁹

Smokers have also tried to attack no smoking policies by claiming that they discriminate against the smoker as a "handicapped per-

92. *Id.* at 757. The expert also testified that secondary smoke damage is greatest when exposure to secondary smoke and asbestos occur at the same time; therefore, inhaling secondary smoke at work adds significantly to the carcinogenic risk. *Id.*

93. *Id.* The Union argued that confirmed chain smokers (*i.e.*, those smokers who smoke three packs of cigarettes a day for thirty years) cannot stop smoking. *Id.* Therefore, adopting a no smoking policy would inevitably cause their termination. *Id.* at 757-58.

94. 79 Lab. Arb. (BNA) 193 (1982) (Koven, Arb.).

95. *Id.* at 194-95. *But see* Snap-On Tools Corp., 87 Lab. Arb. (BNA) 785 (1986) (Berman, Arb.). The arbitrator upheld a partial ban on smoking where the employer has the right to unilaterally promulgate the rules when safety of the workplace was a factor. *Id.* at 789.

96. *See* Comment, *Where There's Smoke There's Ire: The Search for a Legal Path to Tobacco-Free Air*, 3 COLUM. J. ENVTL. L. 62, 68-72 (1976) (discussing smokers' rights). For arguments opposing antismoking legislation, see Merritt & Hill, *Recent Developments in Individual Rights*, 18 URB. LAW. 935 (1986). The authors argue that because we live in a free society, individuals should be able to engage in activities which may adversely affect their health. *Id.* at 938. "It is not yet forbidden to follow a diet of hamburgers and french fries, or to engage in sun bathing, both of which have demonstrable adverse health effects."

97. The Constitution does not explicitly refer to the right of privacy, but the Supreme Court has held that it is a "fundamental right" guaranteed by the Constitution. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

98. *See* Comment, *supra* note 96, at 72. The right to smoke is not on the same level as other rights which the right to privacy encompasses, such as the right of married couples to use contraceptives (*Griswold*, 381 U.S. at 479) and the right of a woman to choose to have an abortion (*Roe v. Wade*, 410 U.S. 113 (1973)). *Id.*

99. *Id.*

son.”¹⁰⁰ No reported case has found smokers to be “handicapped,” requiring the employer to make reasonable accommodation.¹⁰¹ To qualify under the statutory definition of “handicapped,” smokers would have to demonstrate an addiction to the nicotine drug in tobacco products.¹⁰² However, the Federal Rehabilitation Act has never qualified “drug abusers” as handicapped.¹⁰³ Like nonsmokers seeking “handicapped” status, courts may also require smokers to show that giving up their smoking at work would substantially impair a “major life activity.”¹⁰⁴

VII. NONSMOKING LEGISLATION

A. State Legislation

State governments are responsible for most nonsmoking legislation.¹⁰⁵ Since the early 1900s, states have exercised their police power¹⁰⁶ to regulate tobacco smoke.¹⁰⁷ States have justified such restrictions by demonstrating a compelling interest¹⁰⁸ in protecting the health of the general public.¹⁰⁹ The 1986 Surgeon General’s report es-

100. See Classen, *supra* note 13, at 850.

101. SEVENTEENTH ANNUAL INSTITUTE ON EMPLOYMENT LAW 335 (1988).

102. *Id.* at 336.

103. *Id.*

104. *Id.* at 336-37. See *supra* notes 74-89 and accompanying text for a discussion of nonsmokers’ “handicapped” claims.

105. See Merritt & Hill, *supra* note 96, at 936-37 n.3 (providing a current list of all state ordinances restricting smoking).

106. The state’s police power allows the state to restrict the personal freedom and property rights of individuals for the protection of public safety, health and morals and for the promotion of public convenience as well as its general prosperity. However, state and federal constitutions limit the scope of power. *Marshall v. Kansas City*, 355 S.W.2d 877, 883 (Mo. 1962); *Alford v. City of Newport News*, 260 S.E.2d 241 (Va. 1979). The Virginia Supreme Court held that ordinances restricting smoking in public places are “clearly within the police power of the legislature.” *Id.* at 243. See, e.g., 61 AM. JUR. 2d, PLANT AND JOB SAFETY, § 132 (1981) (suggesting that black letter law allows legislatures to impose reasonable regulations on employers for the protection and comfort of its employees).

107. See Classen, *supra* note 13, at 852-54 (1987) (discussing the legality of state legislation restricting smoking in public).

108. A state can only justify limiting fundamental rights such as privacy by showing a compelling state interest. *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965). See also L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 17 (1978) (discussing the constitutional basis for the right to privacy).

109. See 1989 SURGEON GENERAL’S REPORT, *supra* note 1, at 204. The REPORT extensively documents the threat smoking poses to society. Basically, smoking threat-

established a strong foundation for the enactment of the statutes. States legislators claim that an individual's personal autonomy may be restricted when it threatens the well-being of society.¹¹⁰ Therefore, the state's authority to prevent an individual from smoking includes those situations where secondary smoke¹¹¹ threatens the health of third parties.¹¹²

Originally state legislatures justified restrictive smoking legislation as necessary to protect the public from fire and other safety hazards, especially within the workplace.¹¹³ Additionally, states felt a moral obligation to ban cigarette smoking, which was blamed for social evils.¹¹⁴ During the 1960s, the health risks of smoking became widely recognized, and the focus of legislation shifted toward encouraging the smoker to quit.¹¹⁵ However, the metamorphosis in smoking legislation

ens society in two ways. First, tobacco smoke affects the smoker's own body. Scientific evidence shows that it can cause cancer, heart and respiratory ailments and other diseases. *Id.* at 204. Furthermore, smoking decreases productivity in the work force and increases health care costs which detract from other social programs. *Id.* at 189, 287 and 401. Second, smoking affects those individuals who are exposed to secondary smoke. *Id.* at 331. *See supra* notes 1 and 6.

110. *See infra* note 84. State laws requiring motorcyclists to wear helmets are analogous to the laws restricting smoking. *See Classen, supra* note 13, at 853. Many states require motorcyclists to wear helmets as a safety precaution. These statutes have been challenged as irrelevant to public health and safety and as invading the operator's right of privacy. *See, e.g., State v. Burzycki*, 158 Conn. 632, 252 A.2d 312 (Conn. 1969) (Connecticut helmet law held constitutional); *Everhardt v. City of New Orleans*, 253 La. 285, 217 So. 2d 400 (1968) (Louisiana helmet law held constitutional); *Commonwealth v. Howie*, 354 Mass. 769, 238 N.E.2d 373, *cert. denied* 393 U.S. 999 (1968) (Massachusetts helmet law held constitutional). The judiciary has upheld the constitutionality of helmet ordinances, finding that the failure to wear a helmet may contribute to a motorcyclist losing control of his motorcycle and cause a multiple vehicle accident which may injure other motorists. *State v. Fetterly*, 456 P.2d 996 (Or. 1969).

111. *See Classen, supra* note 13, at 854.

112. *See also Merritt & Hill, supra* note 96, at 939 (arguing that public ordinances should also protect the rights of smokers by providing them with reasonable facilities for smoking). *But see Comment, Where There's Smoke There's Ire: The Search for a Legal Path to Tobacco-Free Air*, 3 COLUM. J. ENVTL. L. 62, 68-74 (1976) (discussing smokers rights and their challenges to state smoking statutes).

113. 1989 SURGEON GENERAL'S REPORT, *supra* note 1, at 553. Until 1964, when the Surgeon General issued the first report, 19 states prohibited smoking near explosives or fireworks, in or near mines, or near hazardous fire areas. *Id.*

114. 1986 SURGEON GENERAL'S REPORT, *supra* note 1, at 264-65. The Surgeon General attributes the moral crusade against cigarette smoking to the moral crusade against alcohol that emerged during the same time. The strong public reaction to alcohol prohibition in 1927 encouraged states to repeal their laws banning smoking. *Id.*

115. *Id.* at 265.

began in the 1970s when extensive scientific studies reported the adverse effects that smoking had on nonsmokers. To the chagrin of the tobacco industry,¹¹⁶ the pace of legislation increased and the scope became more restrictive.¹¹⁷

Minnesota passed its landmark Clean Indoor Air Act in 1975.¹¹⁸ The most comprehensive at the time, the Act covered private work sites, restaurants and certain public places. Within the next five years, Utah,¹¹⁹ Montana¹²⁰ and Nebraska¹²¹ enacted similar comprehensive legislation. Momentum continued to build into the 1980s, with twenty-three new laws enacted by sixteen states between 1980 and 1985.¹²² As of 1989, forty-two states and the District of Columbia had enacted laws regulating smoking.¹²³ The remaining eight states which have not taken legislative action to restrict smoking include Alabama, Illinois, Louisiana, Missouri, North Carolina, Tennessee, Virginia and Wyoming.¹²⁴ Because several of these states are heavily dependent on the tobacco industry, the state legislatures are reluctant to pass non-smoking legislation.¹²⁵

The current wave of legislation has imposed new obligations on employers.¹²⁶ The least restrictive workplace laws simply require the em-

116. See, e.g., *Boreali v. Axelrod*, 71 N.Y.2d 1, 517 N.E.2d 1350, 523 N.Y.S.2d 464 (1987). Representatives of the tobacco industry brought suit in an effort to defeat the administrative rule prohibiting smoking in all public places in New York. They based their claim on the argument that the Public Health Council did not have authority to promulgate the rule. *Id.*

117. 1986 SURGEON GENERAL'S REPORT, *supra* note 1, at 264-65. Between 1970 and 1974, eight states enacted smoking regulations. Between 1975 and 1979, 15 states enacted smoking regulations. *Id.*

118. MINN. STAT. ANN. § 144.411-.417 (West 1989).

119. UTAH CODE ANN. § 76-10-106 (1978 & Supp. 1989).

120. MONT. CODE ANN. § 50-40-101 (1986).

121. NEB. REV. STAT. § 71-5707 (1986).

122. 1989 SURGEON GENERAL'S REPORT, *supra* note 1, at 561-68 (providing a table on state laws restricting smoking from 1964-1987).

123. *Id.*

124. *Id.*

125. Doolan & Indeglia, *A Call For Action: The Burning Issue*, 5 J. OF CONTEMP. HEALTH L. & POL. 221, 236 (1989).

126. See Crocker, *Controlling Smoking in the Workplace*, 38 LAB. L.J. 739, 741 (1987) (assessing the impact of state legislation on employer's smoking policies); Hehmann, *Nonsmokers' and Smokers' Rights in the Workplace*, EQU. EMPL. OPP. L. 1901 (1986).

ployer to issue a written smoking policy and to post signs.¹²⁷ More restrictive laws require that employers designate nonsmoking areas, implying that nonsmoking is the norm.¹²⁸

States with more restrictive smoking laws include New Jersey, New Mexico and Rhode Island.¹²⁹ These state legislatures have set guidelines which a private employer must follow in establishing a smoking policy. The New Mexico statute¹³⁰ requires an absolute prohibition in nurse's aid stations, elevators and a contiguous nonsmoking area of not less than one-half of an office's seating capacity. The Rhode Island statute¹³¹ requires an employer to take reasonable efforts to accommodate a nonsmoking employee affected by secondary smoke effects. However, the statute does not require an employer to make any expenditures or structural changes to accommodate the nonsmoking employees.¹³²

State restrictive smoking laws vary in their provisions for implementation and enforcement.¹³³ Nearly all states with nonsmoking laws provide penalties for smokers who violate restrictions.¹³⁴ In two states violators may be jailed.¹³⁵ Employers or others who fail to designate smoking areas may be fined in nine states.¹³⁶ In most states the health department is responsible for policy enforcement.¹³⁷ However, in reality private organizations have been the most effective in implementing

127. 1986 SURGEON GENERAL'S REPORT, *supra* note 1, at 268-73. The Report presents a comprehensive table on state laws regulating smoking in public places and worksites. The table illustrates that five states have adopted a written smoking policy and ten states require the posting of signs. *Id.*

128. *Id.* at 273.

129. Doolan & Indeglia, *supra* note 125, at 240.

130. N.M. STAT. ANN. § 24-16-7 (1978 & Supp. 1986).

131. R.I. GEN. LAWS § 23-20-7 (1989).

132. *Id.*

133. Some Congressional members feel that no smoking laws are basically unenforceable codifications of good manners and common courtesy. N.Y. Times, June 15, 1975, at 48, col. 5.

134. See 1986 SURGEON GENERAL'S REPORT, *supra* note 1, at 243 (listing of state statutes imposing penalties on violators).

135. *Id.*

136. *Id.*

137. *Id.* at 565. Minnesota and Utah grant the state health agencies authority to enforce smoking restrictions in the workplace if the agencies determine that the level of sidestream smoke in the office is detrimental to the health and comfort of nonsmoking employees. Doolan & Indeglia, *supra* note 131, at 236.

the laws.¹³⁸ Nonsmokers' Rights Organization, state and local chapters of the American Lung Association, and other health-oriented groups have proven the most active in making employers aware of their responsibility under the laws.¹³⁹

While private organizations facilitate compliance, the laws themselves encourage individual initiative in resolving tobacco smoke problems.¹⁴⁰ The laws give aggrieved non-smokers assurances that they have a legal right to a remedy by providing a basis for their complaint. Because the specific statutory provisions establish guidelines¹⁴¹ to fashion smoking policies and resolve disputes, there is less of a need to resort to litigation.

B. *Local Legislation*

Municipalities, like states, have discretion to use their police power to preserve public health, safety and morals or to abate public nuisances.¹⁴² In the 1980s, smoking legislation shifted from the state

138. 1986 SURGEON GENERAL'S REPORT, *supra* note 1, at 571. Neither the adequacy of implementation nor the level of compliance has been well studied. *Id.* According to an evaluation on the implementation of Minnesota's smoking statute, the state's department of health receives and resolves approximately 100 complaints per month. Edward R. Brandt, President of the Association for Non-Smokers' Rights, testimony before the Wisconsin Assembly Committee on State Affairs on Assembly Bill 80 (March 20, 1979). The private groups, however, have been particularly effective both in making proprietors and employers aware of their responsibilities under the law and in the production and distribution of signs and visual materials. *Id.*

139. See 1986 SURGEON GENERAL'S REPORT, *supra* note 1, at 440-42 (describing antismoking advocacy and lobbying groups and discussing their contribution to implementing smoking restrictions).

140. See, e.g., MINN. STAT. ANN. §§ 144.411-417. The emphasis of implementing the Minnesota statute has been on voluntary action rather than on using the power of the state to compel compliance and penalize non-compliance. Testimony of Edward B. Brandt before the Wisconsin Assembly Committee on State Affairs (March 20, 1979).

141. See, e.g., MINN. STAT. ANN. §§ 144.411-417 (Minnesota's statute has established a sign requirement as part of its general duty to implement the Minnesota statute); MINN. R. 4620.0500 (1989) (requirements for placement and content of "no smoking" signs); CONN. GEN. STAT. ANN. § 1-21b(b)(B) (West 1988) (Connecticut's statute requires that each sign bear the statement "No Smoking" in letters at least four inches high and the statements "or carrying a lighted cigarette, pipe or cigar," "by act of Congress" and "report violations to. . ." in letters one-half of an inch high); TEX. PENAL CODE ANN. § 48.01(c) (Vernon 1989) (signs are required to be placed at the entrance to no-smoking areas to give adequate notice to the smoker and within the smoking restricted area in clearly visible places. The statute also requires that ash trays be placed at the entrance of every place where smoking is prohibited).

142. See generally Annotation, Constitutionality of Anti-Cigarette Legislation, 20 A.L.R. 926, 931-32 (1922).

level to the local level.¹⁴³ Many local ordinances provide for smoking restrictions in the workplace where the state law does not apply. For example, although California does not restrict smoking in the workplace, sixty-six of its cities and counties have passed smoking ordinances requiring private employers to have a smoking policy or to identify nonsmoking areas.¹⁴⁴ In 1985 San Francisco passed the most restrictive law of any major U.S. city,¹⁴⁵ requiring that employers who permit employees to smoke in the work area must accommodate the preferences of smoking and nonsmoking employees. Employers face fines if they cannot find acceptable solutions for nonsmoker complaints.¹⁴⁶

C. Federal Legislation

Congress has enacted scant federal legislation restricting smoking in the private workplace.¹⁴⁷ However, the "General Duty" clause of the Occupational Safety and Health Acts of 1970 (OSH Act)¹⁴⁸ imposes a general duty upon the public and private employer to eliminate all foreseeable and preventable hazards which are capable of causing death or serious physical harm.¹⁴⁹ However, courts have hesitated to find that secondary smoke qualifies as such a hazard.¹⁵⁰ The OSH Act does not establish any standard concerning tobacco smoke nor does it grant

143. See Warner, *Regional Differences in State Legislation on Cigarette Smoking*, 56 TEX. BUS. REV. 27 (1982).

144. 1986 SURGEON GENERAL'S REPORT, *supra* note 1, at 566. The Report notes that the 117 local ordinances affect nearly 15 million citizens, more than 55% of the state's population.

145. *San Francisco Anti-Smoking Law a Success*, Wall St. J., June 25, 1985, at B1, col. 5. The article discusses the heated battle over enacting the ordinance. It reports that a pro-smoking group collected over 48 signatures in opposition to the bill, and the tobacco industry contributed more than \$1.2 million to the committee's campaign. *Id.*

146. *Id.*

147. 1986 SURGEON GENERAL'S REPORT, *supra* note 1, at 553. The federal government has taken steps to restrict smoking in two categories of public places: transportation facilities (32 C.F.R. 203 (1983)) and government worksites (49 C.F.R. § 1061 (1983)). See also Comment, *The Legal Conflict Between Smokers and Nonsmokers: The Majestic Vice Versus the Right to Clean Air*, 45 MO. L. REV. 444, 460 (1980) (discussing the advantages and disadvantages of enacting federal legislation restricting smoking).

148. 29 U.S.C. § 654(a)(1) (1988).

149. *Id.*

150. See *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980) (holding that OSHA regulations apply to both the federal and private sector). See, e.g., *Gaspar v. Louisiana Stadium & Exposition Dist.*, 418 F. Supp. 716 (E.D. La. 1976), *aff'd*, 557 F.2d 1276 (5th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979); *Federal Employees for Non-Smok-*

nonsmokers a private cause of action.¹⁵¹ For example, in *Federal Employees for Nonsmokers' Rights v. United States*,¹⁵² nonsmoking federal employees sought injunctive relief to restrict smoking to designated areas. The court held that while the OSH Act requires federal agencies to provide a safe and healthful working environment, it does not provide employees with a private cause of action against federal employers.¹⁵³ Furthermore, courts have held that OSH Act does not preempt the field of occupational safety and that states have concurrent power to act under common law.¹⁵⁴

Congress has been most responsive to claims of nonsmokers in the context of airline travel.¹⁵⁵ In 1990, Congress passed an amendment which bans smoking on all airline flights under six hours.¹⁵⁶ Both the growing awareness of the hazards of secondary smoke and the concern for airline safety prompted such action.¹⁵⁷

VIII. THE LEGISLATIVE SOLUTION

Because of increasing scientific and judicial recognition of the adverse effects of secondary smoke, nonsmokers' concerns have prevailed over those of smokers in the workplace.¹⁵⁸ Without any specific legal guidance, employers cannot know the extent to which they can accommodate one group without facing litigation by the other. Therefore, state and local legislation is needed to guide the employer in establishing a viable smoking policy. Carefully drafted legislation can protect

ers' Rights 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).

151. *Id.* See also *Shimp v. New Jersey Bell Tel. Co.*, 145 N.J. Super. 516, 368 A.2d 408 (1976).

152. 446 F. Supp. 181 (D.D.C. 1978), *aff'd*, 598 F.2d 310 (D.C. Cir.), *cert. denied*, 444 U.S. 926 (1979).

153. *Id.*

154. 29 U.S.C. § 653(b)(4)(1988). The statute states that nothing in the Act "shall be construed to supercede or in any manner affect any workmen's compensation law or to enlarge, or diminish or affect in any other manner the common law or statutory rights, duties or liabilities of employers and employees under any law with respect to injuries, diseases or death of employee arising out of, or in the course of employment." *Id.*

155. See *Doolan & Indeglia*, *supra* note 125, at 234.

156. Department of Transportation and Related Agencies Appropriations Act, Pub. L. No. 101-161, § 335, 103 Stat. 1069, 1098-99 (1989).

157. See *Doolan & Indeglia*, *supra* note 125, at 234.

158. *Id.* at 240.

the rights of both smokers and nonsmokers and can prevent future conflicts between the groups. Ideally, legislation should establish non-smoking as the norm. Additionally, it should specify implementation and enforcement methods and penalties for violations.¹⁵⁹

Because secondary smoke can seriously affect the nonsmoker, public policy should require a presumption that non-smoking is the norm, while allowing specified smoking areas.¹⁶⁰ The Minnesota statute best serves as a model for other restrictive smoking statutes.¹⁶¹ It requires the Department of Labor and Industry to establish rules restricting or prohibiting smoking in those places of work where the close proximity of workers or the inadequacy of ventilation causes smoke pollution to hinder the health and comfort of non-smoking employees.¹⁶² The statute also provides an exception for enclosed offices occupied exclusively by smokers.¹⁶³ Without this provision, a law prohibiting smoking in the workplace could have the unintended effect of prohibiting smoking in a truly private office.¹⁶⁴ Wisconsin's Clean Indoor Act¹⁶⁵ is another exemplary statute.¹⁶⁶ While the statute bans smoking in all offices, it also provides for the designation of smoking areas in order to accommodate the interests of all employees.¹⁶⁷ A less restrictive statute could merely require erecting physical barriers or installing ventilation systems to minimize the toxic effect of smoking in nearby areas.¹⁶⁸ However, business experience has shown deficiencies in these solutions; physical barriers are expensive and ventilation systems are often inadequate.¹⁶⁹

Legislators may have difficulty drafting legislation to cover the wide

159. See Comment, *supra* note 147, at 449-59 (comparing state legislation restricting smoking in the workplace).

160. See Doolan & Indeglia, *supra* note 125, at 242.

161. MINN. STAT. ANN. Section 144.411-417.

162. *Id.*

163. *Id.*

164. See Comment, *supra* note 147, at 453.

165. WIS. STAT. ANN. § 101.123 (West 1988).

166. See Doolan & Indeglia *supra* note 125, at 242.

167. WIS. STAT. ANN. § 101.123.

168. See, e.g., NEB. REV. STAT. § 71-5708 (1986).

169. See American Lung Association of Eastern Missouri Brochure, *Smoking and Smoking Policies Development*, Jan. 23, 1985. See also *supra* note 21 (noting the ineffectiveness of a fan in eliminating tobacco smoke).

variation in the size, shape and nature of workplaces.¹⁷⁰ Therefore, they may delegate administrative agencies the authority to implement and enforce guidelines. In Minnesota, for example, the statute charges the State Commissioner of Health with the responsibility of adopting regulations to implement the statute.¹⁷¹ Additionally, the Commissioner, a local board of health and any affected party have authority to institute injunctive action.¹⁷²

Optimal legislation should encourage smokers to comply with the regulations by requiring the employer to post no smoking signs.¹⁷³ The signs serve to delineate the specific area where the employer prohibits smoking, and they remind smokers to extinguish their cigarettes. Furthermore, signs also provide a statutory basis for prosecuting violations.¹⁷⁴

In addition, an effective statute should impose realistic penalties rather than nominal fines. The statute should penalize not only the smoker but also the employer for breach of his duty to protect non-smokers. To justify punishment at this level, the statute must first impose a duty on the employer.¹⁷⁵ For example, the Minnesota Statute¹⁷⁶ states that the employer must make reasonable efforts to prevent smoking by: (1) posting no smoking signs; (2) arranging separate smoking and nonsmoking areas; (3) requesting smokers violating the law to cease; or (4) by other appropriate means.¹⁷⁷ If the employer breaches this duty, the statute may impose a five hundred dollar fine.¹⁷⁸ Such a large penalty provides the employer with a strong incentive to comply with the regulations.

IX. CONCLUSION

Although both employers and society have an interest in allowing

170. See Comment, *supra* note 96, at 94 (evaluating the scope of protection to non-smokers in state legislation).

171. See, e.g., MINN. STAT. ANN. § 144.411-.41713 (West Supp. 1989).

172. *Id.*

173. See *supra* note 140 (noting that the Minnesota Statute aims to achieve voluntary compliance).

174. See *supra* note 141.

175. See Comment, *supra* note 147, at 457 (discussing the range of penalties imposed by statutes).

176. See *supra* note 161.

177. *Id.*

178. *Id.*

smokers to satisfy their indulgences, they are also concerned with protecting the freedom and health of nonsmokers. Therefore, effective protection of the nonsmoker's welfare demands legislative action. To achieve this end, statutes should guide the employer in reaching an equitable smoking policy to appease the tension between smokers and nonsmokers.

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