A Call for Action: The Burning Issue of Smoking in the Workplace

Kathryn M. Doolan

Robert A. Indeglia Jr.
A CALL FOR ACTION: THE BURNING ISSUE OF SMOKING IN THE WORKPLACE*

Traditionally, cigarette smoking has always been considered a personal choice involving individual liberties.1 This is no longer the case.2 There is an increasing concern among medical experts about the dangers of involuntary smoking and the effect it will have on non-smokers. Involuntary smoking, also known as “passive” or “second-hand” smoking, is defined as inhaling the cigarette smoke of others.3 Today, the number of people smoking has decreased to 30% in the United States,4 while the non-smoking majority has increased its demand for its right to breathe in a smoke-free environment.5 Due to the increasing medical evidence, the will of this majority has been expressed by the United States Congress, which recently passed an amendment to the Federal Aviation Act of 1958 prohibiting smoking on all scheduled airline flights of less than two hours.6

With this amendment as the catalyst to future legislation,7 the tobacco industry has used its lobbying efforts to prevent or delay any further anti-smoking legislation.8 The question remains whether the will of the grassroots majority can overcome the influential tobacco industry lobbyists. If so, there will be a flood of legislation from national, state and local levels restricting smoking in various public places.

---

*This paper is dedicated to Mary Doolan and Kate Salisbury, who have experienced the hazards of involuntary and voluntary smoking.


2. Id.


5. See infra note 112.

6. Federal Aviation Act, infra note 106.

7. See infra note 111.

8.See, e.g., Boreali v. Axelrod, 71 N.Y.2d 1, 517 N.E.2d 1350 (1987). This suit was brought by a representative of the tobacco industry in an effort to defeat the administrative rule prohibiting smoking in all public places in New York. This claim was based on the argument that authority was not properly delegated to the Public Health Council to promulgate this rule.
Advocates of non-smokers' rights have focused their efforts on obtaining restrictions in the workplace. Non-smokers have employed two avenues in an attempt to enforce their rights, that is, the courts and legislatures. In tracing the successes and failures of this crusade, this Comment illustrates that the tobacco industry's argument has failed in the judicial system, while increasing medical evidence demonstrating the dangers of involuntary smoking has influenced the legislatures to intervene. This Comment concludes that the most attentive ears lie in the legislatures to resolve this burning issue.

I. MEDICAL EVIDENCE ESTABLISHES A CALL FOR ACTION

"Ever since the first Surgeon General's report on the hazards of smoking in 1964, it has been an established fact that cigarette smoking is a killer. In the United States alone, it contributes to at least 160,000 deaths each year - equivalent to a packed jumbo-jetliner crashing every twelve hours. While cigarette smoking has been considered a matter of individual choice and personal freedom, the focus has shifted recently to third parties affected by an individual's decision to smoke. The Surgeon General's Report of 1986 extrapolates from the evidence about the effects of involuntary smoking on the health of children and adults. The harmful constituents of mainstream cigarette smoke are found in sidestream smoke and, at times, to a greater extent than in mainstream smoke. Therefore, the involuntary smoker may be subject to the same health risks as the smoker himself.

C. Everett Koop, M.D., Surgeon General of the United States, reported that the overall evidence based on the reports of over sixty scientists verified that the exposure to environmental tobacco smoke ("ETS") increases the incidence of lung cancer in non-smokers. The tobacco industry has refuted

9. Further, it has been recognized that these smoking restrictions cannot extend to the home because the fourth amendment prohibits government intrusion in the private home. Weiss, supra note 1.
11. See generally infra notes 12-33 and accompanying text.
14. Id; see also Lee & Wigle, Deaths in Canada from Lung Cancer Due to Involuntary Smoking, 136 CAN. MED. A.J. 372 (1987) which discusses estimates that involuntary smoking causes 330 deaths from lung cancer a year among Canadians who have never smoked.
those conclusions, as well as those of other advocates of non-smokers' rights. In drawing its own conclusions, the tobacco industry asserts that the evidence relating ETS to health effects is scanty, contradictory and often fundamentally flawed. In looking at the quality of the evidence, most of the studies have been criticized for significant flaws in methodology, such as, "to[o] few subjects to permit statistically reliable findings, failure to provide appropriate controls against which comparisons can be made, failure to verify the origin of the primary cancer in all subjects, and failure to account for lifestyle factors that might influence the results." Further, the tobacco industry suggests that the issue of involuntary smoking is a scientific question:

Individual scientists and groups of scientists are being asked frequently whether tobacco smoke in the environment presents a danger to the health of nonsmokers. The issue is not whether some people are annoyed by the smoke of others. Nor is it whether prohibiting smoking in the vicinity of nonsmokers might indirectly 'help' smokers by forcing them to smoke less often. It is a purely scientific question, not a policy question. (Emphasis added).

Finally, the tobacco industry points to specific studies which detract from some of the Surgeon General's primary assertions. The Surgeon General acknowledges that stronger evidence may be needed to justify restrictions on smoking, and he points to the fact that new reports are surfacing indicating the hazards of involuntary smoking. Moreover, "what lawyers call a 'preponderance of evidence' is on the side of those who want to clear the air."

17. Tobacco Institute, Tobacco Smoke and the Nonsmoker: Scientific Integrity at the Crossroads (1987) [hereinafter Tobacco Smoke].
18. Id. at 1.
20. See Tobacco Smoke, supra note 17, at 1.
21. Id. For example, "The study, from the Pulmonary Section of Yale University's School of Medicine, examined the response of nine young asthmatic subjects ranging in age from 19 to 30, to intense levels of machine-generated cigarette smoke. The subjects, who were not smokers themselves, were exposed in an environmental chamber for one hour to what the authors termed a 'severe simulation of passive smoking, beyond what normally occurs in the majority of social or occupational environments.' The exposure produced no wheezing and no change in expiratory flow rates. In fact, the authors reported, it 'caused a slight decrease in nonspecific bronchial reactivity' [emphasis in original] — that is, a slight improvement in the abnormal tendency of an asthmatic patient to react to a standard 'bronchoprovocation' test by a constriction of breathing passages." Id. at 2. See also H. Wiedemann, D. Mahler, J. Loke, J. Vigulto, P. Snyder, and R. Matthay, Acute Effects of Passive Smoking on Lung Function and Airway Reactivity in Asthmatic Subject, 89 CHEST 180 (1986) [hereinafter Wiedemann].
22. Koop, supra note 3, at 112. In lung cancer alone, the Surgeon General reviewed thirteen studies; eleven of which concluded a positive correlation between involuntary smoking and lung cancer. Id. See generally Fielding, supra note 3, at 1453.
For instance, a scientific study has suggested that 5,000 non-smokers die each year from lung cancer traced to involuntary smoking. This number, when compared to the number of deaths caused by environmental and occupational agents which are already regulated by the federal government, such as, air pollution, cotton, coal, radon and silica dusts, involuntary smoking appears to be one of the most important causes of chronic lung injury.

Moreover, the Surgeon General emphasizes, "the importance of involuntary smoking as a public health issue is not related solely to the number of cases of cancer produced but to the societal issue of freedom from exposure." Involuntary smoking affects everyone in either obvious or cosmetic ways. For example, the most common effects associated with exposure to involuntary smoke are eye, nose and throat irritations, as well as the discomfoting odor that lingers in hair, clothes and furniture due to the inability to effectively control the ventilation of tobacco smoke.

Moreover, "respiratory symptoms, such as wheezing, coughing and sputum production are increased about 20 to 80 percent in children of smoking parents. Also, respiratory infections manifested as pneumonia and bronchitis are significantly increased in infants of smoking parents."

The most viable means available to limit the hazards of involuntary smoking are to regulate smoking in the workplace and other public places. Studies have concluded that non-smokers who work for an extended period of time in areas where smoking is present show as much loss of small-airways lung function as light smokers.

23. Fielding, supra note 3, at 1453.
24. Koop, supra note 3, at 112. Furthermore, a "1985 study by the American Cancer Society showed that the lung cancer risks doubled for non-smoking women whose husbands smoked 20 cigarettes a day at home." Id. See Korcok, US Surgeon General Ignites Furor with Findings on Smoking in the Workplace, 134 CAN. MED. A. J. 801 (1986). See also Lee & Wigle, supra note 14.
25. Weiss, supra note 1 (emphasis added).
27. Id.
28. Id. at 111.
29. Id. at 111-112. See generally Fielding, supra note 3.
30. Weiss, supra note 1.
32. R. Carlson, Toward a Smoke Free Workplace (1986). The Second Joint Conference of the Chemical Institute of Canada and the American Chemical Society found that in one hour in a smoke-filled room non-smoker may inhale volatile nitrosamines (cancer-causing agents) as much as is found in 5-30 cigarettes. Id. at 7.
smokers who already have health problems. The presence of tobacco smoke in the atmosphere may precipitate breathing problems or allergy attacks in these non-smokers who form a significant part of most employee populations.\textsuperscript{33}

The evidence supports the conclusion that there is an urgent need to place restrictions on smoking and smokers in order to protect the non-smoking majority. Regulation of smoking in the workplace is likely to be the most plausible means by which to afford such protection. The question remains as to what source of authority would bring about such regulation effectively.

II. JUDICIAL RESPONSE.

The three sources of legal rights available to non-smokers seeking a smoke-free environment are: (1) the Constitution of the United States; (2) common law; and (3) statutes. Some suits brought by non-smokers have proven successful, and future suits are likely to succeed as more evidence of the hazards of involuntary smoking becomes available. Nonetheless, some claims have been rejected due to the lack of tangible medical evidence. Consequently, future litigants will need the support of strong medical evidence of the inherent dangers of involuntary smoking in order to breathe life into such claims.

A. Constitutional Claims.

The courts have consistently rejected claims that the Constitution guarantees individuals a right to a smoke-free work environment.\textsuperscript{34} These cases raise essentially three constitutional arguments. The landmark case employing these constitutional arguments is \textit{Gasper v. Louisiana Stadium & Exposition District},\textsuperscript{35} in which the plaintiffs sought to enjoin the Louisiana Stadium & Exposition District from continuing to allow tobacco smoking during events in the Louisiana Superdome.\textsuperscript{36}

\textsuperscript{33} \textit{Id.} "For instance, among a work force population at the Social Security Administration offices in Baltimore, 10% had heart problems, 39% reported respiratory problems and 10% declared they were allergic to tobacco smoke." \textit{Id.} at 7.


\textsuperscript{36} The plaintiff brought these claims pursuant to 42 U.S.C. § 1983 (1982), which states in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be
In *Gasper*, the plaintiffs, individually and as representatives of other non-smokers similarly situated, claimed that the existence of tobacco smoke in the Superdome created a chilling effect upon the exercise of their first amendment rights "to receive others' thoughts and ideas," since they must breathe that harmful smoke as a precondition to enjoying events in the Superdome. However, the Federal District Court for the Eastern District of Louisiana held that the State's allowance of smoking in the Superdome adequately "preserves the delicate balance of individual rights without yielding to the temptation to intervene in purely private affairs."

In addition, the plaintiffs in *Gasper* alternatively contended that under the fifth and fourteenth amendments of the Constitution, the State of Louisiana was unlawfully depriving non-smoking Superdome patrons of their life, liberty and property without due process of law. The plaintiffs asserted that the penumbras of these amendments provide the right to be free from hazardous tobacco smoke while in state buildings. Once again, the court rejected this claim after balancing the due process rights of the non-smoking plaintiffs against the rights of others attending events in the Superdome.

liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

38. *Id.* at 718. See also *Lamont v. Postmaster General*, United States, 381 U.S. 301 (1965). U.S. CONST. amend. I, which provides that:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

40. *Id.* See U.S. CONST. amend. V which states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend XIV, § 1, which states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The court affirmed the decision in *Tanner v. Armco Steel Corp.*, which held that "[n]o legally enforceable right to a healthful environment, giving rise to an action for damages, is guaranteed by the fourteenth amendment or any other provision of the Federal Constitution." The court in *Gasper* recognized that the Constitution does not provide "judicial remedies for every social and economic ill." However, it can be inferred from the court's decision that it acknowledged the need for a resolution to this social and economic ill, but that a judicial remedy would create a legal avenue "heretofore unavailable through which an individual could attempt to regulate the social habits of his neighbor."

The plaintiffs' third constitutional assertion in *Gasper* was that breathing smoke-free air is one of the non-enumerated fundamental rights protected by the ninth amendment as recognized in *Griswold v. State of Connecticut*. In rejecting the plaintiffs' claim, the court held that unlike the right of sanctity in the marriage relationship, the right to breathe smoke-free air in the Superdome "does not . . . rise to those constitutional proportions envisioned in *Griswold*." The court also stated that to recognize a fundamental right to a smoke-free environment would be to "mock the lofty purposes of such amendments and broaden their penumbral protections to unheard of boundaries."

*Gasper* is distinct from the problems posed by smoking in the workplace because the atmosphere of the average workplace is significantly different from that of the Louisiana Superdome for reasons such as size, capacity and the nature of the event. *Gasper* is also distinct in that a non-smoker voluntarily chooses to attend the Superdome for purposes of enjoyment and pleasure, whereas attendance at the workplace is normally one of necessity. While it is true that an individual may choose where to work, this choice is diminished because presently there are few workplaces which provide a smoke-free environment. Nevertheless, *Gasper* has been relied upon in subsequent cases to dismiss the claims of employees that exposure to co-workers' tobacco smoke infringes upon their constitutional rights.
While non-smokers' constitutional claims have yet to be accepted, advocates of non-smokers' rights can draw one positive aspect from the Gasper decision. The court in Gasper recognized that the hazard of involuntary smoking is a social and economic ill that should be addressed, but for the judiciary to recognize such a fundamental right would be "to engage in that type of adjustment of individual liberties better left to the . . . legislative processes." 51

B. Common Law Claims.

Non-smokers have asserted several common law claims alleging that the employer has a duty to provide a work area free from unsafe conditions. The cornerstone of this claim rests on the decision of Shimp v. New Jersey Bell Telephone Co. 52 In this case, the plaintiff, an employee, sought to enjoin her employer from allowing cigarette smoking in the work area because she had a severe allergic reaction to the smoke. The New Jersey Superior Court concluded that exposure to tobacco smoke caused the plaintiff's physical symptoms and was also harmful to non-hypersensitive persons. 53 It is clear under common law that an employee has a right to work in a safe environment. 54 This right stems from a duty of the employer to provide a work area free from unsafe conditions. 55 In defining unsafe conditions due to preventable hazards, as distinguished from occupational hazards, Shimp recognized that, "[t]here can be no doubt that the by-products of burning tobacco are toxic and dangerous to the health of smokers and non-smokers generally and this plaintiff in particular." 56 In its decision, the Shimp court relied on extensive medical evidence, such as the finding that a significant percentage of

446 F. Supp. 181 (D.D.C.), aff'd, 598 F.2d 310 (D.C. Cir. 1978), cert. denied, 444 U.S. 926 (1979) (action brought to prohibit smoking in federal buildings). See also GASP v Mecklenburg County, 42 N.C. App. 225, 256 S.E.2d 477 (1979) (action to ban smoking in county buildings and facilities). In any event, constitutional rights would only be at issue with respect to public employers and private entities so closely associated with the government that their actions would satisfy the jurisdictional prerequisite of state action.

53. Id. at 531, 368 A.2d at 416; Ashe & Vaughan, supra note 34, at 390.
55. Id. See also Lapham v. Pa. Unemployment Compensation Bd. of Review, 103 Pa. Commw. 144, 519 A.2d 1101 (1987) (claimant who resigned from her position because she suffered from allergic bronchitis due to exposure to cigarette smoke in the work area met the burden of showing compelling cause for termination).
56. Shimp, 145 N.J. Super. at 526, 368 A.2d at 413. See also McCarthy v. Washington Dept' of Social & Health Servs., 46 Wash. App. 125, 730 P.2d 681 (1986), aff'd, 110 Wash. 2d 812, 759 P.2d 351 (1988) (en banc), (held as long as a plaintiff can prove when her disease is not an occupational disease, the plaintiff may sue her employer at common law for negligently failing to provide a safe office environment).
the United States working population has an allergy to cigarette smoke, producing discomforting symptoms such as coughing, wheezing, eye irritations and headaches. The court labeled these hazards as preventable and not a natural by-product of the defendant's business. Further, the court stated that such an atmosphere was not unavoidable:

Plaintiff works in an office. The tools of her trade are pens, pencils, paper, a typewriter and a telephone. There is no necessity to fill the air with tobacco smoke in order to carry on defendant's business, so it cannot be regarded as an occupational hazard which plaintiff has voluntarily assumed in pursuing a career as a secretary.

The reasoning utilized by the Court in Shimp has been followed in subsequent decisions. For example, in Smith v. Western Electric Co., the Missouri Court of Appeals found that the plaintiff, an employee of Western Electric, stated a claim against the employer for breach of the employer's common law duty to provide the employee with a safe place to work. The plaintiff's claim resulted from involuntary exposure to tobacco smoke in the workplace. While the court recognized that the employer had a duty to provide a safe workplace, on remand the trial court in Smith v. AT&T Technologies Inc. found that this duty had not been breached. The court found that the evidence did not demonstrate that "the tobacco smoke at plaintiff's former workplace was harmful or hazardous to his health ... or to the health of the other employees in that area." In Lapham v. Unemployment Compensation Bd. of Review, the plaintiff, an employee who suffered from allergic bronchitis due to exposure from cigarette smoke in the work area, resigned from her position because of this condition. She sought and was denied unemployment compensation benefits. The Commonwealth Court of Pennsylvania stated that "terminating employment for health reasons, the [plaintiff] must show that she explained to her employer her medical condition and her inability to perform regularly assigned duties, and submitted medical evidence of her condition." Once
this burden has been met, the defendant/employer must provide a suitable alternative.\textsuperscript{69} This burden on the employer stems from an employer’s duty to provide a work area that is free from unsafe conditions.\textsuperscript{70} In contrast to the court’s decision in \textit{AT&T Technologies}, which also recognized the existence of such a duty but found no breach,\textsuperscript{71} the court in \textit{Lapham} found a breach.\textsuperscript{72} The distinguishing factor is the lack of medical evidence in \textit{AT&T Technologies}.\textsuperscript{73} In \textit{Lapham}, evidence was introduced which established “the toxic nature of tobacco smoke and its injurious and deleterious effects on health, . . . not only to the smokers, but also to the nonsmokers who are exposed to ‘secondhand’ smoke.”\textsuperscript{74} Based on this evidence, the court held that the defendant failed to provide a suitable alternative and granted the plaintiff’s unemployment compensation benefits.\textsuperscript{75}

The tobacco industry argues that the employer has a duty to accommodate only the needs of “typical” employees. Similarly, in \textit{Gordon v. Raven Systems and Research, Inc.},\textsuperscript{76} the court held that “The common law does not impose upon an employer the duty or burden to conform his workplace to the particular needs or sensitivities of an individual employee. Without such a duty, appellant can complain of no wrong.”\textsuperscript{77}

As the \textit{Lapham} decision illustrates, medical evidence has changed the direction of court decisions since the \textit{Gordon} court rendered its decision. First, the Surgeon General’s Report of 1986 states that involuntary smoking affects even the “typical” employee in the workplace.\textsuperscript{78} Second, the percentage of employees who are “hypersensitive” to involuntary smoking is too significant to be ignored.\textsuperscript{79}

The court in \textit{Shimp} also drew an interesting analogy that is even more convincing today in view of the increased amount of medical evidence:

\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{71} See \textit{AT&T Technologies}, No. 446121, slip. op. (St. Louis Co. Cir. Ct. Apr. 23, 1988).
\textsuperscript{72} \textit{Lapham}, 103 Pa. Commw. at 146, 519 A.2d at 1102.
\textsuperscript{73} See \textit{AT&T Technologies}, No. 446121, slip op. (St. Louis Co. Cir. Ct. Apr. 23, 1988).
\textsuperscript{74} \textit{Lapham}, 103 Pa. Commw. at 147, 519 A.2d at 1102.
\textsuperscript{75} Id. at 148, 519 A.2d at 1103.
\textsuperscript{76} 462 A.2d 10 (D.C. App. 1983). See also Smith v. Blue Cross & Blue Shield, No. C-3617-81E (N.J. Super. Ct. Ch. Div., Aug. 18, 1983) (the safety or adequacy of the work environment is to be judged by reference to the typical employee, rather than one who is hypersensitive). See also Smith v. AT&T Technologies Inc., No. 446121 St. Louis Cty. Cir. Ct., April 23, 1985), slip op. at 3-4 (the Court ruled that it does not have to have the authority to require the defendant to provide a comfortable workplace for its employee, only a reasonably safe workplace.).
\textsuperscript{77} \textit{Gordon}, 462 A.2d at 15.
\textsuperscript{78} Carlson, supra note 32, at 7.
\textsuperscript{79} Id.
The company already [has] in effect a rule that cigarettes may not be smoked around the telephone equipment. The rationale behind the rule [is] that the machines are extremely sensitive and [can] be damaged by the smoke. Human beings [in general] are also very sensitive and can be damaged by cigarette smoke. Unlike a piece of machinery, the damage to a human is all too often irreparable. If a circuit or wiring goes bad, the company can install a replacement part. It is not so simple in the case of a human lung, eye or heart . . . A company which has demonstrated such concern for its mechanical components should have at least as much concern for its human beings.80

In summary, under the common law, the employer has a duty to provide a reasonably safe workplace for the typical employee. Moreover, it has become increasingly clear that the hazards of smoking in the workplace affect all employees. Consequently, a duty to impose smoking restrictions would benefit all employees and, therefore, is justified.

C. Statutory Claims.

In general, legislative action addressing the workplace environment has not been successful in obtaining judicially enforced smoking restrictions in the private workplace.81 Judicial remedies have been limited to occupational safety and handicapped discrimination claims,82 providing negligible relief for the typical non-smoker.83 For instance, in Federal Employees for Non-Smokers' Rights v. United States,84 "[g]roups opposed to smoking and non-smokers employed by federal agencies brought an action seeking . . . injunctive relief restricting smoking in federal buildings to designated areas."85 The court stated that while the Occupation Safety and Health Act (OSH Act)86 "does require federal agencies to provide safe and healthful places and conditions of employment," the OSH Act "does not provide employees with a private cause of action against federal employers."87

The leading case concerning handicapped discrimination claims is Vickers

80. Shimp, 145 N.J. Super. at 516, 368 A.2d at 408.
81. Ashe & Vaughan, supra note 34, at 386.
82. Id.
87. FENSR, 446 F. Supp. at 183.
v. Veterans Administration. In Vickers, the plaintiff was a non-smoker. Due to his hypersensitivity to tobacco smoke, the plaintiff was considered a "handicapped person" under the Rehabilitation Act of 1973. However, in order to be entitled to recovery, the plaintiff needed to demonstrate that the defendant/employer discriminated against him by reason of his handicap. Thus, the plaintiff asserted that he was discriminated against because of his employer's failure to provide reasonable accommodations for his physical handicap by providing a work environment free from tobacco smoke. The court rejected this argument and held that the employer did more than what was reasonable to accommodate the plaintiff for his physical handicap.

In determining who qualifies under the statute as a handicapped person, the courts have imposed a strict interpretation. For example, in GASP v. Mecklenburg County, the court ruled that a group of non-smokers who were "harmed in any way" by the presence of tobacco smoke did not constitute "handicapped persons." The court reached this conclusion because it believed, "[i]t is manifestly clear that the legislature did not intend to include within the meaning of 'handicapped persons' . . . people who are harmed or irritated by tobacco smoke.

In Parodi v. Merit Systems Protection Board, the plaintiff established a prima facie case for entitlement to benefits as a disabled employee due to her

---

89. See 29 U.S.C. § 706(7)(B) (1984) ("Any person is a handicapped person if that person has a physical impairment which substantially limits one or more of his or her major life activities.").
90. Vickers, 549 F. Supp. at 87 ("No otherwise qualified handicapped individual in the U.S. as defined under 29 U.S.C. § 706(7)(1) of this title shall solely by reason of his handicap be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity conducted by any executive agency or by the U.S. postal service.").
91. Id.
92. Id. at 88. For example, smokers and non-smokers occupied separate offices. In addition, the employer obtained a voluntary agreement from employees in adjacent rooms to refrain from smoking. Further, the employer attempted to obtain an improved exhaust system for the plaintiff's work area as well as improving the ventilation system. Also, an air purifier was purchased at the employer's expense for the plaintiff's private office. The employer also offered to partition the plaintiff's desk from the rest of the office and the plaintiff was given the opportunity to move his desk closer to the window. Finally, if none of these accommodations mollified the plaintiff, he was offered an outside maintenance job by the defendant.
94. Id.
95. Id. 42 N.C. App. at 257, 256 S.E.2d at 479.
96. 690 F.2d 731 (9th Cir. 1982). See also Alexander v. Cal. Unemployment Ins. Appeals Bd., 104 Cal. App. 3d 97, 163 Cal. Rptr. 411 (1980) (holding that a nurse who left her job because of her reactions to tobacco smoke had sufficient grounds to do so, and was eligible for unemployment compensation).
hypersensitivity to tobacco smoke. The court stated that:

[A] person is totally disabled, if unable to perform useful and efficient services in the grade or class of its position last occupied by the employee or member because of disease or injury not due to vicious habits, intemperance, or willful misconduct or his part within five years before becoming so disabled.

As a result, the court imposed a duty on the defendant/employer either to pay disability benefits or to provide the plaintiff a comparable job in a smoke-free environment.

The tobacco industry cites Vickers in asserting that courts should leave it up to employers "to fashion appropriate accommodations that take into account both the desires of smokers and non-smokers." However, in Parodi, the employer took no steps to fashion appropriate accommodations, consequently judicial intervention was necessary to initiate these accommodations.

The authors agree with those who stated that the decisions involving statutory claims "offer only derivative relief to the non-smoker who is merely concerned about the health hazards of involuntary smoking. Given the judiciary's general reluctance to grant relief based on a possibility rather than a probability of future harm, concerned non-smokers should seek relief in legislative action."

III. LEGISLATIVE RESPONSE.

Although the judiciary does offer some means of reform, it has continually expressed its inability to equitably balance the rights of non-smokers against the rights of smokers. Consequently, the process of weighing individual liberties is better entrusted to legislative processes. Despite differing objectives, the advocates of both non-smokers' rights and the tobacco industry feel that the legislature is the most efficient means to regulate smoking in the workplace. As a recent editorial stated, "[i]f the court finds that the responsibility rests solely in the hands of the legislature, then the legislature owes it to the people to do the job."

Since 1964, there has been a decrease in the smoking population of Ameri-
cans from 42% to approximately 30%. Therefore, the majority of people are non-smokers who would not be adversely affected by smoking restrictions in the workplace. These figures suggest that a majority of people would endorse restrictions on smoking in the workplace. It is the duty of the legislature to represent the will of the majority.

There has been a growing response by the legislators on the national, state and local levels. To date, there has been little federal legislation directly regulating smoking in the workplace. This was initially due to the lack of medical evidence on the hazardous effects of involuntary smoking. More recently, however, the primary obstacle to such legislation is due to the strength and persistence of the tobacco industry.

As the 100th Session of Congress closed, there was one major breakthrough in the area of smoking regulation. Congress passed an amendment which bans smoking on all airline flights under two hours. The ban affects 80% of all scheduled flights. When the bill was introduced initially in the House in mid-1986, it was met with great skepticism. However, with the growing awareness of the hazards of involuntary smoking, as well as airline safety, the bill passed through Congress. Advocates of non-smokers' rights feel that this legislation may be the initial step needed to generate future actions on the national level directed at the workplace. In fact, a recent Senate report indicates that action was taken on smoking restrictions over thirty times in the 100th Session of Congress, including another airline anti-smoking act which would ban smoking on all airline flights. More importantly, there has been considerable action taken concerning the rights of non-smokers in the workplace. For instance, there is a proposed

105. Koop, supra note 3, at 110.
106. 49 U.S.C. § 1374 (Supp. IV 1986). Federal Aviation Act, § 404 49 U.S.C. § 1374 (1958) is amended by adding at the end thereof the following subsection:
   (d)(1)
   (A) On and after the date of expiration of the 4 month period following the date of enactment of this subsection it shall be unlawful to smoke in the passenger cabin or lavatory on any scheduled airline flight in intrastate, interstate, or overseas air transportation, if such flight is scheduled for 2 hours or less in duration.
   (B) The Secretary of Transportation shall issue such regulations as may be necessary to carry out the provisions of this subsection.
   (C) The provisions of paragraph (1) of this subsection are repealed effective on the expiration of the twenty-eight month period following the date of enactment of this subsection.
107. Telephone interview with Regina Carlson, Executive Director of New Jersey Group Against Smoking (GASP) (January 6, 1988).
108. Id.
ban on smoking in all federal buildings except for designated areas.\textsuperscript{111}

While there is a greater desire to protect non-smokers' rights through federal regulation of smoking in the workplace, there has been substantial action taken by state legislatures. Forty states and the District of Columbia have already enacted statutes which restrict smoking in the workplace and other public places.\textsuperscript{112} However, to date\textsuperscript{113} only 14 states have enacted restrictions that specifically address the workplace.\textsuperscript{114}

\section*{A. 50-State Survey.}

Because most of the legislative activity concerning the rights of non-smokers has occurred at the state level, an analytical review of each state legislatures' response in this area will be helpful to practitioners and laypersons alike. The legislative action can be broken down into four levels of response:


\textsuperscript{113} This comment was submitted to the publisher on February 1, 1989. Any legislative action taken subsequently would have been too late to include in this article. The interested reader should examine his/her state statutes as many legislatures are taking constant action concerning smoking in the workplace.

(1) no legislative action; (2) minor legislative action; (3) action regulating only public places; and (4) action regulating public and private places, including the workplace.

1. No Legislative Action.

At the time of publication, ten states have yet to enact any legislation prohibiting smoking. These states include Alabama, Illinois, Kentucky, Mississippi, Missouri, North Carolina, South Carolina, Tennessee, Virginia and Wyoming. The major reason for legislative inaction can be attributed to the influential lobbying efforts of the tobacco industry. The majority of these states rely heavily on their tobacco crops and many of the larger tobacco companies are located in these states. It is obvious that the legislatures of these states do not want to upset the tobacco growers and producers by placing smoking prohibitions in public areas or the private workplace.

It will require an enormous public outcry by the citizenry of these states to compel their lawmakers to turn their backs on the powerful tobacco industry. This is unlikely to occur in the near future for these "tobacco" states because it appears that the tobacco industry has a strong hold on the legislatures.


A number of states have taken some legislative action to prohibit smoking, but not necessarily in response to the concerns of non-smokers. For example, in Delaware smoking is prohibited "on any trackless trolley coach, or gasoline or diesel-engine propelled bus being used as a public conveyance." It is likely that this legislation was formulated in response to fire safety concerns rather than the dangers of second-hand smoke, as there is no other legislation prohibiting cigarette smoking in Delaware. In Louisiana, the only place where smoking is prohibited is in the Louisiana Superdome. The statute permits smoking "in all areas of the Louisiana Superdome except the arena." Passed in 1986, it is probable that this legislation is a delayed response to the holding in *Gasper v. Louisiana Stadium and Exposition District,* where the United States District Court for the Eastern District of Louisiana refused to enjoin smoking in the arena.

Two states, Pennsylvania and West Virginia, have also enacted very narrow anti-smoking legislation. In Pennsylvania, smoking is prohibited in re-

---

115. For example, R. J. Reynolds, producer of Winston-Salem tobacco products, is located in North Carolina.
tail stores, presumably to protect the merchandise. However, the statute does provide that "private offices or work areas not generally open to the public may be designated 'no smoking,' 'smoking permitted,' or sectioned into different areas at the discretion of the employer." This language indicates the Pennsylvania state legislature's reluctance to interfere with the private employer's prerogative to structure his own business operations. West Virginia law, on the other hand, simply makes it a misdemeanor to smoke in "any factory, mercantile establishment, mill or workshop in which is posted [a sign] . . . stating that no smoking is allowed in such a building." Once again, this statute was not passed to protect the rights of non-smokers, but was passed for fire safety reasons and protection of employers' merchandise.

Finally, Arkansas and Hawaii have taken slightly larger steps to prohibit smoking in certain public places, such as elevators, auditoriums, sports arenas, community centers and health care centers. However, neither state legislature expressly recognizes the dangers of second-hand smoke. Thus, the scope of smoking restrictions is limited.


A number of states have prohibited smoking in indoor public places ranging from public transportation to all state-owned buildings. Some of these states have recognized the growing danger of second-hand smoke, but have refused to extend the prohibition into the private workplace, leaving it to the individual employers to set their own smoking policy. For instance, Arizona, Georgia, Maryland, New York, Oklahoma, South Dakota and Texas have taken the same approach as Arkansas and Hawaii, but the scope of the regulations are broader. In general, these six states prohibit smoking in elevators, public transportation, theaters, public health facilities, libraries, museums, public schools and jury rooms. Of these states, only Arizona and Oklahoma have stated that smoking in any of the above-mentioned public places "is a public nuisance and dangerous to public
health."  

Another group of states extend the scope of smoking restrictions to any state-owned building. Those states include Indiana, Iowa, Massachusetts, Michigan, Nevada, Ohio and the District of Columbia. Most of these states include all the previous restrictions but go further by prohibiting smoking in any "public building owned by or under control of [the] state or any of its political subdivisions," except for those areas which are designated as "smoking permitted." It should be noted that almost all state laws provide that the proprietor or owner of any public building who is required to prohibit smoking may designate smoking areas as long as it does not violate any other statutory provision. For example, an owner of a theater may permit smoking in a portion of the lobby, but may not permit smoking in any elevators.

Finally, a group of states have gone further to prohibit smoking in all indoor public places, including restaurants of certain sizes. The significance of extending the smoking restrictions to restaurants indicates the legislatures' willingness to interfere with what is essentially a private enterprise in order to protect the health of a non-smoker. However, as noted above, these restrictions do not include all restaurants nor do they include the entirety of any particular restaurant. For example, in Connecticut, the law states that, "no person shall smoke . . . in any public area of a restaurant having a seating capacity of seventy-five or more persons unless a sign is posted which indicates that smoking is permitted in such an area, provided no such restaurant shall be designated, in its entirety, as a smoking area." While this last group of state legislatures displays some willingness to interfere with private enterprise (though these private buildings are open to the general

131. Supra note 124; supra note 128.  
136. CONN. GEN. STAT. ANN. § 1-21(b) (1987). See also, OR. REV. STAT. § 433.850(3) (1987), which states: "notwithstanding any other provisions of ORS 433.835 to 433.875 and 433.990(5) in the case of restaurants . . . nothing . . . is intended to prevent the owner or person in charge from expanding or contracting the size of the smoking area to meet the requirements of the patrons." For strict statutory language which restricts smoking to the same degree, see CAL. HEALTH & SAFETY CODE §§ 25940-25949 (Deering 1988).
public), these legislatures are reluctant to take steps to regulate smoking in the workplace.

4. **Smoking Prohibitions in the Workplace.**

As stated previously, there are fourteen states which regulate smoking in the workplace to some degree.\(^{137}\) This group of legislatures has enacted stricter regulations in accordance with their expressed public policy concerns with the dangers of second-hand smoke.\(^{138}\) For instance, the Minnesota legislature found that "smoking causes premature death, disability and chronic disease" and that the purpose of this legislation is "to protect the public health, comfort and environment by prohibiting smoking in areas where children or ill or injured persons are present, and by limiting smoking in public places and at public meetings to designated smoking areas."\(^{139}\) Other legislatures espouse that the hazards of second-hand smoke, based on medical evidence, are clear, therefore justifying stricter restrictions, including restrictions in the workplace.\(^{140}\)

Two states, Minnesota and Utah, address smoking in the workplace by indicating that the state health agency has the power to enforce the smoking restrictions in the workplace, as applied to public places, if the state health agency determines "that the proximity of employees or the inadequacy of ventilation causes smoke pollution detrimental to the health and comfort of non-smoking employees."\(^{141}\) Without the state health agency taking these affirmative steps, the private workplace would not be regulated. Furthermore, it appears that this type of regulation is done on an *ad hoc* basis; *i.e.*, a particular workplace is inspected by the state health agency at any particular time, as compared to scheduled inspections.

In the State of Washington, there is express language indicating that the smoking regulation statute "is not intended to regulate smoking in the private, enclosed workplace . . . except places in which smoking is prohibited by the director of community development, through the director of fire protection, or by other law, ordinance, or regulation."\(^{142}\) Similar to Minnesota and Utah, the State of Washington starts with the premise that smoking will not be regulated in the private workplace. This position is subject to change, but only at the initiative of some state or local agency.

---

\(^{137}\) *Supra* note 114.

\(^{138}\) *Supra* note 114; see *N.J. Stat. Ann.* § 26:3D-23 (West 1987) (the legislature’s intent is to balance the rights of smokers and non-smokers).

\(^{139}\) *Minn. Stat.* § 144.412 (West 1987).


There are two states, Alaska and Colorado, which simply suggest and encourage that private employers take the initiative to set some policy concerning smoking in the workplace.\textsuperscript{143} For instance, in Colorado, employers "are encouraged to designate non-smoking areas that are physically separated from the working environment where other employees smoke. Every effort shall be made to provide a separate area for non-smokers in employee lounges and cafeterias."\textsuperscript{144} Obviously, these state legislatures are reluctant to interfere with a private employer's management prerogative.

The remaining nine states which regulate smoking in the workplace require the private employer to implement some smoking policy taking in the concerns of non-smokers and smokers. These states include Florida, Maine, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, Rhode Island and Vermont.\textsuperscript{145}

The general clause requiring such a policy usually reads as follows:

In a workplace where there are smokers and nonsmokers, employers \textit{shall} develop, implement, and post a policy regarding designation of smoking and nonsmoking areas. Such a policy \textit{shall} take into consideration the proportion of smokers and nonsmokers. Employers who make reasonable efforts to develop, implement, and post such a policy shall be deemed in compliance. An entire area may be designated as a smoking area if all workers routinely assigned to work in that area at the same time agree.\textsuperscript{146}

This type of language requires the employer to take some initiative to protect the rights of non-smokers and smokers, but leaves the employer the flexibility to set his own policy according to his particular business needs. In Maine, the statute requires "that each employer shall establish, or may negotiate through the collective bargaining process, a written policy,"\textsuperscript{147} indicating that smoking in the workplace is a mandatory, or at least permissive, subject of bargaining.

Finally, in New Jersey, New Mexico and Rhode Island, the state legislatures have gone further to set guidelines as to what these smoking policies must contain. For instance, in New Mexico, the statute provides for an ab-

solute prohibition in nurses’ aid stations, elevators and a contiguous non-smoking area of not less than one-half of the office’s seating capacity. In Rhode Island, the statute permits any non-smoking employee to object to the employer about his/her discomfort in the workplace, requiring the employer to take reasonable efforts to accommodate such an employee. However, the statute makes it clear that an employer is not required to make any expenditures or structural changes to accommodate the preferences of non-smoking or smoking employees.

The legislative response on the state level to the dangers of involuntary smoke has been strong. As more medical evidence surfaces, legislatures will be more willing to interfere with management’s prerogative and require that some action be taken to protect the non-smoker in the workplace, such as is the case in New Mexico or in Rhode Island; many other states appear ready to follow. Yet the tobacco industry’s lobbying efforts stand as a major obstacle to the legislative efforts.

The tobacco industry has centralized its efforts to prevent such legislation by focusing on four major areas. First, the tobacco industry argues that these statutes are unconstitutionally vague because they fail to establish a clear standard of required conduct. In support of this contention, the tobacco industry has asserted that, “[i]mpermissibly vague laws that contain criminal or quasi-criminal penalties are unenforceable where the standard of conduct required is such ‘that men of common intelligence must necessarily guess as to [their] meaning and differ as to [their] application’.” Second, the tobacco industry maintains that these statutes present an unlawful delegation of legislative authority to private persons and an unreasonable exercise of the states’ police power lacking any rational basis. Third, the tobacco industry contends that statutes which may require rearrangement and possible relocation of smoking and non-smoking employees may disrupt employers’ operations and employees may become less efficient. Finally, the tobacco industry argues that compliance with these statutes may even require the physical restructuring of the work area with employers incurring

150. Bilosky, supra note 104, at 3-5.
151. Ashe & Vaughan, supra note 34, at 400.
152. Id. See also Connolly v. General Construction Co., 269 U.S. 385, 391 (1926).
154. Ashe & Vaughan, supra note 34, at 399.
substantial costs.\textsuperscript{155}

While these are not all legal arguments, they are factors which have discouraged legislators from supporting such legislation. Nevertheless, the preponderance of evidence, both medical and legal, and the majority of constituents demand legislation to protect the rights of non-smokers.

IV. PROPOSED MODELS OF ACTION.

While there is a need to protect the rights of non-smokers, it would be unnecessary to call for an absolute ban of smoking in the workplace. There are many alternative models of action for the legislatures to pursue. Some of these models leave complete discretion to the employers to choose, implement and enforce these restrictions. For example, a statute enacted by the state of Colorado "encourage[s]" those in charge to designate non-smoking areas that are physically separated from the workplace.\textsuperscript{156} Such models are generally ineffective because there is no way of insuring that the restrictions will be enforced. Rather, the most comprehensive policy would be one which acknowledges non-smoking as the norm.\textsuperscript{157} For example, Wisconsin's "Clean Indoor Act" prohibits smoking in all offices.\textsuperscript{158} "Office[s]" are defined as "any area that serves as a place of work at which the principal activities consist of professional, clerical, or administrative services." However, it also allows for designation of smoking areas or even entire rooms and buildings.\textsuperscript{159} In Wisconsin, non-smoking is the established norm, however they acknowledge the need to balance the interests of all working citizens.

The ability to designate smoking areas can be used in various ways. A model statute would prohibit smoking in any area:

in which a fire or safety hazard exists, company-owned vehicles, all common areas — including elevators, stairwells, lobbies, waiting rooms, copier rooms, mail rooms, employee lounges and restrooms, computer and manufacturing areas, areas in which smokers and non-smokers work together, classrooms and conference rooms (a short smoking break may be provided during meetings lasting longer than one hour, if requested by smokers), and any other area not specifically designated 'Smoking Prohibited.'\textsuperscript{160}

This model is appropriate because it balances both the needs of smokers

\textsuperscript{155} Id.
\textsuperscript{156} COLO. REV. STAT. § 25-14-103(4) (1982).
\textsuperscript{157} CALIFORNIA NONSMOKERS' RIGHTS FOUNDATION, A SMOKEFREE WORKPLACE 9 (1985) [hereinafter CALIFORNIA NONSMOKERS' RIGHTS FOUNDATION].
\textsuperscript{158} WIS. STAT. ANN. § 101.123.1 (West 1988).
\textsuperscript{159} Id. at § 101.123.4.
\textsuperscript{160} Id. at § 101.123.
and non-smokers. Smoking is prohibited throughout company premises; however, employees may request certain areas to be designated “smoking permitted.” If this type of policy is mandated by the legislature, employer discretion will no longer hinder its effectiveness. The Rhode Island Workplace Smoking Pollution Control Act mandates that every employer maintain a written smoking policy, “which must be conspicuously broadcasted to all employees.” Further, if an employer fails to comply with these requirements, he is subject to a civil penalty. Penalties for violation by any party could include injunctions, fines and possibly criminal sanctions for persistent violators.

The tobacco industry criticizes this model statute because it fails to provide for effective enforcement mechanisms. Specifically, the tobacco industry professes that, “[w]here statutes call for state and local law enforcement, it seems plainly unrealistic to assume that significant enforcement resources can or will be committed to monitor and punish violators of workplace smoking laws . . . .” This argument, however, ignores the reality that smoking has been labeled by the Surgeon General as “Public Health Enemy 1,” and as such, the mere enactment of non-smoking restrictions exemplifies a commitment to monitor and punish violators. In addition, the tobacco industry's argument ignores the will of the majority, which favors the enactment and enforcement of these laws. Enforcement lies not only with state and local authorities, but also with employers and employees — the majority of whom are non-smokers. Further, as medical evidence of the dangers of involuntary smoking continues to surface, it is likely that people will be encouraged to follow and enforce these restrictions, for their own safety and for the safety of those around them.

V. Conclusion.

Medical evidence has established that the hazards of involuntary smoking are real. The courts have acknowledged that involuntary smoking is a social and environmental ill, however, the courts have asserted that they cannot and will not grant relief to the typical employee disturbed by involuntary smoke (though the hypersensitive non-smoker may have some recourse). In

161. CALIFORNIA NONSMOKERS' RIGHTS FOUNDATION, supra note 157, at 9.
163. Id.
164. Id. at 23-20.7-7.
165. Id.
167. Ashe & Vaughan, supra note 34, at 398.
168. CALIFORNIA NONSMOKERS' RIGHTS FOUNDATION, supra note 157, at 9.
fact, the courts have recognized that to engage in such an adjustment of
individual liberties is a function better left to the legislature. While the state
legislatures have acted to some extent, there is a need and a duty on their
part to intervene to a greater degree. This need stems from the increasing
medical evidence that involuntary smoking is hazardous to everyone. The
duty to respond to the will of the majority is innate within the legislative
process, and the will of the majority demands regulation of smoking in the
workplace.

Kathryn M. Doolan
Robert A. Indeglia, Jr.