MORE FACTS & FEATURES FOR

# NONSMOKERS & SMOKERS

AMERICAN LUNG ASSOCIATION
The Christmas Seal People

## SMOKING AT THE WORKPLACE

### The Changing Legal Situation

### THE LEGAL SITUATION: AN OVERVIEW

Employers--in increasing numbers--are asking for guidance about their legal responsibilities relating to smoking in the workplace. And nonsmokers inquire about their legal rights on the job.

This general summary is not a legal treatise but instead provides an overview of the legal situation as of mid-1983. None of the information should be considered as a substitute for legal counsel or as in-depth reporting of legislation on the issue, which varies in states and localities.

Lung Associations are educational organizations and do not counsel employers or employees about legal actions. However, the American Lung Association believes it is important for everyone involved in worksite settings to understand how rapidly the legal situation concerning smoking is changing.

Numerous compensation awards for unemployment, disability, and medical retirement have been made to nonsmokers. Union grievances--even at the arbitration level--have been won by nonsmokers. Every employer permitting smoking in work areas could be vulnerable to all these legal actions by nonsmoking employees.

- The 1976 case of Shimp vs. New Jersey Bell--the first legal challenge to smokers in the workplace--is the cornerstone of a growing body of law which favors the right of the nonsmoking employee to a work environment free of tobacco smoke. Legal opinion rendered in civil actions and

680578379

administrative law cases has unanimously accepted the legal and medical definition of tobacco smoke as an occupational health hazard.

An employer's liability actually increases by permitting workplace smoking. In every state except Louisiana the employer is subject to civil action under the common law duty to provide a work environment reasonably free of recognized hazards and to protect the employee from avoidable perils.

In addition, the National Rehabilitation Act of 1973 requires reasonable accommodation for nonsmokers who qualify as handicapped when exposed to secondhand smoke.

- What is an employer's liability if smoking is restricted? Can smoking be banned?

- May an employer hire only nonsmokers without jeopardy?

These two questions are being asked more frequently. The answer to both is that the employer is much more likely to be sued successfully by the nonsmoker than the smoker.

There is no legal precedent for a smoker prevailing in a quest to harm co-workers by smoking. The courts have never yet supported anyone's right to impose a health risk on others. In our courts anyone can seek to file suit; but the consensus of legal opinion is that no smoker would prevail in the legal climate today, unless a labor contract was violated.

This appears to be the current legal consensus: When no labor contract exists, the employer has the right to eliminate smoking on company premises and--even--hire only nonsmokers.

## EXISTING LABOR CONTRACTS

What is the employer's legal right to implement a smoking ban in all work areas when a labor contract exists?

Some lawyers are of the opinion that the employer has a duty to bargain before making a unilateral decision to initiate the policy--if the union does not concur with the policy. The reason lawyers give is that a smoking ban would constitute a change in conditions of employment, or working conditions.

The majority opinion, however, is that on the basis of eliminating an existing hazard an employer can make a unilateral decision without bargaining unless there is specific language in the contract outlining the right to smoke in certain areas or at certain times.

It is good advice to the employer, however, to include the union in formulating guidelines since its support (or at least neutrality) can be helpful in molding employee attitudes.

• The widely reported Johns-Manville cases ended in the courts because the company banned smoking on the premises, and the union claimed a contractual right to smoking areas. One case was heard in Massachusetts, where the judge ruled in favor of the ban that the company had an obligation as well as a right to protect its employees on company premises. The other, in contrast, was won in Texas by the union when the court ruled that the company had to provide smoking areas for breaks--as a consideration for addicted employees (this one is being appealed by the company).

• An April, 1983 decision by the Commonwealth of Pennsylvania Court is a good example of what can happen if an employer does not mount an educational program before implementing a smoking restriction policy--and does not make a case for the health hazards of passive smoking. The Venango County (Pa.) Board of Assistance was first advised by the Pennsylvania Labor Relations Board--and then by the Commonwealth Court--that it must rescind its smoking restriction policy because it had "violated its statutory obligation to bargain (with the union) a change in working conditions."

Although the Board presented little evidence of the health risk to nonsmokers as the basis for its action, the dissenting judges in the split decision (4 to 3) based their dissent on the existence of a health hazard.

Legal opinion is that the Board would have won if it had made a stronger case for the health issue. (Several years ago the same court ruled in favor of the Chambersburg School Board's smoking ban because the health issue was a primary factor and the teachers were seen as role models.)

• A lack of health evidence was the significant factor also in another ruling, this one by the District of Columbia Court of Appeals on May 5, 1983 in the case of Adel Gordon vs. Raven Systems & Research Inc. While Ms. Gordon did present some evidence as to her own sensitivity to second-hand smoke, she "presented no scientific evidence of the deleterious effects of tobacco smoke on nonsmokers in general." The Court contrasted the case to the Shimp case, stating that "in Shimp the court took judicial notice of a plethora of scientific studies and affidavits of medical experts before concluding that cigarette smoke posed a serious health threat to all workers." The message to be learned from this case is that any petition for accommodation of a non-smoking employee should be based on the premise that passive smoking is harmful to everyone in general and the sensitive nonsmoker in particular.

The only defense offered--by smokers or unions--in the common law suits has been that of "OSHA pre-emption," an argument stating that the courts should not rule but require the employee to seek relief through OSHA. Since OSHA has no standards for tobacco smoke, the courts have unanimously agreed that the common law can be used to give protection to employees in jeopardy.

## PROTECTION OF NONSMOKING EMPLOYEES

The legal situation in which an employer places himself or herself by permitting workplace smoking can be divided into several categories. While there are many other cases in each category than those listed here, the cases used in this summary are those which best illustrate the issues.

### Common Law

The common law responsibility is clearly defined as requiring the employer to provide a work environment reasonably free of recognized hazards. Any employer who has exhausted administrative remedies (formal requests to management for a smoke-free work area and the grievance procedure if a union is involved) can then seek protection from the court in a civil suit if no standards or policy exist.

- In 1976 the first case to use this old premise of common law to deal with tobacco smoke was Shimp vs. New Jersey Bell. Mrs. Shimp won a permanent injunction in the New Jersey Superior Court requiring the telephone company to restrict smoking in all work areas and confine smoking to a designated lounge. There was no appeal and the case has since been the basis of all legal decisions favoring non-smoking workers.

- In 1982 an appellate level decision in the Missouri courts in the case of Smith vs. Western Electric upheld the findings in the Shimp case, sustaining the employee's right to sue under the common law for a smoke-free work environment. That case will be reasserted at the trial level in 1983, unless the employer decides to make the necessary accommodation for the plaintiff, Paul Smith.

  This means that Mr. Smith can bring suit at any time unless his employer decides to make his working environment hazard-free. Since there was no argument about the medical evidence of second-hand smoke's deleterious effect--and the appellate court strongly upheld the plaintiff's right to ask for protection from the smoke--it is expected that the plaintiff would win if he is forced to sue.

  Other cases have been filed under the common law in Massachusetts and New Jersey; hundreds have been settled by mutual agreement before being filed in a number of states.

Rehabilitation Act of 1973

This Act requires employers to make "reasonable accommodation" for handicapped employees; and two recent federal decisions have declared employees--who are extremely sensitive to secondhand smoke--as handicapped.

- In the August, 1982 case of Vickers vs. Veterans Administration et al in Seattle, Washington, the nonsmoking employee who had an adverse reaction to tobacco smoke was granted handicapped status and the employer was seen as having made reasonable accommodation by significantly reducing the amount of exposure (relocating his desk, asking smokers nearby to refrain, opening window, etc.).

The Merit Systems Protection Board had set the precedent for such a decision by ruling in June, 1981 that Leroy Pletten of Warren, Michigan was handicapped (Pletten vs. U.S. Army). Experiencing asthma episodes in the presence of tobacco smoke, Pletten was granted reasonable accommodation which prohibited smoking in his entire Division where he as a civilian personnel specialist. Even though other administrative procedures have prevented Pletten from returning to work in the smoke-free environment, the ruling stands as precedent.

Most employees who are impaired only in the presence of tobacco smoke seem to reject the handicapped label and seek another course. Nevertheless employers should be advised that discrimination suits can be brought against them by nonsmoking employees. Employee claims can be filed directly with the Equal Employment Opportunity Commission of a state or the Federal government, or suit can be brought directly in the courts.

Administrative Law

Unemployment and Worker's Compensation

Since 1976 employees in increasing numbers are being awarded claims for passive smoking illnesses and loss of jobs.

- Harriet Brooks vs. Trans World Airlines & Liberty Mutual Insurance paid worker's compensation to an airline stewardess in 1976 because she "sustained an industrial injury" caused by an allergic reaction to the inflight cabin air containing tobacco smoke.

- In 1981 a New Jersey secretary was forced to resign her job as she suffered severe eye irritation and headaches from constant exposure to second-hand smoke (Linda A. Apell vs. Moorestown Board of Education). She was found to have had "good cause attributable to the work for voluntarily leaving such work" and was awarded unemployment compensation on appeal.

## Disability

The first disability case awards were in 1976 and 1977 and have been used as precedent in succeeding cases. In California the Supreme Court ruled that an employer was liable for one-third of the disability award made to a man with emphysema because the employee had been on the job that portion of each 24-hour day--and had been permitted by the employer to inflict this harm on himself (Fuentes vs. Workmens Compensation Appeals Board).

A senior Social Security Administration employee in Baltimore was awarded 75% of his salary in compensation for physical ailments caused by passive smoking, even though he could perform the job if the smoke had been eliminated.

- Filed in 1980, the case of Irene Parodi vs. the Merit Systems Protection Board was finally decided in 1982 in California when Ms. Parodi was granted disability retirement unless the government offered her a "suitable job" within 60 days. The reason for the decision in her favor was that she could not "perform her job due to its location in a smoke-filled office." The Defense Logistics Agency had consistently refused to relocate her, restrict smoking, or grant her disability retirement.

## Dismissals

Employers today are on shaky ground if they dismiss without other cause any nonsmoking employee who complains about having to work in a smoke-filled environment.

- In 1981 a Minnesota jury (composed of three smokers and three nonsmokers) awarded social worker June Anderson approximately $4,500 in compensatory and punitive damages for having been fired after she complained to her department head about the "cloud of smoke" in her office. She also complained to the Health Department, which cited the agency with violations of the Minnesota Clean Indoor Air Act; Ms. Anderson's retaliatory termination followed.

- The case of Hentzel vs. Singer Corporation, filed in California in 1982, stated that patent attorney Hensel was fired for complaining constantly about a smoke-filled work environment. He filed suit on the basis that he had not been dismissed for just cause; his position was upheld by the appellate court and a trial will be held in mid-1983 to seek reinstatement. The appellate court also indicated that he could sue for monetary damages as a result of "intentional infliction of emotional distress" by management in harassing him about the smoking issue.

This growing protection for nonsmokers is important since many fear to file any action or even make formal complaints to management because of the threat of dismissal. The professional or managerial employee appears to be especially vulnerable to retaliatory actions that can be disguised as unrelated to the smoking issue--and thereby escape the protection of the court or administrative law agency. The trauma of entering into any kind of open adversary relationship with an employer, always with the fear of dismissal present, seems to be the reason so few cases have ever reached the courts.

## Labor Union Activity

Until recently, labor unions have not represented the health rights of nonsmokers; but the tide is turning. Many unions willingly represent nonsmokers in seeking smoke-free work environments where regulations or policy exists. In situations where there is no stated policy, unions usually seek special accommodation for the nonsmoker rather than ask for a restricted smoking policy. Unions such as the American Federation of Government Employees and the National Treasury Workers Union have carried cases to arbitration (a procedure where impartial labor law professionals hear both arguments and render a decision, which is normally binding on all parties).

One such case is that of Margaret Wells, an employee of the Department of Labor and member of the American Federation of Government Employees. Wells is acutely sensitive to tobacco smoke. She was granted interim relief by an arbitrator to protect her in the workplace while the case is being heard. A 1983 decision is expected; and lawyers for ASH (Action on Smoking and Health) are representing both Wells and the union in the proceedings.

Of great concern to organized labor are decisions such as the 1981 ruling in the North Carolina Supreme Court stating that a textile worker need not be compensated for the portion of her disabling lung condition caused by her own smoking. Elsie Morrison's condition--byssinosis or "brown lung"--was caused by her exposure to cotton dust but exacerbated by her smoking for at least 20 years; and her compensation award was cut almost in half. Labor's fear is this: its recognition of the hazards of smoking will conflict with its constant battle to eliminate industrial pollution and to win compensation for members with industrially-caused respiratory disease.

## LEGAL ACTIONS BY SMOKERS

The only case in the courts today involving a smoker challenging a ban on workplace smoking is in Massachusetts.

- In January 1983 suit was filed by an exemplary nonsmoking employee of the State of Massachusetts (Marie Lee vs. Massachusetts Public Welfare Department), seeking a ban on work area smoking. Lee won a temporary restraining order on January 12 on the basis of her affidavit and that of her allergist attesting to the medical harm she was suffering.

When court reconvened on January 20 so the judge could determine if he should continue the restraining order until the trial date, a smoking employee was permitted to intervene formally. (It should be noted that anyone affected by litigation has a legal right to assert a claim--even if it is not a "good" one.)

In this case the smoking employee asked that the restraints be lifted because as an addicted cigarette smoker she could not perform her work without jeopardy in a smoke-free environment. When the judge did permit smoking again in Lee's workplace until a trial was held, many observors were stunned.

The majority legal opinion is that the judge felt Lee would not suffer "irreparable harm" by working in a smoky environment until the trial date and that it is not unusual to lift restraints when another claim is asserted. The trial will be of keen interest as the smoker stated at a press conference that she is represented by three law firms associated with the Tobacco Institute and that the Tobacco Institute is paying all legal expenses.

## Banning Smoking

The consensus of legal opinion is that a smoker could not file a winning suit against an employer who chose to ban smoking in work areas, unless an existing labor contract--with specific smoking language--was violated.

When lawyers at the Equal Opportunity Commission in Washington were questioned about the possibility of discrimination suits filed by smokers, they could see no way such a claim could be sustained. There were no other viable courses of action by smokers which were considered worthy of consideration.

## Hiring Nonsmokers

The question of hiring only nonsmokers receives a similar answer relative to potential litigation: it is most unlikely a smoker's suit would prevail.

There is especially solid ground for not hiring smokers when aerobic capacity is a factor affecting job performance or when the risk of fire is great. The concept is presently being tested in the California courts relative to a San Mateo Fire Department decision not to hire smokers and to initiate on-the-job restrictions for existing employees. The Fire Department's position is that smoking impairs job function through reduced lung capacity; and the Department is expected to prevail.

The desirability of an across-the-board rule not to hire smokers has won increasingly wide support in the business community for economic reasons. A good argument has been made that employers do have a right to hire those expected to perform the job most satisfactorily; and one key factor is good health. Previous employment information provided by job applicants would normally give some indication of a predisposition to impairment and substantiate a rejection on the basis of poor attendance or performance. If an applicant wants to quit smoking in order to be hired, this would then become a condition of employment and a return to smoking would constitute grounds for dismissal.

Bearing in mind that the legal system does permit anyone to file suit for any reason--no matter how frivolous it might appear--smoking employees can sue; but it is very unlikely, in many lawyers' opinions, they will ever be able to make a viable case for an addict seeking to harm others while indulging in a habit that costs the employer wasted time and money.

## THE CLIMATE OF THE COURTS

Employees who have sought and failed to find relief in the courts--from smoking at the workplace--have done so because of some technical lack in the suit or because they chose the wrong premise of law. The suit by a Federal employees group in the late 1970's was lost because they had filed prematurely without taking prior administrative action.

The 1981 suit by Anthony Kensell against the State of Oklahoma Department of Human Services was filed on constitutional grounds and for monetary damages in both state and federal courts; the federal suit was denied and is on appeal while the state suit is held in abeyance. Majority legal opinion is that there is no constitutional basis for litigation in the occupational health setting.

In the common law setting, however, the tenor of the courts increasingly supports the right of the nonsmoker to seek relief without waiting until the exposure has resulted in "full-blown" disease or injury.

The most recent authoritative outline of the employer's responsibility is found in the unanimous 1982 opinion of the Missouri Appellate court:

> ". . . .the tobacco smoke of co-workers smoking in the work area is hazardous to the health of employees in general and plaintiff in particular. The allegations also show that defendant (employer) knows the tobacco smoke is harmful to the plaintiff's health and that defendant has the authority, ability, and reasonable means to control smoking in areas requiring a smoke-free environment. Thereby, by failing to exercise its control and assume its responsibility to eliminate the hazardous condition caused by tobacco smoke, defendant has breached and is breaching its duty to provide a reasonably safe workplace. . . ."

It is expected that such strong language from a court in a state considered conservative will have great impact on corporate decisions of the future and cause them to give even more consideration to the health needs of nonsmoking employees to avoid litigation.

Both employer and nonsmoking employees should become aware of this favorable climate in the courts to enhance the nonsmoker's chances of achieving a smoke-free work environment through negotiation. This information is intended as educational background rather than as encouragement of individual litigation. The heavy expenditure of time and money, coupled with the emotional strain reported by all those who have gone to court, make litigation a remedy to be used only as a last desperate resort.

## THE ROLE OF LUNG ASSOCIATIONS

The American Lung Association believes it is important for everyone involved to understand how the legal situation concerning smoking at the workplace is changing. Those changes have an impact on management, unions, smoking and nonsmoking employees.

Long before any legal actions are considered, however, there are a variety of actions nonsmokers--who are distressed by smoking on the job--can take. They can encourage employers to establish company policies to protect nonsmokers; and Lung Associations can help companies select policies most appropriate for them.

Lung Associations can also acquaint managements and unions with the cases highlighted in this publication.

To encourage company policies, employees can speak to their supervisors and personnel departments. In a recent study of 10,000 nonsmoking office workers

- more than 50% reported difficulty working near a smoker
- another 36% said they were forced to move away from their desks or work stations because of passive smoking

Many personnel departments now report the issue of smoking at work is the single, most frequent complaint brought to management. And management is responding. Nonsmokers make up two-thirds of the workforce.

Employees can suggest that the company undertake surveys to find out how most employees feel about the issue, even what solutions they might propose. Employees, of course, can also take personal action: by letting co-workers know they are bothered by smoke and by putting signs at their desks requesting others not to smoke near their work stations.

Many companies--whether they have unions or not--have quality of worklife committees. Employees can submit ideas and ask that the issue of smoking be reviewed. When unions are involved--particularly if they have safety and health directors--the topic can be considered. Lung Associations may be able to provide key information about the hazards of secondhand smoke and assist management and unions to work together to develop policies to protect nonsmokers.

Although some companies still view the nonsmoker who is distressed as a trouble-causer, more and more companies now see smokers as the source of the particular problem. These companies have taken action to support the needs and requirements of the nonsmoker--when those conflict with those of the smoker. The shift is a dramatic one with long-term implications for a healthier, more smoke-free workplace.

Helping companies take those actions--and also offer effective, nationally tested programs to help smokers quit--are vital services Lung Associations can provide for companies across the country.

6/83

## BIBLIOGRAPHY OF LEGAL CASE CITATIONS

Shimp vs. New Jersey Bell, 368 Atlantic Reporter 2nd 408

Smith vs. Western Electric, 643 S.W.2d 10 (Mo.App. 1982)

Hentzel vs. Singer Co., 188 Cal.Rptr. 159 (Apr. 1982)

Lee vs. State of Mass., Superior Court, Bristol County, Case No. 15385

Vickers vs. Veterans Administration, 549 F.Supp. 85(W.D. Wash. 1982)

Parodi vs. MSPB, 690 F.2d 731 (9th Cir. 1982)

Fuentes vs. Workmen's Comp. Appeals Board, 16Cal.3d 1:128CR 673: 41CCC42

Appell vs. Moorestown (NJ) Bd. of Education AT C81-3036 State of NJ Div. Unemp. Comp.

Brooks vs. TWA & Liberty Mutual Ins., 76 SF 257-975 Cal. WC Appeals Bd.

Gordon vs. Raven Systems & Research, District of Columbia Court of Appeals No. 81-1172 (5/5/83)

Commonwealth of Pennsylvania (Venango County Board of Assistance) vs. Commonwealth of Penna., Penna. Labor Relations Board, No. 2167 C.D. 1980 (Commonwealth Court Opinion released 4/28/83)

-- This general summary was prepared for ALA with special assistance from Environmental Improvement Associates --