

## **ARE YOU TREATING YOUR EMPLOYEES LIKE PRISONERS? THE EMPLOYERS' LIABILITY FOR ETS (ENVIRONMENTAL TOBACCO SMOKE)**

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### **INTRODUCTION**

There have been numerous articles written regarding the rights of smokers and nonsmokers in the work environment. Articles written for employers have typically focused on how an employer can balance these competing interests.<sup>1</sup> However, the most recent studies regarding environmental tobacco smoke (hereinafter ETS) indicate that attempts to balance interests and accommodate all employees may not be in the employers' best interest. This article summarizes the many different legal grounds employees have used against their employers for exposing them to ETS. In conjunction, it examines how recent decisions show that even prisoners have been successful in similar lawsuits based on their involuntary exposure to cigarette smoke.<sup>2</sup> The medical reasons for lawsuits based on ETS and the implications for employers are also presented. Based on current trends regarding cigarette smoke in the workplace, managers are given specific options on how to best limit their liability due to this emotionally charged issue.

### **LEGAL REMEDIES FOR EMPLOYEES**

It appears that the number of remedies available to non-smoking employees aggrieved by ETS are limited only by their lawyers' imaginations. Employers have been sued under a wide variety of theories including:

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<sup>1</sup>See, J.C. Fax and B.M. Davison, *Smoking in the Workplace: Accommodating Diversity*, Lab. LJ., July, 1989.

<sup>2</sup>Arguing a violation of the Eighth Amendment (cruel and unusual punishment).

wrongful discharge,<sup>3</sup> common law negligence,<sup>4</sup> intentional infliction of emotional distress,<sup>5</sup> assault and battery,<sup>6</sup> express or implied contracts,<sup>7</sup> the National Labor Relations Act,<sup>8</sup> Title VII,<sup>9</sup> the common law duty to provide a safe workplace,<sup>10</sup> negligent infliction of emotional distress,<sup>11</sup> workers' compensation acts,<sup>12</sup> unemployment compensation acts,<sup>13</sup> constitutional law,<sup>14</sup> and the Rehabilitation Act of 1973.<sup>15</sup> They are undoubtedly already facing suits under the Americans with Disabilities Act and the Civil Rights Act of 1991. In the future, employees may also be able to initiate legal action pursuant to regulations set by the Occupational Safety and Health Administration (hereinafter OSHA) regarding indoor cigarette smoke.<sup>16</sup>

#### ETS AND THE EIGHTH AMENDMENT: PRISONERS' RIGHTS

Although prisoners' rights may seem an unusual topic to include in an article focused on ETS in the workplace, the cases in this area shed light on how the courts are currently viewing ETS. Courts have determined that cigarette smoke can constitute "punishment" and therefore, involuntary exposure to ETS can violate the Eighth Amendment guarantee against cruel and unusual punishment. In making such a determination, the courts have to find that exposure to ETS abrogates society's evolving standard of decency.

One of the early prison cases on the subject of ETS concerned an inmate with a preexisting medical condition which was aggravated by his exposure to cigarette smoke. His lawsuit survived summary judgment due to his serious respiratory problem and the failure of prison officials to install any

<sup>3</sup>Hentzel v. Singer Co., 188 Cal. Rptr. 159 (1982).

<sup>4</sup>Gordon v. Raven Systems & Research, Inc., 462 A.2d 10 (D.G.App.1983).

<sup>5</sup>Bernard v. Cameron & Colby Co., Inc., 491 N.E.2d 604 (Mass.1986).

<sup>6</sup>McCracken v. Sloan, 252 S.E.2d 250 (N.C.App.1979).

<sup>7</sup>Bernard, *supra* note 5.

<sup>8</sup>Pennsylvania v. Pennsylvania Labor Relations Bd., 459 A.2d 452 (1983).

<sup>9</sup>Moore v. Inmont Corp., 608 F. Supp. 919 (W.D.N.G.1985).

<sup>10</sup>Shimp v. New Jersey Bell Telephone, 368 A.2d 408 (N.J.1976).

<sup>11</sup>Bernard, *supra* note 5.

<sup>12</sup>Schober v. Mountain Bell Telephone, 630 P.2d 1231 (N.M.Ct. App. 1981); Ate Fixture Fab v. Wagner, 559 So. 2d 635 (Fla. Dist. Ct. App. 1990).

<sup>13</sup>McCroldin v. Employment Dev. Dept, 205 Cal. Rptr. 156 (1984). *See also* SA. Soehnel Annotation, *Right to Unemployment Compensation as Affected by Employee's Refusal to Work in Areas Where Smoking is Permitted*, 14 A.L.R.4th 1234 (1982).

<sup>14</sup>Kensell v. Oklahoma, 716 F.2d 1350 (10th Cir. 1983).

<sup>15</sup>Vickers v. Veterans Admin., 549 F. Supp. 85 (W.D.Wash. 1982).

<sup>16</sup>P.J. Sheridan, *Science Signals OSHA: Issue Smoking Standard*, **OCCUPATIONAL HAZARDS**, June, 1991, at 31; *see also*. *Clearing the Air*, **OCCUPATIONAL HEALTH & SAFETY**, Feb., 1992, at 24; *OSHA Extends Comment Period for IAQ*, **OCCUPATIONAL HEALTH & SAFETY**, Mar. 1992, at 12. Although OSHA has yet to issue any regulations for indoor cigarette smoke, these articles indicate that OSHA may promulgate regulations for the workplace in the near future.

safeguards against the smoke.<sup>17</sup> A 1987 case, *Avery v. Powell*,<sup>18</sup> went further by addressing whether a prisoner's constant involuntary exposure to tobacco smoke violated the Eighth or Fourteenth Amendments to the United States Constitution. The prison facility in question maintained a common air flow system which circulated air and heat between the separate areas, termed "pods." Each pod consisted of ten cells, a common day room and a bathroom. Approximately two hundred inmates were housed in the facility. The court determined in *Avery* that such ETS exposure constituted punishment under the Eighth Amendment. The plaintiff had alleged that constant exposure to ETS imperiled his health due to the carcinogenic components in cigarette smoke for which there was no known safe level of exposure. The court found that conditions of confinement "must be judged against society's evolving standards of decency."<sup>19</sup> In ruling on the case, the court relied heavily on a 1986 report issued by the Surgeon General regarding the effect of involuntary smoking.<sup>20</sup> According to the court the report realized three primary results:

(1) that involuntary smoking is a cause of disease, including lung cancer, in healthy nonsmokers; (2) that the children of parents who smoke compared with the children of nonsmoking parents have an increased frequency of respiratory infections, increased respiratory symptoms, and slighter smaller rates of increased lung function as their lungs mature; and (3) that the simple separation of smokers and nonsmokers within the same air space may reduce, but does not eliminate, the exposure of nonsmokers to environmental tobacco smoke.<sup>21</sup>

There have been two other cases won by prisoners involving ETS and the Eighth Amendment. In *Clemmons v. Bohannon*,<sup>22</sup> a three judge panel from the Tenth Circuit Court of Appeals initially found a civil rights violation. However, there was a rehearing *en banc* where they vacated the judgment and ruled against the prisoner.<sup>23</sup> However, in reviewing the implications of the

<sup>17</sup>*Beeson v. Johnson*, 668 F. Supp. 498 (E.D.N.C.1987). Rev'd on other grounds, 894 F.2d 401 (1990). See also, *Franklin v. Oregon, State Welfare Div.*, 662 F.2d 1337 (9th Cir. 1981) case remanded for reconsideration where prisoner alleged confinement with smoker aggravated plaintiffs throat tumor. *But see*, *Steading v. Thompson*, 941 F.2d 498 (7th Cir. 1991) in which an asthmatic prisoner failed to get judicial relief.

<sup>18</sup>695 F. Supp. 632 (D.N.H.1988).

<sup>19</sup>*I < L* at 636.

<sup>20</sup>U.S. DEPT. OF HEALTH & HUMAN SERVS., ET AL, THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING (1986).

<sup>21</sup>*Avery*, *supra* note 18, at 637-638.

<sup>22</sup>918 F.2d 858 (10th Or. 1990).

<sup>23</sup>*Gemmons v. Bohannon*, 656 F.2d 1523 (10th Cir. 1992).

medical evidence considered by the court, the initial decision in favor of Clemmons must be scrutinized.

In the initial decision where Clemmons won, the court cited to *Estelle v. Gamble*<sup>24</sup> which established that a prison official's deliberate indifference to an inmate's medical needs constitutes cruel and unusual punishment. Based on *Estelle* the Tenth Circuit Court disagreed with the lower court's opinion that exposure to tobacco smoke was a mere inconvenience. The court cited to the Surgeon General's 1986 report and to legislative enactments. "[A]s of 1987, forty-six states and the District of Columbia had passed legislation restricting smoking to protect nonsmokers from even *voluntary* exposure to ETS."<sup>25</sup> Based on this evidence, the court distinguished their 1983 decision in *Kensell v. Oklahoma*.<sup>16</sup> In that employment case, the state's refusal to provide a smoke-free workplace was found constitutional despite the plaintiffs desire to force a no-smoking rule or have smokers segregated from nonsmokers. The court stated, "Significantly, moreover, *Kensell* was decided well before the Surgeon General published his 1986 findings concerning the hazards of ETS, and predates other significant government action taken in response to the discoveries of the harmful effects of ETS."<sup>27</sup>

Therefore, one implication of these prison decisions for employers could be that the new medical evidence invalidates to some extent earlier cases favoring the employer over the employee. In addition, as the courts become better educated about the carcinogenic effects of cigarette smoke on nonsmokers, employers will potentially face greater liability for exposing their workers to what has become a *known* hazard. Often employers have faced liability for the effects of ETS through workers' compensation statutes which were designed to compensate employees for accidental injury arising out of and in the course of employment;<sup>28</sup> however, intentional acts frequently fall outside the coverage of workers' compensation statutes. If the courts begin to recognize through prison and employment cases, that ETS is a known hazard, then employers might face greater liability awards through intentional tort suits.

This idea of increased risk for employers is supported by the medical evidence presented in *McKinney v. Anderson*.<sup>TM</sup> In this Ninth Circuit case, a non-smoker alleged that he was almost constantly exposed to ETS because he was celled with a heavy smoker and there were no restrictions on smoking in

«429 U.S. 97 (1976).

“Clemmons, *supra* note 22, at 866.

“Kensell, *supra* note 14.

^Clemmons, *supra* note 22, at 869.

“Johannesen v. N.Y. City Dept, of Hous. Preservation and Dev., 546 N.Y. Supp. 2d. 40 (N.Y. App. Div. 1989); Schober, *supra* note 12; J. & R. Elec., 1988 W. L. 191704 (N.Y. Work. Comp. Bd.); City of N.Y. Law Dept., 1989 W.L 204586 (N.Y. Work. Comp. Bd.).

»924 F.2d 1500 (9th Cir. 1991). Reinstated at 959 F.2d 853 (9th Cir. 1992).

the prison. He complained ETS exposure caused him to have nosebleeds, headaches, chest pains, and loss of energy. He argued two distinct Eighth Amendment claims. He alleged prison officials were deliberately indifferent to his existing medical symptoms, and exposure to ETS constituted cruel and unusual punishment.

In discussing the scientific evidence regarding ETS, the court noted that smoking is responsible for more than one in six deaths in the United States and more than 3800 compounds have been identified in cigarette smoke, forty-three of which are carcinogenic.<sup>30</sup> The court explained that ETS is composed of the mainstream smoke that smokers exhale in addition to sidestream smoke which burning cigarettes emit.<sup>31</sup> The court cited, as other courts have done, to the Surgeon General's 1986 report and stated that his warning was even more important since more scientific evidence had been found.

A draft report released by the EPA concluded: (1) ETS is causally associated with lung cancer in nonsmoking adults and that, according to EPA guidelines for carcinogen risk assessment, ETS is a Group A (known human) carcinogen; and (2) approximately 3800 lung cancer deaths per year among nonsmokers (never-smoker and former smokers) of both sexes in the United States are attributable to ETS. 55 Fed.Reg. 25,874 (1990).<sup>32</sup>

Also, the court concluded that the EPA draft report proved that "ETS is a definite and significant cause of lung cancer in humans."<sup>33</sup> Therefore, the court determined that "a finding that ETS endangers human health is sufficient to show an Eighth Amendment violation, even without a separate inquiry into society's evolving standards of decency."<sup>34</sup> In reviewing the current standards of decency, the court cited to significant legislation passed restricting smoking in public places. The court noted that smoking had been banned on all domestic flights except to and from Alaska and Hawaii.<sup>35</sup> The court found that more than eighty cities and counties had passed smoking legislation since 1980.<sup>36</sup> The court concluded that McKinney had stated a valid claim for

<sup>30</sup>*Id.* at 1505 referencing U.S. Dept. Of Health And Human Services, Reducing The HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS, A REPORT OF THE SURGEON GENERAL (1989); NATIONAL RESEARCH COUNSEL, ENVIRONMENTAL TOBACCO SMOKE: MEASURING EXPOSURES AND ASSESSING HEALTH EFFECTS (1986).

<sup>31</sup>*Id.* at 1506.

<sup>32</sup>*Id.* at 1507.

<sup>33</sup>*Id.* at 1508.

<sup>34</sup>*Id.* at 1509.

injunctive relief; consequently, the court remanded the case back to the district court for further proceedings. The court also recommended that the district court appoint an expert witness to testify about the scientific information on the health effects of ETS.

#### MANAGERIAL IMPLICATIONS

The decisions of the courts in the prison litigation just reviewed, reflect what can be and has been the direction in which the courts have been moving - protection of the nonsmoker. The impact of the 1986 Surgeon General's Report has already been noted. In addition, similar medical information was contained in the 1987 Office of Technology Assistance Report which focused on office smoking policies.<sup>37</sup> For employers, the spotlight now is on the recent Environmental Protection Agency (hereinafter EPA) report on ETS that the court focused on in *McKinney*. Smoking, once "equated with motherhood, apple pie, country, and flag"<sup>38</sup> is now shunned by a health conscious society. While forces like the Tobacco Institute continue to fight for smokers' rights, the nonsmokers' fight has been bolstered by startling evidence from medical and employment studies. These studies should be the straw that break the camel's back for employers. With the rise in new information on the dangers of passive smoking<sup>39</sup> and the potential institutional and human costs being analyzed,<sup>40</sup> laws may change to protect nonsmokers in the workplace, just as states have passed legislation directed at prison wardens allowing smoking policies designed to protect nonsmokers in the prison setting.<sup>41</sup>

Employees are not content merely to wait on legislative action, but are seeking governmental assistance from agencies like OSHA. It may be that in the future they will receive this assistance, as OSHA may promulgate indoor air quality regulations in the near future. The 1970 Act that created this enforcement agency states that an employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical

<sup>37</sup>STAFF PAPER, SPECIAL PROJECTS OFFICE OF THE HEALTH PROGRAM, OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, PASSIVE SMOKING IN THE WORKPLACE: SELECTED ISSUES (MAY 1986).

\*RA Aalberts, J.D. and H.W. Rubin, Ph.D, CPCU, CLU, *A Risk Management Analysis of Smoking in the Workplace*, CPCU JOURNAL, June, 1989, at 85.

\*\*Sheridan, *supra* note 16, at 32-34.

“See, M.L Colosi, *Do Employees Have the Right to Smoke?*, PERSONNEL JOURNAL, Apr., 1988, at 72. E.H. Fry, *Not Smoking in the Workplace: The Real Issue*, BUSINESS HORIZONS, Nov.-Dec. 1990, at 13-14. S. Marley, *Employers Pay When Workers Smoke: Study*, BUSINESS INSURANCE, Feb. 10, 1992, at 3. STAFF REPORT, *supra* note 37, at 52.

\*See, *Gorman v. Moody*, 710 F. Supp. 1256, 1261 (N.D.Ind. 1989).

harm to his employees."<sup>42</sup> This general-duty clause, as it is called, can protect the employee because the "fact that employees are exposed elsewhere will not excuse the fact that he is exposed to the activity and its possible harmful effects by condition of employment."<sup>43</sup> The mere possibility of harm to the employee may be all that is necessary to gain judgment for the employee. "[The] condition [an illness from ETS] does not have to be limited to a handful of industries to be a recognized hazard under OSHA's general-duty clause."<sup>44</sup> This general-duty clause was relied on by the court in the leading case of *Shimp v. New Jersey Bell Telephone Co.*<sup>45</sup> In this case, a telephone operator who was allergic to cigarette smoke received an injunction against the employer. *Shimp* was followed by the Missouri Court of Appeals in *Smith v. Western Electric Co.*<sup>46</sup> In *Smith*, the employer was cited for knowing cigarette smoke was a known hazard and not making an effort to eliminate it.

Furthermore, the National Institute for Occupational Safety and Health (hereinafter NIOSH) has jumped on the bandwagon against ETS in the workplace. NIOSH, the research branch of OSHA, recently reviewed evidence on the chemical composition of ETS and issued the Current Intelligence Bulletin 54.<sup>47</sup> An interview with Bryan Hardin, Ph.D., who is deputy director of standards development and technological transfer for NIOSH, commented on this bulletin. He stated that ETS is a carcinogen and should be removed from the workplace as soon as its feasible, like any other carcinogen.<sup>48</sup> The problem is that NIOSH has only advisory power and cannot enforce its findings. The agency hopes employers will finally take the issue of ETS seriously and that OSHA will set some emission standards in the near future. Currently, it has not been determined how much ETS is allowable in the workplace. In many employment instances exposure to carcinogens is necessary due to the production of a product, but OSHA has set emission standards for all companies within those particular industries. The problem is ETS affects all industries and can have different effects depending on the air flow system of any particular building. Anti-smoking activist groups, such as Action on Smoking and Health (hereinafter ASH), have been delighted by these new medical findings which should strengthen their support in state and national legislatures to eliminate ETS in the workplace. John Bazhaf, executive director of ASH, says "eliminate ETS, which has no legitimate use,

<sup>42</sup>F.C. Davenport, *The Legal Aspects of a Smoking Policy in the Workplace*, INDUSTRIAL Management, May-June 1989, at 25.

<sup>43</sup>*Id.*

<sup>44</sup>Davenport, *supra* note 42.

<sup>45</sup>*Shimp*, *supra* note 10.

<sup>46</sup>643 S.W.2d 10 (MoApp. 1983).

<sup>47</sup>*Clearing the Air*, *supra* note 16.

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and there's no feasibility consideration [unlike some other productive carcinogens]. You simply save money."<sup>49</sup>

ASH is not unique in expressing its wish for a smokeless environment in the workplace. Current studies show that it is not only nonsmokers who are in favor of smoking restrictions, but smokers as well.<sup>50</sup> Also, a 1991 survey conducted by the Bureau of National Affairs and the Society for Human Resource Management, disclosed that 85 percent of those companies involved restricted smoking in some way, amazingly higher than the 54 percent response in 1987.<sup>51</sup> Therefore, it is not surprising that the percentage of those companies which completely ban smoking has escalated to 34 percent.<sup>52</sup> Perhaps employers are becoming aware of the prohibitive litigation expenses smoking can cause. In a study of cases decided between 1968 and 1987 it was found that 50 percent of smoking restriction cases were upheld.<sup>53</sup> This evidence emphasizes the point that for employers today a smoking policy of some sort is a necessity.

#### HOW EMPLOYERS CAN AVOID LIABILITY

Today, employers are continually bombarded with well informed reasons explaining why they should have a smoking policy. This makes it more dangerous for them to operate without one in place. Presently, there are legal, health, productivity, and workplace environment reasons for employers to implement smoking policies. Just a brief look at some of the statistics that employers are receiving highlight the urgency of the issue. In a 1992 study published in the *American Journal of Public Health* the following statistics were presented:

1. Smokers' absences, usually short term respiratory illnesses, last 34 percent longer;
2. Smokers are more likely to be in an industrial accident;
3. Smokers are 40 percent more likely to suffer from an occupational injury, and
4. Smokers are 55 percent more likely to be disciplined.<sup>54</sup>

<sup>49</sup>Sheridan, *supra* note 16 at 32.

<sup>50</sup>J.E. McKendrick, *AMS Survey Report: Smoking Policies Take Off*, *MANAGEMENT WORLD*, Feb., 1988, at 13.

<sup>51</sup>N.A. Lang, *The Last Gasp: Workplace Smokers Near Extinction*, *MANAGEMENT REVIEW*, Feb, 1992, at 33.

<sup>52</sup>*Id.*

<sup>53</sup>Colosi, *supra* note 40, at 78.

<sup>54</sup>Marley, *supra* note 40.

Since ETS has twice as much tar and nicotine as inhaled smoke,<sup>55</sup> one can imagine what the added costs to a company are when not only smokers but nonsmoking employees are absent from work. An Administrative Management Society (hereinafter AMS) survey in 1987 supported the fact that companies need to react to employee needs regarding this issue because 73 percent of those who replied had received complaints about ETS.<sup>56</sup>

What does this mean for employers? The evidence indicates employers' must have some sort of smoking policy which includes educational programs, enforcement, and employee support. In the aforementioned AMS survey, employers rated concern for their employee's health the number one reason for the institution of smoking restrictions.<sup>57</sup> So, one key change will be starting educational and self-help programs for employees. As part of the educational process, employees should be involved in the development of the smoking policy and should take part in the final implementation. Employees should also attend seminars on the risks involved with active smoking and the damage ETS has on the workplace environment. After all, there will be disgruntled employees unwilling to change who may regard the rejection of their previously acceptable behavior as an invasion of their rights. To help with the change, employers will also need to implement company run smoking cessation programs. If the employer expects an employee to accept this radical change in policy overnight, he or she is in for a shock. In return for their cooperation, the company must be supportive of those employees who are having a hard time quitting. According to the Surgeon General, smoking is as addictive as heroine or cocaine and should be treated in like manner by employers.<sup>58</sup> Thus, employers may have to resort to the use of incentives to encourage employees to quit or refrain from starting.

Another area of concern to employers is enforcement of their policies once they are in place. The courts have looked at cases in which part of the claim was based on an employers' lack of enforcement of a stated smoking policy.<sup>59</sup> However, most cases in regard to enforcement have been disagreements over the issue of reasonable accommodation for the employee. In the past the courts have ruled that "an employer could be sued for negligence in allowing a state employee to be exposed to [ETS]."<sup>60</sup> In *Parodi v. Merit Systems Protection Board*,<sup>61</sup> the court held, "that the nonsmoker was entitled to full sick pay until the employer could find a comparable job in

<sup>55</sup>GA. Naidoff, *Do You Mind If I Smoke?*, **MANAGEMENT REVIEW**, Sept., 1991, at 40.

<sup>56</sup>McKendrick, *supra* note 50, at 12. <sup>57</sup>*Id.* at 13.

<sup>51</sup> See, RJ. Nobile, *Putting Out Fires With a No-Smoking Policy*. **PERSONNEL**, Mar., 1990, at 10. <sup>52</sup>*I-L* at 7.

<sup>53</sup>Colosi, *supra* note 40, at 76.

<sup>54</sup>702 F.2d 743 (9th Cir. 1983).

which she was not exposed to smoke."<sup>63</sup> In such cases the key factors for the court are: 1. poor ventilation; 2. employees who smoke in the area; 3. nonsmoking employees who cannot avoid the smoke; 4. the belief that ETS is carcinogenic [this has now been determined by the EPA and OSHA]; and 5. the appearance of symptoms such as headaches, nosebleeds, or irritated eyes due to exposure to the smoke.<sup>64</sup>

These factors relied on in employment cases are similar to those discussed in the prison cases. Another analogous issue is the ventilation in buildings. In the 1970s, businesses began sealing off their buildings in an effort to make them more energy efficient. However, while trying to save money for their companies, they probably caused them to lose just as much through absentee claims. It is estimated that smoking and ETS exposure cause American businesses to lose 80 million days a year.<sup>64</sup> In the prison setting, the majority of cases have been won by the prisons due to adequate ventilation or policies designed to accommodate both smokers and nonsmokers.<sup>65</sup>

In conclusion, employers basically have four options for dealing with workplace smoking problems. A fifth one which has been discarded here is that of "doing nothing." In today's workplace employers cannot ignore the requests and concerns of employees about ETS. Therefore, the present options are to: 1. completely ban smoking on the premises; 2. segregate employees in common areas; 3. limit smoking to cafeterias and lounges; and 4. develop completely different areas for smokers and nonsmokers to congregate and work.

The option of a complete ban is gaining in popularity as noted by earlier survey statistics. To see the necessity for such a ban one needs only to review the \$5,740 (1986 dollars) per smoker per year cost estimate of smoking to employers figured by William L. Weis.<sup>66</sup> This further illustrates why employers would seek such a ban. Also, many employers are following the lead of local municipalities which are increasingly banning smoking in governmental workplaces and areas of public accommodation. "Most [city and county] ordinances make no exception for small workplaces; provided that, in a conflict between the concerns of nonsmokers and smokers, nonsmokers'

<sup>63</sup>Colosi, *supra* note 40, at 76.

<sup>64</sup>Davenport, *supra* note 42, at 29.

<sup>65</sup>See, Naidoff, *supra* note 55.

<sup>66</sup>Caldwell v. Quinlan, 729 F. Supp 4 (D.D.C. 1990); West v. Wright, 747 F. Supp. 329 (E.D. Va. 1990).

<sup>67</sup>Fry, *supra* note 40.

concerns will take precedence; and prohibit retaliation against employees who exercise their rights under a smoking ordinance."<sup>67</sup>

Employers who ban smoking in the workplace are also trying to enforce an increasing norm in society by "convey[ing a] strong message about the [lack of] social acceptability of cigarettes".<sup>68</sup> Yet, to institute a total ban on smoking employers must take into consideration the reaction of two internal factions: smoking employees and the company union. Smoking has been determined to be a mandatory subject for collective bargaining with a union.<sup>69</sup> Therefore, employers must be sensitive to the needs of smoking employees — the reason for educational and cessation programs - and to the desires of labor leaders. Both are formidable opponents and need to be involved in the development of the smoking policy and the final stage of implementation. Otherwise, such a unilateral ban by management may be declared unreasonable by arbitrators or the courts.<sup>70</sup> Also, if employees are involved, they will have a better understanding of the employers' concern for their health and work environment and why the company is trying to reduce costs. They will see that it is not just a "witch hunt" against smokers.

A second option is to simply divide open work areas, putting smokers on one side and nonsmokers on the other side. This may sound feasible and, in fact, many employers have implemented policies of this type. However, since employers are usually attempting to satisfy nonsmokers, this solution usually does not end complaints, because smoke may drift from one side to the other, especially in poorly ventilated areas or where no partitions of any kind are provided. Besides, such policies do not encourage smokers to quit and the workplace layouts often hinder the smooth flow of work. Furthermore, these policies are costly in more ways than absenteeism and reduced productivity. In regard to building maintenance, smoking produces additional costs when ventilation systems must be altered or partitions are purchased. Also, in the legal arena, the courts often agree that the nonsmokers are not being reasonably accommodated. After all, "*There is no safe level of exposure to some of the harmful constituents of tobacco smoke.* Before dilution by air, the smoke

•U.S. Dept. Of Health & Human Servs., Et Al, *Smoking And Health In The AMERICAS: A 1992 REPORT OF THE SURGEON GENERAL, IN COLLABORATION WITH THE PAN American Health Organization*, at 157 (1992).

■U.S. DEPT. OF HEALTH & HUMAN SERVS, ET AU *REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS, a REPORT OF THE SURGEON GENERAL*, at 589 (1989).

•Pennsylvania, *supra* note 8.

\*\*\*See, Staff REPORT, *supra* note 37, at 51.

from a smoldering cigarette, cigar, or pipe may contain greater concentrations of some ... substances than smoke which smokers inhale directly."<sup>71</sup>

Therefore, the courts may simply find for the employee based on the medical evidence regarding ETS.

A third option is to limit smoking to employee lounges and cafeterias. This way nonsmokers will not, in essence, "be disturbed" while working. Also, it would provide smokers with a time and place to smoke. The problem, once again, is that the rights of the nonsmoking employees are being restricted. The employer is giving them the option of subjecting themselves to the smoking habits of others if they desire to eat or take breaks in these areas. Exposure of the nonsmoking employees to ETS may cause them to become physically ill or resentful that they are being subjected to such conditions. Governmental statutes, local ordinances, and court decisions are increasingly putting the rights of the nonsmoker first.<sup>72</sup>

Finally, the fourth and least effective method is the segregation of employees into totally different areas. This can cause problems if a company has a poor ventilation system which allows the smoke to float throughout the workplace. Also, the segregation of employees can create problems for the smokers as well if there is poor ventilation because their area could become so smoke filled that its intolerable.<sup>73</sup> The aforementioned policy can also create logistic problems for employers by hindering the normal cycle of work. Segregation of this type can also create hostility and resentment between smoking and nonsmoking factions, in opposition to employer goals of higher productivity and efficiency. For that reason this option is not recommended.

## CONCLUSION

Employers are going to have to face the issue of ETS on an increasing basis with governmental research movements of agencies such as the EPA and OSHA uncovering more disturbing facts about ETS. Previous governmental research was initiated by health agencies and the Surgeon General's office and never directed at the workplace. Now, the health hazards of ETS are being taken seriously and are the subject of numerous articles focusing on the workplace. Also, both the House and the Senate are considering bills that could lead to building design guidelines and indoor emission standards.<sup>74</sup> Even if this legislation does not pass, employers face losing their decision

<sup>71</sup>U.S. Department Of Health & Human Servs., a Statement On The Health Effects Of Passive Smoking (1985).  
*See\* also.* Public Health Serv, Deft. Of Health & Human Servs., Smoking and Health: a National Status Report (1990).

<sup>72</sup>U.S. Dept. Of Health & Human Services, Et Al., *supra* note 68.

<sup>73</sup>Fry, *supra* note 40, at 16.

<sup>74</sup>*California IAQ Lawsuits Increasing.* OCCUPATIONAL HEALTH & SAFETY, May, 199Z at 18.

making power due to the increased passage of smoking and indoor air quality legislation by cities and states.<sup>75</sup>

Employers must initiate smoking policies today. It is a necessity, just like accommodating employees under the Americans with Disabilities Act. The key things they must remember are to involve the employees and the union, no matter what option or combination is chosen. Federal, state, local, and county ordinances must also be examined. Employers can usually have more restrictive policies, but must definitely meet the minimum requirements of such laws. Also, employers must provide advance notice and work with the employees through educational and cessation programs to create an atmosphere of acceptance and cooperation in the workplace. ETS is not an impossible issue; employers need to approach it logically, just like production and other personnel decisions.

The best approach for the employer may be to institute a complete ban on smoking with extensive educational and cessation programs. Ventilation requirements to meet the needs of nonsmokers could be too costly. Also, there are statistics which show nonsmoking environments have higher levels of morale and productivity. As in the prison cases, the courts want to create an accommodating environment. A nonsmoking environment of cooperation eliminates numerous problems, not only in prisons, but also in the workplace. For that reason, employers need to keep abreast of the changing rulings of the courts in regard to environmental tobacco smoke and address the problem before facing legal action by employees.

<sup>75</sup>U.S. Dept. Of Health & Human Servs., Et. Al., *supra* note 68.