

A SPARK IN THE BATTLE BETWEEN SMOKERS AND NONSMOKERS: JOHANNESSEN V. NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION & DEVELOPMENT

At one time, smoking was a symbol of elegance and sophistication in popular culture.¹ Over the past few decades, however, smoking has become less fashionable.² Smokers may face pressure, and even coercion, from relatives and friends who want them to quit.³ Because of recent information about the effects of secondhand smoke, the scope of that pressure has extended from a concern about the smoker's own health to include a concern about the effects on nonsmokers who breathe the same air.⁴

The first blow to smokers came from a 1964 report of the Surgeon General that concluded that smoking could increase a person's risk of lung cancer, chronic bronchitis and emphysema.⁵ Twenty years later the Surgeon General confirmed what had only been suspected before—that nonsmokers exposed to cigarette smoke had an increased risk of acquiring the same diseases.⁶ Finally, in 1992, the Environmental

¹ Larry Kraft, *Smoking in Public Places: Living with a Dying Custom*, 64 N.D. L. Rev. 329, 339 & n.31 (1988) ("[C]igarettes were a prop in constant use by actors in motion pictures."); Nancy R. Gibbs, *All Fired Up Over Smoking*, TIME, Apr. 18, 1988, 64, 69 ("Without smoking, it seemed, great detectives could not detect, writers could not write, lovers could not languish, heroes were deflated and vamps declawed.").

² See Gibbs, *supra* note 1, at 69.

³ See Liz Spayd, *Puffing and Persecution*, WASH. POST, Mar. 15, 1994, at B1.

⁴ See Tom Kenworthy, *Secondhand Smoke Peril Affirmed*, WASH. POST, Jan. 6, 1993, at A1. In one instance, a conflict between a smoker and a nonsmoker turned violent. See Peter Finrite, *Murder Charge in Cigarette Killing*, S.F. CHRON., Oct. 1, 1993, at D4. A mother of four allegedly shot and killed a nonsmoker who complained when she lit up a cigarette in the nonsmoking section of a restaurant. *Id.*

⁵ PUBLIC HEALTH SERV., U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, SMOKING AND HEALTH, REPORT OF THE SURGEON GENERAL 31 (1964) [hereinafter SURGEON GENERAL (1964)].

⁶ See PUBLIC HEALTH SERV., U.S. DEP'T OF HEALTH AND HUMAN SERVS., THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING, REPORT OF THE SURGEON GENERAL 7 (1986) [hereinafter SURGEON GENERAL (1986)]. After reviewing current scientific data, the Surgeon General listed three major conclusions:

1. Involuntary smoking is a cause of disease, including lung cancer, in healthy nonsmokers.
2. The children of parents who smoke compared with the children of nonsmoking parents have an increased frequency of respiratory infections, increased respiratory symptoms, and slightly smaller rates of increase in lung function as the lung matures.

Protection Agency (the "EPA") released a report that classified environmental tobacco smoke as a known human lung carcinogen.⁷ Now that the Surgeon General and the EPA have concluded that the dangers to nonsmokers' health from tobacco smoke exposure are more serious than minor annoyances, employers are more likely to enact policies restricting smoking in the workplace for fear of lawsuits by nonsmokers.⁸

Nonsmokers have used various causes of action as the basis for lawsuits seeking smoking restrictions.⁹ Nonsmokers who claim they have a constitutional right to breathe smoke-free air have not been successful.¹⁰ Attempts to classify smoke allergies as handicaps and bring disability claims also have proved ineffective in recent years.¹¹ In general, courts have favored nonsmokers who bring claims under the common-law duty to provide a safe workplace.¹² More recently, in *Johannesen v. New York City Department of Housing Preservation and Development*, a nonsmoker received an award of damages under Workers' Compensation Law for a smoke-related injury.¹³ Smokers, however, have brought lawsuits against employers who enact overly restrictive anti-smoking policies.¹⁴ Employers need to think carefully about what kinds of policies to adopt to avoid lawsuits from either side.¹⁵

This Note examines trends in lawsuits brought by nonsmokers. Section I examines the recent medical and scientific evidence regarding the effects of secondhand smoke on nonsmokers.¹⁶ Section II discusses which causes of action have been most successful for nonsmokers.¹⁷ Section III focuses on lawsuits in the area of Workers' Com-

3. 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.

Id.

⁷ U.S. ENVTL. PROTECTION AGENCY, RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING: LUNG CANCER AND OTHER DISORDERS 1-3 (1992) [hereinafter EPA REPORT].

⁸ See Edward Felsenthal, *EPA Report Sparks Antismoking Plans*, WALL ST. J., Jan. 7, 1993, at B1 ("The Environmental Protection Agency is counting mainly on plaintiffs' lawyers, rather than regulators, to drive businesses to ban smoking on their premises, and the lawyers are eager to comply.").

⁹ See, e.g., *Vickers v. Veterans Admin.*, 549 F. Supp. 85, 86 (W.D. Wash. 1982); *Gasper v. Louisiana Stadium & Exposition Dist.*, 418 F. Supp. 716, 717 (E.D. La. 1976), *aff'd*, 577 F.2d 897 (5th Cir. 1978); *McCarthy v. Department of Social & Health Servs.*, 759 P.2d 351, 352-53 (Wash. 1988).

¹⁰ See *infra* notes 71-86 and accompanying text.

¹¹ See *infra* notes 87-103 and accompanying text.

¹² See *infra* notes 104-32 and accompanying text.

¹³ 638 N.E.2d 981, 985-86 (N.Y. 1994); see *infra* notes 193-220 and accompanying text.

¹⁴ See *infra* notes 225-46 and accompanying text.

¹⁵ Andrew M. Kramer & Laurie F. Calder, *The Emergence of Employees' Privacy Rights: Smoking and the Workplace*, 8 LAB. LAW. 313, 333 (1992).

¹⁶ See *infra* notes 21-65 and accompanying text.

¹⁷ See *infra* notes 66-138 and accompanying text.

pensation.¹⁸ Section IV examines the rights of smokers in the workplace.¹⁹ Section V addresses the problems faced by employers with respect to the rights of smokers and nonsmokers in light of recent court decisions.²⁰ Finally, this Note concludes that if employers do not take steps to prevent nonsmokers from being exposed to tobacco smoke in the workplace, they will risk increased liability toward non-smoking employees.

I. EFFECTS OF SECONDHAND SMOKE

A. *Medical and Scientific Evidence*

Native Americans introduced Christopher Columbus to tobacco in 1492.²¹ Over the centuries, smoking became a fundamental part of American culture.²² Recently, however, the popularity of smoking has taken a sharp downturn.²³ In 1965, forty-three percent of the United States population smoked, whereas today that figure is only twenty-five percent.²⁴ What was once a social norm is now out of favor with a majority of Americans.²⁵ The accumulation of information about the health effects of smoking on both smokers and nonsmokers provides one of the main reasons for this shift.²⁶

In 1964, the Surgeon General released a report on smoking and health that established causal relationships between cigarette smoking and diseases such as lung cancer, chronic bronchitis and emphysema.²⁷ The report also established a higher incidence of cardiovascular diseases among smokers.²⁸ With this report, the Surgeon General began the war on smoking.²⁹ In 1965, Congress enacted legislation requiring warning labels on cigarette packaging.³⁰ In 1971, Congress banned cigarette advertising from radio and television.³¹

¹⁸ See *infra* notes 139–220 and accompanying text.

¹⁹ See *infra* notes 221–46 and accompanying text.

²⁰ See *infra* notes 247–76 and accompanying text.

²¹ Gibbs, *supra* note 1, at 68.

²² See *id.* at 69. It was not until the start of the twentieth century that smoking became seen as more of an acceptable custom and gained in popularity. See Kraft, *supra* note 1, at 335–36.

²³ Kraft, *supra* note 1, at 337.

²⁴ Spencer Rich, *Study Says Adult Smoking Dropped to 25% in 1993*, WASH. POST, Dec. 23, 1994, at A6. In addition, 70% of adult smokers said that they wanted to quit. *Id.*

²⁵ See Kraft, *supra* note 1, at 336.

²⁶ See Gibbs, *supra* note 1, at 69–70.

²⁷ SURGEON GENERAL (1964), *supra* note 5, at 31.

²⁸ *Id.* at 32.

²⁹ See Gibbs, *supra* note 1, at 69.

³⁰ *Id.*; see *Shimp v. New Jersey Bell Tel. Co.*, 368 A.2d 408, 413 (N.J. Super. Ct. Ch. Div. 1976).

³¹ Gibbs, *supra* note 1, at 69; see *Shimp*, 368 A.2d at 413.

The next wave of anti-smoking fervor followed the Surgeon General's 1986 report on the effects of secondhand smoke.³² The Surgeon General found that a nonsmoker in the same room as a smoker inhales a smaller dose of the same harmful agents.³³ The report stated that this exposure caused lung cancer in adult nonsmokers and respiratory problems for children of smokers.³⁴ Furthermore, because of the way that cigarette smoke disperses in the air, designating "smoking" and "nonsmoking" sections does not fully protect nonsmokers from exposure to environmental tobacco smoke.³⁵

The Surgeon General explained that nonsmokers are exposed to what is known as environmental tobacco smoke ("ETS").³⁶ ETS originates at the lighted end of a cigarette and spreads through the air.³⁷ Many variables affect nonsmokers' exposure, including the number of smokers in the area, the size of the area and the quality of the ventilation.³⁸ One researcher estimated that the average nonsmoker may inhale the equivalent of one to two cigarettes each day.³⁹ Because it spreads rapidly through the air, ETS exposes anyone in the same airspace to its effects.⁴⁰ The most common effects of ETS reported by nonsmokers are irritation of the eyes, nose and throat.⁴¹ The Surgeon General's report, however, establishes a causal relationship between secondhand smoke and a wide variety of serious health problems.⁴²

In 1992, the EPA classified ETS as a "Group A" carcinogen, a known human lung carcinogen.⁴³ The report found that approximately 3000 nonsmokers die of lung cancer annually in the United States

³² Gibbs, *supra* note 1, at 71. In this report, the Surgeon General used the terms "passive smoking" and "involuntary smoking" interchangeably to refer to the exposure of a nonsmoker to secondhand smoke. SURGEON GENERAL (1986), *supra* note 6, at 6.

³³ See SURGEON GENERAL (1986), *supra* note 6, at 6.

³⁴ *Id.* at 13. The Surgeon General noted that further studies were needed to show whether there was a causal relationship between involuntary smoking and other forms of cancer and cardiovascular disease. *Id.* at 14.

³⁵ *Id.* at 13-14.

³⁶ *Id.* at 7.

³⁷ *Id.* at 11. ETS consists of exhaled mainstream smoke ("MS"), which is drawn into the smoker's mouth, and sidestream smoke ("SS"), which issues from the burning tobacco. *Id.* at 7. Although SS has essentially the same composition as MS, studies show that SS may be even more carcinogenic because it is formed at a lower temperature. *Id.*

³⁸ SURGEON GENERAL (1986), *supra* note 6, at 11.

³⁹ JUDITH A. DOUVILLE, ACTIVE AND PASSIVE SMOKING HAZARDS IN THE WORKPLACE 4 (1990).

⁴⁰ SURGEON GENERAL (1986), *supra* note 6, at 11.

⁴¹ *Id.* at 229.

⁴² See *id.* at 7-12.

⁴³ EPA REPORT, *supra* note 7, at 1-3. This classification puts ETS in the same group as asbestos, arsenic and benzene. Kenworthy, *supra* note 4, at A1.

because of exposure to ETS.⁴⁴ In addition, ETS increases the severity of the symptoms of asthmatic children of smokers and may factor into the onset of new cases of asthma.⁴⁵ The EPA has no authority to regulate smoking, but its administrator, William Reilly, voiced his hope that the report will encourage lawsuits by nonsmokers.⁴⁶ These lawsuits would then force the federal Occupational Safety and Health Administration ("OSHA") to adopt rules regarding smoking in the workplace.⁴⁷

B. *Reactions to Scientific Findings*

Various initiatives to regulate smoking followed the publication of the 1964 Surgeon General's report.⁴⁸ Between the publication of the Surgeon General's 1986 report and the end of 1987, Congress introduced almost 100 bills related to smoking issues.⁴⁹ In general, state and local governments have used legislation to regulate smoking in public places.⁵⁰ At the federal level, administrative agencies have taken steps to restrict smoking in government offices and on interstate transportation.⁵¹ In addition, some businesses have reacted by adopting private smoking regulations.⁵²

State governments actually began regulating smoking in the early twentieth century, mostly as a fire and safety hazard.⁵³ After the Sur-

⁴⁴ EPA REPORT, *supra* note 7, at 1-4.

⁴⁵ *Id.* at 1-5. The report also found a strong association between maternal smoking and Sudden Infant Death Syndrome ("SIDS"), but the data did not differentiate between prenatal exposure and postnatal exposure. *Id.* at 1-6. Furthermore, a recent study published in the Journal of the American Medical Association reported that infants who lived with one or more smoking adults were 2.2 to 5.3 times as likely to die from SIDS than infants who did not live with smokers. Thomas H. Maugh II, *Crib Death Risk, Secondhand Smoke Linked*, L.A. TIMES, Mar. 8, 1995, at A1.

⁴⁶ Felsenthal, *supra* note 8, at B1.

⁴⁷ See Kenworthy, *supra* note 4, at A1. OSHA is currently considering a ban on smoking in the workplace and the Food and Drug Administration is considering further regulation of cigarettes. *Nightline* (ABC television broadcast, Apr. 20, 1994), available in LEXIS, Nexis Library, Script File.

⁴⁸ See SURGEON GENERAL (1986), *supra* note 6, at 263; Gibbs, *supra* note 1, at 69-71.

⁴⁹ Susan Ross, Note, *Second-Hand Smoke: The Asbestos and Benzene of the Nineties*, 25 ARIZ. ST. L.J. 713, 714 (1990).

⁵⁰ See SURGEON GENERAL (1986), *supra* note 6, at 263.

⁵¹ *Id.* at 263, 276. OSHA has begun hearings on a proposal that would force employers to either ban smoking completely or supply a smoking area that is enclosed and ventilated to the outside. Frank Swoboda, *The War on Workplace Smoke Goes Nationwide*, WASH. POST, Sept. 18, 1994, at H1. OSHA received an unprecedented 100,000 public comment letters in response to this proposal. *Id.* Smokers may not have to worry yet, however, because OSHA takes an average of 10 years to enact new regulations. *Id.*

⁵² SURGEON GENERAL (1986), *supra* note 6, at 263.

⁵³ Nancy Kornblum, Note, *Extinguishing Smoking in the Workplace*, 38 WASH. U. J. URB. & CONTEMP. L. 183, 195-96 (1990).

geon General's 1964 report on smoking, legislative policy shifted toward encouraging smokers to quit.⁵⁴ It was not until the 1970s, however, that smoking restrictions gained momentum.⁵⁵ Growing recognition that cigarette smoke affects the health of nonsmokers as well as smokers fueled these new restrictions.⁵⁶ In 1975, Minnesota adopted its Clean Indoor Air Act, which prohibited smoking in restaurants, private workplaces and many public places.⁵⁷ Forty-four states currently have some type of restriction on smoking in public places.⁵⁸ A shift from state legislation to local ordinances occurred in the 1980s.⁵⁹ Many of these ordinances extended the scope of state laws to include prohibitions on smoking in restaurants and workplaces.⁶⁰

Most of this legislation, however, only affected public places.⁶¹ Because most adults spend more time at work than at home, exposure to ETS in the workplace has become a growing concern.⁶² By 1991, eighty-five percent of private businesses had instituted some form of smoking policy, but the amount of protection these policies afford nonsmokers varies greatly.⁶³ As the medical evidence accumulated, nonsmokers complained more often about sharing workspace with

⁵⁴ *Id.* at 196; see SURGEON GENERAL (1986), *supra* note 6, at 265.

⁵⁵ See Kornblum, *supra* note 53, at 196-97.

⁵⁶ *Id.*

⁵⁷ SURGEON GENERAL (1986), *supra* note 6, at 265. Many similar statutes in other states followed this one. *Id.* The statutes clearly stated that their purpose was to protect the health of nonsmokers. *Id.*

⁵⁸ Deborah Potter, *CNN News: EPA Says Non-Smokers in Danger from Secondhand Smoke* (CNN Transcripts, Jan. 7, 1993), available in LEXIS, Nexis Library, Script File. The states that have not passed any legislation are located in the southeast and western part of the United States. See SURGEON GENERAL (1986), *supra* note 6, at 266; Sue Anne Pressley, *Cigarette Clouds Still Drift Over the West*, WASH. POST, Nov. 6, 1994, at A6. The southern states that have declined to regulate smoking are located in "tobacco country" (North Carolina, Virginia and Tennessee), which may explain their reluctance. SURGEON GENERAL (1986), *supra* note 6, at 266. The western states appear to subscribe to the philosophy that they would prefer a little secondhand smoke to any more government regulation. Pressley, *supra* at A6.

Texas recently joined the states that regulate smoking in restaurants. *Id.* One resident said, "I never thought I'd see the day . . . when I couldn't sit down in a restaurant in Austin and have me a cup of coffee and a cigarette and read the newspaper. Something's wrong with the world." *Id.*

⁵⁹ SURGEON GENERAL (1986), *supra* note 6, at 275.

⁶⁰ *Id.*

⁶¹ Raymond L. Paoletta, *The Legal Rights of Nonsmokers in the Workplace*, 10 U. PUGET SOUND L. REV. 591, 591 (1987). In 1986, only nine states had smoking legislation that included workplaces. SURGEON GENERAL (1986), *supra* note 6, at 285.

⁶² See SURGEON GENERAL (1986), *supra* note 6, at 284.

⁶³ See Swoboda, *supra* note 51, at H1; see also SURGEON GENERAL (1986), *supra* note 6, at 295-96.

smokers.⁶⁴ When their employers failed to respond to their complaints, nonsmokers turned to the legal system for relief.⁶⁵

II. LEGAL ACTIONS BY NONSMOKERS

Nonsmokers exposed to ETS in their work environments have sued their employers under many different causes of action with varying degrees of success.⁶⁶ Courts have consistently declined to establish a constitutional right to breathe smoke-free air.⁶⁷ At first, it appeared that nonsmokers who are sensitive to ETS may be protected as disabled pursuant to the Federal Rehabilitation Act of 1973.⁶⁸ Recent cases, however, have held that a tobacco sensitivity is not disabling.⁶⁹ Nevertheless, nonsmoking plaintiffs have been quite successful in asserting that employers have a common-law duty to protect them from exposure to ETS based on the recent increase in scientific information about the health effects of secondhand smoke.⁷⁰

A. Constitutional Claims

In 1976, in *Gasper v. Louisiana Stadium & Exposition District*, the United States District Court for the Eastern District of Louisiana held that the United States Constitution does not give nonsmokers a right to breathe smoke-free air.⁷¹ The plaintiffs brought a class action suit on behalf of all nonsmokers who attended events held in the Louisiana Superdome, a public facility.⁷² The plaintiffs claimed that by allowing smoking in the Superdome, the defendants violated the First, Fifth, Ninth and Fourteenth Amendments to the Constitution.⁷³ The court

⁶⁴ David B. Ezra, "Get Off Your Butts": *The Employer's Right to Regulate Employee Smoking*, 60 TENN. L. REV. 905, 906 (1993).

⁶⁵ See *infra* notes 66-138 and accompanying text. Recently, R.J. Reynolds announced a plan to market a new, smokeless cigarette called Eclipse. Philip J. Hiltz, *Little Smoke, Little Tar, But Full Dose of Nicotine*, N.Y. TIMES, Nov. 27, 1994, at 1. The company claims that the Eclipse eliminates 95% of secondhand smoke with a taste that is comparable to regular cigarettes. *Id.* If the Eclipse works as R.J. Reynolds promises and it becomes popular, then the accommodation of both smokers and nonsmokers at work may become possible.

⁶⁶ See *infra* notes 71-138 and accompanying text.

⁶⁷ Ezra, *supra* note 64, at 916-17.

⁶⁸ See Paoletta, *supra* note 61, at 615.

⁶⁹ See *Gupton v. Virginia*, 14 F.3d 203, 205-06 (4th Cir.), *cert. denied*, 115 S. Ct. 59 (1994).

⁷⁰ See Kraft, *supra* note 1, at 343-45.

⁷¹ 418 F. Supp. 716, 722 (E.D. La. 1976), *aff'd*, 577 F.2d 897 (5th Cir. 1978).

⁷² *Id.* at 717. There were seven named plaintiffs who represented all nonsmokers who had attended or would in the future attend events in the Louisiana Superdome. *Id.*

⁷³ *Id.*

rejected their arguments on several grounds and concluded that the Constitution does not guarantee a right to breathe smoke-free air.⁷⁴

First, the court stated that the fact that the plaintiffs had to breathe smoke-filled air in order to attend events at the Superdome did not interfere with the exercise of their First Amendment rights.⁷⁵ The court reasoned that permitting smoking did not restrict the right to enjoy events any more than charging admission or selling alcoholic beverages does.⁷⁶ Second, the court concluded that the plaintiffs were not deprived of their due process rights under the Fifth and Fourteenth Amendments because they could simply choose not to attend events in the Louisiana Superdome and, by extension, not to breathe tobacco smoke.⁷⁷ Finally, the court declared that the plaintiffs' claim to a fundamental right to be free from cigarette smoke extended beyond the boundaries of the Ninth Amendment because it constituted a relatively minor social problem that did not rise to the level of constitutional regulation.⁷⁸ According to the court, the legislature could probably address such a social problem more appropriately than the judiciary.⁷⁹ In conclusion, the court held that the United States Constitution does not protect nonsmokers from breathing cigarette smoke in a public facility.⁸⁰

Similarly, in 1983, in *Kensell v. Oklahoma*, the United States Court of Appeals for the Tenth Circuit held that the United States Constitution does not provide a cause of action for a state employee whose exposure to smoke in his workplace exacerbated his allergic condition.⁸¹ Anthony Kensell suffered from respiratory and cardiovascular problems due to an allergy to cigarette smoke.⁸² Mr. Kensell filed a lawsuit under the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution against his employer, the State of Oklahoma, when it refused to restrict smoking in his work space.⁸³ The court stated that the plaintiff voluntarily took a position in an office where he knew or should have known that people would smoke and that he could choose to quit his job or transfer to another office.⁸⁴ Unless a person had no choice but to endure the smoke, the court

⁷⁴ See *id.* at 718-22.

⁷⁵ *Id.* at 718.

⁷⁶ *Gasper*, 418 F. Supp. at 718.

⁷⁷ See *id.* at 720.

⁷⁸ See *id.* at 721-22.

⁷⁹ *Id.* at 722.

⁸⁰ *Id.*

⁸¹ 716 F.2d 1350, 1351 (10th Cir. 1983).

⁸² *Id.* at 1350-51.

⁸³ *Id.* at 1350.

⁸⁴ See *id.* at 1351.

claimed that it could not impose a smoking ban in the workplace.⁸⁵ Thus, the court held that Kensell had no constitutional cause of action against his employer for failing to protect him from exposure to smoke in the workplace.⁸⁶

B. Disability Claims

In 1982, in *Vickers v. Veterans Administration*, the United States District Court for the Western District of Washington held that an employer is not required to place a ban on smoking for the sake of a nonsmoker who is sensitive to tobacco smoke absent a statute or regulation that prohibits smoking in the workplace.⁸⁷ Lanny Vickers, who had a hypersensitivity to tobacco smoke, worked in a temporary office building where many other employees smoked.⁸⁸ His employer, the Veterans Administration (the "VA"), instituted a nationwide policy of attempting to strike a balance between smoking and nonsmoking employees.⁸⁹ The VA took various steps to reduce the amount of smoke in the plaintiff's office, but it did not enact a smoking ban.⁹⁰ Mr. Vickers continued to complain about the effects of ETS on his health and eventually sued his employer under the Rehabilitation Act of 1973 (the "Rehabilitation Act") for injunctive relief and damages.⁹¹

The court concluded that an allergy to cigarette smoke constituted a handicap within the meaning of the Rehabilitation Act because it substantially limited one of the plaintiff's major life activities, his ability to work in a smoke-filled environment.⁹² The court held, however, that the VA had made reasonable accommodations for the plaintiff by

⁸⁵ See *id.*

⁸⁶ *Kensell*, 716 F.2d at 1351.

⁸⁷ 549 F. Supp. 85, 89-90 (W.D. Wash. 1982).

⁸⁸ *Id.* at 87.

⁸⁹ *Id.* at 88.

⁹⁰ See *id.* at 88-89. The VA separated the desks of smokers and nonsmokers, obtained a voluntary agreement from smokers not to smoke in the plaintiff's presence, installed two vents in the office and offered to build a partition around plaintiff's desk or move his desk closer to a window. *Id.*

⁹¹ *Id.* at 86, 89; see Rehabilitation Act of 1973, which provides in pertinent part:

No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794 (1988 & Supp. V 1993).

At the time the *Vickers* case was decided, the term "handicap" was used in place of the term "disability," but the statute was identical in all other respects. See *Gupton v. Virginia*, 14 F.3d 203, 205 n.2 (4th Cir. 1994).

⁹² *Vickers*, 549 F. Supp. at 86-87. The relevant part of the statute defines an "individual with a disability" as "any person who (i) has a physical or mental impairment which substantially limits

doing as much as it could short of instituting a total ban on smoking.⁹³ The court asserted that until Congress enacted a ban on smoking in government offices, the rights of smokers must be protected as well.⁹⁴ Thus, the court denied the plaintiff relief because the VA had reasonably accommodated his handicap.⁹⁵

Later cases, however, disagree with the interpretation of the term "handicapped person" used in *Vickers*.⁹⁶ For example, in 1994, in *Gupton v. Virginia*, the United States Court of Appeals for the Fourth Circuit held that an allergy to tobacco smoke was not a handicap under the Rehabilitation Act.⁹⁷ When the plaintiff, Betty Gupton, began work for the Virginia Department of Transportation in March 1990, she requested and received a cubicle in a nonsmoking area.⁹⁸ Although Ms. Gupton sat approximately sixty feet from the nearest smoking area, she claimed she was still inhaling smoke.⁹⁹ After one month, she took an unpaid leave and never returned to work.¹⁰⁰ The court reasoned that in order to prove that she had a disability within the meaning of the Rehabilitation Act, the plaintiff needed to show that her allergy prevented her from holding a position in a general field.¹⁰¹ Because the plaintiff only offered evidence that she could not work in that particular office, the court reasoned that her allergy did not actually limit her ability to work.¹⁰² Thus, the court concluded that the plaintiff had no cause of action because an allergy to tobacco smoke does not constitute a "handicap" under the Rehabilitation Act.¹⁰³

C. Common-Law Claims

In 1976, in *Shimp v. New Jersey Bell Telephone Co.*, the Superior Court of New Jersey held that because employees have a right to a safe

one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(8)(B) (1988 & Supp. V 1993).

⁹³ *Vickers*, 549 F. Supp. at 89.

⁹⁴ *See id.*

⁹⁵ *Id.* at 89-90.

⁹⁶ *See Miller v. AT&T Network Sys.*, 722 F. Supp. 633, 639 (D. Or. 1989) (telephone installer with sensitivity to heat was not handicapped), *aff'd*, 915 F.2d 1404 (9th Cir. 1990). The *Miller* court held that an impairment qualifies as a handicap only if it limits a person's ability to obtain a position in general, rather than a specific position. *Id.*

⁹⁷ 14 F.3d 203, 205-06 (4th Cir.), *cert. denied*, 115 S. Ct. 59 (1994).

⁹⁸ *Id.* at 204.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 205.

¹⁰² *Gupton*, 14 F.3d at 205.

¹⁰³ *Id.* at 205-06.

work environment, employers must prohibit smoking in work areas.¹⁰⁴ The plaintiff, Donna Shimp, worked in an office where her employer allowed employees to smoke at their desks.¹⁰⁵ She was allergic to cigarette smoke and became so ill from exposure at work that she had to leave early many times.¹⁰⁶ When Ms. Shimp complained, her employer installed an exhaust fan in her work area that proved insufficient to prevent an allergic reaction.¹⁰⁷ Ms. Shimp then sued for injunctive relief.¹⁰⁸

The court concluded that employees have a right to work in an environment free of recognized and preventable hazards under New Jersey common law.¹⁰⁹ The court noted that cigarette smoke could not be considered a voluntarily assumed occupational hazard because the smoke was not a necessary by-product of her employer's business.¹¹⁰ The court also stated that secondhand tobacco smoke was toxic, especially to the plaintiff because of her allergy.¹¹¹ The court ordered the defendant to ban smoking in its offices and to allow smoking only in its lunchroom.¹¹² Thus, the court held that nonsmokers have a common-law right to be free from tobacco smoke in the workplace.¹¹³

Similarly, in 1983, in *Smith v. Western Electric Co.*, the Missouri Court of Appeals held that an employer violated its common-law duty to provide a safe workplace by not protecting a nonsmoking employee from exposure to tobacco smoke.¹¹⁴ Paul Smith, the nonsmoker plain-

¹⁰⁴ 368 A.2d 408, 416 (N.J. Super. Ct. Ch. Div. 1976).

¹⁰⁵ *Id.* at 409-10.

¹⁰⁶ *Id.* at 410. The plaintiff suffered from various symptoms, including throat, nasal and eye irritation, as well as headaches, nausea and vomiting. *Id.* These symptoms appeared even if only one smoker was present and they subsided once the plaintiff moved to a smoke-free environment. *Id.*

¹⁰⁷ *Id.* After the fan was installed, other employees complained about cold drafts. *Id.* As a compromise, the plaintiff only used the fan at set intervals, which reduced its effectiveness. *Id.*

¹⁰⁸ *Id.* at 409.

¹⁰⁹ *Shimp*, 368 A.2d at 410.

¹¹⁰ *Id.* at 411 ("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 . . .").

¹¹¹ *Id.* at 413. The court noted that the ban on cigarette advertisements along with the requirement of warning labels demonstrate that cigarettes are hazardous to health and that their dangers are generally known to the public. *See id.* at 413-14.

¹¹² *Id.* at 416. The court noted that its ruling should not be difficult for the defendant to implement since the company already forbade smoking around its telephone equipment. *Id.* The court stated that the defendant should show as much consideration for its employees' sensitivities as it did for its machines. *Id.*

¹¹³ *See id.* at 415-16. *But see* *Gordon v. Raven Sys. & Research, Inc.*, 462 A.2d 10, 15 (D.C. 1983) (court refused to find common-law duty to provide smoke-free workplace for sake of one sensitive employee without any scientific evidence of effects of secondhand smoke on nonsmokers in general).

¹¹⁴ 643 S.W.2d 10, 13 (Mo. Ct. App. 1983).

tiff, worked in an office with other employees who smoked while they worked.¹¹⁵ Mr. Smith moved to this office in 1967, and, in 1975, he visited a doctor because he was experiencing respiratory problems.¹¹⁶ When the plaintiff reported his condition to his employer, his employer tried moving him to different areas, but each new office contained enough tobacco smoke to trigger the plaintiff's symptoms.¹¹⁷ Mr. Smith then filed a suit for injunctive relief.¹¹⁸

The court first reaffirmed the common-law rule that an employer has a duty to use due care to eliminate conditions that are harmful to its employees.¹¹⁹ According to the court, the defendant violated this duty because it knew that tobacco smoke was hazardous to its employee's health, and because it had the means to prohibit smoking in certain areas.¹²⁰ Thus, the court held the defendant liable for violating its duty to provide a safe work environment for the plaintiff by not protecting a nonsmoking employee from secondhand smoke.¹²¹

Additionally, in 1988, in *McCarthy v. Department of Social and Health Services*, the Supreme Court of Washington held that the State owed a common-law duty to its employees to provide a workplace free from tobacco smoke.¹²² Helen McCarthy worked at the Department of Social and Health Services for ten years in an office where smoking was commonplace.¹²³ She complained to her supervisors that the smoke affected her health, but her employer did not respond.¹²⁴ Ms. McCarthy became so ill that she had to leave her position.¹²⁵ The Department of Labor and Industries denied Ms. McCarthy's claim for workers' compensation benefits because her condition was not an occupational disease.¹²⁶

¹¹⁵ *Id.* at 12.

¹¹⁶ *Id.* The plaintiff complained of a sore throat, nausea, dizziness, headaches, blackouts and memory loss. *Id.* With each year of work, these symptoms became more severe. *Id.* His doctors told him that he should try to avoid exposure to tobacco smoke. *Id.*

¹¹⁷ *Id.* The defendant also announced that it had adopted a policy of separating smokers and nonsmokers, but the policy was never implemented. *Id.* When the plaintiff renewed his complaints, the defendant offered him a choice of wearing a respirator or working in its smoke-free computer room in a position that paid \$500 less per month than his current position. *Id.* Mr. Smith tried using the respirator, but it did not relieve his symptoms. *Id.*

¹¹⁸ *Id.* at 11. The trial court dismissed the plaintiff's case on the grounds that he failed to state a claim upon which relief could be granted and the plaintiff appealed. *Id.*

¹¹⁹ *Smith*, 643 S.W.2d at 12.

¹²⁰ *Id.* at 13.

¹²¹ *Id.*

¹²² 759 P.2d 351, 354 (Wash. 1988).

¹²³ *Id.* at 352.

¹²⁴ *Id.* Ms. McCarthy eventually developed a pulmonary disease and her doctor advised her not to return to work unless she could breathe clean air. *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

Ms. McCarthy did not appeal this ruling, but instead sued her employer for violating its common-law duty to provide a safe work environment.¹²⁷

According to the court, workers' compensation does not preclude an employee from suing under another cause of action if a disease is not covered by the statute.¹²⁸ The court recognized that an employer has a duty to provide a safe workplace for its employees.¹²⁹ The court cited recent reports published by the Surgeon General to establish that tobacco smoke was harmful to nonsmokers.¹³⁰ The court stated that it would impose a duty on the employer to alleviate the problems caused by tobacco smoke whenever a plaintiff could prove an employer's awareness of its detrimental effects.¹³¹ Thus, the court held that an employer who knows that ETS is harmful to nonsmokers has a common-law duty to take "reasonable precautions" to protect its employees.¹³²

In summary, courts have not allowed nonsmokers to claim a constitutional right to breathe smoke-free air.¹³³ In addition, post-*Vickers* decisions have ruled that an allergy to ETS is not a disability.¹³⁴ Thus, nonsmokers may have a lesser chance of success with a claim against their employers under the Rehabilitation Act.¹³⁵ Courts have held, however, that employers who allow smoking in areas where nonsmokers work may violate their common-law duty to provide a safe work

¹²⁷ *McCarthy*, 759 P.2d at 352-53.

¹²⁸ *Id.* at 354. The State had argued that Ms. McCarthy's action was precluded because the Washington Industrial Insurance Act contained an exclusive remedy provision. *Id.*

¹²⁹ *Id.* at 354.

¹³⁰ *Id.* at 355. The court referred to the Surgeon General's 1986 report on smoking. *Id.*; see also SURGEON GENERAL (1986), *supra* note 6.

¹³¹ *McCarthy*, 759 P.2d at 356. The court cautioned, however, that its holding was limited to the effects on the health of a typical employee rather than a hypersensitive employee. *Id.*

¹³² *Id.* The court noted that the reasonable precautions requirement did not mean that an employer had to provide every nonsmoker with a completely smoke-free environment regardless of cost. *Id.* The court did not make any suggestions as to how the employer should have accommodated the plaintiff in this case. See *id.*

One justice dissented in part, saying that the majority had no legal precedent for requiring an employer to ban tobacco smoke. *Id.* at 358 (Brachtenbach, J., concurring in part and dissenting in part). Justice Brachtenbach suggested that this type of regulation should be left to the legislature. *Id.* (Brachtenbach, J., concurring in part and dissenting in part).

¹³³ See *Kensell v. Oklahoma*, 716 F.2d 1350, 1351 (10th Cir. 1983); *Gasper v. Louisiana Stadium & Exposition Dist.*, 418 F. Supp. 716, 722 (E.D. La. 1976), *aff'd*, 577 F.2d 897 (5th Cir. 1978).

¹³⁴ Compare *Gupton v. Virginia*, 14 F.3d 203, 205-06 (4th Cir. 1994) (tobacco allergy was not a disability) with *Vickers v. Veterans Admin.*, 549 F. Supp. 85, 86-87 (W.D. Wash. 1982) (tobacco allergy was disability).

¹³⁵ See *Gupton*, 14 F.3d at 205-06. Applying the reasoning of this case, plaintiffs would probably also be denied disabled status under the Americans with Disabilities Act of 1990, which uses a similar definition of disability and applies to all employers. 42 U.S.C. §§ 12102(2), 12112 (Supp. V 1993).

environment.¹³⁶ The plaintiff in *McCarthy* originally attempted to obtain workers' compensation benefits for her injury, but never appealed the denial of benefits in court.¹³⁷ The next section examines whether workers' compensation acts may cover secondhand smoke-related injuries.¹³⁸

III. WORKERS' COMPENSATION CASES

A. Background

Workers' compensation provides benefits to persons who suffer injuries in the course of their employment.¹³⁹ An employee receives a set amount of benefits and waives the common-law right to sue the employer for damages.¹⁴⁰ Near the end of the nineteenth century, the growing industrialization of the United States spurred the movement toward providing workers' compensation for job-related injuries.¹⁴¹ By 1920, the vast majority of states had enacted some type of compensation act.¹⁴² The typical act usually pays benefits to employees for accidents arising out of their employment or for occupational diseases.¹⁴³

Most workers' compensation acts provide remuneration for personal injuries that occur "by accident."¹⁴⁴ In general, an accident only includes unexpected injuries.¹⁴⁵ Commentators note, however, that whether the cause or result should be unexpected remains unclear.¹⁴⁶ Furthermore, the injury must be attributable to a specific time, place and cause.¹⁴⁷ Once again, however, the timing requirement may apply to either cause or result.¹⁴⁸ Thus, the clearest case of an accidental injury occurs when both cause and result are unexpected and definite in time.¹⁴⁹

¹³⁶ See *McCarthy*, 759 P.2d at 356; *Smith v. Western Elec. Co.*, 643 S.W.2d 10, 13 (Mo. Ct. App. 1983); *Shimp v. New Jersey Bell Tel. Co.*, 368 A.2d 408, 531 (N.J. Super. Ct. Ch. Div. 1976).

¹³⁷ See *McCarthy*, 759 P.2d at 352-53.

¹³⁸ See *infra* notes 139-220 and accompanying text.

¹³⁹ 1 ARTHUR LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 1.00 (1994).

¹⁴⁰ 1 *id.* § 1.10.

¹⁴¹ See 1 *id.* § 5.20. The number of industrial accidents had increased but there were few legal remedies. 1 *id.* Various states appointed commissions to study the problem. 1 *id.* In 1910, commission members attended a conference in Chicago where they drafted a Uniform Workmen's Compensation Law, which established a framework for state legislation. 1 *id.*

¹⁴² 1 *id.* § 5.30. By 1963, all 50 states had workers' compensation statutes in place. 1 *id.*

¹⁴³ 1 *id.* § 1.10.

¹⁴⁴ See 1A LARSON, *supra* note 139, § 37.00. Nine states do not require that the injury be accidental. 1A *id.* § 37.10.

¹⁴⁵ 1A *id.* § 37.20.

¹⁴⁶ See 1A *id.*

¹⁴⁷ 1A *id.*

¹⁴⁸ 1A *id.*

¹⁴⁹ 1A LARSON, *supra* note 139, § 37.20.

Other combinations make up a continuum along which the results of litigation mark the boundaries of accidental injuries.¹⁵⁰

For example, in 1975, in *Middleton v. Coxsackie Correctional Facility*, the Court of Appeals of New York held that a corrections officer sustained an accidental injury after contracting tuberculosis through exposure to a sick prisoner.¹⁵¹ In 1969, Kenneth Middleton worked in the cannery of a correctional facility in close contact with an inmate who was diagnosed with tuberculosis.¹⁵² After approximately one year, Mr. Middleton developed a severe cough that turned out to be a symptom of tuberculosis.¹⁵³ Although the Workers' Compensation Board declared the injury accidental, the Appellate Division of the Supreme Court reversed the award of benefits.¹⁵⁴ The plaintiff appealed this decision.¹⁵⁵

The Court of Appeals of New York concluded that Mr. Middleton's illness constituted an accidental injury.¹⁵⁶ The court reasoned that a "common-sense viewpoint" should determine whether an illness qualifies as an accidental injury.¹⁵⁷ In addition, the court noted that an accident did not need to be the result of a sudden catastrophe, but that it could result from gradual exposure.¹⁵⁸ Using this construction of the term "accidental injury," the court held that exposure to a tubercular inmate over a period of three or four months leading to an illness does constitute an accidental injury covered by Workers' Compensation Law.¹⁵⁹

All of the current workers' compensation acts also furnish benefits for occupational diseases.¹⁶⁰ In the past, some state acts only provided benefits for accidental injuries.¹⁶¹ Consequently, the acts often defined an occupational disease as anything that did not qualify as an accident but could be attributed to employment conditions.¹⁶² Today, most jurisdictions define an "occupational disease" as a disease that results from hazards present in a particular type of employment, as opposed

¹⁵⁰ See 1A *id.*

¹⁵¹ 341 N.E.2d 527, 531-32 (N.Y. 1975).

¹⁵² *Id.* at 528.

¹⁵³ *Id.*

¹⁵⁴ See *id.* Although this case and other early cases use the term "workmen's compensation," I am using the current term "workers' compensation" throughout this Note for consistency.

¹⁵⁵ See *id.*

¹⁵⁶ *Middleton*, 341 N.E.2d at 531-32.

¹⁵⁷ *Id.* at 530.

¹⁵⁸ *Id.* at 530. The court noted that an injury could be accidental if one could point to a definite time for either the cause or result of the injury. *Id.*

¹⁵⁹ *Id.* at 531-32.

¹⁶⁰ 1B LARSON, *supra* note 139, § 41.00.

¹⁶¹ See 1B *id.* § 41.31.

¹⁶² See 1B *id.* § 41.00.

to a disease that may result from any occupation or from life outside of work.¹⁶³

Using a common judicial definition of an occupational disease, the Commonwealth Court of Pennsylvania, in *Roofner v. Workmen's Compensation Appeal Board*, held that an employee's lung disease was not an occupational disease because of an absence of evidence of a greater prevalence of that disease in his line of work than in other occupations.¹⁶⁴ During his term of employment as a laborer, the plaintiff's duties included hammering dents out of rusted, dusty barrels from a warehouse and transporting them.¹⁶⁵ The plaintiff later contracted emphysema.¹⁶⁶ A physician who examined the plaintiff stated that the dusty warehouse environment probably caused his illness.¹⁶⁷ The court noted that to prove an occupational disease, the plaintiff must demonstrate that: (1) exposure to the condition arose from employment; (2) the condition was causally related to the industry; and (3) the condition is more prevalent in that industry than in the general population.¹⁶⁸ The court reasoned that although the plaintiff established that working in a dusty warehouse likely caused his emphysema, the plaintiff did not offer any evidence regarding the relative incidence of the disease in the general population.¹⁶⁹ Thus, the court held that employees cannot receive workers' compensation for an occupational disease unless they can prove that their illness occurs more often in their occupation than in others.¹⁷⁰

B. *Secondhand Smoke Claims*

One commentator suggested in 1987 that an injury caused by secondhand smoke did not qualify as either an accidental injury or an occupational disease as defined by workers' compensation acts.¹⁷¹ Consequently, he predicted that employees who attempted to request work-

¹⁶³ 1B *id.* § 41.32.

¹⁶⁴ 392 A.2d 346, 348 (Pa. Commw. Ct. 1978).

¹⁶⁵ *Id.* at 347.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 348.

¹⁶⁹ *Roofner*, 392 A.2d at 348.

¹⁷⁰ *See id.*

¹⁷¹ Paolella, *supra* note 61, at 609-12. Paolella suggests that smoke-related injuries are not accidental because they occur after long-term exposure with no definite time of injury and because simply inhaling air is not an injury. *Id.* at 611. He also proposes that these injuries are not occupational diseases because almost every work environment contains some tobacco smoke. *Id.* As a result, an employee is not more likely to sustain a smoke-related injury in one occupation than another. *Id.*

ers' compensation for smoke-related injuries would not be successful.¹⁷² Initially, court decisions were consistent with this assessment.¹⁷³

In 1988, in *Mack v. County of Rockland*, the Court of Appeals of New York held that an illness caused by exposure to cigarette smoke at work did not constitute an occupational disease.¹⁷⁴ The plaintiff, a psychiatric social worker, had an eye disorder.¹⁷⁵ This disorder worsened after the plaintiff's exposure to cigarette smoke in her office.¹⁷⁶ Although an administrative law judge awarded workers' compensation to the plaintiff, the Workers' Compensation Board reversed the decision.¹⁷⁷ The Appellate Division of the New York Supreme Court affirmed and the plaintiff filed an appeal.¹⁷⁸

According to the New York Court of Appeals, the term "occupational disease" refers to conditions that result from recognized risks inherent in a particular type of employment.¹⁷⁹ The court reasoned that because exposure to cigarette smoke was not a natural part of a social worker's position, the plaintiff's injury was not an occupational disease.¹⁸⁰ Thus, the court held that the plaintiff had not suffered a compensable occupational disease due to her exposure to tobacco smoke.¹⁸¹

Similarly, in 1992, in *Palmer v. Del Webb's High Sierra*, the Supreme Court of Nevada held that an employee who developed a lung disease as a result of his exposure to ETS at work could not receive benefits under the state's Workers' Compensation Law.¹⁸² The plaintiff, James Palmer, worked surrounded by smoking customers during his twenty years as a "pit boss" in a casino.¹⁸³ After he experienced problems breathing, Mr. Palmer visited several doctors who diagnosed respiratory problems and advised him not to return to work unless he could avoid tobacco smoke.¹⁸⁴ Mr. Palmer then filed a claim for workers'

¹⁷² *Id.* at 612.

¹⁷³ See, e.g., *Palmer v. Del Webb's High Sierra*, 838 P.2d 435, 435 (Nev. 1992); *Mack v. County of Rockland*, 525 N.E.2d 744, 744 (N.Y. 1988).

¹⁷⁴ 525 N.E.2d at 744.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Mack*, 525 N.E.2d at 744. New York law defines an occupational disease as "a disease resulting from the nature of employment and contracted therein." N.Y. WORKERS' COMPENSATION LAW § 2(15) (McKinney 1992).

¹⁸⁰ *Mack*, 525 N.E.2d at 744.

¹⁸¹ See *id.*

¹⁸² 838 P.2d 435, 437 (Nev. 1992).

¹⁸³ *Id.* at 437-38 (Young, J., concurring).

¹⁸⁴ *Id.* at 438 (Young, J., concurring).

compensation.¹⁸⁵ The Supreme Court of Nevada considered whether an illness caused by exposure to secondhand smoke is compensable as an occupational disease pursuant to workers' compensation.¹⁸⁶

The court held that although ETS is common to the environment of a casino, it does not constitute a hazard incidental to the nature of employment in a casino.¹⁸⁷ Furthermore, the court noted that workers may be exposed to ETS outside of work.¹⁸⁸ The court reasoned that Mr. Palmer did not show a sufficient relationship between his employment and his illness to fall within the purview of an occupational disease.¹⁸⁹ Thus, the court held that illnesses caused by exposure to secondhand smoke in the workplace are not occupational diseases and, as such, are not covered by workers' compensation.¹⁹⁰

The courts in both *Mack* and *Palmer* decided that secondhand smoke-related injuries were not occupational diseases.¹⁹¹ Neither case, however, ever discussed whether injuries caused by secondhand smoke might qualify as accidental injuries pursuant to workers' compensation. A recent New York case addressed this issue directly.¹⁹²

C. *The Johannesen Case*

In 1994, in *Johannesen v. New York City Department of Housing Preservation and Development*, the Court of Appeals of New York held that bronchial asthma caused by prolonged exposure to secondhand tobacco smoke qualified as an accidental injury under workers' compensation law.¹⁹³ The plaintiff, Veronica Johannesen, was an office assistant whose illness became aggravated as a result of breathing co-workers' tobacco smoke while at work.¹⁹⁴ Ms. Johannesen sought workers' compensation benefits for her illness.¹⁹⁵ The Court of Appeals

¹⁸⁵ *Id.* Mr. Palmer's claim was first denied by his employer and later rejected at an administrative hearing. *Id.* at 438. At an administrative appeal, the appeals officer overturned the earlier ruling, finding that Mr. Palmer's injury was compensable. *Id.* High Sierra then appealed to the district court. *See id.*

¹⁸⁶ *Id.* at 435.

¹⁸⁷ *Palmer*, 838 P.2d at 435. The Nevada Occupational Disease Act states, "The disease must be incidental to the character of the business and not independent of the relation of the employer and employee." NEV. REV. STAT. § 617.440(2) (1995).

¹⁸⁸ *Palmer*, 838 P.2d at 435.

¹⁸⁹ *See id.* at 435-36.

¹⁹⁰ *See id.* at 437.

¹⁹¹ *Id.* at 435; *Mack*, 525 N.E.2d at 744.

¹⁹² 638 N.E.2d 981, 982 (N.Y. 1994).

¹⁹³ *Id.* at 985-86.

¹⁹⁴ *Id.* at 982.

¹⁹⁵ *Id.*

reasoned that her illness constituted an accidental injury because exposure to ETS was not a natural side effect of employment in an office.¹⁹⁶ Thus, the court concluded that Ms. Johannesen was entitled to workers' compensation benefits as a result of her exposure to secondhand smoke in the workplace.¹⁹⁷

Ms. Johannesen worked in a large room where approximately half of the employees smoked at their desks.¹⁹⁸ After two years in this work environment, Ms. Johannesen developed a cough and a wheeze.¹⁹⁹ Two years later, her doctor diagnosed her condition as bronchial asthma and recommended a smoke-free environment.²⁰⁰ Although Ms. Johannesen requested a transfer, her employer denied her request.²⁰¹ Ms. Johannesen then sought workers' compensation benefits for her condition.²⁰² While her hearing was pending, Ms. Johannesen experienced two serious asthma attacks, both requiring hospitalization.²⁰³

At an administrative hearing, the workers' compensation law judge awarded Ms. Johannesen compensation on the theory that she had acquired an occupational disease.²⁰⁴ The Workers' Compensation Board (the "Board") affirmed, but disagreed with the judge's reasoning.²⁰⁵ The Board reasoned that Ms. Johannesen was entitled to compensation because she suffered from an accidental injury as a result of her exposure to secondhand smoke.²⁰⁶ The Supreme Court, Appellate Division, affirmed this result, holding that the tobacco smoke in Ms. Johannesen's office was an unusual environmental hazard that led to an accidental injury within the meaning of the Workers' Compensation Law.²⁰⁷ Ms. Johannesen's employer appealed this decision.²⁰⁸

The New York Court of Appeals held that Ms. Johannesen's illness constituted an accidental injury.²⁰⁹ The court first stated that the state enacted the Workers' Compensation Law as a remedy for workers

¹⁹⁶ *Id.* at 985.

¹⁹⁷ *Johannesen*, 638 N.E.2d at 985-86.

¹⁹⁸ *Id.* at 982. Approximately 50 employees worked in this office in which the windows were kept closed and the ventilation system was broken. *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Johannesen*, 638 N.E.2d at 982.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 983.

²⁰⁷ *Johannesen v. New York City Dep't of Hous. Preservation and Dev.*, 546 N.Y.S.2d 40, 41 (N.Y. App. Div. 1989).

²⁰⁸ *See id.*

²⁰⁹ *Johannesen*, 638 N.E.2d at 985-86.

injured in the course of their employment.²¹⁰ The court relied on the "common-sense" approach taken by the *Middleton* court in defining the term "accidental injury."²¹¹ According to the court, an accidental injury not only refers to sudden occurrences, but also encompasses conditions that form gradually.²¹² The court noted both that the office in which Ms. Johannesen worked contained an excessive amount of tobacco smoke due to the number of smokers and lack of ventilation, and that this environment could have caused a degeneration in the plaintiff's condition over time.²¹³

The court also determined that the plaintiff should not have anticipated the risk of the smoke because it was not a natural consequence of her employment.²¹⁴ The court reasoned that, although many people smoke cigarettes, exposure to ETS is not a natural side effect of working in an office.²¹⁵ Moreover, the court determined that the timing of the plaintiff's illness showed a sufficient connection to her exposure to tobacco smoke at work because, among other things, she collapsed twice while on the job.²¹⁶ The court found that, in a workers' compensation claim, any predisposition to an asthmatic condition is immaterial.²¹⁷

Finally, the court rejected the employer's argument that this decision would "open the floodgates" by making any type of allergy or common cold compensable.²¹⁸ The court concluded that its ruling did not change the standards for proving an accidental injury because plaintiffs still had to demonstrate that unusual working conditions or events caused their injuries.²¹⁹ Consequently, the court held that Ms. Johannesen's condition resulted from her exposure to secondhand

²¹⁰ See *id.* at 983. The New York Workers' Compensation Law provides in pertinent part: "Every employer . . . shall . . . secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment without regard to fault as a cause of the injury . . ." N.Y. WORKERS' COMPENSATION LAW § 10(1) (McKinney 1992).

²¹¹ See *Johannesen*, 638 N.E.2d at 983.

²¹² *Id.* at 984. The Workers' Compensation Law states that, "'Injury' and 'personal injury' mean only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom." N.Y. WORKERS' COMPENSATION LAW § 2(7) (McKinney 1992). The court noted that the term "accidental injury" has no statutory definition, but that its application developed through case law. See *Johannesen*, 638 N.E.2d at 984.

²¹³ *Johannesen*, 638 N.E.2d at 984-85.

²¹⁴ *Id.* at 985.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ See *id.*

²¹⁸ *Johannesen*, 638 N.E.2d at 985.

²¹⁹ *Id.*

smoke in her office and that this condition constituted an accidental injury for which she could pursue a remedy under Workers' Compensation Law.²²⁰

IV. SMOKERS' RIGHTS

Despite the strength of recent claims by nonsmokers, employers who wish to institute widespread smoking bans may still face opposition.²²¹ As of 1992, twenty-one states had enacted legislation that prevented employers from refusing to hire smokers.²²² Furthermore, many smokers unhappy with smoking restrictions have taken their grievances to court.²²³ Although only a few smokers have brought successful lawsuits against their employers, the courts have recognized that there are limits to how far employers can go in regulating smoking.²²⁴

In 1980, in *Johns-Manville Sales Corp. v. International Ass'n of Machinists*, the United States Court of Appeals for the Fifth Circuit held that an employer could not prohibit smoking on all of its property because this policy violated a collective bargaining agreement.²²⁵ The employer, Johns-Manville, manufactured asbestos products.²²⁶ Because of the dangers associated with the combination of smoking and asbestos, Johns-Manville adopted a rule that prohibited smoking on all company property.²²⁷ Any violations of this rule led to disciplinary sanctions and after five violations, discharge.²²⁸ When the union complained that this policy violated a collective bargaining agreement, the two parties went to arbitration.²²⁹ The arbitrator declared the ban invalid and suggested that the company designate smoking areas for employees to use during breaks.²³⁰ The employer filed a lawsuit to set aside the arbitrator's decision on the grounds that it violated public policy.²³¹

²²⁰ *Id.* at 985-86.

²²¹ See *infra* notes 225-46 and accompanying text; see also Kramer & Calder, *supra* note 15, at 313.

²²² Kramer & Calder, *supra* note 15, at 323.

²²³ See Jim Schachter, *Where There's Smoke, There's Ire*, L.A. TIMES, Jan. 14, 1988, at 4:1.

²²⁴ See *infra* notes 225-46 and accompanying text.

²²⁵ See 621 F.2d 756, 757, 759-60 (5th Cir. 1980).

²²⁶ *Id.* at 757.

²²⁷ *Id.* The company spent millions of dollars to improve the air quality of its plant. *Id.* Despite the reduction in levels of contaminants, an expert testified that smokers who work with even low levels of contaminants run 92 times the risk of dying from lung cancer than nonsmokers. *Id.*

²²⁸ *Id.* The company set up a program of encouragement and psychological support in order to help smokers quit. *Id.*

²²⁹ *Id.*

²³⁰ *Johns-Manville*, 621 F.2d at 757.

²³¹ See *id.* at 758-59.

According to the court, an arbitration award that violates a law will not be enforced.²³² The court noted, however, that no statutes or regulations required an employer to restrict smoking.²³³ Although Johns-Manville argued that public policy generally supports an employer's efforts to eradicate health hazards, the court reasoned that this policy justification was insufficient to overturn an arbitration award that accorded with a collective bargaining agreement.²³⁴ Thus, the court held that an employer may not institute a smoking restriction if it violates the terms of a collective bargaining agreement, despite public policy justifications.²³⁵

In 1987, in *Grusendorf v. City of Oklahoma City*, the United States Court of Appeals for the Tenth Circuit upheld a fire department's ban on smoking for trainees as constitutional because of the state interest involved.²³⁶ The Oklahoma City Fire Department required all first year firefighter trainees to sign an agreement stating that they would not smoke during the training period whether or not they were on duty.²³⁷ Greg Grusendorf, a trainee, took three puffs of a cigarette on his lunch break.²³⁸ When another employee reported the incident, the employer promptly discharged him.²³⁹ Mr. Grusendorf sued the city claiming that the policy violated his right to privacy under the Fourteenth Amendment of the United States Constitution.²⁴⁰ The court stated that the policy infringed upon trainees' privacy because it affected conduct outside of the workplace.²⁴¹ The court, however, presumed the policy valid because of the state's strong interest in regulating its employees.²⁴² The court then reasoned that the plaintiff had the burden of proving the policy irrational and arbitrary.²⁴³ The court noted that the health risks

²³² *Id.* at 758.

²³³ *Id.* at 758-59.

²³⁴ *See id.* at 759. The court stated that smoking in an asbestos plant harms the smoker, but does not harm third persons. *See id.* The court noted that if the company wished to protect nonsmokers, then the arbitrator's suggestion that they designate special smoking areas would solve that problem. *See id.*

²³⁵ *Johns-Manville*, 621 F.2d at 759-60; *see also* *Commonwealth v. Pennsylvania Labor Relations Bd.*, 459 A.2d 452, 455 (Pa. Commw. Ct. 1983) (court held that employer's ban on smoking at work stations could not be enacted without submitting it to a mandatory bargaining process).

²³⁶ 816 F.2d 539, 543 (10th Cir. 1987).

²³⁷ *Id.* at 540, 543.

²³⁸ *Id.* at 540.

²³⁹ *Id.*

²⁴⁰ *Id.* at 541.

²⁴¹ *Grusendorf*, 816 F.2d at 541. The opinion stated, "It can hardly be disputed that the Oklahoma City Fire Department's non-smoking regulation infringes upon the liberty and privacy of the firefighter trainees. The regulation reaches well beyond the work place and well beyond the hours for which they receive pay." *Id.*

²⁴² *Id.* at 543.

²⁴³ *Id.*

associated with cigarette smoking are well-known and that firefighters need to be in top physical condition.²⁴⁴ The court also considered the possibility that smoking habits may exacerbate the effects of smoke inhalation when fighting fires.²⁴⁵ Thus, the court allowed enforcement of the regulation because it had a rational connection to job performance.²⁴⁶

V. THE EMPLOYER'S DILEMMA

Employers are caught in the middle of workplace disputes between smokers and nonsmokers. Their primary concern should be avoiding liability from lawsuits on either side. They may also wish to reduce the costs associated with workplace smoking, such as higher maintenance and insurance costs.²⁴⁷ Commentators suggest that the legislature should regulate smoking in the workplace.²⁴⁸ Until that happens, however, employers must bear the pressure of following the guidelines set forth by various courts, as well as predict where future decisions will go.

A. *The Significance of Johannesen*

One major question raised by *Johannesen* is whether other jurisdictions will follow its reasoning and include exposure to ETS as an accidental injury. Other courts may disagree with the decision because secondhand smoke-related injuries do not resemble typical workers' compensation accidents.²⁴⁹ Conditions caused by exposure to ETS lack the element of suddenness that most courts seek when classifying an injury as an accident.²⁵⁰ Some courts, however, have found accidental injuries where exposure and illness are gradual by conceptualizing each impact or inhalation as a separate accident.²⁵¹ Moreover, courts are more likely to designate an injury as an accident if at least one

²⁴⁴ *Id.* The court alluded to the Surgeon General's warning on cigarettes as proof of the health risks of smoking. *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Grusendorf*, 816 F.2d at 543.

²⁴⁷ *Ezra*, *supra* note 64, at 909. Furthermore, employees who smoke and nonsmoking employees exposed to ETS may require more sick leave. *Id.* at 910. The estimated annual cost of lost productivity and health care due to workplace smoking is between \$27 and \$61 billion. *Id.*

²⁴⁸ See Kornblum, *supra* note 53, at 201-02; Paolella, *supra* note 61, at 632.

²⁴⁹ See Paolella, *supra* note 61, at 611.

²⁵⁰ See 1A LARSON, *supra* note 139, § 37.20.

²⁵¹ 1B *id.* § 39.00; see 1B *id.* § 39.10 ("[M]ost jurisdictions have at some time awarded compensation for conditions that have developed, not instantaneously, but gradually over periods ranging from a few hours to several decades, culminating in disability from silicosis, asbestosis, and other dust diseases, pneumonia, lead poisoning, . . . and the like.").

aspect of the injury (i.e., the cause or the result) is sudden or definite in time.²⁵² The plaintiff in *Johannesen* contracted bronchial asthma, which worsened to a point where she suffered two sudden collapses at work.²⁵³ Those collapses provided the court with a definite time for the result of the plaintiff's injury. Difficulties may arise, however, for plaintiffs whose injuries do not develop as quickly or do not lead to a sudden collapse. Thus, courts may decline to rule that smoke-related injuries are accidental because these injuries do not fit the prototypical model of an accident.²⁵⁴ New York decisions, however, appear influential and, thus, at least a few jurisdictions may follow *Johannesen*.

If other courts agree that workers' compensation covers injuries caused by exposure to ETS at work, then nonsmokers will encounter both advantages and disadvantages. On the one hand, nonsmokers could apply to an administrative agency for benefits and avoid filing a lawsuit.²⁵⁵ In addition, the rate of compensation is a guaranteed amount based on the worker's earnings at the time of the injury.²⁵⁶

On the other hand, workers' compensation awards are "modest" and may not compare with the amount that a plaintiff could get from a sympathetic jury.²⁵⁷ Even worse, however, nonsmokers would lose the option of suing under any other cause of action, such as the employer's common-law duty.²⁵⁸ Workers' compensation acts provide immunity for employers for any injuries covered by the compensation statutes.²⁵⁹ Thus, if courts decide that workers' compensation covers smoke-related injuries, the statutes will bar all other causes of action.

Courts will probably split over whether to apply the reasoning in *Johannesen* to their own workers' compensation statutes. Courts that do classify conditions caused by exposure to ETS as accidents will provide workers' compensation awards, but will bar nonsmoking plaintiffs from proceeding with a common-law claim. In jurisdictions that do not follow *Johannesen*, nonsmokers will still have a common-law claim and

²⁵² See 1B *id.*

²⁵³ See *Johannesen*, 638 N.E.2d 981, 982 (N.Y. 1994).

²⁵⁴ See 1A LARSON, *supra* note 139, § 37.20. Courts have split over whether "accidental injury" includes cases similar to ETS exposure, such as those involving exposure to cold, heat, dampness, dust or fumes that lead to a disease. 1A *id.* § 38.50. Furthermore, differences in the exact wording of the state statutes may affect court decisions. See 1A *id.*

²⁵⁵ See 1 LARSON, *supra* note 139, § 1.10; JEFFREY V. NACKLEY, PRIMER ON WORKERS' COMPENSATION 70 (1989).

²⁵⁶ See 1 LARSON, *supra* note 139, § 1.10; NACKLEY, *supra* note 255, at 44-45.

²⁵⁷ See 1 LARSON, *supra* note 139, § 1.10.

²⁵⁸ See 1 *id.*; NACKLEY, *supra* note 255, at 91.

²⁵⁹ NACKLEY, *supra* note 255, at 91. Employers are not immune to suit for injuries caused by intentional acts, but ETS claims are generally based on an employer's negligence. See *id.*

will have a good chance of succeeding on such a claim. In the end, employers will probably face liability in every jurisdiction for either a workers' compensation claim or a common-law claim. Thus, the careful employer should analyze cases in its jurisdiction and, assuming that at least one type of claim will succeed, take steps to guard against liability.

B. Enacting Smoking Restrictions at Work

In general, an employer should not restrict smoking any further than is necessary.²⁶⁰ Even so, the employer may face challenges to its smoking restrictions from smokers.²⁶¹ Yet, the employer who retains the status quo will be vulnerable to attacks by nonsmokers. As the literature on the health hazards of passive smoking increases, courts will probably assume that employers are aware of these risks and hold them liable for any consequences.²⁶² Since no regulatory guidelines exist for employers to follow, they must look to the specific fact situations of prior court decisions to formulate smoking policies that will protect them from legal attack.

As the decision in *Johns-Manville* illustrates, union employers must abide by collective bargaining agreements when instituting a new smoking policy.²⁶³ Non-union employers must consider the relationship of the policy to their goals. In *Grusendorf*, the Fifth Circuit upheld a restriction on smoking by employees both on and off duty only because it involved the state's interest in the physical health of its firefighters.²⁶⁴ The court stated in this opinion that the regulation infringed upon firefighters' right to privacy.²⁶⁵ Thus, to the extent that the Fifth Circuit persuades other courts, a private employer could probably not enact such a restrictive policy unless the employer could articulate a connection between the policy and job performance to establish that the policy was not arbitrary.²⁶⁶ Similarly, courts would probably find that a policy of not hiring employees who smoke is overly restrictive, and possibly discriminatory.²⁶⁷

²⁶⁰ Ezra, *supra* note 64, at 953. Ezra suggests, "The best policies will be written, factually substantiated, and clearly explained." *Id.*

²⁶¹ *Id.*

²⁶² See, e.g., EPA REPORT, *supra* note 7; SURGEON GENERAL (1986), *supra* note 6.

²⁶³ See *Johns-Manville Sales Corp. v. International Ass'n of Machinists*, 621 F.2d 756, 759 (5th Cir. 1980).

²⁶⁴ See *Grusendorf v. City of Oklahoma City*, 816 F.2d 539, 543 (10th Cir. 1987).

²⁶⁵ *Id.* at 541.

²⁶⁶ See Ezra, *supra* note 64, at 954; Kramer & Calder, *supra* note 15, at 324-25.

²⁶⁷ See Kramer & Calder, *supra* note 15, at 325; L. Lynne Pulliam, *Smoking in the Workplace*, EMPLOYEE REL. L.J., Dec. 22, 1993, 79, 79.

As demonstrated by *Gasper*, nonsmokers do not have a constitutional right to breathe air that is free of ETS.²⁶⁸ Furthermore, although an employer has a common-law duty to provide a safe workplace, that duty does not demand a totally smoke-free workplace.²⁶⁹ Thus, the most restrictive policies, such as forbidding employees from smoking either on the job or at home or not hiring smokers, not only violate smokers' rights, but also are not necessary to protect nonsmokers' rights.

Consequently, employers should adopt a policy that restricts smoking without banning it completely. Policies in this middle ground include allowing smoking only on breaks, segregating smokers and nonsmokers, restricting smoking to specific areas or making special accommodations for nonsmoking employees who complain about exposure to ETS.²⁷⁰ When enacting these restrictions, employers should keep the available scientific evidence in mind. For example, merely separating the desks of smokers and nonsmokers will not protect nonsmokers from the spread of ETS because of the way that ETS disperses in the air.²⁷¹ Any segregation policy that does not give smokers and nonsmokers separate airspace with proper ventilation will not protect an employer from liability to nonsmokers. Moreover, a segregation policy may also subject an employer to discrimination claims by which-ever group is given the more unfavorable workspace.²⁷²

Instead of segregating work areas, employers may want to designate a particular area where smokers may go on breaks. As long as this area has sufficient ventilation, nonsmokers will not come into contact with ETS. One drawback, however, is that smokers may take longer or more frequent breaks, reducing their productivity.²⁷³ Employers should minimize this waste of time by making the smoking area as convenient to work areas as possible.²⁷⁴ Employers may implement many variations

²⁶⁸ *Gasper v. Louisiana Stadium & Exposition Dist.*, 418 F. Supp. 716, 722 (E.D. La. 1976).

²⁶⁹ *McCarthy v. Department of Social & Health Servs.*, 759 P.2d 351, 356 (Wash. 1988). The *McCarthy* court stated:

While an employer has a duty to provide a workplace reasonably free of tobacco smoke, it is not required to provide a smoke-free environment for each employee no matter what the cost. However, if an employer is aware of an individual employee's special or particular sensitivity to tobacco smoke, it has a duty to take reasonable steps to accommodate the employee's sensitivities.

Id.

²⁷⁰ See Pulliam, *supra* note 267, at 79.

²⁷¹ See SURGEON GENERAL (1986), *supra* note 6, at 11-12.

²⁷² See Ezra, *supra* note 64, at 930-31. Segregation may also lower employee morale and escalate conflicts between smokers and nonsmokers by creating an "us versus them" mentality." *Id.* at 930.

²⁷³ See DOUVILLE, *supra* note 39, at 110.

²⁷⁴ See *id.* For example, if an employer only allows employees to smoke outside of the

of this type of restriction depending upon their needs. The feasibility of different policies will depend on various factors, such as company size, number of smokers and expense of implementation.

The best policy will restrict smoking only as much as is necessary to allow nonsmokers to do their jobs without coming into contact with ETS.²⁷⁵ The employer should put the policy and its objectives in writing.²⁷⁶ Such a writing will help to show that the policy is rationally related to legitimate concerns in any subsequent litigation. In the end, employers should implement some type of restriction on smoking rather than allowing employees to smoke in all areas because nonsmokers have legitimate legal claims for injuries. When implementing a policy, however, employers should not overcompensate by totally eliminating smoking from the company because courts have supported smokers' rights as well.

VI. CONCLUSION

Courts recently have become more sympathetic to nonsmokers who complain of exposure to ETS in the workplace. One reason for this trend is that scientific evidence reported by authorities such as the Surgeon General of the United States and the Environmental Protection Agency documents the serious health effects of ETS. Although courts have not favored nonsmokers who bring constitutional and disability claims, courts have upheld claims made under the common-law duty to provide a safe workplace and more recently, workers' compensation statutes. The bottom line for employers is that nonsmokers are armed with legitimate causes of action and unless employers take steps to restrict smoking in work areas, courts will hold them liable for any harmful effects on their employees. At the same time, smokers may sue employers whose restrictions go so far that they infringe upon privacy or discriminate against smokers as a group. As a result, employers need to draft their smoking policies carefully so that they strike a reasonable balance between these two groups.

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building, they will waste more time reaching the smoking area (and feel more disgruntled, especially when the weather is inclement). On the other hand, if an employer provides a ventilated smoking room on every floor, travel time will be reduced.

²⁷⁵ See Ezra, *supra* note 64, at 953.

²⁷⁶ See *id.*