

## **THE RIGHTS OF SMOKERS AND NONSMOKERS IN THE WORKPLACE\***

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### **ABSTRACT**

Significant changes in societal attitudes to smoking have affected employers and employees. Even though government regulation of smoking in private workplaces has been limited, employers have found it advantageous to restrict, if not ban, smoking. One source of pressure has come from nonsmokers affected by secondary smoke at the workplace. At the same time, smokers have become alarmed about the impingement on their right to smoke at any time. Unions, courts, and arbitrators have been drawn into this controversy between two competing claims. New laws remain to be tested, and new regulations may further escalate the battle.

Public attitudes toward smoking have shifted dramatically in recent years [1]. So, too, have the attitudes of employers, though not always for the same reasons. Nonsmoking employees have been quick to seize the initiative and demand protection from smoke at the workplace. Employees who believe employer actions are insufficient have entered claims for damages in various forums. Smoking employees have been put on the defensive, but they have learned to counter-attack in an effort to preserve their right to smoke at the workplace and elsewhere. The battle of the rights of employees has been joined; the final outcome has yet to be determined.

\*An earlier version of this article entitled "The Role of Government in Human Resource Management: The Case of Smoking at the Workplace in the United States," was presented as a Communication at the Ninth World Congress of the International Industrial Relations Association, Sydney, Australia, September 1992.

## BACKGROUND

Until relatively recently, interest in smoking at the workplace was limited in its scope and application. Initially, employers were concerned with safety of property and physical safety of employees. Thus, employers prohibited smoking in areas with combustible environment or materials to prevent explosions and fire from damaging property and harming employees. Later, employer concern extended to safety of consumer products. Rising consumer interest in the purity of foods and other ingested items led to regulation of smoking in the vicinity of the handling and processing of such items.

The nature of employer interest in workplace smoking was restricted. Extensive flammable conditions were not common, and only a limited number of employers dealt with food and drug items. Even in these cases, moreover, the smoking restrictions applied to certain areas of the employer's property. Employers felt obliged to ensure that employees had time and locations to smoke. By and large, therefore, employees had ample opportunity to smoke at the workplace, and smoking was acceptable adult behavior for smokers and nonsmokers alike.

Reports of the United States Surgeon General changed public perceptions about smoking. The 1964 report focused on the effects of smoking on the smoker, particularly on the incidence of lung disease and life expectancy among smokers [2]. The report publicized the medical damage incurred by smokers and the health advantages of ending smoking. One result was the health warnings required on cigarette packages. Another was the 1970 ban of cigarette advertising from radio and television. Subsequent reports of the Surgeon General established that use of tobacco was directly related to all kinds of cancer, heart disease, stroke, and other illnesses.

The Surgeon General's 1986 report proved even more provocative and influential [3]. This report discussed the carcinogenic effects of secondary smoke, that is, the adverse effects of smoking on the health of nonsmokers present in the vicinity of smokers. Two years later, the Surgeon General declared in his annual report that nicotine use was a drug addiction, with all the connotations that the term implied for illegal drugs. In 1989 the Surgeon General reiterated that "... the workplace is a major source of involuntary smoke exposure for all adults and is the most important source of exposure for adults who live in nonsmoking households" [4].

All of the Surgeon General's reports received wide publicity. Together, they have been largely responsible for the decline in smoking of the U.S. adult population from 42 percent in 1965 to 25.6 percent in 1991 [5].

## GOVERNMENT INITIATIVES TO RESTRICT SMOKING

The definitive findings of the Surgeon General have had limited impact on federal government activity to restrict smoking. Congress enacted legislation restricting smoking in commercial aviation, and the General Services

Administration limited smoking to designated areas in federal buildings [6]. A sharp increase in tax on tobacco products provided a financial disincentive to use such products. Nevertheless, neither the administration nor Congress sought to limit or ban smoking on a wider basis. While the Environmental Protection Agency recognized tobacco smoke as a major carcinogen, it had to defer to the Occupational Safety and Health Administration (OSHA) to limit smoking at the workplace, and OSHA appeared to be in no hurry to propose any regulation [7]. The reluctance of the federal government to limit smoking has been attributed to the powerful tobacco industry lobby.

State governments have been less hesitant to enact legislation regarding smoking. Beginning in the 1970s, state legislation restricted smoking on behalf of nonsmokers and in recognition of the health hazards posed by smokers. The Minnesota Clean Indoor Air Act of 1975 was widely regarded as a model of comprehensive state legislation. By 1992, forty six states had passed legislation to restrict smoking in public places (hospitals, schools, retail stores, indoor entertainment centers) and public conveyances (buses, elevators). Not only did the number of such laws increase, but so did the restrictions in controlling smoking [3, pp. 266-276]. Restrictions aimed at worksite smoking came more slowly. By 1992, seventeen states had enacted legislation addressing workplace smoking in the private sector, and thirty-four states had passed legislation or issued executive orders limiting workplace smoking in the public sector [8]. A number of cities and counties established their own ordinances restricting smoking at the worksite. Although these laws varied in the degree of smoking restrictions, most required employers to establish a smoking policy and to designate smoking areas in their facilities, thereby allowing the remaining areas to be free of smoke pollution. In a related but different vein, some states had passed legislation barring employers from discriminating in hiring against applicants who smoked at a location other than the workplace; the need for such legislation reflects employer inclinations and smoker fears [9].

## EMPLOYER ACTIONS

Employers acknowledged the increasing attention given to smoking. State and local legislation affected employers, but both the rate of adoption and the restrictiveness of employer smoking policies outpaced those of legislation. By 1991, 85 percent of employers had adopted smoking policies, compared to 36 percent in 1986 and 2 percent in 1981 [1].

Economic considerations have spurred employer interest in limiting smoking. Fear of legal liability, especially from suits brought by nonsmokers exposed to smoke in the workplace, may have contributed to employer concerns. Another factor was the realization that smokers in the workplace have higher medical costs, thereby adding to health insurance premiums, and also higher rates of absenteeism, which affects productivity. In 1992 it was estimated that employers

lost \$16 billion and 80 million work days each year due to smoking-related illnesses [10].

Employers believed that adoption of a smoking policy was good public relations and a mark of progressive human resource management. Public attention and employee support for restricting smoking also encouraged employers to adopt such policies.

Employer smoking policies ranged from physical changes in the environment (new ventilation systems, placing barriers between smokers and nonsmokers) to restrictions on employee smoking (designating smoking areas, banning worksite smoking) to preferential hiring of nonsmokers. In time, employers increased the restrictiveness of their policies. For instance, 34 percent of all employers banned smoking from company buildings in 1991, compared to 2 percent in 1986 [10]. One result of such bans has been the sight of smokers congregating on sidewalks or company parking lots. While 17 percent of employers preferred to hire nonsmokers, few required that new hires be nonsmokers or that nonsmoking be a condition of continued employment. Even fewer tested employees to ensure that they did not smoke away from employer premises [11]. Smoking policies generally provided for imposition of the employer's regular disciplinary code and procedure in case of violations.

Some companies have adopted policies that ban employee smoking even beyond the workplace. These policies prohibit smoking anywhere at any time. To enforce the prohibition, employers may require employees to submit to random testing. Other employers elect to fine employees who smoke off-premises as a way to encourage them to cease smoking and to make them aware of the higher insurance costs of their continuing to smoke. Perhaps the strictest stand is taken by employers who reject applicants who smoke, even if the smoking is limited to their home. A 1988 survey found 6 percent of 283 companies admitted they would not hire smokers; the number is undoubtedly higher today [11].

When implementing smoking restrictions, employers instituted a variety of programs to encourage employees to cease smoking, including information and programs to quit smoking, rewards to those who quit, and lower insurance premiums to nonsmokers [12]. While employer representatives thought these measures were helpful, no single one was deemed to be outstandingly successful [12].

Whether employers introduced smoking restrictions at the workplace or failed to do so, their positions have been challenged. The principal avenues of challenge have been legal suits and union protests.

### **LEGAL CHALLENGES BY NONSMOKERS TO WORKPLACE SMOKING**

The courts have held that the United States Constitution does not grant nonsmokers the right to a smoke-free environment. Claims have been made under the

First, Fifth, Ninth, and Fourteenth amendments of the Constitution, but the courts have found that the smoking issue does not deprive nonsmokers of life, liberty, or property without due process, nor does it constitute a breach of privacy rights [13].

The first successful court suit concerning smoking at the workplace was filed by nonsmokers who felt that the employer had violated their common-law rights by not providing a healthful workplace free of tobacco smoke [14]. This precedent was narrowed in subsequent cases, however, as courts found the common law duty to apply only to "normal" persons, not to those who are physically hypersensitive to tobacco smoke [15]. The judicial application of the employer's common-law duty to provide a smoke-free workplace could change if OSHA were to issue a determination that tobacco smoke is hazardous to "normal" workers.

Nonsmokers have been successful in claiming entitlement to various forms of compensation in cases where they were able to prove smoking substantially impaired their ability to work [16]. These cases have claimed compensation because of temporary or permanent disability, and awards have been made from unemployment insurance, workmen's compensation, and employer retirement funds. Some employees have even been successful in being accorded handicapped status under the Federal Rehabilitation Act of 1973 by showing hypersensitivity to tobacco smoke and employer inability to make a reasonable accommodation. The courts have interpreted "reasonable accommodation" to include improved ventilation, physical barriers between the claimant and smokers, and offers of jobs elsewhere in the organization. These standards could presumably also be applied to nonsmokers' claims for protection under the Americans with Disabilities Act if ". . . the impairment substantially limits one or more major life activities (or has a history of, or is regarded as having such an effect)" [17]. It should be pointed out that the courts' actions to date have involved individual claims, not class-action suits.

### **CHALLENGES BY SMOKERS TO SMOKING RESTRICTIONS**

Employees who desire to smoke at the workplace have felt threatened by the rapidity and extent of recent changes. Many of them were hired and worked for many years with the understanding that smoking was acceptable unless it posed a workplace safety hazard. Even then, the employer was usually obliged to provide locations where smoking would be permitted. Certainly smoking was socially acceptable, and nonsmokers tolerated the presence of smokers and their smoke.

The sudden turn of events left smokers unprepared. Unlike nonsmokers who could claim inability to work in an environment in which smoke was present and therefore seek compensation, smokers could not make a comparable claim of requiring such an environment. Smokers also found themselves without reliable research information to support their cause or to gain sympathy. Their main resource was the Tobacco Institute, whose work was sponsored by tobacco companies.

Smokers have found three avenues for possible relief of their worsening plight. First, if provided with the opportunity, smokers could work with employers and nonsmoking employees to arrive at smoking policies that accommodate everyone's needs. Smokers prefer the establishment of designated smoking areas but may have to settle for smoking breaks. Employers by and large, however, have preferred to establish smoking policies unilaterally. Secondly, smokers represented by a union could press that organization to challenge the employer, both on a policy basis and in case of adverse action for individuals. In 1992, fewer than 15 percent of the labor force in the United States was represented by unions, limiting the extent of such protection. Thirdly, potentially broader protection for smokers could come from legislation. As of 1992, so-called "right-to-privacy" legislation had been passed in twenty six states to protect the employment of workers who participate in legal activities off duty [18]. Under this legislation employers cannot discriminate in hiring and continued employment of workers who engage in such activities as smoking, drinking alcohol, and riding motorcycles. The legislation has no impact on activities on employer premises.

## UNION CHALLENGES TO SMOKING RESTRICTIONS

Employer restrictions pose a dilemma for unions. Unions must represent the interests of smokers and nonsmokers among their members. If either group adopts an extreme position, unions are placed in a no-win position. Unions therefore want to find an accommodation acceptable to everyone. In any event, unions are likely to oppose employer policies banning smoking for the entire worksite.

Employer policies restricting smoking present unions with two types of problems: the content of the policies and the application of the policies.

Unions consider smoking policies to be part of working conditions. New employer restrictions on smoking represent a unilateral change in existing conditions. Unions believe such changes should be negotiated. The National Labor Relations Board has provided some official support for the position that changes in smoking policies may be a mandatory subject of collective bargaining [19]. Likewise, the Federal Labor Relations Authority has ruled that smoking policies in the federal sector and their effects are negotiable unless assignment of work is involved [20]. A contrary view was pronounced in a case involving public schools, where the court found a no-smoking policy was inherently related to the school district's educational mission [21]. In any event, unions will try to be part of the decision making, if only to wrest concessions from employers who insist on a smoking policy.

Even when unions grant employers the right to introduce a smoking policy, they may feel the need to challenge the policy on the grounds of reasonableness of the particular policy. The challenge may initially be raised on the grounds that management did not have authority to impose such a policy.

Not infrequently union grievances protesting the employer introduction of smoking restrictions end in arbitration. The union sometimes grieves at the same time as it files an unfair labor practice charge with the National Labor Relations Board that the employer has failed to bargain in good faith. In such cases, the board has increasingly deferred to arbitration as long as the arbitration award deals with the charge and the result is not contrary to the National Labor Relations Act.

Arbitral decisions on grievances protesting the unilateral introduction of smoking restrictions reflect societal thinking. Arbitrators have tended to uphold the employer's right to impose smoking restrictions for three reasons. First, the language of the collective bargaining agreement may grant the employer the right to institute reasonable rules. Arbitrators have held that a unilaterally determined smoking policy falls within the ambit of the employer's rule-making authority [22]. If the policy has been found to be unreasonable, however, arbitrators have refused to uphold total smoking bans [23] or other restrictions [24]. Second, arbitrators have found nothing in the agreement related to smoking or to joint decision-making that would preclude the employer from instituting smoking restrictions [25]. Third, union failure to request bargaining in a timely fashion after employer announcement of smoking restrictions has also resulted in forfeiture of the right to bargain [26].

If the terms of the collective bargaining agreement limit the employer's right to introduce or change conditions of employment, arbitrators have denied employers the right to change unilaterally existing smoking policies. Arbitrators have felt bound by explicit smoking policy provisions in collective bargaining agreements [27]. A limitation has also been inferred implicitly in a "savings clause" that guaranteed continuation of conditions in effect at the time of negotiations [28]. Contractual language that afforded a union an opportunity to discuss proposed changes in work rules was found to preclude employers from unilaterally introducing what otherwise might have been deemed a reasonable smoking policy [29]. In some cases the record indicated that the parties had accepted the principle that smoking policies were negotiable [30].

Even if the union is unsuccessful in challenging the smoking policy, it can claim that discipline for violation of the employer's smoking policy is inappropriate. Arbitral standards regarding discipline for violations of employer smoking policies have essentially been no different than in other kinds of discipline cases. After determining whether the particular policy was reasonable, arbitrators reviewed whether employees were aware of the policy and the consequences of violations, whether the employer enforced the policy consistently, and whether the discipline administered was appropriate [31].

Arbitrators have been confronted with a different sort of issue when non-smokers have been disciplined for failing to perform because of their alleged sensitivity to smoke. Arbitrators frequently have applied criteria similar to those utilized by the courts, namely whether the employee could sustain the medical

burden of proof of sensitivity to smoke and whether the employer had made or was able to make reasonable accommodation.

## CONCLUSIONS

Nonsmokers have gained rapidly in public understanding of their plight and protection from smoke at the workplace in the last twenty years. Conversely, tolerance for and acceptance of smoking has steadily diminished to the point where smokers feel threatened in their right to smoke.

As information about the adverse health effects of smoking became more prominent, especially the effects of smoke on nonsmokers, employers have adopted smoking policies at an accelerating rate. These policies, however, have become increasingly restrictive. State and local laws have been factors in the adoption, but the number of private employers with smoking policies vastly exceeds employers in states requiring such policies. The most frequently cited reasons for adoption have been concerns about employee health and employee complaints. Rising labor costs, especially health-care costs, and public relations have also contributed to employer adoption of smoking restrictions.

Employer policies and practices have been challenged by individuals and unions in court suits and in grievance arbitration. The bulk of the challenges have come from individual nonsmokers who believed environmental smoke constituted unfair treatment. They want, or in some cases need, to work in a smoke-free atmosphere, i.e., any place on the employer's premises in which the employee enters, including restrooms, cafeterias, and offices as well as the primary work location. These employees are less concerned about smoke in other locations; they may therefore support the right of smokers to have designated time and locations for smoking as long as such time places do not impinge on their rights. Nonsmokers thus have sometimes been willing and able to achieve a satisfactory *modus vivendi* to accommodate smoking employees. In other cases, however, nonsmokers who could prove medically that secondary smoke seriously affected their ability to work have been able to get disability payments or some other forms of compensation while not working.

Employees who want to smoke would ideally like to smoke whenever and wherever they want. They recognize that in today's social environment such unrestricted freedom at the workplace is unlikely if the employer has any interest in limiting smoking. They therefore seek accommodation for their needs by working with employers and nonsmoking employees to allow them to smoke during working hours on the premises. Employees who have violated smoking policies have generally not been discharged unless the incident constituted a safety violation or the employer does not grant employment to smokers. Employees have been particularly disturbed when employers have extended the smoking prohibition beyond the workplace. Employees who choose to smoke consider such a ban as a restriction of their freedom and an invasion of their



privacy. Smokers have had limited success in petitioning state legislatures to grant them statutory protection from employer discrimination against smokers.

The final chapter in this tale has yet to be written. The pendulum has swung decidedly against the rights of smokers. If OSHA were to declare smoke unsafe, employers might feel compelled to restrict smoking further. On the other hand, since smoking is recognized as an addiction involving a legal substance, the question remains if smokers could claim protection under the American with Disabilities Act, including employer accommodation of their disability, or if they can gain passage of other legislation to afford them protection.

### ACKNOWLEDGMENT

I wish to acknowledge the research assistance of Deborah Hoover.

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