

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

2307

2005 SENATE INDUSTRY, BUSINESS AND LABOR

SB 2307

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2307

Senate Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date 1-25-05

Tape Number	Side A	Side B	Meter #
1		xx	1600-4100
Committee Clerk Signature			

Minutes: **Chairman Mutch** opened the hearing on SB 2307. All Senators were present.

SB 2307 relates to **Workforce Safety and Insurance** premium discount for smoke-free workplaces.

Senator Flakoll introduced the bill. See attached hand out. Also, see proposed amendments.

Senator Klein : With these amendments, the bureau would more easily determine how this would work?

Senator Flakoll: The original thinking was that we don't want to impose a five percent mandatory incentive, if it's not applicable. We need to look at that data.

Senator Heitkamp : If we are going to talk legislation, allowing for discounts in relation to smoke free work places, don't you feel we as legislators should get rid of ours?

Senator Flakoll: You know as well as I do, that I'm not a big smoker.

Kathleen Mangskau, Director of the Division of Tobacco Prevention and Control for the

North Dakota Department of Health, stated a neutral position on the bill. See attached testimony.

Chairman Mutch : I think the bill is concerned with the discounting for WSI. We are all convinced of the dangers of smoking already.

Senator Heitkamp : Could you please provide this second hand smoke information to the Department of Labor in North Dakota.

Kathleen: I would be happy to.

Chairman Mutch allowed opposition at this time.

Sandy Blunt, Executive Director and CEO of WSI, spoke in opposition. See attached testimony.

Senator Heitkamp : Do you believe that if smoking wasn't allowed in the workplace, there would be less risk of harm in the workplace?

Sandy: Absolutely.

Senator Heitkamp : If that's the case, why is it wrong to give an incentive?

Sandy: You have to go to the next question. What is the harm? Is it work related claim, or health?

Hearing was closed. No action was taken.

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2307

Senate Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date 1-26-05

Tape Number	Side A	Side B	Meter #
3	xxx		1095-1219
Committee Clerk Signature <i>Lisa VanBerkom</i>			

Minutes: **Chairman Mutch** opened committee discussion on SB 2307. All Senators were present. SB 2307 relates to Workforce Safety and Insurance premium discount for smoke-free workplaces.

Senator Klein: I sense that there could be some major issues and with that,

Senator Klein moved a DO NOT PASS.

Senator Espegard seconded.

Roll Call Vote: 5 yes. 2 no. 0 absent.

Carrier: Senator Klein

FISCAL NOTE

Requested by Legislative Council
01/19/2005

Bill/Resolution No.: SB 2307

1A. State fiscal effect: *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2003-2005 Biennium		2005-2007 Biennium		2007-2009 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

1B. County, city, and school district fiscal effect: *Identify the fiscal effect on the appropriate political subdivision.*

2003-2005 Biennium			2005-2007 Biennium			2007-2009 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2. Narrative: *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

WORKFORCE SAFETY & INSURANCE 2005 LEGISLATION SUMMARY OF ACTUARIAL INFORMATION

BILL DESCRIPTION: Premium Discount for Smoke-free workplace

BILL NO: SB 2307

SUMMARY OF ACTUARIAL INFORMATION: Workforce Safety & Insurance, together with its actuary, Glenn Evans of Pacific Actuarial Consultants, has reviewed the legislation proposed in this bill in conformance with Section 54-03-25 of the North Dakota Century Code.

The proposed legislation provides for a workers compensation premium discount for employers that implement and maintain a smoke-free workplace.

Fiscal Impact: We do not have an appropriate database to use in quantifying the potential reduction in losses that may flow from the proposed change as smoke-related claims have been virtually non-existent. Assuming a 5% - 10% smoke-free discount program was implemented; statewide discounts could range between \$2 to \$4 million dollars. Lacking any actuarial justification, it may be prudent to adjust premium levels upward from 3% to 4% (\$3 to \$4 million) to pay for the premium discounts and any associated administrative expenses over the short term future. It is estimated that two additional staff would be needed to monitor employer compliance with such a program. Salary, benefits, and support services for the two FTEs would be approximately \$80,000 per year or \$160,000 for the biennium.

DATE: January 23, 2005

3. State fiscal effect detail: *For information shown under state fiscal effect in 1A, please:*

A. Revenues: *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

see narrative

B. Expenditures: *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

see narrative

C. Appropriations: *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

see narrative

Name:	John Halvorson	Agency:	WSI
Phone Number:	328-3760	Date Prepared:	01/24/2005

PROPOSED AMENDMENTS TO SENATE BILL NO. 2307

Page 1, line 3, after "workplaces" insert "; and to provide for an effective date"

Page 1, line 8, after "discount" insert ", if applicable based upon studies and actuarial data,"

Page 1, after line 14, insert:

"SECTION 2. EFFECTIVE DATE. This Act becomes effective on July 1, 2007.

Renumber accordingly

REPORT OF STANDING COMMITTEE (410)
January 27, 2005 8:07 a.m.

Module No: SR-18-1162
Carrier: Klein
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2307: Industry, Business and Labor Committee (Sen. Mutch, Chairman) recommends DO NOT PASS (5 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). SB 2307 was placed on the Eleventh order on the calendar.

2005 TESTIMONY

SB 2307

Flakoll intro

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Tobacco-Related Workers' Compensation Cases (1910-2000)

Smoker Accidents Background Data

Smoker Sickness Background Data

M'Lauchlan v Anderson, 1 Scot Law Times 127; 48 Sc L Rep 349; 4 SWCC 376 (1 Feb 1910)
(worker fell from work wagon attempting to pick up his fallen pipe, held compensable)

Manson v Forth & Clyde Steamship Co, [1913] SC 921; 50 Scot L R 475; [1913] WC & Ins Rep 399; 6 BWCC 830 (23 May 1913) (fire from cigarette in contact with worker's oil-covered trousers) [or 50 Scot L R 687?]

Chludzinski v Standard Oil Co, 176 App Div 87; 162 NYS 225 (28 Dec 1916)

Haller v City of Lansing, 195 Mich 753; 162 NW 335; LRA 1917E, 324 (9 April 1917) (injury by fire)

Dzikowska v Superior Steel Co, 65 PLJ 502; 31 York 67 (23 April 1917)

Dzikowska v Superior Steel Co, 259 Pa 578; 103 A 351 (7 Jan 1918). SCB: 65 PLJ 502; 31 York 67
("foreman testified . . . he did not allow smoking inside" "the building.")

In re Betts, 66 Ind App 484, 486; 118 NE 551, 552 (18 Jan 1918) ("an habitual and almost constant user of tobacco" was killed on the job when, "two or three steps" from his job site, walking toward to a store "to get some tobacco," apparently suffering withdrawal symptoms causing him to pay less attention than he ought, "he was struck by an automobile . . . and killed almost instantly.")

Whiting-Mead Commercial Co v Industrial Accident Commission, 178 Cal 505; 173 P 1105; 5 ALR 1518 (3 July 1918) (workers' compensation case)

Rish v Iowa Portland Cement Co, 186 Iowa 443; 170 NW 532 (23 Jan 1919)

Taylor v Industrial Commission, 31 OCA 390; 13 Ohio App 262 (19 June 1920)

Storm v Industrial Accident Commission, 191 Cal 4; 214 P 874 (12 April 1923)

Tiralongo v Stanley Works, 104 Conn 331; 133 A 98 (8 April 1926) (worker's compensation case, involving fire; "The rules of the factory forbid smoking during working hours, and notices were posted in the lavatory and toilets of the plant reading 'No smoking.'")

Fischer v R. Hoe & Co, Inc, 224 App Div 335; 230 NYS 755 (20 Sep 1928)

Dattilo's Case, 273 Mass 333; 173 NE 552 (28 Nov 1930) was by the widow of a smoker who had worked with gasoline and had gasoline on his clothing. She sought worker compensation when her husband died as follows: While his trousers were covered with gasoline, he "took a match from his pocket and scratched it on his trousers for the purpose of lighting a cigarette . . . in his mouth, and 'he became a human torch.' He never recovered from his burns and died." That is a lot of addiction!!

Lovallo v American Brass Co, 112 Conn 635; 153 A 783 (3 March 1931)

McAfee v Travis Gas Corp, 137 Tex 314; 153 SW2d 442 (4 June 1941). SCB: 131 SW2d 139 (employee smoked around gas pipe, which was leaking, resultant fire and explosion caused injury to another person)

McDonough v Sears, Roebuck & Co, 127 NJL 158; 21 A2d 314 (25 July 1941) (worker compensation case, employee injured self smoking despite employer ban on smoking)

Western Pipe & Steel Co v Industrial Accident Commission, 49 Cal 2d 108; 121 P2d 35 (13 Jan 1942)

McDonough v Sears, Roebuck & Co, 130 NJL 530; 33 A2d 861 (16 Sep 1943). SCB: 127 NJL 158; 21 A2d 314 ("the [person in charge] warned [the smoker] not to smoke, and went so far as to instruct the [staff] not to let him have cigarettes or matches.")

Richards v Creamer, 267 App Div 928; 46 NYS2d 769 (15 March 1944)

Richards v Creamer, 267 App Div 1007; 48 NYS2d 685 (3 May 1944). SCB: 267 App Div 928; 46 NYS2d 769

Fossum v George A. Fuller Co, 70 RI 191; 38 A2d 148 (22 June 1944) (worker's compensation case)

McLellan v International Paper Co, 269 App Div 800; 55 NYS2d 56 (16 May 1945)

Puffin v General Electric Co, 132 Conn 279; 43 A2d 746 (12 July 1945) (worker compensation case)

McLellan v International Paper Co, 294 NY 967; 63 NE2d 597 (4 Oct 1945). SCB: 269 App Div 800; 55 NYS2d 56

Bradford's Case, 319 Mass 621; 67 NE2d 149 (29 May 1946) (worker's compensation case, where by employer rule, "smoking was not permitted inside the building")

McLellan v International Paper Co, 271 App Div 857; 66 NYS2d 3 (20 Nov 1946). SCB: 294 NY 967; 63 NE2d 597

Waskevitz v Clifton Paper Board Co, 7 NJ Super 1; 71 A2d 646 (1 March 1950) (worker's compensation job smoking case)

Hill-Luthy Co v Industrial Commission, 411 Ill 201; 103 NE 2d 605 (24 Jan 1952) (employee smoking case)

Secor v Penn Service Garage, 35 NJ Super 59; 113 A2d 177 (1 April 1955) (worker compensation case, employee smoked around gasoline)

Secor v Penn Service Garage, 19 NJ 315; 117 A2d 12 (27 Sep 1955). SCB: 35 NJ Super 59; 113 A2d 177

Wiseman v Industrial Accident Commission, 291 P2d 180 (Cal App, 14 Dec 1955)

Wiseman v Industrial Accident Commission, 46 Cal 2d 570; 297 P2d 649 (29 May 1956). SCB: 291 P2d 180

Crotty v Driver Harris Co, 45 NJ Super 75; 131 A2d 578 (22 April 1957) (worker compensation job smoking case)

Crotty v Driver Harris Co, 49 NJ Super 60; 139 A2d 126 (17 Feb 1958). SCB: 45 NJ Super 75; 131 A2d 578

Tobin v W. T. Grant Co, 17 Misc 2d 517; 191 NYS 2d 540 (23 Jan 1959) (worker's compensation case)

Tobin v W. T. Grant Co, 8 App Div 2d 723; 187 NYS2d 989 (4 May 1959). SCB: 17 Misc 2d 517; 191 NYS 2d 540

Tobin v W. T. Grant Co, 9 App Div 2d 691; 191 NYS2d 1010 (19 Oct 1959). SCB: 8 App Div 2d 723; 187 NYS2d 989

Clarke v Coats & Clarke, Inc, 97 RI 163; 196 A2d 423 (10 Jan 1964) (worker compensation employee smoking case)

Bouillier v Samsan Co, 100 RI 676; 219 A2d 133 (25 April 1966) (employee violating employer rule smoked on the job, injured self, filed workers' compensation claim; "no smoking was permitted in the area where the thinners and the lacquers were located")

McGee v Adams Paper & Twine Co, 26 App Div 2d 186; 271 NYS2d 698 (7 July 1966) motion gr 19 NY2d 673; 278 NYS2d 864; 225 NE2d 555 (16 Feb 1967) aff'd 20 NY2d 921; 286 NYS2d 274; 233 NE2d 289 (29 Nov 1967) (smoking-caused a building fire, fireman coming to fight the fire, death ensued, and widow's lawsuit for compensation) (Context)

American Tobacco Co v Sallee, 419 SW2d 160 (Ky App, 5 May 1967) (worker compensation case)

McAlister v Workmen's Compensation Appeals Board, 69 Cal 408; 71 Cal Rptr 697; 445 P2d 313 (4 Oct 1968) ("the more smoke . . . inhaled . . . the greater the danger")

Bolger v Chris Anderson Roofing Co, 112 NJ Super 383; 271 A2d 451 (23 Nov 1970)

Stauffer v Bank of America, No. 68 ANA 23916, 36 Cal Comp Cases 732 (WC Referee, 3 Aug 1971)

Stauffer v Bank of America, No. 68 ANA 23916, 36 Cal Comp Cases 732 (WCAB, 14 Oct 1971)

Stauffer v Workmens Compensation Appeals Board, Civil No. 11834 (Ct App, 6 Dec 1971). SCB: 36 Cal Comp Cases 732

Stauffer v Bank of America, No. 68 ANA 23916, 37 Cal Comp Cases 687 (App Bd, 7 June 1972). SCB: 36 Cal Comp Cases 732

Stauffer v Workmen's Compensation Appeal Board, Civil No. 12157, 37 Cal Comp Cases 687 (Ct App, 13 Oct 1972). SCB: 36 Cal Comp Cases 732

Stauffer v Workmen's Compensation Appeal Board, Cal (Sup Ct, 22 Nov 1972). SCB: 37 Cal Comp Cases 687; 36 Cal Comp Cases 732

Riley v Avondale Shipyards, 305 So 2d 742 (La App, 14 Dec 1974) (worker's compensation case)

Buchanan v Allen Hay Motor Co, 21 Or App 90; 553 P2d 824 (1975)

Fuentes v Workmen's Compensation Appeals Board, 40 Cal Comp Cases 40; 44 Cal App 3d 231; 18 Cal Rptr 530 (8 Jan 1975)

Langlais v Superior Plating, Inc, 303 Minn 213; 226 NW2d 891 (28 Feb 1975)

Nelson v Industrial Commission, 24 Arizona App 94; 536 P2d 215 (5 June 1975)

Fuentes v Workmen's Compensation Appeals Board, 16 Cal 3d 1; 128 Cal Rptr 673; 547 P2d 449 (2 Feb 1976). SCB: 40 Cal Comp Cases 40; 44 Cal App 3d 231; 18 Cal Rptr 530

Matter of Melvin Draper, J371536 (Wash, 7 May 1976)

Matter of Werner Peterke, ECAB Worker Comp Case (Baltimore, June 1977)

Appeal of Melvin Draper, J371536 (Wash, 7 Dec 1977)

Newport News Shipbuilding and Dry Dock v Director, Office of Workers' Compensation Programs, 6 BRBS 133 (1977)

Matter of Evelyn Bertram, Worker Comp Case A9-190131 (Mich, 29 Dec 1977) (nonsmoker injured on job by TTS)

Appeal of Melvin Draper, J371536 (Wash, 16 Jan 1978)

Mueller v State Accident Insurance Fund, 33 Or App 31; 575 P2d 673 (1 March 1978)

Harrison v Industrial Commission of Utah, 578 P2d 510 (Utah, 10 July 1978)

Newport News Shipbuilding and Dry Dock v Director, OWCP, 583 F2d 1273 (CA 4, 21 Sep 1978).
SCB: 6 BRBS 133

Newport News Shipbuilding and Dry Dock v Director, OWCP, 440 US 915; 99 S Ct 1232; 59 L Ed 2d 465 (21 Feb 1979). SCB: 6 BRBS 133; 583 F2d 1273

Pullman Kellogg v Workmens' Compensation Appeals Board, 26 Cal 3d 450; 161 Cal Rptr 783; 605 P2d 422 (4 Feb 1980)

Clark v Burlington Industries, 49 NC App 269; 271 SE2d 101 (21 Oct 1980) (worker comp case)

Morrison v Burlington Industries, 301 NC 226; 271 SE2d 364 (23 Oct 1980). SCB: 47 NC App 50; 266 SE2d 741

Moore v J. P. Stevens & Co, Inc, 301 NC 401; 274 SE2d 226 (4 Nov 1980). SCB: 47 NC App 744; 269 SE2d 159

Crucible Steel v Workmen's Compensation, 59 Pa Cmwnlth 184; 429 A2d 123 (6 May 1981)

Page v Prestressed Concrete Co, 399 So 2d 657 (La App, 26 May 1981) (worker comp case)

Humphries v Cone Mills Corp, 279 SE2d 56 (NC App, 16 June 1981)

Fraday v Groves Thread/General Accident Ins Co, 56 NC App 61; 286 SE2d 844 (16 Feb 1982)

Rutledge v Tultex Corp, 56 NC App 345; 289 SE2d 72 (16 March 1982)

Swink v Cone Mills, Inc, 61 NC App 475; 300 SE2d 848 (5 April 1983)

Rutledge v Tultex Corp./Kings Yarn, 308 NC 85; 301 SE2d 359 (5 April 1983)

Barrington v Dan River, Inc, 225 Va 240; 302 SE2d 505 (29 April 1983)

Caskey v Dan River Mills, Inc, 225 Va 405; 302 SE2d 507 (29 April 1983)

Sumner v Work Comp App Bd, 33 Cal 3d 965; 191 Cal Rptr 811; 663 P2d 534 (2 June 1983)

Director, Office of Workers' Comp Programs v Rowe, 710 F2d 251 (CA 6, Ky, 17 June 1983)

Palmer Coking Coal Co v Director, Office of Workers' Comp Programs, 720 F2d 1054 (CA 9, 17 Nov 1983)

Swink v Cone Mills, Inc, 65 NC App 397; 309 SE2d 271 (6 Dec 1983). SCB: 61 NC App 475; 300

SE2d 848

Calloway v Brown & Williamson Tobacco Co, 675 SW2d 389 (Ky, 13 Feb 1984) (worker compensation case, witness fee issue)

Marlene W. Ritchie, WCB Case No. 84-07248, Claim No. D 69058, Van Natta (Oregon, 7 Oct 1984)

Fraday v Groves Thread/General Accident Insurance Co, 312 NC 316; 321 SE2d 835 (6 Nov 1984).
SCB: 56 NC App 61; 286 SE2d 844

Iandorio v Kriss & Senko Enterprises, Inc, 329 Pa Super 624; 488 A2d 1169 (7 Dec 1984)

Matter of Compensation of Downey, 37 Van Natta 455 (23 April 1985)

Ogg v Bill White Chevrolet Co, 720 P2d 324 (Oklahoma, 3 June 1986) (smoker employee injured on-job, slip-and-fall case, going to car to retrieve cigarettes)

Coleman v Cycle Transformer Corp, 105 NJ 285; 520 A2d 1341 (14 Nov 1986)

Iandorio v Kriss & Senko Enterprises, Inc, 512 Pa 392; 517 A2d 530, 534 (Penn, 17 Nov 1986). A Pennsylvania court said "[the smoker] notwithstanding his actual knowledge of the [foreseeable harm] proceeded to light a cigarette while [the victim] was standing only a few feet away . . . the employer . . . not only knew that its employees smoked at work, but, in fact, dictated where . . . exhibited . . . control over its employees' smoking."

Harper v Brown & Williamson Tobacco Co, 717 SW2d 502 (Ky App, 27 June 1986) (worker compensation case, back injury)

ATE Fixture Fab v Wagner, 559 So 2d 635; 5.3 TPLR 2.110 (Fla App, 25 Jan 1990) (second-hand smoke injury)

Philip Morris, Inc v Poynter, 786 SW2d 124 (Ky App, 23 March 1990) (worker compensation case)

Kufahl v Wisconsin Bell, Inc, Claim 88-000676; 6.2 TPLR 8.23 (Wis Dep't of Industry, Labor and Human Relations, 21 May 1990) (second hand smoke injury)

Avtar Ubhi v Marina's Bar and Grill, WCAB No. SFO 0341691 (WCAB, 15 Dec 1990) (second-hand smoke injury case, as per bar workers disproportionate tobacco-caused disease)

Witte v Dep't of Rehabilitative Services, 88 WC 44629 (Illinois, 19 March 1991) (worker comp case)

Bena v Massachusetts Turnpike Authority, No. 03922088, 7.1 TPLR 8.1 (Mass Dept of Industrial Accidents, 5 Dec 1991) (second hand smoke injury case)

Riddle v Ampex Corp, 839 P2d 489; 7 BNA IER 525 (19 March 1992) (smoker filed for "stress" upon establishment of smoking restrictions, case denied, as such enforcement is common)

Eastern Airlines, Inc and GAB v Crittenden and Travelers Ins Co, 17 Fla W D 724; 596 So 2d 112 (11 March 1992) (second hand smoke injury case)

***Palmer v Del Webb's High Sierra*, 108 Nev 673; 838 P2d 435; 8.1 TPLR 2.174 (1 Sep 1992) (worker comp case, nonsmoker gambling establishment employee acquired lung cancer from disproportionate number of smokers gambling—gambling pursuant to their acalculia, a medical disorder taken advantage of by gambling establishments encouraging smoking as a matter of business practice—in essence discriminating against the mentally handicapped as per pertinent medical analyses, which activists oppose.)**

***Magaw v Middletown Bd of Education*, 323 N J Super 1; 731 A2d 1196 (2 July 1999) cert den 1999 NJ LEXIS 1522 (5 Nov 1999) (worker compensation case, nonsmoker got throat cancer from Toxic Tobacco Smoke (TTS) from smoker coworker, due to exposure to 46,800 cigarettes from sharing office with smoker teacher, another evidence for ending negligent hiring practices). Note that after getting this dread condition, the school fought him all the way to the state Supreme Court, trying to deprive him of even paying his medical and life expenses caused by its negligent and unlawful hiring and safety practices. Educators should know better.**

***Duncan v Northwest Airlines*, Case No. 98-35617 (CA 9, Wash, 6 April 2000) (flight attendant second-hand smoke injury case)**

For Further Reading

<u>Smoking On The Job</u>
<u>Avoidance of Negligent Hiring</u>
<u>Fire Prevention</u>
<u>Toxic Chemicals From Tobacco</u>
<u>Pertinent Legal Definitions</u>

2005 Senate Bill No. 2307
Testimony before the Senate Industry, Business, and Labor Committee
Presented by: Sandy Blunt, Executive Director/CEO
Workforce Safety & Insurance
January 25, 2005

Mr. Chairman, Members of the Committee:

My name is Sandy Blunt and I am the Executive Director and CEO of Workforce Safety & Insurance (WSI). I am here to testify in opposition to Senate Bill 2307. This bill proposes to mandate premium discounts to employers who maintain a smoke-free workplace. The Workforce Safety & Insurance Board of Directors opposes this bill.

At first blush, the members of this committee and the public at large must be asking themselves: "Why in the world would an entity that purports to dedicate itself to the protection of North Dakotans be opposed to something as simple and positive as a smoke-free workplace? I thought you cared about the health of others?" To answer these questions we say: "We do care . . . We do support smoke-free workplaces . . . And nothing is as simple as it appears."

While we support the concept of smoke-free workplace, it is neither appropriate nor fair to place WSI and its employer customers as the police and payors for such an initiative. If it truly is the will of the people that North Dakota have smoke-free workplaces, then WSI respectfully suggests that the legislature should propose a law to directly address that topic.

To better understand our position, it is helpful to first understand the legal duty of WSI. The Board of Directors is charged with the authority and responsibility to assist in the administration and management of WSI and the fund dollars. As part of that responsibility, the Board is charged with the authority of appointing a director to discharge those duties. (N.D.C.C. section 65-02-03.3)

Together, it is the Board's and the Director's responsibility to ensure the funds accumulated from the collection of premiums, are available at adequate levels to ensure payments to North Dakota workers who are injured on the job. Consequently, discounts within the premium structure must have a discernable link to injury reduction and an actuarial correlation to the fiscal health of the fund.

Consistent with this charge, only discounts that entice a behavior to protect our customers and protect the financial health of the fund should be offered. Premium discounts have historically been an incentive-based monetary reward encouraging safety-related employment practices based upon actuarially-sound principles. They are economic incentives that encourage employers to adopt employment practices which lower injury risks.

The difficulties we see in this bill are actuarially based. We are unable to demonstrate any meaningful link between workplace smoking and workplace injuries. In the past decade, we have only seen two tangentially-related smoking claims. Consequently, granting an annual premium discount fails --at the most basic level-- to accomplish the requirements WSI uses in reviewing the appropriateness of such incentive-based proposals.

WSI has recently proposed legislation in HB 1125 to seek the removal of a mandatory "five percent" reference for annual discounts. This change is being sought to permit WSI to expand risk management programs without being locked into providing only a fixed percentage discount. In HB 1125, WSI is seeking the authority to target premium discounts to those practices which truly reduce workplace injuries rather than to those just specifically directed by law. The essence of HB 1125 runs contrary to the requirements of SB 2307.

Additionally, there would be unintended consequences as a result of the passage of this bill. Currently, government organizations and healthcare facilities are among the largest employers in the fund and today are "smoke free." It could be predicted that these and other preexisting smoke-free employers would readily apply for and receive the rate reduction proposed in this bill. The result would be a cost shift to North Dakota's employers --which is akin to writing checks with somebody else's checkbook.

Assuming a five to ten percent smoke-free discount program was implemented, statewide discounts could conservatively range between two to four million dollars. Lacking any actuarial justification, premium levels would have to be adjusted upward by approximately three to four percent annually (three to four million dollars) to pay for the premium discounts and any associated administrative expenses. It is estimated that at a minimum two additional staff would be required to monitor employer compliance with such a program. Salary, benefits, and support services for the two full time employees would be approximately eighty thousand dollars per year.

To create such an incentive --which is not supported by actuarially sound assumptions-- does nothing more than create a "tax" which penalizes those employers who wish not to adhere to this mandate. While WSI opposes the proposed legislation, we do think there may be an alternative solution.

Last fall, WSI, Dr. Terry Dwelle (North Dakota's State Health Officer), and Patrick Traynor (President of the Dakota Medical Foundation) began discussing the concept of conducting a pilot grant program to review if there is a link to worker's compensation costs and the tenets espoused in the *Healthy North Dakota* program. The *Healthy North Dakota* program is a framework supporting North Dakotans in their efforts to make healthy choices by focusing on wellness and prevention -- in schools, workplaces, senior centers, homes and anywhere people live, work and play. The concept of the grant program would be to match the most likely claims WSI sees as a result of personal health choices with various solutions in order to analyze if there is a corresponding drop in claim and system costs.

If HB 1125 is enacted, WSI will have the authority to propose discounts that are actuarially justified. If the grant study data demonstrates both a clear link and actuarial savings, then WSI would have the authority to create premium discounts designed to encourage similar actions. The advantage of this approach is that it takes into consideration a much wider array of health related issues and would not define a solution without first defining the problem.

In closing, I would again like to note that while it sounds irresponsible of WSI to oppose SB 2307, it is the fiduciary obligation of WSI to do so. We are charged with simultaneously protecting both the workforce of North Dakota and the solvency of the fund. In this case, there is no correlation between the two and we feel there is a better solution.

Thank you Mr. Chairman and Members of the Committee for your time. I will be glad to answer any questions.

Flakoll-

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Second-Hand-Smoke Injury Yields Workers' Comp Award

Copyright 1998 New Jersey Law Journal
August 10, 1998

Sharing an office with a chain smoker caused a Middletown physical education teacher's tonsillar cancer, entitling him to disability benefits, a **worker's compensation** judge has ruled.

The ruling by Judge James Boyle appears to be the first in New Jersey to extend compensation for second-hand-smoke exposure beyond lung cancer. Boyle, citing recent litigation involving flight attendants and custody and visitation issues concerning a child's exposure to a parent's second-hand smoke, said the extension was justified.

"I am satisfied ... that the next logical step in the evolution of the known effects of second hand smoke has been reached," Boyle wrote. "That is, I am satisfied that [the petitioner] has proven even beyond the preponderance of credible evidence that [his] tonsillar cancer was caused by his exposure to second-hand smoke during the twenty-six years that he shared an office with a co-employee who was a chain-smoker."

Boyle awarded Donald Magaw \$45,000 in temporary disability benefits and also ordered the Middletown Board of Education to pay outstanding medical bills, provide future treatment and restore sick time that Magaw had used up.

Magaw's attorney Michael McGann, a partner with Oakhurst's Amdur, Boyle, Maggs & McGann, says the ruling expands the already accepted fact that **cigarettes** are dangerous to non-smokers in the workplace. "What this decision illustrates is that the full danger of **cigarettes** has barely been scratched," McGann says.

Middletown's attorney, John Geaney a partner with Mount Laurel's Capehart, Scatchard, & Geaney, says he plans to appeal the decision.

The case began in October 1994 when Magaw was diagnosed with cancer of the tonsils.

Magaw's oncologist, Dr. Carol Kornmehl, told Magaw that tonsillar cancer was caused by exposure to tobacco or alcohol. But, Magaw, 51, of Neptune City was a non-smoker and a light drinker.

Magaw said his only exposure to **cigarettes** was from work. Magaw is a physical education teacher at Thorne Middle School in Port Monmouth since 1968. From the time he was hired until October 1994, he shared an office with another teacher, whose name was removed from record, who was a chain smoker. The other teacher, smoked a pack of **cigarettes** each day. Other teachers testified they could not remember a time when they "didn't not see [the teacher] without a cigarette."

The two men shared a small office with two other gym teachers. The small office did not have any windows that could be opened and its vents were broken. McGann argued that the Middletown School Board left Magaw to be asphyxiated by **cigarettes** for 26 years.

In November 1994, Magaw had surgery that removed his tonsils, jaw palette, and teeth. He then had surgery that grafted bones and skin from his leg to reconstruct his jaw. Magaw underwent radiation, physical and speech therapy to recover from the surgeries. After the procedures, Magaw had to use artificial saliva in order to digest his food.

Magaw sued for temporary disability and medical benefits in early 1995. Over the next three years, seven hearings were held where witnesses and experts testified before Boyle.

McGann says that the case turned on the testimony of Magaw's oncologist, Dr. Carol Kornmehl. Kornmehl testified that the secondary smoke was "the most likely contributing factor for Mr. Magaw's malignancy." She said Magaw's only carcinogen risk was his exposure to second-hand smoke.

Kornmehl's argument was unique because no studies could be cited that authoritatively stated that second-hand smoke caused a head or neck cancer. Middletown's expert, Dr. Frederick Cohen, also an oncologist, testified that "data did not exist to be able to make a case" that second-hand smoke could cause a head and neck malignancy.

McGann said it was left to Boyle to decide whether to believe speculations about data or testimony from a treating physician. "Dr. Kornmehl dealt with Mr. Magaw one on one. She was aware of his history," McGann said. "This is a unique set of circumstances where there really isn't any other way he could have contracted the cancer."

Citing *Shimp v. N.J. Bell Telephone Co.*, 145 N.J. Super. 516, 526 (Ch. Div. 1976), Boyle said that employer are required to provide safe working conditions. In *Shimp*, the court concluded that **cigarettes** contaminate and pollute the air and create health hazards including lung cancer.

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Testimony

Senate Bill 2307

Neutral

Senate Industry, Business and Labor Committee

Tuesday, January 25, 2005; 8 a.m.

North Dakota Department of Health

Good morning, Chairman Mutch and members of the Senate Industry, Business and Labor Committee. My name is Kathleen Mangskau, and I am director of the Division of Tobacco Prevention and Control for the North Dakota Department of Health. I am here today to provide information about various aspects of smoke-free workplaces.

Benefits of a Smoke-Free Workplace

The benefits of a smoke-free workplace are well documented. Workplace smoke-free policies protect employees' health, lower business costs, increase productivity and morale, and reduce absenteeism. Smoke-free policies also reduce the risk of lawsuits being filed by employees who become ill from working in the smoking section and breathing secondhand smoke. (National Restaurant Association, 1993)

In addition to reducing workplace exposure to secondhand smoke, smoke-free policies have resulted in significant reductions in the daily consumption of cigarettes by workers who smoke, as well as increases in tobacco cessation. (*The Guide to Community Preventive Services*, 2001) The Centers for Disease Control and Prevention puts a \$3,383 price tag on each employee who smokes: \$1,760 in lost productivity and \$1,623 in excess medical expenditures. Businesses pay an average of \$2,189 in workers' compensation costs for smokers, compared with \$176 for nonsmokers. (Journal of Occupational and Environmental Medicine, 2001) Smokers, on average, miss 6.16 days of work per year due to sickness compared to nonsmokers who miss 3.86 days of work per year. (Tobacco Control, 2001)

Health Effects of Secondhand Smoke

The health hazards of secondhand smoke are well documented. According to the U.S. Centers for Disease Control and Prevention, secondhand smoke (also known as environmental tobacco smoke) is a leading cause of preventable death in this country, killing 35,000 nonsmokers each year. (CDC, 2004) In North Dakota, between 80 and 140 adults, children and babies die from secondhand smoke each year. (CDC, 1996)

Secondhand smoke is a mixture of the smoke given off by the burning end of a cigarette, pipe or cigar and the smoke exhaled from the lungs of smokers. Secondhand smoke is also called environmental tobacco smoke, and exposure to secondhand smoke is called involuntary or passive smoking.

The U.S. Environmental Protection Agency and the U.S. Department of Health and Human Services National Toxicology Program report that smoke from the burning end of a cigarette contains more than 4,000 chemicals and more than 60 carcinogens, including formaldehyde, cyanide, arsenic, carbon monoxide, methane and benzene. The EPA has classified secondhand smoke as a "Group A" carcinogen – a substance known to cause cancer in humans. The EPA reports that there is no safe level of exposure to environmental tobacco smoke. (EPA, 1992) In 2000, the National Institutes of Health formally listed secondhand smoke as a known human carcinogen in its 9th *Report on Carcinogens*. The EPA estimates that secondhand smoke causes approximately 3,000 lung cancer deaths in nonsmokers each year. Besides the EPA and the NIH, many other United States environmental health, occupational health and public health authorities have condemned secondhand smoke as a health hazard, including the National Toxicology Program (2000), the National Cancer Institute (1993, 1995), the Occupational Safety and Health Administration (1994), the National Institute for Occupational Safety and Health (1990), the Surgeon General (1986) and the National Academy of Sciences (1986). A listing of the key reports documenting the health effects of secondhand smoke and a summary of findings from major studies are attached.

Numerous studies have documented the health effects associated with exposure to secondhand smoke, including lung cancer and nasal sinus cancer, heart disease deaths, and eye and nasal irritation in adults. Each year in North Dakota, 56 low birth weight babies are attributed to secondhand smoke, costing \$378,247. (American Legacy Foundation, 2004) Restaurant and bar workers, who typically have greater exposure to secondhand smoke, are at 50 percent to 100 percent increased risk for lung cancer.

Recent studies assessing the association of secondhand smoke with heart disease show that exposure to secondhand smoke increases the risk of fatal and nonfatal coronary heart disease in nonsmokers by about 30 percent. Exposure to secondhand smoke for as little as 30 minutes can increase the formation of blood clots and restrict flow to the heart, causing a heart attack. A recent study in Helena, Montana, where a smoke-free law had been implemented, showed that heart attack admissions to the local hospital were reduced by 40 percent. The CDC states, "We now have a considerable amount of epidemiological literature and laboratory data on the mechanisms by which relatively small exposures to toxins in tobacco smoke seem to cause unexpectedly large increases in the risk of acute cardiovascular disease." (CDC, 2004)

Current Support for Smoke-Free Environments

There is growing support for smoke-free environments in North Dakota. A survey commissioned by the North Dakota Public Education Task Force on Tobacco in 2004 found that the majority of North Dakotans age 18 through 54 feel smoking should not be allowed in schools, public facilities, entertainment arenas, private businesses and restaurants. More than 86 percent of those surveyed feel that even though smoking is legal for individuals older than 18, nonsmokers have a right to breathe clean air. The

study found that 97 percent believe smoking should not be allowed in elementary and high school buildings, 89 percent believe smoking should not be allowed in public facilities, 85 percent believe smoking should not be allowed in entertainment arenas, 61 percent believe smoking should not be allowed in private businesses and other non-government work sites and 68 percent believe smoking should not be allowed in restaurants. While only 32 percent believe smoking should not be allowed in bars and cocktail lounges, that percentage is up from 22 percent in 2002. A fact sheet on the study findings is attached.

Some may wonder why the Occupational Safety and Health Administration has not promulgated rules on secondhand smoke. Because of repeated Congressional admonitions that secondhand smoke is an issue best handled by states, federal regulatory agencies have been discouraged from undertaking rulemaking or research efforts to protect private-sector workers and the public. In 2001, OSHA withdrew its Indoor Air Quality Proposal and terminated the rulemaking proceeding. Since that proposal was first issued, a great many state and local governments and private employers have taken action to curtail smoking in public areas and in workplaces.

As of July 2004, 12 states have adopted state smoke-free workplace laws. Eleven states include restaurants in their smoke-free workplace laws, and seven states include bars. Ten additional states have implemented various combinations of 100 percent smoke-free provisions since 2002. A listing of the states with comprehensive smoke-free workplace laws is attached.

California has the longest history of smoke-free workplace laws. Smoking prevalence has declined and California smokers are smoking fewer cigarettes. Accelerated reductions have been documented for heart disease deaths and lung cancer incidence rates. From 1988 through 1999, lung and bronchus cancer rates in California declined at nearly six times the rates of decline in the nation. In addition, six out of nine cancer types that have been linked to tobacco use had a lower incidence rate in California than the rest of the United States in 1999.

Economic Impact of Smoke-Free Workplace Laws

Numerous studies have documented the economic impact of smoke-free policies. Key findings from *A Summary of Studies Assessing the Economic Impact of Smoke-free Policies in the Hospitality Industry* by Scollo and Lal (VicHealth Centre for Tobacco Control, 2004) are quoted below.

- No negative economic impact from the introduction of smoke-free policies in restaurants and bars is indicated by the 21 studies where findings are based on an objective measure such as taxable sales receipts, where data points several years before and after the introduction of smoke-free policies were examined, where changes in economic conditions are appropriately controlled for, and where appropriate statistical tests are used to control for underlying trends and

fluctuations in data. Just a few studies have found negative effects and each of these is methodologically flawed.

- Studies concluding a negative economic impact have predominately based findings on outcomes predicted before introduction of policies, or on subjective impressions of estimates of changes rather than actual, objective, verified or audited data. These studies were funded primarily by the tobacco industry or organizations allied with the tobacco industry. Almost none of the studies finding a negative impact are published in peer-reviewed journals.

A study conducted in Minot, North Dakota, after implementation of the smoke-free restaurant ordinance showed no negative impact on business.

Litigation on Secondhand Smoke

At the request of an interim committee in 2004, the Department of Health researched litigation on secondhand smoke. The first secondhand smoke case was filed in 1976. Since the early 1980s, more than 420 cases involving exposure to secondhand smoke have been identified. This number does not include cases settled out of court or workers compensation claims.

Attached is a recent paper on "Lawsuits and Secondhand Smoke" published by E. L. Sweda, Jr. in the March 2004 issues of *Tobacco Control*. This article describes litigation over the past quarter century where nonsmoking litigants have prevailed. Damages awarded in these suits ranged from hundreds of dollars to hundreds of thousands of dollars. The article states: "During the past two decades, nonsmokers who have been harmed by exposure to on-the-job SHS [secondhand smoke] have been awarded worker's compensation benefits and disability benefits." Two precedent-setting cases are referenced on page i62 of the attached article.

Potential Pilot Project

The Department of Health has held preliminary discussions with North Dakota Workforce Safety and Insurance regarding the development of a pilot project to assess the impact of an insurance discount for smoke-free workplaces on workers compensation claims and costs. A proposal or a plan has not yet been developed. The Department of Health would be very interested in pursuing such a project.

Conclusion

In conclusion, the effects of secondhand smoke are significant and well documented, as are the benefits of smoke-free workplaces. There is growing support for smoke-free environments in North Dakota. Finally, smoke-free laws have been shown to have no negative impact on businesses. Senate Bill 2307 would promote the adoption of smoke-free policies in the workplace by providing an incentive for businesses.

The *Surgeon General's Report on Reducing Tobacco Use* strongly recommends smoking bans and restrictions as an effective means to reduce nonsmokers' exposure to secondhand smoke.

This concludes my testimony on Senate Bill 2307. I am happy to answer any questions you may have.

Key Reports Documenting the Health Effects of Secondhand Smoke

- Revised draft Report of the California Environmental Protection Agency (2003)
- Report of the International Agency for Research on Cancer (IARC) (2002)
- U.S. Department of Health and Human Services' *Ninth Report on Carcinogens* (2000)
- Report of the California Environmental Protection Agency (1997)
- Report of the U.S. Environmental Protection Agency (EPA) (1992)
- Report of the National Institute for Occupational Safety and Health (NIOSH) (1991)
- Report of the Surgeon General (1986)
- Report of the National Research Council of the National Academy of Sciences (1986)
- Report of the World Health Organization (1999)
- Report of the United Kingdom Scientific Committee on Tobacco and Health (1998)
- Report of the Australian National Health and Medical Research Council (1997)

Full References on Reports

California Environmental Protection Agency. *Proposed Identification of Environmental Tobacco Smoke as a Toxic Air Contaminant* (draft report updating previous Cal EPA report on environmental tobacco smoke). California Environmental Protection Agency, December 2003, <http://www.arb.ca.gov/toxics/ets/dreport/dreport.htm>

International Agency for Research on Cancer (IARC) *Monographs on the Evaluation of Carcinogenic Risks to Humans*, Volume 83: *Tobacco Smoke and Involuntary Smoking*, 2002, <http://monographs.iarc.fr/htdocs/indexes/vol83index.html>

National Toxicology Program. *9th Report on Carcinogens*, 2000. Research Triangle Park, NC: U.S. Department of Health and Human Services, National Institute of Environmental Health Sciences; 2000.
<http://ehp.niehs.nih.gov/roc/tenth/profiles/s176toba.pdf>.

California Environmental Protection Agency. *Health Effects of Exposure to Environmental Tobacco Smoke*. Office of Environmental Health Hazard Assessment, September 1997, www.oehha.ca.gov/air/environmental_tobacco/finalets.html.
Also published as: National Institutes of Health. National Cancer Institute. *Health Effects of Exposure to Environmental Tobacco Smoke: The Report of the California Environmental Protection Agency*. Smoking and Tobacco Control Monograph Number 10. NIH Publication No. 99-4645, Washington, D.C., USA, August 1999, <http://cancercontrol.cancer.gov/tcrb/monographs/10/index.html>

United States Environmental Protection Agency (EPA). *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders*. Office of Research and Development, EPA/600/6-90/006F, Washington, D.C., December 1992, www.epa.gov/nceawww1/ets/etsindex.htm
Also published as: National Institutes of Health. National Cancer Institute. *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders: The Report of the U.S. Environmental Protection Agency*. Smoking and Tobacco Control Monograph Number 4. NIH Publication No. 93-3605, Washington, D.C., August 1993.

National Institute for Occupational Safety and Health (NIOSH). *Environmental Tobacco Smoke in the Workplace: Lung Cancer and Other Health Effects*. Current Intelligence Bulletin 54, Washington, D.C., 1991. www.cdc.gov/niosh/91108_54.html

U.S. Department of Health and Human Services. *The Health Consequences of Involuntary Smoking. A Report of the Surgeon General*. U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control. DHHS Publication No. (CDC) 87-8398, 1986, www.cdc.gov/tobacco/sgr_1986.htm.

National Research Council of the National Academy of Sciences. *Environmental Tobacco Smoke: Measuring Exposures and Assessing Health Effects*. National Academy Press, Washington, D.C., 1986.

World Health Organization. Tobacco Free Initiative. *International Consultation on Environmental Tobacco Smoke (ETS) and Child Health: Consultation Report*. WHO Technical Document Number WHO/TFI/99.10. 1999, www5.who.int/tobacco/page.cfm?sid=50.

Department of Health. *Report of the Scientific Committee on Tobacco and Health*. The Stationery Office. London, United Kingdom, March 1998. www.archive.official-documents.co.uk/document/doh/tobacco/contents.htm.

National Health and Medical Research Council. *The Health Effects of Passive Smoking – A Scientific Information Paper*. Australia, November 1997, www.nhmrc.gov.au/advice/nhmrc/chap1/index.htm.

Note: The following report, while not an original report or an extensive review, provides a good summary of some of the reports above:

Ontario Tobacco Research Unit, University of Toronto, *Protection from Second-hand Tobacco Smoke in Ontario: A Review of the Evidence Regarding Best Practices*. Toronto, Ontario, May 2001. http://www.otru.org/pdf/special/special_ets_eng.pdf

SECONDHAND SMOKE

- Secondhand smoke contains more than 43 known carcinogens and 200 known poisons, including ammonia, formaldehyde, hydrogen cyanide, arsenic, carbon monoxide and benzene. (*National Cancer Institute 1999*)
- Secondhand smoke is classified as a Group A carcinogen. There is no safe level of exposure to Group A toxins. (*U.S. EPA 1992*)
- Every year, more than 53,000 nonsmokers die from exposure to secondhand smoke, making it the third leading cause of preventable death in the U.S. (*National Cancer Institute*)
- Lung cancer caused by exposure to secondhand smoke is responsible for an estimated 3,000 deaths per year among nonsmokers in the U.S. It is a confirmed cause of nasal sinus cancer in nonsmokers. (*National Cancer Institute, Health Effects of Environmental Tobacco Smoke, December 1999*)
- Exposure to secondhand smoke causes between 35,000 and 62,000 coronary heart disease deaths each year in the United States. (*National Cancer Institute 1999*)
- Nonsmokers exposed to secondhand smoke for just 30 minutes experience hardening of the arteries. (*Journal of the American Medical Association, 2001*)
- The risk of death from heart attack is 91 percent higher for nonsmoking women who are regularly exposed to secondhand smoke, and 58 percent higher for women occasionally exposed to secondhand smoke. (*American Heart Association Journal 1997*)
- Just as the science regarding the health risks of SHS has increased, so has public concern about SHS. According to a 2001 Gallup poll, 52 percent of American adults feel exposure to secondhand smoke is "very harmful," compared with just 36 percent in 1994. (July 2001 Gallup Poll www.gallup.com)
- Even half an hour of secondhand smoke exposure causes heart damage similar to that of habitual smokers. Nonsmokers' heart arteries showed a reduced ability to dilate, diminishing the ability of the heart to get life-giving blood. In addition, the same half hour of secondhand smoke activates blood platelets, which can initiate the process of atherosclerosis (blockage of the heart's arteries) that leads to a heart

attack. These effects explain other research showing that nonsmokers regularly exposed to SHS suffer death or illness rates 30 percent higher than that of unexposed nonsmokers. (Otsuka, R., et al. "Acute Effects of Passive Smoking on the Coronary Circulation in Healthy Young Adults," *Journal of the American Medical Association*, 286: 436-441, 2001)

Employees are at risk.

- Employees exposed to secondhand smoke on the job are 34 percent more likely to get lung cancer. (*U.S. CDC 1996*)
- People routinely exposed to a lot of secondhand smoke, such as restaurant and bar workers, can see their risk of lung cancer triple. (*International Journal of Cancer*, 2001)
- At least 4.5 million Americans experience great discomfort from secondhand smoke at work. (*U.S. CDC 1996*)
- Restaurant and bar workers have three to six times more exposure to secondhand smoke than do other workers. (*U.S. CDC 1996*)
- Food service workers, many of whom are under age 18, have a 50 percent higher risk of lung cancer than the general population. (Corsun, Young, Enz. "Should NYC Restaurateurs Lighten Up?" *Hotel and Restaurant Administration Quarterly*: 1996)
- Waitresses have the highest death rate of any female occupational group. They have a four times higher rate of death from lung cancer and a two and a half times higher rate of death from heart disease. (M. Siegel, "Smoking and Restaurants: A Guide for Policy-Makers" September 1992)
- Levels of secondhand smoke in restaurants are about 1.6 to 2.0 times higher than in office workplaces. Levels in bars are 4 to 6 times higher than in offices. (Siegel, M. "Involuntary Smoking in Restaurant Workplace: A Review of Employee Exposure and Health Effects." *Journal of the American Medical Association*, 270:490-493, 1993)
- Smoking restrictions in workplaces, restaurants, and other public areas are associated with dramatic declines in serum cotinine levels among nonsmokers, an

indication that smoke-free environments significantly reduce exposure to SHS. (Centers for Disease Control and Prevention, "Strategies for Reducing Exposure to Environmental Tobacco Smoke, Increasing Tobacco-Use Cessation, and Reducing Initiation in Communities and Health-Care Systems" *Morbidity and Mortality Weekly Report, Recommendations and Reports* 49(RR-12): 1-12, November 10, 2000)

- Smoking causes a great deal of discomfort in the workplace. For example, 59.2 percent of nonsmoking employees report suffering discomfort, and even 15 percent of smoking employees report some degree of discomfort from secondhand smoke. (CDC, *Morbidity and Mortality Weekly Report*, May 22, 1992)

Costs of Secondhand Smoke to Employers

- Smoking causes inefficiency, errors, eye irritation and lower attentiveness, which costs the employer. (*Action on Smoking and Health 1999*)
- Employers who have banned smoking reported a dramatic decrease in maintenance costs. (*Action on Smoking and Health 1999*)
- Fire risks and subsequent insurance costs decrease when a business goes smoke-free. (*Tobacco-Free Coalition 1999*)
- Workplace smoking increases an employer's potential legal liability. Nonsmoking employees have received settlements in cases based on their exposure to secondhand smoke. For example, a waiter in Sausalito, California, received an \$85,000 settlement in a workers' compensation case. Other nonsmokers have won unemployment compensation and disability benefits. (Sweda, E.L. *Summary of Legal Cases Regarding Smoking in the Workplace and Other Places*. Boston: Tobacco Control Resource Center, December 1997)
- Secondhand smoke harms the health and reduces the productivity of nonsmokers, costing employers money. Estimated costs associated with secondhand smoke's effects on nonsmokers range from \$56 to \$490 per smoker per year. (Kirstein, "How Much Can Business Expect to Profit From Smoking Cessation?" *Preventive*

Medicine, 1983;12:358-381; Jackson & Holle, "Smoking: Perspectives 1985" Primary Care, 1985; 12:197-216)

- More than 60 cities and counties with smoke-free restaurant ordinances have been studied for economic impact. All studies, based on sales tax data, show that there is no negative economic impact. (*Glantz 1999*)
- Scientific studies in North Carolina, Arizona, California, Colorado, New York, Massachusetts and Texas have all shown that ordinances banning smoking have had no negative economic effect.
- Bars and restaurants would likely see an increase in business if they implement smoke-free policies. (*Journal of Public Health Management and Practice 1999*)
- The National Restaurant Association polls show that if a restaurant goes smoke-free, 56 percent of patrons would eat at the restaurant more frequently, and only 26 percent would eat there less frequently. (*Tobacco-Free Coalition 1999*)
- Sales tax data consistently demonstrates that ordinances restricting smoking in restaurants have no effect on revenues. (*Glantz 1999*)

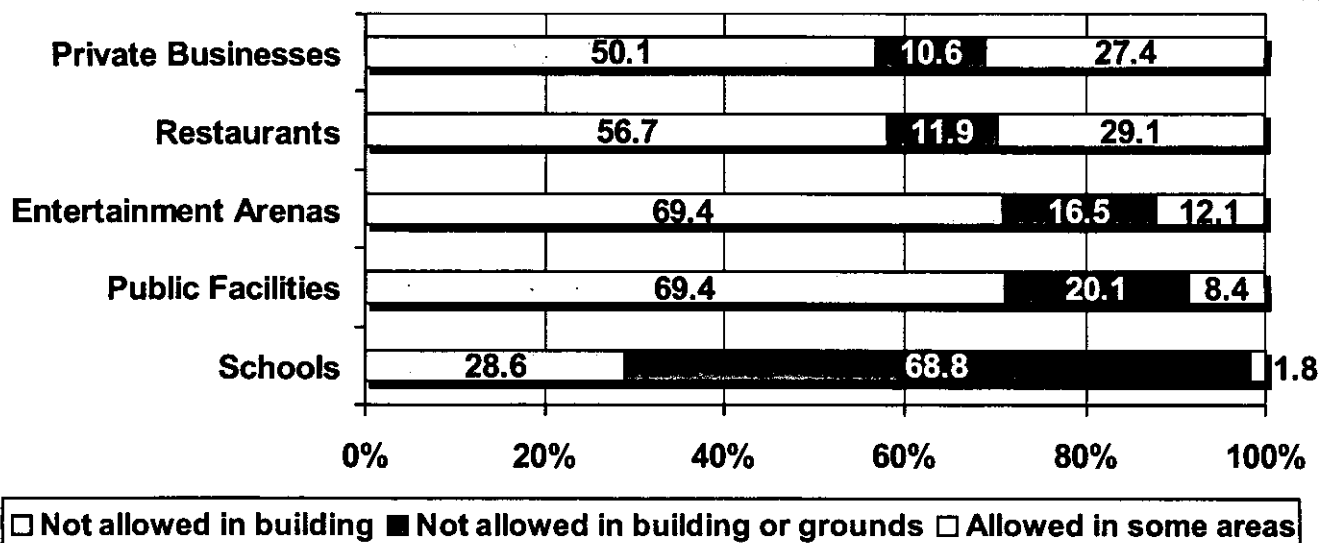
TOBACCO *Facts*

North Dakotans Support Smoke-Free Environments

A 2004 study conducted by Winkelman Consulting of Fargo revealed strong public support for prohibiting smoking in most public places. The study was based on a random-sample telephone survey of 1,200 North Dakotans between the ages of 18 and 54.

- ▶ Nearly 61 percent of those surveyed believe smoking should not be allowed in private businesses and other nongovernmental work sites, and 10.6 percent of those would extend the ban to the grounds.
- ▶ More than 68 percent believe smoking should not be allowed in restaurants, and 11.9 percent of those would extend the ban to the grounds.
- ▶ More than 85 percent believe smoking should not be allowed in entertainment arenas, and 16.5 percent of those would extend the ban to the grounds.
- ▶ More than 89 percent believe smoking should not be allowed in public facilities, and 20.1 percent of those would extend the ban to the grounds.
- ▶ More than 97 percent of North Dakotans believe smoking should not be allowed in school buildings, and 68.8 percent of those would extend the ban to the grounds.

More than 86 percent of those surveyed feel that even though smoking is legal, nonsmokers have the right to breathe clean air.



NORTH DAKOTA
DEPARTMENT of HEALTH

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701.328.3138 or 800.280.5512 / www.ndtobaccoprevention.net

DIVISION of TOBACCO
 PREVENTION & CONTROL

From: Joe Cherner [Joe@smokefree.org]

Sent: Thursday, July 01, 2004 11:59 PM

To: Joe Cherner announce list

Subject: [JoeCherner-announce]status of state smokefree workplace laws

Dear Smokefree Advocate,

We've come a long way, baby... but we still have a long way to go!

The chart below shows the status of smokefree workplace states. In the next twelve months, we expect several more states to pass smokefree workplace laws (including bars and restaurants). The most likely candidates are Washington, Colorado, Maryland, Arizona, and Minnesota... but there are always a few surprises!

	State Smokefree Workplace Laws		
	Smokefree Offices	Smokefree Restaurants	Smokefree Bars
California	☒	☒	☒
Delaware	☒	☒	☒
New York	☒	☒	☒
Connecticut	☒	☒	☒
Maine	☒	☒	☒
Massachusetts	☒	☒	☒
Rhode Island	☒	☒	☒
Florida	☒	☒	☐
Vermont	☒	☒	☐
Utah	☒	☒	☐
Idaho	☒	☒	☐
Maryland	☒	☐	☐

RESEARCH PAPER

Lawsuits and secondhand smoke

E L Sweda Jr

Tobacco Control 2004;13(Suppl 1):i61-i66. doi: 10.1136/tc.2003.004457

Objective: This paper describes secondhand smoke (SHS) litigation over the past quarter century where non-smoking litigants have prevailed and attempts to decipher trends in the law that may impact the course of future cases.

Methods: Since the early 1980s, the author has sought and examined legal cases in which SHS exposure is an important factor. Law library searches using the official reporter system (for example, *Shimp v. New Jersey Bell Telephone Co.*, 368 A.2d 408) have more recently been combined with computerised online searches using LexisNexis and Westlaw. The author has learned of other cases through personal correspondence and from articles in newspapers. Over 420 cases involving exposure to SHS were identified. Each case was reviewed and summarised.

Results: Since 1976, the year of the first reported SHS lawsuit, this type of litigation has increased both in number and in scope with increasing success. While it is common for initial cases to lose in a new area where the law eventually evolves, litigants and their lawyers who later bring similar cases can learn from those previous, unsuccessful cases. It is now apparent that the judicial branch has begun to recognise the need to protect the public—especially some of the most vulnerable members of our society—from the serious threat to their health that is exposure to SHS.

Conclusions: Successful cases brought on behalf of individuals exposed to SHS produce an additional benefit for the public health by both paving the way for other non-smoking litigants to succeed in their cases and persuading business owners and others voluntarily to make their facilities 100% smoke-free.

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In the landmark case of *Shimp v. New Jersey Bell Telephone Co.* (1976)¹ a New Jersey Superior Court judge ruled that the "...evidence is clear and overwhelming... cigarette smoke contaminates and pollutes the air, creating a health hazard not merely to the smoker but to all those around her who must rely on the same air supply. The right of an individual to risk his or her own health does not include the right to jeopardize the health of those who must remain around him or her in order to perform properly the duties of their jobs."

The 1976 ruling in *Shimp* came a full decade before US Surgeon General C Everett Koop issued his 1986 report, *The health consequences of involuntary smoking*, in which he concluded that "[i]nvoluntary smoking is a cause of disease, including lung cancer, in healthy non-smokers", and "[s]imply separation of smokers and non-smokers within the same air space may reduce, but does not eliminate, exposure of nonsmokers to environmental tobacco smoke".²

For more than a quarter of a century since that historic ruling on behalf of an office worker from New Jersey, court cases affecting the rights of non-smokers seeking relief from the hazards of secondhand smoke (SHS) have arisen in a variety of different settings.

This article reviews some of the highlights of the SHS related litigation that has occurred across the USA during the past 27 years and will focus on cases where non-smoking plaintiffs have prevailed. During that span of time, both the number of SHS cases and the likelihood of success for litigants who are the victims of exposure to SHS have increased. Societal recognition of the health risks of SHS exposure has increased as well.

METHODS

Law library searches using the official reporter system (for example, *Shimp v. New Jersey Bell Telephone Co.*, 368 A.2d 408) were combined with computerised online searches using LexisNexis and Westlaw to identify cases where SHS was a feature of the case. This analysis resulted in the identification

of more than 420 cases. For the purpose of this paper, only cases where litigants were victorious in their suit are described. These cases are summarised in table 1. In order to examine trends in these nature these cases over time, each case was categorised by type, as follows: negligence; worker's compensation and disability benefits; discrimination based on disabilities; smoke seepage from one unit into another in a multi-unit building; child custody disputes; prisoner's rights; assault and/or battery; and cases where the defendants are the tobacco companies themselves.

NEGLIGENCE

In *Husain, et al. v. Olympic Airways* (2000),³ a case filed in federal court in California, plaintiffs brought a wrongful death action under the liability provisions of the Warsaw Convention, which normally limits recovery in cases involving "accidents" on airlines to a maximum of \$75 000. After a non-jury trial in the spring of 2000, the court found the defendant liable in the amount of \$700 000. The court found as follows: "On an international passenger flight in January 1998, Dr. Abid M. Hanson, a nonsmoker who suffered from asthma, inhaled a significant amount of second-hand smoke and died in the company of his wife and three children. Dr. Hanson was not seated in the 'smoking' section of the airplane on which he died, but was in a seat three rows ahead. Considerable ambient smoke was present at this location. Had Olympic Airways' flight crew responded appropriately to the repeated requests to move Dr. Hanson from this area, he might be alive today." The court ruled that the flight attendant's refusal, after three impassioned

Abbreviations: ADA, Americans With Disabilities Act; ETS, environmental tobacco smoke; FAMRI, Flight Attendant Medical Research Institute; PWDORA, Persons with Disabilities Civil Rights Act; SHS, secondhand smoke

Table 1 Secondhand smoke (SHS) cases, 1976 to 2003

Name of case	Year	State	Type of case	Result
<i>Shimp v. New Jersey Bell Telephone Co.</i>	1976	NJ	Negligence	Non-smoking (NS) office worker gets relief from exposure to SHS
<i>Husain v. Olympic Airways</i>	2000	CA	Negligence	Family of NS passenger who died from exposure to SHS receives money damages
<i>Magaw v. Middletown Board of Education</i>	1998	NJ	Workers' compensation	Teacher with cancer caused by exposure to SHS receives compensation
<i>Ubhi v. State Comp Ins Fund</i>	1990	CA	Workers' compensation	Waiter with heart attack caused by exposure to SHS receives compensation
<i>Staron v. McDonald's Corp.</i>	1993	CT	Disability discrimination	Asthmatic plaintiffs' case proceeds; McDonald's decides to go smoke-free
<i>Homeyer v. Stanley Tulchin Associates</i>	1995	IL	Disability discrimination	NS worker's case proceeds
<i>Borid v. Sheahan</i>	2001	IL	Disability discrimination	NS corrections officer's case proceeds
<i>Zimmerman v. Dept. of Corrections</i>	2002	MI	Disability discrimination	NS corrections officer's case proceeds
<i>50-58 Gainsborough St. v. Haile</i>	1998	MA	Smoke seepage	NS tenant recovers rent due effect of SHS on her quiet enjoyment of the apartment
<i>Daniel v. Daniel</i>	1998	GA	Child custody	Smoking mother loses custody of asthmatic child to NS father
<i>Skidmore-Shafer v. Shafer</i>	1999	AL	Child custody	Mother, who smoked around child with health problems loses custody to NS father
<i>In Re: Julie Anne, A Minor Child</i>	2002	OH	Child custody	Judge issues restraining order against both parents smoking around the child
<i>In re: Guardianship of A Minor Child</i>	2003	MA	Child custody	A child's paternal grandparents lose custody because they smoke in his presence
<i>Helling v. McKinney</i>	1993	NV	Prisoner	US Supreme Court rules that SHS exposure in prison can be cruel and unusual punishment, proscribed by the 8th Amendment of the US Constitution
<i>Alvarado v. Lischer</i>	2001	WI	Prisoner	Asthmatic inmate claims that prison officials violated his 8th Amendment protection against cruel and unusual punishment; his lawsuit proceeds
<i>Atkinson v. Taylor</i>	2003	DE	Prisoner	NS prisoner's SHS and retaliation claims can proceed
<i>Leichman v. WLW-Jacar Communications, Inc.</i>	1994	OH	Assault and battery	NS guest on radio show claims host deliberately blew smoke at him; lawsuit proceeds
<i>Bron et al. v. Philip Morris Companies, Inc.</i>	1991	FL	Tobacco company defendants	NS flight attendants' class action lawsuit settled in 1997; claims of individuals can proceed

requests by Dr Hanson's wife, to move him to an area farther away from the smoke produced by the smoking passengers, constituted an "accident" for purposes of the Warsaw Convention, that the accident was a primary cause of his death and that the flight attendant's refusal to move him was "wilful misconduct". Thus, the \$75 000 cap on damages under the Warsaw Convention did not apply.

After concluding "that the plaintiffs should receive an award of non-economic damages equal to this Court's earlier award for economic damages", the court determined that the total award is \$1 400 000.

On 12 December 2002, the US Court of Appeals for the Ninth Circuit,⁴ ruled that the district court's "findings and conclusions are well-grounded in the record. Olympic's argument asks this Court to substitute its judgment and second-guess the district court. This we cannot do... Therefore, we affirm the judgment of the district court." On 27 May 2003, the US Supreme Court agreed to consider Olympic Airways' appeal. Oral arguments took place on 12 November 2003.

WORKER'S COMPENSATION AND DISABILITY BENEFITS

During the past two decades, non-smokers who have been harmed by exposure to on-the-job SHS have been awarded worker's compensation benefits and disability benefits. In one such case, *Magaw v. Middletown Board of Education, New Jersey Department of Labor, Division of Workers' Compensation*,⁵ (1998), a physical education teacher's tonsillar cancer was caused by SHS, according to a worker's compensation judge. The judge awarded Magaw \$45 000 in temporary disability benefits and also ordered the Middletown Board of Education to pay outstanding medical bills, provide future treatment, and restore sick time that he had used up. The judge ruled: "I am satisfied that [the petitioner] has proven even beyond the preponderance of credible evidence that [his] tonsillar cancer was caused by exposure to second-hand smoke during the

twenty-six years that he shared an office with a co-employee who was a chain-smoker."

A state appeals panel⁶ upheld Magaw's monetary award but ruled that he would have to go back to the school board to seek reimbursement for the sick leave time he used up. The New Jersey Supreme Court⁷ refused to hear the school district's second appeal, thus letting the lower court ruling stand. Magaw was awarded about \$53 000 for medical costs and \$20 000 for legal costs.

In *Ubhi v. State Compensation Insurance Fund, Cat'n Fiddle Restaurant* (1990),⁸ a vegetarian, non-smoking waiter received a \$10 000 settlement for a heart attack he suffered after five years of working in a smoke filled restaurant. Also as part of the settlement, the California Workers' Compensation Appeals Board agreed to cover his medical bills, which amounted to about \$85 000.

DISCRIMINATION BASED ON DISABILITIES

In *Staron, et al. v. McDonald's Corporation* (1993),⁹ plaintiffs brought an action in federal court in Connecticut under the American with Disabilities Act, arguing that the presence of tobacco smoke in the defendant's restaurants prevents the plaintiffs from having the opportunity to benefit from the defendant's goods and services. The plaintiffs, all of whom have adverse reactions when in the presence of smoke, also allege that the defendant's restaurants are places of public accommodation under 42 U.S.C. 12181. They sought an injunction against smoking in the defendant's restaurants, "thereby giving the plaintiffs equal access to said restaurants". However, a district court judge dismissed the case.

On 4 April 1995, the US Court of Appeals for the Second Circuit reversed¹⁰ the judgments of the district court, ruling that "we find that plaintiffs' complaints do on their face state a cognizable claim against the defendants under the Americans with Disabilities Act". The court noted: "the determination of whether a particular modification is 'reasonable' involves a fact-specific, case-by-case inquiry that considers, among other factors, the effectiveness of the

modification in light of the disability in question and the cost to the organization that would implement it... We see no reason why, under the appropriate circumstances, a ban on smoking would not be a reasonable modification." The *Staron* lawsuit was filed in March 1993; within a year, McDonald's had announced its decision to ban smoking in all of its corporately owned restaurants.¹¹

In *Homeyer v. Stanley Tulchin Associates, Inc., et al.*, (1995),¹² a woman suffering from chronic severe allergic rhinitis and sinusitis sought a smoke-free work environment and sued her former employer after it "repeatedly refused to provide" the plaintiff with a reasonable accommodation of her disability. Shortly after the plaintiff filed an Americans With Disabilities Act (ADA) discrimination claim with the Equal Employment Opportunity Commission and a worker's compensation claim, she was terminated. So, she filed suit, alleging violations of the ADA and an Illinois statute that prohibits retaliatory discharge. A federal judge granted the defendants' motion to dismiss the complaint, saying "that not every impairment that affects a person's major life activities is a substantially limiting one". "Homeyer does not, and cannot, allege that her sensitivity to [environmental tobacco smoke] substantially limits her ability to find employment as a typist generally. Thus, Homeyer is not a qualified individual with a disability, and, accordingly, is not entitled to the protections of the ADA."

However, the US Circuit Court of Appeals for the Seventh Circuit¹³ unanimously reversed the dismissal. Noting that the district court had ignored Homeyer's claim that she was disabled in that her breathing, a major life activity, was affected by SHS, the court of appeals ruled that "we cannot say at this stage that it would be impossible for her to show that her chronic severe allergic rhinitis and sinusitis either alone or in combination with ETS substantially limits her ability to breathe".

In *Bond v. Sheahan* (2001),¹⁴ the plaintiff sued the defendant in his official capacity as Sheriff of Cook County for disability discrimination under the ADA. Working as a corrections officer and after suffering from a pulmonary embolism, Ms Bond began complaining about the presence of SHS at her workplace. While the Sheriff's Department codified a smoking policy in 1990, smoking nonetheless continued in all areas of the facility. In March 1995, Ms Bond was diagnosed with asthma. After her asthma worsened and exposure to SHS continued, Ms Bond resigned effective 28 February 1998. She sued, claiming that the defendant discriminated against her in violation of the ADA by constructively discharging her because of her asthma, a condition aggravated by the SHS. The court dismissed the defendant's motion for summary judgement, ruling that genuine issues of material fact exist concerning whether she was "disabled" for purposes of the ADA—specifically whether she is substantially limited in the major life activity of breathing.

In addition to the federal ADA, state laws barring discrimination against the disabled can be effective tools to protect non-smokers from exposure to SHS. In *Zimmerman v. Department of Corrections* (2002),¹⁵ after the plaintiff was hired as a corrections officer, he developed an increasing allergic reaction to SHS. Although the defendant had a policy that banned smoking in the housing units where plaintiff worked, he maintained that the policy was not enforced and that he suffered such a severe reaction to the smoke that he was disabled under the Persons with Disabilities Civil Rights Act (PWDORA) because it interfered with the major life activity of breathing. He also contended that his disability was unrelated to his ability to function as a corrections officer because breathing SHS is not a prerequisite for his position. The defendant filed a motion for summary disposition; after a

hearing, the trial court denied the motion, concluding that it was a question of fact whether the plaintiff was improperly discriminated against. The Court of Appeals of Michigan affirmed the denial of the defendant's motion, ruling that the "fact plaintiff could otherwise care for himself and perform various physical activities does not necessarily render him outside the protection of the PWDORA".

SMOKE SEEPAGE

Since 1991, there have been at least 14 cases involving allegations of SHS seeping from one unit into another in a multi-unit dwelling. In 1998, a Massachusetts case broke new ground when a non-smoker refused to pay rent because of SHS exposure from a smoky bar on the first floor of her apartment. The tenant withheld the rent, alleging that the amounts of smoke seeping into her apartment deprived her of the quiet enjoyment of that apartment. A Housing Court judge ruled that the amount of smoke from the bar below had made the apartment "unfit for smokers and nonsmokers alike". The judge further ruled that "the evidence does demonstrate to the Court the tenants' right to quiet enjoyment was interfered with because of the second-hand smoke that was emanating from the nightclub below" *50-58 Gainsborough St. Realty Trust v. Haile, et al.*, (1998).¹⁶

As Kline has pointed out, there "are several legal theories available for residents of multiple dwelling residential buildings who are affected by ETS incursion",¹⁷ nuisance, covenant of quiet enjoyment and warranty of habitability. Additionally, the use of state regulations such as a sanitary code can "provide an effective, existing vehicle for resolution of ETS incursion problems".¹⁷ Similarly, a resident of a mobile home park, to gain access to the park's clubhouse successfully, used the Federal Fair Housing Act, which bans discrimination against the disabled and families with children.¹⁸

CHILD CUSTODY

During the past 15 years, legal disputes over child custody where SHS has become an issue have occurred in at least 22 states across the USA. In *Daniel v. Daniel*, (1998),¹⁹ the mother was given legal and physical custody of the child when the parties divorced. After the divorce, the child developed asthma. At the time the child was living in an apartment with her mother who smoked and with her mother's boyfriend, who also smoked. The child made several trips to the doctor for asthma or other respiratory related matters. The trial court found that there was a sufficient change in circumstances to justify a change in custody to the father. The Court of Appeals of Georgia affirmed the judgment of the trial court, ruling that "the fact that the mother continued to smoke inside the apartment for almost three years after the child was diagnosed suggests that she was not adequately concerned about the child's health".

In *Skidmore-Shafer v. Shafer* (1999),²⁰ the couple's separation agreement provided the mother with primary physical custody of their son. Later, the Calhoun (Alabama) Circuit Court awarded the father primary physical custody, holding that the change of custody would materially promote the child's best interests and that the good brought about by the change would offset any disruptive effect caused by uprooting the child. The court noted that during the child's entire life, "he has suffered respiratory infections and was diagnosed with asthma in February 1997, at which time he was also hospitalized with pneumonia". Despite these health problems and more than 20 visits to the doctor, the mother has continued to smoke around the child. The court noted that "it appears that the biggest and most blatant disregard for the health of the child is attributable to" the mother. The court further denounced the smoking around this child: "To

do this to a child is no less child abuse than if you had deprived him of food or medical treatment." The Court of Civil Appeals of Alabama affirmed the court's judgment. "After carefully reviewing the entire record, we cannot say that the court erred in awarding primary physical custody of the child to the father."

In an Ohio case that garnered considerable attention from the news media in 2002, the Court, in *In Re. Julie Anne, A Minor Child* (2002),²¹ issued a restraining order against smokers to protect a child under the court's jurisdiction from the dangers of exposure to SHS and took judicial notice of the harmful nature of SHS on the health of children, citing numerous studies that characterized SHS as a carcinogen and a hazard to those exposed to it. The court concluded: "The overwhelming authoritative scientific evidence leads to the inescapable conclusion that a family court that fails to issue court orders restraining people from smoking in the presence of children under its jurisdiction is failing the children whom the law has entrusted to its care." The court granted a restraining order with provisions that "the mother and father are hereby restrained under penalty of contempt from allowing any person, including themselves, to smoke tobacco in the presence of the minor child Julie Anne. If smoking is allowed in the house in which the child lives or visits on a regular basis, it shall be confined to a room well ventilated to the outside that is most distant from where the child spends most of her time when there."

In a 2003 case in Massachusetts,²² the paternal grandparents of a 7 year old child were appointed as the child's guardians. The child's maternal grandmother later asked the court to remove the paternal grandparents as guardians and appoint her instead on the grounds that the child "is constantly exposed to dangers of secondhand smoke" while in the guardians' home.

The court took "judicial notice of current research that shows second-hand smoke or environmental tobacco smoke (ETS) can cause respiratory problems, including asthma and reactive airway disease, in children" and made a finding that exposing this child "to a smoking environment is contrary to his best interest". The court further found that the paternal grandparents "are largely unconcerned about the possibility" that the child "may continue to have asthma, reactive airway disease, allergies, or other respiratory problems". The court concluded that the fact that the paternal grandparents "have disregarded the multiple recommendations and warnings of physicians and continue smoking" in the child's presence "constitutes a sufficient change in the circumstances of their suitability as guardians". Therefore, the court terminated their role as guardians of the child and issued a decree regarding visitation that they "shall not smoke" in front of the child "or permit anyone else to do so".

PRISONERS

In *McKinney v. Anderson* (1991),²³ an inmate who was housed in a cell with a heavy smoker brought a civil rights action against prison officials alleging violation of his Eighth Amendment right not to be subjected to "cruel and unusual punishment" due to his exposure to SHS. The US District Court for the District of Nevada granted a directed verdict for the prison officials; the inmate appealed. The US Court of Appeals for the Ninth Circuit reversed in part, ruling that even if the inmate cannot show that he suffers from serious, immediate medical symptoms caused by exposure to secondary smoke, compelled exposure to that smoke is nonetheless cruel and unusual punishment if at such levels and under such circumstances as to pose an unreasonable risk of harm to the inmate's health. The court noted: "... our society's attitudes have evolved to the point that unwanted exposure to ETS [environmental tobacco smoke] may amount to a

violation of 'society's evolving standards of decency.'" The court also ruled that Nevada's anti-smoking statute applies to prison libraries and creates a liberty interest in smoke-free prison libraries protected by the due process clause.

On 18 June 1993, the Supreme Court, by a seven to two vote in *Helling v. McKinney* (1993),²⁴ held that "[w]e cannot rule at this juncture that it will be impossible for McKinney, on remand, to prove an Eighth Amendment violation based on exposure to ETS". The court also rejected "petitioners' central thesis that only deliberate indifference to current serious health problems of inmates is actionable under the Eighth Amendment". The Supreme Court affirmed "the holding of the Court of Appeals that McKinney states a cause of action under the Eighth Amendment by alleging that petitioners have, with deliberate indifference, exposed him to levels of ETS that pose an unreasonable risk of serious damage to his future health".

In the decade since the US Supreme Court's ruling in this area, courts have applied that standard to the facts that underlie other prisoners' claims of violations of their Eighth Amendment rights. In *Alvarado v. Litscher, et al.* (2001),²⁵ a non-smoking inmate in Wisconsin who "suffers from severe chronic asthma," filed a civil rights lawsuit alleging that the state corrections department, the warden, and the health services manager violated his Eighth Amendment rights by acting with deliberate indifference to his complaints about his exposure to SHS. Alvarado "claims that other prisoners in the unit smoked in violation of prison policy because the guards were frequently not at their post to enforce the smoking ban". He also claimed that because smoking is permitted in common areas of the prison, he is unable to participate in programmes that would enhance his chances of being paroled. The district court denied the defendants' motion to dismiss. The Court of Appeals for the Seventh Circuit affirmed, ruling: "Alvarado's complaint stated an Eighth Amendment claim when he alleged that because of the prison officials' deliberate indifference, he was being exposed to levels of ETS which aggravated his chronic asthma, thereby endangering his existing health... He also stated a valid claim as to his future health under *Helling v. McKinney*."

In *Atkinson v. Taylor, et al.* (2003),²⁶ Atkinson brought a civil rights lawsuit, alleging that the defendant prison officials subjected him to cruel and unusual punishment due to exposure to SHS. The prison officials' motion for summary judgment was denied by the US District Court for the District of Delaware. The prison officials appealed the denial of their motion. The US Court of Appeals for the Third Circuit affirmed the denial of the defendants' motion for summary judgment with respect to the inmate's SHS, retaliation and excessive force claims, thus allowing Atkinson's claims to go forward.

ASSAULT AND/OR BATTERY

A smoker's deliberate infliction of SHS onto another person can be the basis of a lawsuit alleging that battery—the unconsented to touching of another—has occurred.

In a case from Ohio, *Leichtman v. WLW Jacor Communications, Inc., et al.* (1994),²⁷ a non-smoker who was a guest on a live radio show had cigar smoke blown in his face. He alleged that the act was done deliberately to cause him "physical discomfort, humiliation or distress", violated his right to privacy, constituted battery, and violated a Cincinnati Board of Health regulation. The trial court dismissed all of the plaintiff's claims. However, the Court of Appeals, First Appellate District of Ohio, reinstated the battery claim and affirmed the dismissal of the invasion of privacy and the health regulation claims. The court ruled that, as alleged in the complaint, "when Furman [one of the

defendants} intentionally blew cigar smoke in Leichtman's face, under Ohio common law, he committed a battery". The case was later settled for an undisclosed sum.

SUING TOBACCO COMPANIES

In *Broin, et al. v. Philip Morris Companies Inc., et al.*,²⁸ seven current and former flight attendants who do not smoke sued the six major cigarette manufacturers for their having contracted lung cancer and other ailments or for facing increased risk of disease by inhaling tobacco smoke on airplanes. The plaintiffs, seeking class action status on behalf of 60 000 non-smoking flight attendants, filed the suit on 31 October 1991. Seven months later, a Dade County Circuit Court Judge dismissed the class action aspect of the plaintiffs' complaint. However, a three judge panel of the District Court of Appeal of Florida, Third District unanimously reversed the order of dismissal and ordered that the class action allegations be reinstated.

On 12 December 1994, the Circuit Court for Dade County ruled²⁹ that the case could proceed as a class action. It was estimated that as many as 60 000 current and former flight attendants could be a party to the suit. The class was defined as: "[a]ll non-smoking flight attendants, who are or who have been employed by airlines based in the United States and are suffering from diseases and disorders caused by their exposure to secondhand cigarette smoke in airline cabins."³⁰ On 3 January 1996, the District Court of Appeals for the third district upheld the circuit court's ruling.³¹ In December 1996, the court (Kaye, J) authorised the mass notification of some 150 000 to 200 000 flight attendants so they can either sign up as plaintiffs or exclude themselves from the case to possibly pursue their own suits. The trial began on 2 June 1997 and proceeded for several months.

Lead plaintiff Norma Broin, who was at the time of the trial a 42 year old American Airlines flight attendant suffering from lung cancer, testified on 11 August 1997. A flight attendant for the previous 21 years, Ms Broin told the jury that she had regularly worked in "very, very, very, very dense cigarette smoke" when smoking on airlines was allowed and that the difference in air quality before airline smoking was effectively banned in 1990 compared to when she testified in 1997 was "absolutely night and day, significant difference".³²

The plaintiff's presentation of evidence included testimony from Dr Michael Siegel of the Boston University School of Public Health and former US Surgeon General Julius Richmond. University of Utah cardiologist John H Holbrook testified that people exposed to SHS had an elevated risk of developing heart disease, including heart attacks and clogged arteries. "The evidence had been accumulating, and I will now say unequivocally it is a cause" of coronary heart disease, Dr Holbrook told the jury on 30 July 1997. A former tobacco researcher, Dr Freddy Homburger, testified that he found cancer of the larynx in laboratory hamsters exposed to cigarette smoke in 1973.³³

The tobacco industry began presentation of witnesses on 22 September 1997. Among the industry's witnesses was Michael Ogden, a chemist employed by RJ Reynolds Tobacco Co. On direct examination, Dr Ogden downplayed the significance of non-smokers' exposure to SHS. On cross examination, he was asked whether he believed that active smoking causes lung cancer in human beings. His response was that smoking is a "risk factor" for cancer but that he did not agree that smoking causes that disease.³⁴

On 10 October 1997, the parties announced a proposed settlement whereby the defendants would pay \$300 000 000 to establish a research foundation—which was to become the Flight Attendant Medical Research Institute (FAMRI)—and agree that flight attendants harmed by SHS exposure aboard

What this paper adds

Hundreds of cases involving exposure to SHS have been reported over the past quarter century. This paper presents an analysis of some of the most significant victories for victims of SHS exposure. The increasing positive results of these cases have helped persuade government officials and private business owners to adopt smoke-free rules as the norm.

airlines can sue the tobacco companies regardless of statute of limitations issues. Individual actions can proceed with the burden of proof on the defendants on the issue of whether ETS exposure causes one of five diseases (emphysema, lung cancer, chronic obstructive pulmonary disease, chronic bronchitis, and chronic sinusitis) in non-smokers. By the 7 September 2000 deadline for filing such cases, more than 3000 flight attendants had done so.³⁵ Videotaped testimony from the plaintiffs' experts in the *Broin* case is admissible evidence in these individual actions.

In an order dated 3 February 1998, Dade County Circuit Judge Robert Kaye approved the proposed settlement, calling it "fair reasonable, adequate and in the best interests of the class". Challengers for three individuals objected to the settlement. On 24 March 1999, the Third Circuit Court of Appeal unanimously denied the objectors' appeal of the settlement. The objectors decided not to appeal to the Florida Supreme Court.

Indeed, as the editorial by Daynard notes,³⁶ a supposedly hopeless case resulted in an extraordinary settlement that both produced \$300 000 000 for research and facilitated the prosecution of claims by individual flight attendants whose health had been harmed by their on-the-job exposure to SHS. Additionally, this one case drew enormous public attention to the hazards of exposure to SHS and put human faces on the statistics that underlie the science of SHS.

In those individual cases, plaintiffs who are seeking damages on account of lung cancer, chronic bronchitis, emphysema, chronic obstructive pulmonary disease, or chronic sinusitis will have the burden of proof as to whether SHS can cause one of those diseases borne by the defendant cigarette companies who entered into the October 1997 settlement. As of December 2003, seven of these individual cases on behalf of flight attendants harmed by on-the-job exposure to SHS have gone to trial, with one of them resulting in a verdict for the plaintiff (*French v. Philip Morris Inc. et al.*, a \$5.5 million verdict for the plaintiff on 18 June 2002; verdict reduced to \$500 000 by the trial judge on 13 September 2002).*

CONCLUSION

It is apparent that the judicial branch has increasingly recognised the need to protect the public, especially some of the most vulnerable members of our society, from the serious threat to their health that is exposure to SHS. That practice will likely continue throughout the 21st century as American society clamours for comprehensive laws and policies³⁷ that, taken together, will help produce a smoke-free society.

*Among the other trials, four resulted in a defence verdict (*Fontana v. Philip Morris Inc.*, verdict on 5 April 2001; *Tucker v. Philip Morris Inc.*, verdict on 4 October 2002; *Seal v. Philip Morris USA Inc., et al.*, verdict on 7 February 2003; and *Routh v. Philip Morris USA*, verdict on 14 October 2003), one in a mistrial (*Quiapo v. Philip Morris Inc., et al.*, mistrial declared on 23 May 2002), and one in a defence verdict that was overturned by the trial judge (*Janoff v. Philip Morris Inc., et al.*, defence verdict on 5 September 2002; trial judge overturned the defence verdict on 8 January 2003). That case will be retried.

Individuals who have been harmed by exposure to SHS will continue to wage these courtroom battles as society becomes more cognizant of the damage that SHS inflicts on people. The number of examples of forceful quotes from judges who understand the dangers of SHS will make it easier for non-smokers to prevail in the litigation. This continuing trend will also help persuade those individuals and corporations in control of buildings and other facilities to go 100% smoke-free voluntarily, thereby avoiding risky litigation and improving the health of the public.

Since 1976, the year of the first reported SHS lawsuit, this type of litigation has increased both in number and in scope. With increasing levels of success for non-smoking litigants over the past decade, non-smokers exposed to the dangers of exposure to SHS will continue to seek relief from the courts for the foreseeable future.

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