MISSOURI COURT OF APPEALS

EASTERN DISTRICT

NO. 44286

PAUL SMITH, APPELLANT

V.

WESTERN ELECTRIC COMPANY,
RESPONDENT

AMICUS BRIEF OF CLEAN INDOOR AIR FOUNDATION OF MASSACHUSETTS AND ENVIRONMENTAL IMPROVEMENT ASSOCIATES OF SALEM, NEW JERSEY

On the Brief:

Alvan Brody
Suffolk University Law School
41 Temple Street
Boston, Massachusetts 02114
Tel. (617) 723-4700

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Other Authorities

JURISDICTIONAL STATEMENT

> [T]he inhalation of tobac-combustion products from smoke-filled atmospheres by the nonsmoker . . . is, in a sense 'smoking' because it provides exposure to many of the same constituents of tobacco smoke that voluntary smokers experience. It is also 'involuntary' because . . . [it is] an unavoidable consequence of breathing in a smoke-filled environment. (U.S. Dept. of H.E.W., Pub. Health Serv., The Health Consequences of Smoking: A Report to the Surgeon General (1975), p. 87, Legal File, hereafter F., 113).

The issue in this case is whether the appellant may have equitable relief against the respondent, his employer, from forcing him to smoke at work. From the denial of relief in the lower court on the ground that his complaint fails to state a claim upon which relief may be granted (F. 291), he has appealed (F. 293). This amicus brief is submitted, with leave of the court, by the Clean Indoor Air Foundation of Massachusetts and Environmental Improvement Associates of Salem, New Jersey, on behalf of the appellant and on behalf of all persons similarly situated.

STATEMENT OF FACTS

I. The setting

Paul Smith (the plaintiff or Smith) is an engineer employed by the Western Electric Company (the defendant or the company) at its plant in Ballwin, Missouri (Tr. 3; F. 1). Smith, who once smoked but quit for health reasons (Tr. 6), has been working at the company's Ballwin plant since 1967 (Tr. 3; F. 1). His job is to write specifications for telephone offices (Tr. 3-4, 15).

Smith's desk is located in an area of the plant that is approximately 1000 cubic meters. The area is partially enclosed on two sides, nearly enclosed on a third side, and totally enclosed on the fourth side (F. 201). Smith shares the area with fifty to sixty other people. The co-workers' desks are adjacent one to another, row upon row, and are separated by partitions five-and-a-half feet high (Tr. 4; F. 1). The windows in the work area do not open (Tr. 5). The ventilation system is off a portion of each day, apparently to save energy (Tr. 5). Twenty-seven of the employees in the plaintiff's work area (F. 201), including those immediately next to him (Tr. 7), smoke (Tr. 4-5). Among the smokers are two chain smokers of cigarettes, three cigar smokers, and two pipe smokers (F. 201).

Smith's co-workers have submitted affidavits describing the air quality as "foul, obnoxious and highly

polluted" (Affidavit of Roy L. Groseclose, F. 243) and "typically smoke-filled" (Affidavit of Roland J. Fox, F. 241).

> The air where we work is sometime so bad you have to force yourself to breathe.

(Affidavit of Richard P. Brown, F. 242). In testimony before the County Circuit Court, Smith also described the air as "typically smoke-filled" (Tr. 4). Evidence submitted by James Repace, a senior staff member of the Environmental Protection Agency, estimated that the density of smoke created by the twenty-seven employees, exceeds the Federal Air Pollution Emergency level for outdoor air (F. 201).

II. What tobacco smoke is and what it does.

In the court below the plaintiff introduced considerable evidence about what tobacco smoke is and what it does to nonsmokers who breathe it. Only some of that evidence is repeated here.

A. What individual constituents of tobacco smoke do to people.

lion particles, typically measuring about 0.2 μm across (F. 160). Because of the small size of the particles, they reach every part of the respiratory system; respirators

are ineffective in filtering them (F. 218-219, See also F. 181, 185, 189, 191, 215, 216-217). The particles (as well as the gasses in tobacco smoke) are almost impossible to filter effectively by any method (F. 201). A nonsmoker who shares an office forty cubic meters in size with a habitual smoker is exposed yearly to more than three times the respirable suspended particulates of a person not exposed to tobacco smoke (F. 211). Half of that exposure would exceed the E.P.A.'s outdoor standard for particulates (F. 212).

Burning tobacco smoke creates a high electric potential and the human body, being water-filled, has a low one; smoke in a room gravitates and clings to people in much the same way as iron filings are drawn to a magnet (F. 147). The half-life of an inert respirable particle from tobacco smoke in the lungs of a nonsmoker is ~70 days (F. 212).

Mainstream smoke is that which is drawn through the tobacco during puffing. Sidestream smoke rises from the burning cone of tobacco. U.S. Dept. of H.E.W. Pub. Health Serv., The Health Consequence of Smoking: A Report to the Surgeon General (1975) (Hereafter Surgeon General's 1975 Report, p. 87 (F. 113)). Sidestream smoke is qualitatively richer in certain compounds than mainstream smoke (Surgeon General's 1975 Report at p. 88) (F. 114)). Sidestream smoke has more cadmium (a suspected cause of emphysema)(F. 145), twice as much

nicotine (a substance considered to be a factor contributing to the development of atherosclerotic cardiovascular disease)(F. 92, See also F. 74), five times as much carbon monoxide (a compound that interferes with the ability of the blood to transport oxygen (F. 145, See also F. 74), three times as much 3-4 benzopyrene (a substance with ten times the carcinogenic potency as the fire retardant Tris)(F. 212, See also F. 145 and 154), and fifty times as much dimethylnitrosamine, also a carcinogen (F. 154).

One of the components of tobacco smoke is carbon monoxide (CO). CO is a colorless, odorless gas. It "does not settle out of the atmosphere in an enclosed space, and is not removed by most . . . standard filtration systems" (Surgeon General's 1975 Report, F. 83). "Cigarette smoking can produce CO levels well above the ambient air quality standard (9 p.p.m.) in . . . everyday situations" (Surgeon General's 1975 Report, F. 89). The CO level in a seat next to a person smoking may reach 90 p.p.m. (F. 149). Hemoglobin is the constituent of blood which transports oxygen throughout the body, including to the heart and brain (F. 185). CO has 230 times the affinity of oxygen for hemoglobin. CO combines with hemoglobin, forming carboxyhemoglobin. That hemoglobin which has combined with CO can no longer combine with oxygen. In this way CO displaces the oxygen and

impairs the body's ability to transport oxygen (F. 97). Sufficient exposure to CO can impair psychomotor performance, attentiveness and cognitive function (F. 102). When a nonsmoker leaves a smoky environment, it takes hours for the nonsmoker's body to rid itself of the CO (F. 146).

Dr. Wilfred Aronow, Professor of Medicine and Chief of Cardiovascular Research at the University of California, Irvine, has found that increases in carboxyhemoglobin levels capable of being produced by involuntary smoking can measurably reduce the exercise duration required to induce angina in some patients with coronary artery disease (Aronow,"The Effect of Smoke on the Nonsmoker," Family Practice Recertification, Vol. 1 no. 7, Nov. 1979, at F. 150, See also F. 170, F. 99). (In one experiment Dr. Aronow worked with ten coronary artery disease patients; after they inhaled smoke from fifteen cigarettes smoked in a nine-foot high room, 11½ by 10½ feet, "all ten experienced anginal pain at lower exercise levels . . . than when there had been no exposure to smoke" (F. 151).)

Another substance found in tobacco smoke, nicotine, is considered to be a factor contributing to the development of atherosclerotic cardiovascular disease (Surgeon General's 1975 Report, F. 92). Nicotine is absorbed in small amounts by nonsmokers involuntarily smoking (Surgeon General's 1975 Report, F. 92).

Tobacco smoke contains at least two powerful carcinogens, dimethylnetrosamine (which is present in the gas phase)(F. 74, 93), and benzo(a)pyrene (which is present in the particulate phase)(F. 73, 94). The Surgeon General in 1975 noted that "[t]he effect of chronic exposure to very low levels of this carcinogen benzo(a)-pyrene has not been established for humans" (Surgeon General's 1975 Report; F. 92).[1]

---

[1] A recent paper by Ebright and Wong, published in the July 1981 issue of the Proceedings of the National Academy of Sciences, appears to explain the biological mechanism by which the chemical carcinogen benzpyrene triggers cancer. Ebright, R.H. and Wong, J.R., "Mechanism for Transcriptional Action of Cyclic AMP in Escherichia COLI: Entry into DNA to Disrupt DNA Secondary Structure," Proceedings of the National Academy of Sciences, Biological Sciences, Vol. 78, No. 7 (July 1981) pp. 4011-4015. As recounted in Deitch, Unlocking the double helix, Harvard Magazine, (July-August, 1981) pp. 17-21), the Ebright and Wong model is that the molecule cyclic adenosine monophosphate (cAMP), a "messenger" molecule binds to a "receptor" molecule with one of its ends. "[T]he receptor conveys cAMP to the nucleus of the cell. There, the exposed end of the molecule penetrates the DNA helix. Its interaction with adenine, one of the bases in DNA, disrupts the hydrogen bonds that unite the helical strands. They begin to separate - activating a gene." (Deitch, at 18). As recounted by Deitch:

> Mutations can be caused by a variety of agents, physical . . . and chemical. However, statistical evidence indicates that it is a chemical carcinogen that causes the mutations involved in at least 97 percent of human cancers.
>
> Benzpyrene, a carcinogen in cigarette smoke, provides an example. Once inside a cell, benzpyrene attaches itself to DNA and damages it. Sometimes a damages gene will instruct the cell to divide without cease. This is cancer.

continued on p. 8

Acrolein, acetaldehyde and other irritating substances exist in tobacco smoke and may contribute to eye irritation (F. 93). The Surgeon General has found that "a substantial proportion of the normal population experiences irritation and annoyance on being exposed to cigarette smoke. The eyes and nose are the areas most sensitive to irritation, and the level of irritation increases with increasing levels of smoke contamination" (Surgeon General's 1975 Report, F. 96). In one study, about 70% of the nonallergic nonsmokers surveyed reported eye irritation as a reaction to exposure to tobacco smoke; approximate 30% reported nasal symptoms;

(footnote 1 continued from p. 7).

> In the prevalent view, says Ebright, each step on this sequence of events is random. A carcinogen enteres a cell by chance, moves to the nucleus, and attaches itself to the critical point on the DNA. Ebright finds this "implausible." Of the thousands of genes in DNA, he notes, only one, two or at the most four genes can be changed in a way that will cause cancer . . .
>
> The Ebright-Wong model for carcinogensis eliminates randomness. The most potent chemical carcinogens, notes Ebright, bear a remarkable structural similarity to certain steriod hormones. This leads Ebright and Wong to hypothesize that a steriod receptor binds to the carcinogen and transports it directly to the one to four genes that control growth . . .
>
> Ebright and Wong have supported this model with experiments. A derivative of benzpyrene, they report, binds well to the receptors for estrogen. (Deitch, at 20, emphasis in original).

30%, headache; 25%, cough; almost 10%, nausea; and 5% each reported wheezing, sore throat, hoarseness or dizziness (F. 155,157).

The odor of burning tobacco is the product of at least two substances: ammonia and pyridine. (Pyridine is a strong irritant produced when nicotine burns.) (F. 147).

Not enough research has yet been done on the effects on nonsmokers of other chemicals in tobacco smoke. Cadmium, e.g., is thought to be a factor responsible for the development of bronchitis and emphysema (F. 185). Hydrogen cyanide, a poison that has a toxic effect on the lining of the respiratory airways, is found in concentrations of 1600 p.p.m. in cigarette smoke. Long-term exposure to levels about 10 p.p.m. is considered dangerous (F. 146). Nitrogen dioxide is an acutely irritating gas that can damage the lungs. Levels of five p.p.m. in the air are considered dangerous. Cigarette smoke contains 250 p.p.m. (F. 146).

B. What tobacco smoke in general does to people.

Ira Tager at Harvard's Channing Laboratory has demonstrated small-airways abnormalities in children exposed to parental smoking. (Tager, Weiss, Rosner & Speizer, Effects of Parental Cigarette Smoking on the Pulmonary Function of Children, Am. J. Epidemiol. 1979; 110:15-26; See F. 181).

Two other researchers, White and Froeb, compared small-airways function of (a) nonsmokers who had neither lived in a house where smoking was permitted nor been employed in an enclosed working area that permitted smoking or routinely contained tobacco smoke, and (b) nonsmokers who lived in a house where smoking was not permitted but who had been employed for twenty years or more in an enclosed working area that permitted smoking and routinely contained tobacco smoke, with the small-airways function of persons who smoke in varying degrees -- (1) pipe, cigar and cigarette smokers who did not inhale; (2) "light smokers" (smokers who had inhaled one to 10 cigarettes a day for 20 years or more); (3) "moderate smokers" (smokers who had inhaled 11 to 39 cigarettes a day for 20 years or more; and (4) "heavy smokers" (smokers who had inhaled more than 40 cigarettes a day for 20 years or more (F. 139). The researchers found (1) that "nonsmokers chronically exposed to tobacco smoke had a lower forced mid-expiratory flow rate . . . and forced end-expiratory flow rate . . . than nonsmokers not exposed" (F. 139), and (2) that the values for the nonsmokers who had worked 20 years or more in an enclosed area where smoking was permitted or existed had values "not significantly

different from those in light smokers and smokers who did not inhale" (F. 129). They concluded that "chronic exposure to tobacco smoke in the work environment is deleterious to the nonsmoker and significantly reduces small-airways function." White & Froeb, Small-airways Dysfunction in Non-Smokers Chronically Exposed to Tobacco Smoke, N.Engl.J.Med. 302: 720-723 (1980) (F. 139-142).

Since the preparation of the legal file in this case, certain other studies have been published that bear on the possible risk of lung cancer from long-term chronic exposure to other people's tobacco smoke. One study was of women patients in a hospital in Athens, Greece. Fifty-one women with lung cancer and 163 other hospital patients were interviewed about their smoking habits and those of their husbands. The researchers found a statistically significant association between a husband's smoking and the risk to his wife of lung cancer. The researchers found that "[a] non-smoking woman whose husband is a regular smoker has a risk of developing lung cancer which is twice as high as that of a non-smoking woman married to a nonsmoker" (Trichopoulos, Kalandidi, Sparros & MacMahon, Lung Cancer and Passive Smoking, Int. J. Cancer: 27, 1-4 (1981) at 2).

A study done for the American Cancer Society found a different result. It compared lung cancer mortality

rates for nonsmokers in a prospective study for three four-year periods from 1960 to 1972 with an earlier study of veterans for three five-year periods from 1954 to 1969 and found that, compared with nonsmoking women married to nonsmoking husbands, "nonsmokers married to smoking husbands showed very little, if any, increased risk of lung cancer" (Garfinkle, Time Trends in Lung Cancer Mortality Among Nonsmokers and a Note on Passive Smoking, J.N.C.I. 66: 1061-1066 at 1061 (1981).

The third study, a fourteen year study by Dr. Takeshi Hirayama, the Chief of the Epidemiology Division of the National Cancer Center Research Institute of Tokyo, Japan, tends to confirm the Greek study. Dr. Hirayama found that wives who did not smoke but were exposed to their husbands' cigarette smoke developed lung cancer at a rate much higher than nonsmoking wives of nonsmoking husbands, and found that a statistically significant "dose-response" relationship exists. (Hirayama, Non-smoking Wives of Heavy Smokers Have a Higher Risk of Lung Cancer: A Study from Japan, Brit. Med. J. 282: 183-185 at 183 (1981). Dr. Hirayama found that, overall, there was a two-fold increase in death rates from lung cancer for nonsmoking women who were continually exposed to their husbands' smoke:

2.08 times higher if the husband smoked a pack or more a day; 1.61 times higher if the husband smoked less than a pack a day (Id. at 183-184).

Most studies that have examined the effects of involuntary smoking have examined its effects on relatively healthy people (Surgeon General's 1975 Report, F. 157). "An exposure that is harmless for someone who is healthy may have a very different effect on someone with heart or lung disease or hypersensitivity to substances found in smoke." (Ibid, see also F. 133). According to the Census Bureau, 16.1 million people in the United States have their activity limited by chronic heart conditions (Statistical Abstract of the United States, U.S. Dept. of Commerce, Bureau of the Census (1980), p. 127); the U.S. Public Health Service reports that there are 15½ million people in the United States with chronic lung problems (F. 42); and by one estimate, eight million persons in the United States are clinically sensitive to tobacco smoke (F. 154).[2] Among the

---

[2] According to the U.S. Dept. of Health & Human Services, 16,428,000 people in the U.S. suffer from heart conditions; 7,474,000, from bronchitis; 2,137,000 from emphysema; 6,402,000 from asthma; and 28,540,000 from sinusitis. "Current Estimates from the National Health Interview Survey, U.S., 1979," National Center for Health Statistics, U.S. Dept. of Health and Human Services. Of every 1,000 persons in the United States 32.7 suffer from chronic bronchitis, 6.6 suffer from emphysema, and 30.2 suffer from asthma (with or without hay fever). Vital Health Statistics Series 10, No. 84, Prevalence of Selected Chronic Respiratory Conditions, U.S., 1970, U.S. Department of H.E.W., Public Health Service,
(continued on p. 14)

affidavits submitted in behalf of the plaintiff is one by Dr. Irving Kass, a specialist in pulmonary and respiratory disease and Regent Professor of Medicine at the University of Nebraska College of Medicine (F. 184). Dr. Kass's affidavit recites (in part):

> Anyone who has had to try to care for these individuals is impressed with the degree of suffering that . . . [they] go through unnecessarily simply because there are smoking workers around them (F. 185).

III. The effects of tobacco smoke on the plaintiff.

In 1974 or 1975, the plaintiff first began noticing that tobacco smoke was affecting him (Tr. 7). Tobacco smoke irritates his eyes and throat (F. 1, 165). On exposure to tobacco smoke, he feels "like . . . [he has] been poisoned" and he gets "severe chest pains" excruciating pain --"an immediate response," and "a delayed response . . . pain [that may last] two. . . or three. . . days" (Tr. 6). An affidavit from Dr. Thomas G. Randolph, who examined the plaintiff in June, 1980 at the Environmental Control Unit of the American International Hospital in Chicago (F. 164) states that Smith has "a clinically documented adverse reaction to cigarette smoke" (F. 166). In Smith's

---

(footnote 2 continued from p. 13)

Public Health Services and Mental Health Administration, National Center for Health Statistics, Rockville, Md. (1973), pps. 15, 16, 17.

words:

> I don't experience a happy, normal life unless I'm away from tobacco smoke.

Tr. 6). When someone next to him smokes, he must leave (Tr. 7). The effects are cumulative; the chest pain gets worse after an hour or two of exposure (Tr. 164, Tr. 6). The effects of the smoke abate when he is away from work for a period of time (Tr. 7; F. 1-2):

> . . . by Friday I'm sick. Sometimes by Sunday I'm feeling fine. (Tr. 8)

IV. The plaintiff's efforts at remedy.

When, in 1976 the plaintiff "was breathing smoke with every breath" because he was "in the same proximity . . . [to] a very heavy smoker," he asked to have his seat changed (Tr. 7; F. 1). His seat was changed, but to a worse location, one near another heavy smoker (Tr. 7). Starting in 1975, the plaintiff complained to every level of the defendant's plant management, that tobacco smoke was making him sick (Tr. 8). He appealed to the engineer personnel relations manager, to department chiefs, to his general manager (Tr. 8). He used the company's anonymous complaint procedure ("Comm-Line") to complain (F. 2). He made formal requests that the company separate smokers and nonsmokers (Tr. 8). On one occasion he sought a transfer to the

Bell lab, Western Electric in San Antonio, which he had visited and found had "virtually clean air" (Tr. 15).

In addition to seeking remedy within the company, the plaintiff wrote letters asking for help and filed complaints with a number of agencies, government and private. He inquired of the Federal Information Center and was told "[n]o mandate exists by any federal agency to control smoking in the workplace" (F. 239). He inquired of the Environmental Protection Agency and was told it had no authority over the problem. He wrote to the then Secretary of the Department of Health, Education and Welfare, Joseph Califano; he wrote to the National Institute for Occupational Safety and Health (NIOSH), to the National Cancer Institute, to the National Clearing House Office on Smoking and Health, to the Equal Employment Opportunity Commission, to the Office of Federal Contract Compliance Program (Tr. 25; F. 240), to the Occupational Safety and Health Administration (which told him there were no guidelines regulating cigarette smoking (Tr. 25)), to the Missouri Human Rights Commission, Division of Health, Environmental Quality. On one occasion, he filed a handicapped person form with a state agency,

although "I don't consider myself handicapped unless I'm in the presence of smoke" (Tr. 16). He appealed to the County of St. Louis Health Services, to the Health System Agency of Greater St. Louis, to the St. Louis Heart Association. He appealed to the American Lung Association, to the American Cancer Society, to various nonsmokers' rights groups -- Action on Smoking and Health, Environmental Improvement Associates, Group Against Smoking Pollution (F. 240).

V. The company's responses to the plaintiff.

The company's early responses were to move the plaintiff about, to different locations, in each of which there is smoke; the moving about did not result in any improvement in the situation (F. 2). In January, 1978, the defendant told the plaintiff not to submit any more "Comm-Line" forms regarding smoking because it would not process them (F. 2). It refused to consider the plaintiff's suggestion that it separate smokers and nonsmokers (Tr. 8).

On January 16, 1979, an investigator from NIOSH conducted "a limited health hazard evaluation survey" of the facility (F. 17). The investigator handed out "medical questionnaries" to eighty employees (F. 17). Sixty-six responded. Of those, twenty-four (or 36%) had complaints (F. 17). Thirty-seven percent of the

exsmokers and forty-two percent of the nonsmokers who had "never smoked" had complaints about the smoky air (F. 23). The NIOSH investigator was "surprised to find" (F. 23)

> that thirty percent of the employees who smoked complained of excess smoke in the work area (Ibid.).

The complaints "were for the most part not an everyday occurrence but rather occasional complaints which occur during the week under varying [extreme] environmental conditions . . ." (F. 17). Most of the complaints were of stale, stuffy air from cigarette smoke, resulting for the most part in mild transient symptoms of eye and throat or respiratory tract irritation, headaches and cough" (F. 22). "Eight, or 12% of the 66 participating employees had existing health problems (e.g. allegies, angina pectoris, etc.) which make them more susceptible to airborne contaminants than other employees" (F. 22-23). "Three of the 24 employees who complained had complaints . . . [of periodic] shortness of breath, [of] chest pains, [and of] persistent, rough cough" (F. 23).

The NIOSH investigator tested for the presence of eight chemicals. (There is nothing in the record to indicate whether employees maintained the same smoking patterns during the tests.) His report,

made in March, 1979, indicated that he had obtained positive results for one chemical, carbon monoxide, which it found to be present at a maximum of eight parts per million (8 p.p.m.) (F. 17). The E.P.A. Federal Air Quality Standards for outside air limit concentrations to an average of 9 p.p.m. (F. 145, 89). Applying its standards for "occupational exposure" (F. 20), NIOSH did not identify "any airborne concentrations of toxic substances that could be considered a hazard to employees . . .," but found that "environmental conditions [in the premises] may upon occasion be potentially toxic for those employees who may be more sensitive to environmental conditions. (F. 23), and recommended that "[a] 'policy on smoking' be established . . .[and that] [t]he establishment of non-smoking areas . . . be considered (F. 25).

Fourteen months later, in April, 1980, the defendant adopted a "smoking policy." It provides, in part:

> 1) It is the policy of Western Electric to protect the rights of both smokers and non-smokers by providing accomodations for both employee groups.
>
> 2) Except in areas designated as non-smoking, supervisors should made a reasonable effort to separate in work areas, employees who smoke fro those who do not smoke. This, of course, is subject to normal business needs, which is the controlling factor.

> 3) "No Smoking" areas will be designated in all areas devoted to the storage and use of combustible materials and which by the quantities involved and the manner handled will present or create a fire hazard. These areas shall include, but not be limited to, the following:
>
> a) Service Center; Shop and Warehouse.
> b) Facilities for storage of Class A material (e.g. stationery storage rooms, vault, libraries, etc.).
> c) Maintenance or repair areas and associated storage rooms.
> d) Janitors' closets and store rooms
> e) Loading, receiving and shipping platforms and areas, including truck courts.
> f) Reproduction and duplication areas or rooms.
> g) Areas within five feet of duplicating equipment that may be located in other than reproduction or duplication areas (e.g. walkup xerox machines).
> h) Computer rooms, including tape storage libraries or rooms and associated computer operations such as bursing or data entry.
> i) Restrooms.
> j) Mailrooms.
> k) Kitchen and food preparation areas.
> l) Medical areas, except as determined by the local Medical Director.
> . . . . (F. 27-28).

The defendant required the plaintiff to get medical documentation of how tobacco smoke affects him (Tr. 19) and in June, 1980 the plaintiff underwent three weeks of testing at the Environmental Control Unit of the American International Hospital in Chicago. (Tr. 19-20; F. 164-156) Dr. Randolph's report

(F. 164-166) was the result. Randolph's report concluded "Mr. Smith . . . evidences a clinically documented adverse reaction to tobacco smoke." (F. 166) and "should avoid its contact wherever and whenever possible" (F. 165).

The defendant, on the plaintiff's request, gave him a respirator to wear (Tr. 8) and put him in a room to the back of the building, in a more isolated area, with one smoker, whom it asked to cooperate (Tr. 9). The respirator proved ineffective in preventing the chest pains and the other effects (Tr. 9-10). The defendant provided him with a second respirator, which also proved ineffective (Tr. 10). (Additionally, the plaintiff "felt very silly wearing this thing" (Tr. 1). The defendant offered the plaintiff a job in the computer room (where it does not permit smoking), but because the job meant a reduction in the plaintiff's pay of $500 a month, he refused it (Tr. 9, 16). The defendant has steadfastly refused to prohibit smoking in the plaintiff's work area (Tr. 8).

POINTS RELIED ON

The county circuit court erred in dismissing the plaintiff's petition for failure to state a claim. The petition, with its supporting affidavits and the testimony elicited at the hearing on the motion, document the harm from involuntary smoking and its long-term risks, as well as the harm it is doing to the plaintiff. The harms and risks are physical and substantial. Since smoking is not a necessary by-product of the defendant's business, they are also unnecessary. The allegation and supporting evidence also establish that the defendant has had ample notice of these effects, and that it has, by a deliberate policy, permitted its employees to smoke in the area where the plaintiff works. The defendant has thereby violated its common law obligation, long recognized under Missouri law in other contexts, to use due care to protect persons lawfully on its premises from harm it has reason to anticipate. Hughes v. St. Louis Nat. League Baseball Club, 359 Mo. 993, 224 S.W.2d 989 (1949); Schamel v. St. Louis Arena Corp., 324 S.W.2d 375 (Mo. App. 1959), Willis v. Rivermines I.G.A. Supermarket, 350 S.W.2d 437 (Mo. App. 1961); Schneider v. Southwestern Bell Telephone Co., 354 S.W.2d 315, 318 (Mo. App. 1962). The defendant has also violated its common law duty, also recognized

under Missouri law in other contexts. Hightower v. Edwards, 445 S.W.2d 273 (Mo. 1969); Daynarsh v. Hannibal & St. J. RR Co., 103 Mo. 570, 15 S.W. 554 (1891); Moles v. Kansas City Stock Yards Co., 434 S.W.2d 752 (Mo. App. 1968) and by other jurisdictions in the same context as here, Shimp v. New Jersey Bell Telephone Co., 145 N.J. Super. 516, 368 A.2d 408 (1976); Hubbs v. Davidson, et al., Mass. Super. Ct. Eq. No. 41971 (1980)(unreported) to provide its employees with a safe place in which to work. Neither Contress nor the Occupational Health and Safety Administration has preempted a Missouri Court from acting. 29 U.S.C. §563(b)(4). Portland Huron Cement v. City of Detroit, 362 U.S. 440 (1960) Shimp v. New Jersey Bell Telephone Co., 145 N.J. Super. 516, 522, 368 A.2d 408, 410-411 (1976). The plaintiff's remedy at law is inadequate. Donovan v. Pennsylvania Co., 199 U.S. 279, 305 (1905); Jenkins v. Local Union No. 6313, 271 S.W.2d 71 (Mo. App. 1954). The plaintiff has exhausted all other avenues of redress, and should be given equitable relief. Equitable relief is both simple and practical.

ARGUMENT

I. THE DEFENDANT, BY PERMITTING SMOKING IN THE AREA WHERE THE PLAINTIFF WORKS, IS EXPOSING THE PLAINTIFF TO UNNECESSARY RISKS OF SERIOUS BODILY HARM, THEREBY VIOLATING ITS COMMON LAW DUTY TO USE ORDINARY CARE TO PROTECT THE PLAINTIFF FROM SUCH RISKS.

A. The Defendant has a Common Law Duty to Protect the Plaintiff from Harm from Third Persons which, in the Exercise of Ordinary Care, it Should Anticipate and Can Prevent.

One who is in control of premises has a duty to use ordinary care towards business invitees. Restatement, Torts 2d §343. The duty is well established under Missouri law, and protects a person every time he gets on a bus, Markley v. Kansas City Southern Ry. Co., 90 S.W.2d 409 (Mo. 1936), or goes to a hotel, Cunningham v. Bellerive Hotel, 490 S.W.2d 104 (Mo. 1973); Shute v. Prom Motor Hotel, Inc., 446 S.W.2d 137 (Mo. App. 1969), or shops in a store, Willis v. Rivermines I.G.A. Supermarket, 350 S.W.2d 437, 440 (Mo. App. 1961); Hoffman v. The Kroger Co., 340 S.W.2d 152, 154 (Mo. App. 1960); Kennedy v. Phillips, 5 S.W.2d 33 (Mo. 1928), or lawfully walks or works on telephone company property, Wyatt v. Southwestern Bell Telephone Co., 514 S.W.2d 366 (Mo. App. 1974); Schneider v. Southwestern Bell Telephone Co., 354 S.W.2d 315 (Mo. App. 1962).

This duty includes an obligation to use ordinary care not to expose business invitees to unreasonable

hazards, including hazards emanating from third persons. A party in control of premises who knows or ought to know that actions by a third party pose a danger of unreasonable harm to someone lawfully on the premises, must use ordinary care to prevent such harm. Hughes v. St. Louis Nat. League Baseball Club, 359 Mo. 993, 224 S.W.2d 989 (1949) (proprietor of baseball park liable for failing to stop "horse play" by third parties in the course of which plaintiff was injured); Schamel v. St. Louis Arena Corp., 324 S.W.2d 375 (Mo. App. 1959) (proprietor of roller rink liable to patron injured by speed skater); Raybourne v. Gicinto, 307 S.W.2d 29 (Mo. App. 1957) (tavern owner liable when he threw patron out tavern door and into the arms of belligerent third parties).

The duty applies whether the hazard stems from third persons' intentional acts, Raybourne v. Gicinto, supra; or from their negligence. Hughes v. St. Louis Nat. League Baseball Club, supra; Schamel v. St. Louis Arena Corp., supra. It applies to employers. Lathrop v. Rippee, 432 S.W.2d 227 (Mo. 1968) (employer breached duty of ordinary care to employee when it placed employee in front of large unreinforced glass window at street level of heavily travelled road, and the employee was injured when an automobile crashed through the window.)

An employee working on his employer's premises is a business invitee and is entitled to the protection of one. Schneider v. Southwestern Bell Telephone Co.,

354 S.W.2d 315, 318 (Mo. App. 1962). The reason for imposing the duty is, of course, that the defendant is in control of the premises and can act to protect the plaintiff, while the plaintiff normally cannot. Hughes v. St. Louis Nat. League Baseball Club, 359 Mo. 993, 999, 224 S.W.2d 989, 993 (1949); Kline v. 1500 Massachusetts Ave. Apartment Corp., 141 U.S. App. D.C. 370, 374, 439 F.2d 477, 481 (1970).

The negligence principle has not heretofore been applied to one in control of premises who permits an invitee to be exposed chronically and against his will to the hazards of tobacco smoke, probably because the evidence about the harmful effects of tobacco smoke is recent. This court should recognize the legal implications of the medical evidence on involuntary smoking by recognizing that the hazards of involuntary smoking constitute legally cognizable harms, worthy of judicial protection against. To grant relief would not require the court to establish new principles of law; it would only require that the court apply some of the most well established principles.

One of the most basic of these principles is the right to the inviolability of one's body. 1 Restatement, Torts 2d §18. Intrusions far more limited in scope have evoked judicial response in a wide variety of contexts. See e.g., Alcorn v. Mitchell, 63 Ill. 553 (1872) (single instance of spitting in the plaintiff's face); Fisher v.

Carrousel Motor Hotel, Inc., 424 S.W.2d 627 (Tex. 1967)(single instance of snatching plate from the plaintiff's hand, accompanied by racial slur); Malczewski v. New Orlenas Ry. & Light Co., 156 La. 830, 101 So. 213 (1924) (insulting language); Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344 (1961) (annoying telephone calls). Even if the hazards of second-hand smoke were trivial, the court should still protect against them. It should make no difference whether third parties give a plaintiff black eyes, cf. Quigley v. Wilson Line of Massachusetts, Inc., 338 Mass. 125, 128, 154 N.E.2d 77, 79 (1958), or red ones. As Mr. Justice Cardozo observed in another context,

> It is of no concern of ours that the controversy at the root of this lawsuit may seem to be trivial . . . To enforce one's rights when they are violated is never a legal wrong . . .

Morningstar v. LaFayette Hotel Co., 211 N.Y. 465, 468, 105 N.E. 656, 657 (1914).

To measure the defendant's conduct by the usual test of negligence, the court need only consider

> the likelihood that . . . its conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which . . . [it] must sacrifice to avoid the risk.

Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940); Accord, 1 Restatement, Torts 2d §§291-293.

In the case at bar, the defendant's conduct exposes the plaintiff and the other nonsmokers in the work area to a variety of hazards: some transitory and comparatively minor; others, long term and exceedingly serious. Of the transitory harms, perhaps the least sigificant is the distinctive and offensive odor to which involuntary smokers are subjected, created at least in part by the ammonia and pyridine in the smoke (F. 147). Because the smoke is drawn to people like iron filings are drawn to a magnet, particulates in the smoke cling to clothes and hair (F. 147). Other comparatively minor hazards include eye, nose and throat irritation, headache and dizziness. Seventy percent of people exposed to tobacco smoke are likely to suffer eye irritation (F. 96, 157), which is probably caused by acrolein, acetaldehyde and other irritating substances in the smoke (F. 93). Thirty percent are likely to suffer nasal symptoms (F. 157), and significant numbers are likely to suffer cough, sore throat, hoarseness or wheezing (F. 157). Carbon monoxide in the smoke displaces oxygen in the blood thus impairing the blod's ability to transport oxygen (F. 97, 185); then, depending on the duration and intensity of exposure, some may suffer headaches or dizziness (F. 157)[3] and, on sufficient exposure, impairment of psychomotor skills and cognitive function (F. 102). Secondhad smoke may impair the functioning of nonsmokers' cilia in removing inhaled dust particles and bacteria.

---

[3] Similar symptoms may be produced by irritation of the lining of the sinuses. Ryan et al., Synopsis of Ear, Nose and Throat Diseases, Mosby (3d ed. 1970) pp. 198-199.

(F. 162). These enumerated harms are not speculative. Even the NIOSH investigator's limited survey tended to confirm at least some of these effects. A third of the defendant's employees responding to his questionnaire suffered "eys and throat or respiratory tract irritation, headaches and cough" (F. 22). The short-term effects on the plaintiff are not questioned: eye and throat irritation (F. 1, 165), headache, dizziness, difficulty in concentrating (F. 1, 165), burning sensation in his chest (Tr. 6, F. 164), effects that cumulate during the workweek and last well into his weekend (Tr. 8).

To persons with existing health problems, the short-term effects of exposure to tobacco smoke are potentially more serious. (Twelve percent of the 66 participating employees in the defendant's plant have health problems that make them particularly susceptible to airborne contaminants (F. 21-23). For the statistics for the population as a whole, see note 1 at pp. 7-8 supra.) The implication of Dr. Aronow's studies showing an earlier onset of anginal pain after exertion by persons with coronary artery disease on exposure to certain levels of tobacco smoke (F. 151) are obvious. For example, a fire necessitating rapid evacuation of the defendant's plant would put those employees at a greater risk simply because they had been breathing other people's tobacco smoke before the fire. The NIOSH investigator's report noted that several of the nonsmoking employees complained of periodic shortness of breath and chest pains from the existing smoke (F. 23).

Potentially more serious are the effects of chronic long-term exposure. One of the effects of chronic exposure to tobacco smoke at work, one study has found, is a significant reduction in small-airways function: the study found that the small-airways function of nonsmokers who had worked twenty years or more in an enclosed area where smoking was permitted or existed was

> not significantly different from . . . that of light smokers (F. 139).

Another more serious effect of chronic long term exposure to second-hand tobacco smoke may be the risk of lung cancer. Of the three recent studies of a possible link between involuntary smoking and lung cancer, two found a statistically signficant relation between a husband's smoking and the risk to his wife of developing lung cancer.[4] One found that "[a] non-smoking wife of

---

[4] The conclusion of the Garfinkle study, that passive smoking cannot play more than a very small role in the development of lung cancer"(JNCI 66, at 1065) is suspect for three reasons. First, both the group(s) studied and the control group were from the United States, and, as Garfinkel himself recognizes,

> exposures in Japan and Greece may be very different than they are in the United States (Id. at 1064)

Thus the cancer risk from involuntary smoking by nonsmoking wives may be much better measured in places such as Japan or Greece where wives spend more time at home than do wives in the United States and are therefore exposed for longer times to tobacco-contaminated air. Second, for both the study and control groups

(continued on p. 31)

a regular smoker has a risk of developing lung cancer which is twice as high as that of a non-smoking woman married to a non-smoker" (Trichopoulos, Kalandidi, Sparros & MacMahon, Lung Cancer and Passive Smoking, Int. J. Cancer: 27: 1-4 (1981). The other, the study by the Chief of the Epidemiology Division of the National Cancer Center Research Institute of Tokyo, found a "dose-response" relationship: death rates from lung cancer for the nonsmoking wives 2.08 times higher if the husband smoked a pack or more a day, 1.61 times higher if the husband smoked less than a pack a day. (Hirayama, Non-Smoking Wives of Heavy Smokers Have a Higher Risk of Lung Cancer: A Study From Japan, Brit. Med. J. 282: 183-185 at 183-184 (1981). In absolute terms the risk is small, an increase of about thirteen deaths per 100,000 (New York Times, Jan. 16, 1981, A 1 Col. 1), but as one court has said

> We see no reason why an actor engaging in conduct which entails a large risk of small damage and a small risk of other and greater damage, of the same general sort, from the same general forces, and to the same class of persons, should be relieved of responsibility for the latter simply because

---

(footnote 4 continued from p. 30)

the classification "nonsmokers" included persons who "smoked only occasionally" (Id. at 1061, 1063). Finally, the control study did not take into account the possibility that some of the persons who died of lung cancer may have had prolonged or intense exposure to tobacco-contaminated air not of their own making. Thus, Garfinkle's control group may have included "nonsmokers" who died of lung cancer, the victims of other peoples' tobacco smoke.

> the chance of its occurrence, if viewed alone, may not have been large enough to require the exercise of care.

Petition of Kinsman Transit Co., 338 F.2d 708, 725 (2d Cir. 1964). But the risk, even if viewed alone, is significant enough to require the exercise of care. The harm, if it materializes, is, of course, devastating. Of the estimated 122,000 Americans who will be told this year that they have lung cancer, only about 10% will live another five years or longer (New York Times, Jan. 16, 1981, A 1, col. 1).

Not the least of the harms from involuntary smoking is the impariment of the plaintiff's right to decide for himself whether to undergo the risks of smoking. A smoker, weighing the risks, may decide to take them and continue to smoke. If that is his right, it the plaintiff's right to choose not to smoke. Indeed in this case, Smith, an ex-smoker, gave up smoking because of the damage it was doing to his health (Tr. 6). The defendant's policy of tolerating smoking the work place forces the plaintiff to smoke. Indeed, if the White and Froeb study is correct, he is smoking, by breathing other people's tobacco smoke, the equivalent of from one to ten cigarettes a day (F. 139).

Balanced against the likelihood and seriousness of harm a defendant's conduct creates is "the interest the

defendant must sacrifice to avoid the risk." Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940). As will be argued below at pp. 37-39), there are no legitimate interests the defendant must sacrifice to avoid the risk.

B. The Defendant has Breached its Duty of Care to the Plaintiff.

When the plaintiff first went to work for the defendant its policy prohibited its employees from smoking at their desks. Thereafter, the defendant changed that policy and permitted employees to smoke at their desks. It does not appear from the record when the change came about. It may have come about before the dangers of involuntary smoking were widely known. However, the defendant put in writing its policy of permitting smoking, in April, 1980, fourteen months after the NIOSH investigator's report and long after it had been abundantly educated to the risks (by the plaintiff's requests alone, if not otherwise). At that time, it knew or ought to have known of the harms and risks of involuntary smoking.

The "smoking policy" it enforces -- which, incidentally is evidence of its control -- is a breach of its duty of ordinary care to the plaintiff. The stated purpose of the policy is

> to protect the rights of both smokers and non-smokers by providing accomodations for both employee groups.
>
> (1) by designating as no-smoking areas "all areas devoted to the storage and use of combustible materials . . ., [r]estrooms . . . [m]ailrooms . . . [k]itchen and food preparation areas . . . [m]edical areas . . .[f]acilities for storage of Class A material (e.g. stationery storage rooms, vault, libraries etc.) . . .

> [a]reas within five feet of duplicating equipment . . . [c]omputer rooms, including tape storage libraries or rooms . . ." and
>
> (2) by making "a reasonable effort - to separate in work areas, employees who smoke from those who do not smoke . . . of course, subject to normal business needs, which is the controlling factor." F. 27-28 .

The fundamental fallacy of the defendant's "smoking policy" is its assumption that smoking employees have a "right" to smoke at their desks, even if it means smoking into the air other employees nearby must breathe. Where does this "right" come from? It is not conferred by the common law or by statute. On the contrary, the common law from its earliest origins established a contrary principle -- that everyone has a right to the integrity of his body, a right not to have his body unnecessarily intruded upon by others. Under basic common law principles a smoker's "right" to smoke stops when his smoke intrudes upon another's body without his consent or acquiescence. As Bernard Shaw observed, "A smoker and a nonsmoker cannot be equally free in the same railroad carriage" (F. 55).

The "right to smoke" in the case at bar does not come from the common law or from any statute; it was bestowed by the defendant's "smoking policy." That policy, which attempts to accomodate both groups, "subject to normal

business needs," has already accepted the potential offense of the smoker as a "right" worthy of accomodation vis-a-vis the health and the right to bodily integrity of the nonsmoker. That policy has already subordinated to the conferred "right," the right of the nonsmoker not to be smoked on.

Ironically, the defendant's "smoking policy" also appears to be aimed in significant part at protecting its equipment and supplies, rather than its nonsmoking employees. Apparently, in the defendant's scale of values, the plaintiff is not "Class A material" (F. 28).

The defendant's policy is flawed in another respect. Segregation of smokers and nonsmokers "of course is subject to normal business needs, which is [sic] the controlling factor." (F. 2). Smoking, however, is neither necessary to, nor an incident of, the defendant's business. The defendant is in the communications business, not the business of testing tobacco. Unlike other businesses, where pollution may be a necessary incident to an industrial process, nothing in the making of communications equipment requires, to any degree, the smoking of tobacco. The "normal business needs" to which the defendant refers means nothing more than the need for nicotine of a minority (and probably a dwindling minority) of the defendant's employees.

To satisfy those needs, the defendant has, at one time or another, proposed that the plaintiff should (a) accept a demotion (to the computer room), (b) wear a gas

mask (in a back room), (c) wait for a state clean air act to be passed. These alternatives are patently unreasonable. See National Cotton Council of America v. Marshall, 617 F.2d 638, 653-654 (D.C. Cir. 1979) (rejecting an industry proposal to deal with cotton dust in the work place by using respirators and by job transfers.) The defendant's duty is not met by measures which imply that the plaintiff is peculiar and should be isolated. The smokers are in the minority and initiate the offense; they, not the plaintiff, need special attention. And, certainly, moving the plaintiff next to a smoker did not meet the defendant's duty. Indeed a California court has held that being moved next to a chain cigar smoker is "good cause" for resigning, entitling the employee to unemployment compensation benefits. Case of Nelson Schwartz reported in "The Smoking Digest: Progress Report on a Nation Kicking the Habit, U.S. Dept. of H.E.W., Pub. Health Serv., Nat'l. Insts. of Health, Nat'l. Cancer Inst., Bethesda, Md. (1977) at p. 87.

The defendant raises the spectre of labor unrest were its no-smoking rule extended to the remaining work areas. However, many employees whose jobs require attendance for long stretches -- e.g., miners, food processors, kitchen help, employees at gasoline storage depots, bus drivers, reference librarians, clergymen, museum guards, sales clerks, judges, court clerks -- abide by a no-smoking rule. Presumably so too, do the defendant's

employees who work in its kitchen or in its computer room.

The issue is, of course, not whether the defendant's smoking employees can smoke. The issue is where they may do so. The defendant assumes that permitting smoking only in areas away from the plaintiff's work area would waste time and decrease productivity. The assumption is dubious for several reasons. The defendant's smoking employees no doubt take breaks for many purposes other than smoking and could no doubt combine at least some of those purposes with smoking. Second, there is no necessary relation between productivity and the number of work breaks. Roethlisberger, F.J. & Dickson, W.J., Management and the Worker, an Account of a Research Program Conducted by the Western Electric Company, Hawthorne Works, Chicago, Harvard University Press, Cambridge, Mass. 1939 (1970 ed.), Chap. III, Experiment with Rest Pauses, pp. 40-59. Finally, a no-smoking-at-the-desk rule would discourage people like the plaintiff, who, when they come to work for the company do not smoke, from taking up smoking, and would encourage smokers to quit or, at least, to cut down on their smoking. Thus, a no-smoking-at-the-desk rule would increase productivity in the long run. See Cigarette Smoking and Health Characteristics, (Public Health Serv. Publication No. 1000 - Series 10, No. 34)(1967) (showing that cigarette smokers have more days of work loss, days of bed disability, and days of restricted activity than smokers and

that, in general, the more cigarettes a person smokes, the more such days there are likely to be.) See also Table No. 209 "Cigarette Smoking and Health Characteristics; 1970-1979," Statistical Abstract of the U.S., U.S. Dept. of Commerce, Bureau of the Census, 1980, p. 130. (Each year, the cost of smoking in absenteeism, lost wages and lower productivity is according to a former secretary of H.E.W., eighteen billion dollars. Califano, Jr.,Joseph J., "Governing America, An Insider's Report from the White House and the Cabinet," Simon and Schuster, New York, 1981, p. 186.) By 1978, three percent of all U.S. companies and six percent of Canadian companies were offering their smoking employees bonuses or other incentives to quit smoking, because they found it makes economic sense. Business Week, May 29, 1978, p. 68.[5]

But even if the defendant's assumptions were correct, the defendant's premise is that initial griping by some smokers and an assumed incremental loss in productivity are more important than incremental impairment of the health of its nonsmoking employees. Put another way, the defendant's "smoking policy" is, at bottom, that the

---

[5] For example, "[a]fter a survey by Dow Chemical Co. showed it was paying more than $650,000 in excess wages in its Texas operating division because of lost work days by smokers, the company instituted a bonus program for smokers to quit. Prizes range from weekly cash bonuses to offers of boats and motors." "The Smoking Digest: Progress Report on a Nation Kicking the Habit," U.S. Dept. of H.E.W., Pub. Health Serv.,Nat'l. Insts. of Health, National Cancer Inst., Bethesda, Md. (1977) p. 43).

interest of those employees who have become accustomed to smoking at their desks should be catered to by putting the plaintiff and the defendant's other nonsmoking employees at risk of their health.

If some of the defendant's employees started pinching other employees, or slapping them on their buttocks, or spitting on their sleeves, or spraying ammonia about in small quantities, and the defendant knew of the practice and knew that the victims objected to it, surely the defendant would not be talking about pinchers' rights, or slappers' rights, or spitters' rights or sprayers' rights. It would put a stop to such practices, and quickly. Smoking is equally as offensive and the harm it does vastly exceeds any harm conceivable from the posited practices. If every day the defendant's employees released from canisters the exact chemicals they are now releasing from their cigarettes, the defendant would not defend their "right" to pollute the air, but would act to protect the plaintiff. Its failure to do so here is unreasonable, and is a violation of its common law duty to protect the plaintiff from harms from third persons which it can anticipate and prevent.

II. BY PERMITTING SMOKING IN THE AREA WHERE THE PLAINTIFF WORKS THE DEFENDANT IS VIOLATING ITS COMMON LAW DUTY TO PROVIDE THE PLAINTIFF A SAFE PLACE IN WHICH TO WORK.

The defendant, as the plaintiff's employer, also has a common law duty to provide him with a safe place in which to work. Todd v. Watson, 501 S.W.2d 48 (Mo. 1973); Hightower v. Edwards, 445 S.W.2d 273 (Mo. 1969); Doyle v. Missouri, K. & T. Trust Co., 140 Mo. 1, 41 S.W. 255 (1897); Dayharsh v. Hannibal & St. J. RR. Co., 103 Mo. 570, 15 S.W. 554, 555 (1891); Moles v. Kansas City Stock Yards Co., 434 S.W.2d 752 (Mo. App. 1968); Johnston v. Sel-Mor Garment Co., 571 S.W.2d 691, 693 (Mo. App. 1978).

The duty of an employer to provide a safe workplace has been applied specifically to a work place made unsafe by an employer's refusal to prohibit smoking. Shimp v. New Jersey Bell Telephone Co., 145 N.J. Super. 516, 368 A.2d 408 (1976).[6] The New Jersey court in Shimp found that a workplace where smoking is permitted is not a safe place in which to work. The court said:

---

[6] The Shimp case has been followed in at least one case amicus is aware of, Hubbs v. Davidson et al., Mass. Super. Ct. Eq. No. 41971 (1980) (unreported) (granting equitable relief in favor of a C.E.T.A. trainee against adminstrators of a job training program and against two trainees smoking on the job). The Shimp case has also, to amicus' knowledge, been of great help in persuading employers to adopt no-smoking policies voluntarily.

> There can be no doubt that the by-products of burning tobacco are toxic and dangerous to the health of smokers and nonsmokers generally and to this plaintiff in particular. (145 N.J. Super. at 526, 368 A.2d at 413, F. 34).
>
> 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 upon the same air supply. (145 N.J. Super. at 530, 368 A.2d at 415, F. 36).

In the case at bar, were it not for the NIOSH investigator's limited survey of January 16, 1979, there is little doubt that Smith's workplace is not a "safe place in which to work." The plaintiff's testimony about the quality of the air in the area where he works was corroborated by co-workers. One describes it as "foul, obnoxious and highly polluted" (F. 243); another as "typically smoke-filled" (F. 241). "The air where we work is sometimes so bad you have to force yourself to breathe." (F. 242). Twenty-seven of the 50 to 60 people there smoke. Among the smokers are two chain smokers of cigarettes, three cigar smokers, and two pipe smokers (Tr. 4-5, 7; F. 201). James Repace, a senior staff member of the E.P.A. estimated that pollution levels under such conditions would exceed the E.P.A.'s outdoor standards (F. 201).[7]

---

[7] They would no doubt exceed Missouri's outdoor air quality standards as well; see 10 C.S.R. 10-6.010.

The investigator's conclusion that he had not identified "any airborne concentrations of toxic substances that could be considered a hazard" (F. 23) should not be dispositive for several reasons. First, the evaluation was "limited" (F. 17, 21) both in time and scope. It was done in one day (January 16, 1979), and the smokers were probably aware of the investigator's presence and may well have modified their behavior as a result of that knowledge.

Second, as will be argued in argument III of this brief, OSHA standards are oriented to industrially-produced hazards and are not directed at tobacco smoke: those standards when applied to tobacco smoke are, therefore, fragmentary and inadequate. In the case at bar, the NIOSH investigator did not, for example, test for particulates or measure their likely effect on the capacity of the nonsmokers' cilia to cleanse their air-passages. Nor did he measure the long-term effect the second-hand smoke may be having on the nonsmokers' small-airways passages. Nor did he test for dimethyl-netrosamine or benzo(a)pyrene (the powerful carcinogens in tobacco smoke (F. 74, 93), for acrolein or acetalde-hyde (eye irritants, F. 93), for hydrogen cyanide (the poison that attacks respiratory enzymes and that is found in tobacco smoke at levels 160 times that con-sidered dangerous (F. 146). Of the thousands of constitu-ents in tobacco smoke, the investigator measured only for eight of them (F. 17).

Third, certainly the air around the seats next to the smokers, and particularly the air around the seats next to the chain smokers is unsafe, and someone has to sit next to the smokers.

Fourth, safety, like negligence, is a relative concept. See, Calebresi, The Decision for Accidents, 78 Harv. L. Rev. 713 (1965). There are degrees of safety. One can accept the investigator's findings and reject his conclusion. Air that is contaminated enough with tobacco smoke to produce headaches, eye and throat irritation, cough (F. 22), and in some of those who have to breathe it, shortness of breath and chest pains (F. 23), is, (as the NIOSH investigator's report itself acknowledges), to that extent, potentially not "safe". Air contaminated with tobacco smoke which on chronic exposure to it will impair one's small airways passages is, potentially not "safe." And air contaminated with tobacco smoke which on chronic exposure may double one's risk of dying from lung cancer is potentially not "safe."

If safety is regarded as a relative matter, then clearly Smith's workplace is not safe, for safety is not a matter of one or two parts per million. The defendant's obligation to provide the plaintiff a safe workplace, like the defendant's obligation to use due care to protect the plaintiff from anticipatible harm

from third persons, measures the utility of the defendant's conduct against the risks it entails. Since the defendant's conduct in this instance serves no legitimate purpose, there is no need to tolerate as safe one unnecessary part per million of carbon monoxide, one inert particulate that may lodge for days in someone's lungs, one iota of benz(a)pyrene or one iota of dimethylmetrosamine from which there is even the remotest possibility of getting lung cancer.

To argue, as defendant does, that the plaintiff's workplace is not unsafe, because the smoke affects relatively few people and affects only the plaintiff drastically, is wrong for three reasons. (1) All nonsmoking (and smoking) employees inhale the constituents of the smoke and their bodies react to them. The fact that some employees may not notice the effects does not mean that they are not being affected. For example, that some employees may not become dizzy does not mean that the carbon monoxide is not entering their blood and impairing its oxygen-carrying capacity or the tobacco smoke is not irritating the lining of their sinus The same is true of the effect of the particulates on the functioning of their cilia, the effect of the smoke on the small-airways function. Everyone is affected by smoky air -- some more seriously or sooner than others. (2) The defendant's argument is a variant of an argument that seeks to blame the victim for its own wrong. It blames the plaintiff for being one of

its employees who is affected earlier and more seriously. The plaintiff is merely one of an estimated eight million people (F. 154) in the United States who are clinically sensitive to tobacco smoke. (3) Even if only a few people were affected seriously, the workplace is for that reason alone unsafe. A substantial part of the population suffer from preexisting diseases (heart disease, chronic asthma, chronic obstruction lung disease) (see footnote 2, supra at pp. 13-14) that make involuntary smoking particularly hazardous. As the investigator's questionnarie desmonstrated, the same is true at the defendant's plant: of those responding to the questionnaire, 12% suffered from such diseases (F. 22). Even if the defendant were meeting its duty to the majority of employees, it is surely not meeting its duty to the others, including the plaintiff.

III. EQUITABLE RELIEF IS APPROPRIATE

A. State Relief Has Not Been Pre-empted by Federal Action.

The Occupational Safety and Health Act of 1970 (Pub. L. 91-596, 84 Stat. 1590 appearing in 29 U.S.C. §651 et seq.), relied upon by the defendant as pre-empting a state remedy, was aimed at "occupational safety and health hazards." 29 U.S.C. §651(b)(1). What is meant by "occupational safety and health hazards" is clearly spelled out in the Senate Report recommending passage of the act, Senate Report No. 91-1282, 1970 U.S. Code Cong. & Adm. News, 5177. The report makes clear that the act was aimed at "industrial accidents" (Ibid.) and at illnesses caused by "industrial poison such as lead and mercury" (Id. at 5178), by "dusty trades" (Ibid.) such as "the processing of cotton" (Id. at 5179), by such things as "[c]arcinogenic chemicals, lasers, ultrasonic energy, beryllium metal, epoxy resins . . ." (Id. at 5178), by "asbestos, ionizing radiation, chromatic and certain dye intermediaries" (Ibid.), and by "[p]esticides, herbicides and fungicides used in" agriculture (Id. at 5179); in short the by-products of industrial and agricultural processes.

Tobacco smoke is not such a by-product. Unlike cotton dust or radiation, it does not arise out of

an industrial process. It is not incident to making communications equipment. It is, rather, the product of individual habits and arises from sources having no necessary or logical relation to production. Smoking is no more work-related than is gum chewing. If the events of Schamel v. St. Louis Arena Corp., 324 S.W.2d 375 (Mo. App. 1959) recurred, except that the speed skater was an attendant on duty in the rink and the injured victim another attendant, no one would suggest that federal law precluded a state remedy. The harms in the case at bar are not work-related merely because they occur at work; they would as well occur if the smoker and the plaintiff were roommates. The risks of involuntary smoking, in short, are not the kind of risks Congress was concerned with when it enacted the OSH Act.

True to the Congressional purpose, OSHA has not undertaken generally to regulate on-the-job smoking. It has regulated on-the-job smoking only where, because of special circumstances, such as the danger of fire or the presence of other carcinogens, smoking poses a special hazard. See, e.g., 29 C.F.R. §1910.108(f)(4)(requiring "No Smoking" signs to be posted in the vicinity of dip tanks containing flammable or combustible liquids); 29 C.F.R. §1910.107(m)(2) (requiring such signs to be displayed where organic peroxides are stored, mixed or applied); 29 C.F.R.

§1910.109(c)(5)(vii) (prohibiting smoking within fifty feet of any building or structure used for storage of explosives); See also 29 C.F.R. §1910.106(d)(7)(iii), §1910.107(g)(7); §1910.109(e)(1)(i); See, also OSHA regulations prohibiting smoking (and chewing) of tobacco in "regulated areas" where specific carcinogens are manufactured, handled or stored, subsections (d)(3) of 19 C.F.R. §§1910.1004 through 1006, and of 1015. See, also subsection (g)(1)(iii) of the cited sections, requiring an employee who is assigned to such areas to undergo a physical examination at which the physician must consider whether "conditions of increased risk" one of which is "cigarette smoking" exists. See, also, the "respiratory questionnaire for textile workers inquiring specifically into the worker's smoking habits. 29 C.F.R. §1910.1043. See, in this connection, Current Intelligence Bulletin, Feb. 5, 1971, of the National Institute for Occupational Safety and Health (the advisory panel to OSHA) recommending that OSHA regulate smoking in the workplace where, because of the presence of other chemicals, their synergistic effect with tobacco smoke might pose special danger.) In short, all OSHA regulations that pertain to smoking are addressed to special risks smoking may pose in the context of a particular industrial process or activity.

The defendant in the case at bar argues that because OSHA has standards for some of the components of tobacco smoke, it regulates smoking. The defendant's recipe for tobacco smoke, however, lacks a few ingredients. Applied to tobacco smoke, OSHA's regulations are fragmentary. OSHA does not, e.g., test for particulates, or, as the defendant concedes, for some of the dangerous components of tobacco smoke. If OSHA intended to regulate smoking generally, it would not have made a partial listing of components. With respect to smoking, OSHA's regulations hardly represent a "scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Pennsylvania v. Nelson, 350 U.S. 497, 502 (1956) quoting from Rice v. Santa Fe Elevator Corp., 331 U.S. 218 at 230 (1947). Where OSHA has intended to regulate smoking, it has referred to smoking by name. E.g., 29 C.F.R. §1910. subsections 106(d)(7)(iii); 107(l)(4)(iii); 107(m)(2); 108(f)(4); 109(c)(5)(vii); 109(e)(l)(i). The same is true of other federal agencies. See, e.g., Postal Manual, Sept., 1974 §462.43 (prohibiting smoking by postal employees at service windows and counters). OSHA's measurements in the case at bar were also fragmentary in substance and time. OSHA measured CO levels and took a survey of surface symptoms. It did not measure for particulates, or for many of the toxic substances in tobacco smoke. It did not take measurements over

an extended time or take into account possible risks of chronic exposure to tobacco smoke. Nor did it take into account the fact that the risks are totally unnecessary to any federal or employment purpose. Because the risks did not, on the day it tested, exceed those that must be tolerated in the interests of maintaining industrial production, it took no action, except to pass the matter back to the company.

OSHA's standards do not apply to tobacco smoke because they are ill fitting, they also do not apply to tobacco smoke because the premise underlying the standards does not apply. The chemicals that OSHA's standards limit are necessary to, or are the by-product of, important activities -- the producing of goods, the mining of natural resources, the growing of crops. To eliminate exposure to those chemicals entirely would seriously curtail these activities. Therefore, some exposure to those chemicals must be tolerated in a productive society. The same is not true of tobacco smoke. No reason exists to tolerate any degree of exposure to tobacco smoke. To accord to smoking the tolerance of danger inherent in producing corn or cotton or coal, would be to accord to smoking the same tolerance given socially useful activities. In fact, smoking is a socially harmful activity.

Even if OSHA's list of chemicals completely described tobacco smoke, the plaintiff's common law right

would not be preempted . State law "should not give way unless there is a precise coincidence or regulation or an irreconcilable conflict between the two." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 229-230 (1947). The test of preemption is "whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." Jones v. Rath Packing Company, 430 U.S. 519, 525, rehearing denied 431 U.S. 925 (1977). But as the OSH Act plainly shows, it purpose is to supplement, not supplant, state law:

> Nothing in this chapter shall be construed to supercede or in any manner affect any workman's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities or employers and employees under any law with respect to injuries, diseases, or death or employees arising out of, or in the course of, employment. (29 U.S.C. §653 (b)(4).

Were the plaintiff's involuntary smoking to disable him from working, he might be able to collect worker's compensation benefits. See Fuentes v. Workers' Compensation Appeals Board, 16 Cal.3d 1, 128 Cal. Rptr. 671, 547 P.2d 447 (1976) (portion of employee's permanent diability attributable to on-the-job smoking; employer liable); Case of Harriet Brooks (T.W.A. flight attendant awarded disability from California Workers Compensation

Program after she developed allergy as result of passengers' smoking) "Stewardess Grounded by Smokers Wins $3,657 Suit," Los Angeles Times, April 8, 1977, reported in "The Smoking Digest: Progress Report on a Nation Kicking the Habit," U.S. Dept of H.E.W., Pub. Health Serv., Nat'l. Insts. of Health, Nat'l. Cancer Inst., Bethesda, Md. (1977), p. 87. If state action awarding damages is not preempted by the OSH Act, neither is state action granting equitable relief.

Furthermore, courts reviewing the specific cases of involuntary smoking in the workplace have held that there has been no preemption by OSHA of state common law. Federal Employees for Non-Smokers' Rights v. United States, 446 F. Supp. 181, 183 (1978); Shimp v. New Jersey Bell Telephone Co., 145 N.J. Super. 516, 522, 368 A.2d 408, 410-411 (1976). Hubbs v. Davidson et al., Mass. Superior Court Eq. No. 41971 (1980). As the New Jersey court in Shimp noted in granting equitable relief,

> OSHA in no way preempted the field of occupational safety. Specifically, 29 U.S.C.A. §653(b)(4) recognizes concurrent state power to act either legislatively or judicially under the common law with regard to occupational safety. (145 N.J. Super. at 522, 368 A.2d at 410-411)

For commentary in accord, see Hollander, Injunctions Against Occupational Hazards: Towards a Safe Workplace Environment, 9 Bos. Coll. Env't. Affairs L. Rev. 133,

146-147 (1980); Blumrosen, et al., Injunctions Against Occupational Hazards: The Right to Work Under Safe Conditions, 64 Cal. L. Rev. 702 (1976); Blackburn, Legal Aspects of Smoking in the Workplace, 31 Lab. Law J. 564, 565 (1980); Ashford and Katz, Unsafe Working Conditions, 52 Notre Dame Lawyer 802 (1977).

Even if OSHA's regulation of industrial and agricultural pollutants constituted a comprehensive regulation of on-the-job smoking, Missouri would be free to prohibit it. In Huron Portland Cement Co. v. City of Detroit, Mich., 362 U.S. 440, 80 S. Ct. 813, 4 L.Ed.2d 852, 78 A.L.R.2d 1294 (1960), the United States Supreme Court held that the fact that certain ships were used in interstate commerce and their equipment, including their boilers had been federally inspected, approved and licensed to operate in interstate commerce under a comprehensive system of federal regulations, did not prohibit the city of Detroit from enforcing its smoke abatement code against the ships. "[T]he intent to supercede the exercise by the State of its police power as to matters not covered by Federal legislation," said the Court ". . . is not to be implied unless the Act of Congress, fairly interpreted, is in actual conflict with the law of the state. . ." (citations omitted) 362 U.S. at 443.

Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973 relied upon by the defendant (F. 256) is not on point. The aircraft noise the city of Burbank sought to curtail by an ordinance imposing an 11:00 p.m. to 7:00 a.m. curfew on jet flights arose from aircraft, and local efforts at regulating flight would have seriously impeded interstate commerce. Tobacco smoke does not arise from making communications equipment, and a no-smoking rule in the work area of the defendant's Ballwin plant could have not the slightest ill effect on commerce. A uniform national rule is not required. (Precedents dealing with industrial by-products are equally irrelevant.) Noteworthy in Burbank is the recognition by the Court that the historic police powers of the states are not to be superceded unless clear Congressional intent to do so is manifest (Burbank, 441 U.S. at 633).

State laws prohibiting smoking in certain kinds of workplaces, such as mines, canneries and food preparation plants, libraries and many, many others (See F. 44-45) antedate the OSH Act. Clearly the act was not intended to preempt such laws. If the defendant were right about preemption, such laws would become unconstitutional. Traditionally, health and safety have been within the police power of the states to protect. Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960).

Furthermore, relief by the court would not interfere with any national interest or federal policy. There is no federal policy of, or interest in, permitting smoking in workplaces to any degree. What federal policy there is can be gleaned from the Surgeon General's Reports, which have discouraged smoking, and from Pub. L. 91-222,(the Public Health Cigarette Labelling Act of 1969), §2 appearing in 15 U.S.C. §§1331-1333, requiring health warnings on cigarette advertisements and labels.

When Congress has intended to preempt state action on matters relating to tobacco, it has known well enough how to do it. Thus, section two of the Public Health Cigarette Labelling Act of 1969 deals specifically with preemption, and provides:

> No requirement or prohibition based on smoking and health shall be imposed under state law with respect to the advertising or promotion of any cigarettes the packages of which are labelled in conformity with the provisions of this chapter. (15 U.S.C. §1334(b).)

Clearly there has been no explicit preemption here. Preemption, if it arises, arises by implication. Any such implication (that Congress intended to prevent the states from acting to curb people generally or to curb people in the defendant's plant specifically, from smoking on the job) is far-fetched.

B. Equitable Relief is Appropriate

1. Equitable relief is the plaintiff's only remedy.

The wrong to the plaintiff is a continuing one. It occurs every work day the defendant permits smoking in the plaintiff's work area. It occurs each time the defendant's permitting smoking causes the plaintiff chest pain, or headache, or dizziness; it continues all the while the defendant's permitting smoking puts the plaintiff at risk of even more serious injuries. Injunctive relief is appropriate where the injury is a recurring one or the risk a continuing one. Donovan v. Pennsylvania Co., 199 U.S. 279, 305 (1905). The plaintiff has no adequate remedy at law. See McCracken v. Sloan, 40 N.Car. App. 214, , 252 S.E.2d 250, 252 (1979) (action by employee for assault and battery against his superior held not to lie for two instances of cigar smoking in the absence of a showing that employee suffered a physical illness from inhaling the smoke.) Here, although the plaintiff can show injury and may well have an action at law, such an action would compensate him for past pain and suffering, but only equity can afford the plaintiff complete relief. Only equity can eliminate the source of that suffering. The plaintiff should not have to wait to be disabled, or to bear the risk of it, before getting redress. Only

equitable relief would also obviate a succession of lawsuits. And since only equity can also compel the defendant to act, only equity can vindicate the plaintiff's right not to be forced to inhale tobacco smoke.

The plaintiff has no administrative remedy; he has no remedy under OSHA. He has exhausted all possible avenues of relief. He has sought relief through company procedures; he has sought redress from every manner of agency, both governmental (federal and state), and private. Surely he need do no more to quality for the court's help. See Blumrosen, et al., Injunctions Against Occupational Hazards: The Right to Work under Safe Conditions, 64 Cal. L. Rev. 702, 715 (1976); Davis, Administrative Law Text, (3d ed. 1972) §20.07, pp. 391-392; Hollander, Injunctions Against Occupational Hazards: Toward a Safe Workplace Environment, 9 Bos. Coll. Env't. Affairs L. Rev., 133, 136-141 (1980).

Equitable relief has often been granted in employment situations, see State ex rel. Schoenbacher v. Kelly, 408 S.W.2d 383 (Mo. App. 1966); Heath v. Motion Picture Mach. Operators Union, 290 S.W.2d 152 (Mo. App. 1956); Jenkins v. Local Union No. 6313, 271 S.W.2d 71 (Mo. App. 1954). Equitable relief has often been granted to protect physical safety in nuisance cases involving adjoining landowners. See, e.g. Dauberman v. Grant, 198 Cal. 586, 246 P. 319 (1926) (smoke and

soot); Centoni v. Ingalls, 113 Cal. App. 192, 298 P. 47 (1931) (dust); Hennessey v. Carmony, 50 N.J. Eq. 616, 620, 25 A. 374, 378 (1892). Cases are collected in Blumrosen, supra, 64 Cal. L. Rev. at 714, n. 54; cf. Prosser, Torts, 4th ed., pp. 603-604. Equitable relief is not less appropriate when the smoke is released inside, rather than outside, realty.

2. Equitable relief is practical.

Requiring the defendant to extend its nonsmoking rule to the plaintiff's work area is practical. Since there is no right to smoke on others and no legitimate commercial interest of the defendant to be served by such a practice, there is no need for half-measures. On the contrary, it is impractical to compromise the plaintiff's rights, as the defendant has done here, adjusting the remedy according to nice calculations about density of smoke and concentrations of its toxic components. Smoke expands; its components condense out and cling; it triggers other smokers to smoke. A rule that would curtail, but not eliminate smoking in the plaintiff's workarea would unnecessarily create a set of smoking rules open to interpretation and debate. Such rules are much more difficult of enforcement than is a smoking ban.

A smoking ban would be direct and simple. No special administrative or legislative expertise would be required. There is no need to balance risks and

benefits here since there is no benefit from the defendant's concession to its smokers at the plaintiff's expense. A ban would not require expensive ventilation systems or longer operation of systems that may be in place. (Indeed, it is doubtful that ventilation, particularly because the air in the defendant's plant is recirculated, eliminates the risks).

A court-ordered no-smoking rule would be easy to enforce. Some smokers may grumble initially, partly because the defendant has taken their side. But smoking bans have worked, apparently without incident, in many enclosed places of employment, see supra at p. 37, and among employees who must spend long hours at their work. Apparently a smoking ban works in the defendant's own computer room and elsewhere within the defendant's plant.

In arguing that courts are "ill-equipped to regulate social habits or formulate industrial sumptuary codes" (F. 264), the defendant seeks to complicate a simple matter. The plaintiff is not seeking to be intruded upon by tobacco smoke in his workplace less; he is asserting his common law right not to be intruded upon in his workplace by tobacco smoke at all. His right not to have his body touched without justification is one of the oldest and most basic of common law rights.

Smoking is a habit, indeed an addiction, but it is not a "social" habit, as the defendant contends, except as it affects others. No rule of law exempts behavior from the civil liability merely because a number of people participate in that behavior.

The defendant is well-equipped to stop the practice of smoking in the plaintff's work area. Indeed, to protect its machines, it would have no qualms about controlling far more intimate behavior. Chapter one in a series of sixteen studies done by its engineering staff (and the staff of Bell Telephone Laboratories) and collected under the title "Environmental Control in Electronic Manufacturing," Morrison, P.W., Member of Technical Staff, Editor, Western Electric Series, Van Nostrand Reinhold Co., New York, 1973, recites:

> Human beings are an obvious source of contaminants . . . Product contamination by people may be felt at any point in the manufacturing routine . . . Facetiously it has been said that if you want to keep a job clean, keep people away from it. However, people are essential; and it is important that health and safety planning be incorporated into any manufacturing situation . . .

Id., p. 12. Among the "typical requirements for clean room personnel access and conduct" enumerated in a later chapter is:

> 6. Smoking is prohibited in all clean rooms.

Among the "rules to be enforced to assist in the successful operation of the clean rooms are:

> 9. c. Keep finger nails clean.
> d. Never comb your hair in a clean room.
> e. Do not wear finger nail polish.
> . . .
> k. Nervous type mannerisms such as scratching head, rubbing hands, or similar type actions are to be avoided.

The chapter also recommends that

> [p]ersonnel with skin or upper respiratory diseases should not be allowed to work in clean rooms. Some examples of problems that are detrimental to clean rooms are: . . .
> b. Profuse nasal discharge.
> c. Skin conditions which result in above average sking shedding, dandruff, or skin flaking.
> d. Severe nervous conditions.

Id., p. 345. The defendant contends that a rule prohibiting smoking in the work area is an "industrial sumptuary code," too dificult and expensive for it to accomplish. But, to protect machinery, the defendant in apparent seriousness, has proposed a rule prohibiting employees from scratching their heads.

While the defendant may not be able to keep employees from sneezing or from scratching their heads, it can keep its employees from smoking at their desks. An employee could scratch his head near a machine and his offense might go undetected. However, his smoking in a smoke-free work area could not go undetected. Because the defendant has control over the plaintiff's work area, he can prevent smoking there.

Equitable relief has been granted in similar cases, Shimp, supra; Hubbs v. Davidson et al., Mass. Super. Ct. Eq. No. 41971 (1980) (equitable relief granted in favor of CETA trainee against three CETA officials requiring them not to permit smoking in training program, and against two individuals restraining them from smoking on the job), and on the strength of these two cases, other employers have adopted no-smoking rules without the necessity of court suits. Others have done so in their own economic self-interest. The court's decision in this case will have effects well beyond the case itself, not the least of which will be to reduce litigation.

3. The plaintiff is suffering irreparable harm as are others similarly exposed.

The plaintiff is suffering irreparable harm, but slowly. Forced to breathe smoke contaminated air at

work, he can look forward over time to irreparable impairment of small-airways functions and other potentially serious bodily harm, and backward to a life unnecessarily marred by ill-health. Equity ought to prevent the defendant from continuing to permit smoking, a practice which in effect singes the lungs of the plaintiff and others. Unlike damage to the defendant's computers and Class A materials, damage to the plaintiff's lungs cannot be repaired.

Finally, the defendant disparages this suit as a class action. Every suit is of course a class action to the extent it has an importance beyond that to its immediate parties. This suit is no exception. Its result will influence employers' decisions in Missouri and elsewhere. Its result can arm or disarm employees who daily suffer the injustice of being forced to inhale smoke at work. Its result can aid or hinder the "freedom from smoking" campaign being promoted by such companies as International Paper Corporation, International Business Machines Corporation and Xerox Corporation, and the efforts of such health groups as the World Health Organization, the American Lung Association, the American Heart Association, the American Cancer Society and many others.

This suit is not the doing of the Clean Indoor Air Educational Foundation or of Environmental Improvement Associates. It arises from a continuing wrong to plaintiff. That thousands of other people suffer the

same wrong as does the plaintiff, to lesser or greater degrees, and that the court's decision will have significance to their everyday lives and well-being are not reasons not to do justice to him.

CONCLUSION

For the foregoing reasons, the decision of the court of St. Louis County should be reversed and the case remanded for the framing of an appropriate decree enjoining the defendant from allowing smoking in the plaintiff's workplace and from retaliating against the plaintiff for bringing this action.

Respectfully submitted,

Clean Indoor Air Foundation of
Massachusetts
Harris Hall, Room 428
25 Deaconness Road
Boston, Massachusetts 02115

Environmental Improvement Associates
109 Chestnut Street
Salem, New Jersey 08079

By their attorney,

Alvan Brody

Alvan Brody
Suffolk University Law School
41 Temple Street
Boston, Massachusetts 02114
Tel. 617 573-8700, ext. 171