IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

PAUL SMITH, Appellant, vs. WESTERN ELECTRIC COMPANY, Respondent.	)	Case No. 44286

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
DIVISION 18

HONORABLE PHILIP J. SWEENEY, JUDGE

BRIEF OF APPELLANT

Morley Swingle
Spradling & Spradling
Attorneys at Law
1838 Broadway
P. O. Drawer 1119
Cape Girardeau, MO 63701
(314) 335-8296

Attorneys for Appellant

INDEX

	Page
Jurisdictional Statement	1
Statement of Facts	2
Points Relied On	17
Argument	21
Conclusion	45

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

PAUL SMITH,	)	
	)	
Appellant,	)	
	)	
vs.	)	Case No. 44286
	)	
WESTERN ELECTRIC COMPANY,	)	
	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
DIVISION 18
HONORABLE PHILIP J. SWEENEY, JUDGE

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

This action is one involving the question of whether the respondent-employer has failed in its common law duty of making its work place reasonably safe for its employees in that appellant-employee maintains that respondent continuously exposes its employees to tobacco smoke in the work place in amounts that constitute a medically recognizable health hazard. The Honorable Philip J. Sweeney, Judge of Division 18 of the Circuit Court of St. Louis County, dismissed the petition for failure to state a claim upon which relief can be granted on April 7, 1981, and hence this appeal involves the interpretation of Missouri common law dealing with an employer's duty to make the work place reasonably

safe and the interpretation of Missouri Rü ...iested that had on his 55.27(a)(6).

The Missouri Court of Appeals, Eastern ... the of this appeal as the Circuit Court of St. I... the territorial jurisdiction of the Missouri Eastern District, and the Supreme Court of Mi... the statutes made and provided, have exclusive... Missouri Constitution, as amended in 1970 and ...le V, § 3.

STATEMENT OF FACTS

Record References

Numerals in parentheses without a Roman Numeral refer to pages of the Legal File. Example: (35). Numerals in parentheses preceded by the Roman Numeral "I" refer to pages of Volume I of the transcript. Example: (I-35). Numerals in parentheses preceded by the Roman Numeral "II" refer to pages of Volume II of the transcript. Example: (II-35).

Procedural Background

Paul Smith, the plaintiff-appellant (hereinafter sometimes called Plaintiff Smith or Smith), filed this suit on October 22, 1980(ii). Smith sought a temporary restraining order, a temporary injunction, and a permanent injunction from the Circuit Court of St. Louis County. Smith requested a temporary restraining order restraining Western Electric Company, the defendant-respondent (hereinafter called the defendant-company) from exposing Smith to tobacco smoke in the work place, and from affecting Smith's rate

of pay or conditions of employment (6). Smith requested that these restraints be effective until a hearing could be had on his request for a temporary injunction prohibiting smoking in the work place, thereby limiting smoking to non-work areas such as lounges and lunchrooms, and enjoining defendant-company from affecting Smith's rate of pay or conditions of employment as a result of medical conditions caused by or permitted to exist by defendant-company (6). Smith also requested that after a final hearing a permanent injunction be issued directing defendant-company to provide Smith with a work place free from injurious and toxic substances and enjoining defendant-company from affecting Smith's rate of pay or conditions of employment as a result of medical conditions caused by or permitted to exist by defendant-company (5). Smith accompanied his petition with affidavits from seven doctors and a brief (ii). The Court did not issue the temporary restraining order, but did issue an order for defendant-company to show cause why the temporary injunction should not be granted (193). At a hearing on November 25, 1980, the Court heard the testimony of Plaintiff Smith and Frank H. Topping, Jr., an Engineering Manager of defendant-company (I-1, II-1). Additional affidavits were filed by Plaintiff Smith, and both parties filed briefs (ii). Plaintiff Smith's request for a temporary injunction was denied on November 26, 1980 (248). On February 23, 1981, defendant-company filed a motion to dismiss for failure of the petition to state a cause of action upon which equitable relief can be granted (249). Both parties filed briefs (ii). On April 7, 1981, the Court entered its order dismissing Smith's petition

for failing to state a claim upon which relief can be granted (291). This is an appeal of that order.

Factual Background

Plaintiff Smith began working for defendant-company in 1950 (I-3). In his position as an Engineering Associate (II-17), Smith wrote specifications for the telephone offices (I-4). The work was tedious, technical in nature, sedentary, and exacting (19). He worked seated at a desk in an open area of about fifty or sixty people, with desks adjacent to each other in four or five rows, with banker type partitions going up to a height of approximately five feet (I-4). Some of the employees smoked cigarettes, cigars, or pipes as they worked (I-4,5).

In 1974 or 1975, Plaintiff Smith first noticed that tobacco smoke in the work place was making him sick (I-7). Exposure to tobacco smoke caused Smith to feel ill, as if he had been poisoned (I-6). His symptoms included severe and excruciating chest pains (I-6). The chest pains were an immediate response to the exposure, and sometimes remained with him for two or three days (I-6). He sometimes suffered other associated symptoms such as dizziness (164), sore throat, nausea, headache, blackouts, loss of memory, difficulty in concentration, aches and pains in joints, sensitivity to noise and light, gagging, choking sensations, and light-headedness (1). Smith felt fine when he was away from exposure to tobacco smoke, although it sometimes took days before his chest would be free of pain (I-7,8).

Plaintiff Smith informed defendant-company at various levels of management of his adverse reaction to tobacco smoke (I-8). In

response to his complaints, defendant-company moved Smith to different locations in the building (I-7, II-5). There was no non-smoking work area at defendant-company for someone with Smith's job, however, so he remained in areas where there were employees smoking (II-10,11). One-fourth to one-third of the employees in Smith's work area smoked at the time of the temporary injunction hearing (II-14). Also in response to Smith's complaints, the Medical Director of defendant-Company provided Smith with a small respirator made of blue cloth-like material (I-8,9)(244). Smith consulted Dr. Raymond Slavin, a specialist in Allergic Diseases who teaches at St. Louis University Medical School, and Dr. Slavin told him that the respirator would not do any good at all (I-9)(187,188). Smith never wore that particular respirator (I-9).

From 1976 until 1980, Plaintiff Smith's adverse reaction to tobacco smoke seemed to get worse every year (I-13). During this time period, Smith contacted numerous governmental and private agencies and organizations in an effort to have them help him obtain a non-smoking area at work (239). Smith contacted the Missouri Human Rights Commission, which told him they had no control over smoking in the work place (I-27). He contacted the Federal Information Center, which told him that no federal agency controlled smoking in the work place (I-29). He contacted the Environmental Protection Agency, which told him it had no authority to act on his problem (239). He contacted the National Clearing House Office on Smoking and Health, and was told that no governmental

agency had the authority to ban smoking in the work place (239). He contacted the Office of Federal Contract Compliance Programs, and was informed that his condition was not considered a physical handicap under the Rehabilitation Act (239, 240, 288). He also contacted the National Cancer Institute, the Equal Employment Opportunity Commission, the Missouri Division of Health-Environmental Quality, The Health System Agency of Greater St. Louis, the American Lung Association, the American Cancer Society, the St. Louis Heart Association, and a few non-smokers' rights groups such as Action on Smoking and Health (ASH) and Group Against Smoking Pollution (GASP) (239-240)(I-22,29). None of the organizations could help him (239).

On January 16, 1979, a limited health hazard evaluation survey of Plaintiff Smith's work place was conducted by the National Institute for Occupational Safety and Health (NIOSH) (17). Plaintiff Smith had requested the NIOSH investigation (I-18). The NIOSH investigator prepared a written report, which is a part of the Legal File at pages 17 through 26. The NIOSH investigator made an initial walk-through survey, took environmental samples, handed out medical questionnaires to approximately 80 employees, and interviewed employees (17,19). In his report, the investigator noted that 36% of the employees responding to the questionnaire had complaints of eye strain, irritation of the respiratory tract, smoke odors, and stuffy air (17). They attributed their symptoms to excessive smoking in the area and suspected that the ventilation system might not be adequate (22). Twelve percent (12%) of the answering employees had existing conditions

(e.g., allergies, angina pectoris, etc.) which made them more susceptible to airborne contaminants than other employees (23). Of the 66 employees completing the questionnaire, 4.5% complained of severe symptoms such as shortness of breath, chest pains, or persistent rough cough (23). Forty-two percent (42%) of the employees who had never smoked had complaints about the smoke in the air (23). Thirty-seven percent (37%) of the employees who were ex-smokers complained about the smoke in the air (23). Thirty percent (30%) of the employees who were current smokers complained about the smoke in the air (23). The NIOSH investigator also noted that within the past few years over 100 employees had signed a petition or suggestion requesting improvement of the air contamination from cigarette smoke apparently prevalent on a frequent basis (24). The investigator noted, though, that there were only a few complaints about the condition of the air on the day of the survey, and that the complaints were, for the most part, not an everyday occurrence, but rather were occasional complaints occurring during the week under varying environmental conditions (17). The investigator felt that the percentage of complaints was not unusual (17). The investigator concluded that a health hazard to employees did not exist at the time of the survey, but that a few employees had health conditions that would make them more susceptible to environmental conditions at the facility and, therefore, environmental conditions may upon occasion be potentially toxic for those employees who may be more sensitive to environmental conditions (17). The investigator recommended

that the defendant-company establish a "policy on smoking", that it consider establishing non-smoking areas, and that it provide for a complete evaluation of the current ventilation system (25).

On April 15, 1980, thirteen months after receiving the recommendations of the NIOSH investigator, the defendant-company adopted a "Smoking Policy" (II-3,4)(27,28). The "Smoking Policy" listed several areas where smoking would be prohibited as a fire hazard (27). These areas did not include the work areas for Engineering Associates like Smith (II-10,11). The "Smoking Policy" further provided that supervisors should make a reasonable effort to separate, in the work areas, employees who smoke from employees who do not smoke, subject to normal business needs, which would be the controlling factor (27). Plaintiff Smith was still in a work area shared by smokers, though, since there was still no non-smoking work area for people with Smith's job (II-10,11).

In June, 1980, Plaintiff Smith was admitted to the Environmental Control Unit of the American International Hospital for evaluation and treatment of possible cigarette smoke intolerance (164). Plaintiff Smith was examined by Theron G. Randolph, M.D., who has practiced in the specialty of allergies since 1940, and who is a member of the Society for Clinical Ecology, the American College of Allergists, the American Academy of Allergy, and the American Society of Certified Allergists (164). Dr. Randolph performed several tests on Smith to determine the extent of his reaction to tobacco smoke (165). The tests were performed during a three week period, during which Smith was put in isolation and

exposed to various things to see which of them caused an adverse reaction (I-20). As a result of Smith's history and the tests Dr. Randolph performed during Smith's hospitalization, Dr. Randolph concluded that Smith evidences an adverse reaction to cigarette smoke and should avoid its contact wherever and whenever possible (165). Dr. Randolph recommended rearranging Smith's office environment to minimize contacts with side stream smoke, and he recommended the use of an air filter for Smith's home and office (165).

In August 1980, Plaintiff Smith reported to defendant-company's Medical Department and complained of discomfiture (II-5). The Medical Director, Dr. Hanson, talked with Smith's doctor over the phone and was told that Smith's physical condition was such that exposure to tobacco smoke would have a harmful effect on his medical condition (II-5,6). Frank H. Topping, Jr., the Engineering Manager of defendant-company, consulted with the Medical Director and they put Smith under a permanent work restriction specifying that he not be exposed to cigarette smoke (II-6). Smith was sent home (II-5), and told not to come back to work for two weeks (I-21).

When Plaintiff Smith returned to work, he was given three options as to what would be done about his situation at work (II-6). The first option was that Smith could return to work at his regular location and wear a respirator provided by the defendant-company (II-6). The second option was to work in the computer room at defendant-company, where no smoking was allowed (II-7). The computer room job, however, would have involved a decrease in

pay of approximately $500.00 per month, reducing Smith's pay from approximately $1,800.00 per month to approximately $1,360.00 per month (II-17,7). The third option was that the defendant-company would initiate Smith's pension and he would be involuntarily pensioned (II-7). Smith formally requested a fourth option: that the defendant-company separate smokers from non-smokers (I-8). Defendant company absolutely refused to consider his suggestion (I-8). Of the three options he was given, Smith elected to use the respirator (II-8). Smith accepted the respirator against his doctor's advice (I-9). Smith had contacted Dr. Randolph on September 10, 1980, and Dr. Randolph had advised him that the respirator would not be effective in his situation since such respirators do not completely remove cigarette smoke from ambient air, and since they permit toxic materials known to be in tobacco smoke to either pass the filter or to be uncontrolled by it (165). The defendant-company was aware that Smith's doctor had advised that a respirator would not be effective (II-11).

The respirator provided by the defendant-company was a face-mask type respirator made of rubber and metal, with a filter cartridge and no battery controlled parts (I-9)(245, Exhibit "2"). Plaintiff Smith wore this respirator and found it to be ineffective in preventing his chest pains and other injuries (I-9,10). In addition, Smith found that the use of the respirator interfered with the use of his eyeglasses (II-8,9). After many conversations with Mr. Topping and the Medical Director, Smith and defendant-company decided to look at other respirators (II-9). The next day, defendant-company provided Smith with a

battery controlled helmet-type respirator (I-10);(II-9);(246, Exhibit "3"). The defendant-company paid between four and five hundred dollars for the respirator (II-9). It also proved ineffective in preventing Smith's symptoms (I-10). This respirator also disturbed Smith's vision and made noise at a level that caused Smith to suffer headaches and bothered employees sitting close to him (I-11).

Smith missed no days of work after being provided with the respirators (I-11,12), although the respirators did not prevent his symptoms (I-9,10). He continued to report to the Medical Department (II-12). He was aware, though, that he had been put on warning and threatened about his earlier absences (I-11). Smith filed his suit seeking injunctive relief on October 22, 1980 (ii).

Plaintiff Smith presented to the trial court affidavits from nine doctors discussing tobacco smoke as a health hazard to himself and to all non-smokers in general.

Theron G. Randolph, M.D., the allergy specialist who examined Smith for three weeks in June 1980, testified in his affidavit that Smith evidences an adverse reaction to cigarette smoke, including serious respiratory tract discomfort (164-165). Dr. Randolph stated that he did not approve of the use of a respirator in Smith's situation since it would be ineffective (165). Dr. Randolph also testified that scientific proof is present to clearly document the known and potential health hazards that tobacco smoke presents to non-smokers who breathe it involuntarily

(166). The doctor concluded that second-hand tobacco smoke was a health hazard to all non-smokers in general, and was particularly so as to Smith, who evidences a clinically documented adverse reaction to cigarette smoke (166).

Another affidavit was provided by Wilbert S. Aronow, M.D., Professor of Medicine at the University of California, Irvine, and Chief of the Cardiovascular Section of Long Beach Veterans Administration Medical Center (167). Dr. Aronow testified that he had contributed to 257 papers, and 27 books, and that 43 of these papers had dealt with the effect of smoking or of inhaling carbon monoxide on the cariovascular system; he testified that of 272 abstracts and letters to the editor he had written, 78 dealt with the effect of smoking or inhaling carbon monoxide on the cardiovascular hemodynamics (167). He testified that he had also written on the effect of passive smoking on angina pectoris (167).

Dr. Aronow testified that smoking is harmful, not just to the smoker, but in varying degrees, to non-smokers as well (154). He stated that recent studies show that 69.2% of nonallergic non-smokers suffer eye irritation when exposed to tobacco smoke, 29.2% complain of nasal symptoms, 31.6% complain of headache, and 25% complain of cough (155). He discussed in detail recent medical evidence showing that passive smoking is particularly harmful to people with cardiovascular or pumonary disease, and that it may precipitate or aggravate respiratory infections and allergies in otherwise healthy persons (150,156). Dr. Aronow

concluded that scientific proof is present to clearly document the known potential health hazards that tobacco smoke presents to non-smokers who are forced to breathe it involuntarily, and that unrestricted tobacco smoking in enclosed areas creates a health hazard for millions of persons with a wide variety of medical susceptibilities and conditions, and causes physical irritation and discomfort to the majority of non-smokers (169). He stated that in his medical opinion, non-smokers should always have the right to work in smoke-free areas (169).

Another affidavit was filed by James R. White, Ph.D., who is a health researcher at the University of California, San Diego (180,183). Dr. White has done research on the harmful effects breathing tobacco smoke in the work place can have on non-smokers, and his findings were published in the New England Journal of Medicine (181). Dr. White's study concluded that chronic exposure to tobacco smoke in the work environment is deleterious to non-smokers and significantly reduces small airways function in the lungs (139). Dr. White noted that concentrations of carbon monoxide as low as eight parts per million can increase the incidence of symptomatic or overt ischemic heart disease (141). Dr. White found that non-smokers who work in a smoky environment have about the same risk of small airways impairment as do smokers who inhale between one and ten cigarettes per day (142). Dr. White stated that increases in exposure to cigarette smoke cause a progression from small airways involvement to extensive bronchial and alveolar disease (142). Dr. White stated that the use of a

respirator would not be an effective remedy for a non-smoker in Smith's situation, and that in his laboratory he had tested hundreds of people who wore respirator equipment for a period of 20-30 minutes, and that his data indicated that it was unreasonable to subject a human to the stress and discomfort of being confined to respirator equipment for eight hours per day simply because he requires fresh breathing air (181-182).

An affidavit was submitted by Irving Kass, M.D., a Regent Professor of Medicine at the University of Nebraska College of Medicine, and a specialist in pulmonary and respiratory disease, who has been Chairman of the National Committee of Smoking and Health of the American Lung Association, and who has written over 100 articles on chest diseases (184). Dr. Kass testified that in his opinion, based on a reasonable degree of certainty, workers should be protected from inhalation of tobacco smoke in the work place (184,185). Dr. Kass identified carbon monoxide and cadmium as two components of tobacco smoke that are dangerous to non-smokers (185). He stated that the non-smoker working in an environment where smoking is allowed can experience a rise in the level of carboxyhemoglobin in his body, causing a decrease in oxygen delivered to the vital centers of his body with resulting impairment of thinking and endangering of the functioning capacity of the heart (185). Dr. Kass also warned that cadmium in the air in working areas where smoking is allowed presents a danger to non-smokers (185). Dr. Kass concluded that people exposed to secondhand cigarette smoke can suffer quite harmful deleterious

symptoms, including irritation of the eyes, nose, and respiratory system (185). He commented that anyone who has had to try to care for these individuals is impressed with the degree of suffering they go through unnecessarily simply because there are smoking workers around them (185). He also stated that the use of a respirator against tobacco smoke would not be a suitable remedy (185).

Other medical affidavits were submitted by the following physicians: Raymond G. Slavin, M.D., a specialist in Allergic Diseases who has taught at St. Louis University Medical School for approximately 15 years, and who has done clinical work with people who have suffered harmful effects from breathing tobacco smoke; John Wood, M.D., who specializes in Internal Medicine and practices medicine in St. Louis, Missouri; James R. Wiant, M.D., a pulmonary disease specialist and President of the Missouri Thoracic Society, who practices in St. Louis, Missouri; Charles F. Tate, Jr., M.D., a specialist in Pulmonary Disease who has taught at the University of Miami Medical School for 25 years, and who has done clinical work with people who have suffered harmful effects from breathing tobacco smoke; and Alton Ochsner, M.D., a surgeon, specializing in vascular and thoracic surgery, who practices in New Orleans, Louisiana. All of these doctors concurred that medical evidence exists showing that tobacco smoke presents a health hazard to non-smokers in the work place (187, 189,191,214,216).

An affidavit was submitted by James Repace, M.S., a physicist

who is currently employed as an environmental protection specialist at the Environmental Protection Agency in Washington, D.C. (200). Mr. Repace has worked in the fields of medical physics, health physics, solid state physics, applied nuclear physics, solid state electronics, and environmental protection (200), and has published in the fields of nuclear physics, quantum mechanics, solid state electronics, and smoking and air pollution (200). Mr. Repace testified that based upon his published scientific research, part of which he attached to his affidavit, he has concluded that indoor air pollution from tobacco smoke exposes non-smokers to significant air pollution burdens from the particulate phase of the tobacco aerosol (201). In general, testified Mr. Repace, non-smokers who are chronically exposed to tobacco combustion products in work place related exposures may inhale as much as 27 low tar cigarettes per day, depending upon the duration of the exposure, and the ventilation (201). Based upon information provided to him by Smith, Mr. Repace concluded that the work place air around Smith constituted a very unhealthy place in which to work (201). Mr. Repace also observed that it was not surprising that Smith felt the respirator provided by defendant-company was ineffective in alleviating his respiratory symptoms or chest pains, since tobacco smoke is almost impossible to filter effectively due to the small particle size and the fact that many of the harmful products are in the gas phase (201). Mr. Repace noted that he had been contacted by numerous other

workers from other states, and that Smith's problem is not rare (201).

An affidavit was submitted by John R. Elliott, the Sales Manager of Zink Safety Corporation, a St. Louis company which sells a complete line of personal protective equipment, including respirators (218). Mr. Elliott testified that as a common part of its business, Zink Safety Corporation evaluates the effectiveness of various respirators against various toxic substances (218). Mr. Elliott stated that during his 27 years at Zink Safety Corporation he had become very familiar with respirators and their operation and effectiveness (218). In his opinion, he said, a filter or cartridge respirator would not provide a person with complete protection from tobacco smoke because of the complexity of the exposure (219).

Affidavits were submitted by three of Smith's co-workers who testified that the air in the work place at defendant-company was typically smoke-filled and polluted (241,242,243).

Defendant-company did not offer any medical evidence, or other affidavits.

In its order dismissing Plaintiff Smith's petition for failure to state a claim upon which relief can be granted, the Court stated that it had considered the pleadings, attachments, affidavits and memoranda filed by the parties (291).

POINTS RELIED ON

I.

THE TRIAL COURT ERRED IN APPLYING THE LAW OR DECLARING THE

LAW IN DISMISSING APPELLANT'S PETITION FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED BECAUSE THE AVERMENTS OF THE PETITION INVOKE PRINCIPLES OF SUBSTANTIVE LAW WHICH ENTITLE APPELLANT TO RELIEF IN THAT:

(1) THE PETITION PLEADS SUFFICIENT FACTS SHOWING THAT THE RESPONDENT, BY CONTINUOUSLY DIRECTLY EXPOSING APPELLANT TO TOBACCO SMOKE IN THE WORK PLACE IN AMOUNTS THAT CONSTITUTE A MEDICALLY RECOGNIZABLE HEALTH HAZARD, WHEN IT KNOWS OF THE DANGERS OF TOBACCO SMOKE, AND OF APPELLANT'S LOW TOLERANCE TO SUCH TOBACCO SMOKE, HAS BREACHED ITS COMMON LAW DUTY OF MAKING THE APPELLANT'S WORK PLACE REASONABLY SAFE; AND

(2) THE PETITION ALSO PLEADS SUFFICIENT FACTS SHOWING THAT INJUNCTIVE RELIEF IS APPROPRIATE IN THIS CASE SINCE IT PLEADS FACTS SHOWING THAT THE TOBACCO SMOKE CAUSES IMMEDIATE AND IRREPARABLE HARM TO THE APPELLANT AND PLEADS FACTS SHOWING THAT APPELLANT HAS NO ADEQUATE REMEDY AT LAW SINCE A SUIT FOR DAMAGES WOULD INVOLVE A MULTIPLICITY OF LAWSUITS AND SINCE FURTHER RESORT TO ANY TYPE OF ADMINISTRATIVE RELIEF WOULD BE FUTILE, AND PLEADS FACTS SHOWING THAT WITHOUT THE INJUNCTIVE RELIEF SOUGHT, APPELLANT WILL BE CONTINUOUSLY SUBJECTED TO TOBACCO SMOKE ALL TO HIS DETRIMENT.

Shimp v. New Jersey Bell Telephone Company, 145 N.J. Super 516, 368 A.2d 408 (1976).

A. Blumrosen, et al, "Injunctions Against Occupational Hazards: The Right to Work Under Safe Conditions", 64 Cal.L.Rev. 702 (1976).

Nelson v. Wheeler Enterprises, Inc., 593 S.W.2d 646 (Mo. App., S.D. 1980).

Todd v. Watson, 501 S.W.2d 48 (Mo. 1973).

Note, "Employee's Right to a Safe, Healthy Work Environment-Injunction Issued Prohibiting Tobacco Smoking in Offices and Customer Service Area on Employer's Premises", 8 Cum. L. Rev. 579 (1977).

Note, "Torts-Nonsmokers' Rights-Duty of Employer to Furnish Safe Working Environment Will Support Injunction Against Smoking in the Work Area", 9 Tex. Tech L. Rev. 353 (1977).

Note, "Torts-Occupational Safety and Health-Employee's Common Law Right to a Safe Workplace Compels Employer to Eliminate Unsafe Conditions", 30 Vand. L. Rev. 1074 (1977).

W. Prosser, Law of Torts, 148 (4th ed. 1971).

Restatement (Second) of Torts Sections 291-293 (1965).

Missouri Appellate Practice and Extraordinary Remedies, 12-3 (3d ed. 1981).

Schaeffer v. Kleinknecht, 604 S.W.2d 751 (Mo. App., E.D. 1980).

Donnovan v. Pennsylvania Co., 199 U.S. 279 (1905).

Denning v. Graham, 227 Mo.App. 717, 59 S.W.2d 699 (1933).

Ben Gutman Truck Service, Inc. v. Teamsters Local No. 600, 484 F.Supp. 893, affirmed 636 F.2d 255 (8th Cir. 1980).

State ex rel Taylor v. Anderson, 362 Mo. 513, 242 S.W.2d 66 (1951).

State ex rel Arnold v. Egnor, 275 S.E.2d 15 (W.Va. 1981).

Patsy v. Florida International University, 634 F.2d 900 (5th Cir. 1981).

United States v. Sunny Hill Farms Dairy Co., 258 F.Supp. 94 (E.D. Mo. 1966).

42 Am.Jur.2d Injunctions Section 49 (1969).

Moseley v. City of Mountain Grove, 524 S.W.2d 444 (Mo. App., Spr. 1975).

Andres v. Todd, 296 S.W.2d 139 (Mo.App., Spr. 1956).

K. Davis, Administrative Law Text, 391-92 (3d ed. 1972).

Paddock Forest Residents Association, Inc. v. Ladue Service Corporation, 613 S.W.2d 474 (Mo.App., E.D. 1981).

American Drilling Service Company v. City of Springfield, 614 S.W.2d 266 (Mo.App., S.D. 1981).

Dayharsh v. Hannibal & St. J. R. Co., 103 Mo. 570, 15 S.W. 554 (1890).

Hightower v. Edwards, 445 S.W.2d 273 (Mo. En Banc. 1969).

Lathrop v. Rippee, 432 S.W.2d 227 (Mo. 1968).

Moles v. Kansas City Stock Yards Co. of Maine, 434 S.W.2d 752 (Mo.App., K.C. 1968).

De Bastiani v. Lesser-Goldman Cotton Co., 297 S.W. 174 (Mo. App., St. L. 1927).

St. Joseph Lead Co. v. JOnes, 70 F.2d 475 (8th Cir. 1934).

Doyle v. Missouri, K. & T. Trust Co., 41 S.W. 255 (Mo. 1897).

Comment, "The Legal Conflict Between Smokers and Nonsmokers: The Majestic Vice Versus the Right to Clean Air", 45 Mo.L.Rev. 444 (1980).

II.

THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S PETITION FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED IF IT DID SO ON THE GROUNDS THAT IT LACKED JURISDICTION DUE TO FEDERAL PREEMPTION, BECAUSE THE OCCUPATIONAL SAFETY AND HEALTH ACT, 29 U.S.C. SECTION 651, ET SEQ., DOES NOT PREEMPT STATE COMMON LAW CONCERNING RESPONDENT'S DUTY TO PROVIDE APPELLANT WITH A SAFE WORK PLACE SINCE THE ACT CONTAINS A SAVINGS CLAUSE, 29 U.S.C. SECTION 653(b)(4), SPECIFICALLY STATING THAT IT DOES NOT PREEMPT STATE COMMON LAW.

Shimp v. New Jersey Bell Telephone Company, 145 N.J. Super 516, 368 A.2d 408 (1976).

A. Blumrosen, et al, "Injunctions Against Occupational Hazards", 64 Cal.L.Rev. 702 (1976).

Comment, "Preemption Doctrine in the Environmental Context: A Unified Method of Analysis", 127 U.Pa.L.Rev. 197 (1978).

Jones v. Rath Packing Company, 430 U.S. 519, rehearing denied 431 U.S. 925 (1977).

Rice v. Santa Fe Elevator Corporation, 331 U.S. 218 (1947).

Federal Employees For Nonsmokers' Rights v. United States, 446 F.Supp. 181 (1978).

Note, "Employee's Right to a Safe, Healthy Work Environment-Injunction Issued Prohibiting Tobacco Smoking in Offices and Customer Service Area On Employer's Premises", 8 Cum.L.Rev. 579 (1977).

J. Blackburn, "Legal Aspects of Smoking in the Workplace", Lab.L.J. (Sept. 1980).

Note, "Torts-Occupational Safety and Health-Employee's Common Law Right to a Safe Workplace Compels Employer to Eliminate Unsafe Conditions", 30 Vand.L.Rev. 1059 (1977).

Comment, "Where There's Smoke There's Ire: The Search for Legal Paths to Tobacco-Free Air", 3 Col.J.Env.L. 62 (1976).

H. P. Welch Co. v. New Hampshire, 306 U.S. 79 (1939).

Comment, "The Legal Conflict Between Smokers and Nonsmokers: The Majestic Vice Versus the Right to Clean Air", 45 Mo.L.Rev. 444 (1980).

ARGUMENT

I.

THE TRIAL COURT ERRED IN APPLYING THE LAW OR DECLARING THE LAW IN DISMISSING APPELLANT'S PETITION FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED BECAUSE THE AVERMENTS OF THE PETITION INVOKE PRINCIPLES OF SUBSTANTIVE LAW WHICH ENTITLE APPELLANT TO RELIEF IN THAT:

(1) THE PETITION PLEADS FACTS SHOWING THAT THE RESPONDENT, BY CONTINUOUSLY DIRECTLY EXPOSING APPELLANT TO TOBACCO SMOKE IN THE WORK PLACE IN AMOUNTS THAT CONSTITUTE A MEDICALLY RECOGNIZABLE

HEALTH HAZARD, WHEN IT KNOWS OF THE DANGERS OF TOBACCO SMOKE AND OF APPELLANT'S LOW TOLERANCE TO SUCH TOBACCO SMOKE, HAS BREACHED ITS COMMON LAW DUTY OF MAKING THE APPELLANT'S WORK PLACE REASONABLY SAFE; AND

(2) THE PETITION ALSO PLEADS SUFFICIENT FACTS SHOWING THAT INJUNCTIVE RELIEF IS APPROPRIATE IN THIS CASE SINCE IT PLEADS FACTS SHOWING THAT THE TOBACCO SMOKE CAUSES IMMEDIATE AND IRREPARABLE HARM TO THE APPELLANT AND PLEADS FACTS SHOWING THAT APPELLANT HAS NO ADEQUATE REMEDY AT LAW SINCE A SUIT FOR DAMAGES WOULD INVOLVE A MULTIPLICITY OF LAWSUITS AND SINCE FURTHER RESORT TO ANY TYPE OF ADMINISTRATIVE RELIEF WOULD BE FUTILE, AND PLEADS FACTS SHOWING THAT WITHOUT THE INJUNCTIVE RELIEF SOUGHT, APPELLANT WILL BE CONTINUOUSLY SUBJECTED TO TOBACCO SMOKE ALL TO HIS DETRIMENT.

TESTING SUFFICIENCY OF PETITION

Upon review of a trial court's dismissal of a petition for failure to state a cause of action under Rule 55.27(a)(6) of the Missouri Rules of Civil Procedure, an appellate court must give the petition its broadest intendment, must accept all facts averred in the petition as true, must construe all averments liberally and favorably to the plaintiff, and must determine whether the averments, accorded every fair and reasonable intendment, invoke principles of substantive law which may entitle plaintiff to relief. Paddock Forest Residents Association, Inc. v. Ladue Service Corporation, 613 S.W.2d 474, 476 (Mo.App., E.D. 1981); Nelson v. Wheeler Enterprises, Inc., 593 S.W.2d 646, 647 (Mo.App., S.D. 1980). A petition is not to be dismissed for

failure to state a claim unless it appears that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. American Drilling Service Company v. City of Springfield, 614 S.W.2d 266, 271 (Mo.App., S.D. 1981). Any doubt about the sufficiency of the petition, if at all reasonable, should be resolved in favor of the plaintiff. Nelson v. Wheeler Enterprises, Inc., 593 S.W.2d 646, 647 (Mo.App., S.D. 1980). Although the mere conclusions of the pleader are not admitted, the facts alleged are taken as true and the pleader is entitled to all favorable inferences fairly deducible therefrom; if such facts and interferences, viewed most favorably from plaintiff's standpoint, show any ground for relief, the petition should not be dismissed. American Drilling Service Company v. City of Springfield, 614 S.W.2d 266, 271 (Mo.App., S.D. 1981).

Plaintiff Smith's petition states facts which, when taken as true and given all favorable inferences fairly deducible therefrom, show: (1) that the defendant-company has breached its duty of providing Smith with a safe place to work, causing injury to Smith; and (2) that Plaintiff Smith has stated a cause of action for equitable relief since a suit for damages would not fully protect Smith's rights and would not be an adequate remedy at law.

FACTS PLEADED SHOWING DUTY

Although a suit by an employee for an injunction to force an employer to provide him with a tobacco-free work area is a case of first impression in Missouri, the common law duty of an

employer to make the employee's work place reasonably safe has long been a part of Missouri law. See Dayharsh v. Hannibal & St. J. R. Co., 103 Mo. 570, 15 S.W. 554, 555 (1890). Scores of Missouri cases through the years have set down the rule that an employer is under a duty to use all ordinary care to provide his employees with a reasonably safe working place. E.g. Todd v. Watson, 501 S.W.2d 48, 50 (Mo. 1973). There is no question that the petition pleaded adequate facts establishing the employer-employee relationship. Plaintiff Smith pleaded facts showing that he had been employed by defendant-company for over thirty (30) years (1).

FACTS PLEADED SHOWING BREACH OF DUTY

Whether the employer has fulfilled his duty to make the work place reasonably safe depends upon the facts of each case. Lathrop v. Rippee, 432 S.W.2d 227, 231 (Mo. 1968). Fact situations in which the court has held that the employer failed to provide a reasonably safe place of work include a wide variety of settings. In Lathrop, the unsafe work place consisted of having the employee sit at a desk in front of a large window of unreinforced glass located at street level on a street with much traffic. The employee was injured when a car drove through the window. In Todd v. Watson, 501 S.W.2d 48 (Mo. 1973), the employer's negligence was in having the employee carry heavy stones upon wet and slippery ground. In Hightower v. Edwards, 445 S.W.2d 273 (Mo. En Banc. 1969), the negligence was in providing the employee with a piece of farm machinery that was dangerous due to the lack of a screen

over a revolving agitator. In Moles v. Kansas City Stock Yards Co. of Maine, 434 S.W.2d 752 (Mo.App., K.C. 1968), the unsafe condition was a horse-drawn wagon that had no brakes. In De Bastiani v. Lesser-Goldman Cotton Co., 297 S.W. 174 (Mo.App., St.L. 1927), the danger was in the construction of a coal bin. The bin was set up in a way that allowed large pieces of coal to fall upon the employee. In St. Joseph Lead Co. v. Jones, 70 F.2d 475, 477 (8th Cir. 1934), the unsafe condition involved poisonous lime dust. In Doyle v. Missouri, K. & T. Trust Co., 41 S.W. 255 (Mo. 1897), the unsafe condition consisted of a narrow walkway placed over a forty-five foot drop into a bin, and the employee was expected to carry lumber over the walkway. The list of Missouri fact situations could be extended much further, but for present purposes it is sufficient to note that the key test is whether the employer has provided the employee with a reasonably safe place of work.

The petition has pleaded facts adequately alleging that the defendant-company has breached its duty to provide Smith with a safe place to work (1-6). In his six page petition, Smith has pleaded in detail facts showing that breathing secondhand tobacco smoke, sometimes called "passive" or "involuntary" smoking, is harmful to him (1,2,3,4) and to millions of other people (5). Smith's own pleaded injury is a medically determined severe adverse reaction to cigarette smoke (3), characterized by severe respiratory tract discomfort, sore throat, nausea, dizziness, headache, blackouts, loss of memory, difficulty in concentration,

aches and pains in joints, sensitivity to noise and light, cold sweat, gagging, choking sensations and light-headedness (1). Smith's pleaded facts showing that tobacco smoke in the work area is dangerous to people other than himself include the facts that thirty-four million people in the United States are allergic to tobacco smoke, that more than ten percent of the work force is seriously jeopardized by second-hand smoke, that seventy percent of both smokers and non-smokers suffer eye irritation when exposed to tobacco smoke, that people with certain heart diseases suffer exacerbations of their symptoms as a result of breathing other people's tobacco smoke, that fifteen million, five hundred thousand people with chronic lung problems may suffer exacerbations of their symptoms as a result of breathing other people's tobacco smoke, and that second-hand smoking may contribute to the development of serious diseases in otherwise healthy individuals. As previously noted, for the purposes of ruling upon a motion to dismiss for failure to state a cause of action, the facts alleged in the petition must be taken as true. American Drilling Service Company v. City of Springfield, 614 S.W.2d 266, 271 (Mo.App., S.D. 1981).

Other pleaded facts related to the defendant-company's alleged breach of duty include the facts that defendant-company is aware of the dangers of tobacco smoke and of Smith's low tolerance to such smoke (2,4) and that defendant-company has available to it reasonably feasible and economical alternatives to avoid the continuing breach of its duty; these alternatives include prohib-

iting smoking by employees in the work areas, separating smoking employees from non-smoking employees, or installing and utilizing adequate and effective ventilation equipment (4). The petition stated that defendant-company had already used these alternatives to protect sensitive equipment in the computer room (5). The petition pleaded that the defendant-company had told Plaintiff Smith that it felt restricting smoking in the work place would be offensive to smokers (2). The petition pleaded that defendant-company absolutely refused to segregate smokers from non-smokers, or to limit smoking to non-work areas, but had given Smith the choice between wearing an ineffective respirator at his work place or moving to a job in the computer room at a decrease in salary of approximately $500.00 per month (4).

Although the question whether defendant-company has breached its common law duty to provide Smith with a reasonably safe work place by refusing to provide him with a tobacco free work area is a case of first impression in Missouri, it is not completely without precedent from other jurisdictions.

Until 1972, little was known about the dangers of involuntary smoking, and hence there were no lawsuits of this nature. See Comment, "The Legal Conflict Between Smokers and Nonsmokers: The Majestic Vice Versus the Right to Clean Air," 45 Mo.L.Rev. 444, 447 (1980). Up until that time, allowing smoking in a crowded work place would almost always have been considered reasonable. During the past nine years, however, there has been a deluge of medical evidence concerning the dangers of breathing someone

else's tobacco smoke. The 1972, 1975, and 1979 Surgeon General's reports discussed in detail the dangers of involuntary smoking (70,110), and the 1979 report listed eighty-five publications dealing with the hazards of involuntary smoking (104-109). In fact, nine doctors submitted affidavits to the Court discussing the health hazard that tobacco smoke in the work place presents to workers (ii). Now that the great weight of medical evidence conclusively shows that tobacco smoke is dangerous to non-smokers around a smoker, an employer who refuses to provide an employee with a tobacco-free work place under the circumstances of this case is negligent.

In a case exactly on point, a New Jersey court issued an injunction ordering the employer to provide safe working conditions for the employee by restricting the smoking of employees to the non-work area then used as a lunchroom. Shimp v. New Jersey Bell Telephone Co., 145 N.J.Super 516, 368 A.2d 408, 416 (1976), noted in Note, "Employee's Right to a Safe, Healthy Work Environment-Injunction Issued Prohibiting Tobacco Smoking in Offices and Customer Service Area on Employer's Premises", 8 Cum.L.Rev. 579 (1977); Note, "Torts--Nonsmokers' Rights--Duty of Employer to Furnish Safe Working Environment Will Support Injunction Against Smoking in the Work Area", 9 Tex. Tech. L. Rev. 353 (1977); Note, "Torts--Occupational Safety and Health--Employee's Common Law Right to a Safe Workplace Compels Employer to Eliminate Unsafe Conditions", 30 Vand. L. Rev. 1074 (1977).

In Shimp, the plaintiff, Donna Shimp, worked in an office

setting. Her employer allowed other employees to smoke while on the job at desks situated in the work area she shared with them. Donna Shimp suffered a severe allergic reaction to cigarette smoke, and her symptoms included severe throat irritation, nasal irritation, eye irritation, headaches, nausea, and vomiting. Her symptoms could be triggered by the presence of as little as one smoker adjacent to her.

In the Shimp opinion, the court carefully analyzed the relationship of the common law to the non-smoker in the work place. The court stated that an employee has a right to work in a safe environment and an employer has a concomitant, affirmative duty to provide a safe work area. 368 A.2d at 410. The court noted that the Occupational Safety and Health Act did not pre-empt the field of occupational safety since it specifically recognized the concurrent power of a state to affect the employee-employer relationship through common law judicial and legislative action. 368 A.2d at 410-411. Of particular importance, the court specifically held that cigarette smoke was toxic and dangerous to the health of this plaintiff and that of smokers and nonsmokers generally. 368 A.2d at 411, 413. In fact, the court took judicial notice of the toxic nature of cigarette smoke and its well known association with emphysema, lung cancer and heart disease. 368 A.2d at 414. The court ruled that the plaintiff had not assumed the risk of harm since cigarette smoke is not a natural by-product that is a necessary result of the operation of the telephone business. 368 A.2d at 411. In its holding, the court noted that in light of

the overwhelming evidence on the harm of involuntary smoking, it "is reasonable to expect an employer to foresee health consequences and to impose on him a duty to abate the hazard which causes the discomfort." 368 A.2d at 416. In this case of first impression in Missouri, the Shimp case, which involved a virtually identical fact situation, should serve as a helpful and instructive precedent.

Missouri law provides that a form of negligence occurs when the defendant fails to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do. Todd v. Watson, 501 S.W.2d 48, 50 (Mo. 1973). In Todd, the employer was under a common law duty to make the work place safe, and he failed to do it when he had the employee carry a large and heavy stone over wet and slippery ground. In the present case, defendant-company has failed in its duty to protect Plaintiff Smith from the dangers of involuntary smoking during his eight hour work day.

Many authorities have also held that negligence can be determined by balancing the utility of the defendant's conduct against the probability and gravity of the harm. W. Prosser, Law of Torts, 148 (4th ed. 1971); Restatement (Second) of Torts, Section 291-293 (1965). In the present case, the defendant-company's conduct consists of a steadfast refusal to ban tobacco smoking in the work area, in spite of the knowledge that it is harmful to the employees in general, and to Plaintiff Smith in particular. The utility of the defendant-company's conduct is highly questionable. Defendant-company maintains that restricting smoking to places

other than the work area would hurt the productivity of the smokers, since they would be hostile and rebellious and would attempt to get out of the work area and into areas where they could smoke (II-13,16). In fact, though, the work productivity at defendant-company could actually improve if smoking were prohibited in the work area, since the productivity of more than half of the workers would likely be increased (201). In addition, defendant-company might well save money due to decreased energy costs (157-158). At any rate, the harm caused to Plaintiff Smith is very real. Exposure to cigarette smoke causes him to suffer a wide variety of symptoms, including severe chest pains (1)(I-6). Furthermore, medical evidence indicates that the tobacco smoke inflicts harm upon the other employees, too (5,10,11,40-43,70,110, 139,143,150,159,164,167,180,184,187,189,191,200, 214,216). In fact, a large percentage of defendant-company's employees have complained about the air (22). Obviously, when the utility of the conduct is balanced against the harm involved, the scales tilt in favor of prohibiting smoking in the work area. If defendant-company wants to permit smoking employees to smoke, the smokers could still be allowed to smoke in certain lounges, restrooms, or similar separate places.

The test of an employer's duty in Missouri is ultimately a test of reasonableness. E.g., Todd v. Watson, 501 S.W.2d 48 (Mo. 1973). Considering the tremendous amount of medical evidence on the harm of involuntary smoking, and the ease with which smoking could be prohibited in the work area, it is unreasonable for

defendant-company to continue to submit its non-smoking employees to the choice of wearing a gas mask, taking a drastic pay cut, or quitting to protect their health. At any rate, all of these questions and arguments about the evidence are questions of fact that should be decided at trial, not disposed of by a motion to dismiss for failure to state a claim. A motion to dismiss the petition tests the sufficiency of the petition, not the evidence, to state a claim for relief. Paddock Forest Residents Association, Inc. v. Ladue Service Corporation, 613 S.W.2d 474, 476 n. 1 (1981). In this case the petition has adequately pleaded a duty of reasonable care and the breach of that duty.

FACTS PLEADED SHOWING APPROPRIATENESS OF INJUNCTIVE RELIEF

It is hornbook law that an action for an injunction is a proceeding in equity to protect the plaintiff's rights and property from irreparable injury by the defendant by prohibiting the defendant from doing or commanding him to do certain acts. Missouri Appellate Practice and Extraordinary Remedies, 12-3 (3d ed. 1981). The threat of wrongful and injurious invasion of a legal right of plaintiff by one having the power to do the wrong can furnish the basis for injunctive relief. Schaeffer v. Kleinknecht, 604 S.W.2d 751, 752 (Mo. App., E.D. 1980). Injunctions are normally issued to protect against continuing hazards and recurrent risks. Donnovan v. Pennsylvania Co., 199 U.S. 279, 305 (1905); Denning v. Graham, 227 Mo. App. 717, 59 S.W.2d 699 (1933). To obtain the injunction, the plaintiff must show that he will suffer irreparable harm if the injunction is not granted. Ben

company's breach of its duty to provide it. An irreparable injury is ordinarily defined as an injury which cannot be readily, adequately, and completely compensated for with money. 42 Am.Jur.2d Injunctions Section 49 (1969). The harm in this case is clearly irreparable since bodily injury can never be fully compensated by any scheme of monetary damages. A. Blumrosen, et al, "Injunctions Against Occupational Hazards: The Right to Work Under Safe Conditions", 64 Cal. L. Rev. 702, 714 (1976). The petition has clearly pleaded facts alleging bodily injury (1,7,8). The only remaining question is whether the petition pleads facts showing and inferring that Plaintiff Smith has no adequate remedy at law.

The petition states that Plaintiff Smith has no adequate remedy at law and that his only relief rests in equity (4). While this sentence, taken alone, is a mere legal conclusion, it is supported by six pages of fact detailing Smith's situation with defendant-company, and clarifying the reasons why he has no adequate remedy at law (1-6). While a mere legal conclusion that Plaintiff has no adquate remedy at law, standing alone, is not a sufficient allegation in a pleading, the Plaintiff is entitled to all favorable inferences fairly deducible from the facts and the petition should not be dismissed when the facts and the inferences, viewed most favorably from the Plaintiff's standpoint, show any grounds for relief. Moseley v. City of Mountain Grove, 524 S.W.2d 444 (Mo. App., Spr. 1975).

As in the case of Andres v. Todd, 296 S.W.2d 139, 144 (Mo. App., Spr. 1956), a reading of the petition refutes the contention that the petition states mere conclusions. Plaintiff Smith has

pleaded that he suffers a wide variety of severe symptoms when exposed to tobacco smoke at work and he has described the symptoms in detail (1,7,8). Smith has pleaded that the defendant-company has provided him with an ineffective respirator, and has absolutely refused to segregate smokers from non-smokers or to limit smoking to non-work areas (4). He has pleaded that his injuries are of a continuing nature and have become increasingly severe (2,4). From the facts pleaded, and from the inferences from those facts, it may be deduced from the petition that Plaintiff Smith is severely injured by defendant-company's refusal to make his work place safe and that a lawsuit for money damages would involve a multiplicity of lawsuits and would therefore be inadequate. State ex rel Taylor v. Anderson, 362 Mo. 513, 242 S.W.2d 66 (1951).

From the facts pleaded it can also be seen that Plaintiff Smith had no adequate remedy at law through any type of administrative relief. In the first place, from Smith's statement in his pleading that the National Institute for Occupational Safety and Health (NIOSH) had made recommendations to defendant-company concerning the situation (2), and from the statement that Smith had filed a Handicapped Declaration Statement with defendant-company (4), it could be inferred that Smith had exhausted any feasible administrative remedies. Moseley v. City of Mountain Grove, 524 S.W.2d 444 (Mo. App., Spr. 1975). In the second place, it was not necessary for Plaintiff Smith's petition to list his long and unsuccessful series of attempts to obtain relief through governmental or private agencies since, on the face of each respective statute, it

was clear that none of them was applicable to Smith's situation, and that even if one of them could arguably apply, any relief would be plainly inadequate or futile. Patsy v. Florida International University, 634 F.2d 900 903-904 (8th Cir. 1981); United States v. Sunny Hill Farms Dairy Co., 258 F. Supp. 94, 96 (E.D. Mo. 1966); K. Davis, Administrative Law Text, 391-92 (3d. ed. 1972); A. Blumrosen, et al, "Injunctions Against Occupational Hazards", 64 Cal. L. Rev. 702, 715 (1976). Like the plaintiff in Sunny Hill, Smith has done all that can be expected of him so far as administrative relief is concerned and he should not be required to perform more frustrating and futile actions. 258 F. Supp. at 96.

The defendant-company argued at the trial level that the Federal Occupational Safety and Health Act of 1970, 29 U.S.C. Section 651, et seq (OSHA) provided an administrative remedy for Smith and that until he had exhausted that remedy he was precluded from seeking injunctive relief (261). In truth, OSHA did not have standards regulating tobacco smoke (I-25), and the Act was actually inadequate for providing Smith with an effective remedy (278). As a matter of fact, though, prior to bringing his suit for an injunction, Smith had filed a complaint with OSHA (I-18), his work area had been investigated (I-18), and a report had been made (17). The fact that plaintiff had exhausted any feasible relief from OSHA was pointed out at the temporary injunction hearing (I-18,19) and was, in fact, admitted by the defendant-company in its brief in support of its motion to dismiss (261).

The petition made the inference that plaintiff had sought relief through OSHA by pleading that OSHA had made recommendations to defendant-company (2). The simple fact is that OSHA does not have standards for tobacco smoke and that any further complaint by Smith to OSHA would clearly be futile.

The defendant-company also argued at the trial level that the Missouri Fair Employment Practices Act, Chapter 296 RSMo (1979) provided Smith with an administrative remedy which he needed to exhaust (262). An examination of the Act, however, indicates that it deals with discrimination against handicapped people. This act is inapplicable on its fact since no discrimination is alleged or involved in this case. The defendant-company does not discriminate against Smith. It provides an unsafe work place for all employees, regardless of handicap. It was unnecessary for Plaintiff Smith to specifically plead that he had made the futile attempt of getting relief from this organization. In fact, Smith had made such a futile request (I-27).

The defendant-company also argued at the trial level that the Federal Rehabilitation Act of 1973, 20 U.S.C. 793, et seq provided Smith with an administrative remedy requiring exhaustion. On its face, this Act is also inapplicable to Smith's situation. This Act is aimed at preventing employment discrimination, 41 C.F.R. Section 60-741.4 (1980), not at regulating work place safety. It was unnecessary for Plaintiff Smith to pursue relief from this inapplicable Act or to specifically plead it. As a matter of fact, though, Smith, aware that his action was futile, had filed

a complaint under this Act and was notified that his condition was not considered a handicap under the Act (239,284)(I-26). Smith provded a copy of the letter from the Agency to the trial court (288).

Clearly, Plaintiff Smith was not required to file a complaint with every agency under the sun before bringing his action for injunctive relief. It was only necessary that he exhaust any administrative remedy that was applicable and neither plainly inadequate nor futile. In fact, no such administrative remedy existed. After making many futile attempts to obtain some type of administrative relief, Smith finally filed his suit for an injunction. His petition clearly shows on its face that a suit for damages would not fully protect Smith's right to a safe work place. Nelson v. Wheeler Enterprises, Inc., 593 S.W.2d 646, 647 (Mo. App., S.D. 1980). The facts pleaded in the petition do not allege a situation in which any non-futile administrative relief would be applicable, and they infer that futile efforts to obtain administrative relief were made. The pleaded facts, when taken as a whole, clearly show that without the injunctive relief sought, Plaintiff Smith will be continuously subjected to tobacco smoke in the work place and will suffer irreparable harm.

II.

THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S PETITION FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED IF IT DID SO ON THE GROUNDS THAT IT LACKED JURISDICTION DUE TO FEDERAL PREEMPTION, BECAUSE THE OCCUPATIONAL SAFETY AND HEALTH ACT, 29

U.S.C. SECTION 651, ET SEQ., DOES NOT PREEMPT STATE COMMON LAW CONCERNING RESPONDENT'S DUTY TO PROVIDE APPELLANT WITH A SAFE WORK PLACE SINCE THE ACT CONTAINS A SAVINGS CLAUSE, 29 U.S.C. SECTION 653(b)(4), SPECIFICALLY STATING THAT IT DOES NOT PREEMPT STATE COMMON LAW.

As one of its alternative grounds for arguing that Plaintiff Smith's petition failed to state a claim upon which relief could be granted, the defendant-company argued that the relief sought was outside the scope of the Court's jurisdiction in that the subject matter had been preempted by federal law. This argument is incorrect, and the Court erred in dismissing the petition.

As repeatedly articulated by the United States Supreme Court, the test of preemption is whether Congress unmistakably intended to terminate state control and to vest exclusive power in the federal government. Jones v. Rath Packing Company, 430 U.S. 519, 525, rehearing denied 431 U.S. 925 (1977); Rice v. Santa Fe Elevator Corporation, 331 U.S. 218, 229-30 (1947). Congressional intent is most clearly manifested in statutory language, either allocating dominant control of the field to the federal government or maintaining concurrent state jurisdiction. Comment, "Preemption Doctrine in the Environmental Context: A Unified Method of Analysis", 127 U.Pa.L.Rev. 197, 202 (1978)

In the present case, Congress unmistakably intended to allow concurrent state jurisdiction. That intent is evident in the wording of the Occupational Safety and Health Act, 29 U.S.C. Section 653(b)(4), which specifically recognizes concurrent state

judicial power to use the common law to protect workers. The provision states:

> Nothing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

All courts and commentators who have considered this statute have agreed that its plain meaning is that OSHA has not preempted state law. Federal Employees for Non-Smokers' Rights v. United States, 446 F. Supp. 181, 183 (1978); Shimp v. New Jersey Bell Telephone Company, 145 N.J. Super 516, 368 A.2d 408, 410 (1976); J. Blackburn, "Legal Aspects of Smoking in the Workplace", Lab.L.J. 564, 565 (Sept. 1980); A. Blumrosen, et. al., "Injunctions Against Occupational Hazards", 64 Cal.L.Rev. 702, 720-27 (1976); Comment, "Where There's Smoke There's Ire: The Search for Legal Paths to Tobacco-Free Air", 3 Col.J.Env.L. 62, 104, n. 192 (1976); Note, "Employee's Right to a Safe, Healthy Work Environment - Injunction Issued Prohibiting Tobacco Smoking in Offices and Customer Service Area on Employer's Premises", 8 Cum.L.Rev. 579, 584 (1977); Note, "Torts - Occupational Safety and Health - Employee's Common Law Right to a Safe Workplace Compels Employer to Eliminate Unsafe Conditions", 30 Vand.L.Rev. 1059, 1079-80 (1977).

The most thorough analysis of the reasons why state court actions are not restricted by OSHA was made by Professor Alfred Blumrosen in his 1976 article about injunctions against occupational hazards. Professor Blumrosen noted that Congress intended for

the OSH Act to broaden rather than weaken the employer's duty to provide a safe working environment and that the primary purpose of the Act was to create a federally enforceable standard of care in cases where one did not exist before. Professor Blumrosen stated that Section 667, relied upon by defendant-company in arguing preemption, must be read in light of Section 653(b)(4). He concluded his analysis with the following statement:

> To the extent that the federal safety regulations are inadequate, the state courts may still find a complying employer negligent. The federal regulations can only establish minimum safety standards, which means that where circumstances require additional precautions, mere compliance with the promulgated regulations provides no defense. Adaptation of this rule to the context of section [667] avoids the potential for conflict between state and federal regulators. Therefore, the equitable proceeding [injunction] suggested in this Article need not create conflict between the federal and state systems. A state court injunction, granted despite the absence of a violation of a federal standard, can be viewed simply as an exercise of state power that is "more effective" than the federal law. The Act does not purport to make the federal standards the maximum that any jurisdiction can impose on an employer.

64 Cal.L.Rev. 720-724 (footnotes omitted).

The Court in Shimp v. New Jersey Bell Telephone Co., 145 N.J. Super 516, 368 A.2d 408 (1976) directly considered this issue and held that "OSHA in no way preempted the field of occupational safety." 368 A.2d at 410. In its brief supporting its motion to dismiss, defendant-company contended that the Shimp Court was wrong and cited several cases to support its argument.

The defendant-company asserted that the Court in Shimp should have followed a case decided by another division of the New Jersey Superior Court, Five Migrrant Farm Workers v. Hoffman, 345 A.2d 378 (N.J.Sup.Ct. 1975), which said in dictum that the OSH

Act demonstrated an intention of Congress to supersede all state laws with respect to working conditions. The Farm Workers court, however, overlooked Section 653(b)(4) entirely, incorrectly believing the OSH Act was similar to the Federal Aviation and Environmental Protection laws considered in Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973). Section 653(b)(4) in the OSH Act, however, is an example of what is known as a "savings clause", and such a clause prevents the preemption that would occur absent such a provision. Comment, "Preemption Doctrine in the Environmental Context: A Unified Method of Analysis", 127 U.Pa.L.Rev. 197, 202, n. 28 (1978). The federal laws considered in the Burbank case, relied upon by the Farm Workers court, did not have savings clauses. The Farm Workers case is further distinguishable by the fact that federal standards concerning the subject matter of that lawsuit (migrant farm labor camps) had been enacted, 345 A.2d at 380, whereas federal standards for tobacco smoke have not been enacted.

In its brief in support of its motion to dismiss, the defendant-company listed several components of tobacco smoke that have been labeled health hazards by the Surgeon General and admitted that OSHA has no standards for several of them, including Tar, Acetonitrite, 2, 3 - Butadione, Crotononitrite, and Methacrolein (254). The defendant-company argued that since OSHA had enacted standards covering some of the components of tobacco smoke, it had preempted the common law. The compounds labelled as health hazards, however, were designated as health hazards not only because of their

harmful actions but also because of their concentrations in tobacco smoke. Smoking and Health, A Report of the Surgeon General, 1979, p. 1-30. The defendant-company neglected to mention that a lighted cigarette generates about 2,000 compounds, as well as unidentified carcinogens. Id., 1-29 and 30. In fact, OSHA has not enacted standards covering tobacco smoke or all of its components. Note, "Employee's Right to a Safe, Healthy Work Environment - Injunction Issued Prohibiting Tobacco Smoking in Offices and Customer Service Area on Employer's Premises", 8 Cum.L.Rev. 579, 584 (1977). The defendant-company's "some-but-not-all" idea of a standard is simply incorrect. Even if defendant-company's "some-but-not-all" idea of a standard is accepted, however, the court should remember that the federal law sets only minimum standards, and a state court may provide more protection if it feels it appropriate. A. Blumrosen, et al, "Injunctions Against Occupational Hazards", 64 Cal.L.Rev. 702, 720-24 (1976).

The other cases cited by the defendant-company in its brief in support of its motion to dismiss actually support Plaintiff-Smith's arguments that OSHA did not preempt the jurisdiction of a state court of common law. In Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947), the Court observed:

> When an area of law is in the federal domain Congress may, if it chooses, take unto itself all regulatory authority over it, share the task with the states, or adopt as federal policy the state scheme of regulation. The question in each case is what the purpose of Congress was.

331 U.S. at 229-30. As noted previously, the purpose of Congress is most clearly indicated by the express wording in the statutes,

and the savings clause in the OSH Act expressly recognized concurrent state jurisdiction over an employer's duty to provide a safe workplace. The Rice Court went on to state:

> When Congress legislates in a field which the states have traditionally occupied, we start with the assumption that the historic police powers of the state were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

331 U.S. at 230. Thus, in addition to the express wording of the savings clause, Plaintiff Smith is aided by an assumption that OSHA did not preempt the field. The defendant-company cited Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), aff'd without opinion, 405 U.S. 1035 (1972), as supporting its argument of preemption, but this case merely holds that preemption may be implied under certain circumstances where Congress has not expressly voiced its intent. Such implication is neither necessary nor proper in the present situation where the intent of Congress is spelled out in the savings clause. Furthermore, as the United States Supreme Court stated in H. P. Welch Co. v. New Hampshire, 306 U.S. 79 (1939):

> [Congress's] purpose to displace the local law must be definitely expressed...'In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution...it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested.' We have frequently applied that principle.

306 U.S. at 85. In the present case, the savings clause makes it clear that the purpose of Congress was not to have the OSH Act preempt the state law concerning the workplace safety.

Further evidence indicating that OSHA does not preempt the field of occupational safety is the fact that legislation concerning the health hazard of involuntary smoking has been enacted in numerous states and considered at the federal level. See Comment, "The Legal Conflict Between Smokers and Nonsmokers: The Majestic Vice Versus the Right to Clean Air", 45 Mo.L.Rev. 444, 450-59 (1980). As a matter of fact, as of 1980, thirty-four (34) states and the District of Columbia had enacted legislation restricting smoking in various places in order to reduce involuntary smoking, and one state accomplished the same result by extensive administrative regulations. 45 Mo.L.Rev.at 450. The statutes of Colorado, Minnesota, Montana, Nebraska, Oregon, and Utah contain sections specifically dealing with smoking in the work place. 45 Mo.L.Rev. at 455. If, as defendant-company claims, OSHA has preempted this area of law, then all of these statutes are unconstitutional. If, as defendant-company claims, OSHA's standards effectively cover the thousands of components of tobacco smoke, then one wonders why a Federal Clean Indoor Air Act has beeen proposed, 45 Mo.L.Rev. at 460, and why these state statutes have been enacted. Clearly, if the defendant-company's preemption arguments are correct, a great many courts, legislatures, and commentators have been wrong.

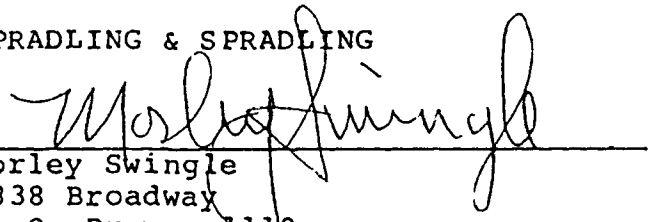
CONCLUSION

Based on the arguments and authorities cited to this Honorable

Court, Appellant respectfully submits that the trial court erred in dismissing Appellant's petition for failure to state a claim upon which relief can be granted because the averments of the petition invoke principles of substantive law which may entitle plaintiff to relief. Therefore, Appellant respectfully submits that the Honorable Court should reverse the order of the trial court and remand the case to the trial court for further proceedings.

Respectfully submitted,

SPRADLING & SPRADLING

By: 

Morley Swingle
1838 Broadway
P. O. Drawer 1119
Cape Girardeau, MO 63701
Missouri Bar #28764
(314) 335-8296

ATTORNEYS FOR APPELLANT